

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.

Text of proposed rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Executive Deputy Commissioner, New York State Department of Correctional Services, 1220 Washington Avenue, Building 2 State Campus, Albany, NY 122206-2050, (518) 457-4951, email: AJAnnucci@Docs.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

In accordance with Correction Law section 70, the Commissioner of the Department of Correctional Services has the authority to designate and classify state correctional facilities. The ruling made by the New York State Court of Appeals in *People v. Taylor*, 9 N.Y.3d 129 (2007), determined that the New York State death penalty sentencing statute enacted in 1995 violates the New York State Constitution on its face and it is not within the power of the judiciary to save the statute. Therefore, the Department has determined that no person is likely to object to the adoption of this proposed rulemaking because it merely repeals regulatory provisions which are no longer applicable to any person (SAPA 102(11)(a)).

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities.

Department of Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Clinton Correctional Facility

I.D. No. COR-52-08-00002-P

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

Proposed Action: This is a consensus rule making to repeal section 100.15(d) of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Clinton Correctional Facility.

Purpose: To remove the reference to the Unit for Condemned Persons (death row) from the directive in accordance with recent litigation.

Text of proposed rule: The Department of Correctional Services repeals and reserves section 100.15(d) of 7 NYCRR.

(c) Clinton Correctional Facility shall be classified as a maximum security correctional facility, to be used for the following functions:

- (1) general confinement facility;
- (2) reception center for males who are between 16 and 21 years of age, at the time of sentencing;
- (3) reception center for males 21 years of age or older;
- (4) detention center;
- (5) diagnostic and treatment center.

[[d) Clinton Correctional Facility shall be used to house male inmates sentenced to death in the Unit for Condemned Persons (death row) until such inmates are transferred to Green Haven Correctional Facility for execution of such sentences of death within the Capital Punishment Unit (death house).]

Education Department

EMERGENCY RULE MAKING

Administration of Immunization Agents by Certified Pharmacists

I.D. No. EDU-47-08-00007-E

Filing No. 1231

Filing Date: 2008-12-03

Effective Date: 2008-12-03

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

Action taken: Addition of section 63.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a), 6527(7), 6801(1), (2), (3), 6802(22), 6828(1), (2) and 6909(7)

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

Specific reasons underlying the finding of necessity: The proposed amendment implements the requirements of Chapter 563 of the Laws of 2008, which authorizes licensed pharmacists with a certification of administration issued by the Department to administer immunizations for influenza and pneumococcal disease and medications for the emergency treatment of anaphylaxis to adults. The statute becomes effective on December 3, 2008.

We estimate that there are approximately 20,000 licensed pharmacists employed in New York State which will require certification by the Department if such pharmacists choose to administer immunizations pursuant to Chapter 563 of the Laws of 2008. The proposed amendment is needed to expand access to immunizations, which is expected to reduce morbidity and mortality caused by influenza and pneumococcal disease and any related complications.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the public health and general welfare, by timely implementing Chapter 563 of the Laws of 2008 to ensure that standards and procedures are in place to certify pharmacists by December 3, 2009, the effective date of Chapter 563 of the Laws of 2008, thereby providing additional opportunities for adults to be immunized against influenza during the current flu season.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at its February 2008 Meeting.

Subject: Administration of immunization agents by certified pharmacists.

Purpose: Establish criteria for the certification of licensed pharmacists and to establish requirements relating to execution of orders.

Substance of emergency rule: The Board of Regents proposes to amend the Regulations of the Commissioner of Education by adding a new section 63.9, effective December 3, 2008. Section 63.9 of the Regulations of the Commissioner of Education is added to establish requirements relating to the administration of immunizations for the prevention of influenza and pneumococcal disease and medications for the emergency treatment of anaphylaxis by certified pharmacists.

Section 63.9(a) defines the applicability of the provision, authorizing certified pharmacists to administer certain immunization agents and medications for the emergency treatment of anaphylaxis only to the extent that the applicable provisions in Education Law sections 6527, 6801, 6802, 6828 and 6909 have not expired or been repealed.

Sections 63.9(b)(1) and (b)(2) provide that a pharmacist with a certificate of administration issued by the Department is authorized to administer immunization agents to prevent influenza or pneumococcal disease to patients over the age of 18, pursuant to either a patient specific order or non-patient specific order and protocol ordered by a licensed physician or certified nurse practitioner with a practice site in the county in which the immunization is administered. If the immunization is administered in a county with a population of 75,000 or less, the immunization shall be prescribed or ordered by a licensed physician or certified nurse practitioner with a practice site in the county in which the immunization is administered or in an adjoining county.

Section 63.9(b)(3) establishes the requirements that a licensed pharmacist must meet in order to obtain a certificate to administer immunizations from the Department. The licensed pharmacist shall submit an application with the required fee and present satisfactory evidence of completion of one of the following: (1) a training course in the administration of immunizations acceptable to the Commissioner and the Commissioner of Health; (2) a training course associated with a Doctor of Pharmacy degree; or (3) possession of a current certificate of administration issued by another jurisdiction and continuous practice in the administration of immunizing agents since the pharmacist received such training or completion of a retraining program in the administration of immunization agents.

Section 63.9(b)(4) establishes the standards, procedures and reporting requirements for the administration of immunizing agents.

Section 63.9(b)(5)(i) provides that certified pharmacists shall maintain or ensure the maintenance of a copy of the patient specific order or the non-patient specific order and protocol prescribed by a licensed physician or a certified nurse practitioner which authorizes the certified pharmacist to administer immunization agents. This section prescribes the information required to be included in patient specific orders and non-patient specific orders and protocol. Such orders and protocol shall be considered a record of the patient. The pharmacist shall maintain a record of the patient in either: (a) a patient medication profile, or (b) in instances where a patient medication profile is not required, on a separate form that is retained by the pharmacist who administered the immunization.

Section 63.9(b)(5)(ii) establishes the contents of patient specific orders and non-patient specific orders.

Section 63.9(b)(5)(iii) specifies additional provisions required to be included in non-patient specific orders, including the incorporation of a protocol.

Section 63.9(b)(5)(iv) requires the protocol, incorporated into the non-patient specific order, to include the standards, procedures and reporting requirements set forth in section 63.9(b)(4).

Section 63.9(c)(1) authorizes certified pharmacists to administer medications for the emergency treatment of anaphylaxis.

Section 63.9(c)(2) establishes the standards, procedures and reporting requirements for the administration of anaphylaxis treatment agents by certified pharmacists.

Section 63.9(c)(3)(i) requires a certified pharmacist to maintain or ensure the maintenance of a copy of the non-patient specific order and protocol prescribed by a licensed physician or a certified nurse practitioner that authorizes such pharmacist to administer medications for the emergency treatment of anaphylaxis. This section requires a record of each patient to be maintained in either a patient medication profile, or in in-

stances where a patient medication profile does not exist, on a separate form that is retained by the pharmacist who has administered the immunization.

Section 63.9(c)(3)(ii) provides that the non-patient specific order shall authorize one or more named pharmacists, or certified pharmacists who are not individually named but are identified as employed or under contract with an entity that is legally authorized to employ or contract with pharmacists to provide pharmaceutical services, to administer specified anaphylaxis treatment agents in specified circumstances for a prescribed period of time. This subparagraph also prescribes the content for such non-patient specific orders.

Section 63.9(c)(3)(iii) requires that the protocol to be incorporated into the non-patient specific order include the requirements set forth in section 63.9(c)(2).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-47-08-00007-P, Issue of November 19, 2008. The emergency rule will expire March 2, 2009.

Text of rule and any required statements and analyses may be obtained from: Lisa Struffolino, Office of Counsel, New York State Education Department, Counsel's Office, Room 148, 89 Washington Avenue, Albany, New York 12234, (518) 473-4921, email: stahoe@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Subparagraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner to promulgate regulations in administering the admission to the practice of the professions.

Subdivision (1) of section 6508 of the Education Law provides that state boards for the professions shall assist the Board of Regents and Department on matters of professional licensing.

Subdivision 7 of section 6527 of the Education Law authorizes physicians to order non-patient specific regimens for the administration of immunizing agents by pharmacists.

Section 6801 of the Education Law authorizes certified pharmacists to administer immunizing agents and authorizes the Commissioner of Education to promulgate regulations regarding training and reporting requirements.

Subdivision 7 of section 6909 of the Education Law authorizes nurse practitioners to order non-patient specific regimens for the administration of immunizing agents by pharmacists.

Section 6828 of the Education Law authorizes the Commissioner to promulgate regulations relating to the issuance of a certificate of administration to a qualifying pharmacist.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes by expanding access to immunizations to residents of the State of New York. The proposed amendment establishes procedures for the Department to certify licensed pharmacists to administer immunizing agents and anaphylactic treatments; prescribes standards, procedures, reporting and record keeping requirements for the administration of immunizations and anaphylactic treatments and sets forth the requirements for orders and protocols for the administration of immunizations and anaphylactic treatments.

3. NEEDS AND BENEFITS:

Chapter 563 of the Laws of 2008, effective December 3, 2008, authorizes licensed pharmacists that are certified by the State Education Department to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. Section 6801(2) of the Education Law, as added by Chapter 563 of the Laws of 2008, directs the Commissioner of Education to promulgate regulations concerning a licensed pharmacist's execution of non-patient specific orders prescribed or ordered by a licensed physician or certified nurse practitioner. Section 6801(3) prohibits a pharmacist from administering immunizing agents without receiving training satisfactory to the Commissioner and the Commissioner of Health.

In order to timely implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes procedures for the certification of licensed pharmacists to administer immunizations. Specifically, the proposed amendment requires a licensed pharmacist to submit an application, with the required fee, to the Department and present satisfactory evidence of one of the following: (1) completion of a training course in the administration of immunizations acceptable to the Commissioner and the Commissioner of Health, within the three years immediately

preceding application for a certificate of administration; (2) a Doctor in Pharmacy Degree and completion of training in the administration of immunization agents received as part of his/her pharmacy degree that is satisfactory to the Department; or (3) possession of a current certificate of administration issued by another jurisdiction and continuous practice in the administration of immunizing agents since the pharmacist received such training or completion of a retraining program in the administration of immunization agents.

The proposed amendment also establishes uniform requirements for certified pharmacists to meet when executing orders to administer immunizations and medications for the emergency treatment of anaphylaxis. For instance, the proposed amendment defines what information should be included in the non-patient specific order and the requirements that must be set forth in the protocol, for a certified pharmacist to follow when administering immunizations through a non-patient specific order. The proposed amendment also establishes uniform reporting requirements. Specifically, the proposed amendment requires a certified pharmacist (1) to inform the recipient, in writing, of potential side effects and adverse reactions prior to the administration of an immunization; (2) to provide written instructions to the recipient regarding the appropriate course of action in the event of contraindications or adverse reactions; and (3) to provide a signed certificate of immunization to the recipient containing certain prescribed information.

With the enactment of Chapter 563 of the Laws of 2008, New York State joins 48 other states and the District of Columbia in authorizing pharmacists to administer immunizations. The proposed amendment is needed to expand access to immunizations, which is expected to reduce morbidity and mortality caused by influenza and pneumococcal disease and any related complications. At the present time, there are approximately 20,000 pharmacists licensed to practice in New York State. Consequently, a significant number of individuals will be affected by the proposed amendment.

The proposed amendment is not expected to cause regulated parties to have to hire additional professional services in order to comply.

4. COSTS:

(a) There are no additional costs to state government beyond those imposed by statute.

(b) There are no additional costs to local government beyond those imposed by statute.

(c) Cost to private regulated parties: The amendment is likely to result in only nominal costs to entities that employ certified pharmacists to execute the non-patient specific orders to administer immunizations. These entities will likely have to bear a small additional cost to provide prescribed written information and issue a certificate of immunization to each recipient who requests such a certificate. The State Education Department estimates that the nominal cost of providing this information and issuing the certificate will be approximately \$.75 per recipient. The other paperwork requirements relate to maintenance of patient records, which are already subject to the requirements of section 29.2(a)(3) of the Regents Rules, and consequently will not result in additional costs.

(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 does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendment defines what information should be included in the orders and the requirements that must be set forth in the protocol, for a certified pharmacist to follow when administering immunizations through a non-patient specific order. The proposed amendment also establishes uniform reporting requirements. Specifically, the proposed amendment requires a certified pharmacist (1) to inform the recipient, in writing, of potential side effects and adverse reactions to prior to administration of the immunization; (2) to provide written instructions to the recipient regarding the appropriate course of action in the event of contraindications or adverse reactions; and (3) to provide a signed certificate of immunization to the recipient containing certain prescribed information.

7. DUPLICATION:

The proposed amendment does not duplicate other existing state or federal requirements.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment and none were considered because of the nature of the amendment, which implements statutory requirements.

9. FEDERAL STANDARDS:

There are no Federal standards that establish requirements that certified professional nurses must meet to administer immunizations, pursuant to non-patient specific orders and protocol.

10. COMPLIANCE SCHEDULE:

The proposed amendment implements and clarifies statutory requirements. Regulated parties must comply with the proposed amendment on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

In order to implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes requirements for the certification of pharmacists to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. The proposed amendment also establishes requirements relating to the execution of patient specific and non-patient specific orders prescribed by licensed physicians or certified nurse practitioners for the administration of such immunizations. The proposed amendment does not regulate small businesses or local governments. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. At the present time, there are approximately 20,303 licensed pharmacists that will be subject to the requirements of the proposed amendment. Of these licensed pharmacists, approximately 2,613 licensed pharmacists report their permanent address of record in a rural county of New York State.

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

Chapter 563 of the Laws of 2008, effective December 3, 2008, authorizes licensed pharmacists that are certified by the State Education Department to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. Section 6801(2) of the Education Law, as added by Chapter 563 of the Laws of 2008, directs the Commissioner of Education to promulgate regulations concerning a licensed pharmacist's execution of non-patient specific orders prescribed or ordered by a licensed physician or certified nurse practitioner. Section 6801(3) prohibits a pharmacist from administering immunizing agents without receiving training satisfactory to the Commissioner and the Commissioner of Health.

In order to timely implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes procedures for the certification of licensed pharmacists to administer immunizations. Specifically, the proposed amendment requires a licensed pharmacist to submit an application, with the required fee, to the Department and present satisfactory evidence of one of the following: (1) completion of a training course in the administration of immunizations acceptable to the Commissioner and the Commissioner of Health, within the three years immediately preceding application for a certificate of administration; (2) a Doctor in Pharmacy Degree and completion of training in the administration of immunization agents received as part of his/her pharmacy degree that is satisfactory to the Department; or (3) possession of a current certificate of administration issued by another jurisdiction and continuous practice in the administration of immunizing agents since the pharmacist received such training or completion of a retraining program in the administration of immunizing agents.

The proposed amendment also establishes uniform requirements for certified pharmacists to meet when executing orders to administer immunizations and medications for the emergency treatment of anaphylaxis. For instance, the proposed amendment defines what information should be included in the non-patient specific order and the requirements that must be set forth in the protocol, for a certified pharmacist to follow when administering immunizations through a non-patient specific order. The proposed amendment also establishes uniform reporting requirements. Specifically, the proposed amendment requires a certified pharmacist: (1) to inform the recipient, in writing, of potential side effects and adverse reactions prior to the administration of an immunization; (2) to provide written instructions to the recipient regarding the appropriate course of action in the event of contraindications or adverse reactions; and (3) to provide a signed certificate of immunization to the recipient containing certain prescribed information.

With the enactment of Chapter 563 of the Laws of 2008, New York State joins 48 other states and the District of Columbia in authorizing

pharmacists to administer immunizations. The proposed amendment is needed to expand access to immunizations, which is expected to reduce morbidity and mortality caused by influenza and pneumococcal disease and any related complications. At the present time, there are approximately 20,000 pharmacists licensed to practice in New York State. Consequently, a significant number of individuals will be affected by the proposed amendment.

The proposed amendment is not expected to cause regulated parties to have to hire additional professional services in order to comply.

3. COSTS:

The proposed amendment is likely to result in only nominal costs to entities that employ certified pharmacists to execute orders to administer immunizations, including those that are located in rural areas of the State. These entities will likely have to bear a small additional cost to provide prescribed written information and issue a certificate of immunization to each recipient. The State Education Department estimates that the nominal cost of providing this information and issuing the certificate will be approximately \$.75 per recipient. The other paperwork requirements relate to maintenance of patient records, that are already subject to the requirements of section 29.2(a)(3) of the Regents Rules, and consequently will not result in additional costs.

4. MINIMIZING ADVERSE EFFECT:

The proposed amendment implements statutory directives to establish requirements for certified pharmacists to execute orders prescribed by licensed physicians or certified nurse practitioners for the administration of immunizations and makes no exception for licensed registered professional nurses who live or work in rural areas. In any event, consistent practice requirements should apply no matter the geographic origin of the licensee to ensure a uniform high standard of competency across the State and that the administration of immunizations is performed safely in all areas of the State. Because of the nature of the proposed amendment, establishing different standards for licensed registered professional nurses in rural areas of New York State is inappropriate.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in promoting expanded access to important immunizations. Included in this group were members of the State Board of Pharmacy; educational institutions which currently offer professional pharmacy programs; professional associations representing the pharmacy profession, such as the Pharmacists Society of the State of New York, the New York State Council of Health System Pharmacists and the New York State Chain Drug Association; the State Board for Nursing; the New York State Department of Health; the New York City Department of Health and Mental Hygiene; and many other interested parties. These groups, which have representation in rural areas, have been provided notice of the proposed rule making and an opportunity to comment on the proposed amendment.

Job Impact Statement

In order to implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes requirements for the certification of pharmacists to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. The proposed amendment also establishes requirements relating to the execution of patient specific and non-patient specific orders prescribed by licensed physicians or certified nurse practitioners for the administration of such immunizations. The amendment will not have a substantial adverse impact on jobs and employment opportunities, beyond those imposed by statute. Accordingly, a job impact statement is not required, and one has not been prepared.

State Board of Elections

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minimum Number of Voting Machines Required Per Polling Place and Maximum Number of Voters Per Machine

I.D. No. SBE-52-08-00003-P

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

Proposed Action: Amendment of Part 6210 of Title 9 NYCRR.

Statutory authority: Election Law, sections 3-100, 7-201, 7-203(2) and 7-206

Subject: Minimum number of voting machines required per polling place and maximum number of voters per machine.

Purpose: Comply with Section 703(2) and provide for accurate elections in New York State.

Text of proposed rule: Subtitle V of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended by adding thereto a new Part, to be Part 6210.19, to read as follows:

Section 6210.19 Minimum Number of Voting Machines

A. The purpose of these determinations is to establish the minimum number of required voting machines and privacy booths needed for each polling place based upon the type of voting system and the number of registered voters (excluding voters in inactive status) assigned to use that specific voting device in accordance with NYS Election Law sections 7-200 and 7-203.

B. Determinations by Type of Voting System

1) Direct Recording Electronic Voting Systems

a) There shall be at least one direct recording electronic voting device for every 550 registered voters (excluding voters in inactive status) at the polling place.

2) Precinct Based Optical Scan Voting Systems

A. There shall be at least one scanning device for every 4000 registered voters (excluding voters in inactive status) at the polling place.

B. Privacy Booths:

(i) There shall be at least one privacy booth for every 300 registered voters (excluding voters in inactive status), except that in a general election for governor, or at elections at which electors for President of the United States are selected there shall be at least one privacy booth for every 250 registered voters (excluding voters in inactive status).

(ii) At polling places that accommodate more than 6000 registered voters (excluding voters in inactive status), there shall be one privacy booth for every 350 registered voters (excluding voters in inactive status) in a general election for governor, or at elections at which electors for President of the United States shall be selected; and one privacy booth for every 400 active voters in all other elections.

(iii) A sufficient number of the privacy booths must be accessible to voters with disabilities.

C. Obligations of the County Boards of Elections

1) County boards shall deploy sufficient voting equipment, election workers and other resources so that voter waiting time at a poll site does not exceed thirty minutes. Each county board of elections may increase in a non-discriminatory manner, the number of voting devices used in any specific polling place.

2) The inspectors in each election district shall record the number of persons using audio, tactile or pneumatic switch ballot devices. The county board of elections shall furnish additional voting machines equipped with audio, tactile or pneumatic switch ballot devices when it appears that the number of persons historically using such devices warrant additional devices.

D. The State Board of Elections may authorize a reduction in the number of voting devices provided in these regulations upon application of a county board of elections which demonstrates that such a reduction will not create excessive waiting time by voters.

Text of proposed rule and any required statements and analyses may be obtained from: Kimberly A. Galvin, NYS Board of Elections, 40 Steuben Street, Albany, NY 12207, (518) 474-6367, email: kgalvin@elections.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.

Summary of Regulatory Impact Statement

Statutory Authority: New York State Election Law § 3-100 creates the State Board of Elections (State Board) and § 3-102 grants commissioners "the power and duty to issue instructions and promulgate rules and regulations relating to the administration of the election process". In addition, under § 7-203(2) of the Election Law "the State Board of Elections shall establish...for each election, the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine. The State Board is currently seeking to adopt NYCRR § 6210.19 in order to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute. The regulation also establishes obligations of the county boards of elections and directs them to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes" § 6210.19(c)(1).

Legislative Objectives: After the 2000 election, the voting process across the country was marred by allegations of corruption and fraud. It was alleged that voting machines had been tampered with and voters were subjected to long lines and delays at the polls. Public confidence and trust

in the voting process was at an all time low. As a result, Congress enacted the Help America Vote Act (HAVA) in 2002, to assist all states to purchase new machines and voting equipment. The legislative intent of the bill was to ensure that all Americans could participate in an efficient and accurate election process and, in doing so, restore voter confidence.

Under New York's Election Reform and Modernization Act New York State's traditional lever machines are required to be phased out and replaced.

The New York Legislature established, in accordance with Election Law sections § 3-100, § 3-102 and § 7-203, that in an effort to maintain efficient elections, the State Board shall establish the minimum required voting machines and voting systems needed for each polling place. This number is based upon the type of voting system and the number of registered voters (excluding voters in inactive status) assigned to use that specific voting device.

Needs and Benefits: By enacting § 6210.19 and defining the minimum number of voting machines and requiring that voter waiting time at a poll site does not exceed thirty minutes, the State Board will ensure that uniform standards prevail for all elections and in all polling places throughout New York.

In setting the minimum required voting machines and privacy booths needed for each polling place based upon the type of voting system and the number of registered voters assigned to use that specific voting device, county boards will ensure that there is a sufficient number of machines for voters. The thirty minute wait provision of the rule will ensure that voters do not wait more than 30 minutes to cast their votes. The benefit of these provisions will be most strongly recognized in Presidential elections when voter turnout tends to be the greatest. Since this type of regulation has never been enacted in the state of New York before, the combined effects of this rule will benefit voters in all elections and in all polling places throughout New York State and should help maintain public confidence in the election process.

Costs: The proposed Regulations may impose additional costs on local government. Under the Help America Vote Act (HAVA) county boards were given federal funding toward the purchase and maintenance of new voting machines.

However, once machines have been purchased, it is incumbent upon counties to continue to maintain their voting machines and additional voting equipment. Under the proposed § 6210.19(b)(1)(a), which establishes guidelines for Direct Recording Electronic voting systems, "there shall be at least one direct recording electronic voting device for every 550 registered voters (excluding voters in inactive status) at the polling place".

Under § 6210.19(2)(a), which establishes the guidelines for precinct based Optical Scan voting systems, "there shall be at least one scanning device for every 4000 registered voters (excluding voters in inactive status) at the polling place". While this machine is considered less technically intricate and can service thousands of voters versus hundreds, the cost to these machines will come in the form of printing a sufficient number of paper ballots for each election. However, the cost of ballots is dependent upon a competitive bid process.

Furthermore, § 6210.19(c)(1) requires county boards to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes". Under this regulation counties may be required to hire additional staff to ensure shorter lines, which may require additional money and election support staff.

Local Government Mandates: This regulation would establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute.

The regulation also establishes obligations of the local county boards of elections and directs them to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes".

Most of the mandated costs will be absorbed by federal funding, but there may be initial and ongoing costs that will be borne by the counties.

Paperwork: Counties must keep track of statistics produced on the number of voters using accessible voting devices.

Duplication: The subject regulation does not duplicate other existing Federal or State requirements.

Alternatives: Under § 7-203(2) the State Board is required to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine.

In order to arrive at the minimum number of voting machines and the maximum number of voters that can vote on one machine, the State Board has conducted studies, solicited surveys and collaborated with other states, as well as reaching out to government advocacy organizations such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

In September 2006, the State Board contracted with the American

Institute for Research (AIR) in order to determine the Maximum Daily Rate (MDR) for voters for each voting system that was being considered for use in New York state elections.

The primary goal of the study was to provide data on the MDR in order to determine the minimum number of voting machines required per the number of registered voters in an election district. For the study, the MDR was defined as the maximum number of voters a given voting system can accommodate in a 15-hour voting period.

Testing of over 800 reported registered voters occurred in Rochester, New York City and Albany. The tests were based on the use of twelve different machines from Avante, Diebold, ES&S, Liberty and Sequoia, as well as the lever machine.

Taking into account several variables, including location and participants, the MDR was based on the mean, the trimmed mean and median of voters voting within a 15 hour day. Using the mean time, numbers ranged from a low of 207 voters on the Sequoia DRE to a high of 1931 voters on the ES&S Optical Scan. Using the trimmed mean, the Diebold Optical Scan system showed the high MDR at 2,348 voters per machine. Finally, using the median number, both ES&S and Diebold Optical Scan systems had the highest MDR at 2571 people. The full text and scope of the AIR study can also be found on the NYSBOE web-site.

In addition to the AIR study, surveys were sent to other states in order to solicit answers to questions on the voting machines they used. The information they provided was used in conjunction with the AIR study to arrive at the numbers proposed in § 6210.19. Twenty-six states responded to the Board's survey.

After reviewing the states answers, NYSBOE has determined that of the participating states:

- Few states established the maximum number of votes. However, Virginia stated "No precinct may have more than 5,000 voters per DRE"; South Carolina uses 250 per DRE; North Carolina uses 250 per; Louisiana uses 600 for AVC Advantage machines; and Florida estimates 120 per DRE, but no state has any statute which mandates the maximum number to be used.

- Of the states that use Op Scans, no state has established mandatory maximum numbers for the Op Scan. However, California uses between 5000 and 6000 registered voters per machine (1 scanner, 1 automark); Connecticut uses 1296 per machine; Florida estimates 3000 per machine; Michigan uses 2999 per precinct and Virginia states that "No precinct may have more than 5000 voters per Op Scan".

- Eight states used VVPATs.

- No uniform number of privacy booths was established. The range varies from 1 for every 75 voters in Illinois to 1 for every 350 voters in Idaho.

- No state has a None of the Above option for undervotes.

- Only two states (Wisconsin and South Dakota) have established voter wait time.

Lastly, the draft proposed text was sent to various government advocacy organizations and has been posted on the New York State Board of Elections web-site, which can be found at www.elections.state.ny.us.

The State Board has received numerous comments from the public on the AIR study, which was used to ascertain maximum numbers of voters for the machines. Comments supported both higher and lower numbers of voting machines. After performing due diligence in determining the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine as per § 7-203(2), this new regulation § 6210.19, will allow county boards of elections to adequately plan for elections when new machines have been certified.

In addition to establishing the minimum number of machines, § 6210.19 also requires that voting line wait times may not exceed thirty minutes.

In order to arrive at this number versus a shorter or longer time period, several State Board of Elections staff reviewed voter turnout issues from several county boards through out the state, both urban and rural. In their review, they analyzed the various voting machines available and the number of voters that could vote on those machines. Also, follow up calls were placed to several election inspectors to inquire if voters were concerned about wait times or if the inspectors observed undue wait times.

Other methods used to determine the 30 minute wait time included comments from government advocacy groups. Some of the comments offered were from voting oversight organizations, disability organizations, and several people who offered actual queuing schemes for suggested wait times.

Lastly, Board staff had a conference call with a company called Segata that worked in Ohio to scientifically determine appropriate wait times. The call was considered more of a brain storming session since the Board did not actually purchase the software offered by the company.

The Board considered all of the above factors prior to establishing the 30 minute wait period. By consensus, it was determined that some wait time was inevitable and was to be expected during an election day. As a

result, a 15 minute wait time seemed unrealistic for larger counties, such as NYC, in a Presidential election and 1 hour was too long, therefore the maximum wait time agreed upon was 30 minutes.

Federal Standards: There are no Federal standards for establishing the maximum number of voters that can vote on a machine in order to guarantee fair and reliable access to voting machines for all voters during average and peak hours or election days.

Compliance Schedule: The Regulation will be effective for the first election after machines have been certified in New York State and the regulation is adopted.

Regulatory Flexibility Analysis

Effect of the rule

This rule applies solely to local governments and does not apply to small businesses. All 62 county boards of elections will have to comply with this rule.

Compliance requirements

Under the Help America Vote Act, New York State's traditional lever machines were required to be phased out and replaced with either Direct Recording Electronic Voting Systems or Precinct Based Optical Scan Voting Systems.

The State Board is currently seeking to adopt NYCRR § 6210.19 in order to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute. The regulation also establishes obligations of the local county boards of elections and directs them to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes".

Professional services

No professional services are needed other than Board of Elections staff.

Costs

The proposed regulation will undoubtedly impose additional costs on local government. However, under the Help America Vote Act (HAVA) county boards were given federal funding toward the purchase and maintenance of new voting machines. Most of the mandated initial costs will be absorbed by federal funding, but there may be ongoing costs that will need to be absorbed by the counties.

The ongoing costs from Direct Recording Electronic (DRE's) voting systems and from Optical Scan machines will come in the form of printing a sufficient number of paper ballots for each election. The exact cost of ballots is dependent upon the technology chosen and the State's competitive bid process.

Furthermore, under this regulation counties may be required to hire additional staff to ensure shorter lines, so that voters do not exceed the 30 minute wait-time provision. This may require additional money and election support staff.

Since there are currently no voting systems, which have been certified, it is difficult to determine exact additional costs for the operation of the machines or for running an election.

Economic and technological feasibility

New machines will have to be purchased by counties in order to replace the lever machine. The new machines will be more technologically advanced than lever machines and have computerized components.

Enacting this rule will not obligate local county boards to go beyond the requirements of the law.

Minimizing adverse impacts

Because this rule requires changing over from lever machines to electronic machines, there will likely be an initial adverse impact on voters. Lever machines have been used for over 100 years and new technology will undoubtedly cause some uneasiness amongst voters. In order to remedy this problem, New York State has appropriated ten million dollars, which was dispersed to local county boards for voter outreach and education purposes.

Participation

In order to arrive at the minimum number of voting machines and the maximum number of voters that can vote on one machine, the State Board has conducted a study by the American Institute of Research, solicited surveys and collaborated with other states, as well as reaching out to government advocacy organizations such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

Throughout the process, local County Boards' of Elections have been kept apprised of on going surveys and outreach by the State Board. Their opinions and input has consistently been solicited.

Rural Area Flexibility Analysis

Effect of the rule

This rule applies to local county Boards of Elections throughout New York State. It will, therefore, have an impact on every rural area in the state.

Compliance requirements

Under the Help America Vote Act (HAVA), New York State's tradi-

tional lever machines were required to be phased out and replaced with either Direct Recording Electronic Voting Systems or Precinct Based Optical Scan Voting Systems.

The State Board is currently seeking to adopt NYCRR § 6210.19 in order to establish the minimum number of voting machines required in each polling place and the maximum number of voters that can vote on one machine pursuant to statute. The regulation also establishes obligations of the local county boards of elections and directs them to "deploy sufficient voting equipment, election workers and other resources so that voter waiting time at the poll site does not exceed thirty minutes". The State Board of Elections took into consideration rural areas and concluded that this regulation may impose an adverse impact in rural areas. As a result, because the process will be new to New York State it may require additional, reporting, record keeping or other compliance requirements.

Professional services

No professional services are needed other than Board of Elections staff.

Costs

The proposed regulation will undoubtedly impose additional costs on county boards in rural areas. However, under HAVA county boards were given federal funding toward the purchase and maintenance of new voting machines. Most of the mandated initial costs will be absorbed by federal funding, but there may be ongoing costs that will need to be absorbed by the counties, including those with rural areas.

The ongoing costs from Direct Recording Electronic (DRE's) voting systems and from Optical Scan machines will come in the form of printing a sufficient number of paper ballots for each election. The exact cost of ballots is dependent upon the technology chosen and the State's competitive bid process.

Furthermore, under this regulation rural counties may be required to hire additional staff to ensure shorter lines, so that voters do not exceed the 30 minute wait-time provision. This may require additional money and election support staff.

Since there are currently no voting systems, which have been certified, it is difficult to determine exact additional costs for the operation of the machines or for running an election.

Economic and technological feasibility

New machines will have to be purchased by all rural counties in order to replace the lever machine. The new machines will be more technologically advanced than lever machines and have computerized components.

Enacting this rule will not obligate counties in rural areas to go beyond the requirements of the law.

Minimizing adverse impacts

Because this rule requires changing over from lever machines to electronic machines, there will likely be an initial adverse impact on voters in rural areas. Lever machines have been used for over 100 years and new technology will undoubtedly cause some uneasiness amongst rural voters. In order to remedy this problem, New York State has appropriated ten million dollars, which was dispersed to counties for voter outreach and education purposes.

Participation

In order to arrive at the minimum number of voting machines and the maximum number of voters that can vote on one machine, the State Board has conducted a study by the American Institute of Research, solicited surveys and collaborated with other states, as well as reaching out to government advocacy organizations such as The League of Women Voters, NYPIRG, Common Cause and New Yorkers for Verified Voting.

Throughout the process, local County Boards' of Elections, including those in rural areas have been kept apprised of on going surveys and outreach by the State Board. Their opinions and input has consistently been solicited.

Job Impact Statement

These regulations will have neither an adverse nor a positive impact on employment opportunities in New York State.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Firewood Restrictions to Protect Forests from Invasive Species

I.D. No. ENV-52-08-00005-E

Filing No. 1263

Filing Date: 2008-12-05

Effective Date: 2008-12-05

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

Action taken: Addition of section 192.5 to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d) (2)(m), 9-0105(1), (3) and 9-1303

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

Specific reasons underlying the finding of necessity: Protecting New York State's forest from invasive insects and diseases carried on firewood and introduced into non-infested forests and urban communities killing millions of trees, degrading water quality and ecosystems, and endangering public safety from diseased and hazardous trees that are weakened and liable to fall down.

Subject: Firewood restrictions to protect forests from invasive species.

Purpose: Prohibit the importation of untreated firewood into New York State and restrict the transport of untreated firewood within New York State.

Text of emergency rule: A new section 192.5 is added to 6 NYCRR Part 192 to read as follows:

§ 192.5 Firewood Restrictions to Protect Forests from Invasive Species.

(a) Definitions. For the purposes of this section, these terms shall be defined as follows:

(1) "Department" shall mean the New York State Department of Environmental Conservation.

(2) "Dealer" shall mean any person or business, other than a firewood producer, that sells firewood.

(3) "Firewood" shall mean any kindling, logs, chunkwood, boards, timbers or other wood of any tree species cut and split, or not split, into a form and size appropriate for use as fuel.

(4) "Firewood producer" shall mean any person or business who processes kindling, logs, chunkwood, boards, timbers or other wood of any tree species into firewood for sale.

(5) "New York-Approved Treated Firewood / Pest-Free" shall mean a labeling standard for firewood that may be used by a firewood producer who complies with the provisions of subdivision (d) of this section.

(6) "New York-Sourced Firewood" shall mean a labeling standard for firewood used by a New York firewood producer who complies with the provisions of subdivision (e) of this section.

(7) "Person" shall mean an individual, organization, corporation or partnership, other than the department, public authority, county, town, village, city, municipal agency or public corporation.

(8) "Phytosanitary certificate" or "plant health certificate" shall mean an official document issued by a state or country from which firewood is being exported which certifies that the firewood meets the phytosanitary regulations of New York State.

(9) "Self-issued Certificate of Source" shall mean certification, on a form prescribed by the department, that is signed by a person who desires to move firewood, for personal use, from one location to another, within New York in compliance with the provisions of subdivision (f) of this section.

(10) "Source" shall mean the village, town or city, which the firewood producer declares as the source of the firewood. All trees or logs that are processed into firewood that is declared to be from the named source shall have been grown within 50 miles of the named source, prior to being obtained by the firewood producer.

(11) "Untreated Firewood" shall mean any firewood that has not been treated in accordance with the provisions of subdivision (d) of this section.

(12) "50 miles" shall mean a 50 mile linear distance determined by

using the scale-bar on a New York State road map, atlas or gazetteer, from the point identified as the stated source of the firewood in question.

(b) Prohibition on Transport of Untreated Firewood into New York State.

No person shall transport, by any means, Untreated Firewood into New York State, for sale or use within the State from any location outside the State.

(c) Restrictions on Transport, Sale and/or Possession of Untreated Firewood within New York State.

(1) No person shall transport, sell or possess Untreated Firewood within the State unless its source is identified according to the criteria set forth in either subdivision (e) or (f) of this section.

(2) No person shall move Untreated Firewood produced, from trees that are grown in New York State, more than 50 miles from the source of the firewood.

(3) Dealers of New York-Sourced Firewood shall provide copies of the firewood source documentation, provided by the firewood producer, to all purchasers.

(4) Firewood producers shall maintain records of log or wood purchases or procurement to verify the sources of their firewood. Such records shall be made available for inspection by the department upon request.

(d) Standards for Treatment and Labeling.

(1) Firewood may be labeled "New York-Approved Treated Firewood / Pest Free" if accompanied by a Firewood producer's certification that it was heat treated to achieve a minimum wood core temperature of 71°C for a minimum of 75 minutes. Such treatment may employ kiln-drying or other treatments approved by the department that achieve this specification through use of steam, hot water, dry heat or other methods.

(2) A Firewood producer's certification shall indicate the producer's name, legal address and the village, town or city of the business on a label, bill of sale or lading, purchase receipt or invoice accompanying such firewood.

(3) Producers of "New York-Approved Treated Firewood / Pest-Free" firewood shall maintain, for at least one year from the date of treatment, records that document the treatment method and the volume of firewood treated, and shall also allow department officials to inspect such records and the facilities used to treat firewood upon request.

(4) Phytosanitary certificates from an out-of-state firewood producer's State Department of Agriculture or the United States Department of Agriculture Animal Plant Health Inspection Service (USDA APHIS) may be used to verify the treatment method and volumes of treated firewood that is produced out-of-state.

(e) "New York-Sourced Firewood" requirements.

(1) The "New York-Sourced Firewood" designation may be applied only to Untreated Firewood that has its source wholly within New York State, and is transported not more than 50 miles from the firewood producer's declared source of the firewood.

(2) Dealers of "New York-Sourced Firewood" shall provide to customers the name of the producer of the firewood, the producer's legal address and the source of the firewood, as provided by the firewood producer, on a label, bill of sale or lading, purchase receipt or invoice, attached to or accompanying such firewood they sell.

(f) Self-issued Certificate of Source.

(1) Persons who cut and transport Untreated Firewood for personal use must complete and possess a Self-Issued Certificate of Source from the department in accordance with this section.

(2) A Self-Issued Certificate of Source must specify the source of the firewood being cut and transported.

(3) Self-Issued Certificate of Source forms shall be available on the department's website, www.dec.ny.gov, and at the department's regional offices.

(4) No person who cuts and/or transports firewood for personal use shall move such firewood more than 50 miles from its source unless it is treated in accordance with subdivision (d) of this section.

(5) Persons who cut firewood on their own property, for their own use on that same property, are exempt from the requirements of this subdivision.

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 March 4, 2009.

Text of rule and any required statements and analyses may be obtained from: Bruce Williamson, DEC, 625 Broadway, Albany, NY 12233-4253, (518) 402-9425, email: firewood@gw.dec.state.ny.us

Summary of Regulatory Impact Statement

Statutory authority:

Environmental Conservation Law (ECL) section 1-0101 (3) (b) directs the Department of Environmental Conservation ("Department") to

guarantee “that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences.” ECL section 1-0101 (3) (d) directs the Department to preserve the unique qualities of the Adirondack Forest Preserve. ECL section 3-0301 (1) (b) gives the Department the responsibility to “promote and coordinate management of... land resources to assure their protection... in promulgating any rule or regulation.” ECL section 3-0301 (1) (d) authorizes the Department to “provide for the care, custody and control” of forest preserve lands; ECL section 9-0105(1) authorizes the Department to “exercise care, custody and control of the several preserves, parks and other state lands described” in ECL Article 9; ECL section 3-0301 (2) (m) authorizes the Department to adopt rules and regulations “as may be necessary, convenient or desirable to effectuate the purposes of the ECL” and ECL section 9-0105 (3) authorizes DEC to “make necessary rules and regulations to secure proper enforcement of ECL Article 9.”

ECL section 9-1303 grants the following authority for the purpose of control and preventing the spread of forest insects and forest tree diseases: to conduct necessary investigations to discover better methods of control or prevention of the spread of forest insects and forest tree diseases; to enter upon any lands for the purpose of determining if such property is infested with forest insects or forest tree diseases; to establish quarantine districts in the State; to prohibit the movement of materials which may be harboring forest insects or forest tree diseases in any of their different forms; to poison forest areas in or near sections infested by insect pests or forest tree diseases; to establish zones for preventing the spread of forest insect and disease pests; and to make rules and regulations to prevent the spread of or to control forest insects and forest tree diseases, their pupae, eggs and caterpillars, and plants or trees infested by them.

Legislative objectives:

The proposal directly supports the legislative intent underlying the Department’s authority to protect forests, by regulating the importation and movement of a wood product that has been demonstrated to be a primary carrier for numerous destructive, invasive, and exotic forest pests. The United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS) and State agencies have identified a connection between the movement of infested firewood with new infestations and expansions of infested areas for Emerald ash borer in Michigan, Illinois, Indiana, and West Virginia. In the absence of a confirmed, specific pest infestation, the federal government does not have the authority to prevent the movement of potentially-infested wood materials. This is akin to closing the barn door after the horses have left. The New York State Legislature clearly intended the Department to be pro-active in protecting our forest resources, which is the intent of this regulation.

Needs and benefits:

Firewood has the potential to spread many destructive, invasive, exotic pests, both known and, as yet, unknown. Confirmed threats to New York State include: Emerald ash borer, *Sirex noctilio* (European wood wasp), Asian long-horned beetle, European gypsy moth, Asian gypsy moth, and a number of other wood boring or defoliating insects, plus decay and wood-stain fungi as well as the pathogens that cause Dutch elm disease, oak wilt, and sudden oak death. Firewood product is often stored and unused for long periods of time, and is handled by persons generally not trained to identify signs of invasive pests. Once established in new areas, invasive forest pests can quickly kill trees in forests, parks, communities and campgrounds. For example, USDA APHIS estimates that over 30 million ash trees have already been killed by the Emerald ash borer in Michigan with additional millions of trees dead or dying in the Indiana, Illinois, Ohio, Pennsylvania, Maryland, West Virginia and Ontario, Canada. In urban settings, this presents liability concerns and may require significant expenditures (in the millions of dollars) for removal of dead trees. For example, it will cost the City of Ann Arbor, Michigan (population 99,000) over \$4.3 million dollars to remove over 10,000 dead and dying ash trees (7,500 street trees alone) that pose safety hazards to residents and property, and expose the city to potential liability costs.

Ecological costs could include the loss of entire tree species. There are an estimated 750 million ash trees in New York State (excluding the Adirondack and Catskill Forest Preserves) and ash constitutes 7% of all trees in our forests.

Similarly, the Asian longhorned beetle, an invasive insect has already been found in New York City and on Long Island, and could wreak havoc across upstate New York forests and communities because most maple species are among its preferred hosts.

The proposed rule is needed to reduce the risk of introduction and spread of invasive insects and diseases of trees by preventing untreated firewood from entering New York State and restricting the movement, sale and possession, within the State, of untreated firewood that originates in New York State.

The Department intends to hold a series of public meetings around the State to inform interested and affected stakeholders of the need for

firewood regulations. These meetings will include information about how producers, dealers and consumers of firewood will be affected, along with the actions necessary for their compliance with these regulations. Department staff has and will continue to discuss this regulation with individual stakeholders. In addition, the development of this regulation has been based in part on firewood surveys last summer at DEC and private campgrounds. Also, the Department and the Office of Parks, Recreation and Historic Preservation (OPRHP) have developed “Don’t Move Firewood” information on their public websites. As part of its outreach strategy, the Department developed communication materials (bookmarks, fact sheets, and signs) that were distributed statewide to numerous outlets such as the New York State Thruway rest stops, the New York State Fair, county fairs, and private campground associations.

Costs:

The proposed regulation will impose additional costs to out-of-state producers, or large scale, in-state producers shipping firewood farther than 50 miles. The cost to comply with treatment requirements for firewood may be passed on to consumers. Equipment investment of up to \$250,000 may be required for a business to acquire all the necessary equipment from scratch, although most already have much of the necessary equipment, or could acquire second-hand equipment. Other compliance requirements that would increase costs for producers include increased documentation and record-keeping on firewood, monitoring equipment and personnel time to comply with the product labeling standard. Labeling, if not already done, could be a positive investment, as it would increase marketability of the product to consumers.

The regulation may also increase markets and demand for treated or local, “New York-Sourced” firewood. Ultimately, the Department anticipates no change in the overall amount of firewood consumed, but a redistribution of the firewood supply.

The proposed regulation would increase costs and demands on Department staff due to the following:

- increasing public outreach;
- increasing communication with campers and other firewood users;
- increasing outreach to firewood producers and vendors;
- supplying firewood at campgrounds;
- enforcing this regulation; and
- disposal of confiscated material.

Many of these same costs would also be incurred by OPRHP, and to a lesser extent, New York State Department of Agriculture and Markets (NYSDAM).

Local government mandates:

The proposed regulation does not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district or other special district.

Paperwork:

Producers would be required to document treatment of firewood, or document sources of firewood or logs converted to firewood. Firewood dealers, both wholesale and retail, would be required to provide documentation of treatment or local source of firewood to customers, which could be accomplished by labeling or on an invoice or receipt.

Duplication:

Some firewood producers may also receive certification from USDA APHIS to move firewood into or out of federally quarantined areas for certain forest pests. APHIS certification may require heat treatment of the product consistent with the proposed State regulation and would be accepted as meeting the State’s requirements.

Alternatives:

The Department could continue its public awareness campaign without implementing regulations. This alternative would prevent enforcement against inappropriate firewood movement, and compromise the Department’s ability to responsibly manage State owned lands.

Or the Department could prohibit out-of-state firewood, or “non-local wood” from being brought into State campgrounds, or onto public lands. Some other States, localities, or federal agency units (certain National Forests, managed by the U.S. Forest Service, or National Parks, managed by the National Park Service) have taken this limited approach. However, this approach does not adequately protect all of the State’s forests, since our State campgrounds and lands only comprise a partial percentage of the State forests.

Another alternative could utilize voluntary agreements between the Department and the firewood producer/vendor for “New York-Sourced wood”, and focus on the point of sale. This differs from the proposed regulation because it fails to address the subsequent movement or possession of firewood by the buyer. If the subsequent movement and possession of untreated firewood is not regulated, there would be no protection of our forest resources from the unintentional and unknowing human-assisted movement of forest pests within the State. Also, it would not address the significant risk presented by the movement of wood into New York State from other States. The Department is equally concerned about the move-

ment of pests harbored on firewood from Long Island to the Catskills or Buffalo to the Adirondacks.

Federal standards:

USDA APHIS' authority to impose quarantine restrictions concerning treatment and movement of firewood (a commodity) are only imposed in direct conjunction with a specific pest species regulatory action. The Department is being proactive and recognizes that a wide variety of invasive, exotic forest pests and diseases may be transported to new areas on many different species of wood used as firewood.

The heat treating standard the Department is requiring for imported firewood is consistent with USDA APHIS Emerald ash borer quarantine standards and international trade standards for firewood and solid wood packaging materials.

Compliance schedule:

Regulated parties can comply immediately with the regulation by altering their distribution patterns for firewood. To be in compliance, in state producers, dealers and consumers of firewood only need to restrict their sourcing, distribution and movement of firewood to refocus on readily available local markets. In most cases, this will not entail any change in current practices, since most firewood is already obtained, processed and sold locally. Firewood is a low value product, and the high and increasing cost of gas and diesel fuel make long distance commercial movement of this product uneconomical.

Many out-of-state producers already heat-treat their firewood as a marketing strategy, and have most of the necessary facilities and equipment to meet New York State's import requirements. Minimal time would be required for them to comply with the additional monitoring requirements, and time and temperature requirement for the treating process. The Department is not proposing to recall existing dealer stocks of firewood from the marketplace and anticipate that there will be a period of time (perhaps 1-2 months, or more) when some firewood will continue to be sold that does not meet the new labeling and treating standards. Our intention is to focus on awareness and education during this initial period, rather than strict enforcement.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed regulation will impose additional costs to out-of-state producers, who would be required to heat-treat firewood which they plan to export to New York State, and those in-state firewood producers who choose to distribute their firewood beyond 50 miles and must therefore heat-treat it. Equipment investment of up to \$250,000 may be required for a business looking to acquire new heat-treatment equipment, although many large producers already own much of the necessary equipment (kilns, controls, racks, etc.) or could acquire used equipment. Other compliance requirements that would increase costs to heat-treated wood producers that may be passed on to consumers include increased documentation and record-keeping on firewood, monitoring equipment and personnel time to maintain records and compliance with the product labeling standard, although compliance with labeling requirements would be minimal if compliance information is added to an existing label or invoice. Source labeling could be an added expense for all firewood producers, in-state and out-of-state, if not already being done. Labeling, however, could be a positive investment, as it could increase marketability of the product to consumers and serve as advertising.

Regulation may also increase markets and demand for treated or "New York-Sourced Firewood", as users change their behavior patterns in firewood use in response to the Department's increased outreach education promoting the new regulations and the "don't move firewood" and "use local firewood" messages. Ultimately, the Department anticipates no changes in overall amount of firewood use, but, rather, a re-distribution or change in the pattern of consumption. The Department expects that as a result of the rulemaking, firewood produced in a given area, will be bought, sold and used within that area. Long distance movement of untreated firewood will be discontinued. Due to the ready availability of firewood in most parts of the state where firewood is used, this should have minimal impact on the consumers or producers.

Many firewood dealers are "small businesses." This rule does not make special provisions for "small businesses," because pest infestations are unrelated to business size. However, this rule should have little impact on their sales because most of their firewood is sold locally and locally sold firewood need not be treated before sale.

2. Compliance requirements: This rule will impact long distance operators the most. These operators will be required to undertake a wide ranging number of acts to gain producer certification in order to comply with the proposed regulation. These acts will require new reporting and recordkeeping activities (where none or very little is currently required), as well as building new infrastructure and the purchasing of new equipment. In addition, this segment of the industry will be required to comply and coordinate with state regulators on a regular basis where no such contact previously existed.

Local operators will be required to initiate new, but relatively minor

recordkeeping activities that include product origin-labeling or other types of documentation that indicate firewood is "New York"-sourced.

3. Professional services: Long distance operators will likely require professional services in order to build new infrastructure and to purchase and install a heat source (e.g. boiler, direct heat) and temperature/time monitoring equipment.

4. Compliance costs: Long distance operators will face substantial initial capital costs in order to continue transporting firewood over 50 miles. Start-up costs if new equipment must be purchased would approximate 250,000 dollars. In addition, other costs will likely be incurred initially due to a change in normal business activities.

It is not possible for the Department to fairly and accurately estimate the annual cost of continuing compliance for long distance operators since little information is available regarding time and energy consumption needs for treating firewood according to the time/temperature requirement stated in the rule. Annual costs will vary for long distance operators depending on many factors, including scale of operation and type of fuel available for producing process heat.

Both initial and continuing compliance costs will likely vary between long distance operators since some operators will have some of the infrastructure required for heat-treatment already in place. Others will have the capacity to install required equipment for less cost than the estimate due to their ability to fabricate certain types of equipment "in-house" rather than purchasing from an outside vendor, or the purchase of used equipment.

Finally, it is anticipated that some long distance operators would be able to recoup an unknown portion of additional annual operating costs by raising prices to the consumer.

Local operators will face little up front capital cost and negligible costs in order to maintain compliance on an annual basis. Costs to maintain compliance will be mostly in the form of additional administrative and record keeping time to the operator.

5. Economic and technological feasibility: Compliance is technologically feasible for both long distance and local operators, however, it is less likely that long distance operators will be willing or able to comply with the regulation due to both their relatively small scale of business and economic constraints of compliance costs noted above. Although one long distance operator currently sells firewood that meets the proposed compliance requirement, and two sell "kiln-dried" firewood (partially meeting the compliance requirement), these operations are unique in that they sell "retail" firewood on a large scale basis and command a premium price since it is sold in bagged or wrapped units of one cubic foot or less. These operations contrast with most long distance operators who generally deliver unwrapped green firewood "in bulk" (between 40 and 1,000 cubic feet).

It is not anticipated that the proposed rule will have a net negative impact on the overall level of firewood trade in New York. However, it is anticipated that it will have the effect of shifting the firewood trade between the existing pool of long distance operators so that more firewood is sold locally.

6. Minimizing adverse impact: The proposed compliance requirement minimizes adverse impact to the potentially affected segments of the firewood industry. The heat-treatment requirements proposed for long distance operators and the labeling requirement proposed for local operators are the only feasible methods known to prevent the accidental human-caused spread of invasive forest pests. The only other option for preventing the spread of invasives by firewood would be banning the sale of firewood, which would be far more onerous on the firewood industry.

7. Small business and local government participation: Department staff have had numerous conversations with firewood related businesses and individuals related to the proposed regulation. These conversations included some long distance operators that either currently heat-treat firewood to the required standard as stated in the proposal or to a lesser standard. No alternative methods have been discovered that would be less adverse to small businesses and at the same time meet the objective of the proposal. In addition, the Department plans to hold a series of public information meetings at various locations around the state. An announcement will appear in the New York Timber Producers Association Quarterly Newsletter as well as in local newspapers, and on the Department's website, regarding a schedule for these meetings.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposal is applicable Statewide and covers all rural and non-rural areas equally.

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

Producers of firewood across the state would be required to document treatment of firewood or document sources of firewood or logs converted to firewood. The firewood producer would need to maintain and make available for inspection documentation of the treatment method and

sources of firewood upon request of an inspecting official, but would not be required to file any documentation with the Department of Environmental Conservation.

Wholesale and retail firewood dealers would be required to provide to their customers documentation regarding treatment or local source(s) of firewood, which can be accomplished by labeling the firewood or by providing this information on an invoice or receipt.

No professional services are anticipated to be necessary for any firewood producer or dealer to comply with the regulation.

3. Costs:

The proposed regulation will impose additional costs to out-of-state producers who export firewood to New York State because firewood would have to be heat treated. In state producers who choose to distribute their firewood beyond 50 miles would also incur additional costs due to the heat-treat requirement. This cost will likely be passed on to consumers. Equipment investment of up to \$250,000 may be required for a business acquiring new heat-treatment equipment, although many large producers already have much of the necessary equipment (e.g., kilns, controls, and racks) or could acquire used equipment. Other compliance requirements that would increase costs to heat-treated wood producers that may be passed on to consumers include increased documentation and record keeping on firewood, monitoring equipment and personnel time to maintain records that comply with the product labeling standard. Compliance with the product labeling standard would be minimal if the compliance information is added to an existing label or invoice. Source labeling could be an added expense for all firewood producers, in state and out-of-state, if it is not already being done. Labeling, however, could be a positive investment, as it could increase marketability of the product to consumers and serve as advertising.

The regulation may increase markets and demand for treated or "New York-Sourced Firewood". Users change their behavior patterns relating to firewood use in response to the Department's outreach education promoting the new regulations and "don't move firewood" and "use local firewood" messages. Ultimately, the Department anticipates no changes in the overall amount of firewood use, but, rather, a re-distribution, or change in the pattern of consumption. It is expected that long distance movement of firewood will be dramatically reduced, and firewood produced in a given area will be bought, sold and used primarily within that area. Due to the ready availability of firewood in most parts of the state where significant quantities of firewood are used, this should have minimal impact on the availability of firewood for consumers or the businesses of producers.

The regulation would increase costs and demands on Department staff due to the following:

- Increased public outreach,
- Increased communication with campers and other firewood users,
- Increased outreach to firewood producers and vendors,
- Enforcement of the regulation, and
- Disposal of confiscated material.

Many of these costs would also be incurred by the Office of Parks, Recreation and Historic Preservation and, to a lesser extent, the New York State Department of Agriculture and Markets.

4. Minimizing adverse impact:

The Department has minimized unnecessary adverse impacts on New York State jobs by creating a mechanism for the continued production and sale of firewood in the State. In some areas of the State, including rural areas, this may increase employment or economic opportunities because there will be a greater demand from consumers for locally-sourced firewood. Restricting the importation of untreated firewood into the state may also increase demand for locally-sourced firewood and the market opportunities for New York State based producers and retailers of this commodity.

5. Rural area participation:

The Department intends to hold a series of public information meetings around the State to inform the public of the proposed regulations, the need for them, how they will affect producers, dealers and consumers of firewood, and how all can comply with the regulation.

Job Impact Statement

1. Nature of impact:

The regulation is not expected to have any significant impact on job numbers. Most people involved in producing and selling firewood do so as a sideline or part-time endeavor, or as a secondary aspect of another business (e.g., an arborist whose crew cuts logs and limbs from tree care work into firewood for later sale). Much of the firewood business and "employment" is typically "underground", and not documented in Labor statistic or with IRS. The regulations should prompt only a shift in the distribution, sales and use patterns of firewood, encouraging local use by discouraging the long-distance movement of wood. The total count of firewood produced and used should not be affected. For larger business that choose to heat-treat firewood for broader distribution, there may be an increase in jobs related to the heat-treating requirements.

2. Categories and numbers affected:

The jobs affected would primarily be laborer types, requiring minimal skills and training, related to cutting and splitting log length wood into firewood pieces and handling, treating, packaging and delivering the product. No data is available on the number of people employed in producing firewood, as this is not a well-documented workforce. It is highly seasonal, and intermittent in nature. The "workforce" may, at times, include arborists, tree care and landscape contractors, nurseries and garden centers, loggers, farmers, and possibly anyone who owns a chainsaw and pick-up truck. Due to the nature of the product and market, there are few large-scale producers and dealers.

3. Regions of adverse impact:

The regulation applies equally across the State. There are no regions where the rule would have a disproportionate adverse impact on jobs or employment opportunities.

4. Minimizing adverse impact:

The Agency has minimized unnecessary adverse impacts on New York jobs by creating a mechanism for the continued local production and sale of firewood. In some areas of the State, this may increase job or economic opportunities since there will be a greater demand from consumers for locally-sourced firewood. Restricting the importation of untreated firewood into the state may also increase demand for locally-sourced firewood and the market opportunities for producers and retailers of this commodity.

5. Self-employment opportunities:

Much of the firewood market is supplied through self-employment (and much of it is undocumented). As previously stated, it is anticipated there will be more opportunities for individuals to enter the firewood business, both as producers and dealers, in their local areas as customers seek to find more local sources of firewood supply.

Department of Health

EMERGENCY RULE MAKING

Payment for FQHC Psychotherapy and Offsite Services

I.D. No. HLT-45-08-00018-E

Filing No. 1266

Filing Date: 2008-12-08

Effective Date: 2008-12-08

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

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

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

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

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

Based upon the Department's interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC's baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

Subject: Payment for FQHC Psychotherapy and Offsite Services.

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

Text of emergency rule:

Section 86-4.9 is amended to read as follows:

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

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

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

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

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

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

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

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

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

(1) FQHC offsite services must:

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-45-08-00018-P, Issue of November 5, 2008. The emergency rule will expire February 5, 2009.

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, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

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

Legislative Objective:

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

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

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

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

- Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.

- Payment will be made on the basis of a FQHC group rate.

- Payment will only be made for services that occur in FQHCs.

Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

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

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

- Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.

- Services must be rendered by a physician, physician assistant, midwife or nurse practitioner and reimbursed at the FQHC offsite professional rate.

- Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

Needs and Benefits:

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

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

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

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

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

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

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

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

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

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

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

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

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:
No impact on small businesses or local governments is expected.

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

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

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

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

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Small Business Participation:

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

Rural Area Flexibility Analysis

Types and Estimated Number of Rural Areas:

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

Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

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

Compliance Costs:

There are no direct costs associated with compliance.

Minimizing Adverse Impact:

There is no adverse impact.

Opportunity for Rural Area Participation:

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

Job Impact Statement

Nature of Impact:

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

Categories and Numbers Affected:

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

Regions of Adverse Impact:

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

Minimizing Adverse Impact:

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

Self-Employment Opportunities:

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

Insurance Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Guidelines for the Processing of Coordination of Benefit (COB) Claims

I.D. No. INS-52-08-00006-P

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

Proposed Action: Amendment of Parts 52 and 217 of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, 2403, 3216, 3221, 3224-a, 3224-b, 4304 and 4305

Subject: Guidelines for the processing of Coordination of Benefit (COB) claims.

Purpose: To establish guidelines for the processing of healthcare claims for persons covered by more than one health insurance policy.

Text of proposed rule: Section 52.23(r) is amended to read as follows:

(r) Right of recovery. *Subject to the provisions of Section 217-2.2(c) of this Title (Regulation No. 178)*

(1) If the amount of the payments made by an insurer is more than it

should have paid under its COB provision, it may recover the excess from one or more of:

- (i) the persons it has paid or for whom it has paid;
- (ii) insurance companies; or
- (iii) other organizations.

(2) A secondary plan that provides benefits in the form of services may recover the reasonable cash value of providing the services from the primary plan, to the extent that benefits for the services are covered by the primary plan and have not already been paid or provided by the primary plan. Nothing in this subdivision shall be interpreted to require a plan to reimburse a covered person in cash for the value of services provided by a plan that provides benefits in the form of services.

Part 217 is hereby retitled: "Processing Of Health Insurance Claims."

Part 217 (Regulation No. 178) is hereby renumbered Subpart 217-1, in sequence. Subpart 217-1 shall be entitled: "Prompt Payment of Health Insurance Claims."

New section 217-1.1 is amended to read as follows:

Section 217-1.1 Definitions and applicability.

(a) For the purposes of this [Part] Subpart:

(b) This [Part] Subpart shall apply to all health care claims submitted under contracts or agreements issued or entered into pursuant to Articles 32, 42 or 43 of the Insurance Law or Article 44 of the Public Health Law.

New section 217-1.2(d) is amended to read as follows:

(d) Nothing in this [Part] Subpart shall prohibit a payer from electing to accept some or all claims with less information than that specified in the lists set forth in subdivisions (b) and (c) of this section.

A new Subpart 217-2, entitled "Coordination of Benefit Claims," is added to read as follows:

Section 217-2.1 Definitions and Applicability.

(a) For purposes of this Subpart:

(1) *Coordination of benefits or COB means a procedure that is intended to avoid claims payment delays and duplication of benefits when a person is covered by two or more health insurers providing benefits or services for medical, dental or other care or treatment by: establishing an order in which plans pay their claims, providing the authority for the orderly transfer of information needed to pay claims properly and permitting a reduction of the benefits of a health insurer when, by the rules established by Section 52.23 of this Title (Regulation No. 62), it does not have to pay its benefits first.*

(2) *Health care claim means a request for payment for services rendered to an insured pursuant to the benefits provided in a health insurance policy.*

(3) *Health care provider means an entity licensed or certified pursuant to Article 28, 36 or 40 of the Public Health Law; a facility licensed pursuant to Article 19, 23 or 31 of the Mental Hygiene Law; a health care professional licensed, registered or certified pursuant to Title 8 of the Education Law; or a health care provider comparably licensed, registered or certified by another state; or a dispenser or provider of pharmaceutical products, services or durable medical equipment.*

(4) *Health insurance policy means a contract that provides benefits or services for medical, dental or other health care or treatment.*

(5) *Health insurer means an insurer that issues a health insurance policy.*

(6) *Remittance advice means a form on which a health insurer indicates to a health care provider the details of the health insurer's processing of a particular claim.*

(7) *Primary health insurer means a health insurer whose benefits for a person's health care coverage must be determined without taking the existence of coverage issued by any other health insurer into consideration, pursuant to the COB rules in Section 52.23 of this Title and the provisions of the health insurer's policy or contract.*

(8) *Secondary health insurer means a health insurer that is not a primary health insurer that may take into consideration the benefits of the primary health insurer or insurers and the benefits of any other accident and health coverage.*

(b) *This Subpart shall apply to a health insurer authorized to write accident and health insurance pursuant to Article 42 of the New York Insurance Law, a corporation licensed pursuant to Article 43 of the Insurance Law, or an entity certified pursuant to Article 44 of the Public Health Law, with respect to a health care claim submitted under a health insurance policy.. This Subpart shall not apply to coordination of benefits involving no-fault auto insurance policies, workers compensation policies or the Medicare program.*

(c) *The requirements of this section shall apply when an individual is covered, or where there is a reasonable basis supported by specific information to believe that the individual is covered, under more than one health insurance policy that provides benefits or services for medical, dental or other care or treatment.*

Section 217-2.2 Coordination of benefit requirements.

(a) *When a health care provider submits a claim to a health insurer,*

that submission shall suspend the time period for submission of the claim to a second health insurer until such time as the provider has received a remittance advice or other evidence of a benefit determination, including an appeal determination, from the first health insurer. After the health care provider receives a remittance advice, appeal determination, or other evidence of a benefit determination from the first health insurer, the health care provider shall have at least 60 days from receipt of the remittance, appeal determination or other evidence of a benefit determination to bill any other health insurer that has a potential payment obligation. A claim submitted to the second health insurer after the 60-day period shall be subject to the claims submission rules of the second health insurer. Unless the health care provider is otherwise able to demonstrate, it shall be presumed that the remittance advice, appeal determination, or other evidence of a benefit determination was received within eight calendar days of the date on the document.

(b)(1) *If a health care provider submits a claim to a secondary health insurer prior to submitting the claim to the primary health insurer, the secondary health insurer shall deny the claim, notify the health care provider that it is secondary and notify the health care provider of the identity of the primary health insurer, or, if the identity of the primary health insurer is not known, provide whatever information was used to make the determination that it is a secondary health insurer. The secondary health insurer may provide the information by referring the health care provider to the specific page of the secondary health insurer's website and shall include a toll free telephone number through which the information will be provided. The health care provider's submission of the claim to the primary health insurer shall suspend the time period for resubmission of such claim to the secondary health insurer as set forth above in subdivision (a) of this section.*

(2) *If the information provided by the secondary health insurer is not sufficient to determine the identity of the primary health insurer, the health care provider shall have 60 days from the notice that other coverage may exist to make a reasonable effort to confirm if other coverage does exist. A "reasonable effort" shall include at least an attempt by the health care provider to contact the patient.*

(3) *If the health care provider is unable to confirm other coverage within 60 days as provided in paragraph (2) of this subdivision, the secondary health insurer shall process the claim in accordance with the provisions in the health insurance policy, provided that the health care provider resubmits the claim to the secondary health insurer, with copies of the documents to support the health care provider's efforts to confirm other coverage, within 30 days of the determination that other coverage could not be confirmed despite reasonable efforts.*

(c)(1) *If a secondary health insurer makes a payment to a health care provider prior to determining the secondary health insurer's actual obligation to pay the claim, the secondary health insurer shall delay any action to recover the payment, pending a determination by the primary health insurer as to the primary health insurer's obligation and a determination by the secondary health insurer of its actual obligation to pay the claim. Subject to all provisions of this subdivision, the secondary health insurer may recover the payment if the health care provider does not submit a remittance advice, appeal determination, or other evidence of a benefit determination from the primary health insurer to the secondary health insurer within 120 days of the secondary health insurer's notification that other coverage exists. Nothing herein shall prevent the secondary health insurer from allowing more than 120 days to submit the documents.*

(2) *If the information provided by the secondary health insurer is not sufficient to determine the identity of the primary health insurer, the health care provider shall have 60 days from the notice that other coverage may exist to make a reasonable effort to confirm if other coverage does exist. A "reasonable effort" shall include at least an attempt by the health care provider to contact the patient.*

(3) *If the health care provider is unable to confirm other coverage within 60 days as provided in paragraph (2) of this subdivision, the secondary health insurer shall process the claim in accordance with the provisions in the member's health insurance policy, provided that the health care provider notifies the secondary health insurer and forwards copies of the documents to support the health care provider's efforts to confirm other coverage, within 30 days of the determination that other coverage could not be confirmed despite reasonable efforts.*

(d) *If a health care provider receives approval from a health insurer to provide services to the health insurer's insured, prior to the rendering of those services to the insured, a second health insurer shall not subsequently deny a claim for the services on the basis that no prior approval from that health insurer was received. The fact that one health insurer has given a health care provider prior approval does not, however, preclude another health insurer from determining that the services that were provided were not medically necessary or otherwise not covered under the policy.*

(e) Every determination of the primary health insurer and secondary health insurer shall comply with Section 3224-a of the Insurance Law.

Section 217-2.3 Effective Date.

This Subpart shall apply to all claims initially submitted on or after January 1, 2008.

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: Amais@ins.state.ny.us

Data, views or arguments may be submitted to: Laura Dillon, Consumer Services Bureau, NYS Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 486-9105, email: Ldillon@ins.state.ny.us

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

Consolidated Regulatory Impact Statement

1. Statutory authority: Sections 201 and 301 authorize the Superintendent to effectuate any power granted to the Superintendent under the Insurance Law, and to prescribe forms or otherwise make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations affecting health maintenance organizations (HMOs) and effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Section 2403 prohibits unfair and deceptive acts or practices.

Section 3216 describes the policy provisions required for individual accident and health insurance forms.

Section 3221 describes the policy provisions required for group accident and health insurance forms.

Section 3224-a requires insurers, HMOs and prepaid health services plans (PHSPs) to process claims within specified time frames, except in those instances where the obligation of the insurer is not reasonably clear.

Section 3224-b establishes rules relating to the processing of health claims and overpayments to physicians.

Section 4304 describes the policy provisions required for individual contracts issued by non-profit medical and dental indemnity or health and hospital services corporations.

Section 4305 describes the policy provisions required for group contracts issued by non-profit medical and dental indemnity or health and hospital services corporations.

2. Legislative objectives: The rulemaking is intended to facilitate the timely processing and payment of health insurance claims in those circumstances where the patient is covered by more than one policy issued by different insurers. Insurers, HMOs, and PHSPs do not always provide all available information, such as the name of the other insurer, to the health care provider when it is determined that other coverage exists. If the claim has already been paid, many times the insurer, HMO or PHSP will recoup the payment from current claims, leaving the provider with an unpaid claim and insufficient information to seek payment from the other carrier. This recoupment is done through accounting transactions on the remittance advice in which the insurer or HMO makes a payment for patient "A" and then deducts a payment for patient "B" that was originally paid on a previous remittance advice. This results in the appearance of an underpayment by the insurer or HMO for patient A. This practice is permitted if the agreement between the provider and insurer or HMO contains language that allows for the recovery of overpayments in this manner. In addition, if the name of the other insurer is known and the claim is submitted for payment, many times the claim will be denied for late filing, again leaving the provider with an unpaid claim after services had been rendered.

3. Needs and benefits: 11 NYCRR 53.23 (Regulation 62) currently requires insurers, HMOs, and PHSPs to coordinate benefits when a member is covered by more than one accident and health policy. The proposed Subpart 217-2 to Regulation 178 would establish procedures that an insurer, HMO or PHSP must follow when it is determined that other coverage may exist. In addition, the proposed Subpart establishes requirements for the provider if the provider wishes to seek payment from the other insurer, and the time in which the provider must act. These procedures include guidelines for those cases when the claim has already been paid before the existence of other coverage is established, as well as when the existence of other coverage is established before any claim payment is made. The guidelines also change the timely filing requirements for those cases where other coverage exists. The time begins to run from the date of notification of other coverage, not from the date of service. Ultimately, these procedures prevent providers from being stuck with unpaid claims when an insurer recoups payment and the other plan denies the claim for late filing. The amendment to Regulation 62 cross-references the two regulations.

4. Costs: This rule imposes no compliance costs on state or local governments. The Insurance Department does not anticipate any additional costs to this Department.

The costs to regulated parties would be negligible once the process is implemented. The only initial costs are the time and expense required for the insurer, HMO or PHSP to reprogram their internal processing procedures to conform to the new regulation. These regulations are the results of many meetings with representatives of health care providers (Medical Society of the State of New York, Greater New York Hospital Association and Healthcare Association of New York), insurers, HMOs and PHSPs (Health Plan Association and Conference of the Blue Cross Blue Shield) and the New York State Departments of Health and Insurance. These discussions took place over several years from 2004 until a consensus on the Regulation was reached in 2007. Therefore the industry was included in the negotiations of this regulation and is in agreement with the new procedures.

The costs to health care providers include the cost of producing correspondence to their patients regarding additional coverage, the postage to mail such correspondence and the administrative cost of producing the letter. However these negligible costs are offset by the income retained by the provider when the insurer or HMO does not recoup the payment on these claims.

5. Local government mandates: This rule does not impose any program, service, duty or responsibility upon a city, town, village, school district or fire district.

6. Paperwork: There is no additional paperwork required as a result of this amendment.

7. Duplication: This amendment will not duplicate any existing state or federal rule for insurers that write accident and health insurance.

8. Alternatives: No viable alternatives. This amendment was the result of many meetings with representatives of health care providers (Medical Society of the State of New York, Greater New York Hospital Association and Healthcare Association of New York), insurers, HMOs and PHSPs (Health Plan Association and Conference of the Blue Cross Blue Shield) and the New York State Departments of Health and Insurance. These discussions took place over several years from 2004 until consensus was reached in 2007. During these discussions various other options were discussed, such as not making any changes to the current process and also extending or reducing the time frames in this Regulation.

Taking no action was not an option for the healthcare providers who were looking for a way to retain payment for the services they had provided. Reducing the timeframes in this Regulation did not permit the healthcare providers enough time to appeal timely filing denials that will undoubtedly result from the automatic claim processing systems. The health insurance industry was not agreeable to extending the time frames because they want to ensure that the process is concluded in a reasonable amount of time.

After much discussion the proposal as submitted was agreed upon since it provides time for the healthcare providers to investigate whether or not other coverage exists while holding them to a reasonable timeframe, thus permitting the insurers or HMOs to ultimately close their books. The healthcare providers have incentive to work within the timeframes if they wish to preserve the income.

9. Federal standards: There are no minimum federal standards for the processing of claims involving the coordination of benefits. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance schedule: The guidelines shall take effect 90 days after the notice of adoption is published in the State Register and shall apply to all claims initially submitted on or after that date.

Consolidated Regulatory Flexibility Analysis

1. Effect of rule: These regulations will affect insurers paying claims under contracts written pursuant to Articles 32, 42 and 43 of the Insurance Law and health maintenance organizations (HMOs) and prepaid health service plans (PHSPs) authorized pursuant to Article 44 of the Public Health Law. The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of insurers authorized to do business in New York and HMOs, and has concluded that the insurers and HMOs do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedure Act, because there are none which are both independently owned and have under 100 employees.

There are less than 20 PHSPs in New York, some of which are small businesses. PHSPs are entities certified pursuant to Article 44 of the Public Health Law that provide Medicaid services in a managed care environment. However, they will not be negatively impacted by this regulation. These regulations establish minimum requirements for the processing of Coordination of Benefit (COB) claims. These minimum guidelines will assist insurers, including PHSPs, by defining the requirements for processing these claims.

These regulations will also affect health care providers, many of which are small businesses. These regulations set forth guidelines for the processing of these claims, and reduce the administrative burden on the providers by requiring that insurers provide the name of the other insurer when a patient is covered by more than one health insurance policy. In addition,

the guidelines prohibit the automatic recoupment of claims already paid while giving the provider time to seek payment from the other insurer.

These regulations would affect health care facilities that are owned or operated by state or local governments as they would any other healthcare provider. While there will be a small administrative burden to determine if other coverage existed, the income preserved would offset any negative impact. For state and local governments that do not own or operate health care facilities, the regulations do not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements.

These regulations are the result of meetings with representatives of health care providers, insurers, HMOs and PHSPs, and represent a consensus between the Department and various interested parties as to the appropriate handling of claims.

2. Compliance requirements: Coordination of benefits is already required by 11 NYCRR 52.23 (Regulation 62). Insurers, HMOs and PHSPs are already required to coordinate payments with the benefits of other insurers. There are no compliance requirements for local governments unless they own or operate a healthcare facility. In that case the compliance requirements would be the same as other healthcare providers who, if they choose to take advantage of the process in this regulation, will be required to attempt to verify the existence of other coverage if the name of the primary carrier is not provided by the secondary health plan. In those cases the provider would have 60 days from the notice of other potential coverage to verify whether or not the coverage existed. If the coverage is verified the healthcare provider must submit the claim to the primary carrier. If other coverage is not confirmed the healthcare provider must notify the secondary carrier and provide documents to support their efforts to confirm the existence of other coverage. There are no compliance requirements for small businesses except for health care providers and they are not negatively impacted since the ability to retain the income for services already provided far exceeds the cost of attempting to verify other coverage. These regulations were negotiated with the purpose of helping health care providers by leveling the playing field with regard to COB claims.

3. Professional services: Insurers, HMOs and PHSPs should not need to obtain professional services to comply with these regulations. Health care providers do not need to obtain professional services as a result of this regulation.

4. Compliance costs: Insurers, HMOs and PHSPs are already subject to the COB requirements in Regulation 62. Regulation 62 permits insurers and HMOs to coordinate coverage and establishes uniformity in the processing of health care claims when consumers are covered by more than one health plan. This new regulation has been requested by interested parties in order to establish the framework for handling COB claims, both pre-payment and post-payment. The costs to regulated parties would be negligible once the process is implemented. The only initial costs are the time and expense required for the insurer, HMO or PHSP to reprogram their internal processing procedures to conform to the new regulation. However, the industry (The Health Plan Association and Conference of Blue Cross Blue Shield) was included in the negotiations of this regulation and is in agreement on the new procedures.

Costs to health care providers are difficult to measure. In most cases it is anticipated that the secondary insurer will identify the name of the other insurer, in which case the health care provider must simply submit the claim to the other insurer or HMO. If the claim is denied for timely filing by the primary carrier, the healthcare provider will need to appeal the denial and provide a copy of the notice from the secondary carrier. This is an administrative procedure and the costs associated with it involve the generation of correspondence, postage and labor costs. The total cost cannot be estimated because it is not known how many providers will actually take advantage of this process. That being said, the income retained through this process will far outweigh any administrative cost incurred by the health care provider.

5. Economic and technological feasibility: Compliance with these regulations should be economically and technologically feasible for small businesses since the purpose of the regulations is to streamline the processing of COB claims. Adherence on the part of the health care provider will result in less administrative cost because insurers' responsibilities are more clearly defined.

6. Minimizing adverse impact: These regulations are intended to help health care providers, many of which are small businesses, by leveling the playing field. They prevent insurers from recouping money before providers have an opportunity to seek payment from another carrier. If the other coverage cannot be verified, the insurer that paid the claim is prohibited from recouping the payment. Thus, providers will retain the income for the services they have provided.

Other options were discussed at the Healthcare Roundtable including making no changes to the current process, increasing or decreasing the time frames in this regulation and permitting the secondary insurer to

recoup the money even if the primary insurer could not be identified. The health insurance industry acknowledged the current process was unfair to health care providers and agreed to accept the liability for the services if the other insurer could not be identified. At the same time the industry asked that the providers be required to make an effort to determine if there was other coverage and also requested time frames in which the provider must act.

7. Small business and local government participation: Notification of the Department's intent to propose the regulations was included in the Department's regulatory agenda for June, 2008 and was accessible to small businesses and local governments. Interested parties representing insurers, HMOs, PHSPs, (The Health Plan Association and the Conference of Blue Cross Blue Shield) and healthcare providers (Medical Society of the State of New York, Greater New York Hospital Association and the Healthcare Association of New York) developed the regulation with representatives of New York State Departments of Health and Insurance during numerous meetings convened by the Department of Insurance. As a result the interested parties had an opportunity to participate in the rule-making process. During these meetings which occurred over several years, the various affected parties discussed many options and alternatives. These include making no changes to the current process, increasing or decreasing the time frames in this regulation and permitting the secondary insurer to recoup the money if the primary insurer could not be identified. The industry recognized that the healthcare providers had served their members in good faith and should be paid for their services. After much discussion we agreed to a regulation that was acceptable to all parties.

Consolidated Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Insurers to which these regulations are applicable, health maintenance organizations (HMOs) and prepaid health service plans (PHSPs), do business in every county of the state, including rural areas as defined under Section 102(13) of the State Administrative Procedure Act. Health care providers in New York State are comprised of mostly physicians, but include other health care providers in individual practices or small groups throughout the state, including rural areas.

2. Reporting, recordkeeping and other compliance requirements; and professional services: In addition to the requirements currently in contained in 11 NYCRR 52 (Regulation 62), this Regulation will require insurers, HMOs and PHSPs to provide the name of the primary insurer, if known. These regulations will also require health care providers to document their efforts to verify other coverage. If the primary insurer initially denies the claim for late filing the health care providers may also have to appeal the denial and provide a copy of the notice of other coverage from the secondary insurer. These requirements are ministerial in nature and the benefit of retaining the payment for services provided far outweighs the costs.

3. Costs: The costs to regulated parties will be negligible once the process is implemented. The only initial costs are the time and expense required for the insurer, HMO or PHSP to reprogram their internal processing procedures to conform to the new regulations. Any other costs associated with processing COB claims have already been incurred by insurers, HMOs and PHSPs with the implementation of Regulation 62. These proposed regulations do not require insurers, HMOs or PHSPs to provide additional or new benefits, but simply establish the procedures to follow when processing a Coordination of Benefits (COB) claim. The health insurance industry was included in the negotiations of this regulation and is in agreement about the new procedures and thus have accepted the costs associated with this regulation.

Health care providers will also incur ministerial costs associated with documenting their reasonable effort to identify other coverage, the cost of filing an appeal, related postage and labor costs. However, the benefits of retaining the income for services provided outweigh these costs. In addition, similar costs are currently incurred by health care providers who appeal the recoupments under the current process. This regulation will allow health care providers to retain their income for services provided that otherwise would have been recovered by insurers and HMOs.

4. Minimizing adverse impact: The regulations have the potential to decrease expenses to insurers, HMOs and PHSPs in rural areas by reducing the number of claims that need to be reprocessed. The regulations also will maximize the accounts receivable of health care providers, because insurers will be unable to recoup the payment on a COB claim without first giving the healthcare provider the opportunity to verify other coverage and seek payment from the other insurer. If other coverage cannot be verified and the healthcare provider notifies the secondary insurer in a timely manner the payment cannot be recovered. This should assist in keeping local providers in family practice in their respective communities, and foster consumers' continued access to rurally located providers.

5. Rural area participation: Notification of the Department's intent to propose these regulations were included in the Department's Regulatory Agenda for June, 2008. In addition, interested parties representing insurer-

ers, HMOs, PHSPs and providers, including those actually or potentially located in rural areas, discussed the regulation during numerous meetings convened by the Department, and therefore had an opportunity to participate in the rule-making process. The proposed regulation also provides flexibility for providers located in rural areas. First, the healthcare provider has an option to obtain the name of the other insurer either by calling a toll-free telephone number or use of the internet. There is also flexibility in how healthcare providers attempt to verify the existence of other coverage. For instance, there are no requirements that attempts be made via notarized documents or certified mail, thus permitting healthcare providers in rural areas the flexibility to handle these functions in a manner that best meets their abilities.

Consolidated Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the relationship between payers and providers, ultimately assisting providers in collecting payment for services provided, and keeping providers in their communities. As result of these regulations, providers will spend less time tracking down other coverage and attempting to collect on claims where payment has been made and then recouped by the payers.

There is no anticipated adverse impact on job opportunities in this state.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Credit for Reinsurance from Unauthorized Insurers

I.D. No. INS-52-08-00008-P

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

Proposed Action: Amendment of Part 125 (Regulation 20) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 307(a), 308, 1301(a)(14), 1301(c) and 1308

Subject: Credit for Reinsurance from Unauthorized Insurers.

Purpose: Reinsurance companies that are not authorized or accredited will now post collateral based on their credit ratings.

Substance of proposed rule (Full text is posted at the following State website: <http://www.ins.state.ny.us>): Sections 125.1, 125.2 and 125.3 are repealed to delete redundant and dated insolvency clause requirements and a new Section 125.1 is proposed to apply principle-based credit risk management standards to all licensed ceded insurers.

Section 125.4 is renumbered Section 125.2 and amended to include a new Section 125.2(h) to provide alternative credit for cessions to unauthorized reinsurers. This alternative credit to unauthorized reinsurers adjusts the credit that the ceding insurer may take in its financial statement based upon the financial strength of the unauthorized assuming reinsurer. In order to qualify for the reduced credit, the unauthorized assuming reinsurer in the transaction must:

- maintain a minimum net worth of \$250 million;
- be authorized and meet the standards of solvency and capital adequacy in its domiciliary jurisdiction; and
- have a credit rating from at least two rating agencies.

Moreover, to qualify for the reduced credit with respect to cessions to an unauthorized non-U.S. assuming insurer, the superintendent and the domiciliary regulator of the unauthorized non-U.S. assuming reinsurer must have in place an executed memorandum of understanding pursuant to this part. Further, the domiciliary jurisdiction of an unauthorized non-U.S. assuming reinsurer shall allow U.S. reinsurers access to the market of that jurisdiction on terms and conditions that are at least as favorable as those provided in New York laws and regulations for unauthorized non-U.S. assuming insurers.

Ceding insurers seeking alternative credit for cessions to unauthorized reinsurers must maintain audited financial statements for the unauthorized assuming reinsurers for the last three years, and maintain satisfactory evidence that an unauthorized reinsurer meets the requirements mentioned above.

The reinsurance contract itself must contain an insolvency clause, a designation of a person in New York or the ceding insurer's domestic state for service of process, a requirement that any disputes will be subject to United States courts and laws, and a requirement that the unauthorized assuming reinsurer will notify the ceding insurer of any changes in its license status or any change in its rating from a credit rating agency.

While this alternative credit for cessions to unauthorized reinsurers will reduce the collateral requirement in a manner that corresponds to the financial strength of the reinsurer, where an order of rehabilitation, liquidation or conservation is entered against the ceding insurer, the unauthorized

assuming reinsurer must, as a general matter, post full collateral for all outstanding liabilities owed to the ceding insurer.

Section 125.5 is renumbered Section 125.3 and various references to other sections are corrected.

Section 125.6 is renumbered Section 125.4 and various references to other sections are corrected.

Section 125.7 is renumbered Section 125.5 and a reference to another section is corrected.

Section 125.8 is renumbered Section 125.6.

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, New York Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

Data, views or arguments may be submitted to: James Davis, New York Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5124, email: jdavis@ins.state.ny.us

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

Summary of Regulatory Impact Statement

1. Statutory authority: Sections 110, 201, 301, 307(a), 308, 1301(a)(14), 1301(c) and 1308 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing when an authorized ceding insurer (i.e., an insurer authorized or licensed to do business in New York) may take credit on its balance sheet for a reinsurance recoverable from an assuming insurer not authorized in this state.

Section 110 authorizes the Superintendent to share documents, materials and other information with other state, federal and international regulatory agencies and the National Association of Insurance Commissioners (NAIC).

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 307(a) requires insurers doing business in the state to file an annual statement, in a form and containing such matters as shall be prescribed by the Superintendent, in the office of the Superintendent.

Section 308 vests the Superintendent with the authority to require authorized insurers to file reports relating to the insurer's transactions, financial condition or any matter connected therewith.

Sections 1301(a)(14) and (c) and 1308 give the Superintendent the authority to prescribe, by regulation, the conditions under which an authorized ceding insurer may be allowed credit, as an asset or a deduction from loss and unearned premium reserves, for a reinsurance recoverable from an assuming insurer not authorized to do an insurance business in this state.

2. Legislative objectives: Article 13 of the Insurance Law establishes minimum standards for the assets of insurers, including when an authorized ceding insurer may take credit on its balance sheet for reinsurance recoverable from an assuming insurer not authorized to do an insurance business in this state.

3. Needs and benefits: Reinsurance is insurance for insurance companies. It is a means of redistributing risk throughout the global insurance industry. Often, an insurance company will transfer (or "cede") part or all of that risk to another party (the assuming insurer or reinsurer). The reinsurer then is ultimately responsible for paying its part of those ceded claims. The primary insurer, or "cedent", is given credit on its balance sheet for the business ceded to a reinsurer recognized by New York. This allows the cedent to reduce its reserves and increase the number of policies it can write. However, the ability to take a credit for ceded claims only applies on a very limited basis when the reinsurer, irrespective of its financial strength, is not authorized to do business in New York.

Under the current regulation, the cedent generally may take credit on its balance sheet only if the reinsurer posts collateral equal to 100 percent of the transferred policyholder claims. There is a seldom utilized section of the regulation that allows the cedent to take credit of up to 85% on its balance sheet for cessions to unauthorized companies, provided the cedent maintains documentation demonstrating that the unauthorized insurer meets financial requirements similar to those of New York authorized insurers.

Non-U.S. reinsurers posted an estimated \$120 billion in collateral in the U.S. in 2005, the latest year for which there is available data, on which they pay about \$500 million a year in transaction costs. The Insurance Department has seen no negative fiscal impacts on US ceding insurers in instances where the collateral levels have been reduced. It therefore makes sense, with appropriate safeguards in place, to build on this precedent and allow the most highly rated non-US reinsurers to reduce their collateral postings further.

Adoption of this amended regulation will reduce this transactional cost and increase reinsurance capacity. It also will bring New York in line with

global insurance markets and worldwide accounting standards governing reinsurance contracts. Most jurisdictions outside the U.S. do not require non-domestic reinsurers to post collateral in order for authorized ceding insurers to take credit. Under the amendment, the most financially healthy reinsurers need not post collateral, or at least not 100% collateral. The amendment will level the playing field among reinsurers by predicating credit for reinsurance principally on financial strength, not geography. Reinsurers with strong credit ratings will, under the amendment, post less collateral than those with weak ratings.

In addition, this amendment imposes principles-based credit risk management on the authorized ceding insurers, by putting the onus on cedents to ensure that the reinsurers with whom they do business have the financial wherewithal to meet their obligations. Principles-based regulation aims to reduce unnecessary regulatory and administrative burdens, ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted, and provide benefits for consumers from more efficient markets, more effective protection, and better responsiveness to consumers' needs.

Indeed, this amendment extends the Department's efforts to keep New York competitive while bringing the U.S. into the 21st century of financial services regulation. Insurance companies ceding risk to reinsurers will be responsible for vetting their reinsurers and developing risk management plans for their reinsurance placements. The amendment thus represents a move to let the market decide whether the posting of collateral is appropriate by eliminating the across-the-board regulatory mandate that requires even the strongest reinsurance companies to post collateral. Nevertheless, under the amendment, nothing prevents authorized ceding insurance companies from negotiating their own collateral requirements with reinsurers or from choosing to do business with reinsurers that are willing to post collateral, should the authorized ceding insurance company so insist. The rule amends the existing collateral requirements on a prospective basis. This will prevent any disruption to the existing reinsurance market, while giving the Department the opportunity to assess the effectiveness of the rule.

The National Association of Insurance Commissioners (NAIC) Reinsurance Task Force has been developing a Model Law on Reinsurance Collateral Requirements. The Department has been a participant in the task force. It is the Department's intent to make the rule consistent with the Model Law, to the extent it is consistent with the needs of the New York insurance market.

4. **Costs:** This rule imposes no compliance costs on state or local governments. Nor is it expected that either the Insurance Department or regulated entities will directly incur additional costs. Nevertheless, with the adoption of the amendment, it will be incumbent on authorized ceding insurers to vet the financial wherewithal of their reinsurers and develop appropriate risk management plans for reinsurance placements. However, even under the current regulation, authorized ceding insurers should be performing these functions as a matter of prudent risk management.

5. **Local government mandates:** This rule does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. **Paperwork:** The only new requirements established by this rule are set forth in Section 125.1(b): An authorized ceding insurer shall notify the superintendent within 30 days after a reinsurance recoverable from any single assuming insurer, or group of affiliated assuming insurers, exceeds 50% of the authorized ceding insurer's last reported surplus to policyholders, or after it is determined that a reinsurance recoverable from any single assuming insurer, or group of affiliated assuming insurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the authorized ceding insurer. In addition, an authorized ceding insurer shall notify the superintendent within 30 days after ceding to any single assuming insurer, or group of affiliated assuming insurers, more than 20% of the ceding insurer's gross written premium in the prior calendar year, or after it has determined that the reinsurance ceded to any single assuming insurer, or group of affiliated assuming insurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the authorized ceding insurer.

7. **Duplication:** This amendment will not duplicate any existing state or federal rule. The National Association of Insurance Commissioners (NAIC) Reinsurance Task Force has been developing a Model Law on Reinsurance Collateral Requirements. The Department has been a participant in the task force. It is the Department's intent to make the rule consistent with the Model Law, to the extent it is consistent with the needs of the New York insurance market.

8. **Alternatives:** The Department conducted extensive outreach to entities representing authorized ceding insurers, and to reinsurers both authorized and unauthorized to do business in New York. The Department received comments from nine entities. A complete discussion of the comments submitted can be found at the Department's website (<http://www.ins.state.ny.us>).

9. **Federal standards:** There are no minimum standards of the federal government for the same or similar subject areas.

10. **Compliance schedule:** Once the amended regulation is adopted, regulated parties will be able to comply immediately.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. This rule applies to insurers and reinsurers authorized to do business in New York State, as well as unauthorized reinsurers. The rule establishes certain requirements for ceding insurers and reinsurers that enable ceding insurers to take credit on their balance sheets for risks ceded to reinsurers.

The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of authorized insurers and the trustee surplus of alien insurers subject to this amendment, and believes that none of them comes within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because there are none which are both independently owned and have under 100 employees.

This rule also is not expected to have any adverse economic impact on local governments, and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at ceding insurers and reinsurers, none of which is a local government.

Rural Area Flexibility Analysis

1. **Types and estimated numbers of rural areas:** This amendment applies to insurers authorized to do business in New York State and addresses whether a ceding insurer may take credit on its balance sheet, as an asset or deduction from reserves, for reinsurance recoverable from an unauthorized assuming insurer. The amendment establishes certain requirements for ceding insurers and reinsurers, and puts the onus on ceding insurers to prudently manage their risk. The ceding insurers and reinsurers do business in every county in this state, including rural areas as defined under State Administrative Procedure Act Section 102(13).

2. **Reporting, recordkeeping and other compliance requirements, and professional services:** The only new reporting requirements established by this rule are found in Section 125.1(b). A ceding insurer shall notify the superintendent within 30 days after a reinsurance recoverable from any single assuming insurer, or group of affiliated assuming insurers, exceeds 50% of the ceding insurer's last reported surplus to policyholders, or after it is determined that a reinsurance recoverable from any single assuming insurer, or group of affiliated assuming insurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the domestic ceding insurer. In addition, a domestic ceding insurer shall notify the superintendent within 30 days after ceding to any single assuming insurer, or group of affiliated assuming insurers, more than 20% of the ceding insurer's gross written premium in the prior calendar year, or after it has determined that the reinsurance ceded to any single assuming insurer, or group of affiliated assuming insurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the ceding insurer. There are no other additional paperwork requirements for ceding insurers and reinsurers that are based in rural areas.

3. **Costs:** This rule imposes no additional costs for ceding insurers and reinsurers, including those based in rural areas. Of course, the rule requires ceding insurers to vet the financial wherewithal of the reinsurers with whom they do business, but even under current regulation, ceding insurers should be performing these functions as a matter of prudent risk management.

4. **Minimizing adverse impact:** The current regulation requires a strongly capitalized non-New York (unauthorized) reinsurer to tie up capital by posting collateral while not imposing a similar burden on a New York (authorized) reinsurer. The proposed rule requires ceding insurers to assume full responsibility for credit risk management and compliance in entering into reinsurance arrangements.

This rule applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State. This rule levels the playing field for all reinsurers, mitigates the risk that may exist under the present regulatory structure, and continues the Department's efforts to keep New York competitive while bringing the state into the 21st century of financial services regulation.

5. **Rural area participation:** In developing this rule, the Department conducted extensive outreach by contacting insurers, trade groups, other regulators, and other interested parties, including those located or domiciled in rural areas. The comments from these parties are discussed in the "Alternatives" section of the Regulatory Impact Statement.

Job Impact Statement

The proposed amendment should have no negative impact on jobs or economic opportunities in New York State. The amendment applies to reinsurance contracts, and establishes a framework by which a ceding insurer may take credit on its balance sheet, as an asset or deduction from reserves,

for a reinsurance recoverable from any unauthorized assuming insurer that maintains, on a stand-alone basis separate from its parent or any affiliated entities, an interactive financial strength rating from at least two rating agencies. In addition, the regulation imposes principles-based credit risk management on the ceding insurers, by putting the onus on cedents to ensure that the reinsurers with whom they do business have the financial wherewithal to meet their obligations. Moreover, private parties may, as a matter of contract, require a reinsurer to post collateral. This amendment simply does not require the posting of collateral in every instance involving risk ceded to an unauthorized insurer by an authorized cedent.

While ceding insurers may change their choice of reinsurers to ensure that they receive credit as an asset or deduction from reserves for such reinsurance, the amendment will not change the fact that licensed companies need to obtain such reinsurance. Thus, there should be no negative impact on jobs or economic opportunities in New York State.

Office of Mental Health

NOTICE OF ADOPTION

Waiver Authority

I.D. No. OMH-18-08-00003-A

Filing No. 1267

Filing Date: 2008-12-08

Effective Date: 2008-12-24

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

Action taken: Addition of Part 501 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.01 and 31.04

Subject: Waiver authority.

Purpose: To establish waiver authority for the Commissioner of Mental Health under certain circumstances.

Text or summary was published in the April 30, 2008 issue of the Register, I.D. No. OMH-18-08-00003-P.

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

Revised rule making(s) were previously published in the State Register on October 22, 2008.

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

Assessment of Public Comment

Issue: The agency received a request to include a step in the waiver process requiring the applicant to provide a specific statement from the affected local governmental unit or units as to how the proposed program might impact the local planning process. The suggestion further requested language be included which specifically states that the program created by the waiver will not adversely impact the local planning process.

Response: The agency believes that this issue has been sufficiently handled by the requirements in the regulation, specifically Section 501.3(a)(4) and (6). Those sections state that requests for waivers and waiver renewals include specific evidence of prior consultation with the appropriate local governmental unit(s). In addition, the agency will consult with the Conference of Local Mental Hygiene Directors in the development of the waiver application form.

Issue: Section 501.3(a)(2)(iv) is vague in stating that the waiver may be granted for "other purposes deemed appropriate by the Commissioner".

Response: The requirements set forth in paragraph (2) of Section 501.3(a) clearly articulate the criteria for waiver consideration, and the agency believes this sufficiently addresses this issue.

Issue: The proposed grounds for a waiver (providing additional flexibility to better meet local service needs) should not be grounds for a case-by-case waiver. Instead, the regulation at issue should be changed.

Response: The waiver requests will provide the agency with the ability to assess its current regulations and see where there may be deficiencies or need for revision. If it is determined that a regulation in effect does not serve the public interest or has outlived its usefulness, then a formal Notice of Proposed Rulemaking will be filed with the Department of State, pursuant to the State Administrative Procedure Act.

Issue: The regulation should provide that the determination by the Commissioner of a waiver request clearly state the grounds under which the waiver was granted.

Response: The agency believes that issue has been resolved in paragraph (7) of Section 501.3(a). That paragraph states that "The Office shall provide public notice of applications for waivers by posting such information in its internet site. The Office shall review and consider any public comments which are received regarding the application for a waiver. The Office shall supplement its internet posting with the Commissioner's determination with respect to each application, when such determination is made."

Department of Motor Vehicles

NOTICE OF ADOPTION

Display of Registration Numbers on Snowmobiles

I.D. No. MTV-40-08-00003-A

Filing No. 1284

Filing Date: 2008-12-09

Effective Date: 2008-12-24

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

Action taken: Amendment of section 107.11 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 2223

Subject: Display of registration numbers on snowmobiles.

Purpose: To establish the manner in which snowmobile registration stickers are displayed.

Text or summary was published in the October 1, 2008 issue of the Register, I.D. No. MTV-40-08-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Carrie L. Stone, Department of Motor Vehicles, Empire State Plaza, Room 526, Albany, NY 12228, (518) 474-0871.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

International Registration Plan

I.D. No. MTV-42-08-00010-A

Filing No. 1285

Filing Date: 2008-12-09

Effective Date: 2008-12-24

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

Action taken: Amendment of section 28.5 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 405-i

Subject: International Registration Plan.

Purpose: Provide for suspensions of vehicle fleets in the International Registration Plan.

Text of final rule: Paragraph (5) of subdivision (b) of section 28.5 is amended to read as follows:

(5) The registrant to whom the TA has been issued must submit all required documents and fees indicated on the invoice to the International Registration Bureau of the department within 30 days from the date the TA was processed. Upon receipt of proper documentation and fees, the transaction processing will be completed and the appropriate IRP documents will be produced by the department and mailed to the registrant. Failure of the registrant to submit required documentation and fees within that 30 day period will result in suspension of the registration of all vehicles [in the] *for any fleet registered in its name*, [for which the TA was requested] and may result in the inability of that registrant to obtain TAs in the future for any [fleet] *vehicle* registered in its name.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 28.5(5)(b).

Text of rule and any required statements and analyses may be obtained from: Carrie L. Stone, Department of Motor Vehicles, Counsel's Office, Room 526, 6 Empire State Plaza, Albany, NY 12228, (518) 474-0871.

Revised Job Impact Statement

A revised Job Impact Statement is not submitted because the minor change to the proposed rule does not necessitate any revision.

Assessment of Public Comment

The agency received no public comment.

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

Electronic Tags Used to Identify a Vehicle for Parking or Security Purposes

I.D. No. MTV-52-08-00001-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 amend section 174.5 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 375(1)

Subject: Electronic tags used to identify a vehicle for parking or security purposes.

Purpose: To display electronic tags on inside of the windshield in the lower left hand corner without prior approval of Commissioner.

Text of proposed rule: Part 174 is amended by amending section 174.5 to read as follows:

174.5. Parking or Security Stickers.

(a) Subject to the limitations of this section, stickers identifying a vehicle for parking or security purposes may be placed on the inside of the windshield in the lower right hand without prior approval of the Commissioner. *Electronic tags identifying a vehicle for parking or security purposes may be placed on the inside of the windshield in the lower left hand corner without prior approval of the Commissioner.*

(b) Stickers or electronic tags may not be of a size that would interfere with visibility. The front surface of the sticker must be gummed so that it may be attached to the inside of the windshield.

(c) No vehicle may display more than two parking or security stickers or electronic tags, or combination thereof.

(d) This section shall not apply to military installations (but see Section 174.8)

Text of proposed rule and any required statements and analyses may be obtained from: Heidi A. Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.state.ny.us

Data, views or arguments may be submitted to: Everett Mayhew, Assistant Counsel, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871

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

Consensus Rule Making Determination

Display of windshield stickers of any kind is controlled by 15 NYCRR Part 174. Currently only the registration sticker (174.2) and inspection sticker (174.3) are allowed to be placed on the lower left corner of the windshield. Placement of parking (or security) stickers is controlled by 174.5(a) which says: "Subject to the limitations of this section, stickers identifying a vehicle for parking or security purposes may be placed on the inside of the windshield in the lower right hand corner without prior approval of the Commissioner."

Due to the structural design of certain parking garages, the electronic tag is only effective if it is placed in the lower left hand corner. This regulation accommodates this need by permitting the placement of such tags in the lower left hand corner.

This is submitted as a consensus rule because it is a minor rule that addresses the changing needs of the parking industry.

Job Impact Statement

A Job Impact Statement is not submitted with this proposed rule because it will have no adverse impact on job development in New York State.

Commission on Public Integrity

**EMERGENCY
RULE MAKING**

Adjudicatory Proceedings and Appeals Procedure

I.D. No. CPI-41-08-00015-E

Filing No. 1233

Filing Date: 2008-12-03

Effective Date: 2008-12-03

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

Action taken: Amendment of Part 941 of Title 19 NYCRR.

Statutory authority: Executive Law, section 94(9) and (13)

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

Specific reasons underlying the finding of necessity: In order that the regulations governing adjudicatory proceedings and appeals procedure comport with changes effectuated by the recently- enacted governing statute, the Public Employee Ethics Reform Act of 2007.

Subject: Adjudicatory proceedings and appeals procedure.

Purpose: To afford all parties due process protection and the fair and just resolution of all matters that may come before the commission.

Text of emergency rule: The rules governing adjudicatory proceedings and appeals procedures are amended to comport with the Public Employee Ethics Reform Act of 2007 ("PEERA"). Therefore, these amendments provide that the adjudicatory proceeding rules apply to violations of all laws within the jurisdiction of the Commission on Public Integrity, specifically, sections 73, 73-a and 74 of the Public Officers Law, section 107 of the Civil Service Law and Article 1-A of the Legislative Law. As PEERA repealed the Public Advisory Council, these amendments also set forth the amended appeals procedure for applications for deletion and exemption from Financial Disclosure Statements pursuant to section 73-a of the Public Officers Law. These amendments also provide the amended list of documents that are publicly available from the Commission on Public Integrity.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 31, 2009.

Text of rule and any required statements and analyses may be obtained from: Shari Calnero, Associate Counsel, Commission on Public Integrity, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: scalnero@nyintegrity.org

Regulatory Impact Statement

1. Statutory authority: Executive Law Section 94 (9)(c) generally directs the Commission on Public Integrity ("CPI") to adopt, amend, and rescind rules and regulations to govern the procedures of the CPI; Executive Law Section 94(9)(f) authorizes CPI to review financial disclosure statements and to delegate all or part of this review function to CPI's executive director; Executive Law Section 94(9)(g) authorizes CPI to receive complaints and referrals alleging violations of Public Officers Law Sections 73, 73-a and 74, Legislative Law Article one-A and Civil Service Law Section 107; Executive Law Section 94 (9)(h) authorizes CPI to grant or deny requests from subject individuals for deletion of certain information from Financial Disclosure Statements and to provide an appeal process from such denials; Executive Law Section 94(9)(i) authorizes CPI to grant or deny requests from subject individuals for exemption from the requirement to provide certain information in Financial Disclosure Statements and to provide an appeal process from such denials; and Executive Law Section 94 (13) specifically directs CPI to adopt rules governing the conduct of adjudicatory hearings for violations of Public Officers Law Sections 73, 73-a and 74, Legislative Law Article one-A and Civil Service Law Section 107, as well as to adopt rules governing appeals taken pursuant to denials of requests for certain deletions and exemptions from Financial Disclosure Statements pursuant to section 73-a of the Public Officers Law.

2. Legislative objectives: The Public Employee Ethics Reform Act of 2007 (APEERA@) established the CPI, thus merging the former New York State Ethics Commission ("Ethics Commission") and the former New York Temporary State Commission on Lobbying ("Lobbying Commission"). PEERA intended that the CPI's consolidated jurisdiction

would strengthen integrity, public trust and confidence in New York State government. PEERA authorizes the CPI to conduct adjudicatory proceedings to enforce the laws within its jurisdiction and to ensure that all parties receive due process protection and a fair and just resolution of applicable enforcement actions and of the aforementioned appeals.

3. Needs and benefits: The proposed rule-making is necessary to fulfill the statutory mandate of the CPI. PEERA became law on March 26, 2007. Pursuant to PEERA, effective September 22, 2007, all powers, duties and functions conferred upon the former Ethics Commission and the former Lobbying Commission were transferred to and assumed by the CPI. Pursuant to Resolution CPI 07-03, the CPI adopted the rules codified at Title 19 NYCRR Part 941, which were previously adopted by the former Ethics Commission, to govern the conduct of adjudicatory proceedings for violations of all laws within the CPI's jurisdiction, specifically violations of sections 73, 73-a and 74 of the Public Officers Law, section 107 of the Civil Service Law and Article 1-A of the Legislative Law.

However, the existing text of Title 19 NYCRR Part 941 does not comport with PEERA and Resolution CPI 07-03. In addition to having adopted these amendments as an emergency measure, the CPI seeks to permanently amend these rules through a proposed rulemaking.

For example, pursuant to PEERA, the CPI's jurisdiction is expanded in that it may now adjudicate Public Officers Law section 74 violations. The existing text of Title 19 Part 941 does not state that these rules apply to such violations. By adopting this rule, Title 19 NYCRR Part 941 will be amended to reflect that these rules also apply to Public Officers Law section 74 violations, thus providing the general public and those who would be affected by this change in the law, including statewide elected officials and state officers and employees, with adequate notice, comment and due process of law.

PEERA also repealed the Public Advisory Council, which previously served as the body authorized to review requests for deletions and exemptions of certain information from Financial Disclosure Statements, as provided in paragraphs (h) and (i) of subdivision 9 of section 94 of the Executive Law. While PEERA retains an appeal process for these requests for deletion and exemption, the existing text of the applicable section Part 941.19 is obsolete, as it describes the now-dissolved Public Advisory Council's role in the appeal process. By adopting this rule, section 941.19 will be amended to reflect that the Public Advisory Council no longer exists, and to also set forth the statutorily-authorized appeal process, thus providing statewide elected officials and state officers and employees who are required to submit Financial Disclosure Statements with adequate notice should they seek deletions or exemptions or appeal such denials.

In addition, PEERA authorized the CPI to enforce and adjudicate violations of section 107 of the Civil Service Law, commonly referred to as the "Little Hatch Act." The existing text of Title 19 NYCRR Part 941 does not state that the rules apply to such violations. By adopting this rule, Title 19 NYCRR Part 941 will be amended to reflect that these rules also apply to Civil Service Law section 107 violations, thus providing the general public and those who would be affected by this change in the law, including statewide elected officials and state officers and employees, with adequate notice, comment and due process of law.

Furthermore, PEERA authorized the CPI to enforce and adjudicate violations of Article 1-A of the Legislative Law, which was within the jurisdiction of the former Lobbying Commission prior to September 22, 2007. The former Lobbying Commission's adjudicatory proceeding rules codified at Title 21 NYCRR Part 250 are obsolete and do not comport with PEERA. Pursuant to Resolution CPI 07-03, the CPI duly rescinded Title 21 NYCRR Part 250 and adopted the rules set forth in Title 19 NYCRR Part 941 to also cover violations of Article 1-A of the Legislative Law, subject to PEERA's requirement that adjudicatory proceedings for such violations shall be open to the public in accordance with Article 7 of the Public Officers Law. While the rules codified at Title 19 NYCRR Part 941 now govern violations of Article 1-A of the Legislative Law, the existing text of Title 19 NYCRR Part 941 does not state that the rules also apply to violations of Article 1-A of the Legislative Law. By adopting this rule, Title 19 NYCRR Part 941 will be amended to reflect that these rules also apply to violations of Article 1-A of the Legislative Law, thus providing the general public and those affected by this change in the law, including registered lobbyists and clients in New York State, with adequate notice, comment and due process of law.

4. Costs:

- a. costs to regulated parties for implementation and compliance: None
- b. costs to the agency, state and local government: None
- c. cost information is based on the fact that there are no costs associated with these amendments to the rules.
- d. not applicable

5. Local government mandate: None

6. Paperwork: This amendment will not require the preparation of any additional forms or paperwork.

7. Duplication: None

8. Alternatives: On December 11, 2007, the CPI approved Resolution CPI 07-03, which adopted the rules codified at Title 19 NYCRR Part 941 to govern adjudicatory proceedings for all laws within its jurisdiction. While this resolution provides the requisite authority to adopt such rules, the text of the existing rules remains inaccurate and misleading to the general public and those directly affected by the changes in the law effectuated by PEERA. Therefore, the CPI seeks to publish notice of such amendment in the State Register and the revised text of the rules in the Official Compilation of Codes, Rules and Regulations of the State of New York in order to afford the public with the most notice and due process practicable.

9. Federal standards: The proposed rule-making pertains to adjudicatory proceedings and appeals taken from denials for exemption or deletion from Financial Disclosure Statements pursuant to PEERA. These amendments do not exceed any federal minimum standard with regard to a similar subject area.

10. Compliance schedule: Compliance is required on the part of the CPI only and will take effect upon adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Adoption since the proposed rule will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The Commission notes that while it is authorized by the Public Employee Ethics Reform Act of 2007 ("2007") to enforce the reporting requirements of the Article 1-A of the Legislative Law, which requires those public corporations that conduct lobbying activity to register and report expenses in accordance with the law, these amendments to the adjudicatory proceeding and appeal procedure rules does not impose any adverse economic impact on those public corporations for compliance purposes. The New York State Commission on Public Integrity makes these findings based on the fact that the adjudicatory proceedings and appeals procedure affect only certain State officers and employees and lobbyists and their clients, including certain public corporations registered for lobbying activity in New York State. Small businesses and local governments are not affected in any way by these amendments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this Notice of Adoption since the proposed rule-making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Commission on Public Integrity makes these findings based on the fact that the adjudicatory proceedings and appeals procedure affect only certain State officers and employees and registered lobbyists and clients in New York State. Rural areas are not affected in any way.

Job Impact Statement

Job Impact Statement is not submitted with this Notice of Emergency Adoption since the proposed rule-making will have no impact on jobs or employment opportunities. The Commission on Public Integrity makes this finding based on the fact that the proposed rule-making is technical in nature and applies to certain State officers and employees subject to the provisions of Public Officers Law sections 73, 73-a and 74 and Civil Service Law section 107 and lobbyists and clients subject to Article one-A of the Legislative law. This regulation does not apply, nor relate to small businesses, economic development or employment opportunities.

NOTICE OF ADOPTION

Adjudicatory Proceedings and Appeals Procedure

I.D. No. CPI-41-08-00015-A

Filing No. 1232

Filing Date: 2008-12-03

Effective Date: 2008-12-24

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

Action taken: Amendment of Part 941 of Title 19 NYCRR.

Statutory authority: Executive Law, section 94(9) and (13)

Subject: Adjudicatory proceedings and appeals procedure.

Purpose: To afford all parties due process protection and the fair and just resolution of all matters that may come before the commission.

Text of final rule: Section 941.1 Intent and purpose.

Executive Law, section 94 subdivision (13) authorizes the [State Ethics Commission] *Commission on Public Integrity* to adopt rules governing the

conduct of adjudicatory proceedings and appeals relating to the assessment of the civil penalties; rules relating to appeals taken pursuant to [public advisory council] denials of requests [for certain deletions or exemptions to be made from] *to delete or exempt certain information from a financial disclosure statement authorized in paragraph (h) or paragraph (i) of subdivision (9) of section 94 of the Executive Law; and rules relating to appeals taken from hearing officer final decisions. In adjudicatory proceedings and appeals undertaken pursuant to the Ethics in Government Act, section 107 of the Civil Service Law and article one-A of the Legislative Law, as amended by the Public Employee Ethics Reform Act of 2007 (Chapter 14, Laws of 2007), it is the intention and purpose of the [State Ethics Commission], Commission on Public Integrity to afford all parties due process protection and fair and just resolution of all matters. The purpose of the [Ethics in Government Act] Public Employee Ethics Reform Act of 2007 is to [restore] strengthen the public's trust and confidence in government. Through effective enforcement, including adjudication, this purpose can be accomplished.*

Section 941.2 is amended to read as follows:

Section 941.2 Definitions.

(a) *Appellant* shall mean the recipient of [an adverse determination] *a denial* by the [Public Advisory Council] *executive director for deletion or exemption of certain information from a financial disclosure statement* who wishes to appeal or has appealed that [adverse decision] *denial to the members of the commission.*

(b) *Commission* shall mean New York State [Ethics Commission] *Commission on Public Integrity* [created by] *established pursuant to section 94 of the Executive Law, which may delegate the authority to act as provided in these rules and regulations to its executive director.*

[(c) *Ethics in Government Act* shall mean Chapter 13 of the Laws of 1987, as amended.]

(c[d]) *Executive director* shall mean executive director of the [State Ethics Commission] *Commission on Public Integrity* as appointed pursuant to section 94(9)(a) of the Executive Law.

(d[e]) *Financial disclosure statement* shall mean annual statement of financial disclosure which is required to be filed pursuant to section 73-a of the Public Officers Law.

(e[f]) *Hearing officer* shall mean the presiding officer in adjudicatory hearings conducted pursuant to this Part.

(f[g]) *Hearing* shall mean any adjudicatory proceeding held by the commission to determine whether a violation of sections 73, [or] 73-a or 74 of the Public Officers Law, section 107 of the Civil Service Law or article one-A of the Legislative Law has occurred.

(g[h]) *Respondent* shall mean any State officer or employee covered by the provisions of sections 73, [or] 73-a or 74 of the Public Officers Law or section 107 of the Civil Service Law, or any lobbyist or client, as such terms are defined in article one-A of the Legislative Law, who is the subject of a hearing held by the commission.

Section 941.3 is amended to read as follows:

Section 941.3 Notice of reasonable cause.

(a) If the commission, subsequent to an investigation of a possible violation of sections 73, 73-a or 74 of the Public Officers Law, section 107 of the Civil Service Law or article one-A of the Legislative Law, determines that there is reasonable cause to believe that a violation has occurred, it shall send a notice of reasonable cause:

(1) to the person who is the object of the investigation;

(2) to the complainant, if any;

(3) in the case of a statewide elected official, to the Temporary President of the Senate and the Speaker of the Assembly; and

(4) in the case of a State officer or employee, to the appointing authority for such person.

Subdivision (a) of section 941.4 is amended to read as follows:

Section 941.4 Notice of hearing (form).

(a) Where the commission elects to go forward with a hearing to determine whether a civil penalty should be assessed for a violation of sections 73, [or] 73-a or 74 of the Public Officers Law, section 107 of the Civil Service Law or article one-A of the Legislative Law, it shall serve a written notice, by certified mail or other appropriate method of service authorized under the Civil Practice Law and Rules, to the parties and their representatives of record at least 20 calendar days prior to the date of any hearing under these rules. The notice of hearing shall contain the following:

(1) a statement of the time and place of the hearing;

(2) a statement of the nature of the hearing;

(3) reference to particular statutes and rules relevant to the hearing;

(4) a short, plain language statement of the violations asserted; and

(5) a statement for hearing impaired parties and participants concerning the provision of deaf interpretation without charge.

Subdivision (b) of section 941.4 is amended to read as follows:

(b) A plain language summary of these rules shall accompany each notice of hearing which is sent to a party cited for a violation of sections 73,

[or] 73-a or 74 of the Public Officers Law[.], section 107 of the Civil Service Law or article one-A of the Legislative Law.

Section 941.6 is amended to read as follows:

Section 941.6 Evidence and proof.

(a) The formal rules of evidence do not apply with respect to any hearings under the commission's jurisdiction. [under the Ethics in Government Act.] Objections to evidentiary offers may be made and shall be a part of the record. Subject to these rules, any party may, for the purpose of expediting the hearing, and when the interests of the parties will not be substantially prejudiced thereby, submit all or part of the evidence in written form.

Section 941.18 is amended to read as follows:

Section 941.18 Privacy/confidentiality.

(a) Notwithstanding the provisions of article [7] 6 of the Public Officers Law, the only records of the commission that shall be available for public inspection and copying are:

(1) the information set forth in the annual statement of financial disclosure filed pursuant to section 73-a of the Public Officers Law, except the categories of value or amount, [which shall remain confidential, and] any other item of information deleted or exempted pursuant to paragraph (h) or (i) of subdivision 9 of section 94 of the Executive Law[;] *and all information that is the subject or part of a request or appeal seeking deletion or exemption pursuant to section 941.19 of this Part, which shall remain confidential;*

(2) notices of delinquency sent under subdivision 11 of section 94 of the Executive Law;

(3) notices of reasonable cause sent under paragraph (b) of subdivision 12 of section 94 of the Executive Law; [and]

(4) notices of civil assessment imposed under [this] section[.] 94 of the Executive Law which shall include a description of the nature of the alleged wrongdoing, the procedural history of the complaint, the findings and determinations made by the commission, and any sanction imposed;

(5) the terms of any settlement or compromise of a complaint or referral which includes a fine, penalty or other remedy; and

(6) those required to be held or maintained publicly available pursuant to article one-A of the Legislative Law.

(b) Notwithstanding the provisions of article 7 of the Public Officers Law, no meeting or proceeding of the commission, including any proceeding contemplated under paragraph (h) or (i) of subdivision 9 of section 94 of the Executive Law, shall be open to the public, except as expressly provided otherwise by the commission[.] or as is required by article one-A of the Legislative Law.

(c) Information which would reveal confidential material protected by Federal or State statute, shall be deleted from any final decision, order, determination or declaration issued by the commission.

Section 941.19 is amended to read as follows:

Section 941.19 Appeals from [public advisory council decisions] *executive director's denials to delete or exempt certain information from financial disclosure statements.*

(a) *Grounds for appeal of [a decision of the public advisory council] the executive director's denial to delete or exempt certain information from the financial disclosure statement.*

(1) Any person required to file a financial disclosure statement whose written request for deletion of one or more items of information as provided in Executive Law section 94(9)(h) has been denied in writing by the [public advisory council] *executive director*, may file a written appeal of such denial, called a notice of appeal, within 15 calendar days of receipt of such denial, with the [executive director] *members of the commission* pursuant to these rules.

(2) Any person required to file a financial disclosure statement whose written request [to the public advisory council] for exemption from any requirement to report one or more items of information [which] *that* pertain to such person's spouse or unemancipated children as provided in Executive Law section 94(9)(i) has been denied in writing by the [public advisory council] *executive director*, may file a written appeal of the denial within 15 days of receipt of such denial, with the [executive director] *members of the commission* pursuant to these rules.

(b) *Confidentiality of information related to [public advisory council decisions] the executive director's denials to grant deletion or exemption requests.*

(1) [Following the filing of a notice of appeal pursuant to these rules, the commission shall keep all information which is the subject or a part of the appeal confidential. The reporting individual may request, within five calendar days of receipt of an adverse decision, and upon such request the commission shall provide, that any information which is a part of the appeal remain confidential for a period of 30 days following notice of such determination. In the event that the reporting individual resigns from office and holds no other office subject to the jurisdiction of the commission, the information which is part of the appeal shall be made public and shall be expunged in its entirety.] *Pending any application for deletion or*

exemption to the executive director or notice of appeal filed with the members of the commission, all information which is the subject or a part of the application or appeal shall remain confidential. Upon an adverse determination by the members of the commission, the reporting individual may request, within five calendar days of receipt of an adverse determination, and upon such request the commission shall provide, that any information which is the subject or part of the application remain confidential for a period of thirty days following notice of such determination. In the event that the reporting individual resigns from office and holds no other office subject to the jurisdiction of the commission, the information shall not be made public and shall be expunged in its entirety.

(c) Notice and procedure for appeal from [an adverse public advisory council decision] the executive director's denial to grant a deletion or exemption request.

(1) A notice of appeal must be filed with the [executive director] members of the commission within 15 calendar days of receipt by the appellant of [an unfavorable determination] a denial by the [public advisory council] executive director. The notice of appeal must be in writing, must provide a clear statement of the reasons for appeal, and shall be addressed to the [executive director] chairman of the commission at the address provided on a document accompanying the [determination] denial by the [public advisory council] executive director which shall include such information and the procedure for appeals.

(2) Upon receipt of the notice of appeal by the [executive director] chairman of the commission, the [executive director] chairman, or his/her designee, shall issue a notice of docketing which sets forth a time and date for submission only of written arguments and documentary evidence in support of the appellant's position. This time and date shall be no sooner than 15 days after receipt of the notice of appeal and no later than 30 days thereafter.

(d) Record on appeal.

(1) The [executive director] members of the commission shall consider the record provided by the [public advisory council] executive director and the written submissions of the appellant in making a determination on the appeal of [an adverse determination] the executive director's denial. The [executive director] members of the commission may request the appellant to file additional information.

(2) The formal rules of evidence shall not apply in the appeals process.

(3) The burden is on the appellant to show that the [public advisory council] executive director made an erroneous determination in deciding not to grant appellant's deletion or exemption request.

(e) Decision on appeal from [public advisory council decisions] executive director's denials.

(1) The [executive director] members of the commission shall review the written appeal filed pursuant to these rules, and shall render a decision by a majority vote of a quorum being present. Such decision shall be based upon the entire record submitted to the [public advisory council] executive director and the written submission of the appellant.

(2) The written decision of the [executive director] members of the commission shall affirm, reverse, remand and/or dismiss the decision of the [public advisory council] executive director and, as appropriate, shall set forth a concise statement of the reasons for the [executive director's] commission members' decision and shall be issued within 60 days of the receipt of the written notice of appeal filed with the commission members pursuant to these rules, or as soon thereafter as possible.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 941.1.

Text of rule and any required statements and analyses may be obtained from: Shari Calnero, Associate Counsel, Commission on Public Integrity, 540 Broadway, Albany, NY 12207, (518) 408-3976, email: scalnero@nyintegrity.org

Regulatory Impact Statement

The changes made to the last published rule, that is, the agency's name was changed to comport with the new agency name provided in the recently-enacted Public Employee Ethics Reform Act of 2007, do not necessitate revision to the previously published RIS because the change was nonsubstantive.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with this Notice of Adoption since the proposed rule will not impose any adverse economic impact on small businesses or local governments, nor will it require or impose any reporting, record-keeping or other affirmative acts on the part of these entities for compliance purposes. The Commission notes that while it is authorized by the Public Employee Ethics Reform Act of 2007 ("2007") to enforce the reporting requirements of the Article 1-A of the Legislative Law, which requires those public corporations that conduct lobbying activity to regis-

ter and report expenses in accordance with the law, these amendments to the adjudicatory proceeding and appeal procedure rules does not impose any adverse economic impact on those public corporations for compliance purposes. The New York State Commission on Public Integrity makes these findings based on the fact that the adjudicatory proceedings and appeals procedure affect only certain State officers and employees and lobbyists and their clients, including certain public corporations registered for lobbying activity in New York State. Small businesses and local governments are not affected in any way by these amendments.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this Notice of Adoption since the proposed rule-making will not impose any adverse economic impact on rural areas, nor will compliance require or impose any reporting, record-keeping or other affirmative acts on the part of rural areas. The Commission on Public Integrity makes these findings based on the fact that the adjudicatory proceedings and appeals procedure affect only certain State officers and employees and registered lobbyists and clients in New York State. Rural areas are not affected in any way.

Job Impact Statement

Job Impact Statement is not submitted with this Notice of Adoption since the proposed rule-making will have no impact on jobs or employment opportunities. The Commission on Public Integrity makes this finding based on the fact that the proposed rule-making is technical in nature and applies to internal adjudicatory proceedings and appeal procedures only. In addition, the regulation applies to certain State officers and employees subject to the provisions of Public Officers Law sections 73, 73-a and 74 and Civil Service Law section 107 and lobbyists and clients subject to Article one-A of the Legislative law. This regulation does not apply, nor relate to small businesses, economic development or employment opportunities.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

Transfer of Water Plant Assets

I.D. No. PSC-19-08-00015-A

Filing Date: 2008-12-04

Effective Date: 2008-12-04

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

Action taken: On November 12, 2008, the PSC adopted an order approving the petition of Davenport Water Company to transfer its water plant assets to the Town of Davenport.

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

Subject: Transfer of water plant assets.

Purpose: To approve the petition of Davenport Water Company to transfer its water plant assets to the Town of Davenport.

Substance of final rule: The Commission, on November 12, 2008, adopted an order approving the petition of Davenport Water Company to transfer its water plant assets to the Town of Davenport, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-W-0317SA1)

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

Creation of an SBC Funding Category and Modifications to the Schedule of Collections And/or Transfers

I.D. No. PSC-52-08-00010-P

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

Proposed Action: The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the System Benefits Charge (SBC) program to create and fund a new Major Program Category for Statewide Evaluation Protocol Development.

Statutory authority: Public Service Law, sections 4(1), 5(2), 66(1) and (2)
Subject: Creation of an SBC funding category and modifications to the schedule of collections and/or transfers.

Purpose: To develop statewide energy efficiency evaluation, measurement and verification protocols.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the System Benefits Charge (SBC) program to create a new Major Program Category entitled "Statewide Evaluation Protocol Development" with an annual budget level of \$750,000. The Commission is considering whether to use such funds to join and facilitate participation in the Evaluation, Measurement and Verification (EM&V) Forum, a project of the Northeast Energy Efficiency Partnerships (NEEP). The project is designed to facilitate the development of common EM&V protocols to estimate, track, and report the impacts of energy efficiency demand-side resources (including energy and demand savings) and environmental benefits. NEEP is a regional nonprofit organization that promotes the efficient use of energy in homes, buildings and industry, primarily in the Northeast United States. The New York State Energy Research and Development Authority (NYSERDA) as administrator of the SBC program would administer the funds allocated to the Statewide Protocol Development category. An operating plan for the category would be developed by NYSEDA, subject to the approval of the New York State Department of Public Service, Director of the Office of Energy Efficiency and the Environment after consultation with the Energy Efficiency Portfolio Standard (EEPS) Evaluation Advisory Group. The Commission is also considering whether any such changes will require modification to the schedule of collections of SBC funds from ratepayers or the schedule of transfer of such funds from the utilities that collect the funds to NYSEDA.

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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@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.

(05-M-0090SA4)

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

Market Supply Charge and Monthly Adjustment Clause Mechanisms

I.D. No. PSC-52-08-00011-P

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

Proposed Action: The Commission is considering a proposed filing by Consolidated Edison Company of New York, Inc. to recover through the Market Supply Charge and the Monthly Adjustment Clause Mechanisms, costs related to the Regional Greenhouse Gas Initiative.

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

Subject: Market Supply Charge and Monthly Adjustment Clause Mechanisms.

Purpose: To recover costs related to the Regional Greenhouse Gas Initiative.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Consolidated Edison Company of New York, Inc. (Con Edison) to recover through the Market Supply Charge and the Monthly Adjustment Clause Mechanisms, costs related to the Regional Greenhouse Gas Initiative (RGGI), of company-owned generating facilities. Con Edison is not seeking reimbursement for any RGGI-related costs associated with generation from non-utility generators with which it has contracts, as that issue is being addressed in Case 08-E-0539.

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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@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-E-1408SA1)

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

Water Rates and Charges

I.D. No. PSC-52-08-00012-P

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

Proposed Action: The Commission is considering the filing of The Chaffee Water Works Company (Chaffee Water) filed on December 8, 2008, requesting authority to increase its annual revenues by approximately \$17,754 or 105%.

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

Subject: Water rates and charges.

Purpose: For approval to increase The Chaffee Water Works Company's annual revenues by about \$17,754 or 105%.

Substance of proposed rule: On December 8, 2008, The Chaffee Water Works Company (Chaffee or the company) filed, in Case 08-W-1407, to become effective on April 1, 2009, a tariff amendment (Leaf No. 12, Revision 1) to its electronic tariff schedule P.S.C. No. 2—Water containing new customer metered rates designed to produce additional annual revenues of about \$17,754 or 105%. Chaffee provides water service on a flat rate basis to 77 customers in the Hamlet of Chaffee in the Township of Sardinia, Erie County. The company is currently undergoing system upgrades of its infrastructure through a \$555,438 Environmental Facilities Corporation (EFC) financing approved by the Commission in Case 07-W-0928. As part of the system upgrades related to this EFC financing, the company has installed customer meters and is now seeking Commission approval to go from its present quarterly flat rate of \$20 to a new metered rate structure that will produce the \$17,754 mentioned above. The company's proposed metered rate structure will consist of a \$59.43 per quarter minimum charge for the first 3,000 gallons along with a quarterly usage rate of \$3.30 per 1,000 gallons after 3,000 gallons. The company's tariff, along with its proposed changes, will be available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us) located under Access to Commission Documents—Tariffs. The Commission may approve or reject, in whole or in part, or modify the company's request.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: 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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brillling@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-W-1407SA1)

Racing and Wagering Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Allowing Audible Alert on Electronic Bingo Aids When a Winning Pattern Has Been Obtained

I.D. No. RWB-52-08-00013-P

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

Proposed Action: Amendment of section 5823.2 of Title 9 NYCRR.

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

Subject: Allowing audible alert on electronic bingo aids when a winning pattern has been obtained.

Purpose: To amend the Board's bingo rules to allow audible alerts on electric bingo aids and to correct a typographical error.

Text of proposed rule: 5823.2 Electronic Bingo Aids

No licensed bingo supplier may offer for sale, lease or otherwise furnish any electronic bingo aid unless the Racing and Wagering Board has approved such electronic bingo aid in writing. All electronic bingo aids sold, leased or used in the State of New York shall comply with the following requirements:

(a) Each device or software program shall identify the name and license number of the licensed bingo supplier.

(b) A sales record shall be recorded and retained for a period of not less than 12 months.

(c) A receipt shall be provided to the player at the time of each sale, which shall reflect the amount paid by the player, the number of face cards to be played, date and time of sale, the name of the licensed authorized organization, and the registration identification number of the licensed authorized organization.

(d) No electronic bingo aid shall emit any sound while in use by a player other than an audible alert unobtrusively notifying the user that a winning bingo pattern has been obtained on one or more of that player's bingo cards.

(e) The Board or its designee may approve any other written requests for an electronic bingo aid change which ensures that the games are fairly and properly conducted and which enable individuals with disabilities to play the game independently.

(f) Each player shall be required to manually enter the letter or number of the object or ball announced by the bingo caller into the electronic bingo aid, by means of pressing a button or touch-screen image. Automatic daubing features that mark the numbers called for the player, or permit the player to automatically "catch-up" with numbers previously announced by the caller are prohibited.

(g) No electronic bingo aid shall resemble a slot machine or other game of chance, or be capable of accepting or electing anything of value, including but not limited to, currency, coin, token, credit card, or debit card.

(h) Every model of electronic bingo aid shall be certified in writing by an independent testing laboratory or a regulatory agency of another state approved by the Board, at the manufacturers' expense, that the electronic bingo aid meets the standards herein and that the erasable programmable read only memory modules (EPRO(N)M) or other game program media logic storage or retrieval components cannot be altered, tampered with, replaced or otherwise programmed by anyone other than by the manufacturer without rendering the electronic bingo aid inoperable.

Text of proposed rule and any required statements and analyses may be obtained from: Gail Pronti, 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 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. Section 296 (2)(c)(ii) and (d) of the New York State Executive Law states that it is unlawful discriminatory practice to refuse an accommodation that would ensure that no person with a disability is excluded from a public amusement because of the absence of auxiliary aids unless the accommodation would fundamentally alter the nature of the public amusement or that the accommodation would be an undue burden and can be carried out without much difficulty and expense.

2. Legislative objectives: Section 435(1)(a) of the Executive Law states that "said games shall be fairly and properly conducted for the purposes and in the manner in the said bingo licensing law prescribed". Everyone must be given an equal opportunity to win. The new audible alert feature insures visually impaired individuals an equal opportunity to win by alerting them when a winning bingo pattern has been obtained on one of their cards. The Americans With Disabilities Act states that "Disability is a natural part of human experience and in no way diminishes the right of individuals to: A. live independently, B. enjoy self-determination, C. make choices, D. contribute to society, E. pursue meaningful careers, and F. enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society." Adding the audible alert would certainly contribute to the full inclusion of blind individuals in the cultural mainstream, by allowing them to participate in bingo without other assistance. Section 296(2)(c)(ii) and (d) of the New York State Executive Law provides that accommodations must be made, and it is unlawful discriminatory practice not to make accommodations, so that disabled individuals can take part in all aspects of daily life, unless such accommodations would result in an undue burden, or the modification would fundamentally alter the nature of the facility.

3. Needs and benefits: The Board was approached by an individual citizen of New York State who is totally blind and who plays bingo daily throughout the state. This individual asked that we review the current rule. She states that she believes that she is often cheated at bingo because she now has to rely on other players to inform her when she has a bingo. She also states that when she talks with friends about what recreational options are available to totally blind individuals, that the options are quite limited. She believes that many blind people would enjoy the opportunity to play bingo in the community if the audible alert feature were added. This rule amendment is necessary to allow organizations to turn on the audible alert feature on electronic bingo aids. This feature assures that visually impaired individuals will be notified when they have a winning pattern on one of their bingo cards, thus giving them an equal opportunity to win and allowing them to be fully included in a community event. In the past, no sound was allowed by electronic bingo aids. The Board has tried to maintain a traditional approach to bingo and to avoid turning the game into more of a slot machine experience with the addition of electronic bingo aids that give off a number of sounds, creating a casino type atmosphere. The Board elected not to have an audible alert when a player was one square away from a bingo to limit the noise factor.

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 the audible alert feature will have the feature enabled by the supplier or manufacturer of the machines. Most machines have the audible alert feature presently, but

it is currently disabled, as previously, electronic bingo aids were not allowed to emit any sound in New York State.

(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 previously had for bingo games, and local governments will continue to have the same licensing and oversight responsibilities as they previously had for 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 allow organizations to enable audible alerts on electronic bingo aids and thus assist visually impaired people in their enjoyment of bingo and give them the same opportunity to win as all other players.

- 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 and 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 amendment, which authorizes electronic bingo aids to emit sounds audibly alerting a player when a designated winning bingo pattern has been obtained on one or more cards during bingo sessions held by licensed authorized charitable organizations. This proposed amendment does not impact upon State Administrative Procedure Act Section 102(8), nor does it 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.

Office of Real Property Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Residential Assessment Ratios

I.D. No. RPS-52-08-00007-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 191-3.2 and 191-3.1(d) of Title 9 NYCRR.

Statutory authority: Real Property Tax Law, section 202(1)(l)

Subject: Residential Assessment Ratios.

Purpose: To repeal sections 191-3.1(d) and 191-3.2 which have become obsolete.

Text of proposed rule: The State Board of Real Property Services hereby amends Part 191-3 of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York as follows:

- Section one. Subdivision d of Section 191-3.1 is repealed.
- Section 2. Section 191-3.2 is repealed.

Section 3. This amendment shall take effect immediately.

Text of proposed rule and any required statements and analyses may be obtained from: Hung Kay Lo, Senior Attorney, New York State Office of Real Property Services, 16 Sheridan Ave, Albany, New York 12210-2714, (518) 474-8821, email: internet.legal@orps.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.

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

Consensus Rule Making Determination

Section 738 of the Real Property Tax Law has been amended to repeal the current methodology and to mandate a new methodology for the determination of the Residential Assessment Ratio. Under this new law, certain sections of Subpart 191-3 are inapplicable and obsolete. Specifically, Sections 191-3.1(d) and 191-3.2 are obsolete and are to be repealed. This rulemaking is intended to conform the State Board's rules to statutory changes. Therefore, no person is likely to object to the rule as written.

Job Impact Statement

This proposed amendment would repeal Sections 191-3.1(d) & 191-3.2 of Part 191 of the Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York, concerning residential assessment ratios. The proposed repeal should have no effect, positive or negative, on job opportunities.

Department of State

EMERGENCY RULE MAKING

Document Destruction Contractors

I.D. No. DOS-52-08-00009-E

Filing No. 1283

Filing Date: 2008-12-09

Effective Date: 2008-12-09

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

Action taken: Addition of Part 199 to Title 19 NYCRR.

Statutory authority: General Business Law, article 39-G, section 899-bbb(12)(a)

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

Specific reasons underlying the finding of necessity: The legislature enacted statutory authority, with effective date of October 1, 2008, for a new licensing category regarding contractors engaged in the business of document destruction. The new law requires businesses that offer document destruction services to register with the Department of State, and enables the Secretary of State to promulgate such rules and regulations as are deemed necessary to effectuate the purposes of the article. This new law is necessary for the protection of the public to prevent the unlawful taking of personal identification information from documents disposed of by the public. The bill would limit the amount of documents containing sensitive personal information subject to misappropriation by ensuring the availability of qualified and reputable document destruction contractors. The law will work in concert with recently implemented federal disposal rules (16 CFR Part 682), and New York's newly adopted Disposal Law (Chapter 65 of the Laws of 2006), which require businesses to take appropriate steps when disposing of personal information. In order to comply with these mandates, many businesses hire contractors that specialize in the destruction of records containing personal information. The new licensing category enacted by the NYS Legislature will ensure that information required to be destroyed under the federal Disposal Rule and New York's Disposal Law pursuant to a document destructions contract is disposed of properly by a contractor registered with the State of New York.

Subject: Document destruction contractors.

Purpose: To provide guidance regarding the process of applying for, and registering as, a document destruction contractor.

Text of emergency rule: Part 199 is added to 19 NYCRR to be entitled and read as follows:

believed that there will be costs to the regulated public associated with obtaining the requisite NYS background check, estimated to be \$75. Regarding costs for fingerprints of principals, officers, or employees of the document destruction contractor, these are estimated to be approximately \$12 to \$30 for each set of fingerprints prepared and obtained pursuant to these rules and the statute. The regulated public will likely incur costs associated with record retention for those licensees who do not possess sufficient on-site storage for records. The cost of storage facilities varies depending on various factors such as location and size. It is estimated that the starting price for an off-site storage unit is approximately \$40.00 per month. It is not anticipated that the regulated public will incur any other costs.

b. Costs to the Department of State:

The Department of State does not anticipate any additional costs to the agency to implement and continue to administer the rules' requirements. The Department of State currently licenses and regulates in excess of twenty-eight different occupations. The Department did not hire additional staff to assist with the implementation and administration of the new document destruction contractor licensing requirements. As a result, existing staff will absorb the functions necessary to support the program and the regulations established by this rulemaking.

5. Local government mandates:

The rules do not impose any program, service, duty or responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

The rules clarifies the already mandated statutory requirement that all applications for licensure be accompanied by two sets of fingerprint cards for all principals and officers; prospective registrants/licensees are already required to satisfactorily complete applications for registration, with accompanying documentation. The rule delineates and specifies the paperwork and record keeping requirements imposed on licensees by General Business Law Article 39-G. The statute mandates, in part, that document destruction contractors be subject to investigation and to supply documentation upon request, and this rule clarifies the requirements for document retention. The rule also requires that advertisements and certain business records contain the license number and/or a statement that the licensee is licensed by the Department of State.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State considered not proposing any regulations; however, since subpart 12 of § 899-bbb requires that the Secretary of State shall promulgate such rules and regulations as are deemed necessary to effectuate the purposes of the legislation, it was deemed appropriate and necessary that the Department of State propose regulations to clarify the legislation. It was decided that not having any regulations would disadvantage both the regulated public and the Department of State insofar as certain vague statutory provisions would remain undefined and result in confusion and difficulties with enforcement. As a result, the Department of State is only proposing those regulations deemed necessary at this point in time, and has determined to hold in abeyance the possible need to file additional regulations to clarify and/or define other statutory issues.

9. Federal standards:

There are no federal standards regulating the registration of document destruction contractors, although there are federal standards regulating the disposal of personal information implemented in a federal Disposal Rule (16 CPF Part 682), and New York has a Disposal Law (Chapter 65 of the Laws of 2006), which comports with the federal requirements. The proposed rulemaking does not exceed any existing federal standard.

10. Compliance schedule:

The rule making will be effective as of the date of adoption. Prospective registrants/licensees are already required to register pursuant to the statutory provisions of Article 39-G on or before October 1, 2008, are on notice of the Secretary's power to enact regulations in concert therewith, and will therefore be able to comply with this rule as of its effective date.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed rulemaking create a framework for the successful process of businesses registering for approval to act as document destruction contractors, and to employ qualified workers to conduct services related thereto, as well as to allow for the continued qualifications for renewal of same, and the responsibilities of the companies for document preparation and retention, for ensuring the qualifications of workers, and for the standards by which such businesses shall operate.

The rule does not apply to local governments.

2. Compliance requirements:

The business of document destruction is now being regulated under the auspices of the Department of State (DOS), and any companies or persons

meeting the criteria for registration must do so. The proposed rules are intended to amplify the legislation, and to clarify specifics as to the requirements for registration. Further, pursuant to the statute, the Department is required to publish and makes available a list of registered document destruction contractors who have properly qualified and registered with the Department. By statute, the list of registered document destruction contractors is to be made available to any interested parties by way of online viewing on the Department's website, and also by permitting an interested party to obtain a copy thereof, at a cost to be determined by the Department, which the rules now clarify to be a minimal amount. The proposed rules provide the mechanism for compliance.

3. Professional services:

Small businesses will not need professional services in order to comply with this rule.

4. Compliance costs:

Registrant licensees will not incur any significant compliance costs associated with these rules, although there will be compliance costs associated with obtaining the requisite fingerprints of the principals, officers and/or qualifiers for the registrant contractors, and for producing the proper identification cards. The rules do not mandate that any businesses will incur significant expense beyond the expenses made necessary in order to comply with the statutory requirements.

5. Economic and technological feasibility:

Small businesses will not incur any additional costs or require technical expertise as a result of the implementation of these rules, beyond the requirements already placed upon small businesses which are required to comply with the statute.

6. Minimizing adverse economic impact:

DOS did not identify any alternatives which would provide relief for registrant contractors, and, at the same time, be less restrictive and less burdensome on them in terms of compliance.

7. Small business and local government participation:

No comment has been received to the enacted legislation, and no comment has yet been received from the anticipated registrant pool or the public. Simultaneously with the adopting of the rulemaking as an emergency adoption, the proposed rulemaking has been posted on the Department's website, in an attempt to alert any interested parties and to seek public comment.

Rural Area Flexibility Analysis

These rules do not impose any adverse impact on rural areas. The rules complement the statutory adoption of the new licensing category of document destruction contractors, such that the procedures for obtaining and renewing registration in this area of business employment will be clear and readily apparent to the public. The Department of State has not received any objection to these procedures from approved providers.

Job Impact Statement

The proposed rule will not have a substantial adverse affect on jobs and employment opportunities for licensed document destruction contractors insofar as Article 39-G of the General Business Law already requires that such qualifying companies register with the Secretary of State. This rule making merely codifies the procedure to obtain Department of State approval to offer and provide services as a registered document destruction contractor.

Department of Taxation and Finance

NOTICE OF ADOPTION

Definition of Resident for Personal Income Tax

I.D. No. TAF-42-08-00016-A

Filing No. 1286

Filing Date: 2008-12-10

Effective Date: 2008-12-24

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

Action taken: Amendment of section 105.20(e)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 697(a) and 605(b)(1)

Subject: Definition of resident for personal income tax.

Purpose: To eliminate provisions regarding temporary stays.

Text or summary was published in the October 15, 2008 issue of the Register, I.D. No. TAF-42-08-00016-P.

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

Text of rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax_regulations@tax.state.ny.us

Assessment of Public Comment

Written comments were received regarding proposal TAF-42-08-00016-P from the New York State Society of Certified Public Accountants ("NYSSCPA"), the Business Council of New York State, Inc. ("Business Council"), the New York State Bar Association Tax Section ("Tax Section"), and a New York State resident attending law school in Florida.

The NYSSCPA states that there has been "a vast amount of litigation, the subject of which centered on what constitutes a 'temporary stay' in New York" and that "[w]hat constitutes a 'temporary stay' as compared to a permanent stay is the cause of the longstanding controversy." The NYSSCPA indicates that the "determination requires a detailed and often onerous examination of the intent of both the employer and the employee. This examination results, at best, in a protracted audit and litigation and, at worst, in inconsistent results among similarly situated taxpayers." Nevertheless, the NYSSCPA recommends that the rule to eliminate the temporary stay provisions not be adopted. The NYSSCPA asserts that eliminating the rule would put New York businesses at a competitive disadvantage and subject taxpayers to tax on certain income in both their state of domicile and in New York as their state of statutory residence. This effect on taxpayers is also noted by the Tax Section. The NYSSCPA indicates that the rule would effect a major change in Department interpretation of the Tax Law provision.

The Business Council also asserts that the rule, by subjecting more individuals to tax as residents, would negatively impact business. The Business Council indicates that a number of its members bring non-domiciliaries into New York for temporary work assignments and that they find the temporary stay provisions to be "fairly straightforward" and not "particularly confusing".

It is noted first that the fact that a taxpayer may be subject to tax as a domiciliary of another state and a statutory resident of New York is a function of the statutory structure of the personal income tax. This fact does not argue against what the Department believes is a fairer interpretation of the statutory provisions, even though more taxpayers will be treated as residents. As noted in the Regulatory Impact Statement, "[t]he proposed rule levels the playing field among non-domiciliary taxpayers, providing equal treatment for all taxpayers who maintain a permanent place of abode within the state for more than eleven months, and spend more than 183 days within the state, irrespective of their purpose for doing so." The Department acknowledges that the rule would change longstanding practice and interpretation, but believes it is moving toward a better interpretation of the Tax Law.

With respect to the Business Council's comment that its members routinely bring individuals in for temporary work assignments and that it finds the temporary stay rule fairly straightforward, we note that being in New York for a temporary assignment was not sufficient to qualify under the temporary stay rule. In order for the place of abode to not be considered permanent under the rule, it would have to be maintained for a fixed and limited period for the accomplishment of a "particular purpose." The Department has found this rule to be difficult to administer and that is confirmed by the above-noted statements by the NYSSCPA. The Tax Section also observes that "[t]here is no question that the temporary stay exception has been the source of considerable confusion."

Noting that section 605(b) defines a statutory resident as one who maintains a permanent place of abode in the state and spends more than 183 days of the taxable year in the state, the Business Council argues that a temporary stay rule is already embodied in the statute's definition of resident, and that taxpayers should therefore be permitted to avoid taxation as residents on the basis of a claimed temporary stay regardless of the proposed rule. The Tax section also suggests that a taxpayer could assert that he or she is not "maintaining a permanent place of abode in New York... because his or her apartment is not being maintained on a permanent basis". The Business Council and the Tax Section conflate the permanency requirement relating to the place of abode with the temporal requirement relating to the taxpayer. In order to be considered a resident for tax purposes, an individual must maintain a permanent place of abode in the state, and spend more than 183 days in the state. While recognizing its longstanding interpretation, the Department believes that a better interpretation of "permanent place of abode" focuses on the nature of the place of abode. Thus, section 105.20(e)(1) of the Regulations defines "permanent place of abode," recognizing the distinction between these criteria by

indicating that a mere camp or cottage, suitable and used only for vacations, or an abode not equipped with facilities normally found in a dwelling, such as facilities for cooking or bathing, will not be considered a permanent place of abode.

Moreover, the regulations provide that the place of abode must be maintained for substantially all of the taxable year, and the Department has construed this to mean more than eleven months. The temporary stay provisions unnecessarily extend this eleven month period of "nonresidency" based on the individual's purpose for being in the state and the anticipated duration of his or her stay. The proposed rule recognizes the fairness of defining residency status for tax purposes based on the benefits and services received from the state, without regard to the taxpayer's subjective purpose for being in the state. The Department has determined that a better interpretation of the Tax Law rests the residency analysis on objective criteria, using easily applied rules.

The Business Council also raises the possibility that taxpayers planning on claiming temporary stay for the 2008 tax year may not have paid sufficient tax - estimated or withheld - to cover the potential increase in their tax liability and may therefore be subject to penalty and interest. Under section 685(c) of the Tax Law, taxpayers generally will not be subject to the addition to tax for failure to pay estimated tax if the tax paid is equal to ninety percent of the tax shown on the taxpayer's return for the taxable year or one hundred percent (one hundred ten percent for taxpayers whose income for the preceding year exceeds one hundred fifty thousand dollars) of the tax shown on the taxpayer's return for the preceding year. The addition to tax is the amount of the underpayment, multiplied by the rate of interest prescribed under section 697(j), for the period of the underpayment, meaning that the addition essentially reflects the time value of money, rather than a punitive exaction. Additionally, section 685(d) provides certain exceptions to the addition to tax for failure to pay estimated income tax, including instances where the underpayment is less than \$300, where there was no tax liability for the preceding year, and where the Department determines that such addition would be against equity and good conscience, due to casualty, disaster, or other unusual circumstances.

The Tax Section recommends that the temporary stay exception be retained, but that it be modified to: (1) be limited to a three-year period; (2) allow the Department to rebut a taxpayer claim that the taxpayer is in New York or intends to be in New York for three years or less; (3) state that coming to New York to work for a particular employer for a limited period of time is a sufficiently limited purpose; and (4) address how the temporary stay exception would apply to non-work purposes, such as college or medical emergencies. As discussed, the Department believes that elimination of the temporary stay rule results in a better and fairer interpretation of the statute. We note specifically that the Tax Section's recommendation to effectively eliminate the particular purpose aspect of the rule in focusing only on the limited period of time would, in the Department's view, result in an unwarranted expansion of the taxpayers that would qualify.

The Tax Section recommends, if the rule is adopted, that its effect be postponed to tax years beginning after 2008. As discussed in the Regulatory Impact Statement, the elimination of the temporary stay rule would provide more equitable treatment among non-domiciliary taxpayers. The Department does not believe that a delay is in order.

With regard to the comments submitted by the New York State resident attending law school in Florida, the writer expressed approval of the proposed rule as a more equitable treatment of residency status for tax purposes that will result in increased revenue. Noting that the proposed rule is effective for tax years ending on or after December 31, 2008, the writer suggests that the temporary stay provisions should be "phased out" gradually for taxpayers who may have relied on the temporary stay exception. The Department acknowledges this concern, but prefers to implement what it feels is the best interpretation of section 605(b)(1) as soon as possible. First, it is difficult to determine how a phase-out could be administered for these taxpayers. A taxpayer is either a resident or a nonresident under the Tax Law. Second, as discussed above and pointed out by the writer, the elimination of the temporary stay rule would provide more equitable treatment among non-domiciliary taxpayers. The Department does not believe that a delay is in order.

No changes were made to the rule as a result of these comments.

Worker's Compensation Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Dental Fee Schedule

I.D. No. WCB-52-08-00004-P

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

Proposed Action: Addition of Part 444 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13 and 117

Subject: Dental fee schedule.

Purpose: To adopt a fee schedule for dental treatment and care provided to injured workers.

Text of proposed rule: The title to Subchapter M of Chapter V of Title 12 NYCRR is amended to read as follows:

M. Pharmacy, [and] Durable Medical Goods, and Dental Fee Schedules and Appendices

Subchapter M of Chapter V. of Title 12 NYCRR is amended to add a new Part 444 to read as follows:

Part 444. Dental Fee Schedule

Section 444.1 Applicability

This dental fee schedule is applicable to dental treatment and procedures performed on or after, March 1, 2009, for the necessary care and treatment of an injured employee regardless of the date of accident or date of disablement. The date of service for dental treatment or for a dental procedure shall be the applicable date for reimbursement in accordance with this fee schedule. Dental treatment or procedures performed prior to March 1, 2009, shall be reimbursed at the usual and customary rate in the location where the claimant resides.

Section 444.2. Fee Schedule

(1) The dental fee schedule for all dental services shall be the Official New York Workers' Compensation Dental Fee Schedule, First Edition, March 1, 2009, prepared by the Chair and published by the Board, which is hereby incorporated by reference, except that the maximum reimbursement for dental services in cases in which the insurance carrier files or has filed a notice of controversy pursuant to Workers' Compensation Law section 25(2)(a) or (b) shall be twenty-five percent more than the fees set forth in the Official New York Workers' Compensation Dental Fee Schedule.

(2) The Official New York Workers' Compensation Dental Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, 99 Washington Avenue, Suite 650, Albany, New York 12231, the Legislative Library, the libraires of the New York State Supreme Court, and the district offices of the Board in Albany, Binghamton, Brooklyn, Buffalo, Hauppauge, Hempstead, Manhattan, Peekskill, Queens, Rochester and Syracuse. Copies may be obtained from the Board by writing to New York Workers' Compensation Dental Fee Schedule, Bureau of Health Management, New York State Workers' Compensation Board, 100 Broadway - Menands, Albany, New York 12241 or by telephone at 1-800-7812362 or by email at general_information@wcb.state.ny.us.

(3) The dental fee schedule shall be updated by the Chair as he or she deems warranted by changes in market rates. The dental fee schedule consists of a list of Current Dental Terminology (CDT) codes and descriptions of treatment services and procedures as published by the American Dental Association with a corresponding maximum fee to be charged by dental providers. Nothing shall prohibit a provider from charging a fee that is less than the fee schedule.

(4) Any treatment or procedure provided in connection with a work-related injury not specifically contained in the dental fee schedule should be billed using CDT code D9999 "Unspecified Adjunctive Procedure By Report" (BR). The provider should establish a fee consistent in relativity with the other fees listed in the dental fee schedule. Any bill submitted by a dental provider which lists CDT Code D9999 shall be accompanied by a report providing the reasons why such procedure is necessary to treat the injured employee.

444.3 Payment of Bills and Reimbursement Requests.

(1) Bills submitted by a dental provider to the carrier or self-insured employer for payment or reimbursement shall be paid according to the fee schedule adopted under Workers' Compensation Law Section 13(a) within forty-five calendar days of receipt of the bill or reimbursement request.

(2) Where the liability of the self-insured employer or carrier for the claim has not been established or the treatment or procedure is not for a

causally related condition, the self-insured employer or carrier shall pay any undisputed amount of the bill or reimbursement request and notify the Board, claimant and dental provider in writing using the form prescribed by the Chair for this purpose within forty-five calendar days of receipt of the claim or reimbursement request: a) that the claim is not being paid and the reason for non-payment of the claim; or b) to request additional information needed to reasonably determine the self-insured employer's or carrier's liability for the claim or whether the dental treatment or procedure is causally related to the injury. Upon receipt of the information reasonably requested, the self-insured employer or carrier shall have thirty days to pay the bill or reimbursement request or provide written notice to the Board, claimant and dental provider using the form prescribed by the Chair for this purpose explaining why the bill is not being paid with copies of the additional information requested attached to the form to support the determination.

(3) Where the self-insured employer or carrier has failed to pay a bill or reimbursement request or make reasonable request for additional information within forty-five calendar days, the self-insured employer or carrier is deemed to have waived any objection to liability for the bill or reimbursement request and shall pay the bill or reimbursement request.

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

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

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. WCL § 13(a) requires the Chair to prepare and establish a fee schedule for the state for dental care and treatment.

2. Legislative Objectives: Chapter 6 of the Laws of 2007 amended WCL § 13 to specifically require the Chair to propose and adopt a dental fee schedule. The proposed regulation incorporates the Official New York Workers' Compensation Dental Fee Schedule to govern the cost of dental procedures to eliminate disputes over the proper amount of payment and ensure timely payment to dentists who provide services to injured workers. By eliminating or reducing disputes about the proper amount of payment for dental services, the costs associated with resolving such disputes are also eliminated or reduced, thereby reducing the cost of workers' compensation insurance. Eliminating or reducing delays in payment for dental services should result in dentists being more willing to treat injured workers.

3. Needs and Benefits: This rule, which incorporates the Official New York Workers' Compensation Dental Fee Schedule, is needed because the law was amended to require the Chair to adopt a dental fee schedule. In addition to the statutory mandate for a dental fee schedule, there are other reasons why this rule is needed. First, there currently is no fee schedule for dental care and treatment for injured workers. Prior to the legislative change in 2007, WCL § 13(a) limited dentists to such charges as prevail in the claimant's community for similar treatment of injured individuals of a like standard of living. Payers of workers' compensation benefits, such as insurance carriers, State Insurance Fund and private and public self-insured employers, were required to pay such charges and object to any portion in excess of this amount. Unfortunately it was not always clear what the charges are that prevail in a claimant's community.

Second, to assess the charges submitted by dental providers, payers would use the New York State No-Fault Fee Schedule (NFFS) for dental treatment as a guide to determine the proper reimbursement amount. This was problematic because: 1) neither the law nor regulations authorized the application of the NFFS to dental services provided to injured workers; and 2) the fees charged and the codes reflecting the services provided have remained the same since 1994, so the NFFS does not cover the latest dental procedures. When the NFFS is applied, the reimbursement amounts do not reflect current charges or do not list the treatment provided, which results in dental providers refusing to treat injured workers because the reimbursement is inadequate or there are disputes over the proper reimbursement.

Third, if a payer objects to a charge or adjustment, notice is sent to the dental provider but not always to the Board. Without this notice the Board cannot act to resolve disputes. This is problematic because dental providers have no standing to request any adjudicatory action by the Board to resolve disputes over the proper reimbursement.

Disputes regarding the proper fee for a particular dental procedure must be decided by a Workers' Compensation Law Judge (WCLJ) or conciliator. If a hearing is required to resolve such disputes, it is very

costly and time consuming. The time a WCLJ spends deciding the correct payment to a dentist is time not spent adjudicating whether a claimant is entitled to any benefits.

There are a number of benefits of adopting a fee schedule. First, the Chair will be in compliance with the statute. Second, the fee schedule will use the most up-to-date Current Dental Terminology (CDT) codes so current dental procedures are covered. Third, the reimbursement amounts will be in line with the charges in the dental community. Fourth, dental providers and payers will know what the proper reimbursement amount is so disputes over the proper payment for dental care should be eliminated or reduced. This will eliminate or reduce the costs involved in resolving such disputes. Fifth, dental providers will know upfront the fee for the service and, as it is in line with current charges, they should be willing to provide the treatment to injured workers.

The rule also provides a process for the timely payment or objection to bills for dental services. Currently, there is no statute or regulation which provides such a process. However, WCL § 13(a) requires employers to "promptly provide" dental treatment for an injured worker. Part of promptly providing treatment is paying the provider of such treatment. The term "promptly" is not specifically defined in the WCL, but § 13-g provides that bills for medical care must be paid or the payer must notify the provider that the bill is not being paid and why within 45 days. While dental treatment is not medical care covered by WCL § 13-g, this section supports the position that 45 days is considered prompt. This rule requires payers to pay dental bills according to the fee schedule or notify the Board, claimant and provider why payment is not being made within 45 days of receipt of the bill.

The benefit of this provision is that it defines what is meant by promptly. Without this provision, dental providers could wait indefinitely for payment or notice that payment is not being made. Dentists need to be paid for the services they provide within a reasonable time period. If there is no time period within which to pay them, they will not be willing to treat injured workers. Further, a 45 day time period is provided for medical care and pharmacy bills, so it is only logical to apply it to dental bills.

The rule will benefit payers by providing a uniform standard for pricing which will reduce the litigation which arises when there is a difference between the price a payer will pay and the actual costs charged by a dentist. The rule will benefit injured workers by increasing the participation rate of dentists in the workers' compensation system. Dentists will be more likely to treat workers' compensation claimants if they know that they will be paid a reasonable fee, faster and with little or no litigation.

The rule will also benefit the Board as it is anticipated that there will be a reduction in the number of hearings held to determine the proper amount of fees charged for dental treatment. The rule is also a benefit to payers and dentists because it uses the American Dental Association (ADA) CDT codes that are already utilized in dental practice software systems and insurance carrier billing systems.

4. Costs: The adoption of the fee schedule does not impose any new costs on payers, as they have always been liable for dental services up to the charges that prevail in the claimant's community for such treatment. The adoption of the fee schedule actually eliminates the uncertainty over what is the amount of the charges that prevail. Payers may incur some new costs if they fail to pay or object to a dental bill within 45 days. The rule provides that if the payer does not timely pay or object to a dental bill it is liable for such bill regardless of the legitimacy of any defense, which is new. Some payers will be liable for bills they previously would not be because they fail to act timely. However, this provision is necessary to ensure that payers promptly provide dental services by paying for them and will not apply if they respond in a timely fashion as provided by the rule. The 45 day time period to pay a dental bill in this rule is the same time period for paying a medical bill (WCL § 13-g) or a pharmacy bill (WCL § 13-i). By setting a 45 day time period, the payment of dental bills easily fits into any processes or systems to pay medical or pharmacy bills. Therefore, payers should have little or no difficulty in meeting the 45 day limit. Further, the rule is similar to the rule for paying pharmacy bills. Therefore, carriers will not have to train staff on a new process but can transfer the knowledge from pharmacy bills to dental bills.

The fee schedule will reduce in some instances the amount that a dentist can charge for dental treatment. However, fees set by the schedule are reasonable and were developed using the fees dentists currently charge. Even with reduced fees in some instances, dentists should actually see greater reimbursement. With a set fee schedule disputes regarding the proper reimbursement amount will be greatly reduced, this will speed reimbursement payments to dentists and reduce their administrative expenses from trying to litigate and collect the proper reimbursement. Dentists and payers will not be charged for the fee schedule.

The use of a uniform price standard will reduce the number of hearings necessary to determine the amounts due and owing to a dentist or claimant thus reducing the costs necessary for legal representation at the hearing. It is anticipated that costs will be reduced for claimants due to lower charges

for dental treatment through use of the dental fee schedule as opposed to paying usual and customary charges and then seeking reimbursement from the carrier.

5. Local Government Mandates: A municipality or governmental agency that is self-insured is required to comply with the rules for reimbursement for dental treatment. They will be required to pay according to the fee schedule and pay or object within 45 days. However, as they are required to process medical and pharmacy bills within 45 days this should fit easily within their claims processing.

6. Paperwork: If a payer objects to a bill or requests additional information, it must notify the Board, the claimant and the dentist using a prescribed form within 45 days from receipt of the bill; otherwise the payer is deemed to have waived any objection. However, there should be few disputed bills as the fee amount will be set in the schedule. The objections or requests for additional information must go to the Board, claimant and dentist so the Board can take any needed action and the claimant and dentist know the status of payment. The use of a prescribed form is important so all required information is provided and the action taken by the payer is clear. The Board will not be charging for the fee schedule and it will be available for dentists and carriers in a secure area of the Board's website. Once the rule is adopted, the Board will post instructions on how to access the dental fee schedule on its website.

7. Duplication: There is no duplication.

8. Alternatives: Initially, the Chair considered using the New York State Medicaid dental fee schedule. However, after comparing it with the existing NFFS and consultation with the New York State Dental Association (NYSDA), it was determined that many of the reimbursement rates were too low. The NYSDA distributed a survey to its membership requesting fees for all CDT codes. A comparison of the NYS Medicaid fee schedule with the results of the NYSDA survey showed that the Medicaid rates were extremely low.

Using the NYSDA data, the Chair prepared an initial draft of the fee schedule to use to obtain feedback on the reasonableness of the amounts. A Subject Number was issued on October 9, 2007, asking anyone who was interested in providing comments on the dental fee schedule to request a copy of the draft fee. The comment period extended through November 12, 2007. The Chair received comments about the level of reimbursement from both payers and payees from across the state. In addition the initial draft was compared with the draft Washington State Dental Fee Schedule as it provided the most comprehensive listing of dental procedures and utilized a survey of dental fees based on zip codes. Discussions about the content of the regulations were held with the NYSDA who provided comments and suggestions to be considered in the regulations.

When the Chair requested comments, suggested fees were sought for all CDT codes. However, suggested fees for all codes were not received. Possible options for CDT codes without fees were to: 1) simply leave those codes off the schedule; 2) assign a value to those codes; or 3) provide that any service not covered by a specific code would be covered by code D9999 and the provider would set the fee. The Chair decided to require the use of code D9999 so that all services would be covered by the fee schedule. A few carriers noted that some services covered by CDT codes are the same as Current Procedural Terminology (CPT) codes in the medical fee schedule but the values for the CDT codes provided in the draft were higher than the CPT codes. The Chair had to decide whether to: 1) not include the CDT codes that were the same as the CPT codes; 2) include the CDT codes but have the value equal the value for the CPT codes; or 3) include the CDT codes with values based upon the reasonable fee in the dental community. The Chair decided to include the CDT codes with the values based upon the reasonable fee in the dental community in order to prevent illogical and inequitable results. Specifically, so a dental treatment covered by a CPT code would not have a lesser value than a simpler procedure covered by a CDT code.

The Chair considered not including procedures for objecting to dental bills. However to standardize the process and ensure timely resolution of such issues, he decided to a similar process as is required for pharmacy bills. Originally, the procedures required notification of any objections or requests for information to be sent by certified mail, but this was removed as unnecessary. Also, the rule originally did not require the notification to be sent to the Board. This was changed so the Board would have the knowledge to act.

9. Federal Standard: There are no applicable Federal Standards.

10. Compliance Schedule: The proposed regulation is mandatory and it is expected that all affected entities will be able to comply with the fee schedule and procedures beginning on March 1, 2009.

Regulatory Flexibility Analysis

1. Effect of rule:

Insurance carriers, State Insurance Fund and individual self-insured employers are not small employers. Approximately 2511 political subdivisions currently participate as municipal employers in self-

insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to dental bills if they object to any such bills. This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims, many of whom are small businesses. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or self-insured employer subject to the rule. Under the rule, objections to a dental bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Finally, many dentists are small businesses. The new rule will provide savings to small business and local government by reducing litigation costs associated with reimbursement rates for dental care and treatment. In addition, it will set a fair uniform reimbursement rate for dental care and treatment through the fee schedule it adopts, that eliminates the use of usual and customary rates that vary dentist by dentist and the use of inappropriate fee schedules by carriers that are low and/or out of date.

2. Compliance requirements:

Workers' Compensation Law (WCL) § 13 was amended by Chapter 6 of the Laws of 2007, to specifically require employers to provide dental treatment to injured workers for damage caused by a work related accident or exposure. The amendments also require the Chair to adopt a dental fee schedule setting the reimbursement rate when such dental treatment is provided. Prior to these changes, dental treatment was provided to injured workers, based upon an interpretation of the statute, and the reimbursement amount was the charges that prevail in the claimant's community. The proposed rule adopts a dental fee schedule as required by the statute. Small business/local government payers, such as third party administrators, group self-insured trusts, and self-insured local governments, will be required to reimburse dental providers according to the fee schedule adopted. Private insurance carriers, the State Insurance Fund and individually self-insured employers will also have to reimburse dental providers according to the dental fee schedule. Dental providers who are small businesses will be required to accept the fees set forth in the Dental Fee Schedule as payment in full for dental treatment provided to injured workers. Neither payment pursuant to the fee schedule nor acceptance of such payment amounts should be a hardship for small businesses and local governments. The fee schedule is in line with current reimbursement levels. While the Board does not have an exact number of claimants who need dental treatment, experience indicates that it is a very small number.

The fee schedule provides a set reimbursement rate for services according to the American Dental Association (ADA) Current Dental Terminology (CDT) codes. These codes are commonly used for dental billing purposes and are widely known and understood. The fee schedule was developed after consulting with the New York State Dental Association and an opportunity for dentists and payers to comment on the amount of reimbursement. In addition, the Board reviewed the draft of the State of Washington's workers' compensation dental fee schedule as a point of comparison while drafting the proposed fee schedule. The Board will provide the fee schedule in paper format free of charge and will make it available on the Board's website in accordance to the terms of the licensing agreement with the ADA.

The proposed regulation will require small businesses/local government payers to pay or file written objections to dental bills within a 45 day time period. This same requirement is also imposed on private insurance carriers, the State Insurance Fund and individually self-insured employers. If a carrier or self insured-employer fails to object within 45 days, it will be liable for payment of the bill. The new requirement is the same as the requirements for pharmacy bills [WCL § 13(i)] and medical bills [WCL § 13-g]. The purpose of this requirement is to set a reasonable period of time within which the provider of dental services can expect to be paid and to expedite processing of dental treatment bills.

A payer which objects to a dental bill or seeks additional informa-

tion will be required to notify the Board, claimant and dentist using a prescribed form. Currently, if a payer objects to a dental bill it provides notice to the dentist in writing, and sometimes to the Board. It is important that the Board and the claimant also are notified of any objections or requests for additional information, so the Board can take action to resolve any disputes and monitor whether payers are acting timely. The use of a prescribed form assists payers in ensuring all required information is provided, makes it easier for dental providers to identify an objection or request for information and enables the Board to track the payers' actions.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will impose minimal compliance costs on small businesses, such as dental providers, third party administrators and group self-insured trusts, and self-insured local governments. These same costs will be imposed on private insurance carriers, the State Insurance Fund and individually self-insured employers. First there may be some cost involved in incorporating the fee schedule into the practices of the businesses. Dentists will need to incorporate the fee schedule into its billing practices and small business/local government payers will need to incorporate the fee schedule into their bill review and objection procedures. It must be noted that small business/local government payers currently have bill review and objection procedures as they current receive dental bills for payment. There will be no cost to dental providers and payers for the fee schedule as it will be provided in hard copy and on the Board's website for free in accordance with the ADA licensing agreement.

In addition to the minimal costs from incorporating the fee schedule into their processes, small business/local government payers may experience minimal costs in complying with the bill payment process. Upon receiving a dental bill, small business payers, must pay, request additional information or object to a dental bill within 45 days. If the payer objects or requests additional information, it must notify the Board, claimant and dentist on a prescribed form. The requirements to notify the Board and claimant and to use a Board prescribed form are new. These requirements should impose minimal new costs as the notification must already be in writing and it already must be sent to the dentist. Further, if the payer does not act within 45 days it is liable for the bill regardless of any defenses. Payers who fail to respond timely will face additional expense. However, without this provision dentists, which are also small business, will not be promptly paid as there will be no repercussion for failing to comply.

It is expected that these costs will offset by the savings from having set time periods for payment and a fee schedule. The mandatory fee schedule and set time periods for payment should eliminate or reduce disputes about the proper charge for dental treatment and payment, which will eliminate or reduce the number hearings necessary. As hearings are very costly, a reduction in the number necessary results in a reduction in the cost of workers' compensation coverage. As the Board does not know how many hearings are held just for dental disputes or the exact cost of a hearing, the exact savings cannot be calculated. The cost of a hearing would vary by location due to costs such as rent, electric and the pay differential for downstate employees. Small employers must purchase workers' compensation coverage, so any cost would be due to an increase in the cost of such coverage. However, it is expected that the savings produced by this rule will outweigh the costs.

In short, the fee schedule and payment requirements will reduce costs by reducing the need for Board intervention and delays in payment. Any costs are also offset by the benefit to claimants who will be able to obtain dental services for work related injuries because dentists will know the applicable fee and those they are to be paid within 45 days.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. Most small businesses involved in workers' compensation, such as third party administrators, group self-insured trusts and self-insured local governments, have computers and internet

access in order to take advantage of the ability to review claim files from their offices. The Board will provide secure access to the fee schedule through its website. No other additional equipment or software is needed for access to the fee schedule other than an existing web browser and a computer with internet access. Access to the website will require a secure login which is required as part of the license agreement with the ADA to use the CDT codes it publishes.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts on all insurance carriers, employers, self-insured employers and claimants, including those that are small businesses or local governments. The Chair is required to set a dental fee schedule by statute. As part of the development, dental fees from dentists were reviewed to create a state wide fee schedule that would be fair across the state. The Chair was conscious of the need to draft a fee schedule which would not limit access to dental services by injured workers, a situation that already exists. As the fee schedule is based, in part, on data directly received from dentists in response to a survey conducted by the New York State Dental Association (NYSDA), dental practices which are small businesses should receive adequate and appropriate compensation for dental services provided to injured workers. Small businesses and local governments should benefit from this rule, as it sets a fair reimbursement level that will ensure that dentists are willing to provide the services without increasing costs. Further, having a fee schedule and a process for the payment of bills will reduce disputes about the payment of dental bills which reduces costs for everyone. The Board could not set a different fee schedule or different process depending on whether the employer is a self-insured local government or a member of a group self-insured trust as this is information that the dentist would likely not have at the time of treatment, so he would not know what fee to use or process applied and it could result in disparate treatment of injured workers depending whether their employer was a self-insured local government or member of a group trust.

7. Small business and local government participation:

The NYSDA conducted a survey of its membership, which consists of dentists across the state, many of whom are small businesses, requesting information on the fees charged for each CDT code. The raw data was provided to the Board, which reviewed it when developing the fee schedule which is incorporated by reference into the rule. Further, the Board sought comments from all dentists and payers across the state regarding a draft fee schedule it prepared. Comments were received from dentists and payers across the state. The Board then consulted with the NYSDA again before finalizing the fee schedule. The rule was shared with the Business Council of New York State and the AFL-CIO for comment.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and dentists in all areas of the state, which includes all rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Workers' Compensation Law (WCL) § 13 was amended by Chapter 6 of the Laws of 2007, to specifically require employers to provide dental treatment to injured workers for damage caused by a work related accident or exposure. The amendments also require the Chair to adopt a dental fee schedule setting the reimbursement rate when such dental treatment is provided. Prior to these changes, dental treatment was provided to injured workers, based upon an interpretation of the statute, and the reimbursement amount was the charges that prevail in the claimant's community. The proposed rule adopts a dental fee schedule as required by the statute. All entities that pay workers' compensation benefits will be required to reimburse dental providers according to the fee schedule adopted. The fee schedule is the same regardless of where in the state the treatment is provided. Dental providers who are small businesses will be required to accept the fees set forth in the Dental Fee Schedule as payment in full for dental treatment provided to injured workers. The fee schedule is in line with current charges by dentists and reasonable for the entire state. While the Board does not have an exact number of claimants who need dental treatment, experience indicates that it is a very small number.

The fee schedule provides a set reimbursement rate for services according to the American Dental Association (ADA) Current Dental Terminology (CDT) codes. These codes are commonly used for dental billing purposes and are widely known and understood. The fee schedule was developed after consulting with the New York State Dental Association and an opportunity for dentists and payers to comment on the amount of reimbursement. In addition, the Board reviewed the draft of the State of Washington's workers' compensation dental fee schedule as a point of comparison while drafting the proposed fee schedule. The Board will provide the fee schedule in paper format free of charge and will make it available on the Board's website in accordance to the terms of the licensing agreement with the ADA.

The proposed regulation will require all payers of workers' compensation benefits (carriers, State Insurance Fund, private and public self-insured employers, group self-insured trusts and third party administrators), where ever located in the state, to pay or file written objections to dental bills within a 45 day time period. If a carrier or self insured-employer fails to object within 45 days, it will be liable for payment of the bill. The new requirement is the same as the requirement for pharmacy bills [WCL § 13(i)] and medical bills [WCL § 13-g]. The purpose of this requirement is to set a reasonable period of time within which the provider of dental services can expect to be paid and to expedite processing of dental treatment bills.

A payer which objects to a dental bill or seeks additional information will be required to notify the Board, claimant and dentist using a prescribed form. Currently, if a payer objects to a dental bill it provides notice to the dentist in writing, and sometimes to the Board. It is important that the Board and the claimant also are notified of any objections or requests for additional information, so the Board can take action to resolve any disputes and monitor whether payers are acting timely. The use of a prescribed form assists payers in ensuring all required information is provided, makes it easier for dental providers to identify an objection or request for information and enables the Board to track the payers' actions.

3. Costs:

This proposal will impose minimal compliance costs on carriers, self-insured employers and dental providers across the state, including those in rural areas. First there may be some cost involved in incorporating the fee schedule into the practices of the businesses. Dentists will need to incorporate the fee schedule into its billing practices and payers will need to incorporate the fee schedule into its bill review and objection procedures. It must be noted that payers currently have bill review and objection procedures as they current receive dental bills for payment. There will be no cost to dental providers and payers for the fee schedule as it will be provided in hard copy and on the Board's website for free in accordance with the ADA licensing agreement.

In addition to the minimal costs from incorporating the fee schedule into their processes, payers may experience minimal costs in complying with the bill payment process. Upon receiving a dental bill, payers must pay, request additional information or object to a dental bill within 45 days. If the payer objects or requests additional information, it must notify the Board, claimant and dentist on a prescribed form. The requirements to notify the Board and claimant and to use a Board prescribed form are new. These requirements should impose minimal new costs as the notification must already be in writing and it is already must be sent to the dentist. Further, if the payer does not act within 45 days it is liable for the bill regardless of any defenses. Payers who fail to respond timely will face additional expense. However, without this provision dentists, including those located in rural areas, will not be promptly paid as there will be no repercussion for failing to comply.

It is expected that these costs will offset by the savings from having set time periods for payment and a fee schedule. The mandatory fee schedule and set time periods for payment should eliminate or reduce disputes about the proper charge for dental treatment and payment, which will eliminate or reduce the number hearings necessary. As hearings are very costly, a reduction in the number necessary results in a reduction in the cost of workers' compensation coverage. As the Board does not know how many hearings are held just for dental

disputes or the exact cost of a hearing, the exact savings cannot be calculated. The cost of a hearing would vary by location due to costs such as rent, electric and the pay differential for downstate employees.

In short, the fee schedule should decrease costs as it will set a fair, uniform reimbursement rate for dental care and treatment that eliminates the use of usual and customary rates that vary dentist by dentist and the use of inappropriate fee schedules by carriers that are low and/or out of date. The fee schedule and payment requirements will reduce costs by reducing the need for Board intervention and delays in payment. Any costs are also offset by the benefit to claimants who will be able to obtain dental services for work related injuries because dentists will know the applicable fee and those they are to be paid within 45 days.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts on all insurance carriers, employers, self-insured employers and claimants, including those in rural areas. The Chair is required to set a dental fee schedule by statute. As part of the development, dental fees from dentists were reviewed to create a state wide fee schedule that would be fair across the state. The Chair was conscious of the need to draft a fee schedule which would not limit access to dental services by injured workers, a situation that already exists. As the fee schedule is based, in part, on data directly received from dentists in response to a survey conducted by the New York State Dental Association (NYSDA), dental practices in rural areas should receive adequate and appropriate compensation for dental services provided to injured workers. All businesses and claimants in rural areas should benefit from this rule, as it sets a fair reimbursement level that will ensure that dentists are willing to provide the services without increasing costs. Further, having a fee schedule and a process for the payment of bills will reduce disputes about the payment of dental bills which reduces costs for everyone. The Board could have created a fee schedule that varied depending on whether the dentist was located in an urban or rural area. However, this was rejected because determining the boundaries of urban areas can be difficult and result in dental practices only miles apart receiving different reimbursement levels. Also, while overhead costs in urban areas may be higher than in some rural areas, there may be a shortage of dentists in rural areas which raises costs. It was determined that the best course of action was a fee schedule with a single fee for each CDT that was reasonable for the entire state.

5. Rural area participation:

The NYSDA conducted a survey of its membership, which consists of dentists across the state, many of whom are in rural areas, requesting information on the fees charged for each CDT code. The raw data was provided to the Board, which reviewed it when developing the proposed fee schedule. Further, the Board sought comments from all dentists and payers across the state regarding a draft fee schedule it prepared. Comments were received from dentists and payers across the state. The Board then consulted with the NYSDA again before finalizing the fee schedule. The rule was shared with the Business Council of New York State and the AFL-CIO for comment.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of dental care and treatment bills.