

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Plum Pox Virus

I.D. No. AAM-31-08-00002-E
Filing No. 710
Filing date: July 9, 2008
Effective date: July 9, 2008

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

Action taken: Addition of Part 140 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

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

Specific reasons underlying the finding of necessity: This rule establishes a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this viral infection of stone fruit trees within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit and ornamental nursery stock that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but seriously debilitates the produc-

tive life of the plants. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for plum pox. However, in 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox quarantine in that portion of Niagara County. The plum pox virus has since been detected in four (4) other locations in Niagara County as well as one location in Orleans County. This rule establishes the plum pox virus quarantine in Orleans County and contains the necessary extensions of that quarantine in Niagara County.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that failure to immediately establish a quarantine to regulate the intrastate movement of stone fruit could result in the unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the agricultural resources of the State, but could also result in a federal quarantine or exterior quarantines imposed by other states. Such quarantines would cause economic hardship for New York's stone fruit growers, since such quarantines may be broader than that which we propose and may vary in requirements and prohibitions from state to state. The consequent loss of business would harm industries which are important to New York State's economy and as such, would harm the general welfare. Accordingly, it appears that this rule should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Plum pox virus.

Purpose: To prevent the further spread of this viral infection of plants within the State.

Text of emergency rule: PART 140. CONTROL OF THE PLUM POX VIRUS (POTYVIRUS DIDERON STRAIN)

Section 140.1 Definitions.

For the purpose of this Part, the following words, names and terms shall be construed, respectively, to mean:

(a) Certificate means a certificate issued or authorized to be issued by the Commissioner, certifying the eligibility of products for intrastate movement under the requirements of this Part.

(b) *Commissioner* means the Commissioner of Agriculture and Markets of the State of New York and any officer or employee of the New York State Department of Agriculture and Markets or the United States Department of Agriculture duly delegated pursuant to section 17 of the Agriculture and Markets Law.

(c) *Compliance agreement* means an agreement approved by the Commissioner and executed by persons or firms, covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement.

(d) *Infection* means the presence of plum pox virus.

(e) *Inspector* means an inspector of the New York State Department of Agriculture and Markets, or representatives of the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS), when authorized to act in that capacity.

(f) *Limited permit* means a permit issued by the Commissioner for the planting of regulated articles in the nursery stock regulated area for the restricted movement of regulated articles from a regulated area to a specified destination for specified processing, handling or utilization.

(g) *Moved and movement* means shipped, offered for shipment to a common carrier received for transportation or transported by a common carrier, or carried, transported, moved or allowed to be moved from the regulated area.

(h) *Nursery dealer* means any person, firm, partnership, association or corporation which or who is not a nursery grower or an original producer of nursery stock in the State and which or who buys, or acquires, or receives on consignment nursery stock for the purpose of reselling, transporting, or otherwise disposing of same.

(i) *Nursery grower* means the owner or operator of the grounds or premises, private or public, on or which nursery stock is propagated, grown or cultivated for the purpose of distribution or selling the same as a business. The term nursery grower shall not include persons engaged in the part-time production of plant products not sold in the regular channels of business.

(j) *Nursery stock* means all trees, shrubs, plants and vines and parts thereof.

(k) *Nursery stock regulated area* means any area so designated by this Part, which is within 11.5 kilometers of any location where plum pox virus has been detected within the preceding three years.

(l) *Plum pox virus* means the plum pox potyvirus Dideron strain, which is a pathogen affecting susceptible *Prunus* species.

(m) *Quarantined area* means the area designated as quarantined by this Part.

(n) *Regulated area* means an area designated as regulated pursuant to this Part due to the presence of plum pox virus in that area.

(o) *Regulated articles* means plant and plant materials, including trees, seedlings, root stock, budwood, branches, twigs and leaves of the following varieties of the *Prunus* species:

(1) *Fruit-bearing and ornamental varieties of Prunus americana* (American plum and wild plum); *Prunus armeniaca* (apricot); *Prunus cerasifera* (*Myrobalan plum/cherry plum*); *Prunus domestica* (*European plum*); *Prunus dulcis* (sweet almond); *Prunus peresica* var. *persica* (peach and flowering peach); *Prunus persica* var. *nucipersica* (nectarine); and *Prunus salicina* (Japanese plum).

(2) *Ornamental varieties of Prunus cerasifera* (purple leaf plum); *Prunus x cistena* (purple leaf sand cherry); *Prunus glandulosa* (flowering almond); *Prunus persica* (flowering peach and purple leaf peach); *Prunus pumila* (sand cherry); *Prunus spinosa* (black thorn and sloe); *Prunus serrulata* (Japanese flowering cherry and Kwanzan cherry); *Prunus tomentosa* (Nanking cherry and Hansen's bush cherry); and *Prunus triloba* (flowering plum).

(3) For the purposes of this Part, the following varieties of the *Prunus* species are not regulated articles: *Prunus avium*; *Prunus cerasus*; *Prunus Effuse*; *Prunus laurocerasus*; *Prunus mahaleb*; *Prunus padus*; *Prunus sargentii*; *Prunus serotina*; *Prunus serrula*; *Prunus subhirtella*; *Prunus yedoensis*; and *Prunus virginiana*.

(4) For the purposes of this Part, seeds and fruit that is free of leaves of all varieties of the *Prunus* species are not regulated articles.

(p) *State* means the State of New York.

Section 140.2 Quarantined area

(a) That area of Niagara County which is bordered on the north by Lake Ontario and bordered on the east by Hartland Road, which extends south to its intersection with Ditch Road; extends west on Ditch Road to its intersection with Hosmer Road; extends south on Hosmer Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Orangeport Road; and extends south

on Orangeport Road to its intersection with Slayton-Settlement Road; extends west on Slayton-Settlement Road to its intersection with Route 78 (Lockport-Olcott Road); extends south on Route 78 (Lockport-Olcott Road) to its intersection with Stone Road; extends northwest on Stone Road to its intersection with Sunset Drive; extends south on Sunset Drive to its intersection with Shunpike Road; extends west on Shunpike to its intersection with Route 93 (Townline Road); extends south on Route 93 (Townline Road) to its intersection with Route 270 (Campbell Boulevard); extends south on Route 270 (Campbell Boulevard) to its intersection with Beach Ridge Road; extends southwest on Beach Ridge Road to its intersection with Townline Road; extends south on Townline Road to its intersection with the Tonawanda Creek; following the Tonawanda Creek west to its entry into the Niagara River; following the Niagara River north to its entry into Lake Ontario.

(b) That area of Orleans County which is bordered on the north by Lake Ontario and bordered on the west by County Line Road; extends south on County Line Road to its intersection with Johnson Road; extends east on Johnson Road to its intersection with Salt Works Road; extends south on Salt Works Road to its intersection with the Orleans/Genesee County border; extends east along the Orleans/Genesee County border to its intersection with Route 98 (Quaker Hill Road); extends north on Route 98 (Quaker Hill Road) to its intersection with East Barre Road; extends east on East Barre Road to its intersection with Culver Road; extends north on Culver Road to its intersection with East Lee Road; extends east on East Lee Road to its intersection with Rich's Corners Road; extends north on Rich's Corners Road to its intersection with Route 31 (Telegraph Road) and Keitel Road; extends north on Keitel Road to its intersection with Zig Zag Road; extends north on Zig Zag Road to its intersection with Lattin Road; extends north on Lattin Road to its intersection with Route 104 (Ridge Road West); extends west on Route 104 (Ridge Road West) to its intersection with Sawyer Road; extends north on Sawyer Road to its intersection with Roosevelt Highway; extends west on Roosevelt Highway to its intersection with Oak Orchard Road; extends north on Oak Orchard Road to its intersection with Point Breeze Road; extends north on Point Breeze Road to its intersection with Lake Ontario.

Section 140.3 Regulated area

The following areas within the quarantined area are regulated areas:

(a) That area bordered on the east by Porter Center Road; bordered on the south by Balmer Road which terminates on Creek Road; bordered on the west by Creek Road, Blairville Road and the Robert Moses Parkway; and bordered on the north by Lake Ontario in the Town of Porter in the County of Niagara, State of New York.

(b) That area bordered on the north by Lake Ontario; bordered on the west by Maple Road; extends south on Maple Road to its intersection with Wilson-Burt Road; extends east on Wilson-Burt Road to its intersection with Beebe Road; extends south on Beebe Road to its intersection with Ide Road; extends east on Ide Road to its intersection with Route 78 (Lockport-Olcott Road); extends north on Route 78 (Lockport-Olcott Road) to its intersection with Lake Ontario, in the Towns of Burt, Newfane, and Wilson in the County of Niagara, State of New York.

(c) That area bordered on the east by Porter Center Road starting at its intersection with Route 104 (Ridge Road) and extending north-northeast on Porter Center Road to its intersection with Langdon Road; extends east on Langdon Road to its intersection with Dickersonville Road; extends north on Dickersonville Road to its intersection with Schoolhouse Road; extends east on Schoolhouse Road to its intersection with Ransomville Road; extends south on Ransomville Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Simmons Road; extends south on Simmons Road to its intersection with Albright Road; extends east on Albright Road to its intersection with Townline Road; extends south on Townline Road to its intersection with Lower Mountain Road; extends west on Lower Mountain Road to its intersection with Meyers Hill Road; extends south on Meyers Hill Road to its intersection with Upper Mountain Road; extends west on Upper Mountain Road to its intersection with Indian Hill Road; extends northeast on Indian Hill Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Porter Center Road, in the Town of Lewiston, in the County of Niagara, State of New York.

(d) That area bordered on the south by the Erie Canal at its intersection with Culvert Road extending north on Culvert Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Kenyonville Road; extends south on Kenyonville Road to its intersection with Eagle Harbor- Knowlesville Road; extends east on Eagle Harbor- Knowlesville Road to its intersection with the Erie Canal;

following west along the Erie Canal to its intersection with Culvert Road, in the Town of Ridgeway, in the County of Orleans, State of New York.

Section 140.4 Nursery stock regulated area

The nursery stock regulated area shall consist of the quarantined area set forth in section 140.2 of this Part, exclusive of the regulated areas set forth in section 140.3 of this Part.

Section 140.5 Conditions governing the propagation of regulated articles.

Regulated articles originating from or growing within the regulated area or the nursery stock regulated area shall not be used as a source of propagated material (either root stock, scion or seed).

Section 140.6 Conditions governing the intrastate movement of regulated articles.

(a) Prohibited movement.

(1) The movement of any regulated article within the regulated area is prohibited.

(2) The intrastate movement of any regulated article from the regulated area to any point outside the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(3) The intrastate movement of any regulated article from any point outside the regulated area to the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(4) The intrastate movement of any article infected with or suspected of having been exposed to the plum pox virus is prohibited, except as provided in Section 140.12 of this Part.

(5) The handling of regulated articles by nursery dealers or nursery growers within the nursery stock regulated area is prohibited, except pursuant to a compliance agreement.

(6) The digging or moving of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(7) The planting and over-wintering of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(b) Regulated movement.

Regulated articles may be moved through the regulated area if the regulated articles originated outside the regulated area and:

(1) the point of origin of the regulated articles is on the waybill or bill of lading; and

(2) a certificate accompanies the regulated articles; and

(3) the vehicle moving the regulated articles does not stop within the regulated area except for refueling; and

(4) the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or a vehicle completely covered by canvas, plastic or closely woven cloth to prevent access by aphids or other vectors of plum pox virus.

Section 140.7 Records

Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated area shall compile, maintain and make available for inspection, for a period of two years, records of inventory and sales of regulated articles on a form or forms prescribed by the Commissioner.

Section 140.8 Conditions governing the issuance of certificates and permits.

(a) Certificates may be issued for the intrastate movement of regulated articles under one or more of the following conditions:

(1) when they have been tested and found apparently free from infection; or

(2) when they have been grown, produced, manufactured, stored, or handled in such a manner that, in the judgment of the inspector, no infection would be transmitted thereby, provided, that subsequent to certification, the regulated articles will be loaded, handled, and shipped under such protection and safeguards against reinfection as are required by the inspector.

(b) Limited permits may be issued for the movement of noncertified regulated articles to specified destinations for specified processing, handling, or utilization. Persons shipping, transporting, or receiving such articles may be required to enter into compliance agreements to maintain such sanitation safeguards against the establishment and spread of infection and to comply with such conditions as to the maintenance of identity, handling, processing, or subsequent movement of regulated products and the cleaning of cars, trucks and other vehicles used in the transportation of such articles, as may be required by the inspector. Failure to comply with conditions of the agreement will result in cancellation of a limited permit.

(c) Certificates or limited permits issued under these regulations may be withdrawn or canceled by the Commissioner and further certification

refused whenever in his or her judgment the further use of such certificates or limited permits may result in the spread of the plum pox virus.

Section 140.9 Inspection and disposition of shipments.

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the regulated area, which contains, or which the inspector has probable cause to believe may contain, regulated articles or other articles infected with the plum pox virus, may be examined by an inspector at any time or place. When regulated articles are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he or she deems necessary to eliminate the danger of the spread of the plum pox virus. If found to be infected, such articles or regulated articles shall be freed of infection without cost to the State except that for inspection and supervision.

Section 140.10 Assembly of regulated articles for inspection.

(a) Persons intending to move intrastate any of the articles covered by these regulations shall make application for certification as far in advance as possible, and will be required to prepare and assemble articles at such points and in such manner as the inspector shall designate, so that thorough inspection may be made or approved treatments verified. Articles to be inspected as a basis for certification must be free from matter which makes inspection impracticable.

(b) The New York State Department of Agriculture and Markets or the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS) shall not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

Section 140.11 Marking requirements.

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid certificate or limited permit, issued in compliance with these regulations: provided, that:

(a) for lot freight shipments, other than by road vehicle, one certificate may be attached to one of the containers and another to the waybill; and for car lot freight or express shipment, either in containers or in bulk, a certificate need be attached to the waybill only and a placard to the outside of the car, showing the number of the certificate accompanying the waybill; and

(b) for movement by road vehicle, the certificate shall accompany the vehicle and be surrendered to consignee upon delivery of shipment.

Section 140.12 Shipments for experimental and scientific purposes.

Regulated articles may be moved intrastate for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed by the New York State Department of Agriculture and Markets. The container of articles so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the New York State Department of Agriculture and Markets showing compliance with such conditions.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 6, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Robert J. Mungari, Director, Division of Plant Industry, Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-2087

Regulatory Impact Statement

1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Said Section also provides that the Commissioner may adopt and promulgate such rules

and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

2. Legislative objectives:

The proposed rule establishing a quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the further spread within the State of a serious viral infection of plants, the plum pox virus (Potyvirus).

3. Needs and Benefits:

This rule establishes a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this viral infection of plants within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the *Prunus* species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but debilitates the productive life of the trees. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. There is no known treatment or cure for this virus. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox virus by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for the plum pox virus. However, in 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox quarantine in that portion of Niagara County. The plum pox virus has since been detected in four (4) other locations in Niagara County as well as one location in Orleans County.

This rule establishes the plum pox virus quarantine in Orleans County and contains the necessary extensions of that quarantine in Niagara County. The amendments create two (2) separate and non-contiguous quarantined areas; one quarantined area is in Niagara County, and the other is in Orleans County.

Within the quarantined area in Niagara County, there are three (3) regulated areas and one nursery stock regulated area. The first regulated area extends 1.5 to 2 kilometers from one point where the plum pox virus was detected in 2006. The second regulated area extends 1.5 to 2 kilometers from the point where the plum pox virus was recently detected this year. The third regulated area extends 1.5 to 2 kilometers from each of the three (3) points where the plum pox virus was recently detected this year as well as from one point where the virus was detected in 2006. The nursery stock regulated area extends 11.5 kilometers from the regulated areas in Niagara County where the plum pox virus was detected.

Within the quarantined area in Orleans County, there is one regulated area and one nursery stock regulated area. The regulated area extends 1.5 to 2 kilometers from the point in Orleans County where the plum pox virus was recently detected. The nursery stock regulated area extends 11.5 kilometers from the regulated area in Orleans County where the plum pox virus was detected.

The amendments prohibit the movement of any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State. Otherwise, only the movement of regulated articles i.e., plants and trees of any *Prunus* species susceptible to plum pox virus, are restricted under the amendments, and the extent of those restrictions depends on whether the regulated articles are in the regulated areas or the nursery stock regulated areas.

In the regulated areas, the amendments prohibit the following: the movement of regulated articles within the regulated areas; the intrastate movement of regulated articles from the regulated areas to any point outside the regulated areas, except pursuant to a limited permit, authorizing such movement; and the intrastate movement of regulated articles from

any point outside the regulated areas to the regulated areas, except pursuant to a limited permit, authorizing such movement.

The amendments also regulate the movement of regulated articles through the regulated areas. Under the amendments, regulated articles may be moved through the regulated areas if the regulated articles originate outside the regulated areas and the point of origin of the regulated articles is on the waybill or bill of lading; a certificate accompanies the regulated articles; the vehicle moving the regulated articles does not stop except for refueling; and the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or is completely covered by canvas, plastic or closely woven cloth.

In the nursery stock regulated areas, the amendments prohibit the following: the handling of regulated articles by nursery dealers or nursery growers, except pursuant to a compliance agreement; the digging or moving of regulated articles by nursery dealers and nursery growers; and the planting and over-wintering of regulated articles by nursery dealers and nursery growers.

Under the amendments, certificates may be issued when the regulated articles have been inspected and found to be free of infection or have been grown, produced, stored or handled in such a manner that, in the judgment of the inspector, no infection is present in the articles. Limited permits may be issued for the movement of noncertified articles to specified destinations for specified purposes. The amendments provide that persons shipping, transporting, or receiving such articles may be required to enter into written compliance agreements. These agreements would allow the shipment of articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that the plum pox virus is not spread. Under the amendments, certificates and limited permits may be withdrawn or canceled whenever an inspector determines that further use of such certificate or permit might result in the spread of infection.

The amendments are necessary, since although the virus has only been found in seven locations in Niagara County and Orleans County, the failure to immediately establish this quarantine could result in the unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the natural resources of New York, but could also result in the imposition on New York of a federal quarantine or quarantines by other states. Such quarantines would cause economic hardship for New York's nurseries and stone fruit growers, since such quarantines may be broader than this one. The consequent loss of business would harm industries which are important to New York's economy and as such, would harm the general welfare.

4. Costs:

(a) Costs to the State government:

Regulated articles in the regulated areas that are exposed to plum pox virus would be destroyed. Compensation for the regulated articles is predicated upon the age of the plants and trees. Compensation would range from \$4,368 to \$17,647 per acre, of which the USDA would pay 85% of the compensation. Accordingly, New York's 15% share of the compensation would be \$655 to \$2,647 per acre, provided the owners of the regulated articles in question submit verified claims to the Department in accordance with section 165 of the Agriculture and Markets Law, and provided further that damages are awarded based on those claims.

Nursery dealers and nursery growers would also be eligible to receive compensation for regulated articles planted in the regulated areas and nursery stock regulated areas that would otherwise be prohibited from sale. New York would pay up to \$1,000 per acre in costs to remove such regulated articles.

(b) Costs to local government: none

(c) Costs to private regulated parties:

Regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas and nursery stock regulated areas.

(d) Costs to the regulatory agency:

It is anticipated that regulatory oversight and enforcement of the quarantine would require the hiring of two inspectors at an annual cost to the

Department of \$150,900. This cost includes salary, fringe benefits, travel costs, computer hardware and support and cell phones for the persons hired.

5. Local government mandate:

None.

6. Paper work:

Nursery dealers and nursery growers handling regulated articles in the nursery stock regulated areas would require a compliance agreement with the Department. They may also require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement of these regulated articles.

7. Duplication:

None

8. Alternatives:

None. The failure of the State to establish a quarantine could result in the establishment of quarantines by the federal government or other states. It could also place the State's own natural resources at risk from the further spread of plum pox virus which could result from the unrestricted movement of regulated articles in the regulated areas. In light of these factors, there does not appear to be any viable alternative to the establishment of the quarantine proposed in this rulemaking.

9. Federal standards:

Sections 301.74 through 301.74-5 of Title 7 of the Code of Federal Regulations (CFR) restricts the interstate movement of regulated articles susceptible to the plum pox virus. This rule does not exceed any minimum standards for the same or similar subject areas, since it restricts the intrastate, rather than interstate, movement of regulated articles by establishing a plum pox virus quarantine in New York State.

10. Compliance schedule:

It is anticipated that regulated persons would be able to comply with the rule immediately.

Regulatory Flexibility Analysis

1. Effect on small business.

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are approximately 35 stone fruit growers and 50 nursery growers or nursery dealers in the nursery stock regulated areas, and 29 stone fruit growers in the regulated areas. Most of these entities are small businesses.

Although it is not anticipated that local governments would be involved in the handling or movement of regulated articles within the quarantined areas, in the event that they do, they would be subject to the same requirements and restrictions as are other regulated parties.

2. Compliance requirements.

All regulated parties in the nursery stock regulated areas, which includes approximately 35 stone fruit growers and 50 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated areas would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated areas from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

All regulated parties in the regulated areas, which include approximately 29 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

3. Professional services.

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

(b) Annual cost for continuing compliance with the proposed rule:

Regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection

and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas.

Local governments moving regulated articles to or through the regulated areas would incur similar costs.

5. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the Prunus species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated areas. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

6. Small business and local government participation:

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated areas, other than pursuant to a compliance agreement, would require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, would be made pursuant to compliance agreements for which there is no charge.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 35 stone fruit growers and 50 nursery growers or nursery dealers in the nursery stock regulated areas, and 29 stone fruit growers in the regulated areas. Many of these entities are located in rural areas of New York State.

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

All regulated parties in the nursery stock regulated areas, which includes approximately 35 stone fruit growers and 50 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated areas would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated areas from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

All regulated parties in the regulated areas, which include approximately 29 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

The amendments would prohibit regulated parties in the nursery stock regulated areas from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

All regulated parties in the regulated areas, which include approximately 29 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

3. Costs:

Regulated parties handling regulated articles in the nursery stock regulated areas pursuant to compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs will be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles exposed to the plum pox virus.

4. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the *Prunus* species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated areas. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

5. Rural area participation:

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm

Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

Job Impact Statement

The establishment of a plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 35 stone fruit growers and 50 nursery growers or nursery dealers in the nursery stock regulated areas, and 29 stone fruit growers in the regulated areas. A further spread of this plant infection would have very adverse economic consequences to these industries in New York State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government and by other states. By helping to prevent the spread of the plum pox virus, the rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's stone fruit and nursery industries.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-31-08-00003-P

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

Proposed action: Amendment of Appendix 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Health, by deleting therefrom the position of Director Bureau Medical Assistance Evaluation and Planning and by increasing the number of positions of Health Program Director 3 from 14 to 15.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

Jurisdictional Classification

I.D. No. CVS-31-08-00004-P

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

Proposed action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

Purpose: To classify positions in the non-competitive class in the Department of Labor.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor under the subheading "Workers' Compensation Board," by adding thereto the positions of ϕ Workers' Compensation Medical Director (1).

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

Jurisdictional Classification

I.D. No. CVS-31-08-00005-P

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

Proposed action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Criminal Justice Services," by adding thereto the position of ϕ Director of Identification Operations (1).

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

Jurisdictional Classification

I.D. No. CVS-31-08-00006-P

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

Proposed action: Amendment of Appendix 1 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Mental Hygiene under the subheading "Office of Mental Retardation and Developmental Disabilities," by increasing the number of positions of Deputy Commissioner from 3 to 4.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

Jurisdictional Classification

I.D. No. CVS-31-08-00007-P

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

Proposed action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Transportation, by deleting therefrom the positions of Assistant Photolog Supervisor (1) and Photolog Supervisor (1).

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

Jurisdictional Classification

I.D. No. CVS-31-08-00008-P

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

Proposed action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office for the Prevention of Domestic Violence," by decreasing the number of positions of Domestic Violence Program Administrator 1 from 14 to 13 and by increasing the number of positions of Domestic Violence Program Specialist from 11 to 12.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

Jurisdictional Classification

I.D. No. CVS-31-08-00009-P

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

Proposed action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Budget," by decreasing the number of positions of Senior Mail and Supply Clerk from 3 to 2 and by increasing the number of positions of Principal Mail and Supply Clerk from 1 to 2.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, Department of Civil Service, Albany, NY 12239, (518) 473-2624, e-mail: judith.ratner@cs.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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

**Department of Economic
Development**

**EMERGENCY
RULE MAKING**

Empire Zones Reform

I.D. No. EDV-31-08-00010-E

Filing No. 712

Filing date: July 11, 2008

Effective date: July 13, 2008

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

Action taken: Amendment of Parts 10 through 14 of Title 5 NYCRR.

Statutory authority: General Municipal Law, art. 18-B, section 959

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

Specific reasons underlying the finding of necessity: The Empire Zones Program reforms as enacted by Chapter 63 of the Laws of 2005 were designed to improve the cost-effectiveness and accountability of the program for all New Yorkers. However despite these reforms, the program continues to grow at a rate that is unsustainable and benefits some companies that do not meet their job commitments. In some cases, the tax benefits a company receives exceed the economic return to the State. Prudent financial management of this and all public programs is an imperative at all times but even more important when the State is experiencing fiscal difficulties. Additional regulatory action is needed immediately to protect the integrity of the program, enhance its strategic focus, improve its cost-effectiveness, increase accountability, and mitigate the impact on the General Fund.

One area of particular concern relates to regionally significant projects. Regionally significant projects should be limited to those businesses that would have the most significant economic impact for local communities and the State by restricting eligibility to projects that export a substantial amount of their goods or services to customers outside of New York State. These "export" type of projects ensure that net new economic activity will be created in the State versus simply redistributing economic activity between different communities of the State, or providing incentives for projects where such incentives are not necessary to create or retain jobs.

To increase accountability, job creation for regionally significant projects would have to occur in a timely manner. The timeframe for achieving job targets would be reduced from five to three years. This change would make firms more accountable for job creation by reducing the incentive for companies to inflate job numbers knowing they have five years of zone benefits in which to achieve their goals.

Participation would also be limited to companies that provide a greater economic return on the State's investment in order to improve the cost-effectiveness of the Program. A statewide standard would be adopted based on the cost-benefit factors defined in law. Specifically, there would need to be twenty dollars of economic development benefits in the form of wages and capital investments for every one dollar of tax credits a business would receive. For projects where the economic development benefits are justified based on non-quantitative factors, there would need to be at least five dollars of such benefits for every one dollar of tax credits. In addition, the non-quantifiable terms identified in the law for strategic industry cluster or its supply chain would be defined to ensure that only businesses that are truly part of a strategic industry cluster or its supply chain can qualify based on the non-quantifiable factors of the cost-benefit analysis.

In order to hold businesses more accountable for their commitments and realize annual savings in program costs, these regulatory changes need to be adopted immediately. With 82 empire zones statewide, 10-20 applications are being submitted to the State weekly. Once businesses are in the Program, the annual costs are borne by the State for a 10 year period. These changes are expected to immediately reduce the number of eligible applicants by about 30% in order to achieve the objectives of strategic focus, improved cost-effectiveness, greater accountability and ultimately help preserve the program during the immediate fiscal crisis and beyond.

Subject: Empire zones reform.

Purpose: To implement previous reforms and adopt changes to enhance program's strategic focus, cost effectiveness and accountability.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2005, as well as a comprehensive review of administrative procedures and existing regulations for the purpose of making the program more strategic, cost effective and accountable to taxpayers. The amended laws require the existing Empire Zones to identify revised zone boundaries—that is, placement of zone acreage into “distinct and separate contiguous areas”—which has not yet been completed. The existing regulations fail to address this requirement, and at the same time, contain several outdated references. The proposed regulations will correct these two items and improve the program's administrative procedures. The Empire Zone regulations contained in 5 NYCRR Parts 10 through 14 are hereby amended as follows:

First, pursuant to Chapter 63 of the Laws of 2000 and Chapter 63 of the Laws of 2005, the emergency rule would reflect the name change of the program from Economic Development Zones to the Empire Zones and add reference to three new tax benefits: the Qualified Empire Zone Enterprise (“QEZE”) Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

Second, the emergency rule would conform the regulations to existing statutory terminology, definitions and practices. For example, an incorrect reference to a local empire zone administrator is being corrected to read local empire zone certification officer or simply, the local empire zone, if applicable. Pursuant to statute, the chief executive officer must ensure that the information on a designation application is accurate and complete, not the local legislative body. The requirements for a shift resolution did not contain all the criteria as set forth in statute. Certain regulatory provisions regarding application for zone designation were not in accord with the statute, such as whether certain information must be contained in local law rather than the application itself. In addition, tracking the statutory changes from Chapter 63 of the Laws of 2005, census tract zones are renamed “investment zones”, county-created zones are renamed “development zones”, and the new term “cost-benefit analysis” is defined. The emergency regulation also tracks the amended statute's deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

Third, the emergency rule would amend the Department's discretionary provision that limits the designation of nearby lands in investment zones to 320 acres. Such regulatory limitations are arbitrary and unnecessarily exceed or are inconsistent with State statute, and at the same time place undue limits on the reconfiguration of zones; municipalities cannot effectively utilize zone acreage to create opportunities for business investment and job growth in economically distressed areas that are not necessarily located in eligible or contiguous census tracts. At the same time, the Department is required to provide guidance in regulation on placement of nearby zone lands, and cannot countenance abuse of the program's requirements on acreage placement. Thus, placement of nearby lands can exceed 320 acres provided that the municipality demonstrates that (1) there is insufficient existing or planned infrastructure within eligible or contiguous tracts to accommodate business development in a highly distressed area, or to accommodate development of strategic businesses or (2) placing up to 960 acres in eligible or contiguous census tracts would be inconsistent with open space and wetland protection or (3) there are insufficient lands available for further business development within eligible or contiguous census tracts or (4) lands previously designated in the eligible or contiguous census tracts that were otherwise suitable for development and have not had any appreciable commercial activity or capital investment or (5) changes to eligible census tracts as a result of the 2000 Census, combined with the requirement in the amended statute that the distinct and separate contiguous areas accommodate already designated lands, alter the amount of nearby acreage used and available for development.

Fourth, the emergency rule clarifies the statutory requirement from Chapter 63, L. 2005 that development zones (formerly county zones) create up to three areas within their reconfigured zones as investment (formerly census tract) zones. The rule would require that 75% of the acreage used to define these investment zones be included within an eligible or contiguous census tract. Furthermore, the rule would not require a development zone to place investment zone acreage within a municipality in that county if that particular municipality already contained an investment zone, and the only eligible census tracts were contained within that municipality. The purpose of this is to fulfill the intent of the new

statutory amendments that the counties place a substantial portion of the zone acreage within eligible or contiguous census tracts, and this provision follows essentially the same method for concentrating acreage within distressed areas as the General Municipal Law employed for census tract zones.

Fifth, the emergency rule tracks the statutory requirements that zones reconfigure their existing acreage in up to three (for investment zones) or six (for development zones) distinct and separate contiguous areas, and that zones can allocate up to their total allotted acreage at the time of designation. These reconfigured zones must be presented to the Empire Zones Designation Board for unanimous approval. The emergency rule makes clear that zones may not necessarily designate all of their acreage into three or six areas or use all of their allotted acreage, however, any subsequent additions after their official redesignation by the Designation Board will still require unanimous approval by that Board.

Sixth, the emergency rule clarifies the new statutory requirement that certain defined “regionally significant” projects can be located outside of the new distinct and separate contiguous areas. There are four categories of projects identified in Chapter 63; only one category of applications, manufacturers projecting the creation of 50 or more jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Such projects must be projects that are exporting a substantial amount of goods or services beyond the State. The emergency rule identifies a timetable for meeting the minimum job creation requirement: 100% of the minimum jobs required to meet the definition of regionally significant project within 3 years of the date of designation of the project as regionally significant. Failure to achieve the minimum job creation requirement would trigger a decertification process.

Seventh, the emergency rule elaborates on the “demonstration of need” requirement mentioned in Chapter 63 of the Laws of 2005 for the addition (for both investment and development zones) of an additional distinct and separate contiguous area. A zone can demonstrate the need for a fourth or, as the case may be, a seventh distinct and separate contiguous area if (1) there is insufficient existing or planned infrastructure within the three (or six) distinct and separate contiguous areas to (a) accommodate business development and there are other areas of the applicant municipality that can be characterized as economically distressed and/or (b) accommodate development of strategic businesses as defined in the local development plan, or (2) placing all acreage in the other three or six distinct and separate contiguous areas would be inconsistent with open space and wetland protection, or (3) there are insufficient lands available for further business development within the other distinct and separate contiguous areas.

Eight, the emergency rule clarifies Chapter 63's permission for zone-certified businesses which will be located outside of the distinct and separate contiguous areas to receive zone benefits until decertified. The area which will be “grandfathered” shall be limited to the expansion of the certified business within the parcel or portion thereof that was originally located in the zone before redesignation. Each zone must identify any such business by December 30, 2005.

Ninth, the emergency rule tracks Chapter 63's requirement that new zone development plans, created in the conjunction with the new distinct and separate contiguous areas to be approved by the Empire Zones Designation Board, are to be approved by the Department within 90 days of submission. The emergency rule defines the date of submission for each zone as the date of approval of the distinct and separate contiguous areas by the Empire Zones Designation Board.

Tenth, the emergency rule fulfills the requirements of Chapter 63 to subject all businesses applying for zone benefits to meet a “cost-benefit analysis”. The cost-benefit analysis is to be included in the zone development plan by the applicant municipality. The definition included in the emergency rule establishes a minimum economic development benefit to cost ratio of 20:1 for a project to be eligible for certification. A project that does not meet the 20:1 ratio but can be justified based on non-quantifiable factors must meet a minimum ratio of 5:1. In addition, definitions for strategic industry cluster and supply chain are included in the rule.

Eleventh, the emergency rule clarifies the status of community development projects as a result of the reconfiguration of the zones pursuant to Chapter 63. The current regulations require the community development projects to be located in an Empire Zone in order for investments in those projects to qualify for tax benefits. Drawing distinct and separate contiguous areas around community development projects would severely limit the ability of Empire Zones to include as many eligible businesses as possible into the new distinct and separate contiguous areas. Community development projects are not necessarily required to be certified. There is a

strong public policy preference for these projects and there is an expectation by their sponsors that they continue to offer tax credits to contributors until fundraising for the projects are completed. To that end, all community development projects approved by the Department before April 1, 2005 would be considered to be located within its respective Empire Zone, and a community development project will be considered to be located in the Empire Zone if it can demonstrate that a zone has been working with the project before April 1, 2005 for the purpose of submitting a boundary revision for inclusion in to the Zone that would include job creation.

Twelfth, the emergency rule would revise the application process in order to ensure timely action and improve efficiency and accountability. For example, the proposed process would no longer require the applicant to submit an application to both the Department and the Department of Labor. In addition, the proposed process allows the applicant to cure incomplete or deficient applications within a set time period.

Lastly, the emergency rule would add certain programmatic information that is helpful to zone administrators, applicants, and practitioners such as the method for determining the effective dates for certifications and boundary revisions.

The full text of the rule is available at www.empire.state.ny.us

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 8, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Thomas P. Regan, Department of Economic Development, 30 S. Pearl St., Albany, NY 12245, (518) 292-5120, e-mail: tregan@empire.state.ny.us

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt rules and regulations governing the criteria of eligibility for empire zone designation, the application process, and the joint certification of a business enterprise.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to recent statutory amendments and the remaining revisions conform the regulations to existing statute or clarify administrative procedures of the program. It is the public policy of the State to offer special incentives and assistance that will promote the development of new businesses, the expansion of existing businesses and the development of human resources within areas designated as Empire Zones. The proposed amendments help to further such objectives by enabling the Department of Economic Development to administer the program in a more efficient manner. In addition, these amendments further the Legislative goals and objectives for the Empire Zones program, particularly as they relate to regionally significant projects and the cost-benefit analysis. With these changes, the Department strives to make the Program more strategic, cost-effective and accountable to the taxpayers of the New York state.

NEEDS AND BENEFITS:

The emergency rule is required in order to bring the regulations into accord with statute and to improve the overall administration and effectiveness of the program. There are several benefits that would be derived from this emergency rulemaking. First, the emergency regulations would conform to statutory provisions and thereby eliminate potential confusion to the practitioner. Second, the emergency rule would clarify the application process to ensure timely action and improve efficiency and accountability. Third, the rule seeks to reform the Empire Zones program to make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate.

COSTS:

I. Costs to private regulated parties (the Business applicants): None. The emergency regulation will not impose any additional costs to the business applicants beyond the existing program. In fact, there may be a cost savings due to a clearer application and the ability to cure application deficiencies rather than being immediately denied.

II. Costs to the regulating agency for the implementation and continued administration of the rule: While there will be additional costs to the Department of Economic Development associated with the emergency rule making, this is a result of the statutory changes which the emergency regulation language tracks or interprets. All existing Empire Zones have to revise their boundaries as a result of the statutory changes, with certain exceptions tied to specific types of business or the timing of certain applications. This has resulted in more paperwork and additional staff time

and will continue even more so as regulatory changes add additional scrutiny to the review and evaluation of projects attempting to gain eligibility into the program.

III. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

IV. Costs to local governments (the Local Zone administration): None. The emergency regulation will not impose any additional costs to the local zone administration beyond any additional costs associated with implementing the statutory requirements which reform the program. In the long term, there may be some cost savings in regards to staff time due to a clarification of program requirements.

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones Program. If a local government chooses to participate, there is a cost associated with local administration. However, this emergency rule does not impose any additional costs to the local governments beyond any additional costs associated with implementing the statutory requirements which reform the program.

PAPERWORK:

The emergency rule does create additional paperwork, insofar as the various Empire Zones have to refile applications to reconfigure their Zone acreage, identify regionally significant projects and "grandfathered" businesses where necessary, and process boundary revisions before deadlines enumerated in statute which are reproduced verbatim from the statute.

DUPLICATION:

The emergency rule will not duplicate or exceed any other existing Federal or State statute or regulation.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions. Certain alternatives to policies seeking to be adopted were considered in certain subject areas where the Legislature provided some room for interpretation; for example, acreage devoted to existing businesses outside of the reconfigured zone areas, creation of investment zones within development zones, the placement of "nearby" acreage, the location of "grandfathered" businesses and the continuation of community development projects. In each case, interpretation was geared to preserving, to the extent possible, the expectation of benefits for existing zone businesses, making zone reconfiguration as clear as possible for existing zones, and enabling zone acreage to be utilized in the most effective manner. Finally, with regard to the application process, an alternative was considered to include more time for review of the application at the State level. This alternative was rejected because it was determined that certification of a business, which has a complete and sufficient application, should not be delayed.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program; it is purely a state program that offers, among other things, state and local tax credits. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The affected State agencies (Economic Development and Labor), local zone administration and the business applicants will be able to achieve compliance with the emergency regulation as soon as it is implemented.

Regulatory Flexibility Analysis

Participation in the Empire Zones Program is entirely at the discretion of each eligible municipality and business enterprise. Neither General Municipal Law Article 18-B nor the emergency regulations impose an obligation on any local government or business entity to participate in the program. The emergency regulation does not impose any adverse economic impact, reporting, record-keeping, or other compliance requirements on small businesses and/or local governments. In fact, the emergency regulations may have a positive economic impact on the small businesses and local governments that do participate due to clarifying changes, the added flexibility and a new application process. The administrative structure of the program was designed to offer a streamlined application and approval process by extracting only essential information from the applicants. In addition, the changes to the regulations that track changes in statute and result in a reconfiguration of zones will actually enhance the ability of businesses yet to apply which are located in distressed areas to receive program benefits. Local governments will have the additional short-term burden of taking the legal and administrative steps necessary to reconfigure their zones, but this is a statutorily imposed burden, not solely a regulatory one. Because it is evident from the nature of the emergency rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, no further affirmative steps were

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

Rural Area Flexibility Analysis

The program is a statewide program. There are eligible municipalities and businesses in rural areas of New York State. However, participation is entirely at the discretion of eligible applicant municipalities and eligible business enterprises. The program does impose some responsibility on those municipalities and businesses which participate in the program such as submitting applications and reports. The emergency rule will not impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency regulation will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency regulation relates to the Empire Zones Program. The Empire Zones Program itself is a job creation incentive. The emergency regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the emergency regulations, which result from statutory-based reforms, will enable the program to better fulfill its mission: job creation and investment for economically distressed areas. At the same time, businesses currently receiving benefits will not have their status jeopardized as a result of the emergency regulations. Because it is evident from the nature of the emergency regulations that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Education Department

EMERGENCY RULE MAKING

Requirements for Course Work or Training in the Needs of Students with Autism

I.D. No. EDU-15-08-00009-E

Filing No. 711

Filing date: July 11, 2008

Effective date: July 11, 2008

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

Action taken: Amendment of sections 52.21 and 80-3.7, addition of Subpart 57-3 and section 80-1.12 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 208 (not subdivided), 212(3), 305(1), (2), 3004(1), (4), (5) and 3007 (not subdivided)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to implement the requirements of Education Law 3004(4) and (5), as added by Chapter 143 of the Laws of 2006, to require teachers seeking certification in special education to have course work or training in the needs of students with autism. The proposed amendment also establishes standards for Education Department approval of providers of course work or training in autism.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare in order to establish necessary regulatory standards to implement the requirements of Chapter 143 of the Laws of 2006. The State Education Department has estimated that it will take approximately one year for persons or organizations seeking approval as a provider to offer course work or training in the needs of students with autism to obtain the necessary faculty and educational specialists to offer such training, to apply to the State Education Department and for the Department to approve certain providers. Therefore, an emergency action is necessary to ensure that the standards for

Department approval of such providers are in place on July 11, 2008, so that the Department will have a sufficient amount of providers to offer the required course work or training by September 2, 2009.

Subject: Requirements for course work or training in the needs of students with autism.

Purpose: To require teachers seeking certification in special education to have course work or training in the needs of students with autism.

Text of emergency rule: 1. Subclause (1) of clause (b) of subparagraph (vi) of paragraph (3) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education is amended, effective July 11, 2008, as follows:

(1) study in the following:

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) . . .

(vi) . . .

(vii) use of assistive and instructional technology in the teaching of and learning by students with disabilities; [and]

(viii) . . .

(ix) *understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood supports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and*

2. Subpart 57-3 of the Regulations of the Commissioner of Education is added, effective July 11, 2008, as follows:

SUBPART 57-3

Training in Autism

§ 57-3.1 Purpose.

The purpose of this Subpart is to set forth standards for approval and the approval process for providers of course work or training in the needs of students with autism that is offered to candidates for a teachers' certificate or license in any of the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing; and blind and visually impaired and for school administrators, to the extent required by section 3004 of the Education Law.

§ 57-3.2 Definitions.

As used in this Subpart:

(a) *course work or training means course work or training in the needs of students with autism.*

(b) *provider means any teachers' or professional organization or association, school district, board of cooperative educational services, non-public school, institution of higher education, hospital, health care facility, government agency or office, social service agency, or any other organization that has as its purpose the provision of course work or training in the needs of students with autism, and that is approved by the department to offer such course work or training pursuant to section 3004 of the Education Law.*

§ 57-3.3 Filing of application for approval as a provider.

(a) *A person or organization seeking approval as a provider shall submit to the department, an application on forms prescribed by the commissioner, with a fee of \$600.*

(b) *To be approved, each applicant shall submit evidence acceptable to the department that the applicant:*

(1) *has and will maintain adequate resources to offer the course work or training;*

(2) *has and will ensure that faculty and educational specialists who will offer the course work or training have demonstrated by training, earned degrees or experience, their competence to offer the course work or training. The faculty or educational specialists who offer such course work or training must hold at least a master's degree; and have specialized training in autism or shall have demonstrated, in other widely recognized ways, their specialized knowledge in the area of autism, as determined by the department;*

(3) certifies in writing that the course work or training will be conducted through use of a curriculum which, at a minimum, includes the syllabus prepared by the department; and

(4) certifies, in writing, that certification of completion forms obtained from the department will be issued to students upon completion of the course work or training for their use in documenting satisfaction of the requirement of course work or training in autism, as required under section 3004 of the Education Law.

§ 57-3.4 Term of approval as a provider.

(a) Providers shall be approved for a period of six years, except that the approved status of such providers may be terminated during this term by the department in accordance with section 57-3.6 of this Subpart.

(b) At the expiration of said term, the provider may reapply to the department for approval following the requirements of section 57-3.3 of this Subpart, including payment of the required fee.

§ 57-3.5 Responsibility of providers.

(a) Pursuant to the requirements of section 3004 of the Education Law, a provider, at a minimum, shall offer the syllabus prepared by the department. However, nothing in this section shall preclude providers from offering additional course work or training which exceeds, or expands upon, the three hour syllabus prescribed by the department.

(b) An approved provider of such course work or training shall execute a certification of completion of each person completing course work or training, and within 21 calendar days of the completion of course work or training, the provider shall submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion.

(c) The provider shall retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training.

(d) In the event that an approved provider discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the department.

(e) Course work or training shall be taught by instructors who have demonstrated by training, education and experience their competence to teach the course content prescribed in subdivision (a) of this section.

§ 57-3.6 Review of providers by the department.

(a) The department may review approved providers during the term of approval to ensure compliance with the requirements of this Subpart and may request information from a provider and may conduct site visits, pursuant to such review.

(b) A determination by the department that the services offered by a provider are inadequate, incomplete or otherwise unsatisfactory pursuant to the standards set forth in this Subpart shall result in the denial or termination of the approved status of the provider.

§ 57-3.7 Exemption.

An institution that offers a registered program leading to certification in any of the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing; and blind and visually impaired, pursuant to section 52.21 of this Title, shall be deemed approved, pursuant to this Subpart, for purposes of offering course work or training in autism within such program to students in the program.

3. A new Section 80-1.12 of the Regulations of the Commissioner of Education is added, effective July 11, 2008, as follows:

Section 80-1.12 Required study in the needs of students with autism for certificates in certain classroom teaching titles.

All candidates for a certificate or license valid for a certificate in the classroom teaching titles of students with disabilities in early childhood, childhood, middle childhood or adolescence; deaf and hard of hearing; blind and visually impaired and speech and language disabilities, who apply for a certificate or license on or after September 2, 2009, shall have completed at least three clock hours of course work or training in autism, as required by section 3004 of the Education Law, which is provided by a registered program leading to certification pursuant to section 52.21 of this Title or other approved provider pursuant to Subpart 57-3 of this Title.

4. Paragraph 3 of subdivision (a) of Section 80-3.7 of the Regulations of the Commissioner of Education is amended, effective July 11, 2008, as follows:

(3) Additional requirements. A candidate seeking to fulfill the education requirement for the initial certificate through individual evaluation of education requirements shall meet the additional requirements in this paragraph or their substantial equivalent as determined by the commis-

sioner, if so prescribed for that certificate title, in addition to the general requirements prescribed in paragraph (2) of this subdivision.

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) Students with disabilities (birth-grade 2).

(a) . . .

(b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(vi) Students with disabilities (grades 1-6).

(a) . . .

(b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(vii) Students with disabilities (grades 5-9).

(a) . . .

(b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(viii) Students with disabilities (grades 7-12).

(a) . . .

(b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(ix) Deaf and hard of hearing (all grades).

(a) . . .

(b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(x) Blind or visually impaired (all grades).

(a) . . .

(b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(xi) Speech and language disabilities (all grades).

(a) . . .

(b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(xii) . . .

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously published a notice of proposed rule making, I.D. No. EDU-15-08-00009-P, Issue of April 9, 2008. The emergency rule will expire October 8, 2008.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 208 of the Education Law grants to the Board of Regents authority to award and confer certificates, diplomas and degrees.

Subdivision (3) of section 212 of the Education Law authorizes the Department to fix by regulation fees for certification or permits for which fees are not otherwise provided under the Education Law.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner of Education to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

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

Subdivision (4) of section 3004 of the Education Law, as added by Chapter 143 of the Laws of 2006, requires that all persons applying for a teaching certificate or license in special education or a school administrator who works in special education to complete course work or training in the area of children with autism. This section authorizes the Department to approve institutions and/or providers to provide such course work or training.

Subdivision (5) of section 3004 of the Education Law, as added by Chapter 143 of the Laws of 2006, authorizes the Commissioner of Education to prescribe the necessary regulations to establish programs and training related to the needs of students with autism and to approve providers and institutions to provide such course work and training.

Section 3007 of the Education Law authorizes the Commissioner of Education to endorse a diploma or certificate issued in another state.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to implement Education Law Section 3004(4), (5), as added by Chapter 143 of the Laws of 2006, by requiring teachers seeking certification in certain special education titles to have course work or training in the needs of students with autism and establishing standards for Education Department approval of providers of such course work or training.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Education Law section 3004(4) and (5), by requiring teachers seeking certification in certain special education classroom teaching titles to have course work or training in the needs of students with autism and establishing standards for Education Department approval of providers of such course work or training.

4. COSTS:

(a) Costs to State government: The amendment will not impose any significant additional costs on State government including the State Education Department. The amendment will minimally affect the State Education Department's staffing and resources in reviewing and processing applications for certificates under individual transcript evaluation and in reviewing and processing applications for providers and monitoring approved providers.

(b) Costs to local governments: School districts and BOCES seeking status as an approved provider will be required to submit an application fee of \$600 to the Department. If granted, the provider receives approval for a six-year period, at the expiration of which, the provider must reapply. Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

(c) Cost to private regulated parties: The proposed amendment will impose a cost of \$600 on private regulated parties that select to apply to become an approved provider of the required course work or training. Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

For candidates seeking certification as a teacher in special education through individual evaluation pursuant to Section 80-3.7 of the Regulations of the Commissioner of Education, there is no additional cost to the

applicant to apply for certification, but the candidate may need to pay a fee to take the three-hour course. This fee is estimated to be \$100.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Government," the amendment will impose minimal additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

School districts and BOCES seeking status as an approved provider must submit an application and a \$600 fee to the Department and will be required to:

(1) offer at least three clock hours of course work or training in understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood supports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and

(2) execute a certification of completion for each person completing course work or training and, within 21 calendar days of the completion of course work or training, submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion; retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training; and in the event that a provider discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the Department; and

(3) ensure that course work or training shall be taught by instructors who have demonstrated by training, education, and experience their competence to teach the course content.

The Department may approve a provider for a six year period. Upon expiration of the period, the provider may reapply to the Department for approval by submitting a new application and fee.

Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

6. PAPERWORK:

An institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, shall be deemed an approved providers. All other prospective providers must complete an application and submit a \$600 fee. At the expiration of its 6 year term of approval, a provider may reapply to the Department in accordance with the procedures set forth in proposed section 57-3.3, including payment of the required fee. An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements, and is necessary to implement the requirements of Chapter 143 of the Laws of 2006.

8. ALTERNATIVES:

Since these amendments are required by Chapter 143 of the Laws of 2006, no alternatives were considered.

9. FEDERAL STANDARDS:

There are no related Federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with this amendment by its stated effective date.

Regulatory Flexibility Analysis**1. EFFECT OF RULE:**

Small business firms providing training services in New York State to teachers in certain classroom teaching titles and administrators may be affected by this proposed amendment if such small businesses seek to become an approved provider. The proposed amendment also applies to each of the 698 school districts and the 37 board of cooperative educational services (BOCES) in the State.

2. COMPLIANCE REQUIREMENTS:

School districts and BOCES, seeking status as an approved provider must submit an application and a \$600 fee to the Department and will be required to:

(1) offer at least three clock hours of course work or training in understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood supports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and

(2) execute a certification of completion for each person completing course work or training and, within 21 calendar days of the completion of course work or training, submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion; retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training; and in the event that a provider discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the Department; and

(3) ensure that course work or training shall be taught by instructors who have demonstrated by training, education, and experience their competence to teach the course content.

The Department may approve a provider for a six year period. Upon expiration of the period, the provider may reapply to the Department for approval by submitting a new application and fee.

Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

3. PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional service requirements on small businesses or local governments.

4. COMPLIANCE COSTS:

The proposed amendment will not impose costs on private regulated parties, unless they choose to become an approved provider of the course work or training in autism. The cost for application to become an approved provider is \$600. If granted, approval would be for a period of six years. At the expiration of this period, reapplication would include submission of a \$600 fee to the Department. Some approved providers may be able to charge fees to individuals taking the course, thereby recovering their costs. Also, section 57-3.7 of the proposed amendment provides an exemption to an institution that offers a registered program leading to certification in certain classroom teaching titles, pursuant to 8 NYCRR 52.21, in which

the institution shall be deemed approved by the Department for purposes of offering such course work or training within such program to students in the program.

For a candidate seeking certification in a special education title through individual evaluation pursuant to Section 80-3.7 of the Regulations of the Commissioner of Education, there is no additional cost to the applicant to apply for certification, but the candidate may need to pay a fee to take the three-hour training. This cost is estimated to be \$100.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment imposes no new technological requirements on small businesses, school districts, BOCES or other local governments. Economic feasibility is addressed under the Compliance Costs and Minimizing Adverse Impact sections.

6. MINIMIZING ADVERSE IMPACT:

Only those small businesses that seek status as an approved provider must submit an application fee of \$600 to the State Education Department and meet the requirements of the proposed Subpart 57-3. Organizations approved to offer course work are not prevented by the proposed amendment from charging fees to students taking the course work or training. Because the costs imposed by this rule are minimal and may be defrayed by the fees charged to students, the proposed amendment is not expected to have any adverse economic impact on small businesses. It would be contrary to the public welfare to exempt small businesses from the requirements of the proposed amendment, or impose a lesser standard, because such requirements are designed to assure that approved providers offer adequate training in the needs of students with autism.

With respect to local governments, only those school districts and BOCES that seek status as an approved provider, would be required to pay the \$600 application fee and meet the requirements of 57-3.3. It would be contrary to the public welfare to exempt such local governments from the requirements of the proposed amendment, or impose a lesser standard, because such requirements are designed to assure that approved providers offer adequate training in the needs of students with autism.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State. Copies of the proposed amendment have also been supplied to a representative sample of small business firms providing similar training services in New York State to teachers, to meet the training requirements for child abuse and reporting under Subpart 53-1 of the Regulations of the Commissioner of Education.

Rural Area Flexibility Analysis**1. TYPES AND ESTIMATE OF THE NUMBER OF RURAL AREAS:**

The proposed amendment will affect candidates seeking certification in special education titles and will apply to all school districts and boards of cooperative education services (BOCES) in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

School districts and BOCES seeking status as an approved provider must submit an application and a \$600 fee to the Department and will be required to:

(1) offer at least three clock hours of course work or training in understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood supports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and

(2) execute a certification of completion for each person completing course work or training and, within 21 calendar days of the completion of course work or training, submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion; retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training; and in the event that a provider

discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the Department; and

(3) ensure that course work or training shall be taught by instructors who have demonstrated by training, education, and experience their competence to teach the course content.

The Department may approve a provider for a six year period. Upon expiration of the period, the provider may reapply to the Department for approval by submitting a new application and fee.

Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

3. COSTS:

The proposed amendment will not impose costs on private regulated parties, unless they choose to become an approved provider of the course work or training in autism. The cost for application to become an approved provider is \$600. If granted, approval would be for a period of six years. At the expiration of this period, reapplication would include submission of a \$600 fee to the Commissioner. Some approved providers may be able to charge fees to individuals taking the course, thereby recovering their costs. Also, section 57-3.7 of the proposed amendment provides an exemption to an institution that offers a registered program leading to certification in certain classroom teaching titles, pursuant to 8 NYCRR 52.21, in which the institution shall be deemed approved by the Department for purposes of offering such course work or training within such program to students in the program.

For candidates seeking certification as a teacher in special education through individual evaluation pursuant to Section 80-3.7 of the Regulations of the Commissioner of Education, there is no additional cost to the applicant to apply for certification, but the candidate may need to pay a fee to take the three-hour training or course in the needs of students with autism. This cost is estimated to be \$100.

4. MINIMIZING ADVERSE IMPACT:

Only those school districts, BOCES and other entities that seek status as an approved provider must submit an application fee of \$600 to the State Education Department and meet the requirements of proposed section 57-3.3. Because the costs imposed by this proposed amendment are minimal and may be defrayed by the fees charged to students, the proposed amendment is not expected to have any adverse economic impact on rural areas. It would be contrary to the public welfare to exempt rural areas from the requirements of the proposed amendment, or impose a lesser standard, because such requirements are designed to assure that approved providers offer adequate course work or training in the needs of students with autism. A uniform standard ensures the quality of certified special education and school administrators working in special education in all parts of the State.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

In order to implement the requirements of Education Law 3004 (4) and (5), as added by Chapter 143 of the Laws of 2006, the purpose of the proposed amendment is to require teachers seeking certification in special education to have course work or training in the needs of students with autism. The proposed amendment also establishes standards for Education Department approval of providers of course work or training in autism, to the extent required under section 3004 of the Education Law. In order to comply with the new requirements, it may be necessary for some school

districts and boards of cooperative educational services to employ new personnel, which may result in an increase in jobs and employment opportunities.

Because it is evident from the nature of this regulation that it will have only a positive impact or no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

A Notice of Proposed Rule Making was published in the State Register on April 9, 2008. Below is a summary of written comments received by the State Education Department (SED) on the proposed amendment.

1. COMMENT: Teachers with existing certification should be required to obtain the same training in the needs of students with autism. Two hours of training can not make a teacher an expert. We must do a better job of ensuring that all students have the opportunity to become productive citizens.

DEPARTMENT RESPONSE: Chapter 143 of the Laws of 2006 does not require currently certified teachers to receive training in the needs of children with autism. However, the Department believes that existing special education teachers will be encouraged to receive this training once approved providers are available. The Department agrees that we must do a better job of ensuring that all students have the opportunity to become productive citizens.

2. COMMENT: There are too many topics to be covered in a two hour workshop.

RESPONSE: The syllabus for the required course work or training through approved providers has not yet been developed by SED. The topics identified in the proposed amendment are for registered teacher education programs, not for the required course work or training. Moreover, in response to public comment, SED has extended the length of the required course work or training from two hours to three hours.

3. COMMENT: Institutions with registered programs leading to certification in any disability area do not all have faculty prepared to provide autism specific training and therefore such institutions should not be exempted from applying to be an approved provider.

DEPARTMENT RESPONSE: Current regulations require that institutions that prepare special education teachers have faculty with the knowledge and skills to prepare special education teachers to meet the needs of the full range of students with disabilities, including students with autism.

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

Special Education Programs and Services

I.D. No. EDU-31-08-00014-P

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

Proposed Action: Amendment of sections 200.4 and 200.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 4402(1-7), 4403(3) and 4410(13)

Subject: Special education programs and services.

Purpose: To extend the date for required use of State forms for IEPs, prior written notice and meeting notice.

Text of proposed rule: 1. Paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective November 13, 2008, as follows:

(2) Individualized education program (IEP). If the student has been determined to be eligible for special education services, the committee shall develop an IEP. IEPs developed on or after [January 1, 2009] *September 1, 2009*, shall be on a form prescribed by the commissioner and developed consistent with the commissioner's guidelines. In developing the recommendations for the IEP, the committee must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or districtwide assessment programs; and any special considerations in paragraph (3) of this subdivision. The IEP recommendation shall include the following:

- (i) . . .
- (ii) . . .
- (iii) . . .

- (iv) . . .
- (v) . . .
- (vi) . . .
- (vii) . . .
- (viii) . . .
- (ix) . . .
- (x) . . .
- (xi) . . .
- (xii) . . .

2. Paragraph (1) of subdivision (a) of Section 200.5 of the Regulations of the Commissioner of Education is amended, effective November 13, 2008, as follows:

(1) Prior written notice (notice of recommendation) that meets the requirements of section 200.1(o) of this Part must be given to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student. Effective [January 1, 2009] *September 1, 2009*, the prior written notice shall be on [the] a form prescribed by the commissioner *and developed consistent with the commissioner's guidelines*.

3. Paragraph (1) of subdivision (c) of Section 200.5 of the Regulations of the Commissioner of Education is amended, effective November 13, 2008, as follows:

(1) Whenever the committee on special education proposes to conduct a meeting related to the development or review of a student's IEP, or the provision of a free appropriate public education to the student, the parent must receive notification in writing at least five days prior to the meeting. The meeting notice may be provided to the parent less than five days prior to the meeting to meet the timelines in accordance with Part 201 of this Title and in situations in which the parent and the school district agree to a meeting that will occur within five days. The parent may elect to receive the notice of meetings by an electronic mail (e-mail) communication if the school district makes such option available. Effective [January 1, 2009] *September 1, 2009*, the meeting notice shall be on a form prescribed by the commissioner *and developed consistent with the commissioner's guidelines*.

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

Data, views or arguments may be submitted to: Rebecca H. Cort, Deputy Commissioner, VESID, Education Department, Rm. 1606, One Commerce Plaza, Albany, NY 12234, (518) 473-2714, e-mail: rcort@mail.nysed.gov

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

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

Education Law section 4410 outlines special education services and programs for preschool children with disabilities. Section 4410(13) authorizes Commissioner to adopt regulations.

LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to ensure consistency in procedural safeguards and carry out the legislative objectives in the aforementioned statutes.

NEEDS AND BENEFITS:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date by which school districts would be required to use the forms prescribed by the Commissioner for individualized education programs (IEPs), Committee on Special Education (CSE) and Committee on Preschool Special Education (CPSE) meeting notices and for prior written notices (notice of recommendation), and providing that the IEPs and notices be developed consistent with the Commissioner's guidelines.

The regulations that require the use of the State's forms for IEPs, CSE and CPSE meeting notices, and prior written notice (notice of recommen-

ation) as of January 1, 2009 were adopted in September 2007. Since that date, the Department sought extensive comment from the field on the development of the forms from stakeholders across the State. In response to their comments, the Department proposes to extend the effective date for required use of the forms from January 1, 2009 to September 1, 2009. Extending the date for the required use of these forms will allow additional time for VESID to work with stakeholders to field check proposed forms and to provide professional development on the new forms and guidance. In addition, the proposed amendment will require school districts to use the new forms at the beginning of the 2009-2010 school year, and thereby avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-2009 school year.

COSTS:

a. Costs to State government: None.

b. Costs to local governments: None.

c. Costs to regulated parties: None.

d. Costs to the State Education Department of implementation and continuing compliance: None.

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by federal and State statutes and regulations. The proposed amendment will extend the date for requiring the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice, and provide that the IEPs and notices be developed consistent with the Commissioner's guidelines.

Section 200.4 revises the date by which all school districts must use the form prescribed by the Commissioner to develop IEPs from January 1, 2009 to September 1, 2009 and provides that such form be developed consistent with guidelines prescribed by the Commissioner.

Section 200.5 revises the date by which all school districts must use the prior written notice (notice of recommendation) and meeting notices prescribed by the Commissioner from January 1, 2009 to September 1, 2009 and provides that such forms be developed consistent with guidelines prescribed by the Commissioner.

PAPERWORK:

The proposed amendment will extend the date for requiring the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice and provides that such forms be developed consistent with guidelines prescribed by the Commissioner, and does not impose any additional paperwork requirements.

DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with any other State or federal statute or regulation.

ALTERNATIVES:

Since the September 2007 adoption of regulations requiring, as of January 1, 2009, the use of the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice, the Department has obtained extensive public comment on the development of the forms from stakeholders across the State. Various alternative effective dates for mandatory forms were considered. However, in response to public comment, the Department proposes to extend the effective date for required use of the forms from January 1, 2009 to September 1, 2009 to allow the Department additional time to work with stakeholders to field check proposed forms and to provide professional development of the new forms and guidance. In addition, the proposed amendment will require school districts to use the new forms at the beginning of the 2009-2010 school year, and thereby avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-2009 school year.

FEDERAL STANDARDS:

The proposed amendment is not required by federal law or regulations, but is necessary to ensure consistency in procedural safeguards.

COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date. The proposed amendment will require school districts to use the new forms for IEPs, prior written notice (notice of recommendation) and meeting notice at the beginning of the 2009-2010 school year, and thereby avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-2009 school year.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to the provision of special education programs and services to students with disabilities, and is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice and providing that the completion of such forms be consistent with guidelines prescribed by the Commissioner. Because it is evident from the nature of the rule that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

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

COMPLIANCE REQUIREMENTS:

The proposed amendment will extend the date for required use of the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice and provide that the completion of such forms be developed consistent with the Commissioner's guidelines, and does not impose any additional compliance requirements upon local governments beyond those imposed by federal statutes and regulations.

Section 200.4 revises the date by which all school districts must use the form prescribed by the Commissioner to develop IEPs from January 1, 2009 to September 1, 2009 and provides that such form be developed consistent with the Commissioner's guidelines.

Section 200.5 revises the date by which all school districts must use the prior written notice (notice of recommendation) and meeting notices prescribed by the Commissioner from January 1, 2009 to September 1, 2009 and provides that such forms be developed consistent with the Commissioner's guidelines.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on local governments.

COMPLIANCE COSTS:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date for requiring the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice and providing that the completion of such forms be developed consistent with the Commissioner's guidelines, and does not impose any additional costs beyond those imposed by federal statutes and regulations and State statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed does not impose any new technological requirements. Economic feasibility is addressed above under Compliance Costs.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date for requiring the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice and providing that the completion of such forms be developed consistent with the Commissioner's guidelines, and does not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes.

The regulations that require the use of the State's forms for IEPs, CSE and CPSE meeting notices, and prior written notice (notice of recommendation) as of January 1, 2009 were adopted in September 2007. Since that date, the Department sought extensive comment from the field on the development of the forms from stakeholders across the State. In response to their comments, the Department proposes to extend the effective date for required use of the forms from January 1, 2009 to September 1, 2009. Extending the date for the required use of these forms will allow additional time for VESID to work with stakeholders to field check proposed forms and to provide professional development on the new forms and guidance. In addition, the proposed amendment will require school districts to use the new forms at the beginning of the 2009-2010 school year, and thereby avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-2009 school year.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

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

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

The proposed amendment will extend the date for required use of the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice and provide that the completion of such forms be developed consistent with the Commissioner's guidelines, and does not impose any additional compliance requirements upon rural areas beyond those imposed by federal statutes and regulations.

Section 200.4 revises the date by which all school districts must use the form prescribed by the Commissioner to develop IEPs from January 1, 2009 to September 1, 2009 and provides that such form be developed consistent with the Commissioner's guidelines.

Section 200.5 revises the date by which all school districts must use the prior written notice (notice of recommendation) and meeting notices prescribed by the Commissioner from January 1, 2009 to September 1, 2009 and provides that such forms be developed consistent with the Commissioner's guidelines.

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

COSTS:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice and providing that the completion of such forms be developed consistent with the Commissioner's guidelines, and does not impose any additional costs beyond those imposed by such federal statutes and regulations and State statutes.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice and providing that the completion of such forms be developed consistent with the Commissioner's guidelines, and does not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes. Since these requirements apply to all school districts in the State, it is not possible to adopt different standards for school districts in rural areas.

The regulations that require the use of the State's forms for IEPs, CSE and CPSE meeting notices, and prior written notice (notice of recommendation) as of January 1, 2009 were adopted in September 2007. Since that date, the Department sought extensive comment from the field on the development of the forms from stakeholders across the State. In response to their comments, the Department proposes to extend the effective date for required use of the forms from January 1, 2009 to September 1, 2009. Extending the date for the required use of these forms will allow additional time for VESID to work with stakeholders to field check proposed forms and to provide professional development on the new forms and guidance. In addition, the proposed amendment will require school districts to use the new forms at the beginning of the 2009-2010 school year, and thereby avoid any risk of potential disruptions to a district's policies, procedures and practices that might result if this requirement were to be made effective in the middle of the 2008-2009 school year.

RURAL AREA PARTICIPATION:

The proposed amendment was submitted for discussion and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

Job Impact Statement

The proposed amendment relates to the provision of special education programs and services to students with disabilities, and is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice and providing that the completion of such forms be developed consistent with the Commissioner's guidelines. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken.

Accordingly, a job impact statement is not required, and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Recreational Harvest and Possession of Summer Flounder and Scup

I.D. No. ENV-21-08-00003-A

Filing No. 716

Filing date: July 15, 2008

Effective date: July 30, 2008

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

Action taken: Amendment of section 40.1 of Title 6 NYCRR.

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

Subject: Recreational harvest and possession of summer flounder and scup.

Purpose: To ensure that the recreational harvest of summer flounder and scup remain in compliance with existing FMPs.

Text or summary was published in the notice of emergency/proposed rule making, I.D. No. ENV-21-08-00003-EP, Issue of May 21, 2008.

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

Text of rule and any required statements and analyses may be obtained from: Stephen W. Heins, Department of Environmental Conservation, 205 N. Belle Meade Rd., Suite 1, East Setauket, NY 11733-3400, (631) 444-0435, e-mail: swheins@gw.dec.state.ny.us

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

Assessment of Public Comment

This proposed rule making, which amends New York's regulations for the recreational harvest of summer flounder and scup, was published in the New York State Register on May 21, 2008.

The proposed amendment for summer flounder established a minimum size limit of 20.5 inches, a possession limit of four fish and an open season of May 15 through September 1. The scup regulations were amended to reflect the following: a) a change in the open season for the scup recreational fishery from June 1 through October 31 to May 24 through September 26; b) a change in the open season for the scup party/charter boat sector from June 1 through October 31 to June 12 through October 15; c) an increase in the size limit for anglers fishing aboard party and charter vessels from 10.5 inches Total Length to 11 inches Total Length; and, d) a decrease in the possession limit from 25 fish per angler to 10 fish per angler, except that anglers fishing aboard party and charter vessels during the 45-day "bonus season," which runs from September 1 through October 15, may possess up to 45 fish per angler.

The department received one written comment (via email) during the public comment period for this rule making. The comment made three points, all of which were directed at summer flounder, and are summarized below followed by the department's response.

1. Comment: The size limit is too high. Since the commercial fishery harvests the fish at 14 inches, there will be no fish of 20.5 inches for the recreational fisherman to harvest.

Department response: The department regrets that this regulation will reduce the number of fish available to recreational harvesters, but finds it is necessary in order to achieve the reduction required under the joint Mid-Atlantic Fishery Management Council /Atlantic States Marine Fisheries Commission Summer Flounder Fishery Management Plan (FMP). There will be some fish that are 20.5 inches and larger available for harvest, as the summer flounder population has expanded and the age structure in the population shows an increase in the numbers of older, larger fish. The purpose of the rule, however, is to reduce the recreational take to keep

harvest below a specified target. The size limit increase is designed to achieve that goal while still allowing fishing activity.

2. Comment: The department should adopt a slot limit (for example 17.5 to 18.5 inches) with a highly restrictive bag limit. This change would allow some harvest in consideration of the fuel and other expenditures by anglers.

Department response: A slot limit is under consideration by fishery biologists working on summer flounder technical specifications for the 2009 fishing season. If a slot limit is developed, it should be applied coastwide, be of a narrow range, and be associated with a very restrictive possession limit, with no allowance for a "trophy" fish.

3. Comment: The entire recreational industry is being severely impacted by these regulations.

Department response: Prior to emergency adoption of this rule, the department received over 500 emails in its favor, mostly from industry and anglers who support the industry's position. The arguments in support of the rule stated that it was more beneficial for the industry to have a longer fishing season as opposed to the alternative of keeping the 2007 size limits and curtailing the season. The effect of a very short season would be devastating to the industry, while the size limit increase would be much less so.

Office of Mental Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Operating Certificates

I.D. No. OMH-31-08-00011-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 573, 580, 582 and 584 of Title 14 NYCRR.

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

Subject: Operating certificates.

Purpose: To permit the Office of Mental Health to issue operating certificates with a duration of three years to certain providers of service.

Text of proposed rule: 1. The Statutory Authority of the Title of Part 573 of Title 14 NYCRR is amended to read as follows:

PART 573

OPERATING CERTIFICATE ISSUANCE AND LIMITATION

(Statutory Authority: Mental Hygiene Law §§ 7.09, 9.39, 31.02, 31.03, 31.04, 31.05, 31.15, 31.17, 31.22, 43.02)

2. Subdivision (c) of Section 573.1 of Title 14 NYCRR is amended to read as follows:

(c)(1) For all providers for which an operating certificate from the Office of Mental Health is required, except for family care homes, initial [Initial] operating certificates will be issued for a period not to exceed [two] three years, as determined by the office. Subsequent operating certificates will be issued for periods of [two] three years except that shorter periods may be prescribed for cause [and excepting that operating certificates will be issued to outpatient programs in accordance with Part 587 of this Title].

(2) In accordance with Mental Hygiene Law Section 31.03, the operating certificate issued for a family care home shall be valid for two years.

1. Subdivision (c) of Section 580.4 of Title 14 NYCRR is amended to read as follows:

(c) A certificate valid for a period not to exceed [two] three years shall be issued for units which satisfactorily meet the conditions of this Part.

2. Subdivision (c) of Section 582.4 of Title 14 NYCRR is amended to read as follows:

(c) A certificate valid for a period not to exceed [two] three years shall be issued to hospitals which satisfactorily meet the conditions stated in this Part.

3. Subdivision (d) of Section 584.5 of Title 14 NYCRR is amended to read as follows:

(d) The term of the operating certificate shall be determined by the Office of Mental Health, but in no event shall the term exceed [two] *three* years.

Text of proposed rule and any required statements and analyses may be obtained from: Joyce Donohue, Office of Mental Health, 44 Holland Ave., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.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 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his/her jurisdiction.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law provides that the Commissioner has the power to adopt regulations, including those that specify a definite period for which an operating certificate will be issued pursuant to Article 31 of the Mental Hygiene Law. Subdivision (c) of Section 31.03 of the Mental Hygiene Law provides that an operating certificate issued for a family care home shall be valid for a period of two years.

2. Legislative Objectives: Article 7 of the Mental Hygiene Law reflects the Commissioner's authority to establish regulations regarding mental health programs. Furthermore, the Legislature intended, through passage of Mental Hygiene Law Article 31, to grant the Commissioner of the Office of Mental Health the authority to issue operating certificates, and to prescribe a definite length of time for which such operating certificates will remain effective.

3. Needs and Benefits: When the Office of Mental Health (OMH) moved all non-inpatient programs to a three-year maximum duration in the early 1990's, there was concern that inpatient programs served patients at highest risk and, therefore, required more frequent monitoring by OMH licensing staff. The inpatient regulations were relatively old in terms of when they were developed, the outpatient and residential regulations had been substantially revised, and OMH had not systematized the inpatient licensing inspection protocols for monitoring inpatient programs.

However, beginning in 2003, OMH undertook a multi-year initiative to strengthen and revise the entire OMH licensing process to promote greater uniformity and consistency across all of the licensing staff in all five field offices for all program categories. In addition to improved training for licensing staff, OMH developed statewide inspection protocols specifically for inpatient programs that brought together not only the standards from OMH's inpatient regulations, but also related regulations applicable to inpatient status, updated physical plant standards, and relevant standards of other regulatory agencies such as the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) and the New York State Department of Health (DOH). This improved licensing process has made the inpatient monitoring system more consistent with that of the non-inpatient programs, which have been subject to a maximum three-year duration for several years.

In addition to OMH's monitoring efforts with respect to licensing, there has been increased scrutiny of the inpatient programs by other monitoring organizations in recent years. The Joint Commission accredits the majority of the inpatient programs within general hospitals, private psychiatric hospitals, and most residential treatment facility programs. This accreditation process is subject to three-year cycles for maximum duration. DOH jointly licenses general hospitals that include psychiatric units and may exercise on-site, as well as remote, monitoring responsibility. In addition, Federal CMS surveys have occurred with more frequency in New York State than was the case previously, thereby providing additional monitoring capability of inpatient programs. Finally, other OMH staff conduct more targeted monitoring visits by responding to complaints from patients and families regarding inpatient programs and investigating serious incidents that occur at inpatient programs.

Taken as a whole, the need to limit quality inpatient programs to a more restrictive standard in terms of maximum license duration as compared to non-inpatient programs is no longer applicable or even useful. As with any program licensed by OMH, the actual duration of a license is determined by the extent of compliance found during OMH license renewal inspections. Any program demonstrating weaker performance will receive less than the maximum duration and will be subject to more frequent monitoring by OMH staff, whether the program is inpatient, outpatient, or residential. In addition, all surveys now completed by the Joint Commission, CMS

and OMH are unannounced, thereby providing a more accurate reflection of a program's true day-to-day functioning.

It should be noted that, with this amendment, the only OMH program category that will continue to receive operating certificates limited to two years' duration will be family care homes. OMH is unable to extend this amendment to family care homes because the two-year operating term for this specific program modality is specified in Mental Hygiene Law Section 31.03; therefore, OMH lacks statutory authority to extend their operating certificates to three year terms. Technical amendments are made to 14 NYCRR Section 573.1 to clarify this disparity.

4. Costs:

(a) cost to State government: These regulatory amendments will not result in any additional costs to State government.

(b) cost to local government: These regulatory amendments will not result in any additional costs to local government.

(c) cost to regulated parties: These regulatory amendments will not result in any additional costs to regulated parties.

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

6. Paperwork: By extending the period of time for which an operating certificate may be issued, this rule may, in fact, result in reduced paperwork for certain providers who maintain a history of compliance and a record of providing a high quality of care.

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

8. Alternatives: The only alternative to the regulatory amendment which was considered was inaction. Since the amendment will provide a consistent regulatory approach within the mental health system by ensuring that all certified programs are measured against the common standards of three years and will ultimately result in a less burdensome quality improvement process for providers of mental health services, that alternative was necessarily rejected.

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

10. Compliance Schedule: The regulatory amendments would become effective immediately upon adoption.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this notice because the amended rules will not impose any adverse economic impact on small businesses, nor will they impose any new reporting, record keeping or other compliance requirements on small businesses or local governments. The amendments to the rule are designed to simply permit OMH to issue operating certificates with a duration of three years to certain providers of service. No new or additional requirements are being imposed on small businesses, local governments, or other public or private entities.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not being submitted with this notice because the proposed rules will not impose any adverse economic impact on rural areas. The amendments will simply serve to allow OMH the ability to issue operating certificates with a duration of three years to certain providers of service.

Job Impact Statement

As the amendments to the rule are designed to simply allow OMH to issue operating certificates with a duration of three years to certain providers of service, a Job Impact Statement is not being submitted with this notice. It is evident from the subject matter of the amendments that the amendments will have no impact on jobs and employment opportunities.

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

Adjudicatory Proceedings

I.D. No. OMH-31-08-00012-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 503 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.16 and 31.17; State Administrative Procedure Act, art. 3

Subject: Adjudicatory proceedings.

Purpose: To amend Part 503 to eliminate a duplicative step in the hearing officer process.

Text of proposed rule: 1. Paragraphs (2) and (3) of subdivision (i) of Section 503.4 of Title 14 NYCRR are amended to read as follows:

(2) [Any party may submit objections to the hearing officer's report by filing a written response with the hearing officer and serving a copy of such response upon all parties within 20 days after service of the hearing officer's report. Replies to any such response may be filed and served in like manner within ten days after service. Unless the commissioner grants an extension of time, no response or reply submitted after the prescribed time will be considered.

3] The record of the hearing[, together with] *and* the hearing officer's report [and any responses or replies duly filed] shall be transmitted to the [commissioner] *Commissioner* for final determination and order.

Text of proposed rule and any required statements and analyses may be obtained from: Joyce Donohue, Office of Mental Health, 44 Holland Ave., 8th Fl., Albany, NY 12229, (518) 474-1331, e-mail: cocbjdd@omh.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 7.07 of the Mental Hygiene Law charges the Office of Mental Health with the responsibility of seeing that mentally ill persons are provided with care and treatment, that such care, treatment, and rehabilitation is of high quality and effectiveness, and that the personal and civil rights of persons receiving care, treatment, and rehabilitation are adequately protected.

Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

Section 31.16 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority to suspend, revoke or limit an operating certificate, or impose fines. Such section further requires the Commissioner to provide the holder of the operating certificate with a notice of such action and an opportunity to be heard prior to any determination, except in cases where the suspension or revocation must be imposed in accordance with statutory emergency suspension procedures. This section also empowers the Commissioner to establish regulations to govern the hearing procedure and the process of determination of the proceeding. Furthermore, in accordance with this Section, all orders or determinations are subject to review in accordance with Article 78 of the Civil Practice Law and Rules.

Section 31.17 of the Mental Hygiene Law establishes the process for formal hearings that are required to be afforded pursuant to Chapter 27 of the Consolidated Laws of the State of New York. Such Section permits the Commissioner of Mental Health to establish regulations governing the hearing procedure and the process of determination of the proceeding.

Article 3 of the State Administrative Procedure Act establishes procedures for the conduct of adjudicatory proceedings and requires agencies to adopt rules governing such proceedings.

2. Legislative Objectives:

As set forth in Section 7.01 of the Mental Hygiene Law, the state of New York and its local governments have a responsibility for the prevention and detection of mental illness and for the comprehensively planned care, treatment, and rehabilitation of its citizens who have mental illness. Section 7.07 of such law evinces the Legislature's intent to facilitate effective, quality care for persons with mental illness by charging the Commissioner of Mental Health with the responsibility for "seeing that mentally ill persons are provided with care and treatment, that such care, treatment and rehabilitation is of high quality and effectiveness, and that the personal and civil rights of persons receiving care, treatment and rehabilitation are adequately protected."

Through passage of Mental Hygiene Law Article 31, the Legislature created the process through which providers of service would receive certification through the Office of Mental Health to engage in the provision of such services. In recognition of the fact that a provider of services would have a property right in an operating certificate, the Legislature further ensured the provision of appropriate due process in the event the Office initiated action to revoke, suspend, or limit such operating certificate. Because the Commissioner of Mental Health is charged with the responsibility for the care and treatment of persons with mental illness, the Legislature empowered the Commissioner to adopt regulations governing the review procedures available through Mental Hygiene Law Article 31, in order to effect the appropriate balance between the compelling need to

ensure the health, safety, and welfare of persons with mental illness and the due process protections afforded the provider of services by virtue of its property interest in an operating certificate.

3. Needs and Benefits:

Section 31.16 of the Mental Hygiene Law establishes requisite procedures associated with the suspension, revocation, or limitation of an operating certificate, as well as imposition of fines by the Commissioner of Mental Health. These actions are authorized upon a determination by the Office that the holder of the certificate has failed to comply with the terms of its operating certificate or with the provisions of any applicable statute, rule or regulation. In accordance with this section, a provider of services must be provided with notice and an opportunity to be heard prior to any such determination, except if no such notice or opportunity to be heard is necessary prior to an emergency suspension or limitation of an operating certificate in accordance with the provision of subdivision (b) of such Section.

When an opportunity to be heard is requested by the holder of an operating certificate, the statute requires that a hearing be scheduled by the Office of Mental Health. A copy of charges stating the substance of the alleged violations of the terms of the operating certificate or the alleged violation of any applicable statute, rule or regulation, together with the notice of the date, time and place of the hearing, must be served in person or mailed by registered or certified mail to the facility at least ten days before the date fixed for the hearing.

The statute gives a provider the right to file a written answer to the charges with the Office within 3 days prior to the hearing. In accordance with the statute, all parties are afforded the right of counsel, as well as an opportunity to require the production of witnesses and evidence in manner and form as prescribed by the New York State Civil Practice Law and Rules, to cross-examine witnesses, to examine evidence produced against them, and to have subpoenas issued on their behalf.

Section 31.16 of the Mental Hygiene Law further requires the Commissioner of Mental Health to issue a ruling within 10 days after the termination of the hearing or, if a hearing officer has been designated, within 10 days from the hearing officer's report. The ruling must be based upon a preponderance of the evidence and shall contain conclusions concerning the alleged violations of the terms of the operating certificate or the alleged violation of any applicable statute, rule or regulation. The statute explicitly states that all orders or determinations issued under Mental Hygiene Law Section 31.16 are subject to review as provided in Article 78 of the Civil Practice Law and Rules.

14 NYCRR Section 503.4 sets forth general hearing procedures which apply, *inter alia*, to the conduct of hearings held in response to Office action to suspend, revoke, or limit an operating certificate. This section includes all of the statutorily required procedures as set forth in Mental Hygiene Law Section 31.16.

Over time, it has become evident that some additional procedures have been added to Office regulations, though not statutorily required. As such, these procedures exceed the minimum due process protections the Legislature deemed essential via the passage of Mental Hygiene Law Section 31.16.

When value is added by these additional procedures, the Office has determined to voluntarily preserve these additional procedures. However, the Office has also determined that some of these additional procedures, in fact, do not add value to the process and could actually serve to harm persons whose personal and civil rights the Legislature has charged the Office as responsible for protecting. This is the case with respect to the proposed amendment to 14 NYCRR Section 503.4.

Subdivision (i) of 14 NYCRR Section 503.4 includes procedures applicable to the hearing officer's report. In accordance with the governing statute, (Mental Hygiene Law Section 31.16), after a hearing officer issues a report, the Commissioner of Mental Health must issue a ruling within 10 days from the hearing officer's report. The ruling must be based upon a preponderance of the evidence and shall contain conclusions concerning the alleged violations of the terms of the operating certificate or the alleged violation of any applicable statute, rule or regulation. The statute explicitly states that all orders or determinations issued under Mental Hygiene Law Section 31.16 are subject to review as provided in Article 78 of the Civil Practice Law and Rules.

Notably, 14 NYCRR Section 503.4(i) places an additional step in the process by providing the opportunity for any party to submit objections to the hearing officer's report. This opportunity is not provided in statute. Over time, the Office has discovered that this additional step does not only not add value to the process, it actually serves to detract from it. First, it serves as an incentive to both parties to not comprehensively present their

case at the hearing, since they will be provided with an opportunity to submit additional evidence outside of the scope of the hearing, with no opportunity for either party to respond to this additional submission. Secondly, it serves to consume more time before a determination can be finally issued, which could extend the period of time during which a provider can operate in violation of agency regulations, to the detriment of the personal and civil rights of the persons it serves. Thus, since both parties have the opportunity to submit briefs to the hearing officer before he or she renders a decision, the need for comments regarding the decision is unnecessary, provides an unfair opportunity to provide additional evidence outside of the hearing process, and unduly lengthens the process for no additional benefit.

In its establishment of Mental Hygiene Law Section 31.16, the Legislature identified the due process it felt was legally essential to protect the property interests of providers with respect to operating certificates. As such, the opportunity to initiate an Article 78 action under the Civil Practice Law and Rules was determined to be sufficient due process with respect to parties who were not satisfied with a determination issued pursuant to Mental Hygiene Law Section 31.16.

Accordingly, the Office has determined that the additional procedural step established in 14 NYCRR Section 503.4 (i)(2) is not required by statute, is duplicative, encourages the opportunity to submit additional evidence outside of the hearing process to the detriment of either party, does not add value to the process, and delays the time during which regulatory violations can persist, to the possible detriment of the civil and personal rights of persons for whom the Office is legally responsible.

4. Costs:

(a) cost to regulated persons: This regulatory amendment will not result in any additional costs to regulated persons.

(b) cost to State and local government: This regulatory amendment should not result in any additional costs to State and local government. By removing an unnecessary step in the hearing officer process, it has the potential to reduce costs associated with this process.

5. Paperwork:

There are no new paperwork requirements associated with this amendment.

6. Local Government Mandates:

This regulatory amendment will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

7. Duplication:

There are no duplicate, overlapping or conflicting mandates which may affect this rule.

8. Alternative Approaches:

The only alternative to this regulatory amendment would be inaction. For all of the reasons cited in the Needs and Benefits section of this Statement, that alternative was necessarily rejected as unreasonable in light of the statutory responsibilities for which the Legislature has charged the Office of Mental Health.

9. Federal Standards:

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

10. Compliance Schedule:

The regulatory amendment will apply to all applicable administrative hearings commenced on or after the date of adoption of the amendment.

Regulatory Flexibility Analysis

Because it is evident from the nature of the proposed rule that there will be no adverse economic impact on small businesses or local governments, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the proposed rule will not impose any adverse economic impact on rural areas.

Job Impact Statement

It is clear from the nature of this regulatory amendment, which simply eliminates a duplicative step in the hearing officer process in an effort to streamline and expedite the process, that there will be no adverse impact on jobs or employment opportunities in New York State.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Fee Setting in HCBS Waiver Community Residential Habilitation Services, Clinic Treatment and Day Treatment Facilities

I.D. No. MRD-20-08-00033-A

Filing No. 715

Filing date: July 14, 2008

Effective date: Aug. 1, 2008

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

Action taken: Amendment of sections 671.7, 679.6 and 690.7 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 43.02

Subject: Fee setting in HCBS waiver community residential habilitation services, clinic treatment and day treatment facilities.

Purpose: To establish cost of living (COLA) adjustments and trend factors applicable to these facilities and services.

Text or summary was published in the notice of proposed rule making I.D. No. MRD-20-08-00033-P, Issue of May 14, 2008.

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

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, OMRDD, Regulatory Affairs Unit, Office of Counsel, 44 Holland Ave., Albany, NY 12229, (518) 474-1830, e-mail: barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act (SEQRA) and in accordance with 14 NYCRR Part 622, OMRDD has on file a negative declaration with respect to this action. Thus, consistent with the requirements of 6 NYCRR Part 617, OMRDD, as lead agency, has determined that the action described herein will not have significant effect on the environment, and an environmental impact statement will not be prepared.

Assessment of Public Comment

An assessment is not attached because no comments were received.

Department of Motor Vehicles

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Issuance of Enhanced Driver's Licenses

I.D. No. MTV-31-08-00015-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 3 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 508(1) and (4)

Subject: Issuance of enhanced driver's licenses.

Purpose: To authorize the fingerprinting of certain employees who are involved in the issuance of enhanced driver's licenses.

Text of proposed rule: Section 3.3 is amended by adding a new subdivisions (f) and (g) to read as follows:

(f) No employee or agent of the Department of Motor Vehicles shall be involved in the issuance of an enhanced drivers license or non-driver identification card, pursuant to section 503(2)(f-1) or 491(2) of the Vehicle and Traffic Law, unless such employee or agent: 1) is a United States citizen, and 2) has undergone a State and FBI fingerprint based criminal history background check, as required under an agreement between the Department of Motor Vehicles and the federal Department of Homeland

Security, entered into pursuant to 8 CFR 235.1 and section 7209 of the intelligence reform and terrorism prevention act of two thousand four, public law 108-458, and such search indicates that such employee or agent has not been convicted of, or charged with, a disqualifying offense as set forth in 49 CFR 1572.103.

(g) The provisions of the Code of Federal Regulations which have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the booklet entitled: Code of Federal Regulations, title 49, Part 1572, revised as of March 30, 2007, and 8 CFR 235.1, revised as of April 3, 2008 published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The provisions of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, have also been incorporated by reference and have been filed with the Secretary of State of the State of New York. The regulations and public law incorporated by reference may be examined at the Office of the Department of State, One Commerce Plaza, 99 Washington Ave, Albany, NY 12231, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Motor Vehicles, Office of Counsel, 6 Empire State Plaza, Albany, NY 12228. They may also be purchased from the Superintendent of Documents, Government Printing Office Washington, DC 20402. Copies of the Code of Federal Regulations and public laws are also available at many public libraries and bar association libraries.

Text of proposed rule and any required statements and analyses may be obtained from: Carrie L. Stone, Counsel's Office, Department of Motor Vehicles, 6 Empire State Plaza, Albany, NY 12228, (518) 474-0871, e-mail: carrie.stone@dmv.state.ny.us

Data, views or arguments may be submitted to: Ida L. Traschen, First Assistant Counsel, Department of Motor Vehicles, 6 Empire State Plaza, Albany, NY 12228

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 for publication in the Register.

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department. VTL section 508(1) provides that the Commissioner shall appoint agents to act on his behalf to issue drivers licenses and authorizes him or her to prescribe internal procedures to be followed by such agents with respect to such matters. VTL section 508(4) authorizes the Commissioner to promulgate regulations with respect to the administration of the provisions of Article 19, Licensing of Drivers.

2. Legislative objectives: The Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, established several measures to enhance the security of the United States. One proposal was the Western Hemisphere Travel Initiative (WHTI), as set forth by the Department of Homeland Security (DHS) in the June 26, 2007 and April 3, 2008 Federal Registers. A key component of WHTI is the issuance of an enhanced driver's license (EDL) that will enable US citizens to more easily enter the United States at land and sea crossings. DHS has issued a mandatory policy directive that employees may only issue EDLs if such employees are United States citizens and have been subject to a criminal history check. This proposed regulation, which subjects certain Department of Motor Vehicle and county employees to a criminal history check and requires verification of U.S. citizenship, is necessary to comply with the DHS policy directive.

3. Needs and benefits: As explained above, WHTI is a plan devised by the United States Department of Homeland Security pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004. Under WHTI, all travelers must present a secure document, such as a passport or other document, which denotes citizenship and identity when entering or departing the United States from within the Western Hemisphere. An enhanced driver license and enhanced non-driver photo identification card are documents designated as secure and acceptable documents under WHTI for land and sea travel border crossings. These enhanced documents will contain a vicinity Radio Frequency Identification (RFID) chip, and a Machine Readable Zone (MRZ) that can be scanned, to facilitate border and port processing, as well as include physical security features that will guard against tampering. The RFID technology will allow a device to read information contained in a wireless device or "tag" from a distance without making any physical contact or requiring a line of sight between the two.

The EDL, available only to US citizens, will enable its holders to more easily cross land and sea borders. It is critical to maintaining New York State's significant commercial and tourism relationship with Canada, with which we share a 445 mile border. It will also enhance our security by allowing Custom's officials to more readily screen those passing through our borders.

DHS policy mandates that employees who are involved in the issuance of EDLs must be U.S. citizens and be subject to criminal history checks. There are approximately 900 DMV employees and 900 county employees, who act as agents of the DMV Commissioner pursuant to Vehicle and Traffic Law section 205, who will be involved in the issuance of EDLs. These employees must be screened for citizenship and fingerprinted in accordance with DHS directive. The employees' prints will be transmitted to the Division of Criminal Justice Services for a State and federal criminal history check. Thus, this rulemaking is necessary to require such employees to be screened for citizenship and be fingerprinted prior to issuing EDLs.

4. Cost: To the State: DMV expects to purchase three Livescan units that perform electronic fingerprinting at a cost of about \$152,000. The Livescan machines will be used to fingerprint DMV employees. The counties will choose the method appropriate to them, but for many, it will be the ink and roll method. In addition to assuming the cost of fingerprinting all DMV employees, the Department will assume the cost of fingerprinting county employees who are employed prior to the implementation date of EDL issuance, which is targeted for late summer 2008. An ink and roll fingerprint costs \$61.00 per employee. A Livescan fingerprint costs \$38.00 per employee. Thus, fingerprinting all DMV employees using Livescan would cost about \$34,200.00. We cannot estimate the cost of fingerprinting county employees because we do not know how many will use Livescan and how many will use ink and roll.

5. Cost to local governments: DMV will assume the cost of fingerprinting county employees who are hired prior to the implementation of EDL issuance, which is targeted for late summer 2008. This will minimize the adverse impact on local governments.

6. Paperwork: DMV will develop a system to track employees who have been fingerprinted and the results of the fingerprint check. Each county will be responsible for keeping track of its employees. DMV and each county will develop processes to validate citizenship, such as reviewing an employee's birth certificate or passport.

7. Duplication: This proposed regulation does not duplicate or conflict with any State or Federal rule.

8. Alternatives: A "no action alternative" was considered but was deemed not viable, because DHS requires that certain employees must be U.S. citizens and be fingerprinted in order for them to issue EDLs. DMV contacted CSEA and PEF regarding this matter, because it affects covered employees. DMV negotiated a policy statement with the two unions that encapsulates the requirements of U.S. citizenship and fingerprinting. The unions did not offer an alternative to these two requirements.

9. Federal standards: This rule does not exceed or conflict with any federal law or regulation.

10. Compliance schedule: Upon adoption of the regulation.

Regulatory Flexibility Analysis

1. Effect of rule: This proposal does not affect small businesses. Fifty-one counties will need to validate their employees' citizenship status and fingerprint those employees who will be involved in the issuance of Enhanced Drivers Licenses (EDLs). DMV estimates 900 county employees will be subject to the fingerprint requirement. In addition, approximately 900 DMV employees will be fingerprinted.

2. Compliance requirements: All county employees who are involved in the issuance of EDLs shall be subject to the criminal history check and citizenship verification.

3. Professional services: None are mandated. For example, the county may choose to use the local sheriff's department as a fingerprinting resource. The county, however, may contract with a vendor to purchase Livescan equipment for electronic fingerprinting.

4. Compliance costs: DMV will pay the costs to fingerprint county employees who are employed by the county prior to the implementation of the EDL program, which is targeted for the summer 2008. The county would assume the cost of purchasing a Livescan machine, which costs about \$50,000 per unit.

5. Economic and technological feasibility: The county may utilize the ink and roll fingerprinting technique or may purchase Livescan machines that electronically fingerprint individuals.

6. Minimizing adverse impact: The Department will minimize the impact by paying the cost of fingerprinting county employees who are

employed by the county prior to EDL issuance, which is targeted for late summer 2008. DMV has had numerous meetings and contacts with the 51 county clerks who will be impacted by the program. DMV will continue to assist them with developing procedures to implement the EDL program.

7. Small business and local government participation: The Department has met with the 51 county clerks on several occasions to assist them with implementing the EDL program. DMV has a County Clerk liaison who works with the clerks on a daily basis to address their concerns.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not submitted with this rule because it will not have an adverse impact on job creation or development. DMV and county employees who are not U.S. citizens and/or who are found to have been convicted of a disqualifying offense pursuant to a criminal history check will not be terminated. Such employees will perform other motor vehicle related services that do not involve the issuance of the Enhanced Drivers License (EDL), such as issuing registrations or non-EDLs.

Public Service Commission

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

Purchase of Accounts Receivable Program filed by KEDNY

I.D. No. PSC-31-08-00017-P

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

Proposed action: A filing by the Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) to implement a proposed Purchase of Accounts Receivable Program.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Purchase of Accounts Receivable Program filed by KEDNY.

Purpose: To develop recommendations for a Purchase of Accounts Receivable Program to be implemented by KEDNY.

Substance of proposed rule: On December 21, 2007, the Public Service Commission (Commission) issued an Order in Case 06-G-1185 which required The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) to implement a Purchase of Accounts Receivable Program in which KEDNY will purchase the accounts receivable of Energy Service Companies (ESCOs) doing business in its service territory and participating in KEDNY's consolidated billing program. KEDNY filed, in accordance with the Order, a proposed Purchase of Accounts Receivable Program.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-G-1185SA5)

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

Weather Normalization Adjustment Calculation

I.D. No. PSC-31-08-00018-P

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

Proposed action: A proposal filed by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) regarding the elimination of the 2.2 percent deadband from its weather normalization adjustment calculation.

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

Subject: Weather normalization adjustment calculation.

Purpose: To make revisions to KEDLI's weather normalization adjustment calculation to remove the 2.2 percent deadband.

Substance of proposed rule: The Commission is considering a proposal filed by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI) to eliminate the 2.2% deadband from KEDLI's weather normalization adjustment calculation prior to the upcoming heating season. The Commission may approve, reject or modify, in whole or in part, KEDLI's proposal.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(06-G-1186SA3)

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

Disposition of Tax Refund

I.D. No. PSC-31-08-00019-P

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

Proposed action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Verizon New York Inc. to retain \$1.1 million, the regulated, intrastate New York portion of a \$1.8 million property tax refund.

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

Subject: Disposition of tax refund.

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

Substance of proposed rule: On July 1, 2008, Verizon New York Inc. (Verizon) filed a petition proposing the disposition of that portion of a tax refund and tax credits allocable to its regulated, intrastate New York operations. The overall tax refund of approximately \$1,774,000 was the result of the settlement of claims related to Verizon's real property assessments in the City of White Plains. Verizon requests permission to retain that portion of the tax refund allocable to its regulated, intrastate New York operations, approximately \$1,080,000. The Commission may approve or reject, in whole or in part, Verizon's request.

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

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

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

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

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

(08-C-0749SA1)

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

Issuance of Securities

I.D. No. PSC-31-08-00020-P

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

Proposed action: A petition of National Fuel Gas Distribution Corporation ("distribution") for authorization to issue and sell securities.

Statutory authority: Public Service Law, section 69

Subject: Issuance of securities.

Purpose: To permit the company to issue and sell securities.

Substance of proposed rule: The Commission is considering whether to approve, reject or modify a petition by National Fuel Gas Distribution Corporation (Distribution) to issue promissory notes in the aggregate principal amount of not more than \$175,000,000, and to assume the costs and benefits of certain derivative instruments in notational amounts not to exceed \$350,000,000 at any one time outstanding. Distribution will use net proceeds for various purposes; including reimbursement of Distribution's treasury for moneys expended for capital purposes during the calendar years 2009 through 2011, repayment of existing debt, construction expenditures, and for general corporate purposes, and will authorize Distribution to enter into agreements concerning derivative transactions. The Commission shall consider all other related matters.

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

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

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

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

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

(08-G-0741SA1)

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

Interim Energy Efficiency Program and Lost Revenue Mechanism for Niagara Mohawk Power Corporation

I.D. No. PSC-31-08-00021-P

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

Proposed action: To approve, modify or reject, in whole or in part, an interim energy efficiency program and lost revenue mechanism for Niagara Mohawk Power Corporation d/b/a National Grid.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Interim energy efficiency program and lost revenue mechanism for Niagara Mohawk Power Corporation.

Purpose: To develop and implement an interim energy efficiency program and lost revenue mechanism for Niagara Mohawk Power Corporation.

Substance of proposed rule: In accordance with the June 23, 2008 Order Case 07-M-0548, which sets out the Energy Efficiency Portfolio Standard and approves the implementation of certain energy efficiency programs, and incorporating Niagara Mohawk Power Corporation d/b/a National

Grid's (Niagara Mohawk) rate filing in Case 08-G-0609, Staff for the Department of Public Service, Niagara Mohawk and the Active Parties in Case 08-G-0609 are seeking to implement an interim energy efficiency program and lost revenue mechanism for Niagara Mohawk Power Corporation for use during the 2008-2009 winter heating season. The Commission shall approve, reject or modify, in whole or in part, the interim energy efficiency program and lost revenue mechanism.

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

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

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

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

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

(08-G-0609SA1)

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

Modifications in the Current Process While Providing More Flexibility to Current Market Participants

I.D. No. PSC-31-08-00022-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 extending the settlement period for conversion transactions used in the calculation of environmental disclosure labels for retail electricity providers from six months to 12 months.

Statutory authority: Public Service Law, sections 4(1), 5(2), 66(1) and (2)

Subject: Modifications in the current process used to calculate environmental disclosure labels.

Purpose: Improve the efficiency of the current process while providing more flexibility to current market participants.

Substance of proposed rule: The New York State Public Service Commission (NYPSC or Commission) is considering modifying the settlement period used for the Environmental Disclosure Program. New York State's Environmental Disclosure Program was established to provide information to retail electricity customers about the attributes of the electricity being supplied to them by their Load Serving Entity. The information is presented to the customer in the form of a label that discloses information based on the last calculated annual period. The label contains a disclosure of the mix of fuel sources used to produce the electricity that was purchased by the consumer and a graph that displays how the emission levels of sulfur dioxide (SO₂), nitrogen oxide (NO_x) and carbon dioxide (CO₂) for that fuel mix compare to the average for New York State. Staff of the New York State Department of Public Service (the Administrator) administer the program and currently compile and distribute updated environmental disclosure information in a six-month cycle or settlement period. The Commission is considering modifying the settlement period so that the compilation and distribution of updated environmental disclosure information would occur in a twelve-month cycle or settlement period corresponding with the calendar year.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (94-E-0952SA39)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Funds would be Reallocated to the Anaerobic Digester—Electricity and Solar PV Programs in the Customer-Sited Tier

I.D. No. PSC-31-08-00023-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 reallocating and increasing funding approved for specific technologies in the order on customer-sited tier implementation (renewable portfolio standard) issued and effective June 28, 2006.

Statutory authority: Public Service Law, sections 4(1), 5(2), 66(1) and (2)

Subject: Funds would be reallocated to the anaerobic digester—electricity and solar PV programs in the customer-sited tier.

Purpose: To respond to demonstrated demand and changing market need for solar PV and anaerobic digester technologies.

Substance of proposed rule: The New York State Public Service Commission is considering authorizing reallocation of additional funds to the Renewable Portfolio Standard (RPS) Customer-Sited Tier. The purpose of the increased funding, if approved, is to respond to changing market needs for eligible renewable energy technologies.

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

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

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

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

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

(03-E-0188SA17)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Transfer of Water Supply Assets

I.D. No. PSC-31-08-00024-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 joint petition filed by Scott A. Tozzi and J.J. Gokey Properties, Inc. for approval to transfer the water supply assets of Roland Properties, Inc., f/k/a Knollwood Water Company, to J.J. Gokey Properties, Inc.

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

Subject: Transfer of water supply assets.

Purpose: To transfer the water plant assets of Roland Properties, Inc., f/k/a Knollwood Water Company, to J.J. Gokey Properties, Inc.

Substance of proposed rule: On June 20, 2008, Scott A. Tozzi and J.J. Gokey Properties, Inc. filed a joint petition requesting approval to transfer the water supply assets of Roland Properties, Inc. (Roland) f/k/a Knollwood Water Company (Knollwood) to J.J. Gokey Properties, Inc. Roland currently provides water service to 4 residential homes in the Town of Malone, Franklin County. The Commission may approve or reject, in whole or in part, or modify the petition.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:

Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

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

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

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

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

(08-W-0737SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Recovery of Reasonable DRS Costs from the Cost Mitigation Reserve (CMR)

I.D. No. PSC-31-08-00025-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 approve, modify or reject, in whole or in part, a petition filed by National Fuel Gas Corporation for authorization to recover reasonable costs of the Discounted Retail Access Transportation Program (DRS).

Statutory authority: Public Service Law, section 66

Subject: Recovery of reasonable DRS costs from the cost mitigation reserve (CMR).

Purpose: To authorize recovery of the DRS costs from the CMR.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition by National Fuel Gas Distribution Corporation to recover \$292,106.84 of costs for the Discounted Retail Access Transportation Service Program from the Cost Mitigation Reserve (CMR). Pursuant to the terms in the Joint Proposal in Case 04-G-1047, Commission approval is required to recover these costs from the CMR. The Commission shall consider all other related matters.

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

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

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

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

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

(04-G-1047SA7)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Weather Normalization Adjustment Calculation

I.D. No. PSC-31-08-00026-P

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

Proposed action: A proposal filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) regarding the elimination of the 2.2 percent deadband from its weather normalization adjustment calculation.

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

Subject: Weather normalization adjustment calculation

Purpose: To make revisions to KEDNY's weather normalization adjustment calculation to remove the 2.2 percent deadband.

Substance of proposed rule: The Commission is considering a proposal filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY) to eliminate the 2.2% deadband from KEDNY's weather normalization adjustment calculation prior to the upcoming heating season. The Commission may approve, reject or modify, in whole or in part, KEDNY's proposal.

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

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

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

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

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

(06-G-1185SA6)

Department of State

EMERGENCY RULE MAKING

Use of Temporary Swimming Pool Enclosures During the Period of Construction or Installation of a Swimming Pool

I.D. No. DOS-31-08-00001-E

Filing No. 708

Filing date: July 10, 2008

Effective date: July 10, 2008

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

Action taken: Addition of section 1228.4 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378; and L.2007, ch. 234, section 3

Finding of necessity for emergency rule: Preservation of public safety.

Specific reasons underlying the finding of necessity: This rule is adopted on an emergency basis to preserve public safety and because time is of the essence. Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007, provide that the State Uniform Fire Prevention and Building Code (the Uniform Code) must (1) include standards for temporary swimming pool enclosures used during the construction or installation of swimming pools requiring that any such enclosure shall sufficiently prevent any access to such swimming pool by any person not engaged in the installation or construction of such swimming pool and shall sufficiently provide for the safety of any such person, and (2) require that any temporary swimming pool enclosure be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in ground swimming pool, whichever is later. Section 3 of Chapter 234 of the Laws of 2007 provides that the regulations necessary to implement the new requirements must be adopted prior to the effective date of Chapter 234. The effective date of Chapter 234 was January 14, 2008. A prior emergency rule similar to this rule was filed on January 14, 2008 and became effective on that date. The prior emergency rule has expired. A second emergency rule similar to this rule was filed on April 11, 2008 and became effective on that date. That rule has also expired. Adoption of this rule on an emergency basis is necessary to reduce the number of accidental drownings in swimming pools, and to continue to satisfy the mandate of section 3 of Chapter 234 of the Laws of 2007.

Subject: Use of temporary swimming pool enclosures during the period of construction or installation of a swimming pool.

Purpose: To implement Executive Law, section 378(14)(c) and (16), as added by L. 2007, ch. 234.

Text of emergency rule: Part 1228 of Title 19 NYCRR is amended by adding a new section 1228.4 to read as follows:

Section 1228.4. Temporary swimming pool enclosures.

(a) *Purpose.* This section is intended to implement the provisions of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007. (The provisions of Executive Law section 378(14)(c), as added by Chapter 75 of the Laws of 2007, as well as the provisions of Executive Law section 378(14)(b), are implemented by section 1228.2 (Pool alarms) of this Part.)

(b) *Definition.* For the purposes of this section, the following words and terms shall have the following meanings:

(1) The word "approved" means approved by the code enforcement official responsible for enforcement and administration of the Uniform Code as complying with and satisfying the purposes of this section.

(2) The term "complying permanent enclosure" means an enclosure which surrounds a swimming pool and which complies with (i) all provisions of the Uniform Code (other than the provisions of subdivision (c) of this section) applicable to swimming pool enclosures, (ii) the provisions of any and all other New York State codes or regulations applicable to swimming pool enclosures, and (iii) any and all local laws applicable to swimming pool enclosures and in effect in the location where the swimming pool shall have been installed or constructed.

(3) The term "swimming pool" means any structure, basin, chamber or tank which is intended for swimming, diving, recreational bathing or wading and which contains, is designed to contain, or is capable of containing water more than 24 inches (610 mm) deep at any point. This includes in-ground, above-ground and on-ground pools; indoor pools; hot tubs; spas; and fixed-in-place wading pools.

(c) *Temporary enclosures.* During the installation or construction of a swimming pool, such swimming pool shall be enclosed by a temporary enclosure which shall sufficiently prevent any access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and sufficiently provide for the safety of any such person. Such temporary enclosure may consist of a temporary fence, a permanent fence, the wall of a permanent structure, any other structure, or any combination of the foregoing, provided all portions of the temporary enclosure shall be not less than four (4) feet high, and provided further that all components of the temporary enclosure shall have been approved as sufficiently preventing access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and as sufficiently providing for the safety of all such persons. Such temporary enclosure shall remain in place throughout the period of installation or construction of the swimming pool, and thereafter until the installation or construction of a complying permanent enclosure shall have been completed.

(d) *Permanent enclosures.* A temporary swimming pool enclosure described in subdivision (c) of this section shall be replaced by a complying permanent enclosure. The installation or construction of the complying permanent enclosure must be completed within ninety days after the later of

(1) the date of issuance of the building permit for the installation or construction of the swimming pool or

(2) the date of commencement of the installation or construction of the swimming pool; provided, however, that if swimming pool is installed or constructed without the issuance of a building permit, the installation or construction of the complying permanent enclosure must be completed within ninety days after the date of commencement of the installation or construction of the swimming pool. Nothing in this subdivision shall be construed as permitting the installation or construction of a swimming pool without the issuance of a building permit if such a building permit is required by any statute, rule, regulation, local law or ordinance relating to the administration and enforcement of the Uniform Code with respect to such swimming pool.

(e) *Extensions.* Upon application of the owner of a swimming pool, the governmental entity responsible for administration and enforcement of the Uniform Code with respect to such swimming pool may extend the time period provided in subdivision (d) of this section for completion of the installation or construction of the complying permanent enclosure for good cause, including, but not limited to, adverse weather conditions delaying construction.

(f) *Exceptions.* An above-ground hot tub or spa equipped with a safety cover classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F1346

(2003), entitled "Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs," published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, shall be exempt from the requirements of subdivisions (c) and (d) of this section, provided that such safety cover is in place during the period of installation or construction of such hot tub or spa. The temporary removal of a safety cover as required to facilitate the installation or construction of a hot tub or spa during periods when at least one person engaged in the installation or construction of the hot tub or spa is present shall not invalidate the exception provided in 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 October 7, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Raymond Andrews, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, e-mail: Raymond.Andrews@dos.state.ny.us

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Executive Law section 377(1) authorizes the State Fire Prevention and Building Code Council to periodically amend the provisions of the New York State Uniform Fire Prevention and Building Code ("Uniform Code"). Executive Law section 378(1) directs that the Uniform Code shall address standards for safety and sanitary conditions. Executive Law section 378(16), as added by Chapter 234 of the Laws of 2007, requires that the Uniform Code include standards for temporary swimming pool enclosures used during the installation or construction of swimming pools requiring that any such enclosure shall sufficiently prevent any access to such swimming pool by any person not engaged in the installation or construction of such swimming pool and shall sufficiently provide for the safety of any such person. Executive Law section 378(14)(c), as added by Chapter 234 of the Laws of 2007, requires that the Uniform Code provide that any temporary swimming pool enclosure be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in-ground swimming pool, whichever is later. Executive Law section 378(14)(c), as added by Chapter 234 of the Laws of 2007, also provides that a local building department may issue a waiver to allow an extension of such ninety day time period for good cause, including but not limited to adverse weather conditions delaying construction.

2. LEGISLATIVE OBJECTIVES:

In the memorandum accompanying the bill which became Chapter 234 of the Laws of 2007, the Legislature stated as justification for the bill:

"According to a 2004 study by the National SAFE KIDS Campaign, drowning is the second leading cause of injury-related death among children ages 1 to 14. In 2001, 859 children under age 14 died from drowning, and in 2002, an estimated 2,700 children under age 14 were treated in hospital emergency rooms for near-drowning. Drowning can occur in only one inch of water. A child loses consciousness after two minutes of being submerged, and permanent brain damage occurs after only four to six minutes.

"The health effects of near-drowning can also be severe, including permanent neurological disability, and psychological and emotional impacts. The financial impacts on the child's family are also significant, with costs of \$75,000 for initial treatment, \$180,000 per year for long-term care, and a lifetime cost of over \$4.5 million per child. Of all drownings reviewed by SAFE KIDS, 39 percent occurred in pools.

"Studies have shown that proper fencing could reduce the number of deaths caused by drowning and near-drownings that involve children by 50 to 90 percent.

"In one tragic incident on May 1, 2005, Matthew Lenz, age 2 1/2 of Craryville in Columbia County, lost his life after wandering onto a neighbor's property with an in-ground swimming pool that had no fence. Had the pool been properly secured by fencing, as required by the State Residential Code section AG 105, Matthew's life may have been spared.

"At present, New York's residential codes pertaining to pool enclosures comply and surpass federal code. On occasion however, fencing is not erected at all, or some pool owners rely on temporary fencing for an inordinate amount of time. While municipal building departments are charged with the responsibility of inspecting pool enclosures, they are reliant on pool owners to seek building permits and, at times, never notified that a pool has been installed.

"Neither current statute nor rules and regulations pertaining to swimming pool enclosures address the length of time a temporary fence may be in place."

The Legislative objective sought to be achieved by this rule is a reduction in the number of accidental drownings in swimming pools in this State.

3. NEEDS AND BENEFITS:

This rule making amends the Uniform Code by adding a new provision (19 NYCRR section 1228.4) which requires that a swimming pool be enclosed by a temporary enclosure during the installation or construction of the pool; requires that such temporary enclosure sufficiently prevent access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and sufficiently provide for the safety of any such person; and requires that such temporary enclosure be replaced by a permanent enclosure that complies with the requirements of existing laws and regulations within 90 days of issuance of the building permit or commencement of installation or construction of the pool. By requiring the use of such temporary enclosures during installation / construction, and by requiring the replacement of such temporary enclosures with permanent enclosures within the stated time period, this rule should provide the benefit intended by the Legislature: a reduction in the number of accidental drownings.

4. COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. An average residential pool can be fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more.

Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool construction or installation activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction/installation period.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

There are no costs to the Department of State for the implementation of the rule. The Department of State is not required to develop any additional regulations or develop any programs to implement the rule.

There are no costs to New York State or local governments for the implementation of the rule; provided, however, that if the State or any local government installs or constructs a swimming pool, it will be required to install the temporary enclosure as required by this rule, and to replace such temporary enclosure with a permanent enclosure within the time period specified by this rule. In addition, since this rule adds provisions to the Uniform Code, in a situation where the State or a local government is responsible for administration and enforcement of the Uniform Code with respect to the installation or construction of a swimming pool, the State or such local government will be required to consider the requirements added by this rule in reviewing plans and performing inspections; however, it is anticipated that this will not have a significant impact on the review and/or inspection process.

5. PAPERWORK:

This rule imposes no new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

6. LOCAL GOVERNMENT MANDATES:

This rule does not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows: First, any county, city, town, village, school district, fire district or other special district that installs or constructs a swimming pool will be required to comply with this rule. Second, cities, towns and villages (and sometimes counties) are charged by Executive Law section 381 with the responsibility of administering and enforcing the Uniform Code; since this rule adds provisions to the Uniform Code, the aforementioned local governments will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code.

7. DUPLICATION:

The rule does not duplicate any existing Federal or State requirement.

8. ALTERNATIVES:

This rule provides an exemption from the temporary enclosure requirement for above-ground spas and hot tubs equipped with a safety cover. The alternative of not providing such an exemption was considered, but rejected, because hot tubs and spas equipped with a safety cover are exempt from the permanent enclosure requirements, and it would be illogical to require such hot tubs and spas to be enclosed with a temporary enclosure during the installation / construction period when they are not required to be enclosed with a permanent enclosure after installation / construction is complete. The alternative of providing an exemption for in-ground hot tubs and spas was considered and rejected, since there would be an unprotected and uncovered hole in the ground during the installation / construction of such a hot tub or spa, and a temporary enclosure would provide a measure of protection against children and others falling into the hole during the installation / construction period. No other significant alternatives to this rule were considered, since other alternatives would not provide the safety protections contemplated by Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007.

9. FEDERAL STANDARDS:

There are no standards of the Federal Government which address the subject matter of the rule.

10. COMPLIANCE SCHEDULE:

Regulated persons will be able to achieve compliance with the rule in the normal course of the installation or construction of a swimming pool.

Regulatory Flexibility Analysis**1. EFFECT OF RULE:**

This rule will apply to any small business and any local government that installs or constructs a swimming pool. The State Fire Prevention and Building Code Council (the Code Council) and the Department of State are unable to estimate the number of small businesses and local governments that own or operate swimming pools; however, it is believed that a majority of the non-residential swimming pools in this State are owned or operated by small businesses or local governments.

Small businesses that install or construct swimming pools for others will also be affected by this rule.

Since this rule adds a provisions to the Uniform Fire Prevention and Building Code (the Uniform Code), each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The State Fire Prevention and Building Code Council (the Code Council) and the Department of State estimate that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

2. COMPLIANCE REQUIREMENTS:

No reporting or record keeping requirements are imposed upon regulated parties by the rule. Small businesses and local governments that install or construct swimming pools will be required to erect a temporary enclosure around the pool during the installation / construction period, and to replace the temporary enclosure with a permanent enclosure (as required by existing laws and regulations) within 90 days after issuance of the building permit or commencement of installation or construction. Local governments that enforce the Uniform Code will be required to consider the requirements of this rule when reviewing plans for installation or construction of a pool by any person or entity, public or private, and when inspecting work.

3. PROFESSIONAL SERVICES:

No professional services will be required to comply with the rule.

4. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. An average residential pool can be fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more. Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool installation / construction activities, and by using temporary enclosure components to en-

close only the remainder of the pool area during the construction / installation period.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days after issuance of the building permit or commencement of installation of the pool, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

It is economically and technologically feasible for regulated parties to comply with the rule. No substantial capital expenditures are imposed and no new technology need be developed for compliance.

6. MINIMIZING ADVERSE IMPACT:

The rule minimizes any potential adverse economic impact on regulated parties (including small businesses or local governments) by allowing use of any type of temporary enclosure, provided that it is (1) at least 4 feet high and (2) approved by the code enforcement official as sufficiently preventing access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and as sufficiently providing for the safety of any such person; by permitting all or any part of the permanent enclosure (as required by existing laws and regulations) to be used as all or part of the temporary enclosure, thereby permitting regulated parties to minimize the amount of temporary enclosure components required during construction; and by providing an exemption from the temporary enclosure requirements for above-ground hot tubs and spas equipped with a safety cover.

This rule implements Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007. Those statutes do not authorize the establishment of differing compliance requirements or time-tables with respect to swimming pools owned or operated by small businesses or local governments.

Except for the exemption for above-ground hot tubs and spas equipped with a safety cover, providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

On December 6, 2007, the Department of State notified code enforcement officials throughout the State and other interested parties of the new requirements to be imposed by this rule by means of a notice in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and currently distributed to approximately 7,000 subscribers representing all aspects of the construction industry. The notice was also posted on the Department of State's website. The notice invited interested parties to provide comments.

Rural Area Flexibility Analysis**1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.**

This rule implements the provisions of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007, by adding a provision to the Uniform Fire Prevention and Building Code ("Uniform Code") requiring that swimming pools be enclosed by a temporary enclosure during the period of installation or construction of the pool, and requiring that such temporary enclosure be replaced with a permanent enclosure within 90 days. Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements. The rule will impose the following compliance requirements: swimming pools will be required to be enclosed by temporary enclosures during the period of installation or construction of the pool, and such temporary enclosures will be required to be replaced with a permanent enclosure as required by existing laws and regulations within 90 days after issuance of the building permit or commencement of installation or construction. No professional services are likely to be needed in a rural area in order to comply with such requirements.

3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive and available at most lumber and hardware type stores. The fencing can include the plastic orange type

with wood or metal stakes or the green wire “yard guard fence” type. Wooden snow fencing can also be used. An average residential pool can be fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more. Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool installation / construction activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction / installation period. Any variation in such costs for different types of public and private entities in rural areas will be attributable to the size and configuration of the swimming pools owned or operated by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

4. MINIMIZING ADVERSE IMPACT.

Executive Law sections 378(14)(c) and 378(16) make no distinction between swimming pools located in rural areas and swimming pools located in non-rural areas. However, the economic impact of this rule in rural areas will be no greater than the economic impact of this rule in non-rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas.

Executive Law sections 378(14)(c) and 378(16) do not authorize the establishment of differing compliance requirements or timetables in rural areas.

The rule provides exemptions from the temporary enclosure requirements for above-ground hot tubs and spas equipped with safety covers because such hot tubs and spas are exempt from permanent enclosure requirements. Providing additional exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

5. RURAL AREA PARTICIPATION.

On December 6, 2007, the Department of State notified code enforcement officials throughout the State, including those in rural areas, and other interested parties of the new requirements to be imposed by this rule by means of a notice in *Building New York*, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and currently distributed to approximately 7,000 subscribers representing all aspects of the construction industry. The notice was also posted on the Department of State’s website. The notice invited interested parties to provide comments.

Job Impact Statement

The Department of State and the State Fire Prevention and Building Code Council have concluded after reviewing the nature and purpose of the rule that it will not have a “substantial adverse impact on jobs and employment opportunities” (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

The rule adds a requirement to the Uniform Fire Prevention and Building Code (“Uniform Code”) that swimming pools be enclosed by a temporary enclosure during the period of installation or construction of the pool, and that such temporary enclosure be replaced with a permanent enclosure (as required by existing laws and regulations) within 90 days. This provision is added to the Uniform Code pursuant to the requirements of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007.

Regulated parties may comply with this rule by installing a temporary enclosure during installation or construction of the pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire “yard guard fence” type. Wooden snow fencing can also be used. An average residential pool can be fenced with the orange fence material with stakes and labor for approximately \$175 to \$250. The wooden snow fencing will cost approximately \$100 more. Regulated parties will be permitted to use components of the permanent enclosure that will be required by existing laws and regulations after installation or construction is complete to be used as the temporary enclosure during the installation / construction period. This would permit regulated parties to minimize the cost of the temporary enclosure by constructing as much of the permanent enclosure as can be installed without restricting pool installation / con-

struction activities, and enclosing only the remaining portion of the pool area with a temporary enclosure.

It is anticipated that the cost of providing the temporary enclosures required by this rule will be insignificant when compared to the overall cost constructing or installing a swimming pool. Accordingly, it is anticipated that this rule will have no significant impact on the number of pools installed or constructed in this State, and that this rule will not have a “substantial adverse impact on jobs and employment opportunities.”

EMERGENCY RULE MAKING

Continuing Education Requirements for Licensed Home Inspectors

I.D. No. DOS-31-08-00013-E

Filing No. 713

Filing date: July 14, 2008

Effective date: July 14, 2008

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

Action taken: Addition of Subpart 197-3 to Title 19 NYCRR.

Statutory authority: Real Property Law, section 444-f

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

Specific reasons underlying the finding of necessity: This rule was adopted on an emergency basis to preserve and enhance the public welfare. Article 12-B of the Real Property Law (Home Inspection Professional Licensing Act, which became effective December 31, 2005), requires that no person shall conduct a home inspection for compensation unless that person is licensed as a home inspector in accordance with requirements set forth in the statute, including meeting specific standards for education and experience. Further, § 444-f(1) of Article 12-B, requires that applicants for renewal of a license as a home inspector must complete a course of continuing education approved by the Secretary of State. Accordingly, to ensure that prospective applicants continue to meet the educational standards required for their profession, this rule has been adopted on an emergency basis. As such, it is similar to those required by other regulatory statutes, and provides a greater measure of assurance to the general public that home inspectors are qualified for licensure. As part of fulfilling its ongoing obligation to provide appropriate guidelines and standards for the profession, the state home inspection council has only recently adopted the number of course hours required for meeting the continuing education requirement, thus necessitating the adoption of this rule on an emergency basis. This rule is being adopted on an emergency basis so that it can remain in effect until it is adopted on a permanent basis.

Subject: Continuing education requirements for licensed home inspectors.

Purpose: To establish standards for continuing education courses for licensed home inspectors.

Text of emergency rule: An Amendment to 19 NYCRR Part 197 is adopted to read as follows:

SUBPART 197-3. HOME INSPECTION CONTINUING EDUCATION COURSES

Section 197-3.1 General requirements.

(a) *Renewals.* For all home inspection licenses that expire prior to December 31, 2008, no renewal license shall be issued unless said licensee has completed 6 hours of approved continuing education within the two-year period immediately preceding such renewal. For all home inspection licenses that expire on or after December 31, 2008, no renewal license shall be issued unless said licensee has completed 24 hours of approved continuing education within the two-year period immediately preceding such renewal.

(b) *Course approval.* No offering of a course of study in the home inspection field for the purpose of compliance with the continuing education requirements of subdivision (a) of this section shall be acceptable for credit unless such course of study has been approved by the Department of State under the provisions of this Part.

Section 197-3.2 Approved entities.

Continuing education home inspection courses (herein referred to as “sponsors”) may be given by any college or university accredited by the Commissioner of Education of the State of New York or by a regional accrediting agency approved by the Commissioner of Education; public or private schools; and home inspection related professional societies and

organizations. Types of instruction which shall not be acceptable as meeting continuing education requirements include such courses as:

(a) offerings in basic computer skills training, instructional navigation of the Internet, instructional use of generic computer software or industry specific report writing software, instruction in personal motivation, business marketing, salesmanship, radon and pests, and any other instruction that is unrelated to home inspection.

Section 197-3.3 Request for approval of course of study.

The following applies to courses to be presented in a class-room setting where the instructor is present with the class. Requests for approval of courses of study in the home inspection field to be given to satisfy the requirements for continuing education under the provisions of this Part shall be made 60 days before the proposed course is to be given. The request shall include the following:

- (a) name, address and telephone number of the applicant;
- (b) if applicant is a partnership, the names of the partners in the entity; if a corporation, the names of any persons who own five percent or more of the stock of the entity;
- (c) title of each course to be offered;
- (d) location of each course offered;
- (e) duration and time of each course offered;
- (f) procedure for taking attendance;
- (g) a detailed outline of the subject matter of each course or seminar. The outline shall contain the amount of time each segment of the course or seminar lasts, as well as the teaching techniques used in each segment. Each course or seminar will contain at least one hour of instruction, and at most 24 hours of instruction; and
- (h) description of materials to be distributed to the participants.

Section 197-3.4 Program Approval.

Sponsors of courses of study may file applications for approval within 30 days of the completion of that course. The sponsor conducting the program may not guarantee to licensees that approval will be granted. Advertisements of such courses of study must indicate that such approval is not guarantee.

Section 197-3.5 Successful completion of course.

(a) Any course for continuing education shall be accepted for credit on the basis of attendance only. For those courses that have received pre-instruction approval from the Department of State, the course administrator must submit to the Department of State within 15 days of completion of the class, the names of all individuals who successfully complete the approved course together with the unique identification number assigned by the Department of State to all such individuals. For those courses that have received post-instruction approval from the Department of State pursuant to 19 NYCRR 197-3.4, the course administrator must submit this information to the Department of State within 15 days of having been granted post-instruction approval by the Department of State.

(b) Evidence of successful completion of the course must be furnished to students in certificate form. The certificates must indicate the following: the name of the approved entity, the name of the course, the code number of the course, and that the student who shall be named has satisfactorily completed a continuing education course approved by the Department of State and the number of hours earned. The certificate must be signed and dated by the person authorized to sign certificates. For those courses that have received post-instruction approval from the Department of State pursuant to 19 NYCRR 197-3.4, the course administrator shall provide this course certificate to qualified course attendees within 30 days of having received Department of State course approval.

Section 197-3.6 Equivalency Credit.

(a) A licensee who teaches an approved home inspection course pursuant to Subpart 197-2 of this Part or an approved course offered for continuing education shall be credited with two hours for each hour of actual teaching performed. Records of such teaching shall be maintained by the person or organization presenting the course and certified on forms prescribed by the Department of State. The records of such teaching shall be deemed records of attendance for all purposes of these rules. Credit shall not be awarded for teaching the same course more than once in a license cycle. Instructors must submit evidence of such teaching experience with an equivalency application as prescribed by the Department of State.

(b) Individuals who complete a course of study offered outside of the State of New York, which course has not been approved by the Department of State, may file a request to the Department to have such course count as credit toward their New York continuing education requirement. All applications for such consideration must be submitted with official documentation of satisfactory completion and the official descriptions of the course of

study as prescribed by the Department of State. Upon receipt of such a request, the Department of State will review and evaluate the out-of state course to determine if all or a portion of the course may be credited toward the applicant's New York continuing education requirement. Within 30 days of receipt of a request, the Department of State will approve or deny the request for New York continuing education credit.

(c) All applications for and evidence of equivalency credit must be submitted to the Department of State for consideration at least 30 days prior to the expiration of the license.

Section 197-3.7 Extension of time to complete courses.

The Department of State may grant an extension to any licensee who evidences bona fide hardship precluding completion of the continuing education requirements prior to the time the renewal application is to be filed. A licensee seeking such an extension shall submit a written request, together with the evidence demonstrating such hardship. Within 30 days of receipt of a request, the Department of State will notify the licensee whether their request for an extension has been granted or denied.

Section 197-3.8 Computation of instruction time.

To meet the minimum statutory requirement, attendance shall be computed on the basis of an hour equaling 60 minutes.

Section 197-3.9 Attendance and Record Retention.

(a) No licensed person shall receive credit for any course presented in a class-room setting if he or she is absent from the class room, during any instructional period, for a period or periods totaling more than 10 percent of the time prescribed for the course pursuant to section 197-3.3(g) of this Part, and no licensed person shall be absent from the class room except for a reasonable and unavoidable cause.

(b) The person or organization conducting the course shall certify to the Department of State the name of each licensed person who successfully completed the course of study and his or her unique identification number as assigned by the Department of State, and shall maintain its attendance records and a copy of such report for three years and, in addition, shall maintain the following records concerning the course:

- (1) the approval number issued by the Department of State for the course;
- (2) title and description of the course;
- (3) the dates and hours the course was given; and
- (4) the names and Unique Identification numbers of the persons who took the course and whether they completed it successfully.

Section 197-3.10 Policies concerning course cancellation and tuition refund.

Any educational institution or other organization requesting from the Department of State approval for home inspection courses must have a policy relating to course cancellation and tuition refunds. Such policy must be provided in writing to prospective students prior to the acceptance of any fees.

Section 197-3.11 Auditing.

A duly authorized designee of the Department of State may audit any course offered and may verify attendance and inspect the records of attendance of the course at any time during its presentation or thereafter.

Section 197-3.12 Change in approved course of study.

There shall be no change or alteration in any approved course of study without prior written notice to, and approval by, the Department of State.

Section 197-3.13 Suspensions and denials of school approval.

The Department of State may deny, suspend or revoke the approval of a home inspection school, if it is determined that they are not in compliance with the law and rules. If disciplinary action is taken, a written order of suspension, revocation, or denial of approval will be issued. Anyone who objects to such denial, suspension or revocation shall have the opportunity to be heard by the Secretary of State or his or her designee pursuant to Real Property Law section 444-i.

Section 197-3.14 Open to public.

All courses approved pursuant to this Part shall be open to all members of the public regardless of the membership of the prospective student in any home inspection professional society or organization.

Section 197-3.15 Facilities.

Each course shall be presented in such premises and in such facilities as shall be necessary to properly present the course.

Section 197-3.16 Faculty.

(a) Each instructor for an approved home inspection course of study must be approved by the Department of State. To be approved, an instructor must submit an application along with a resume reflecting three years of experience as a home inspector during which time the applicant has completed at least 250 home inspections.

(b) An instructor who does not qualify under subdivision (a) of this section may be approved as a technical expert if the instructor submits an application and resume establishing, to the satisfaction of the Department of State, that the applicant is an expert in and has at least three years' experience in a specific technical subject related to home inspection. Approval by the Department of State shall specify the subject(s) within the home inspection course or course module for which approval is given.

Section 197-3.17 Continuing education credit.

No continuing education course will be considered for continuing education credit more than once within the two year cycle of renewal.

Section 197-3.18 Registration period.

Each registration or renewal period for approved programs or courses shall be for 12 months or a part thereof, said period to commence on January 1 or date thereafter and to continue until December 31.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 11, 2008.

Text of emergency rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, Division of Licensing Services, P.O. Box 22001, Albany, NY 12231-0001, (518) 473-2728, e-mail: whitney.clark@dos.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, enacted as Chapter 461 of the Laws of 2004, and amended by the Laws of 2005, ch. 225, provides that no person shall perform a home inspection for compensation unless that person is licensed as a home inspector. The statute sets forth minimum standards of education and experience required to obtain a license as a home inspector. These include the successful completion of an extensive course of study of not less than one hundred forty hours, including at least forty hours of field-based inspections in the presence of a licensed home inspector, professional engineer or architect; performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination.

Real Property Law, § 444-f (1) provides that licenses for home inspectors shall be valid for two years, and are subject to renewal only after successful completion of a course of continuing education approved by the Secretary of State in consultation with the home inspection council. This rule fulfills that obligation by outlining the continuing education requirements for home inspectors, and setting appropriate standards for approval of home inspection courses. Accordingly, the Secretary of State has express authority to adopt this rule.

2. Legislative objectives:

In enacting Article 12-B of the Real Property Law, the legislature emphasized the significant role played by home inspectors, and the reliance consumers place upon their reports in purchasing homes, especially when encouraged to do so by mortgage lenders. Recognizing that not all persons providing this service may be reliable, this legislation was enacted to provide additional assurance to consumers that those individuals performing such inspections are qualified to do so. The statute sets minimum standards for the home inspection profession, which include an extensive course of study of not less than one hundred forty hours, including at least forty hours of field based inspections in the presence of a licensed home inspector, professional engineer or architect; the performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination. In addition, all applicants for renewal of a license must have successfully completed a course of continuing education approved by the Secretary of State.

Thus, Article 12-B was designed to "protect the public," especially from those who present themselves as qualified professionals, but without the necessary education and experience.¹ This rule re-enforces the stated objectives of the Legislature when it enacted Article 12-B, by providing appropriate standards for maintaining the skills required by professional home inspectors.

3. Needs and benefits:

Real Property Law § 444-f(1) requires all home inspectors seeking renewal of their licenses to have successfully completed a course of continuing education approved by the Secretary of State, in consultation with the home inspection council. Created by statute, the home inspection council is an advisory board that advises the Secretary of State on the need for certain regulatory action, including continuing education. The home inspection council has advised the Secretary of State that this rule making is

necessary to ensure that all home inspectors who apply for renewal of their licenses will have had the opportunity to meet the statutory continuing education requirement.

The rule making will pro rate the continuing education requirement for certain licensees. Licensees whose licenses expire prior to December 31, 2008 will have to complete six hours of approved continuing education. Those whose licenses expire on or after December 31, 2008 will be required to complete the full 24 hours of continuing education.

In addition, consumers benefit from the assurance that persons hired to inspect the homes they purchase continue to meet the qualifications and experience needed to render professional service.

4. Costs:

a. Costs to regulated parties:

Licensees seeking renewal will be required to pay the cost of attending and completing an approved course of study for the required number of hours. The Department has conferred with several education providers throughout the State and estimates that course providers will charge an average of \$480 for 24 hours of continuing education courses. Based on a review of continuing education fees currently being charged by course providers, the Department of State determined that each continuing education unit costs a student approximately \$20.00 per credit; or \$480 for 24 hours of continuing education.

b. Costs to the Department of State:

The Department of State anticipates that the cost and implementation will be minimal, and administration of this rule will be accomplished using existing resources.

c. Costs to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The rule requires that each applicant seeking renewal of a home inspector's license obtain and retain certificates as evidence of the successful completion of the required number of hours of continuing education.

7. Duplication:

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

8. Alternatives:

During regular meetings, the state home inspection council reviewed and considered various proposals for compliance with the statutory mandate for continuing education standards, ultimately recommending approval of the number of hours, courses of study, and methods of ensuring compliance adopted by this rule. The home inspection council considered waiving the continuing education requirement completely, or reducing the requirement to a de minimus amount. The Department, in consultation with the council determined that six hours of continuing education was appropriate insofar as it provides an accommodation to licensees whose licenses expire prior to December 31, 2008, while providing protections to consumers by guaranteeing that all licensed home inspectors complete an appropriate amount of continuing education.

9. Federal standards:

There are currently no federal standards requiring continuing education courses for licensed home inspectors.

10. Compliance schedule:

Applicants for renewal of a home inspector's license have two years in which to comply with the continuing education requirement, with a pro-rated reduction for renewal of licenses expiring less than two years from the effective date of this rule. The Department of State maintains a list on its website of approved continuing education providers, with their relevant contact information to assist licensees to locate approved continuing education courses. Therefore, regulated parties will be on notice of, and have adequate time to comply with the requirements imposed by the proposed rule making.

¹ McKinney's Session Laws of New York, 2005, p. 1951

Regulatory Flexibility Analysis

1. Effect of rule:

The rule affects all licensed home inspectors (individuals, firms, companies, partnerships, limited liability companies, or corporations) who seek renewal of a home inspector's license. Each such applicant will be required to expend the time and incur the costs of attending the required number of hours needed for successful completion of an approved course of continuing education, and obtain a certificate as evidence of successful

completion of that requirement. However, it is not anticipated that this requirement will place an undue financial burden, or impose a hardship for those applicants seeking to maintain their qualifications for providing professional services to consumers.

The rule does not apply to local governments.

2. Compliance requirements:

Applicants seeking renewal of their licenses will be required to attend and complete an approved course of study of continuing education, and obtain certificates as proof of the successful completion of these courses.

3. Professional services:

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

4. Compliance costs:

It is anticipated that small businesses will incur only the costs of any fees required for attending and completing an approved course of continuing education. It is estimated that the cost of completing 24 hours of continuing education will be \$500 per licensee.

5. Economic and technological feasibility:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs or require technical expertise as a result of implementation of this rule.

6. Minimizing adverse economic impact:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs as a result of implementation of this rule.

7. Small business and local government participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council are diverse and include owners of small businesses. The subject matter of the proposed rule was further discussed at meetings of the home inspection council which were open to public comment.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies equally to all licensed home inspectors in all areas of the state-urban, suburban and rural. The rule does not apply to public entities located in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Reporting and recordkeeping requirements include the obligation of all applicants seeking renewal of their licenses to maintain course completion certificates as proof of completing the required continuing education. Applicants for renewal of a home inspector's license in rural areas will not need to employ any additional professional services in order to comply with this rule.

3. Costs:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any costs of compliance as a result of this rule.

4. Minimizing adverse impact:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any additional costs of compliance.

5. Rural area participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council represent geographically diverse areas including rural areas of New York State. In addition, the subject matter of the proposed rule was discussed during open meetings of the home inspection council and which were open to public comment.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs and employment opportunities. As a result of enactment of Article 12-B of the Real Property Law, which became effective December 31, 2005, any person performing a home inspection for compensation in this state must obtain a license. Licenses are valid for two years, and may be renewed only upon successful completion of an approved course of continuing education. Inasmuch as this rule affects only those licensed home inspectors who seek renewal of license, it promotes employment opportunities by ensuring that only those qualified to provide this service, will be licensed.

NOTICE OF ADOPTION

Continuing Education in Infection Control and Applicable Law for Registered Hearing Aid Dispensers

I.D. No. DOS-49-07-00003-A

Filing No. 714

Filing date: July 14, 2008

Effective date: Jan. 1, 2009

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

Action taken: Amendment of section 192.7 of Title 19 NYCRR.

Statutory authority: General Business Law, section 803

Subject: Continuing education in infection control and applicable law for registered hearing aid dispensers.

Purpose: To require registered hearing aid dispensers to complete at least two continuing education credits per registration period.

Text or summary was published in the notice of proposed rule making I.D. No. DOS-49-07-00003-P, Issue of December 5, 2007

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

Text of rule and any required statements and analyses may be obtained from: Whitney A. Clark, Department of State, Division of Licensing Services, Alfred E. Smith State Bldg., 80 S. Swan St., P.O. Box 22001, Albany, NY 12231, (518) 473-2728, e-mail: whitney.clark@dos.state.ny.us

Assessment of Public Comment

After the close of the public comment period, one comment was received from the NYS Board for Speech-Language Pathology and Audiology. Although untimely, the Department of State considered the comment. The comment objected to that portion of the proposed rule that would require audiologists who are registered with the Department of State as hearing aid dispensers to complete continuing education in infection control. The comment argued that the Department of State does not have jurisdiction to mandate education for hearing aid dispensers who are also licensed as audiologists and that continuing education in infection control for these Department of State licensees is not necessary.

The Department of State has jurisdiction to prescribe continuing education standards for registered hearing aid dispensers. In enacting General Business Law, Article 37-A, the Legislature empowered the Department of State with express statutory authority to promulgate regulations pertaining to continuing education for hearing aid dispensers. (General Business Law section 791). This broad statutory authority permits, "the Secretary ... in his or her discretion, and as needed to contribute to the health and welfare of the public, 'to' require the completion of continuing education courses in specific subjects to fulfill 'the' mandatory continuing education requirement." (General Business Law section 794(1)).

Registered hearing aid dispensers are required, under the statute, to complete 20 hours of continuing education credits. Those registrants who are also licensed as audiologists may satisfy this requirement by demonstrating to the Secretary of State compliance with the continuing competency requirements prescribed by the Education Law, "provided, however, that such persons shall submit documentation showing the successful completion of four continuing education credits relating to the dispensing of hearing aids." (General Business Law section 794(2)). In accordance with its statutory discretion to require the completion of continuing education courses in specific subject areas, the Department of State is well within its jurisdiction to require hearing aid dispensers who are also licensed as audiologists to fulfill three of these four credit hours by taking one or more courses in infection control and licensing law.

The comment also argued that hearing aid dispensers who are also licensed as audiologists do not need education in infection control because of the high degree of education and training required to obtain an audiologist license. A review of existing educational requirements for audiologists, however, reveals no specified training in infection control. Although a rule is pending which would make infection control an elective topic in the qualifying education for audiologists, it is not mandatory and no minimum number of hours are devoted to the topic. Additionally, the education, if taken, would only be completed prior to obtaining an audiologist license. There is no current requirement that audiologists obtain ongoing continuing education in infection control. The NYS Hearing Aid Advisory Board has advised the Department of State that on-going continuing education in infection control is not only important but necessary due to the on-going evolution of technologies and procedures.

In enacting Article 37-A of the General Business Law, the Legislature stated its intent that "more rigorous education, training and business practice standards should be applied to those persons registered to dispense hearing aids pursuant to this article." (See, General Business Law section 788). The NYS Hearing Aid Advisory Board, of which four members are licensed audiologists, unanimously supports the proposed continuing education for all licensees. Board members have expressed their concern regarding the lack of infection control procedures being utilized by registrants and have stressed that the proposed continuing education is necessary to protect hearing aid consumers.

The Department of State agrees that the protection of the health and safety of hearing aid consumers is paramount. The Department of State has determined that the proposed continuing education is necessary and should be imposed upon all registrants.

Twenty-nine other comments were received unanimously supporting the bill as necessary for the health and safety of hearing aid dispenser consumers.

Office of Temporary and Disability Assistance

NOTICE OF ADOPTION

Veteran Assistance

I.D. No. TDA-17-08-00001-A

Filing No. 709

Filing date: July 10, 2008

Effective date: July 30, 2008

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

Action taken: This is a consensus rule making to amend sections 301.2(a), (c), (d)(2), 301.3(a) and 301.5 (a)(1), (b)(1) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34, 131(1) and 169

Subject: Veteran assistance.

Purpose: To clarify that incapacitated children may be eligible for veteran assistance if one of their parents is a deceased veteran.

Text or summary was published in the notice of proposed rule making, I.D. No. TDA-17-08-00001-P, Issue of April 23, 2008.

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

Text of rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, Office of Temporary and Disability Assistance, 40 N. Pearl St., 16C, Albany, NY 12243-0001, (518) 474-9779, e-mail: Jeanine.Behuniak@otda.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Workers' Compensation Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Indexing of Workers' Compensation Claims and Expedited Processing of Controverted Claims

I.D. No. WCB-31-08-00016-P

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

Proposed Action: Amendment of sections 300.1, 300.33 and 300.34 and addition of sections 300.37 and 300.38 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13, 25, 117(1), 141 and 142; L.2007, ch. 6

Subject: Indexing of workers' compensation claims and expedited processing of controverted claims.

Purpose: To provide a process to resolve controverted claims within 90 days.

Summary of proposed rule (Full text is posted at the following State website www.wcb.state.ny.us): The proposed changes amend 12 NYCRR § 300.1(a), § 300.33 and § 300.34, and add new § 300.37 and § 300.38 to govern indexing of all claims, pre-hearing conference, the expedited hearing process and the resolution of controverted claims.

Section 300.1(a) provides definitions of terms used in Part 300. The proposed rule making adds definitions for the terms "affidavit", "affirmation", "initial expedited hearing" and "insurance carrier." The existing definition of "representative" is clarified that it refers to "legal representative" and that it includes representatives licensed by the Board pursuant to Workers' Compensation Law (WCL) §§ 24 and 50(3-b) and (3-d). The proposed rule making also adds a definition of "prima facie medical evidence" that comports with the amendment to WCL § 25(2-a) (a) by Chapter 6 of the Laws of 2007.

Section 300.33 regarding pre-hearing conferences (PHC) is amended by this rule. First, § 300.33 is amended to require PHC in cases in which a notice of controversy and a medical report referencing an injury (a medical report) are received must be scheduled within 30 days and to eliminate the requirement that notices of PHC must be sent 21 days before the PHC. Other cases with outstanding issues shall be referred to a PHC when necessary to complete discovery. New subdivisions (c), (d) and (e) of § 300.33 are added to provide that the notice of PHC, the PHC statement filed by a represented party, and how the PHC is conducted if the claimant is represented are governed by new § 300.38. Subdivision (f) sets forth how a pre-hearing conference will be conducted if a claimant is not represented and is only minor changes to existing § 300.33.

Section 300.34 regarding the expedited hearing process is amended to reflect the statutory changes to WCL § 25(3) (d) by Chapter 6 of the Laws of 2007 and that the expedited hearing process for controverted claims is governed by new § 300.38. Chapter 6 amended WCL § 25(3)(d) to authorize the Chair to transfer claims with an issue outstanding before the Board for one year rather than two years to be transferred to the expedited process. It also specifically authorizes the Chair to transfer controverted claims to the expedited process. Section 300.34 is renumbered and new subdivision (c) requires a PHC statement in accordance with § 300.33(c) be filed in any case transferred to the expedited hearing process. Subdivision (f) of § 300.34 requires adjournments in cases transferred to the expedited hearing process be granted only in accordance with § 300.38. Throughout § 300.34 references to carrier and representative are corrected to refer to "insurance carrier" and "legal representative". Subdivision (h) clarifies that decisions solely containing determinations, directions and orders made by a Workers' Compensation Law Judge (WCLJ) in the special expedited hearing process are interlocutory and not reviewable under WCL § 23 until the conclusion of the trial and the resolution of all outstanding issues.

A new § 300.37 is added to govern case file creation and indexing of claims. Subdivision (a) requires the Board to assemble a case upon receiving a document regarding a claim or potential claim for workers' compensation and assign it a unique case number within five days. Assembling a case is not the indexing of a claim for purposes of WCL § 25(2) (b) and does not change existing law with respect to the filing a claim for purposes of WCL § 28.

Subdivision (b) provides that a claim may only be indexed if the Board receives an employee claim form or employer report of injury for any type of claim, a report by a medical provider on the form prescribed by the Chair unless the treating provider is based out of state, the claimant was treated in an emergency room or the claimant is deceased, and a limited release if the claimant files an employee claim form that indicates he or she had a prior injury to the same body part or similar illness to the one listed on the form. However, the rule authorizes the Chair to direct the indexing of a claim if a worker is killed and the employer refuses or fails to file an Employer's Report and no one files a claim on behalf of the beneficiaries. Once all of the required forms are received the Board must send a notice of indexing to the parties and make the limited release available to the insurance carrier. The notice of indexing must indicate that if the claim is controverted the insurance carrier must file an independent medical examination (IME) report with the Board at least 3 days prior to the initial expedited hearing or waive the right to have such a report considered.

Subdivision (c) provides that if the insurance carrier files a form to accept or controvert a claim or to notify the Board that it has begun to make temporary payment of compensation before all of the forms required to index a claim are received, the Board is not required to index a claim and can take any necessary action to resolve any issues in the claim.

Subdivision (d) includes provisions applicable to all claims, regardless of whether they are indexed or not. Specifically, it requires the legal representative of a claimant to provide a written certification and list of documents if retained when the employee claim form is filed; requires the Board to send a claimant information packet (packet) to unrepresented claimants who have not filed an employee claim form or had their claim accepted, details the contents of the packet and requires the Board to provide assistance to the claimant; requires the employer or the third-party it designated to file the employer's report to certify that the employer gave the packet to the claimant; and requires a medical report to be on the prescribed form and fully completed except in certain circumstances in order for the provider to be paid.

A new § 300.38 is added to govern the resolution of controverted claims. Subdivision (a) requires the filing of the notice of controversy and details the contents of such notice, including that it contain a written certification by the insurance carrier, a list of witnesses and list of documents. Subdivision (b) requires a notice of PHC be sent to the parties upon receipt of the notice of controversy and a medical report. The notice shall include the date of the PHC which shall be no more than 30 days after the receipt of the notice of controversy and a medical report and notification that an IME report must be filed at least 3 days prior to the initial expedited hearing.

Subdivision (c) authorizes the parties to seek production of relevant medical records using the limited release and requires medical professionals authorized by the Chair to produce such records within 21 days or 10 business days if the requesting party offers to pay \$1.50 per page. A medical professional who fails to produce the records timely, if authorized by the Chair to treat or conduct IMEs of claimants, shall be subject to administrative warning or suspension or revocation of his or her authorization. All medical records obtained by the parties must be filed with the Board.

Subdivision (d) requires a legal representative of a claimant retained after a claim is indexed or the carrier files a form as provided in § 300.37(c) to file a notice of retainer within five days, ensure an employee claim form is filed and certified by the legal representative, and provide a list of documents that support the claim. Subdivision (e) provides that the claimant's retention of a legal representative 10 days or less before the PHC may constitute good cause for an adjournment.

Subdivision (f) prescribes the content and date for filing the PHC statement. An unrepresented claimant is not required to file such statement. Each party must attach all documents not already part of the claim file to the PHC statement. Failure by the insurance carrier to timely serve and file the PHC statement or to file an incomplete statement will result in a waiver of defenses; failure to list witnesses or attach documents not in the electronic case folder will result in a waiver of the right to call the witness or introduce such document. There will be no waiver if a WCLJ finds the failure was due to good cause. If the legal representative of a claimant fails to timely file or files an incomplete PHC statement, his or her legal fee will be reduced.

Subdivision (g) governs the PHC for a represented claimant. It requires the PHC to be held within 30 days of the filing of the notice of controversy and medical report and prescribes what will occur at the PHC. For example, at the PHC the WCLJ will confirm all forms are filed, add any necessary parties, simplify and limit factual and legal issues, determine whether the medical report constitutes PFME, determine if the offer of proof for a defense was sufficient, obtain the names and addresses of medical providers for prior injuries or illnesses if relevant, determine if the insurance carrier is entitled to a broader medical release, direct the claimant to file an employee claim form if one has not already been filed, set the date by which the IME report must be filed, identification of medical witnesses to be cross-examined, how and when such cross-examination shall occur and sets the date for the Initial Expedited Hearing.

Subdivision (h) governs the expedited hearing process for controverted claims when the claimant is represented. It requires the initial expedited hearing to occur within 30 days after the PHC where the claimant was represented. All lay witness testimony will be taken at that hearing. If no lay witness testimony is requested, nor the testimony of the claimant, the initial expedited hearing will not occur and the testimony of the medical witnesses will occur as set forth at the PHC. All IME reports must be filed and served at least three days before the date of the initial expedited

hearing. If the testimony of the medical witnesses is to occur at a hearing it shall be scheduled no more than 30 days after the initial expedited hearing. This subdivision sets for the process if witnesses fail to appear. Paragraph (3) of subdivision (h) authorizes parties to make oral summations but limits written post-hearing summations, memoranda of law and/or briefs to certain situations. Finally, paragraph (4) details the timing of decisions deciding the controverted claim.

Subdivision (i) provides that decisions containing only orders or directions made by a WCLJ in connection with a PHC or expedited hearing process pursuant to § 300.38 are not reviewable by the Board until a decision is made by a WCLJ establishing or disallowing a claim.

Subdivision (j) governs adjournments. An adjournment will only be granted in an emergency, and shall not exceed 20 days, and the grounds for an adjournment must be established by an affidavit of a legal representative. If a request for an adjournment is not an emergency and is frivolous the penalties in WCL § 25(3) (d) and § 300.34(f) and (g) apply.

Subdivision (k) provides that the § 300.38 shall not apply to controverted claims where the employer was uninsured and the provisions relating to pre-hearing conferences and expedited hearings shall not apply if the claimant is unrepresented at the time of the PHC at which hearings are scheduled.

Text of proposed rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Workers' Compensation Board, 20 Park St., Rm. 400, Albany, NY 12207, (518) 408-0469, e-mail: 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.

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) and the Chair of the Board are authorized to adopt this rule pursuant to Workers' Compensation Law (WCL) § 117(1), § 141, § 142, § 25, § 24, § 13-a, § 13-b, § 13-d, § 13-k, § 13-l, § 13-m and Chapter 6 of the Laws of 2007.

2. Legislative objectives:

On March 13, 2007, Governor Spitzer signed into law sweeping reforms of the workers' compensation system which amended the WCL to increase benefits to claimants while decreasing costs to employers. Section 40 of Chapter 6 amended WCL Section 25(2-a) to reduce the period in which a pre-hearing conference (PHC) is held from 60 days to 45 days and to require a medical report before scheduling a pre-hearing conference. These regulations build upon these legislative changes so that controverted claims can be resolved as quickly as possible.

3. Needs and benefits:

In a letter dated March 13, 2007, Governor Spitzer directed the Superintendent of Insurance, with the assistance of the Chair of the Board and the Commissioner of Labor, to development recommended regulations to adjudicate a controverted claim within ninety days. To assist the Superintendent, the Governor directed the formation of an Advisory Committee comprised of representatives of the AFL-CIO, Business Council of New York State, New York State Senate and Assembly. On June 1, 2007, the Superintendent issued his report and recommended regulations.

The Board received comments regarding the recommended regulations from attorneys, associations representing attorneys, one union, an occupational health and safety committee and the New York State Insurance Fund. In addition, the Chair and other representatives of the Board met with interested parties to discuss their concerns regarding the recommended regulations. Based upon the comments and concerns expressed, as well as logistical challenges identified by the Board, the recommended regulations have been revised to retain the goal of resolving controverted claims within 90 days and the core philosophy that more information early in the claim enables the insurance carrier or self-insured employer to make informed decisions about whether or not to controvert a claim.

The proposed rule eliminates the requirement that a determination of prima facie medical evidence be made within five days of receipt of the notice of controversy, the mediation conference and removes the requirement that the first expedited hearing occur immediately after the PHC. The proposed regulations are based on a 30-60-90 timeframe. The PHC will be held within 30 days of the filing of the notice of controversy and a medical report referencing an injury. The initial expedited hearing, at which all lay testimony will be taken, will be held 30 days after the pre-hearing conference or 60 days after the receipt of the requirement documents. If a second expedited hearing is necessary for medical testimony it will be held no

more than 60 days after the pre-hearing conference. The 30-60-90 timeframe fits easily within the statutory requirements.

Chapter 6 of the Laws of 2007 amended WCL § 25(2-a) to reduce the maximum time period in which a PHC must be held in a controverted case from 60 to 45 days and added the requirement that “a medical report referencing an injury” must also be received by the Board before the 45 day time limit begins to run. These changes clearly indicate the need for faster resolutions of controverted claims and that the evidence necessary to proceed to a PHC is a medical report referencing an injury.

The reduction in time from receipt of a notice of controversy to the convening of a PHC has obvious benefits for an injured worker. In the past PHCs were held only to find that there are no medical reports in the Board’s file for the Workers’ Compensation Law Judge (WCLJ) to review for the purpose of determining whether “prima-facie medical evidence” (PFME) exists. These types of “no medical evidence” hearings were of limited value. The statutory amendment and the proposed regulations ensure that “no medical evidence” PHCs will no longer be held. In addition, the amendment makes clear that all that is needed in order to proceed to a pre-hearing conference at which discovery will close and a hearing scheduled is a medical report referencing an injury. Therefore, prima facie medical evidence is now a medical report referencing an injury. The proposed regulation sets forth this definition.

The new case file creation, claim indexing, notice of indexing and notice of controversy regulations are designed to generate more claim information earlier in the process so that an employer/carrier can make an informed decision whether to accept or controvert a claim. If the decision is to controvert, the proposed regulations require the employer/carrier to specifically state the basis (es) of the controversy.

The proposed regulations require the filing of a PHC statement at least 10 days prior to the PHC. This statement must contain certain required information. It is intended to narrow the issues in dispute, provide witness names, and otherwise facilitate the prompt and efficient resolution of disputed issues relating to the basic, initial compensability of the claim.

The new regulations are designed to expedite the adjudication of controverted claims by requiring carriers to file Independent Medical Exam (IME) reports, if the carrier wishes to produce such a report in support of its controversy, on or before the initial expedited hearing date.

The proposed regulations modified the recommended regulations to schedule the initial expedited hearing 30 days after the pre-hearing conference to ensure the most efficient use of resources. Under the recommended regulations, if a controversy was resolved at the PHC then the time blocked for the initial expedite hearing would not be used. In addition, parties would be required to prepare witnesses and prepare to examine witnesses before a WCLJ had ruled whether the witness could testify at the PHC. The proposed regulations require the taking of all medical testimony at a hearing to be held within 30 days after the initial expedite hearing or no more than 55 days after the PHC.

Like the recommended regulations, the proposed regulations regulate and limit the circumstances under which adjournments in controverted cases can be granted. Adjournments usually prolong the time it takes to reach a decision in a controverted case. Additionally, the proposed regulations limit appeals of decisions that contain orders and directions that do not establish or disallow the claim. This provision is in accordance with existing regulations at 12 NYCRR § 300.34.

Unlike the recommended regulations, the proposed regulations revise 12 NYCRR § 300.33 and § 300.34. These sections currently govern PHCs and the expedited hearing process. Changes were made to conform to the provisions in section 300.38 for controverted claims.

4. Costs:

Some of the provisions in the regulations already exist, such as the filing of IME reports and PHC statements. The proposed regulations eliminate the requirement in the recommended regulations that a mediation conference occur before the PHC. Carriers, self-insured employers and attorneys would have incurred costs in attending these conferences. There should be fewer controverted claims because carriers and self-insured employers will be able to make an informed decision due to the increased information they will receive and the requirement that the Board receive a medical report before indexing a claim. The regulations require parties to use required forms. Employers, carriers, attorneys and medical providers may experience some increase in costs from fully complying with the WCL and regulations.

There are some minimal costs that will be incurred regardless of whether the claim is controverted, such as distributing the Claimant Information Packet (Packet) to employees injured or who become ill on the job. Legal Representatives of claimants will incur small costs in complying

with the requirement to submit a written certification and a list of documents if the representative is retained at the time the Form C-3, Employee’s Claim for Compensation, is filed with the Board.

5. Local government mandates:

All local governments, especially the approximately 2,511 political subdivisions who currently participate in self-insured programs for workers’ compensation coverage in New York State, will have to comply with these regulations. Local governments will be affected by the proposed rule in the same manner as all other employers. Since the purpose behind the regulations is to speed the resolution of controverted claims so claimants receive the benefits they are entitled to as quickly as possible, there is no justification or reason why an employee of a local government has any less right to a swift resolution when a local government decides to controvert a claim.

6. Paperwork:

The proposed rule imposes some paperwork requirements. First, the rule requires that all forms be completed fully which the Board has not historically required. The proposed rule creates consequences for failing to fully complete forms. Second, existing forms must be modified. The proposed regulations require revised Forms C-2, C-3, C-4, C-7 and PH-16.2. Third, new forms and documents are required such as, a claimant must complete a limited medical release in order for a claim to be indexed in certain cases, claimant’s legal representative must file a written certification that the allegations and facts in the employee claim form have evidentiary support or will have such support after an opportunity for investigation, and claimant’s legal representative must file a list of all documents that may be used to support the claim. The employer upon receiving notice of a work place injury must provide the employee with a Claimant Information Packet. The Board is required to send this packet to an individual who has not retained a legal representative and has a case number but a claim has not been indexed. The limited release required by the regulations is only for relevant medical records for the same condition or injury site as that at issue in the workers’ compensation claim. To obtain a broader release, an insurance carrier must make an application to the Board supported by an affidavit showing relevance. Requests for adjournments under the proposed rule must be made by affidavit rather than merely submitting a letter or telephoning the Board.

The proposed rules will limit some paperwork because it limits the filing of appeals until a final decision is reached. The proposed rule will also limit the number of summations, memoranda of law and/or briefs that are submitted.

The proposed rule requires the parties to file all medical reports obtained by them through the use of medical releases with the Board.

7. Duplication:

These amendments will not duplicate any existing Federal or State requirements.

8. Alternatives:

One alternative would be to take no action. However, given the statutory amendment of WCL § 25(2-a) and gubernatorial directive to design a streamlined docket system to process workers’ compensation claims, this is not a viable alternative.

Another alternative would be to propose and adopt the recommended regulations as submitted to the Chair and Board. However, the recommended regulations contain provisions which are inconsistent with statute, do not account for all types of claims that are filed with the Board, and contain provisions which are logistically difficult for the Board and the parties. The proposed regulation has addressed these issues.

The Board received suggested changes to the recommended regulations from participants in the system and from within the Board.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with all of these changes upon three months notice and for all claims indexed or created after the effective date of the regulation. However, the statutory amendment to WCL § 25(2-a) regarding the 45 day notice of controversy to PHC and medical report referencing an injury requirements became effective for claims filed on and after March 13, 2007, and has been implemented. Therefore, parties are already complying with these requirements.

Regulatory Flexibility Analysis

1. Effect of rule:

All small businesses and local governments for which workers’ compensation coverage is required and whose employee(s) might be injured will be affected by this rule to some extent. For the most part, it is the entity

providing coverage for the small employer that must comply with all of the provisions of this rulemaking. Small businesses cannot be individually self-insured. They must purchase coverage from the State Insurance Fund or a private insurance carrier authorized to write workers' compensation insurance in New York or join a group self-insured trust. The impact on the State Insurance Fund and all private insurance carriers is not covered in this document as they are not small businesses. Group self-insured trusts, third party administrators hired by private insurance carriers and group self-insured trusts, and attorneys may be small businesses who will be impacted by this regulation. Further, all health practitioners authorized by the Chair to treat or conduct independent medical examinations of claimants will have to comply with parts of this rule.

The approximately 2,511 political subdivisions that are self-insured for workers' compensation coverage in New York State will have to comply with all provisions of this proposal. Those local governments who are not self-insured will be affected by this rule to a limited extent.

2. Compliance requirements:

The proposed rule imposes new compliance requirements on all small businesses and local governments. First, those small businesses and local governments who purchase coverage and whose only involvement with the workers' compensation system is that of an employer will only be minimally affected by this rule. Specifically, such employers will be required to provide an injured employee with a Claimant Information Packet (hereinafter referred to as Packet), which contains a Form C-3 (Employee's Claim For Compensation), instructions for completing the form, explanation of the necessity of a Form C-4 (Attending Doctor's Report), a limited medical release, and notice that the employee has the right to a legal representative. Either they or their designated third-parties will be required to certify on the Form C-2, Employer's Report of Work-Related Accident, that the Packet was provided.

Second, small businesses authorized to provide medical treatment to claimants will have to comply with the requirements discussed above for medical reports and testimony. Specifically, the proposed regulations require medical providers authorized by the Chair to fully complete and submit a Form C-4, Attending Doctor's Report. Historically, the Board has accepted office notes, medical narratives and the HCFA 1500 form. The proposed regulations only allow for the filing of the Form C-4 by authorized providers. If an authorized medical provider fails to file a fully completed Form C-4, he or she will not be paid for the services provided to the claimant. Medical providers will be required to comply with shortened time periods in which to appear for a hearing to give medical testimony. Additionally, medical providers authorized by the Board will be required to reply to requests for records within 21 days or within 10 days if an expedited request is made. Authorized medical providers will be paid \$1.50 per page for expedited orders to defray any associated costs. If an authorized provider fails to comply with this requirement, he/she will be subject to administrative warning, suspension or revocation.

Third, those small businesses involved in the actual process of adjudicating claims, such as third party administrators, group self-insured trusts and/or trust administrators, and attorneys, must comply with all of the provisions of the proposed regulations. Also, self-insured local governments will have to comply with all of the provisions. The proposal requires all forms to be fully completed and requires the filing of forms that to date have not been regularly filed. For example, the regulation requires modifications to the Form PH-16.2, Statement on Specific Issues in Dispute, to include more information and provides for sanctions for failing to file the form. Historically, this form has not been filed. Small businesses and local governments, along with all insurance carriers and the State Insurance Fund, will now be required to file this form. The proposal also requires the Form C-7, Notice that Right to Compensation is Controverted, be complete, including a basis for the carrier's controversion of the case and any defenses, be certified by the carrier or its legal representative, and be accompanied by a list of documents that may be used to support the carrier's position.

The proposed regulations impose some new reporting and compliance requirements. If a claimant has retained legal representation at the time the Form C-3 is filed with the Board, the legal representative will be required to provide written certification that the contents of the Form C-3 have evidentiary support or will after discovery and investigation, and a list of all documents in the claimant's control that will be used to support the claim.

Pursuant to this proposal, a determination of prima facie medical evidence is interlocutory, so that it cannot be appealed by either party. This will reduce delays and costs as neither side will need to prepare and file Applications for Review or Rebuttals. Additionally, the proposal prohibits

the filing of summations, memoranda of law and/or briefs unless the Workers' Compensation Law Judge finds that the claim presents extensive and complicated factual determinations or novel and important questions of law.

3. Professional services:

It is believed that no additional professional services will be needed to comply with these regulations. Small businesses and local governments will continue to use the same professional services as they are using today, such as third party administrators and attorneys.

4. Compliance costs:

The additional costs from this rule making are minimal. Mainly the regulation requires compliance with existing requirements. All participants in the workers' compensation system, including small businesses and local governments, will be required to fully complete and file all forms that have been required for decades using the forms prescribed by the Chair or Board. Some small businesses and local governments may experience costs associated with now complying with these requirements. Employers may experience some costs in complying with the requirement to provide a Claimant Information Packet to injured or ill employees. Small businesses that are involved in the adjudication of claims and self-insured small businesses will experience some costs from completing the more extensive Form PH-16.2, Statement on Specific Issues in Dispute.

Medical providers may incur some costs in complying with expedited record requests, but the provider is paid twice the usual rate for such requests.

At the same time, the regulations will reduce legal costs by expediting resolution of disputes.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for most small businesses and local governments to comply with the proposed amendments.

6. Minimizing adverse impact:

These proposed amendments seek to minimize adverse impacts on small businesses and local governments by eliminating unnecessary and unproductive "no medical evidence" hearings and by expediting the adjudication of controverted claims. Therefore, these proposed regulations provide a benefit to small businesses and local governments by eliminating frictional costs.

The regulations also provide relief to small businesses by enabling the Workers' Compensation Law Judge or conciliator to allow medical experts to testify by deposition or telephone rather than having to travel to the hearing. Not only does this save time in the process, it saves time and money for the witnesses, many of whom may be small businesses.

7. Small business and local government participation:

The proposed regulations are based upon regulations recommended by the Superintendent of Insurance based upon the work of the Advisory Committee appointed by Governor Spitzer in his March 13, 2007, letter. The Advisory Committee is composed of representatives from the AFL-CIO, Business Council of New York State, and New York State Assembly and Senate.

The Board made modifications to the recommended regulations to address provisions which were inconsistent with statute, to ensure all types of claims are covered and to address provisions which were logistically difficult for the Board and the parties. While the recommended regulations require the PHC statement to be filed 14 days before the PHC, statute requires it to be filed 10 days before the PHC. The recommended regulations only allowed an employer to file an employer's report of injury or C-2 form, however WCL § 110(2) specifically authorizes employers to designate a third-party to file the form. The recommended regulations required medical providers to file medical reports electronically and legal representatives to file PHC statements electronically. However, State Technology Law § 305(1) prohibits the Board from refusing to accept paper forms and requiring electronic filing without statutory authority. The recommended regulations only referenced the C-3 and C-2 forms and not the forms to file a death claim or a claim for volunteer firefighter or volunteer ambulance worker benefits. The recommended regulations required all medical providers to complete the form prescribed by the Chair, the C-4 form, and did not accept office notes or a narrative. However, not all claimants are treated by medical providers authorized by the Chair who are required to complete the C-4 form, such as emergency room physicians. As stated above, holding the first expedited hearing, to take all lay testimony, immediately after the PHC could easily result in wasted calendar time and make it difficult for the parties to prepare for the hearing. The proposed regulations address all of these issues.

The Board received suggested changes to the recommended regulations from participants in the system and from within the Board. The Board received comments from the Injured Workers' Bar Association, the State Insurance Fund, the Public Employees Federation, New York Committee for Occupational Safety and Health, the Bar Association of Nassau County, and the Suffolk County Bar Association.

The comments suggested:

(a) Permitting the indexing of a claim upon receipt of any medical report that provides a history, a diagnosis and statement on causal relationship rather than restricting indexing to receipt of completed, prescribed medical report. The Board amended the recommended regulations to allow for the indexing of a claim without receiving the prescribed medical report when the claimant is treated out of state, treated in an emergency room and when the claimant has died due to his or her work related injury. Also the Board revised the definition of prima facie medical evidence (PFME) in accordance with the amendment to WCL § 25(2-a).

(b) Amending the recommended regulation to make Claimant Information Packets available to employers on the Board's website, available to anyone.

(c) Deleting the phrase "by an attending medical provider" from the recommended definition for PFME to allow the acceptance of PFME from a medical professional other than an "attending medical provider" in some cases. The definition of PFME has been completely changed and no longer contains a reference to attending provider.

(d) Deleting the requirement that a prescribed form must be used for a medical report to qualify as PFME. The Board amended the recommended regulations to allow a medical report other than on the prescribed form when the claimant is treated out of state, treated in an emergency room and when the claimant has died due to his or her work related injury.

(e) Deleting sections relating to Limited Releases. Currently, claimants are directed to sign releases for prior medical records. The proposed regulations modify the recommended regulations by only requiring receipt of a limited release to index a claim when a claimant notes on the C-3 form that he or she suffered a prior injury or similar illness to the work related injury or illness.

(f) Deleting the recommended regulation section regarding mediation meetings as unnecessary and unworkable. The proposed regulation eliminates this provision.

(g) Modifying the recommended regulation to indicate that photocopies or electronic copies of a Limited Release are the equivalent of an original signed release and must be accepted as such by medical professionals and hospitals. This suggestion is incorporated into the draft form prepared by the Board.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

These regulations will apply to all insurance carriers, employers, local governments, attorneys, medical providers, group self-insured trusts, third party administrators and claimants across the state. These individuals and entities exist in all rural areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

The proposed rule imposes new compliance requirements on all participants to the workers' compensation system. First, claimants will be required to complete a limited release. The limited release is necessary to provide carriers and self-insured employers with the information about prior injuries or similar illnesses to the work related injury or illness.

Second, those employers who purchase coverage and whose only involvement with the workers' compensation system is that of an employer will only be minimally affected by this rule. Specifically, such employers will be required to provide an injured employee with a Claimant Information Packet (hereinafter referred to as Packet), which contains a Form C-3 (Employee's Claim For Compensation), instructions for completing the form, explanation of the necessity of a Form C-4 (Attending Doctor's Report), a limited medical release, and notice that the employee has the right to a legal representative. Employers or the third-parties they designate will be required to certify on the Form C-2, Employer's Report of Work-Related Accident, that the Packet was provided.

Third, individuals authorized to provide medical treatment to claimants will have to comply with the requirements for medical reports and testimony. Specifically, the proposed regulations require medical providers authorized by the Chair to treat claimants to fully complete and submit a Form C-4, Attending Doctor's Report. Historically, the Board has accepted office notes, medical narratives and the HCFA 1500 form. The proposed regulations only allow for the filing of the Form C-4 by authorized medical providers. If an authorized medical provider fails to file a fully completed Form C-4, he or she will not be paid for the services

provided to the claimant. Medical providers will be required to comply with shortened time periods in which to appear for a hearing to give medical testimony. Additionally, medical providers authorized by the Board will be required to reply to requests for records within 21 days or within 10 days if an expedited request is made. Authorized medical providers will be paid \$1.50 per page for expedited orders to defray any associated costs. If an authorized provider fails to comply with this requirement, he/she will be subject to administrative warning, suspension or revocation.

Fourth, those entities involved in the actual process of adjudicating claims, such as self-insured employers, insurance carriers, local governments, third party administrators, group self-insured trusts and/or trust administrators, and attorneys must comply with all of the provisions of the proposed regulations. The proposal requires all forms to be fully completed and requires the filing of forms that to date have not been regularly filed. For example, the regulation requires modifications to the Form PH-16.2, Statement on Specific Issues in Dispute, to include more information and provides for sanctions for failing to file the form. Historically, this form has not been filed so entities will be required to adjust. The proposal also requires the Form C-7, Notice that Right to Compensation is Controverted, be complete, including a basis for the carrier's controversion of the case and any defenses, be certified by the carrier or its legal representative, and be accompanied by a list of documents that may be used to support the carrier's position.

The proposed regulations impose some new reporting and compliance requirements. If a claimant has retained legal representation at the time the Form C-3 is filed with the Board, the legal representative will be required to provide written certification that the contents of the Form C-3 have evidentiary support or will after discovery and investigation, and a list of all documents in the claimant's control that will be used to support the claim.

Pursuant to this proposal, a determination of prima facie medical evidence is interlocutory so that it cannot be appealed by either party. This will reduce delays and costs as neither side will need to prepare and file Applications for Review or Rebuttals. Additionally, the proposal prohibits the filing of summations, memoranda of law and/or briefs unless the Workers' Compensation Law Judge finds that the claim presents extensive and complicated factual determinations or novel and important questions of law.

3. Costs:

The additional costs from this rule making are minimal. Mainly the regulation requires compliance with existing requirements. All participants in the workers' compensation system will be required to fully complete and file all forms that have been required for decades using the forms prescribed by the Chair or Board. Some entities and individuals in rural areas may experience costs associated with now complying with these requirements.

Employers may experience some costs in complying with the requirement to provide a Claimant Information Packet to injured or ill employees. Medical providers may incur some costs in complying with expedited record requests, but the provider is paid twice the usual rate for such requests. Entities and individuals that are involved in the adjudication of claims, and self-insured small businesses will experience some costs from completing the more extensive Form PH-16.2, Statement on Specific Issues in Dispute.

At the same time, the regulations will reduce legal costs by expediting resolution of disputes.

4. Minimizing adverse impact:

These proposed amendments seek to minimize adverse impacts on entities and individuals in rural areas by eliminating unnecessary and unproductive "no medical evidence" hearings and by expediting the adjudication of controverted claims.

The regulations also provide relief to small businesses by enabling the Workers' Compensation Law Judge or conciliator to allow medical experts to testify by deposition or telephone rather than having to travel to the hearing. Not only does this save time in the process, it saves time and money for the witnesses, which will be particularly beneficial to those in rural areas.

5. Rural area participation:

The proposed regulations are based upon regulations recommended by the Superintendent of Insurance based upon the work of the Advisory Committee appointed by Governor Spitzer in his March 13, 2007, letter. The Advisory Committee is composed of representatives from the AFL-CIO, Business Council of New York State, and New York State Assembly and Senate.

The Board made modifications to the recommended regulations to address provisions which were inconsistent with statute, to ensure all types of claims are covered and to address provisions which were logistically difficult for the Board and the parties. While the recommended regulations require the PHC statement to be filed 14 days before the PHC, statute requires it to be filed 10 days before the PHC. The recommended regulations only allowed an employer to file an employer's report of injury or C-2 form, however WCL § 110(2) specifically authorizes employers to designate a third-party to file the form. The recommended regulations required medical providers to file medical reports electronically and legal representatives to file PHC statements electronically. However, State Technology Law § 305(1) prohibits the Board from refusing to accept paper forms and requiring electronic filing without statutory authority. The recommended regulations only referenced the C-3 and C-2 forms and not the forms to file a death claim or a claim for volunteer firefighter or volunteer ambulance worker benefits. The recommended regulations required all medical providers to complete the form prescribed by the Chair, the C-4 form, and did not accept office notes or a narrative. However, not all claimants are treated by medical providers authorized by the Chair who are required to complete the C-4 form, such as emergency room physicians. As stated above, holding the first expedited hearing, to take all lay testimony, immediately after the PHC could easily result in wasted calendar time and make it difficult for the parties to prepare for the hearing. The proposed regulations address all of these issues.

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(b) Amending the recommended regulation to make Claimant Information Packets available to employers on the Board's website, available to anyone.

(c) Deleting the phrase "by an attending medical provider" from the recommended definition for PFME to allow the acceptance of PFME from a medical professional other than an "attending medical provider" in some cases. The definition of PFME has been completely changed and no longer contains a reference to attending provider.

(d) Deleting the requirement that a prescribed form must be used for a medical report to qualify as PFME. The Board amended the recommended regulations to allow a medical report other than on the prescribed form when the claimant is treated out of state, treated in an emergency room and when the claimant has died due to his or her work related injury.

(e) Deleting sections relating to Limited Releases. Currently, claimants are directed to sign releases for prior medical records. The proposed regulations modify the recommended regulations by only requiring receipt of a limited release to index a claim when a claimant notes on the C-3 form that he or she suffered a prior injury or similar illness to the work related injury or illness.

(f) Deleting the recommended regulation section regarding mediation meetings as unnecessary and unworkable. The proposed regulation eliminates this provision.

(g) Modifying the recommended regulation to indicate that photocopies or electronic copies of a Limited Release are the equivalent of an original signed release and must be accepted as such by medical professionals and hospitals. This suggestion is incorporated into the draft form prepared by the Board.

Job Impact Statement

The amendments to Section 300.1 and the addition of Sections 300.37 and 300.38 implement statutory changes and accelerate, enhance and improve the process for resolving controverted claims of represented claimants. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment, and therefore a job impact statement is not required.