

RULE MAKING ACTIVITIES

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

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

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

Department of Audit and Control

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Additional Reporting Requirements for Elected and Appointed Officials in Relation to Reporting Requirements

I.D. No. AAC-42-08-00002-P

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

Proposed Action: Renumbering of section 315.4 to 315.5 and addition of new section 315.4 to Title 2 NYCRR.

Statutory authority: Retirement and Social Security Law, sections 11, 34, 311 and 334

Subject: Additional reporting requirements for elected and appointed officials in relation to reporting requirements.

Purpose: To provide further guidance for elected and appointed officials in relation to reporting requirements.

Text of proposed rule: Section 315.4 is renumbered to section 315.5 and a new section 315.4 is added to read as follows:

315.4 Additional reporting requirements for elected or appointed officials of a participating employer.

(1) *Standard Work Day Resolution.* In addition to the reporting requirements set forth in subpart 315.3 and for the sole purpose of reporting service credit to the retirement system, at each re-organization meeting held on or after January 1, 2009, the governing board of a participating employer of an elected or appointed official shall establish, by resolution in a form prescribed by the Comptroller,

a standard work day for each such elective or appointive office, which shall state the number of hours prescribed for the position in a standard work day. For the purpose of determining service credit, in no event shall less than six hours be considered to be a full day of work. Said resolution will list the term expiration and standard work day for each elective or appointive office. Whenever a new elective or appointive office is established by an employer, a resolution setting the standard work day shall be adopted by the governing board and posted in the manner set forth in this regulation. All such resolutions shall be posted on the employer's website for a minimum of thirty days. In the event the employer does not maintain a website that is available to the public, the resolution shall be posted on the official sign-board or at the main entrance to the office of the clerk for the municipality or similar office of the participating employer for a minimum of thirty days. A certified copy of the resolution and an affidavit of posting shall be filed with the Comptroller within 45 days of adoption. In the event a resolution is not adopted within ninety days of establishment of a position or, for a previously established position, the re-organization meeting, no service credit shall be provided for the position until such time as a resolution is adopted, posted and filed with the Comptroller.

(2) *Record of activities.* In the event an employer does not maintain an actual record of time worked on a daily basis for an elective or appointive office, the official holding the office shall record his or her work activities for a period of three consecutive months. In preparing the record, the official may consider factors that require his or her attention outside the normal working hours for the purpose of actually attending to official duties, including responding to an emergency, attending an employer sponsored event or meeting with or responding to members of the public on matters of official business. Such record of activities shall be completed within 150 days of taking the office. The record of activities shall be submitted by the official to the secretary or clerk of the governing board within 180 days of the board's adoption of the standard work day resolution with a certification, in a form prescribed by the Comptroller and signed by such official, that the official has filed the required record of activities with the secretary or clerk. The secretary or clerk shall promptly file the certification with the Comptroller. Each such record of activities shall be retained by the employer for a period of ten years and full and complete copies shall be provided to the Comptroller upon his or her request. A record of activities need not be prepared by an elected or appointed official who is not a member of the Retirement System. The failure of the official to maintain and timely file the record of activities shall result in the suspension of service crediting and retirement system membership benefits for the elected or appointed official until such time as the record is maintained and a certification is filed with the Comptroller.

(3) *Reporting Resolution; Creditable Time.* At the first regular meeting held after submission to the governing board of the official's record of activities, the governing board shall also authorize, by resolution, the maximum total number of days per month based upon the standard work day and the record of activities that will be reported for the elected or appointed official. Said resolution shall be posted on the employer's website for a minimum of thirty days. In the event the employer does not maintain a website that is available to the public, the resolution shall be posted on the official sign-board or at the main entrance to the office of the clerk for the municipality or similar office of the participating employer for a minimum of thirty days. A certified

copy of the resolution and an affidavit of posting shall be filed with the Comptroller within 45 days of the meeting. The failure of the governing board to adopt such resolution shall result in the suspension of service crediting and retirement system membership benefits for the elected or appointed official until such time as the resolution is adopted, posted and filed with the Comptroller.

Text of proposed rule and any required statements and analyses may be obtained from: Jamie Elacqua, Office of the State Comptroller, 110 State St., Albany, NY 12236, (518) 474-9024, email: JElacqua@osc.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: Sections 34 and 334 of the Retirement and Social Security Law, as added by chapter 510 of the Laws of 1974, require that the Comptroller adopt rules and regulations, which shall have the force and effect of law, for the reporting of service, salary and deductions information for all member-employees of employers that participate in the New York State Employees' Retirement System and the New York State Police and Fire Retirement System. Said statutes further provide that the chief fiscal officer of the participating employer, or other officer exercising similar duties, shall file the required report in such form and at such times as we may be prescribed in the said rules and regulations. Sections 34 and 334 make the refusal or willful neglect to file the required report a violation which shall subject the officer so refusing or neglecting to a penalty of \$5 per day for each day's delay beyond seven days. Sections 11 and 311 of the Retirement and Social Security Law establish the Comptroller as the administrative head of the retirement system and authorize him to adopt and amend rules and regulations for the administration and transactions of the business of the retirement system.

2. Legislative objectives: Elected officials, appointed officers and employees of participating employers are eligible for membership in the retirement system. Public employers participating in the retirement system are required to report service and salary information for all their elected officials, appointed officers and employees so that the retirement system may accurately determine the employers' obligation to contribute to the funding of the retirement system, the members' entitlement to the benefits administered by the retirement system and, ultimately, calculate the amount of benefits due to members upon retirement or death. The existing regulation instructs employers to report elected officials, appointed officers and employees who are active members of the retirement system or who are in the process of being registered to membership and it provides some instructions for the reporting of these individuals. In particular, employers are instructed to report the number of days worked for each member paid on a payroll during the month. Recognizing the difficulty in reporting days worked for elected officials and appointed officers, who may be called upon to render service to the public outside regular business hours, the existing regulation authorized the employer to adopt a sample month method in lieu of an actual time record. Under this method, the official/officer keeps a record of public activities for a period of one month which is then submitted to the governing board and used by the board to establish both a standard work day and the number of days worked per month to be reported by the employer for the official/officer.

3. Needs and benefits: The existing regulation fails to take into account changing circumstances in that it requires that the sample month be kept only once during the entire time the member holds the elective or appointive office. Furthermore, the one month recording period has proven to be insufficient to provide an accurate record of the actual number of days worked by an official. Finally, the existing regulation does not include any time frames for the completion of the sample month or the establishment of the standard work day and number of days worked to be reported to the retirement system. Consequently, it is not uncommon to find that, as elected officials and appointed officers near retirement age and begin to make inquiries into their prospective benefit; the records of the retirement system are incomplete or incorrect. The amendment to the existing regulation provides employers with additional guidance and time frames to aid them in establishing a standard work day and the number of days

worked to be reported for their elected officials and appointed officers. The amendment requires that, at each reorganization meeting held on or after January 1, 2009, the governing board of the employer establish by resolution the standard work day for each elective or appointive office. In the event the employer does not maintain daily time records for an elective or appointive office, the officer is required to keep a record of activities for a period of three consecutive months and submit it to the governing board. The employer is required to maintain a copy of the record of activities for a period of ten years. Based upon the previously established standard work day and the record of activities, the governing board shall then authorize, by resolution, the maximum total number of days per month to be reported for the official. Finally, the amendment requires submission of the record of activities by the member, public posting of the resolutions on the employer's website or other public place, and the filing of certified copies with the Comptroller all within established time periods. Failure to satisfy these requirements will result in the suspension of service crediting and retirement system membership benefits for the official.

4. Costs: While there may be a modest administrative cost for employers associated with the preparation, posting and submission of the resolutions, we anticipate that any such cost will be offset by the savings to employers resulting from increased accuracy of record keeping and timely reporting of days worked to the retirement system.

5. Local government mandates: The proposed rule imposes a duty on county, city, town, village, school district, fire district or other special district participating employers to post resolutions either on their website, official sign-board or other public place and to submit them to the retirement system. It will also require that they maintain a copy of a record of activities for a period of ten years.

6. Paperwork: To provide more accurate and timely reporting of the standard work day and the days worked by elected officials and appointed officers, the proposed amendment will require the employer to prepare, post and submit resolutions following each reorganization meeting and at other times as set forth in the rule.

7. Duplication: This action does not conflict with or duplicate any state or federal requirements.

8. Alternatives: No significant alternatives were considered.

9. Federal standards: Not applicable

10. Compliance schedule: Not applicable

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because the proposal will not impose any adverse economic impact or significant reporting, record keeping or compliance requirements on small businesses or local governments. Rather, this proposal may result in an economic savings by local governments as a result of the reduction in incorrect and untimely reporting of days worked for elected officials and appointed officers.

Rural Area Flexibility Analysis

This action will not impose any adverse economic impact, reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Office of Children and Family Services

EMERGENCY RULE MAKING

Mandatory Disqualification of Foster and Adoptive Parents Based on Criminal History

I.D. No. CFS-42-08-00018-E

Filing No. 957

Filing Date: 2008-09-30

Effective Date: 2008-10-01

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

Action taken: Amendment of sections 421.27(d)(1) and 443.8(e)(1); and repeal of sections 421.27(k) and 443.8(k) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(d)(3), 34(f)(3) and 378-a(2); L. 1997, ch. 436; and L. 2008, ch. 623

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

Specific reasons underlying the finding of necessity: The regulations must be filed on an emergency basis to protect the health and safety of children in foster boarding homes and adoptive placements. The regulations reflect newly enacted state statutory standards.

Subject: Mandatory disqualification of foster and adoptive parents based on criminal history.

Purpose: The regulations implement Chapter 623 of the Laws of 2008 relating to criminal history checks of foster and adoptive parents.

Text of emergency rule: Paragraph (1) of subdivision (d) of section 421.27 is amended to read as follows:

(d)(1) Except [as authorized herein and] as set forth in subdivision (h) of this section, the authorized agency must deny an application to be an approved adoptive parent or revoke the approval of an approved adoptive parent when a criminal history record of the prospective or approved adoptive parent reveals a conviction for:

- (i) a felony conviction at any time involving;
 - (a) child abuse or neglect;
 - (b) spousal abuse;
 - (c) a crime against a child, including child pornography;
 - (d) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery[, unless the prospective adoptive parent or approved adoptive parent demonstrates that:

(1) such denial or revocation will create an unreasonable risk of harm to the physical or mental health of the child; and

(2) approval of the application or continuing approval will not place the child's safety in jeopardy and will be in the best interests of the child]; or

(ii) a felony conviction within five years for physical assault, battery, or a drug-related offense [, unless the prospective adoptive parent or approved adoptive parent demonstrates that:

(a) such denial will create an unreasonable risk of harm to the physical or mental health of the child; and

(b) approval of the applicant will not place the child's safety in jeopardy and will be in the best interests of the child].

Notwithstanding any other provision to the contrary, with regard to an adoptive parent fully approved prior to October 1, 2008, the provisions of this paragraph only apply to mandatory disqualifying convictions that occur on or after October 1, 2008.

Subdivision (k) of section 421.27 is repealed.

Paragraph (1) of subdivision (e) of section 443.8 is amended to read as follows:

(e)(1) Except as [authorized herein and as] set forth in this section, the authorized agency must deny an application for certification or approval as a certified or approved foster parent or deny an application for renewal of the certification or approval of an existing foster parent *submitted on or after October 1, 2008* or revoke the certification or approval of an existing foster parent when a criminal history record of the prospective or existing foster parent reveals a conviction for:

- (1) a felony conviction at any time involving;
 - (a) child abuse or neglect;
 - (b) spousal abuse;
 - (c) a crime against a child, including child pornography; or
 - (d) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery[; unless the applicant or approval or certification as a foster parent or the certified or approved foster parent demonstrates that;

(1) such denial or revocation will create an unreasonable risk of harm to the physical or mental health of the child; and

(2) continued certification, approval or renewal will not place the child's safety in jeopardy and will be in the best interests of the child]; or

(ii) a felony conviction within the past five years for physical assault, battery, or a drug-related offense[; unless the applicant for certification or approval as a foster parent or the certified or approved foster parent demonstrates that:

(a) such denial or revocation will create an unreasonable risk of harm to the physical or mental health of the child; and

(b) continued certification, approval or renewal will not place the child's safety in jeopardy and will be in the best interests of the child].

Notwithstanding any other provision to the contrary, with regard to a foster parent fully certified or approved prior to October 1, 2008, the provisions of this paragraph only apply to mandatory disqualifying convictions that occur on or after October 1, 2008.

Subdivision (k) of section 443.8 is repealed.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 28, 2008.

Text of rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington St., Rensselaer, NY 12144, (518) 473-7793

Regulatory Impact Statement

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Office of Children and Family Services (OCFS) to establish rules, regulations and policies to carry out its powers and duties.

Section 34(3)(f) of the SSL authorizes the commissioner of OCFS to establish regulations for the administration of public assistance and care within New York State, both by the State and by local government units.

Section 378-a(2) of the SSL requires criminal history record reviews of prospective foster and adoptive parents, as well as other persons over the age of 18 who reside in the home of such applicants.

Chapter 623 of the laws of 2008 amended the criminal history review standards set forth in section 378-a(2) of the SSL. Section 5 of Chapter 623 of the Laws of 2008 authorizes OCFS to promulgate rules and regulations on an emergency basis for the purpose of implementing the provision of the Chapter.

2. Legislative objectives:

The regulations implement Chapter 623 of the Laws of 2008 relating to criminal history record reviews of applicants for certification or approval as foster or adoptive parents. The regulations reflect amendments to federal and state statutory standards relating to situations where such applicant has been convicted of a mandatory disqualifying crime. The regulations eliminate the category of presumptive disqualifying crimes and replace that category with the category of mandatory disqualifying crimes for applicants for certification or approval as foster or adoptive parents.

Chapter 623 of the Laws of 2008 and the regulations implement changes in federal statutes that had previously allowed states to opt out of federal criminal history record review requirements for prospective foster or adoptive parents and that required the application of mandatory disqualification for certain categories of felony convictions. The federal Adam Walsh Child Protection and Safety Act of 2006 (P.L.109-248) eliminated effective October 1, 2008 the ability of states to opt out of federal criminal history review standards and required states to comply in order to receive federal Title IV-E payments for foster care or adoption assistance.

3. Needs and benefits:

The regulations are necessary for OCFS to conform to federal and state statutory changes to criminal history record review standards. The regulations reflect the federal requirement set forth in the federal Adam Walsh Child Protection and Safety Act of 2006 that states must adopt federal mandatory disqualification standards for prospective foster and adoptive parents who are convicted of certain categories of felonies. Compliance with the federal requirement is a condition for New York State to have a compliant Title IV-E State Plan which is a condition for New York State to receive federal funding for foster care and adoption assistance.

The regulations are also necessary to reflect amendments to section 378-a(2) of the SSL that eliminated the category of presumptive disqualifying crimes. The regulations reflect the mandatory disqualification of an applicant to be certified or approved as a foster or adoptive parent when such applicant has been convicted of a certain category of felony.

The regulations will not impact persons who were fully certified or approved as a foster or adoptive parent prior to October 1, 2008 for convictions that occurred prior to that date.

4. Costs:

The regulations are necessary to comply with federal requirements that states perform background checks and review the criminal history of prospective foster and adoptive parents as a prerequisite for continuation of federal funding under Title IV-E of the Social Security Act effective October 1, 2008. New York State must implement provisions set forth in these regulations by October 1, 2008, or face significant losses of earned federal revenue. The enactment of Chapter 623 of the Laws of 2008 and these regulations will preserve approximately \$600 million in federal Title IV-E funding earned on an annual basis.

5. Local government mandates:

The regulations adopt the standards that were in place in 1999 with the enactment of Chapter 7 of the Laws of 1999, but were amended by Chapter 145 of the Laws of 2000 that created the criteria of presumptive disqualifying crimes.

Social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe have been required to perform criminal history record reviews since 1999 in regard to New York State checks through the New York State Division of Criminal Justice Services and since 2007 in regard

to a national criminal history record check through the Federal Bureau of Investigation. The regulations do not expand who must have a criminal history record check in relation to foster care or adoption.

6. Paperwork:

Authorized agencies are currently required to document their criminal history record review activities. The regulations do not impose additional paperwork requirements on social services districts or voluntary authorized agencies.

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

The proposed regulations are required to implement the state law, Chapter 623 of the Laws of 2008 and the federal Adam Walsh Child Protection and Safety Act of 2006.

9. Federal standards:

The federal Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248) eliminated the ability of states to opt out of the federal criminal history record review requirements set forth in section 471(a)(20) of the Social Security Act for prospective foster and adoptive parents. New York State had opted out of the federal requirements in 2000 through Chapter 145 of the Laws of 2000 that created the category of presumptive disqualifying crimes. Effective October 1, 2008, for a state to have a compliant Title IV-E State Plan, the state must apply the federal criminal history record review standards for applicants for certification or approval as foster or adoptive parents. Those standards prohibit the final certification or approval of a prospective foster or adoptive parent who has a felony conviction at any time for abuse or neglect, spousal abuse, or a crime against a child or for a crime involving violence. In addition, the federal statutes prohibit final certification or approval of a prospective foster or adoptive parent who has been convicted within 5 years of such application for assault or a drug related offense.

10. Compliance schedule:

Chapter 623 of the Laws of 2008 provides for an October 1, 2008 effective date of the standards set forth in the regulations. OCFS is developing the necessary revised forms and instructions to authorized agencies to implement the revised standards.

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

The regulations will affect social services districts, Indian tribes with an agreement with the State of New York to provide foster care and adoption services and voluntary authorized agencies that certify or approve prospective foster and adoptive parents. There are 58 social services districts and approximately 160 voluntary authorized agencies. The St. Regis Mohawk Tribe has an agreement with the State of New York to provide foster care and adoption services.

2. Reporting, recordkeeping and compliance requirements:

The regulations are necessary to comply with federal and state statutory requirements relating to criminal history record reviews of persons applying for certification or approval as foster or adoptive parents. The regulations reflect the enactment by Chapter 623 of the Laws of 2008 regarding mandatory disqualifying crimes for applicants for certification or approval as foster or adoptive parents and the elimination of the category of presumptive disqualifying crimes for such applicants. The adoption of mandatory disqualifying crimes is required by the federal Adam Walsh Child Protection and Safety Act of 2006 in order to enable New York State to continue to receive federal funding for foster care and adoption assistance pursuant to Title IV-E of the Social Security Act. The 2006 federal Act requires implementation of this provision effective October 1, 2008.

Social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe will continue to process requests for criminal history record reviews as originally mandated by Chapter 7 of the Laws of 1999. The regulations reflect modifications to the standards for the certification or approval of prospective foster or adoptive parents when an applicant has been convicted of a mandatory disqualifying crime.

The regulations will not impose additional record keeping or reporting requirements on agencies. The regulations will eliminate a notification that is presently required in regard to presumptive disqualifying crimes.

3. Professional services:

No new or additional professional services would be required by small businesses or local governments in order to comply with the regulations.

4. Compliance costs:

The regulations are necessary to comply with federal requirements that states perform background checks and review the criminal history of prospective foster and adoptive parents as a prerequisite for continuation of federal funding under Title IV-E of the Social Security Act effective October 1, 2008. New York must implement the provisions set forth in these regulations by October 1, 2008, or face significant losses of earned federal revenue. The enactment of Chapter 623 of the Laws of 2008 and these regulations will preserve approximately \$600 million in federal Title IV-E funding earned on an annual basis.

5. Economic and technological feasibility:

The social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe affected by the regulations have the economic and technological ability to comply with the regulations. The regulations do not expand the categories of persons for whom a criminal history record review must be completed. OCFS is making modifications to the statewide automated child welfare information system, CONNECTIONS and to its criminal history information system, CHRS to support and implement the regulations.

6. Minimizing adverse impact:

The regulations reflect specific amendments to state statute enacted by Chapter 623 of the Laws of 2008 and amendments to federal standards as enacted by the Adam Walsh Child Protection and Safety Act of 2006. The process for fingerprinting foster or adoptive parents and other persons over the age of 18 who reside in the home of the applicants has been the same since 1999 for in-state checks through the New York State Division of Criminal Justice Services and since 2007 for national checks through the Federal Bureau of Investigation. While the regulations will change the standards following the receipt of the result of the criminal history check, the regulations will not change the process for taking and reviewing of fingerprints. The regulations build on existing procedures.

7. Small business and local government participation:

OCFS advised social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe of the federal amendment to criminal history record checks in the federal Adam Walsh Child Protection and Safety Act of 2006 and the anticipated impact on New York State standards in an administrative directive (07-OCFS-ADM-01 State and National Criminal History Record Checks (for Foster /Adoptive Parents) issued on February 7, 2007. A reminder of the federal statutory change and related impact on New York State standards was sent to the same parties in an informational letter (08-OCFS-INF-07 Preparation for the Elimination of the "Out-Out" Provision for conducting Criminal History Record Checks) issued May 21, 2008. The federal statute was posted on the OCFS website and was discussed at a video conference held in October of 2006 at which agencies were invited to view and to ask questions. A tape of that conference is also available to all agencies that were not able to attend.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect 44 social services districts that are defined as being rural counties and the seven social services districts that include significant rural areas within their borders. The regulations will also affect the St. Regis Mohawk Tribe that has an agreement with the State of New York to provide foster care and adoption services and which services a rural community. In addition, there are approximately 100 voluntary authorized agencies that service rural communities that will be affected by the regulations.

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

The regulations are necessary to comply with federal and state statutory requirements relating to criminal history record reviews of persons applying for certification or approval as foster or adoptive parents. The regulations reflect the enactment by Chapter 623 of the Laws of 2008 regarding mandatory disqualifying crimes for applicants for certification or approval as foster or adoptive parents and the elimination of the category of presumptive disqualifying crimes for such applicants. The adoption of mandatory disqualifying crimes is required by the federal Adam Walsh Child Protection and Safety Act of 2006 in order to enable New York State to continue to receive federal funding for foster care and adoption assistance pursuant to Title IV-E of the Social Security Act. The federal 2006 Act requires implementation of this provision effective October 1, 2008.

Social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe will continue to process requests for criminal history record reviews as originally mandated by Chapter 7 of the Laws of 1999. The regulations reflect modifications to the standards for the certification or approval of prospective foster or adoptive parents when an applicant has been convicted of a mandatory disqualifying crime.

The regulations will not impose additional record keeping or reporting requirements on agencies. The regulations will eliminate a notification that is presently required in regard to presumptive disqualifying crimes.

3. Costs:

The regulations are necessary to comply with federal requirements that states perform background checks and review the criminal history of prospective foster and adoptive parents as a prerequisite for continuation of federal funding under Title IV-E of the Social Security Act effective October 1, 2008. New York State must implement the provisions set forth in these regulations by October 1, 2008, or face significant losses of earned federal revenue. The enactment of Chapter 623 of the Laws of 2008 and these regulations will preserve approximately \$600 million in federal Title IV-E funding on an annual basis.

4. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impacts on rural areas.

5. Rural area participation:

The Office of Children and Family Services (OCFS) advised social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe of the federal amendment to criminal history record checks by the Adam Walsh Child Protection and Safety Act of 2006 and the anticipated impact on New York State standards in an administrative directive (07-OCFS-ADM-01 State and National Criminal History Record Checks (for Foster/Adoptive Parents) issued on February 7, 2007. A reminder of the federal statutory change and related impact on New York State standards was sent to the same parties in an informational letter (08-OCF-INF-07 Preparation for the Elimination of the "Opt-Out" Provision for Conducting Criminal History Record Checks) issued on May 21, 2008. The federal statute was posted on the OCFS website and was discussed at a statewide video conference held in October of 2006 at which agencies were invited to view and to ask questions. A tape of the video conference is available for agencies not able to attend.

Job Impact Statement

A full job impact statement has not been prepared for the regulations which contain new requirements imposed by Chapter 623 of the Laws of 2008. The regulations will not have an impact on jobs and employment opportunities because they will not impact the number of staff authorized agencies must maintain to certify, approve or supervise foster or adoptive homes. The regulations impact persons who are not in an employment relationship with the agency.

Department of Correctional Services

NOTICE OF ADOPTION

Sentence of Death to be Carried Out at Green Haven Correctional Facility

I.D. No. COR-30-08-00003-A

Filing No. 941

Filing Date: 2008-09-24

Effective Date: 2008-10-15

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

Action taken: Repeal of section 100.21 of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Sentence of Death to be Carried out at Green Haven Correctional Facility.

Purpose: To repeal the regulation consistent with New York State Court of Appeals decision in *People v. Taylor*, 9 N.Y.3d 129 (2007).

Text or summary was published in the July 23, 2008 issue of the Register, I.D. No. COR-30-08-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Anthony J. Annucci, Executive Deputy Commissioner, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2- State Campus, Albany, NY 12226-2050, (518) 457-4951, email: AJAnnucci@DOCS.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Division of Criminal Justice Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Availability of Records.

I.D. No. CJS-42-08-00007-P

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

Proposed Action: This is a consensus rule making to amend Part 6150 of Title 9 NYCRR.

Statutory authority: Public Officers Law, section 87(1)(b); Executive Law, section 837(13)

Subject: Availability of records.

Purpose: Update provisions regarding availability of Division's records.

Text of proposed rule: 1. Part 6150 of title 9 NYCRR is amended as follows:

PART 6150
AVAILABILITY OF RECORDS [FOR PUBLIC INSPECTION AND COPYING]

Section 6150.1. Purpose. The purpose of this Part is to set forth the [methods and] procedures governing the availability[, location, and nature] of [those] records of the Division of Criminal Justice Services [subject] pursuant to the provisions of article 6 of the Public Officers Law, known as the Freedom of Information Law.

Section 6150.2. Definitions. For the purposes of this Part:

(a) The term DCJS means the Division of Criminal Justice Services.
(b) Record or records means any information kept, held, filed, produced or reproduced by, with or for an agency or the State Legislature, in any physical form whatsoever, including but not limited to reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

(c) [The term statistical tabulation means a collection or orderly presentation of numerical data logically arranged in columns and rows or graphically.

(d) The term factual tabulation means a collection of statements of objective information logically arranged which is empirically derived and reflects objective reality, actual existence or an actual occurrence.

(e) The term workday means any day except Saturday, Sunday, a public holiday or, with respect to a particular office of DCJS, a day on which that office is otherwise closed for regular business.

(f) The term commissioner means the Commissioner of the Division of Criminal Justice Services.

[(g)] (d) The term records access officer means the [associate public information specialist and/or any other employees] *employee* designated by the commissioner to receive and respond to inquiries [to inspect or copy records maintained by DCJS] *made pursuant to the Freedom of Information Law*.

[(h)] The term fiscal officer means the administrative officer of DCJS and/or any other employee designated by the commissioner to certify the DCJS payroll.]

Section 6150.3. [Nature of records] *Records* available to the public. [Subject to the exceptions set forth in section 6150.4 of this Part, all] *All* records maintained by DCJS shall be available [for public inspection and copying.] *to the public pursuant to the Freedom of Information Law and DCJS may deny access to records or portions of records only in accordance with section eighty-seven of the Public Officers Law.* [These shall include but not be limited to:

(a) Final opinions and orders made in the adjudication of cases;
(b) Statements of policy and interpretations which have been adopted by DCJS and any statistical or factual tabulations which led to the formulation thereof;

(c) Minutes of public meetings of any public boards or committees and any final determinations and dissenting opinions of their members, including a record of the final votes of each member of the governing body;

(d) Minutes of public hearings held by DCJS;
(e) Internal or external audits and statistical or factual tabulations made by or for DCJS;

(f) Administrative staff manuals and instructions to staff that affect members of the public;

(g) An itemized payroll record for DCJS, indicating the name, business address, title, and salary of every officer or employee of DCJS, except that in the case of law enforcement employees the record shall indicate the title and salary only; and

(h) Any other files, records, papers or documents required by any other provision of law to be made available for public inspection.

Section 6150.4. Records exempt from disclosure. Notwithstanding the provisions of section 6150.3 above, the following types of records shall be exempt from public inspection and/or copying:

(a) Records which are specifically exempt from disclosure by State or Federal statute;

(b) Records constituting information the disclosure of which would result in an unwarranted invasion of personal privacy. An unwarranted invasion of personal privacy shall include, but not be limited to:

(1) disclosure of such personal matters as may have been reported in confidence to DCJS or any other State or local agency or municipality, and the publication of which is not relevant or essential to the ordinary work of DCJS;

(2) disclosure of employment, medical or credit histories or personal references of applicants for employment, unless the applicant has provided a written release permitting such disclosure;

(3) disclosure of items involving the medical or personal records of a client or patient in a hospital or medical facility;

(4) the sale or release of lists of names and addresses in possession of any agency or municipality if such lists are to be used for private, commercial or fund-raising purposes;

(5) disclosure of items of a personal nature which would result in economic or personal hardship to the subject party and when the publication of such records is not relevant or essential to the ordinary work of DCJS; and

(6) disclosure of information contained in the criminal history file, license and employment file and wanted and missing persons file, maintained by DCJS, including any and all information contained in such files;

(c) disclosure of information which if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) disclosure of information which constitutes trade secrets or maintained for the regulation of commercial enterprise and would cause substantial injury to the competitive position of the subject enterprise;

(e) Investigatory files compiled for law enforcement purposes, including administrative and criminal law enforcement proceedings, and other information related to the operations of criminal justice agencies that are sensitive or confidential to such a degree that disclosure would not be in the interest of the public, in that disclosure would interfere with law enforcement investigations or judicial or administrative proceedings, deprive a person of the right to a fair trial or impartial adjudication, identify a confidential source or disclose confidential information relating to a criminal investigation or reveal criminal investigative techniques or procedures;

(f) Preliminary or interim communications related to the DCJS decision making process, including but not limited to opinions, interpretations and evaluations prepared by staff or consultants which are not:

- (1) statistical or factual tabulations;
- (2) instructions to staff that affect the public; or
- (3) final agency policy or determinations;

(g) Record of deliberations of any public boards or committees while in executive session.]

Section [6150.5.] 6150.4 List of records. [On behalf of DCJS, the] *The* records access officer shall maintain and make available for public inspection and copying a *reasonably detailed current list by subject matter of all records in the possession of DCJS, whether or not available under the Freedom of Information Law.* [current list, by subject matter, of the types of records produced, filed, or first kept by DCJS whether or not available under this act. Such lists shall be in conformity with such regulations as may be promulgated by the State Committee on Public Access to Records.]

Section [6150.6.] 6150.5. Procedures for obtaining *access* to records. [All requests for access to records maintained by DCJS, other than an itemized payroll record, shall be processed as follows.]

(a) [Place of request.] Any person wishing to inspect and/or [copy] *obtain copies of any record* [, other than a payroll record, may apply at one of the following locations:

(1) Albany. Records Access Officer, New York State Division of Criminal Justice Services, Executive Park Tower, Stuyvesant Plaza, 5th floor, Albany, N.Y. 12203.

(2) New York City. Records Access Officer, New York State Division of Criminal Justice Services, 80 Centre Street, 4th floor, New York, N.Y. 10013] *shall submit a written request identifying the record requested with reasonable particularity via landmail, facsimile, or e-mail to:*

Records Access Officer

NYS Division of Criminal Justice Services

4 Tower Place

Albany, NY 12203-3764

FAX: (518) 457-2416

E-mail: foil@dcjs.state.ny.us

(b) Within five business days of receipt of a request, the records access officer shall:

(1) make such record available to the person requesting it;

(2) deny such request in writing; or

(3) furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.

[Form of request. All requests for access shall be in writing on a form prescribed by the records access officer, identifying the record requested with reasonable particularity. Blank forms may be obtained from the records access officer either personally on any workday, or by mail addressed to such office.

(c) Processing of request. Completed forms may be submitted to the records access officer personally on any workday between the hours of 9:30 a.m. and 4 p.m. Upon receipt of such a request, on the proper form and at the appropriate time, the records access officer shall notify the applicant of one of the following results:

(1) that the record requested is available for inspection at a specified time and place;

(2) when requested, and upon payment of the appropriate fee as prescribed in section 6150.8 of this Part, that a copy of the record will be provided to the applicant;

(3) that the record requested is not in his custody, does not exist, is in the custody of another specified agency or has been lost; or

(4) that access to the record is denied as provided in section 6150.10 of this Part.

(d) Time for processing request. All requests shall be fully processed by the records access officer at the earliest possible time. In view of the time required to conduct record searches, locate and copy certain information, DCJS reserves the right to respond to inquiries or shall furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied within five working days of receiving the request. If access to records is neither granted nor denied within 10 business days after the date of acknowledgment of receipt of a request, the record may be construed as a denial of access that may be appealed.

(e) Waiver of procedures. The records access officer may at his or her discretion waive any formality prescribed by this section, including the use of application forms prescribed by such officer.

Section 6150.7. Itemized payroll records. The fiscal officer of DCJS shall be the custodian of the itemized payroll records of DCJS. Any bona fide member of the news media wishing to inspect and/or obtain a copy of such itemized payroll record may apply to the fiscal officer by appearing in person on any workday between the hours of 9:30 a.m. and 3 p.m. at the DCJS Albany offices. Upon receipt of such an application at the appropriate time and on the proper form prescribed by the New York State Comptroller, and upon production by such member of appropriate identification, the fiscal officer shall produce the payroll record for inspection. Upon request, the fiscal officer shall provide the member with a copy of the payroll record.]

Section [6150.8.] 6150.6. [Fee for copies of records] *Fees.* (a) [Except when a different fee is otherwise prescribed by law, there] *There* shall be no fee charged for the following:

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to *section 89 of the Public Officers Law*

[this Part].

(b) The fee for photocopies of records shall be 25 cents per page not exceeding 9 by 14 inches in size or *the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute.* [The fees for other types of copies shall be such amount as the commissioner shall establish which shall not exceed the actual reproduction cost.]

(c) Notwithstanding the above, the commissioner may, in his or her discretion, waive any or all portion of the fees authorized by this section for copies of any record or class of records.

Section [6150.9.] 6150.7. *Trade secrets and critical infrastructure information.* *A person acting pursuant to law or regulation who submits information to DCJS may request that DCJS except such information from disclosure on the grounds that such information constitutes trade secrets or disclosure would cause substantial injury to the competitive position of the subject enterprise which submitted the information. Such requests shall be submitted and determined in accordance with subdivision 5 of section 89 of the Public Officers Law.* [Deletion of information. In accordance with the provisions of subdivision 2 of section 89 of the Public Of-

ficers Law, section 6150.4 of this Part, and in conformance with such guidelines as may be promulgated by the State Committee on Public Access to Records, prior to making a record available for public inspection and/or copying, the records access officer may delete from it any identifying details the disclosure of which would result in an unwarranted invasion of personal privacy. In the event that one or more deletions are so made, the records access officer shall give notice of that fact to the person given access to the record. If the record is such that the personal matters cannot be fully deleted without substantively affecting the record or the identifying details cannot be deleted effectively, the records access officer shall deny access to such record as provided in section 6150.10 of this Part.

Section 6150.10. Grant or denial of access to records. If the records access officer determines that an application to inspect and/or copy records pertains to information required to be disclosed under section 6150.3 of this Part and is not otherwise exempt from disclosure under section 6150.4 of this Part, he shall grant the application. If the records access officer determines that an application to inspect and/or copy records pertains to other information not exempt under section 6150.4 of this Part, he shall grant the application unless he determines that to do so would adversely affect the public interest. If the records access officer determines that an application to inspect and/or copy records pertains to information specifically exempt under section 6150.4 of this Part he shall deny such application. In denying an application, the records access officer shall indicate his reason for such denial and shall advise the applicant of his right to appeal such denial to the commissioner.]

Section [6150.11] 6150.8. Appeals. Any person [whose application to inspect and/or copy records has been denied pursuant to section 6150.10 of this Part] *denied access to a record* may appeal such denial within 30 days of such denial to: *Deputy Commissioner and Counsel, Office of Legal Services, 4 Tower Place, Albany, NY 12203.* [the commissioner at 80 Centre Street in New York City.] Such appeal must be in writing [on a form prescribed by DCJS] and shall set forth [:] the name and address of the applicant; the specified record(s) requested; the date of the denial; [the reasons given for the denial;] and other evidence the applicant deems pertinent. The [commissioner] *Deputy Commissioner and Counsel* shall, [upon receipt of a written appeal, immediately review the matter and affirm, modify or reverse the denial. If the commissioner affirms or modifies the denial he shall,] within [seven] *ten business* days of the receipt of the appeal [:(a) communicate his reasons for such affirmation or modification to the person making the appeal] either *fully explain in writing to the person requesting the record the reasons for further denial or provide access to the records sought.* [; and (b) inform such person of his right to appeal such affirmation or modification under article 78 of the Civil Practice Law and Rules.] Copies of all appeals and determinations of those appeals [will be transmitted] *shall immediately be forwarded* to the [State] Committee on [Public Access to Records] *Open Government*, Department of State, [162] *One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231.*

Section [6150.12] 6150.9. Severability. If any provision of this Part or the application thereof to any person or circumstance is adjudged invalid by a court of competent jurisdiction, such judgment shall not affect or impair the validity of the other provisions of this Part or the application thereof to other persons and circumstances.

Text of proposed rule and any required statements and analyses may be obtained from: Mark Bonacquist, Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, (518) 457-8413

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

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

Consensus Rule Making Determination

This proposal updates the Division's procedures regarding the availability of records pursuant to the Freedom of Information Law (FOIL). The revisions made by the proposal are in conformity with the requirements of FOIL, and update the procedures for requesting records to conform with current practice. Accordingly, the Division believes this proposal implements non-discretionary provisions of the FOIL, makes technical changes, and is otherwise non-controversial. As such, no person is likely to object to the adoption of this rule as written.

Job Impact Statement

This proposal updates the Division's procedures regarding the availability of records pursuant to the Freedom of Information Law. As such, it is apparent from the nature and purpose of the proposal that it will have no impact on jobs and employment opportunities.

Education Department

EMERGENCY RULE MAKING

Employment of Retired Persons in Public School Districts, BOCES and County Vocation Education and Extension Boards

I.D. No. EDU-29-08-00004-E

Filing No. 955

Filing Date: 2008-09-30

Effective Date: 2008-09-30

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

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

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

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

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

The proposed amendment was adopted at the June 23-24 Regents meeting as an emergency rule, effective June 27, 2008. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 16, 2008.

At their July 28-29, 2008 meeting, the Regents substantially revised the proposed rule, and adopted the revised rule by emergency action, effective August 1, 2008. A Notice of Emergency Adoption and Revised Rule Making was published in the August 20, 2008 State Register.

Pursuant to the State Administrative Procedure Act section 202(4-a), the revised rule cannot be adopted by regular (non-emergency) action until at least 30 days after publication of the revised rule in the State Register. The earliest the proposed amendment can be adopted by regular action, after expiration of the 30-day public comment period for a revised rule making, is the October 20-21, 2008 Regents meeting. However, the July emergency adoption will expire on September 29, 2008, 60 days after its filing with the Department of State on August 1, 2008. A lapse in the rule's effectiveness would disrupt implementation of the revised proposed rules relating to the employment of retired persons in public school districts, boards of cooperative education services and county vocational education and extension boards. A third emergency adoption is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the June Regents meeting, and revised at the July Regents meetings, remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: Employment of retired persons in public school districts, BOCES and county vocation education and extension boards.

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

Text of emergency rule: Section 80-5.5 of the Regulations of the Commissioner of Education is repealed and a new section 80-5.5 of the Regulations of the Commissioner of Education is added, effective September 30, 2008 as follows:

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

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

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

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

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

(b) *Applicability.*

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

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

(c) *Written request for approval.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) The written request shall be signed by the prospective employer and the retired person and filed with the commissioner prior to employment, but in no event more than 30 days after employment commences.

(d) *Duration of Approval.*

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-29-08-00004-ERP, Issue of August 20, 2008. The emergency rule will expire November 28, 2008.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

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

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

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

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

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

2. LEGISLATIVE OBJECTIVES:

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

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employ-

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

4. COSTS:

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

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

5. LOCAL GOVERNMENT MANDATES:

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

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

6. PAPERWORK:

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

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

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

7. DUPLICATION:

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

8. ALTERNATIVES:

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

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

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

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

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment establishes the regulatory standards re-

lating to the process for approval by the Commissioner of Education for the employment of retired persons in school districts, boards of cooperative educational services and county vocational education and extension boards, as required by section 211 of the Retirement and Social Security Law. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to the 698 school districts and seven BOCES located in New York State and establishes the regulatory standards relating to the process for approval by the Commissioner of Education for the employment of retired persons in school districts, boards of cooperative educational services and county vocational education and extension boards, as required by section 211 of the Retirement and Social Security Law.

2. COMPLIANCE REQUIREMENTS:

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

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

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional compliance costs on school districts or BOCES, beyond those imposed by the Retirement and Social Security Law.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional techno-

logical requirements. Economic feasibility is addressed under the Compliance Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment strengthens current regulatory standards relating to the approval process for the employment of retired persons in school districts, BOCES or county vocational education and extension boards, as prescribed in Retirement and Social Security Law § 211. Because the statutory requirements specifically apply to school districts and BOCES, it is not possible to exempt them from the proposed amendment or impose a lesser standard. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on school districts and BOCES.

7. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

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

The Department estimates that it receives approximately 400 written requests for approval of employment under Section 211 of the Retirement and Social Security Law per year from school districts, boards of cooperative educational services (BOCES) and county vocational education and extension boards in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

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

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

3. COSTS:

The proposed amendment will not any impose costs beyond those currently required to comply with statutory and regulatory require-

ments for the employment of retired persons in school districts, BOCES and county vocational education and extension boards.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment strengthens the approval process for a school district, BOCES or county vocational educational and extension board seeking approval by the Commissioner for the employment of retired persons in such districts or boards. These requirements are in place to insure that school districts have the best available leadership and to improve the approval process with a particular focus on transparency, effectiveness and legislative intent. Because these statutory requirements specifically apply to school districts and BOCES located in all areas of the State, it is not possible to exempt them from the proposed amendment or impose a lesser standard.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The purpose of the proposed amendment is to strengthen the standards for approval by the Commissioner of Education for the employment of retired persons in public school districts, boards of cooperative educational services and county vocational education and extension boards, as prescribed in Section 211 of the Retirement and Social Security Law. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

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

School Library Systems

I.D. No. EDU-42-08-00001-P

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

Proposed Action: Amendment of section 90.18 of Title 8 NYCRR.

Statutory authority: Education Law, sections 282, 283 and 284

Subject: School library systems.

Purpose: To update and clarify certain terminology relating to the functions of and State aid for school library systems.

Text of proposed rule: Section 90.18 of the Regulations of the Commissioner of Education is amended, effective January 8, 2009, as follows:

§ 90.18 School library systems.

(a) Definitions. (1) The term school library system as used in this section means:

- (i) . . .
- (ii) . . .
- (2) . . .
- (3) . . .
- (4) . . .

(5) For the purpose of determining eligibility for State aid to a school library system pursuant to section 284 of the Education Law, enrollment means the *total* number of pupils enrolled in the schools [of members of] *in* a school library system *service area* on the first day of October of the base year, as defined in section 3602 (1)(b) of the Education Law.

(6) . . .

(7) Coordinator of a school library system means a certified school library media specialist with a minimum of three [years’] *years* employment as a school library media specialist and possessing a *valid* school administrator and supervisor (S.A.S.) certificate *or a valid school building leader (S.B.L.) certificate* in accordance with [section 80.4(b)] *Part 80* of this Title.

(b) Governance. (1) The board of cooperative educational services or the board of education of the city school district shall be the governing board of the school library system. In the case of a school library system serving a combination of BOCES and/or city school districts, one BOCES or city school district shall be designated as the official administrative agency. Each such board shall appoint members to the [first] school library system council, including nonpublic school representation, shall act as fis-

cal agent, and shall submit the plan of service to the commissioner for approval.

(2) School library system council. (i) Each school library system shall have a school library system council, which shall meet at least four times a year. Such school library system council shall be composed of at least nine members, and shall include representatives of the members in the school library system and other representatives of providers and users of library services in the school library system. The plan of service shall specify the method of appointment of the school library system council. The school library system council members shall serve three-year terms [, provided that first members of each school library system council shall be appointed for terms of from one to three years so that] *and shall be appointed in a manner as to provide that*, as nearly as possible, one third of the members of the council shall [thereafter] be appointed each year. A vacancy on the school library system council shall be filled by the governing board for the duration of the term of the individual whose seat on the council is to be filled. Members shall serve without compensation.

(ii) . . .

(c) Plan of service. (1) Content. A BOCES or board of education of an eligible city school district, or combination of BOCES and/or eligible city school districts, seeking funding as a school library system shall submit to the commissioner a plan of service approved by the school library system council in the form prescribed by him or her. The plan shall include, but not be limited to:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .
- (vii) . . .
- (viii) . . .
- (ix) . . .
- (x) . . .
- (xi) . . .
- (xii) . . .
- (xiii) . . .

(xiv) a description of the responsibilities of [district liaisons and, in city school district systems, of] the [communication] *communications coordinators representing the member public school districts and nonpublic schools.*

(2) . . .

(3) Revision. The plan of service of each school library system shall be effective for a period of five years. Subsequent revisions thereof shall be filed no later than April 30th for implementation in the school year beginning the following July 1st. [The plan of service shall include a statement that the chief school officer of each member has been made aware of the plan of service and any subsequent revision(s) in writing.] Plans and revisions shall be approved by the council, the governing body and the commissioner.

(d) System staffing. Each school library system shall employ a full-time coordinator of the school library system. School library systems, or combinations thereof, with the enrollment of 200,000 students or more, shall employ at least an additional 0.5 full-time equivalent certified school library media specialist for each additional 100,000 students, or major fraction thereof, to assist the coordinator in designated school library system activities. At least one full-time clerical staff member shall be assigned to each coordinator. Other professional and support staff members shall be employed as necessary to execute school library system functions. The adequacy of the staff in relation to the plan of service activities shall be determined by the commissioner.

(e) Functions of the system coordinator. The school library system coordinator will be responsible for the following aspects of the school library system, including but not limited to:

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .

(5) ongoing communications with the [district liaisons or, in the city school districts, the] communications coordinators, with the school library system council, and with other school or community personnel or agencies;

(6) . . .

(7) planning periodic meetings between the school library system council and [liaisons or] *the* communications coordinators [in the city school districts];

(8) serving as advisor to member school library media [centers] *staff*, [and] *school districts and nonpublic schools* on program development and improvement and assisting with development and updating of members’ plans developed pursuant to paragraph (f)(4) of this section;

- (9) . . .
 (10) . . .
 (11) . . .
 (12) . . .

(13) preparing annually a budget *application*, on forms prescribed by the commissioner, to be approved by the school library system council and governing board, and such budget shall be filed with the department no later than April 30th of each year for approval and release of State aid in the next school year.

(f) Membership. (1) All school districts and nonpublic schools, located within a BOCES supervisory district which has established a school library system, shall be eligible for membership in such school library system, provided that each such member shall designate a certified school library media specialist as the [liaison] *communications coordinator* to the school library system. The [liaison] *communications coordinator* shall implement the procedures to be followed in the district, within the general guidelines and procedures determined by the school library system, regarding data collection for union lists, cooperative collection development, other system requirements, intra-district and inter-district loan requests, and necessary reports. The [liaison] *communications coordinator* shall keep other school library media specialists and staff of the members informed of school library system policies, procedures, activities and services. Time to perform [liaison] *communications coordinator* duties shall be provided by the member district or nonpublic school. The [liaison] *communications coordinator* shall have an outside telephone line, telefacsimile, [microcomputer] *computer with internet access and e-mail* [, modem by June 30, 1999] and access to photoduplication facilities.

(2) [In the city school district of the City of New York, each community school district and borough superintendent for high schools, and the division of special education, shall designate a licensed teacher of library as communications coordinator to assist in liaison activities between the school library system staff and the school library media centers in the district.] Within school library systems established by the city school districts of *New York City*, Buffalo, Rochester, Syracuse and Yonkers, a certified school library media specialist shall be designated as communications coordinator to the school library system from each zone, representative area or other internal subdivision of the city school district used for school organization as designated in the plan of service. Nonpublic school members shall designate a representative to serve as communications coordinator between such nonpublic school members and the school library system.

(3) Each member *school district and nonpublic school* of a school library system shall permit the interlibrary loan of books and other library materials to other members of the school library system or members of other systems with which the school library system has reciprocal agreements, except for materials not otherwise loaned by such member.

(4) Member plan. At least once during the five-year period of each plan of service, each member school district and nonpublic school member, and in New York City [each community school district and high school district] *any internal subdivision of the city school district used for school organization*, shall file with the system a plan which shows how district and building library resources and programs meet the needs of students and teachers and describes the ways in which it proposes to make effective use of the system. Such plan shall include:

- (i) . . .
 (ii) . . .
 (iii) . . .
 (iv) . . .
 (5) . . .

(6) Each school library system member shall provide school library system personnel access to the [shelf lists] *bibliographic records* of its school library media centers for purposes of creating and maintaining a school library system union catalog.

(g) [Maintenance of effort. A member of the school library system shall be eligible to participate in a school library system if, effective in 1986-87 and thereafter, its expenditure for school library materials, as reported in its annual financial report, is not less on a per capita basis in the preceding fiscal year than it was in the second preceding fiscal year. Approval may be granted for a variance from the requirements of this paragraph upon a finding that exceptional circumstances make compliance with such requirements infeasible.

(h) Reports. [Each] *By September 30th of each year, each* school library system shall transmit to the department [annually, by September 30th, a] *an annual* report for the year ending [the previous] *on June 30th of the previous school year*, in such form as shall be prescribed by the commissioner, and such other progress reports as may be required by the commissioner. Such annual report shall include an evaluation by participants and shall be approved by the department.

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

Data, views or arguments may be submitted to: Jeffrey W. Cannell, Deputy Commissioner for Cultural Ed., State Education Department Office of State Librarian, Rm 10C34 Cultural Education Center, Albany, New York 12230, (518) 474-5930, email: ppaolucc@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the education supervision of the State and require reports from such schools.

Sections 282, 283, and 284 of the Education Law provide for the establishment and functions of and State aid for school library systems in BOCES, the Big Five city school districts (New York City, Buffalo, Syracuse, Rochester, and Yonkers) and school districts and nonpublic schools enumerated in a school library system plan of service approved by the Commissioner of Education.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statutes by updating and clarifying certain terminology relating to the functions of and State aid for school library systems.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is essentially to update and clarify certain terminology relating to school library systems in BOCES and the Big Five city school districts. Specifically, the proposed rule amends terminology primarily relating to the functions of school library systems to accurately reflect the current operations of such library systems and to omit references to obsolete practices and terms. The proposed rule also amends certain terms relating to State aid for school library systems to accurately reflect the legislative intent of section 284 of the Education Law.

Additionally, the proposed rule amends certain terminology relating to school library systems to conform such provisions of the Commissioner's Regulations to other corresponding sections of such regulations. The proposed rule amends the definition of a "coordinator of a school library system" to clarify that such a coordinator must possess a valid certificate as either a school administrator and supervisor (S.A.S.) or a school building leader (S.B.L.). Moreover, the amendment is necessary to uniformly apply the title of "Communications Coordinator" to persons serving such role in both BOCES and the Big Five city school districts and to more accurately describe the role of such persons, which is to effectuate two-way communication between districts and school library systems.

4. COSTS:

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

(b) Costs to local government: The proposed amendment will not impose any additional costs upon local government.

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

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

The proposed amendment merely clarifies and updates language in sections 282, 283, and 284 of the Education Law and does not impose any additional costs on the State, local governments, or the State Education Department.

5. PAPERWORK:

The proposed amendment does not require any additional paperwork requirements.

6. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not directly impose any additional program, service, duty or responsibility upon local governments. The proposed amendment is merely needed to clarify and update language in Education Law sections 282 through 284.

7. DUPLICATION:

The proposed amendment does not duplicate any existing State or federal requirements.

8. ALTERNATIVES:

The proposed amendment merely updates and clarifies certain terminology relating to school library systems. There were no viable alternatives to the proposed amendment, and none were considered.

9. FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standards of the federal government.

10. COMPLIANCE STANDARDS:

The proposed amendment would take effect on its stated effective date. It is anticipated that the regulated parties would come into compliance

with the amendment on or immediately in following such date. Because of the nature of the proposed amendment, no additional period of time is needed to enable regulated parties to comply.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment primarily concerns technical amendments to provisions of the Commissioner's Regulations relating to school library systems. Particularly, the amendment updates and clarifies certain terminology pertaining to the functions of and State aid for school library systems. The amendment does not impose any reporting, recordkeeping, or compliance requirements on small businesses and will not have an adverse economic impact on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further steps were needed to ascertain that fact and none were taken.

(b) Local Governments:

1. EFFECT OF RULE:

The proposed rule applies to the 41 school library systems in New York State, the 36 boards of cooperative educational services (BOCES), and the Big Five city school districts (New York City, Buffalo, Syracuse, Rochester and Yonkers).

2. COMPLIANCE REQUIREMENTS:

The proposed rule applies to the 41 school library systems established in New York State, the 36 BOCES and the Big Five city school districts. The amendment does not directly impose any compliance requirements on local governments.

The proposed amendment is primarily needed to update and clarify certain terminology in the Commissioner's Regulations relating to the functions of and State aid for school library systems in order to accurately reflect the statutory intent and current implementation of sections 282, 283, and 284 of the Education Law.

3. PROFESSIONAL SERVICES:

The proposed amendment will not require school districts or BOCES to employ additional professional services in order to comply.

4. COMPLIANCE COSTS:

The proposed amendment merely updates and clarifies certain terminology relating to the functions of and State aid for school library systems. The amendment will not impose any costs on local governments, including school districts or BOCES.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or costs on local governments. As stated in "compliance costs," the amendment will not impose any costs on school districts or BOCES.

6. MINIMIZING ADVERSE IMPACT:

The amendment will not adversely impact school districts or BOCES in the State of New York. Because of the nature of the proposed amendment, it is unnecessary to minimize any adverse impact.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school library system directors in various regions of the State.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to the 41 school library systems established in New York State, the 36 boards of cooperative educational services (BOCES), and the Big Five city school districts (New York City, Buffalo, Syracuse, Rochester, and Yonkers), including school library systems located in the 44 rural counties and 71 towns in urban counties with a population density of 150 per square mile or less.

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

The purpose of the proposed amendment is essentially to update and clarify certain terminology relating to school library systems in BOCES and the Big Five city school districts. Specifically, the proposed rule amends terminology primarily relating to the functions of school library systems to accurately reflect the current operations of such library systems and to omit references to obsolete practices and terms. The proposed rule also amends certain terms relating to State aid for school library systems to accurately reflect the legislative intent of section 284 of the Education Law. The proposed rule also amends such terminology to conform certain provisions of the Commissioner's Regulations to other corresponding sections of such regulations. The proposed amendment will not impose any additional reporting, recordkeeping, or other compliance requirements or professional services requirements.

3. COSTS:

The proposed amendment merely updates and clarifies certain terminology relating to the functions of and State aid for school library systems and does not impose any additional costs on school library systems or BOCES located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment applies to school library systems, BOCES and the Big Five city school districts and is necessary to update and clarify terminology relating to such library systems. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on regulated parties. In order to ensure uniform, State-wide high standards for school library systems, the proposed amendment applies State-wide and, accordingly, it was not possible to provide for a lesser standard or exemption for rural areas.

5. RURAL AREA PARTICIPATION:

The proposed amendment has been sent for comment to school library system directors in various regions of the State, including those in rural areas.

Job Impact Statement

The purpose of the proposed amendment is to update and clarify certain terminology relating to the functions of and State aid for school library systems. The amendment will not affect jobs or employment opportunities in this or any field. Because it is evident from the nature of the proposed rule that it will have no impact on jobs 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

Sanitary Condition of Shellfish Lands

I.D. No. ENV-25-08-00001-A

Filing No. 943

Filing Date: 2008-09-26

Effective Date: 2008-10-15

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

Action taken: Amendment of section 41.2 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

Subject: Sanitary condition of shellfish lands.

Purpose: To change the classification of shellfish lands to allow harvest.

Text or summary was published in the June 18, 2008 issue of the Register, I.D. No. ENV-25-08-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: William Hastback, NYSDEC - Bureau of Marine Resources, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0479, email: wghastba@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a Negative Declaration and a short Environmental Assessment Form is on file with the Department of Environmental Conservation. A Coastal Assessment Form was prepared and forwarded to the NYS Department of State.

Assessment of Public Comment

The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

DRGs, SIWs, Trimpoints and the Mean LOS

I.D. No. HLT-42-08-00006-E

Filing No. 951

Filing Date: 2008-09-29

Effective Date: 2008-09-29

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

Action taken: Amendment of sections 86-1.55, 86-1.62 and 86-1.63 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2803(2), 2807(3), 2807-c(3) and (4)

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

Specific reasons underlying the finding of necessity: 86-1.55 Development of Outlier Rates of Payment

The Department of Health and Human Services (HHS), Office of Inspector General, has issued to the New York State Department of Health a final audit report (A-02-04-01022, June 2006) on the State's hospital outlier payment methodology. This report addressed vulnerabilities in the methodology that may result in excessive payments to certain hospitals. HHS noted that NYS does not use the most accurate cost-to-charge data in determining the outlier payments, and that if it had done so there could be savings for the Medicaid program. After reviewing the report and HHS's recommendations, the Department of Health concurs with the findings and has agreed to update the outlier payment methodology to reflect a calculation based on cost-to-charge data from the year of the patient discharge. However, revised regulations need to be adopted in order to implement the HHS recommendations because current regulation does not provide for the use of updated data.

86-1.62 Service Intensity Weights and Group Average Arithmetic Lengths of Stay

86-1.63 Non-Medicare Trim Points

The Department finds that the immediate adoption of this amendment is necessary to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS). This is required by Section 2807-c(3) of the Public Health Law, which states, "The Commissioner shall establish as a basis for case classification for case based rates of payment the same system of diagnosis-related groups for classification of hospital discharges as established for purposes of reimbursement of inpatient hospital service pursuant to Title XVIII of the Federal Social Security Act (Medicare) in effect on the first day of July in the year preceding the rate period." Additionally, such amendments modify existing DRGs and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications.

In addition, the SIWs and group average inlier length of stays (LOS) were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. The current SIWs and LOS are based on twelve year old data and need to be updated for hospital payment to reflect prevailing patterns of health use and services. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns.

The SIWs and non-Medicare trimpoints are an integral part of the hospital Medicaid and like payor inpatient rates. The amendments provide payors of inpatient hospital services with the new values used to determine the correct case based payment for each DRG for each hospital so hospital claims can be submitted and paid in a timely manner. Additionally, the Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health use and services. Such requirements warrant adoption of these amendments as soon as practicable.

Subject: DRGs, SIWs, Trimpoints and the Mean LOS.

Purpose: Updates the calculation of outlier payments based on HHS audit findings and recommendations.

Substance of emergency rule: 86-1.55 - Development of Outlier Rates of Payment

The proposed amendment of section 86-1.55 of Title 10 (Health) NYCRR is intended to update the calculation of cost outlier payments to reflect a cost to charge ratio which is based on data for the year in which the discharge occurred. Currently the payments are calculated based on the most recent information available, generally two year old cost to charge data.

This amendment is the result of a final audit report by the Department of Health and Human Services on Medicaid hospital outlier payments.

86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system, and additional changes to identify medically appropriate patterns of health resource use for services that are efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

In addition, the SIWs and group average inlier length of stays were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns. The revised service intensity weights based on 2004 data are being phased-in over a three year period. The weights effective for the period January 1, 2008 through December 31, 2008 will be based on 75% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 25% of the service intensity weights based on 2004 data. The service intensity weights effective for the period January 1, 2009 through December 31, 2009, will be based on 33% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 67% of the service intensity weights based on 2004 data. Effective January 1, 2010 and thereafter, the service intensity weights will be based on 2004 data. Effective July 1, 2008, the service intensity weights and group average arithmetic lengths of stay are being revised to incorporate several methodological changes.

86-1.63 - Non-Medicare Trimpoints

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimpoints used to determine the outlier days in the hospital case based payment system to be based on 2004 data. In addition, the trimpoints are being revised effective July 1, 2008 to reflect the methodological changes referenced above.

General Summary for 86-1.62 and 1.63

The changes in the DRG classification system and service intensity weights described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimpoints to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpoint values are provided in Section 86-1.63.

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 27, 2008.

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

Regulatory Impact Statement**Statutory Authority:**

The authority for the subject regulations is contained in sections 2803(2), and 2807(3) and 2807(4) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c (3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimpoints for each DRG. Sections 34, 34-a and 34-b, of Part C of Chapter 58 of the Laws of 2007 authorizes the SHRPC and the Commissioner to update the cost and statistical base used to determine the SIWs and trimpoints to calendar year 2004 data and to provide for a phase-in of the new weights. PHL section 2807-c (4) authorizes the SHRPC to adopt rules, subject to the Commissioner's approval, for exceptions to case based payments for cost outliers.

Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

Needs and Benefits:

The proposed amendment to section 86-1.55 of Title 10 (Health) NYCRR is intended to revise the methodology for calculating hospital cost outlier payments. The proposed methodology is based on more current and appropriate cost to charge ratios for determining the outlier expense, which is consistent with the method used in Medicare reimbursement. The proposal will provide for an update to the ratio from the initial payments based on two year old data, to data from the year in which the discharge occurred. This will cause the outlier payments to more accurately reflect reasonable costs incurred by each hospital, and address the problem of excessive over payments.

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) NYCRR are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications. Additionally, the SIWs and trimpoints are updated from the current 1992 cost and statistic base to 2004 data reported to the Department and being phased-in over a three year period.

The SIWs and non-Medicare trimpoints are an integral part of the hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, and to incorporate the 2004 cost and statistical basis, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Lastly, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

COSTS:**Costs to State Government:**

The proposed amendment to 86-1.55, development of outlier payments, is estimated to produce savings to the State.

The amendments to 86-1.62 and 86-1.63 revising the DRGs, SIWs and trimpoints has been legislated as budget neutral; therefore there is no additional costs to the State as a result of these regulation changes.

Costs of Local Government:

No increase or decrease in costs to local governments is anticipated as a result of these amendments.

Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classification system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

The change to the outlier payment methodology is based on an audit by the Department of Health and Human Services. The Department concurs with the findings of the audit and HHS's recommended methodology change.

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to current clinical practices, new medical technologies, changes in patient resource consumption, and changes in hospital length of stay patterns. Two alternatives were considered for the means of adjusting the revised SIWs to ensure budget neutrality. The first alternative was to apply a neutrality adjustment in the calculation of the SIWs. However, since the SIWs are formulated on non-medicare costs and the budget neutrality provision in statute applies to Medicaid expenditures, this approach was rejected. Instead, budget neutrality for Medicaid expenditures will be achieved by applying an adjustment to the Medicaid hospital inpatient rates.

Federal Standards:

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

Compliance Schedule:

The proposed rule establishes rates of payment as of July 1, 2008; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person: Katherine Ceroalo, NYS Department of Health, Bureau of House Counsel, Regulatory Affairs Unit, Corning Tower Building, Room 2438, Empire State Plaza, Albany, NY 12237, (518) 473-7488, (518) 473-2019 (fax), email: regsqna@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

Regulatory Flexibility Analysis**Effect on Small Business and Local Governments:**

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data

extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the outlier payments; the DRG classification system used by the Medicare prospective payment system (PPS), and add new DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications, and the new cost and statistical base.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no anticipated increases or decreases in hospitals' Medicaid revenues. However, revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

Minimizing Adverse Impact:

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its May 22, 2008 meeting. That agenda is mailed to general hospitals qualifying as small businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster

Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	

Compliance Requirements:

No new reporting, record keeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

Minimizing Adverse Impact:

The proposed amendments will be applied to all general hospitals. The Department of Health considered the approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Rural Area Participation:

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its May 22, 2008 meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rulemaking.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the calculation of cost outlier payments and update the diagnosis related group (DRG) classification system for inpatient hospital services as well as the corresponding service intensity weights and length of stay standards. The cost outlier payments are exceptions to the case payment rates for high cost or long stay cases and have been in effect since 1988 in New York State. The DRG classification system, which also has been in effect since 1988, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. The proposed regulations have no implications for job opportunities.

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

DRGs, SIWs, Trimpoints and the Mean LOS

I.D. No. HLT-42-08-00011-P

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

Proposed Action: Amendment of sections 86-1.55, 86-1.62 and 86-1.63 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2803(2), 2807(3), 2807-c(3) and (4)

Subject: DRGs, SIWs, Trimpoints and the Mean LOS.

Purpose: Updates the calculation of outlier payments based on HHS audit findings and recommendations.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): 86-1.55 - Development of Outlier Rates of Payment

The proposed amendment of section 86-1.55 of Title 10 (Health) NYCRR is intended to update the calculation of cost outlier payments to reflect a cost to charge ratio which is based on data for the year in which the discharge occurred. Currently the payments are calculated based on the most recent information available, generally two year old cost to charge data.

This amendment is the result of a final audit report by the Department of Health and Human Services on Medicaid hospital outlier payments.

86-1.62 - Service Intensity Weights and Group Average Arithmetic Inlier Lengths of Stay

The proposed amendments of section 86-1.62 of Title 10 (Health) NYCRR are intended to change the diagnosis related group (DRG) classification system for inpatient hospital services and the corresponding service intensity weight (SIWs) and group average arithmetic inlier length of stay (LOS) for each DRG.

The DRG classification system used in the hospital case payment system is updated to incorporate those changes made by Medicare for use in the prospective payment system, and additional changes to identify medically appropriate patterns of health resource use for services that are efficiently and economically provided. The SIWs were revised accordingly to reflect the costs of the redistributed cases.

In addition, the SIWs and group average inlier length of stays were updated to reflect 2004 costs and statistics reported to the Department for a representative sample of hospitals. This update ensures a reflection of more current clinical practices, advances in technology, changes in patient resource consumption, and changes in hospital length of stay patterns. The revised service intensity weights based on 2004 data are being phased-in over a three year period. The weights effective for the period January 1, 2008 through December 31, 2008 will be based on 75% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 25% of the service intensity weights based on 2004 data. The service intensity weights effective for the period January 1, 2009 through December 31, 2009, will be based on 33% of the service intensity weights in effect as of December 31, 2007 that are based on 1992 data, and 67% of the service intensity weights based on 2004 data. Effective January 1, 2010 and thereafter, the service intensity weights will be based on 2004 data. Effective July 1, 2008, the service intensity weights and group average arithmetic lengths of stay are being revised to incorporate several methodological changes.

86-1.63 - Non-Medicare Trimpoints

The proposed amendments of section 86-1.63 of Title 10 (Health) NYCRR are intended to change the non-Medicare trimpoints used to determine the outlier days in the hospital case based payment system to be based on 2004 data. In addition, the trimpoints are being revised effective July 1, 2008 to reflect the methodological changes referenced above.

General Summary for 86-1.62 and 1.63

The changes in the DRG classification system and service intensity weights described above (Section 86-1.62 of Title 10 (Health) NYCRR) cause a modification of the non-Medicare trimpoints to reflect the redistribution of cases from the existing DRGs to the new DRGs. These new trimpoint values are provided in Section 86-1.63.

The changes to the DRG classification system will enable providers to place patients in the most appropriate DRG and, therefore, they will receive adequate reimbursement for services provided. In the aggregate, these changes will have a budget-neutral impact on the reimbursement system.

The Department is statutorily required to update the grouper to be consistent with changes made to the DRG classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to more accurately reflect patterns of health resource use.

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

Statutory Authority:

The authority for the subject regulations is contained in sections 2803(2), and 2807(3) and 2807(4) of the Public Health Law (PHL), which require the State Hospital Review and Planning Council (SHRPC), subject to the approval of the Commissioner, to adopt and amend rules and regulations for hospital reimbursement rates that are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities. PHL section 2807-c (3) authorizes the SHRPC to adopt rules subject to the Commissioner's approval, to adjust the diagnosis related groups (DRGs) or establish additional DRGs to reflect subsequent revisions applicable to reimbursement for discharges of Medicare beneficiaries or to identify medically appropriate patterns of health resource use efficiently and economically provided and to subsequently amend the service intensity weights (SIWs) and trimpoints for each DRG. Sections 34, 34-a and 34-b, of Part C of Chapter 58 of the Laws of 2007 authorizes the SHRPC and the Commissioner to update the cost and statistical base used to determine the SIWs and trimpoints to calendar year 2004 data and to provide for a phase-in of the new weights. PHL section 2807-c (4) authorizes the SHRPC to adopt rules, subject to the Commissioner's approval, for exceptions to case based payments for cost outliers.

Legislative Objectives:

The Legislature sought to have the DRGs used in the hospital reimbursement methodology be consistent with those used in Medicare reimbursement and reflect medically appropriate, efficient and economic patterns of health resource use and services.

Needs and Benefits:

The proposed amendment to section 86-1.55 of Title 10 (Health) NYCRR is intended to revise the methodology for calculating hospital cost outlier payments. The proposed methodology is based on more current and appropriate cost to charge ratios for determining the outlier expense, which is consistent with the method used in Medicare reimbursement. The proposal will provide for an update to the ratio from the initial payments based on two year old data, to data from the year in which the discharge occurred. This will cause the outlier payments to more accurately reflect reasonable costs incurred by each hospital, and address the problem of excessive over payments.

The proposed amendments to sections 86-1.62 and 86-1.63 of Title 10 (Health) NYCRR are intended to make current regulations consistent with changes made to the diagnosis related group (DRG) classification system used by the Medicare prospective payment system (PPS) and to modify existing and add new DRGs to reflect medically appropriate patterns of health resource use. The current service intensity weights (SIWs) and trimpoints are also updated to be consistent with the proposed DRG modifications. Additionally, the SIWs and trimpoints are updated from the current 1992 cost and statistic base to 2004 data reported to the Department and being phased-in over a three year period.

The SIWs and non-Medicare trimpoints are an integral part of the hospital Medicaid and like payor inpatient rates. The Department makes changes to the grouper used to assign inpatient cases to the appropriate DRG. As part of this process, the Department may make modifications, revisions and create new DRGs that reflect the current resources consumed by inpatients. After the grouper is modified, the SIWs and trimpoints must be recalculated consistent with the newly created and updated list of DRGs, and to incorporate the 2004 cost and statistical basis, thus creating new values for the SIWs and trimpoints in sections 86-1.62 and 86-1.63. Lastly, the amendments provide payors of inpatient hospital services with the new values used to determine the correct case base payment for each DRG so hospital claims can be submitted and paid in a timely manner.

COSTS:

Costs to State Government:

The proposed amendment to 86-1.55, development of outlier payments, is estimated to produce savings to the State.

The amendments to 86-1.62 and 86-1.63 revising the DRGs, SIWs and trimpoints has been legislated as budget neutral; therefore there is no additional costs to the State as a result of these regulation changes.

Costs of Local Government:

No increase or decrease in costs to local governments is anticipated as a result of these amendments.

Costs to Private Regulated Parties:

In the aggregate, there will be no increases or decreases in hospital revenues as a result of these amendments. Changes to the DRG classifica-

tion system will cause a realignment of cases among the DRGs. Those cases that require more intensive provision of care will realize an increase in the SIW (and reimbursement) for that DRG. The removal of such cases from the DRG to which they were previously assigned will decrease the SIW (and reimbursement) for that DRG. Therefore, revenues will shift among individual hospitals depending upon the diagnosis of and procedures performed on the patients they treat. The extent of the shift in revenues cannot be determined because it will depend upon future patient services.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

This regulation affects the costs to counties and New York City for services provided to Medicaid beneficiaries as described above. It imposes no program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

There is no additional paperwork required of providers as a result of these amendments.

Duplication:

These regulations do not duplicate existing State and Federal regulations.

Alternatives:

The change to the outlier payment methodology is based on an audit by the Department of Health and Human Services. The Department concurs with the findings of the audit and HHS's recommended methodology change.

Based upon suggestions/recommendations received from hospital industry representatives, the Department has included adjustments that provide more appropriate recognition of the costs related to current clinical practices, new medical technologies, changes in patient resource consumption, and changes in hospital length of stay patterns. Two alternatives were considered for the means of adjusting the revised SIWs to ensure budget neutrality. The first alternative was to apply a neutrality adjustment in the calculation of the SIWs. However, since the SIWs are formulated on non-medicare costs and the budget neutrality provision in statute applies to Medicaid expenditures, this approach was rejected. Instead, budget neutrality for Medicaid expenditures will be achieved by applying an adjustment to the Medicaid hospital inpatient rates.

Federal Standards:

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

Compliance Schedule:

The proposed rule establishes rates of payment as of July 1, 2008; there is no period of time necessary for regulated parties to achieve compliance.

Contact Person: Ms. Katherine Ceroalo, New York State Department of Health, Bureau of House Counsel, Regulatory Affairs Unit, Corning Tower Building, Room 2438, Empire State Plaza, Albany, New York 12237, (518) 473-7488, (518) 473-2019 (FAX), email: REGSQNA@health.state.ny.us

Comments submitted to Department personnel other than this contact person may not be included in any assessment of public comment issued for this regulation.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

Compliance Requirements:

No new reporting, record keeping or other compliance requirements are being imposed as a result of these rules.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Economic and Technological Feasibility:

Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are intended to make current regulations consistent with changes made to the outlier payments; the DRG classification system used by the Medicare prospective payment system (PPS), and add new DRGs to reflect medically appropriate patterns of health resource use. The current SIWs and trimpoints are also updated to be consistent with the proposed DRG modifications, and the new cost and statistical base.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate,

as a result of the amendments to 86-1.62 and 86-1.63 there will be no anticipated increases or decreases in hospitals' Medicaid revenues. However, revenues will shift among individual hospitals depending upon the diagnoses of and procedures performed on the patients they treat and the extent to which they would be classified into the modified diagnosis related groups.

Minimizing Adverse Impact:

The proposed amendments will be applied to all general hospitals. The Department of Health considered approaches specified in section 202-b (1) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Small Business and Local Government Participation:

Local governments and small businesses were given notice of these proposals by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its May 22, 2008 meeting. That agenda is mailed to general hospitals qualifying as small businesses, providers, members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations that represent the interests and concerns of hospitals across New York State, including small businesses and local governments. This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Rural Area Flexibility Analysis

Effect on Rural Areas:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:

No new reporting, record keeping, or other compliance requirements are being imposed as a result of this proposal.

Professional Services:

No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

Compliance Costs:

No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of the amendment to 86-1.55, there may be a decrease to specific hospitals' revenues. In the aggregate, as a result of the amendments to 86-1.62 and 86-1.63 there will be no increases or decreases in hospitals' revenues. Revenues will shift among individual hospitals depending upon the diagnoses of and approved procedures performed on the patients they treat.

Minimizing Adverse Impact:

The proposed amendments will be applied to all general hospitals. The

Department of Health considered the approaches specified in section 202-bb (2) of the State Administrative Procedure Act in drafting the proposed amendments and rejected them as inappropriate given the reimbursement system mandated in statute.

Rural Area Participation:

Rural areas were given notice of this proposal by its inclusion in the agenda of the Fiscal Policy Committee of the State Hospital Review and Planning Council for its May 22, 2008 meeting. That agenda is mailed to members of the Fiscal Policy Committee, the New York State Legislature and representatives of the hospital associations, among others. The associations are member organizations, which represent the needs and concerns of providers across New York State, including rural areas. The amendment was described at meetings of the Fiscal Policy Committee prior to the filing of the notice of proposed rulemaking.

This outreach resulted in the Department of Health receiving comments and suggestions related to additional changes that industry representatives recommended be implemented. Based on this feedback, the Department did make additional changes to the service intensity weights to incorporate several of these comments and suggestions.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the calculation of cost outlier payments and update the diagnosis related group (DRG) classification system for inpatient hospital services as well as the corresponding service intensity weights and length of stay standards. The cost outlier payments are exceptions to the case payment rates for high cost or long stay cases and have been in effect since 1988 in New York State. The DRG classification system, which also has been in effect since 1988, is utilized to reimburse hospitals for inpatient services rendered to Medicaid beneficiaries. The proposed regulations have no implications for job opportunities.

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

Physician Board Certification Entities

I.D. No. HLT-42-08-00017-P

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

Proposed Action: Amendment of section 1000.1 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2995(1)(b)

Subject: Physician Board Certification Entities.

Purpose: Amendment to definition of board-certified to remove The College Family Physicians of Canada (CFPC).

Text of proposed rule: Subdivision (a) of Section 1000.1 is amended to read as follows:

(a) *Board certification* means a specialty or subspecialty in which a physician is certified by the American Board of Medical Specialties (ABMS), American Osteopathic Association (AOA), or Royal College of Physicians and Surgeons of Canada (RCPSC) [or The College of Family Physicians of Canada (CFPC)].

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

Statutory Authority:

The authority for the promulgation of this regulation is contained in section 2995(1)(b) of the Public Health Law, which directs the Department of Health to promulgate rules for the purpose of implementing provisions of Title 1 of Article 29-D of the Public Health Law, the Patient Health Information and Quality Improvement Act of 2000.

Legislative Objectives:

Article 29-D of the Public Health Law creates a statewide health information system, the purpose of which is to increase information available to patients about health care providers and health care plans and to improve the quality of health care in New York State. The statewide health information system will collect information on physicians, hospitals, and health care plans and disseminate such information to the public for purposes of improving health care decision-making.

Needs and Benefits:

Certain provisions of Section 2995-a of the Public Health Law require the education and various qualifications of physicians to be available for public dissemination. When a physician's profile indicates that a physician is "board-certified," the public has a reasonable expectation that the physician has been both adequately trained and rigorously tested in the specialty area. Under current regulation, a physician may be "board-certified" by The College of Family Physicians of Canada (CFPC). In a recent review of board certifications, concerns have been raised that a physician could become board-certified in certain specialties by CFPC without sufficient rigorous training and experience. As a result, the public might be misinformed or misled that such a CFPC-certified physician has working knowledge and experience that spans a wide range of medical conditions and treatment. This regulation will remove CFPC as one of the entities which the New York State Physician Profile includes when disclosing physicians' board certifications on the Department's public website.

Costs:

Costs to Regulated Parties:

There should be no additional costs to regulated parties resulting from this regulation.

Costs to State and Local Governments:

There will be no additional costs to the State as a result of this regulation. The only cost to the State remains the annual operating cost for the database of \$1,809,162, which is not affected by this regulation. There will be no additional costs to local governments as a result of the database required by statute and reporting clarifications set forth in these regulations.

Cost to the Department of Health:

As discussed in the preceding section, there will be no additional costs to the Department of Health as a result of this particular regulation. The only cost to the Department of Health will be the annual operating cost for the overall database of \$1,809,162.

Local Government Mandates:

These regulations do not impose any substantial new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district, or other special district.

Paperwork:

There will be no additional paperwork required as a result of this regulation.

Duplication:

This regulation will not duplicate, overlap or conflict with federal or state statutes or regulations.

Alternatives:

The alternative of taking no regulatory action was rejected because CFPC certification provides an inaccurate expectation to the public regarding the breadth and depth of training and experience of CPFC-certified physicians.

Federal Requirements:

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

Compliance Schedule:

This regulation will go into effect upon filing a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

This regulation will have no impact on small businesses or local governments. This regulation solely impacts physicians in their individual, professional capacity.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This regulation applies uniformly throughout the State, including all rural areas. Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, those counties which include towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins

Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

This regulation has no adverse impact on rural areas.

Job Impact Statement

In accordance with Section 201-a(2)(a) of the State Administrative Procedure Act, the Department has determined that this regulation will have no impact on jobs and employment opportunities. It is evident from the subject matter of the regulation that it has no impact on jobs and employment opportunities since it merely removes an entity, with less stringent training and clinical education requirements, from which physicians can receive board certification.

Department of Labor

EMERGENCY RULE MAKING

Provision of Safety Rope and System Components for Firefighters at Risk of Being Trapped at Elevations

I.D. No. LAB-42-08-00004-E

Filing No. 942

Filing Date: 2008-09-26

Effective Date: 2008-09-26

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

Action taken: Addition of section 800.7 to Title 12 NYCRR.

Statutory authority: Labor Law, article 2, section 27; article 2, section 27a; article 7, section 200

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

Specific reasons underlying the finding of necessity: To give fire departments sufficient time to conduct risk assessments regarding the type of safety ropes and rescue systems needed, to purchase needed equipment, and to train firefighters in their use before effective date of the statutory requirement.

Subject: Provision of safety rope and system components for firefighters at risk of being trapped at elevations.

Purpose: To insure that firefighters are provided with appropriate ropes and system components for self-rescue and emergency escape.

Text of emergency rule: 12 NYCRR Part 800.7 Emergency Escape and Self Rescue Ropes and System Components for Firefighters

(a) *Title and Citation:* Within and for the purposes of the Department of Labor, this part may be known as Code Rule 800.7, Emergency Escape and Self Rescue Ropes and System Components for Firefighters, specifying the requirements for safety ropes and associated system components.

(b) *Purpose and Intent:* This rule is intended to ensure that firefighters are provided with necessary escape rope and system components for self rescue and emergency escape and to establish specifications for such ropes and system components.

(c) *Application:* This part shall apply throughout the State of New York to the State, any political subdivision of the State, Public Authorities, Public Benefit Corporations or any other governmental agency or instrumentality thereof employing firefighters within the meaning of § 27-a of the Labor Law.

This Part shall not apply to such employers located in a city with a population of over one million.

(d) **DEFINITIONS.** Within this part, the following terms shall have the meanings indicated:

(1) "System Components" means safety harnesses, belts, ascending devices, carabiners, descent control devices, rope grab devices, and snap links.

(2) "Escape Rope" means a single purpose, single use, emergency escape (Self-rescue) rope.

(3) "Interior Structural Fire Fighting" means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage.

(4) "Interior Structural Fire Fighter" means a firefighter who is designated by their employer to perform interior structural firefighting duties in an immediately dangerous to life and health (IDLH) atmosphere and is medically qualified to use self-contained breathing apparatus (SCBA) as defined in 29 CFR 1910.134.

(5) "Entrapment at Elevations" means a situation where a firefighter finds the normal route of exit is made unusable by fire, or other emergency situation, that requires the firefighter to immediately exit the structure from an opening not designed as an exit, that is above the ground floor and at an elevation above the surrounding terrain which would reasonably be expected to cause injury should the firefighter be required to exit.

(e) **Specifications for Escape Ropes and System Components**

Escape ropes and system components provided to firefighters shall conform to the requirements of "The National Fire Protection Association Standard 1983, Standard on Fire Service Life Safety Rope and Equipment for Emergency Services" in effect at the time of their manufacture. Escape ropes and system components purchased after the effective date of this Part shall conform to the 2006 edition (NFPA1983- 2006) of such standard.

(f) **Risk Assessment and Equipment Selection**

(1) Each employer who employs firefighters shall develop a written risk assessment to be used to determine under what circumstances escape ropes and system components will be required and what type will be required to protect the safety of firefighters in its employ. In performing the assessment, the employer shall:

(i) Identify the types and heights of buildings and other structures in the area the firefighters are expected to work. Such area shall include the regular scope of the fire district or other area covered by the fire department in question as well as any other districts or communities to which the fire department provides mutual aid with a reasonably predictable frequency.

(ii) Assess the standard operating procedures followed by the department with regard to rescue of firefighters from elevations.

(iii) Identify the risks to firefighters of being trapped at an elevation during structural fire fighting operations given the types of buildings or other structures located in the area(s) in which firefighters are expected to work. Identification of the risk in question shall include an assessment of:

(a) the extent to which standard operating procedures already in place will mitigate the risks identified;

(b) the type of escape ropes and system components that will be necessary to protect the safety of firefighters if operating procedures do not sufficiently mitigate the risk.

(2) Should the risk assessment establish that firefighters employed by the department performing interior structural firefighting are reasonably expected to be exposed to the risk of entrapment at elevations, the employer shall provide to each interior structural firefighter in its employ a properly fitted escape rope and those system components which meet the specifications for such rope and system components set forth in Part 800.7(e) and which would mitigate the danger to life and health associated with such risk.

(g) **Training**

(1) The employer shall ensure that each firefighter who is provided with an escape rope and system components is instructed in their proper use by a competent instructor. Instruction shall include the requirements of paragraph (h) of this Part and the user information provided by the manufacturer as required by NFPA 1983 Chapter 5.2 for each rope and system component.

(2) Instruction shall include hands-on use of the equipment in a controlled environment.

(3) A record of such instruction including the name of the individual being trained, the name of the individual delivering the training, and the date on which the training was provided shall be maintained by the employer until such time as the firefighter is no longer employed by the employer or the employer delivers a subsequent training on this topic, whichever comes first.

(h) **Employer Duties.** In addition to the duties set forth in Parts 800.7(f) and (g), employers covered by this Part shall have the following duties:

(1) To ensure the adequacy of the safety ropes and system components, the employer shall routinely inspect and ensure that:

(i) Existing safety ropes and system components meet the codes, standards, and recommended practices adopted by the Commissioner;

(ii) Existing safety ropes and system components still perform their function by taking precautions to identify any of their limitations through reasonable means, including, but not limited to:

(a) Checking the labels or stamps on the equipment; and

(b) Checking any documentation or equipment specifications;

and

(c) contacting the supplier or approval agency.

(iii) Firefighters are informed of the limitations of any safety rope or system components;

(iv) Firefighters are not allowed or required to use any safety rope or system components beyond their limitations;

(v) Existing or new safety ropes and system components have no visible defects that limit their safe use;

(vi) Safety ropes and system components are used, cleaned and maintained according to the manufacturer's instructions;

(vii) Firefighters are instructed in identifying to the employer any defects the firefighter may find in safety ropes and system components; and

(viii) Any identified defects are corrected or immediate action is taken to eliminate the use of the equipment by:

(a) Ensuring that escape rope and system components with defects which are repairable are tagged as unsafe and stored in such a manner that they cannot be used until repairs are made;

(b) Ensuring that escape rope and system components that cannot be repaired are immediately destroyed or rendered unusable as an escape rope and system components; and

(c) Ensuring that any escape rope that has been utilized under load for the purpose of self rescue / emergency escape is immediately removed from service, destroyed, or rendered unusable as an escape rope and immediately replaced.

(2) The employer's routine inspection cycle required by this paragraph shall be based upon the volume of activity the Department undertakes but, in no case, any less frequently than once each month.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 24, 2008.

Text of rule and any required statements and analyses may be obtained from: Thomas Mc Govern, NYS Department of Labor, Counsel's Office, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: thomas.mcgovern@labor.state.ny.us

Regulatory Impact Statement

Statutory Authority: The legislature placed the amendment in Article 2 Section 27a of the Labor Law, Public Employee Safety and Health Act. Section 4 of the Act directs the Commissioner to promulgate rules to provide for the enforcement of the amendment and require that the latest edition of the National Fire Protection Association's standard on Life Safety Ropes and System Components be adopted.

The Commissioner has broad authority to promulgate rules and regulations under New York State Labor Law Article 2, Section 27a; Article 2, Section 27; Article 7, Section 200.

Legislative Objective: The intent of the Legislature was to insure that firefighters are provided with the appropriate ropes and system components to allow self-rescue from upper stories of buildings should they become trapped. The Legislature also specified the national consensus standard to which life safety ropes and system components must conform as well as the testing criteria that must be followed by the manufacturer.

Needs and Benefits: Firefighters occasionally become trapped on upper stories during fire suppression activities. Many times the firefighter is rescued by ladders or aerial apparatus; however, there are cases where the trapped fire fighter cannot be reached or the rapid development of the emergency situation does not allow for rescue by other means and those cases could result in death or serious injury. One such case involved 6 trapped firefighters who were forced to jump from a fourth story. Four were seriously injured and two died of their injuries. Some of these injuries and deaths were attributable, in part, to either the lack of rescue ropes or the failure of the rope involved.

Costs: The ropes and system components needed to equip a firefighter for self rescue can be obtained for as little as \$60.00. New York City has provided each of its firefighters with a system that costs more than \$400.00. The proposed rule contains no minimum cost threshold. This allows the employer to take appropriate steps to reduce the cost of providing the equipment required by the rule, so long as the employer provides equipment appropriate for the risks identified in its risk assessment. Moreover, the equipment need only be provided to interior structural firefighters who work in areas where they could become trapped. Employers need not purchase or provide ropes and rescue devices to apparatus drivers and

fire policemen or other employees not expected to perform interior structural firefighting.

Additional costs would be incurred for training in instructing employees in the use of the selected equipment and self rescue techniques. These costs will vary but as an example of the potential costs associated with the rule, one manufacturer sells a system which costs \$400.00 while the training in the system use is \$250.00 per person. On the other hand, the manufacturer will offer train the trainer instruction to a Fire Department Trainer for a one time cost; this instruction will then permit the Department to train its affected employees at a much lower cost than it would incur if it purchased the manufacturer's training for each of its members. Also, as mentioned elsewhere in this rulemaking, fire departments may also consider other methods to reduce training costs such as using in-house trainers and consolidating training classes with fellow departments to maximize training resources.

Paperwork: The paperwork requirements contained in the proposed rule are minimal. The employer must certify that the hazard assessment has been completed and must maintain that document. The employer must also keep training record identifying all employees trained under the rule. Since other standards and laws already require that training records be maintained, this provision will have minimal impact on the employer.

Local Government Mandates: Fire protection is a function of local government and as such the monetary burden of providing this equipment will be borne by the local government responsible for fire protection. The legislature did not provide funding for mandate relief.

Duplication: This rule does not duplicate any state or federal regulations.

Alternatives: The legislation requiring promulgation of the rule provided little room for any alternative to be considered. The amendment specifically requires equipment that meets a defined national consensus standard for specific purposes. The alternatives provided by the Department involve the judgment of the Department with regard to the risks faced by its employees performing interior structural firefighting and the ropes and equipment needed to mitigate that risk. The agency determined that the employer would be best suited to survey the hazards in the local protection area and select the equipment based upon the hazards firefighters would be exposed to, as opposed to imposing its own stringent requirements specifying the type of equipment needed.

Federal Standards: There are no federal standards with like requirements.

Compliance Schedule: The provisions of the amendment are effective on May 18, 2008 and employers will be required to be in compliance by November 1, 2008. The effective date of the rule will be upon adoption. The compliance aspects are not difficult and under normal inspection protocols an employer would be given 30 days to comply.

Regulatory Flexibility Analysis

Effect of the Rule: There is no requirement for small businesses; the rule will apply to all governmental agencies that employ a firefighter. The rule does not apply to New York City. Virtually all local government will be affected by this rule. Impacts should be low with compliance costs at less than \$100.00 per firefighter in most areas of the state. In many smaller municipalities, minimal costs would accrue depending on the nature of the structures in the area protected.

Local Governments with hazards requiring the provision of protective equipment and training for firefighters may collaborate on the training and use quantity buying practices to reduce costs. Training requirements could also be met by utilizing free training provided by the Department of State, Office of Fire Prevention and Control. However, that agency does not have the resources to train every firefighter affected by this rule.

Compliance Requirements: The Law requires that each employer that employs firefighters must provide emergency escape rope and system components appropriate for the risk to which firefighters in their employ are exposed. To accomplish this the employer must conduct an assessment of the types of structures in the fire protection area, determine what the hazard to employees would be and then provide the appropriate harnesses, ropes and equipment so that employees may self rescue should they become trapped at an elevation expected to cause injury should the individual be required to jump. The law also requires that the employer is required to provide training in the use of the provided equipment and inspect and assure the safety of the equipment. The authorizing legislation was also specific as to the design and testing of the provided equipment citing a national consensus standard, The National Fire Protection Association Standard 1983, "Life Safety Rope and Equipment for Emergency Responders". The law requires the commissioner to adopt the latest edition which is the 2006 edition.

NFPA 1983-2006 established the design, construction and testing requirements for emergency escape and life safety ropes and system components and all such equipment must bear a label attesting to its conformance.

To meet the compliance requirements the employer must:

1 Conduct a hazard assessment to establish the risk.

- 2 Select the appropriate ropes and system components.
- 3 Provide properly fitted ropes and system components (many belts and harnesses are sized) to each Firefighter at risk.
- 4 Train each firefighter in the use of the selected rope and system components.
- 5 Inspect the ropes and system components periodically to assure they are safe for use.

Professional Services: Training on the required subject matter is provided free of charge by the Office of Fire Prevention and Control. OFPC classes are limited and would not meet the needs of all employers. There are also many experts in the field who provide rope training and smaller employers could collaborate and share the expense of training.

Under provisions of the executive law, career departments must have a Municipal Training Officer who would be capable of providing the training.

Compliance Costs: Purchase of the ropes and system components would be relatively inexpensive in suburban fire protection areas. As the height and complexity of structures increase the equipment will become more expensive and the required training more comprehensive.

Many suppliers can provide ropes and attachment devices at a price range from \$ 20.00 to \$50.00. Harnesses or escape belts can run from \$50.00 to \$100.00. On the high end of the cost spectrum, the system developed and used by FDNY costs approximately \$400.00 per firefighter and the Manufacturer (Petzil) requires that the employer participate in their training program at \$250.00 per person. They will provide train the trainer services.

Economic and Technological Feasibility: The emergency regulation does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

Minimizing Adverse Impact: The emergency regulation is necessary to implement Labor Law, Section 27-a(4)(c), as enacted by chapter 433 of the Laws of 2007 and amended by chapter 47 of the Laws of 2008, and to that extent, does not exceed any minimum State standards. Section 27-a(4)(c) requires the Commissioner to adopt the codes, standards and recommended practices promulgated by the most recent edition of the National Fire Protection Association 1983, Standard on Fire Service Life Safety Ropes and System Components, and as are appropriate to the nature of the risk to which the firefighter shall be exposed. This emergency regulation has been carefully drafted to meet these State statutory requirements and does not impose any additional costs or compliance requirements on local governments that employ firefighters beyond those inherent in the statute.

Small Business and Local Government Participation: This emergency regulation has no impact on small business. The regulation applies to all governmental agencies that employ a firefighter. The Department solicited input on this regulation by holding meetings with employer groups such as the New York State Association of Fire Chiefs and Regional Fire Administrators from around the State. The regulation was also discussed with the Counsel for the Firemen's Association of the State of New York. Additionally, input was solicited from the Office of Fire Prevention and Control and from the Department of State Counsel. Local governments that employ firefighters will also have an opportunity to comment on this regulation when it is subsequently filed as a proposed regulation and may offer comments at the public hearing that will be held regarding the proposed regulation.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:
The rule will apply to all public employers who employ firefighters. As many as 800 employers in rural or suburban areas will be affected by this rule.
2. Reporting, recordkeeping, and other compliance requirements; and professional services:

The rule will require the employer to maintain training records to show that the firefighters have been trained. Employers are already required to maintain training records by other rules such as the OSHA requirements promulgated under 12NYCRR Part 800. The proposed rule does not appear to impose an additional recordkeeping burden on the employer and will require a minimum amount of effort to comply. The training record must be maintained until the training is repeated, for a period of one year.

Compliance with the overall rule will be less and less burdensome as the size of the employer decreases. The employer must perform a hazard assessment to determine the level of risk to which its employees are exposed and use that information to select the appropriate equipment to be provided. Depending on the height and types of structures in the area where the employer provides fire protection, the equipment could be a little as a rope, belt, and attachment devices.

The employer must also train employees in the techniques of self rescue. Many Fire Departments have the expertise in-house to provide this service, particularly in rural areas where building size and configurations may limit the risks addressed by the rule. Moreover, in rural areas rope

work is part of high angle rescue work which a number of fire departments in mountainous areas provide. Individuals trained in high angle rescue techniques would require little or no extra training to meet the requirements of this proposed rule.

Training provided by the State Office of Fire Prevention and Control also covers the criteria involved. However, this office does not have sufficient staff resources to provide the training on a statewide basis. Some rope and rescue system manufacturers will provide training in their equipment; there will typically be a cost associated with this service, however.

Another option open to employers is to group together and hire a professional trainer to provide a train-the-trainer course for individuals from a number of departments who would then train the members of their own department. This method would make the expense of hiring a contractor a shared expense.

3. Costs:

There are two primary areas of cost imposed by the rule: the cost of purchasing and maintaining the equipment and the cost of providing the required training. The cost of the equipment would fluctuate by department, depending upon the risks identified in the risk assessment conducted by the Department and the equipment needed to address the risk. Each firefighter who is at risk of entrapment at elevation must be provided with properly fitted (belts and harnesses come in different sizes) self-rescue rope and other components such as a belt and carabiners. A rural fire department employer could reasonably outfit each employee covered by the rule for as little as \$100.00; if employers were to coordinate purchases and buy these items in bulk that cost could be reduced substantially. We should note that some of the manufactured systems cost as much as \$400.00. In most rural areas such expensive systems should not be necessary.

Costs associated with the provision of training in systems are discussed above. If training is provided in-house, costs would be minimal or none at all. A professional trainer could be provided by a manufacturer "free of charge" if the employer purchases a sufficient number of units of equipment. [Note: although this is classified as a free service, it is really a service whose cost is included in the equipment purchase cost.] If the professional trainer's services are not provided along with the purchase, the charges for the trainer's time could range up to \$500.00.

4. Minimizing adverse impact:

The only adverse impact resulting from the proposed rule are the costs associated with compliance. As discussed previously, covered employers can try to minimize such costs through coordination with other fire departments to purchase equipment in bulk and through train the trainer sessions which will allow one or more members to deliver the training to their fellow firefighters.

5. Rural area participation:

The proposed rule was posted on the department web site along with a contact. Numerous emails and phone calls were taken during the 6 months it was posted.

Meetings were held with employer groups such as The New York State Association of Fire Chiefs and Regional Fire Administrators from around the state. The rule was discussed with the Counsel for The Firemen's Association of the State of New York.

Meetings were also held with representatives of the Office of Fire Prevention and Control and with Department of State Counsel.

Comments from these meetings and contacts were used to develop the rule.

Job Impact Statement

This rule concerns the provision of safety ropes and system components for public sector Fire Fighters. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

EMERGENCY RULE MAKING

The Number of Crane Board Members Needed to Conduct a Crane Operator's Examination & to Hold Administrative Hearings

I.D. No. LAB-42-08-00005-E

Filing No. 944

Filing Date: 2008-09-26

Effective Date: 2008-09-28

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

Action taken: Amendment of section 23-8.5 of Title 12 NYCRR.

Statutory authority: General Business Law, section 483; Labor Law, sections 21 and 27

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

Specific reasons underlying the finding of necessity: This is a very busy season for practical examinations for crane operators. This amendment will allow for more testing days to be scheduled thereby eliminating delays in getting examinations.

Subject: The number of Crane Board members needed to conduct a crane operator's examination and hold administrative hearings.

Purpose: To modify the requirements regarding crane operator examinations and administrative hearings for crane operators.

Text of emergency rule: 12NYCRR Section 23-8.5 is amended to read as follows:

§ 23-8.5 Special provisions for crane operators

(a) Finding of fact. The board finds that the trade or occupation of operating cranes of the type described in subdivision (b) of this section, in construction, demolition and excavation work involves such elements of danger to the lives, health and safety of persons employed in such trade or occupation as to require special regulations for their protection and for the protection of other employees and the public in that such cranes may fall over, collapse, contact electric power lines, dislodge material and cause such material to fall or fail to support intended loads and convey them safely, unless such cranes are operated by persons of proper ability, judgment and diligence.

(b) Limited application of this section. This section applies only to mobile cranes having a manufacturers' maximum rated capacity exceeding five tons or a boom exceeding forty feet in length and to all tower cranes operating in construction, demolition and excavation work. The word crane as used in this section refers to tower cranes and to such mobile cranes of the following type: a mobile, carrier-mounted, power-operated hoisting machine utilizing hoisting rope and a power-operated boom which moves laterally by rotation of the machine on the carrier.

(c) Certificate of competence required. No person, whether the owner or otherwise, shall operate a crane in the State of New York unless such person is a certified crane operator by reason of the fact that:

(1) He holds a valid certificate of competence issued by the commissioner to operate a crane; or

(2) He is at least 21 years of age and holds a valid license issued by the Federal government, a State government or by any political subdivision of this or any other State and such license has been accepted in writing by the commissioner as equivalent to a certificate of competence issued by him; or

(3) He is a person who:

(i) is at least 21 years of age and is employed by the Federal government, the State or a political subdivision, agency or authority of the State and is operating a crane owned or leased by the Federal government, the State or such political subdivision, agency or authority and his assigned duties include operation of a crane;

(ii) is at least 21 years of age and is employed only to test or repair a crane and is operating it for such purpose while under the direct supervision of a certified crane operator; or under the direct supervision of a person employed by the Federal government, the State or a political subdivision, agency or authority of the State and his assigned duties include the operation of a crane;

(iii) an apprentice or learner who is at least 18 years of age and who has the permission of the owner or lessee of a crane to take instruction in its operation and is operating such crane under the direct supervision of a certified crane operator or under the direct supervision of a person employed by the Federal government, the State or a political subdivision, agency or authority of the State and whose assigned duties include the operation of a crane.

(d) Application forms and photographs. An application for a certificate of competence or for a renewal thereof shall be made on forms provided by the commissioner. Upon notice from the commissioner to an applicant that a certificate of competence or a renewal thereof will be issued to him, the applicant must forward photographs of himself in such numbers and sizes as the commissioner shall prescribe, and such photographs must have been taken within 30 days of the request for such photographs.

(e) Physical condition. No person suffering from a physical handicap or illness, such as epilepsy, heart disease, or an uncorrected defect in vision or hearing, that might diminish his competence, shall be certified by the commissioner.

(f) Experience required. An applicant for a certificate of competence must be at least 21 years of age and must have had practical experience in the operation of cranes for at least three years and, in addition, have a practical knowledge of crane maintenance.

(g) Examining board. The commissioner may appoint an examining board which shall consist of at least three members, at least one of whom shall be a crane operator who holds a valid certificate of competence is-

sued by the commissioner, and at least one of whom shall be a representative of crane owners. The members of the examining board shall serve at the pleasure of the commissioner and their duties will include:

(1) The examination of applicants and their qualifications, and the making of recommendations to the commissioner with respect to the experience and competence of the applicants;

(2) The holding of hearings regarding appeals following denials of certificates;

(3) The holding of hearings prior to determinations of the commissioner to suspend or revoke certificates, or to refuse to issue renewals of certificates;

(4) The reporting of findings and recommendations to the commissioner with respect to such hearings;

(5) The acts and proceedings of the examining board shall be in accordance with regulations issued by the commissioner.

(h) General examination. Each applicant for a certificate of competence will, and each applicant for a renewal thereof may, be required by the commissioner to take an appropriate general examination.

(i) Operating examination. An applicant who passes the general examination will also be required to take a practical examination in crane operation, except that the commissioner may waive this requirement with respect to an applicant for a renewal of a certificate of competence. *The commissioner may designate one or more individual members of the examining board to conduct the practical examination. When the practical examination is conducted by a single member of the examining board, the applicant must achieve a passing score from the member to receive a certificate of competence. When the practical examination is conducted by two or more members of the examining board, the applicant must achieve a passing score, which shall be calculated as an average of all scores received from the members that conducted the practical examination. The procedures used regarding the conduct of the practical examination, the establishment of the passing score and the assignment of the board members to conduct individual examinations shall be set forth in a guidance document approved by the examining board.*

(j) Contents of certificate. Each certificate of competence issued shall include the name and address of the certified crane operator, a brief description of him for the purpose of identification and his photograph.

(k) Term of certificate. Each certificate of competence or renewal thereof shall be valid for three years from the date issued, unless its term is extended by the commissioner or unless it is sooner suspended or revoked. The commissioner may extend the term of any certificate of competence as he may find necessary to relieve a certified operator of unnecessary hardship.

(l) Carrying certificate. Each certified crane operator shall carry his certificate on his person when operating any crane and failure to produce the certificate upon request by the commissioner shall be presumptive evidence that the operator is not certified.

(m) Renewals. An application for renewal of a crane operator's certificate of competence shall be made within one year from the expiration date of the certificate sought to be renewed, except that the commissioner may extend the time to make such application to prevent any undue hardship to a certified crane operator.

(n) Suspension, revocation, refusal to renew, denials of certificates, hearings.

(1) The commissioner may, upon notice to the interested parties and after a hearing before the examining board, suspend or revoke a certificate of competence upon finding that the certified operator has failed to comply with an order of the commissioner or that the certified operator is not a person of proper competence, judgment or ability in relation to the operation of cranes, or for other good cause shown.

(2) Prior to a determination by the commissioner not to renew a certificate of competence, the commissioner shall require a hearing before the examining board upon notice to the interested parties.

(3)[(i)] An applicant whose application for a certificate has been denied by the commissioner may, upon his written request made to the commissioner within 30 days after the mailing or personal delivery to him of a notice of such denial, have a hearing before the examining board.

[(ii) Such hearing shall be held by the examining board which] (4) *The commissioner shall designate a panel of two or more members of the examining board to conduct all hearings required pursuant to this section. The commissioner may also designate a hearing officer to assist the panel in conducting the hearings. The panel shall make its recommendations to the commissioner within three days after such hearing has been concluded. A written notice of the commissioner's decision, containing the reasons therefor, shall be promptly given to the certified operator or applicant, as the case may be, and to any interested parties who appeared at the hearing. Every such hearing shall be held in accordance with such regulations as the commissioner may establish.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and

will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 24, 2008.

Text of rule and any required statements and analyses may be obtained from: Thomas J. McGovern, Department of Labor, Counsel's Office, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: thomas.mcgovern@labor.state.ny.us

Regulatory Impact Statement

1. Statutory Authority:

Section 27(2) of the Labor Law authorizes the Commissioner of Labor to adopt, amend or repeal safety and health standards which provide reasonable and adequate protection to the lives, safety and health of employees and of persons lawfully frequenting a place of employment. The Commissioner may also require licenses as a condition of carrying on an industry, trade, occupation or process which the Commissioner finds contains special elements of danger. Section 21 of the Labor Law also gives the Commissioner general rulemaking authority. Finally, Section 483 of the General Business Law gives the Commissioner of Labor the authority to prescribe such rules and regulations as may be necessary and proper for the administration and enforcement of Article 28-D relating to Crane Operators and Blasters. Such regulations may provide for examinations, categories of certificates, licenses or registrations (Section 483(2)).

2. Legislative Objectives:

The rulemaking accords with the public policy objectives the Legislature sought to advance when it adopted Section 483 of the General Business Law. These regulatory revisions clarify administrative procedures regarding the administration of the practical examinations for crane operator's certificates and the conduct of hearings by the examining board regarding the revocation, suspension, refusal to renew or denial of a crane operator's certificate. The Department is seeking to make it easier to schedule the practical examinations by authorizing the Commissioner to designate one or more members of the examining board to conduct the exams. Currently, at least a quorum of the entire Crane Examining Board must be present to conduct the exams. Crane Board members already dedicate more than forty (40) days annually to crane testing and hearings without compensation. This is a substantial commitment of time given that Board members are responsible for operating their own businesses or are employed full-time. Finding adequate number of Board members to participate in each testing series can be difficult given limitations on availability, particularly in the construction season when demand for testing can be at its highest. The proposed rule will facilitate the conduct of examinations by allowing one or more members of the Board to be present. Additionally, the Department wants to make it easier to get administrative hearings scheduled regarding the revocation, suspension, refusal to renew or denial of a crane operator's certificate. The Board is responsible for conducting these hearings and making a report and recommendation to the Commissioner. Individuals seeking review of adverse determinations regarding their operator's certificate expect timely access to the hearing process.

It is important that crane operators not have any delays in getting their exams scheduled. It is even more important that administrative hearings not be delayed due to scheduling difficulties.

3. Needs and Benefits:

As previously mentioned, the members of the Board serve without salary or other compensation (General Business Law, Section 483(3)). The time estimated to conduct the exams and hearings is approximately 40 days per year. While Board members have been extremely generous in making themselves available for their duties, it is increasingly difficult to find testing and hearing dates when sufficient numbers of the board members are available for tests or hearings given other professional and personal demands on their time. This creates many scheduling difficulties and can create delays which affect crane operator applicants and individuals who are seeking hearings to review adverse determinations regarding their operator certificates. Moreover, since General Construction Law § 41 establishes a default quorum of a majority of Board members for the conduct of official business, increasing the size of the Board to make more members available to serve as examiners or hearing panelists will only exacerbate this problem. The amendments to 12 NYCRR Section 23-8.5 establishing a smaller number of Board members who need to be present at either examinations or hearings will make it easier to schedule the exams, thereby making certain that there will be no delays in the process. Additionally, the amendments will also make it easier to schedule administrative hearings. It is very important that there not be any delays in the hearing process.

4. Costs:

This amendment imposes no compliance costs upon state or local governments. There will be no additional costs to crane operators. There will also be no additional costs to the Labor Department.

5. Local Government Mandates:

The proposed amendment imposes no new programs, services, duties or responsibilities on local government.

6. Paperwork:

The proposed amendment imposes no new paperwork requirements.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other State or federal requirements.

8. Alternatives:

The primary alternative is to leave the regulation unchanged. Another alternative would be to add new Board members, thereby increasing the pool of available members for testing and/or hearing panelists. The current regulations provide for the Commissioner of Labor to appoint the Board members and that the Board be comprised of at least three members. Accordingly, the Commissioner could increase the number of Board members to provide for a larger pool of members to conduct tests or hearings. However, as described above, since General Construction Law § 41 establishes a default quorum of a majority of Board members for the conduct of official business, increasing the size of the Board to make more members available to serve as examiners or hearing panelists will only exacerbate this problem.

9. Federal Standards:

There are no federal standards regulating the testing and licensing of crane operators, or administrative hearings relating thereto.

10. Compliance Schedule:

The provisions of this amendment will take effect immediately.

Regulatory Flexibility Analysis

These emergency regulations make revisions regarding the number of Crane Examining Board members required to be in attendance in order to conduct a practical examination for a crane operator's certificate and how passing scores will be calculated when the exam is conducted by two or more members of the Board. The emergency regulations also permit the Commissioner to designate a panel of two or more members of the Board together with an administrative hearing officer to conduct hearings regarding the suspension, revocation, refusal to renew, and the denials of a certificate to operate a crane. The practical examination was already required in regulation and does not impose any new requirement on crane operators. The regulations also currently provide for hearings for crane operators who have their certificate of competence to operate a crane suspended, revoked, refused to renew or denied. This amendment merely clarifies that the hearings need not be conducted by the entire examining board, but rather may be conducted by a panel of two or more members of the board.

The emergency regulations do not impose any additional obligations on any local government or business entity. Nor do they impose any adverse economic impact, reporting or recordkeeping, or other compliance requirements on small businesses and/or local governments. Rather, they are intended to facilitate the testing of individuals seeking crane operator certificates, some of whom are employees of local governments or businesses. 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 rule will not impose any additional reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. On the contrary, the rule is intended to facilitate the timely conduct of crane operator examinations and hearings. Therefore, the regulations will not have a substantial adverse economic impact on rural areas or reporting, recordkeeping 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 regulation relates to the administration of a crane operator's practical examination and the conduct of hearings regarding a suspension, revocation, refusal to renew, or denial of a crane operator's certificate. Currently, regulations already require that a crane operator pass a practical examination before being given a certificate to operate a crane. Additionally, where a certificate is suspended, revoked, refused a renewal or denied, the individual is given an opportunity for a hearing before the Crane Examining Board. The regulation merely clarifies that the practical examination may be administered by one or more members of the Board and that the hearings may be conducted by a panel of two or more members of the Board. Accordingly, the regulation will not have a substantial adverse impact on jobs and employment opportunities. Rather, the rule will encourage and support employment opportunities for qualified crane operators because it will facilitate the testing of individuals seeking crane operator licenses. Because it is evident from the nature of the regulation that it will have a beneficial impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Therefore, a job impact statement is not required and one has not been prepared.

Office of Mental Health

EMERGENCY RULE MAKING

Comprehensive Outpatient Programs

I.D. No. OMH-42-08-00015-E

Filing No. 956

Filing Date: 2008-09-30

Effective Date: 2008-09-30

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

Action taken: Amendment of Part 592 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04 and 43.02; Social Services Law, sections 364 and 364-a

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

Specific reasons underlying the finding of necessity: The amendments are a result of the enacted State budget and were effective as of July 1, 2008.

Subject: Comprehensive Outpatient Programs.

Purpose: To increase the Medicaid reimbursement associated with certain outpatient treatment programs regulated by OMH.

Text of emergency rule: 1. Subdivisions (c), (d), and (k) are amended and a new subdivision (l) is added to section 592.8 of Title 14 NYCRR as follows:

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

(1) For outpatient mental health programs *other than clinics* which are designated Level I providers pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, *as well as grants received for subsequent fiscal years which have been identified for inclusion by the Office of Mental Health* shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate.

(2) *For clinic treatment programs which are designated Level I programs pursuant to this Part, grants received for the local fiscal year ended in 2001 for upstate and Long Island based providers, and for the local fiscal year ended in 2001 for New York City based providers, as well as grants received for subsequent fiscal years which have been identified for inclusion by the Office of Mental Health* shall be added, if applicable, to the annualized eligible deficit approved in the calculation of the previous supplemental rate.

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

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

(ii) *For clinic treatment programs, the combined total of outpatient mental health program visits reimbursed by medical assistance for each provider shall be calculated by using the average number of visits provided in the most recent three fiscal years multiplied by 90.9 percent, for rates effective prior to July 1, 2008. For rates effective July 1, 2008,*

the higher of the number of paid visits from calendar year 2007 or the average number of paid visits provided in the calendar years 2005 - 2007, multiplied by 90.9 percent, shall be used. These visits shall include all visits reimbursed by Medicaid, including visits partially reimbursed by Medicare, and those for which payment has been made or approved by a Medicaid managed care organization. Providers, who in the three most recent fiscal years earned less than the full Medicaid supplemental rate on visits partially reimbursed by Medicare, shall have the projected number of annual visits adjusted to reflect the lower supplemental revenue earned on Medicare/Medicaid dually eligible visits. The calculation of the Medicare/Medicaid adjusted visits shall be based on the percentage of Medicaid supplemental payments earned on Medicare/Medicaid dually eligible visits provided during the three most recent fiscal years and the number of dually eligible visits provided in the three most recent fiscal years. The Medicare/Medicaid adjusted visits are calculated by multiplying the projected annual volume of dually eligible visits by the average percentage of Medicaid supplemental revenue earned on these visits during the three most recent fiscal years.

[(ii)] (iii) Rates calculated pursuant to [subparagraph] *subparagraphs (i) or (ii)* of this paragraph are subject to appeal by the local governmental unit, or by the provider with the approval of the local governmental unit. Appeals pursuant to this paragraph shall be made within [one year] 120 days after receipt of initial notification of the most recent supplemental reimbursement rate calculation. However, under no circumstances may the recalculated rate be higher than the rate cap set forth in paragraph [(3)] (4) of this subdivision.

[(3)] (4) The supplemental rate for a provider operating a licensed outpatient mental health program shall be the lesser of the rate calculated in paragraph [(2)] (3) of this subdivision or a rate cap as established by the Commissioner of Mental Health and approved by the Director of the Division of the Budget.

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

[(d)] (1) *For outpatient programs other than clinic treatment programs, in [In] order to recoup supplemental payments for those visits in excess of 110 percent of the number of visits used to calculate the supplemental rate for a Level I provider, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. The Office of Mental Health may recover such funds by requesting that the Department of Health withhold such funds from future Medicaid payments to the provider.*

(2) *For clinic treatment programs, in order to recoup supplemental payments for those visits provided prior to July 1, 2008 in excess of 110 percent of the number of visits used to calculate the supplemental rate for a Level I program, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. The Office of Mental Health may recover such funds by requesting that the Department of Health withhold such funds from future Medicaid payments to the provider. For services provided July 1, 2008, and thereafter, the Office of Mental Health will no longer recover supplemental payments in excess of 110 percent of the number of visits used to calculate the supplemental rate of a Level I provider.*

(k) *When a clinic treatment provider opens a new clinic program location, the supplemental rate shall be re-calculated to include the volume of Medicaid visits projected for the location in the provider's approved Application for Prior Approval Review. The funding used in calculation of the supplemental rate shall be increased by the amount calculated by multiplying the increased volume of Medicaid visits from the approved Application for Prior Approval Review by the Level II COPS supplement for the applicable program/region.*

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

2. Subdivision (b) of section 592.10 of Title 14 NYCRR is amended to read as follows:

(b) [in] *In order to recoup supplemental payments for those visits in excess of the number of visits used to calculate the supplemental rate under*

this section, the Office of Mental Health may adjust the supplemental rates for the period in which the excess visits occurred. Such adjustments shall be made no more frequently than quarterly during the year. *Effective with all services rendered July 1, 2008 and thereafter, no recoupment of supplemental payments to clinic treatment programs shall be made.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 28, 2008.

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

Regulatory Impact Statement

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law

grants the Commissioner of the Office of Mental Health the authority and responsibility

to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

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

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

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

Chapter 54 of the Laws of 2008 provides increased funding appropriations in support of amendments to Part 592. (Section 1, State Agencies, Office of Mental Health, lines 18-29 on page 393, lines 46-50 on page 403, and lines 1-7 on page 404.)

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs. The amendments to Part 592 increase the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health (OMH) consistent with the enacted 2008-2009 state budget. These changes will be targeted in such a way as to provide general fiscal relief to providers, as well as improve the quality and availability of services. They will also equalize reimbursement fees for clinic treatment within geographic areas, as approved by the Division of Budget.

3. Needs and Benefits: The enacted state budget for State Fiscal Year 2008-2009 provided for an approximately \$5 million increase for clinic treatment programs in State share of Medicaid (\$10 million gross Medicaid funds) through adjustments to the Medicaid fee supplements calculated in accordance with Part 592. This funding will have a full annual value of \$10 million in State share of Medicaid (\$20 million in gross Medicaid funds). Clinic treatment programs provide outpatient treatment designed to reduce symptoms, improve functioning and provide ongoing support to adults and children admitted to the program with a diagnosis of a designated mental illness. This rulemaking includes provisions to increase certain programs to a minimum payment level and removes the requirement to recover monies generated by paid visits in excess of 110 percent of the visits used to calculate the rate supplement.

4. Costs:

a) Costs of regulated parties: There are no costs to providers associated with these amendments.

b) Costs to State and Local government and the agency: Medicaid services typically involve both a state and county share in matching the federal portion. The state share of this \$20 million outpatient initiative is \$10 million, with no impact to local governments. The increase is being implemented after the local share Medicaid cap is already in place. (The local share Medicaid cap was an initiative included in the enacted State budget for 2005-2006, under which the state pays for increases in the local share of Medicaid after January 1, 2006.) The proposed changes were implemented effective July 1, 2008.

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

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

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

8. Alternatives: The application of the increased funding for certain outpatient programs consistent with the 2008-2009 enacted state budget

resulted in increases for certain clinic treatment programs, and allows clinic treatment programs to retain additional Medicaid rate supplement payments, should they increase the number of services they provide. Determination of the methodology to implement the supplement changes, and the decision to allow clinic treatment programs to retain additional Medicaid rate supplement payments was made in consultation with the New York State Division of Budget, to be consistent with the enacted state budget. This would allow for the continued strengthening and expansion of the ambulatory mental health system and support a movement away from more expensive modalities of treatment. Therefore, no alternative was considered.

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 changes were effective as of July 1, 2008. This rulemaking is effective upon adoption.

Regulatory Flexibility Analysis

The proposed rule will increase the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health. This increase is consistent with the 2008-09 enacted State budget. 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, which serves to increase the Medicaid reimbursement associated with certain outpatient treatment providers, will not impose any adverse economic impact on rural areas.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the proposed regulation merely increases the Medicaid reimbursement associated with certain outpatient treatment programs regulated by the Office of Mental Health. Therefore, it is evident that there will be no adverse impact on jobs and employment opportunities.

Department of Motor Vehicles

NOTICE OF ADOPTION

Renewal of Driver's Licenses and Enhanced Driver's Licenses

I.D. No. MTV-32-08-00005-A

Filing No. 953

Filing Date: 2008-09-30

Effective Date: 2008-10-15

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

Action taken: Amendment of section 3.3 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 502(6)(a), (b)

Subject: Renewal of driver's licenses and enhanced driver's licenses.

Purpose: Establishes renewal cycles for driver's licenses and enhanced driver's licenses.

Text or summary was published in the August 6, 2008 issue of the Register, I.D. No. MTV-32-08-00005-P.

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

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

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

International Registration Plan

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

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

Proposed Action: This is a consensus rule making to amend section 28.5 of Title 15 NYCRR.

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

Subject: International Registration Plan.

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

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

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

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

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

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

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

Consensus Rule Making Determination

The International Registration Plan, as established in Article 14-A of the Vehicle and Traffic Law, is a registration reciprocity agreement among states of the United States and Provinces of Canada providing for a single payment of registration fees on the basis of fleet miles operated in various jurisdictions. It calls for a single license plate or set of plates and a single cab card to be issued by only one jurisdiction for each vehicle in a fleet registered under the Plan, and so far as registration is concerned, that vehicle may be operated both interstate and intrastate in the appropriate jurisdictions.

An IRP Temporary Authority (TA) is a 30-day permit issued by the DMV to customers who have requested the temporary registration by submitting a TA Request form. In signing this form, the registrant affirms that they understand that the "IRP account will be suspended if I do not pay the appropriate fees and provide the required documents within this 30-day period."

This consensus rule insures that DMV will be able to suspend the registration of any vehicle in *any fleet* of an account holder who fails to pay the appropriate fees and provide the required documents. This will provide an incentive for account holders to abide by the terms of the TA agreement to which they are signatories. The agreement clearly states that the "account will be suspended" upon failure to pay. Since the account includes all fleets within such account, DMV has clear authority to suspend all fleets within an account.

Since this rulemaking simply reflects the terms of the current TA agreement, it imposes no new burdens or requirements upon participants in the IRP.

Job Impact Statement

A Job Impact Statement is not submitted, because this rule will have no adverse impact on job creation or job development in New York State.

Niagara Frontier Transportation Authority

NOTICE OF ADOPTION

The NFTA's Freedom of Information Regulations

I.D. No. NFT-26-08-00012-A

Filing No. 945

Filing Date: 2008-09-25

Effective Date: 2008-10-15

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

Action taken: Amendment of Part 1156 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 1299-e(5)

Subject: The NFTA's Freedom of Information Regulations.

Purpose: To amend the NFTA's Freedom of Information Regulations to conform to changes in state law.

Text or summary was published in the June 25, 2008 issue of the Register, I.D. No. NFT-26-08-00012-P.

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

Text of rule and any required statements and analyses may be obtained from: Ruth A Keating, Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York 14203, (716) 855-7398, email: Ruth_Keating@nfta.com

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

NOTICE OF ADOPTION

To Defer and Recover Excess Water Charges

I.D. No. PSC-26-08-00018-A

Filing Date: 2008-09-29

Effective Date: 2008-09-29

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

Action taken: On September 17, 2008, the PSC adopted an order permitting United Water New Rochelle Inc., to defer \$6,226,818 of excess per capita water costs, and future water costs resulting from a Water Supply Agreement with the New York City Water Board.

Statutory authority: Public Service Law, section 89-c

Subject: To defer and recover excess water charges.

Purpose: To approve the deferral and recovery of excess water charges.

Substance of final rule: The Commission, on September 17, 2008, adopted an order permitting United Water New Rochelle Inc., to defer \$6,226,818 of excess per capita water costs, and future excess per capita water costs resulting from a Water Supply Agreement with the New York City Water Board, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(04-W-1221SA3)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-27-08-00006-A

Filing Date: 2008-09-25

Effective Date: 2008-09-25

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

Action taken: On September 17, 2008, the PSC adopted an order approving the petition of 1240 First Avenue LLC, to submeter electricity at 400 East 67th Street, New York, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of 1240 First Avenue LLC, to submeter electricity at 400 East 67th Street, New York, New York.

Substance of final rule: The Commission, on September 17, 2008, adopted an order approving a petition by 1240 First Avenue LLC, to submeter electricity at 400 East 67th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0617SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-27-08-00008-A

Filing Date: 2008-09-25

Effective Date: 2008-09-25

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

Action taken: On September 17, 2008, the PSC adopted an order approving the petition of United Development Corporation, to submeter electricity at 370 Route 13, Cortlandville, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of United Development Corporation, to submeter electricity at 370 Route 13, Cortlandville, New York.

Substance of final rule: The Commission, on September 17, 2008, adopted an order approving a petition by United Development Corporation, to submeter electricity at 370 Route 13, Cortlandville, New York, located in the territory of Niagara Mohawk Power Corporation d/b/a National Grid.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0608SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-29-08-00006-A

Filing Date: 2008-09-25

Effective Date: 2008-09-25

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

Action taken: On September 17, 2008, the PSC adopted an order approving the petition of Living Opportunities of DePaul, to submeter electricity at 67-113 Lindwood Street, Warsaw, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of Living Opportunities of DePaul, to submeter electricity at 67-113 Lindwood Street, Warsaw, New York.

Substance of final rule: The Commission, on September 17, 2008, adopted an order approving a petition by Living Opportunities of DePaul, to submeter electricity at 67-113 Lindwood Street, Warsaw, New York, located in the territory of New York State Electric & Gas Corporation.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0554SA1)

NOTICE OF ADOPTION

Limited Waiver of Certain Commission Rules

I.D. No. PSC-29-08-00010-A

Filing Date: 2008-09-29

Effective Date: 2008-09-29

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

Action taken: On September 17, 2008, the PSC adopted an order approving the petition of the Town of Butler, Wayne County for waiver of Commission rules for 894.1, 894.2, 894.3 and 894.4 relating to cable television franchising.

Statutory authority: Public Service Law, section 216(1)

Subject: Limited waiver of certain Commission rules.

Purpose: To approve the Town of Butler, Wayne County for a waiver of certain Commission rules.

Substance of final rule: The Commission, on September 17, 2008, adopted an order approving the petition of the Town of Butler, Wayne County for a limited waiver of Commission rules 894.1, 894.2, 894.3 and 894.4 relating to cable television franchising, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-V-0720SA1)

NOTICE OF ADOPTION

Limited Waiver of Certain Commission Rules

I.D. No. PSC-29-08-00011-A

Filing Date: 2008-09-29

Effective Date: 2008-09-29

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

Action taken: On September 17, 2008, the PSC adopted an order approving the petition of the Town of Torrey, Yates County for a waiver of Commission rules 894.1, 894.2, 894.3 and 894.4 relating to cable television franchising.

Statutory authority: Public Service Law, section 216(1)

Subject: Limited waiver of certain Commission rules.

Purpose: To approve the Town of Torrey, Yates County for a waiver of certain Commission rules.

Substance of final rule: The Commission, on September 17, 2008, adopted an order approving the petition of the Town of Torrey, Yates County for a limited waiver of Commission rules 894.1, 894.2, 894.3 and 894.4 relating to cable television franchising, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commis-

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-V-0718SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-29-08-00012-A

Filing Date: 2008-09-25

Effective Date: 2008-09-25

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

Action taken: On September 17, 2008, the PSC adopted an order approving the petition of The Mark Hotel LLC, to submeter electricity at 25 East 77th Street, New York, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To grant the petition of The Mark Hotel LLC, to submeter electricity at 25 East 77th Street, New York, New York.

Substance of final rule: The Commission, on September 17, 2008, adopted an order approving a petition by The Mark Hotel LLC, to submeter electricity at 25 East 77th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-E-0656SA1)

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

Interconnection of the Networks between Verizon and Litecall Inc. for Local Exchange Service and Exchange Access

I.D. No. PSC-42-08-00012-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Verizon New York (Verizon) for approval of an interconnection agreement with Litecall Inc. executed on August 26, 2008.

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

Subject: Interconnection of the networks between Verizon and Litecall Inc. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Verizon and Litecall Inc.

Substance of proposed rule: Verizon New York Inc. (Verizon) and Litecall Inc. have reached a negotiated agreement whereby Verizon and Litecall Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The agreement establishes obligations, terms and conditions under which the parties will interconnect their network lasting until August 25, 2010.

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

New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

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

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

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

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

(08-C-1110SA1)

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

Utility Financial Incentives for Energy Efficiency Programs

I.D. No. PSC-42-08-00013-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 Petition for Rehearing by Consolidated Edison Company of New York, Inc. with respect to the Commission's Order Concerning Utility Financial Incentives issued August 22, 2008.

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

Subject: Utility financial incentives for energy efficiency programs.

Purpose: Reconsideration of elements of the order issued August 22, 2008.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny, modify, in whole or in part, a petition by Consolidated Edison Company of New York, Inc. for rehearing, (a) to utilize a net resource benefits method in calculating incentives; (b) to allow banking toward meeting annual targets; and (c) to allow incentives for demand reductions that contribute to deferral of specific transmission or distribution infrastructure investments. 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: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

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

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

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

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

(07-M-0548SA12)

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

The Attachment of Wireless Antennas to Company Structures and Land

I.D. No. PSC-42-08-00014-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 accept, reject or modify, the revised Property Transfer Review Procedure Form of Niagara Mohawk Power Corporation, which was required to submit the form in our January 10, 2005 Order in case 04-M-1078.

Statutory authority: Public Service Law, sections 66(1) and 70

Subject: The attachment of wireless antennas to company structures and land.

Purpose: To accept, modify or reject the revised procedure for evaluating proposed wireless antenna attachments.

Substance of proposed rule: On January 10, 2005, in Case 04-M-1078, Niagara Mohawk Power Corporation (d/b/a National Grid) was ordered to submit a revised Property Transfer Review Procedure Form, which is used to evaluate applications for the placement of wireless antennas and related facilities on National Grid land.

On April 22, 2008, National Grid submitted the required form, entitled "National Grid Checklist – Communications Tower Review and Approval." The Commission is now considering whether to accept this document in satisfaction of the January 10, 2005 order, or reject or require modifications to the form.

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

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

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

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

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

(04-M-1078SA2)

Department of State

EMERGENCY RULE MAKING

Electrical Bonding of Gas Piping, and Protection of Gas Piping Against Physical Damage

I.D. No. DOS-42-08-00008-E

Filing No. 952

Filing Date: 2008-09-25

Effective Date: 2008-09-25

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

Action taken: Amendment of section 1224.1(b) and addition of sections 1220.1(d)(9)-(12) and 1224.1(c)(2)-(4) to Title 19 NYCRR.

Statutory authority: Executive Laws, sections 377 and 378

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

Specific reasons underlying the finding of necessity: At its meeting held on September 10, 2008, the State Fire Prevention and Building Code Council determined that adopting this rule on an emergency basis is necessary to preserve public safety by clarifying requirements for electrical bonding of gas piping, clarifying requirements for protection of gas piping against physical damage, and adding new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST), which will increase protection against fires caused by lightning strikes in the vicinity of buildings equipped with CSST gas piping and fires caused by accidental punctures of CSST gas piping.

Subject: Electrical bonding of gas piping, and protection of gas piping against physical damage.

Purpose: To clarify and add requirements for electrical bonding and protection of gas piping.

Substance of emergency rule: This rule amends several existing provisions in, and adds several new provisions to, the 2007 edition of the Residential Code of New York State (the "2007 RCNYS"), the publication which is incorporated by reference in 19 NYCRR Part 1220, and the 2007 edition of the Fuel Gas Code of New York State (the "2007 FGCNYS"), the publication which is incorporated by reference in 19 NYCRR Part

1224. The new and amended provisions in the 2007 RCNYS and 2007 FGCNYS:

(1) Clarify the situations in which a gas piping system that contains no corrugated stainless steel tubing ("CSST") will be considered to be "likely to become energized" and, therefore, required to be bonded to an effective ground-fault current path;

(2) Specify that a gas piping system that contains no CSST may be bonded in any manner described in Section E3509.7 of the 2007 RCNYS, in cases where the 2007 RCNYS applies, or in any manner described in Section 250.104(B) of NFPA 70-2005, in cases where the 2007 FGCNYS applies;

(3) Require gas piping systems that contain any CSST to be electrically continuous and bonded to the electrical service grounding electrode system at the point where the gas service enters the building or structure;

(4) Specify standards for the installation and bonding of CSST, including standards for the size of the bonding jumper, standards for bonding clamp, standards for the place and manner of attachment of the bonding clamp, and standards for separation of the CSST from other electrically conductive systems;

(5) Specify standards for protection of piping other than black or galvanized steel from physical damage, including standards for the types of shield plates to be used, standards for determining the location where shield plates are required, and additional standards for protection of piping made of CSST; and

(6) Clarify the situations in which section E3509.7 in the RCNYS (entitled "Bonding other metal piping") will apply.

This rule also provides that the 2005 edition of standard NFPA 70, entitled "National Electrical Code" shall be deemed to be one of the standards incorporated by reference into 19 NYCRR Part 1224.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 17, 2008.

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, One Commerce Plaza, 99 Washington Ave., Albany, NY 12231, (518) 474-6740, email: joseph.ball@dos.state.ny.us

Regulatory Impact Statement

1. STATUTORY AUTHORITY.

Subdivision 1 of Executive Law section 377 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").

Subdivision 1 of Executive Law section 378 directs that the Uniform Code shall address standards for safety and sanitary conditions.

2. LEGISLATIVE OBJECTIVES.

Executive Law section 371 provides that it is be the public policy of the State of New York to provide for the promulgation of a Uniform Code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the state from hazards of fire and inadequate building construction. The Legislative objective sought to be achieved by this rule is a reduction in the number of fires caused by lightning strikes in the vicinity of buildings equipped with gas piping made of corrugated stainless steel tubing (CSST), and the number of fires caused by accidental puncturing of such piping.

3. NEEDS AND BENEFITS.

The purpose of this rule is to reduce the number of fires caused by lightning strikes in the vicinity of buildings equipped with gas piping made of corrugated stainless steel tubing (CSST), and the number of fires caused by accidental punctures of such piping. This rule is necessary because it has been determined that the existing provisions of the Uniform Code relating to electrical bonding and physical protection of gas piping could be construed as permitting electrical bonding which is not adequate to prevent fires caused by lightning strikes, and as permitting physical shielding which is not adequate to prevent accidental punctures by nails driven into walls containing piping, and because it has been determined that more detailed requirements relating to installation of CSST piping are appropriate. The benefits to be derived from this rule will be a reduction in the number of fires caused by lightning strikes and by accidental punctures of CSST gas piping.

A report or study that served as a basis for this rule is Corrugated Stainless Steel Tubing for Gas Distribution in Buildings and Concerns Over Lightning Strikes, dated August 2007, published by The NAHB Research Center, Inc., which is summarized as follows: "... the primary issue is safeguarding against an electric potential in metallic piping. In the case of proximity lightning, a high voltage can be induced in metallic piping that may cause arcing; and for CSST there is concern that arcing may cause perforation of the CSST wall and therefore cause gas leakage. The fuel gas code, electric code, plumbing code, product standards, and manufac-

turer installation instructions have different methods of providing dissipation of electrical energy through techniques called bonding and grounding. Since the codes, product standards, and installation requirements are not harmonized, builders and contractors may find differing and possibly conflicting requirements. Generally, the local jurisdiction having authority and code official will rely upon the manufacturer's installation recommendations in lieu of other requirements." This report was used to determine the necessity for and benefits derived from this rule in the following manner: CSST manufacturers have always required that CSST systems be bonded to the electrical system in accordance with the local codes (i.e. FGCNYS, NFGC and the NEC). Based on this report, the bonding methods prescribed within these documents are minimum requirements and are designed to protect the consumer against ground-faults from the premise wiring system only. The intent of this rule is to harmonize the requirements for bonding of metallic piping while providing protection from proximity lightning strikes.

4. COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule. It is anticipated that any increase in costs of complying with the Uniform Code provisions which are amended by this rule, as compared to complying with the provisions as currently written, will be negligible.

Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

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

There are no costs to the State of New York or to local governments for the implementation of this rule, except as follows:

First, if the State or any local government constructs a building equipped with gas piping (including gas piping made of CSST), or installs any such piping in an existing building, the State or such local government, as the case may be, will be required to bond the piping and protect the piping from physical damage in the manner required by this rule.

Second, since this rule amends provisions in the Uniform Code, the authorities responsible for administering and enforcing the Uniform Code will have additional items to verify in the process of reviewing building permit applications, conducting construction inspections, and (where applicable) conducting periodic fire safety and property maintenance inspections.

5. PAPERWORK.

This rule will not impose any new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

6. LOCAL GOVERNMENT MANDATES.

This rule will 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 constructs a building equipped with gas piping (including gas piping made of CSST), or installs any such piping in an existing building, will be required to comply with the electrical bonding and physical protection provisions amended and/or added by 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 amends provisions in 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.

The rule does not otherwise impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

7. DUPLICATION.

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

8. ALTERNATIVES.

The alternative of making no change to the Uniform Code provisions relating to electrical bonding and physical protection of gas piping was considered. However, it was determined that the existing provisions of the Uniform Code could be construed as permitting inadequate electrical bonding and inadequate physical shielding of gas piping, particularly in the case of gas piping made of CSST. Therefore, this alternative was rejected.

The alternative of banning the use of CSST was considered. However, it was determined that the principal concerns about the use of CSST piping (viz., fires cause by lightning strikes in the vicinity of buildings equipped with CSST piping and puncturing of CSST piping by nails driven into walls in which CSST piping is concealed) could be adequately addressed by the increased electrical bonding and physical protection requirements to be added by this rule. Therefore, this alternative was rejected.

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 this rule in the normal course of operations, either as part of the installation or construction of a new building or the renovation of an existing building.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions clarify requirements for electrical bonding of gas piping and for protection of gas piping against physical damage, and add new requirements for installation of gas piping made from corrugated stainless steel tubing (CSST). Any small business or local government that constructs a building equipped with gas piping (including gas piping made of CSST), or that installs any such gas piping in an existing building, will be affected by this rule. Small businesses that manufacture, sell or install gas piping (including gas piping made of CSST), bonding jumpers, bonding clamps, shield plates, and other related equipment may also be affected by this rule.

Since this rule amends provisions in the Uniform Code, each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. 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 subject to the rule will be required to install gas piping (including gas piping made of CSST) in accordance with the rule's provisions. In most cases, such installation will be incidental to the construction of a building or will otherwise involve the issuance of a building permit; in such cases, the local government responsible for administering and enforcing the Uniform Code will be required to consider the requirements of this rule when reviewing plans and inspecting work.

3. PROFESSIONAL SERVICES:

The rule will clarify the requirements relating to electrical bonding of gas piping, clarify the requirements relating to protection of gas piping against physical damage, and add new requirements relating to the installation of gas piping made from CSST. 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 and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule. It is anticipated that any increase in costs of complying with the provisions amended by this rule, as compared to complying with the provisions as currently written, will be negligible. Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

Any variation in costs of complying with this rule for different types or sizes of small businesses and local governments will be attributable to the size and configuration of the gas piping installed by such entities, and not to nature or type or sizes of such small businesses and local governments. To the extent that larger businesses and larger local governments may tend to own larger buildings, or more than one building, the total costs of compliance would be higher for larger businesses and larger local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The economic impact of this rule on small businesses and local governments will be no greater than the economic impact of this rule on other regulated parties, and the ability of small businesses and local governments to comply with the requirements of this rule should be no less than the ability of other regulated parties to comply. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department of State notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all

aspects of the construction industry. In addition, the Department of State held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. The meetings included the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee members, with participation from several CSST manufacturers and local government representatives. The Department of State will publish a notice of the emergency adoption of this rule in a future edition of Building New York. In addition, the Department of State will post a notice of the emergency adoption of this rule, and the full text of this rule, on the Department's website.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions clarify requirements for electrical bonding of gas piping and for protection of gas piping against physical damage, and add new requirements for installation of gas piping made from corrugated stainless steel tubing (CSST). 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 clarify the requirements relating to electrical bonding of gas piping, clarify the requirements relating to protection of gas piping against physical damage, and add new requirements relating to the installation of gas piping made from CSST. 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 and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule. It is anticipated that any increase in costs of complying with the provisions amended by this rule, as compared to complying with the provisions as currently written, will be negligible. Compliance with this rule will occur when gas piping or is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule. Any variation in costs of complying with this rule for different types of public and private entities in rural areas will be attributable to the size and configuration of the gas piping installed by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

4. MINIMIZING ADVERSE IMPACT.

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. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry. In addition, the Department of State held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. The meetings included the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee members, with participation from several CSST manufacturers and local government representatives. The Department of State will publish a notice of the emergency adoption of this rule in a future edition of Building New York. In addition, the Department of State will post a notice of the emergency adoption of this rule, and the full text of this rule, on the Department's website.

Job Impact Statement

The Department of State has 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 new paragraphs (9), (10), (11), and (12) to subdivision (d) of section 1220.1, amends subdivision (b) of section 1224.1, and adds new paragraphs (2), (3), and (4) to subdivision (c) to section 1224.1 of Title 19 NYCRR. New paragraphs (9), (10), (11), and (12) of subdivision (d) of section 1220.1 and new paragraphs (2), (3), and (4) of subdivision (c) of section 1224.1 will clarify requirements in the Uniform Fire Prevention and Building Code ("Uniform Code") relating to electrical bonding of gas piping and protection of gas piping against physical damage, and

will add new requirements relating to installation of gas piping made of corrugated stainless steel tubing (CSST).

It is anticipated that builders will be able to comply with the electrical bonding and physical protection requirements, as clarified and added by this rule, by using equipment that is currently available and techniques that are currently known. It is also anticipated that any increase costs of compliance resulting from this rule will be negligible. Therefore, it is anticipated that this rule will have no significant adverse impact on jobs or employment opportunities in the building industry, or in businesses that manufacture or install gas piping, other metal piping, or CSST piping.

NOTICE OF ADOPTION

Cease and Desist Zone for the County of Kings

I.D. No. DOS-32-08-00007-A

Filing No. 946

Filing Date: 2008-09-29

Effective Date: 2008-10-15

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

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h

Subject: Cease and desist zone for the County of Kings.

Purpose: To extend and expand an existing cease and desist zone for the County of Kings.

Text or summary was published in the August 6, 2008 issue of the Register, I.D. No. DOS-32-08-00007-P.

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, NYS Department of State, Division of Licensing Services, 80 South Swan Street, P.O. Box 22001, Albany NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

Assessment of Public Comment

On September 6, 2007, prior to the rule being proposed, the Department of State held a public hearing in Brooklyn NY to consider whether to extend and/or expand the existing cease and desist order for the Mill Basin area. The public hearing was attended by residents, representatives of local civic associations and legislative representatives. The testimony and evidence submitted demonstrated that some residents of the defined geographic zone are the subject of intense and repeated solicitation to list their homes for sale and that this rule should be proposed for adoption.

The Department of State has not received any public comments since a Notice of Proposed Rule Making was published for this rule in the August 6, 2008 edition of the New York State Register.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

30 Hour Supplemental Course for Real Estate Brokers and Salespeople

I.D. No. DOS-42-08-00009-P

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

Proposed Action: Addition of section 176.26; and amendment of section 177.18 of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-k

Subject: 30 hour supplemental course for real estate brokers and salespeople.

Purpose: To amend current regulations to conform with recent statutory amendments to Article 12-A of the Real Property Law.

Text of proposed rule: Section 176.26 is added to 19 NYCRR to read as follows:

176.26 30 Hour Supplemental Course

(a) Applicants for licensure as a real estate broker who successfully completed the 45 hour salesperson qualifying course prior to July 1, 2008 may take a 30 hour supplemental course which, if successfully completed, may be used by said applicant in conjunction with the 45 hour salesperson qualifying course towards satisfying the salesperson educational require-

ments for licensure as a real estate broker, as provided in section 176.4(a) of this Part.

(b) The following are the required subjects to be included in the 30 hour supplemental course and the required number of hours to be devoted to each such subject:

Contract Preparation	1 hour
Predatory Lending	1 hour
Pricing Properties	1 hour
Municipal Agencies	2 hours
Property Insurance	2 hours
Taxes and Assessments	3 hours
Condominiums and Cooperatives	4 hours
Commercial and Investments Properties	10 hours
Income Tax Issues in Real Estate Transactions	3 hours
Mortgage Brokerage	1 hour
Property Management	2 hours
Total	30 hours
Final Exam	2 hours
TOTAL	32 HOURS

Section 177.18 of Title 19 NYCRR is amended to read as follows:

177.18 Continuing education credit.

(a) A salesperson who has received credit for a broker qualifying course pursuant to Part 176 of this Subchapter during a period of time as defined in section 441 (3) (a) of the Real Property Law, shall receive continuing education credit for such course for such period.

(b) A salesperson may receive 19 1/2 hours of continuing education credit for successfully completing the approved 30 hour supplemental course as described in section 176.26 of this Subchapter; provided, however, that in order to complete the 22 1/2 hours of continuing education required in Real Property Law section 441(3)(a), such salesperson must also complete three hours of instruction pertaining to fair housing and/or discrimination in the sale or rental of real property or an interest in real property.

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

Text of proposed rule and any required statements and analyses may be obtained from: Whitney A. Clark, NYS Department of State, Division of Licensing Services, 80 South Swan Street, P.O., Box 22001, Albany NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory Authority:

Real Property Law (RPL) Article 12-A, *Real Estate Brokers and Salesmen*, prescribes requirements for individuals and business entities to act as a real estate salesperson and/or real estate broker. RPL § 440-a, among other provisions, requires that an individual or entity possess a license from the Department to operate as a real estate salesman or broker. RPL § 441, *Application for license*, prescribes the qualifications to be licensed as a real estate broker or real estate salesperson, including satisfactory completion of a real estate course program that has been approved by the Department. RPL § 441(1)(b), as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 90 to 120 the required minimum number of hours of course work to obtain a real estate broker's license; RPL § 441(1-A)(d) as amended by Chapter 183 of the Laws of 2006, effective July 1, 2008, increased from 45 to 75 the required minimum number of hours of course work to obtain a real estate salesperson's license. RPL § 442-k(1) authorizes the New York State Real Estate Board to promulgate regulations to administer and effectuate the purposes of Article 12-A of the Real Property Law. RPL § 442-k(1) provides that the Secretary of State shall adopt rules to administer the provisions of RPL § 441. To fulfill these purposes, the Department of State, in conjunction with the New York State Real Estate Board, has issued rules and regulations which are found at Part 176 of Title 19 NYCRR and is proposing the rule making.

2. Legislative Objectives:

Real Property Law, Article 12-A, requires the Department of State to license and regulate real estate brokers and salespeople ("real estate licensees"). One of the purposes of Article 12-A is to ensure that real

estate licensees are properly educated and trained. The rule making advances this legislative intent by providing real estate broker applicants who have taken the 45-hour salesperson qualifying course with the option of taking a 30-hour supplemental course which will fulfill the 75 hours of real estate salesperson education required for real estate broker licensing by the recent statutory amendments and section 176.4 of 19 NYCRR.

3. Needs and Benefits:

The proposed rule making will protect consumers and meet the legislative intent in enacting the amendments to Article 12-A. As a result of the statutory amendments to Article 12-A, the hours of qualifying education required for licensure were increased for real estate brokers (from 90 to 120 hours) and salespersons (from 45 to 75 hours). The Department of State is permitted by Real Property Law section 441(1)(c) to credit the 75 hours of real estate salesperson qualifying education against the 120 hours required for licensure as a real estate broker.

The proposed rule making will create a 30-hour supplemental course for those real estate broker applicants who completed the 45 hours of qualifying education prior to July 1, 2008. By successfully completing the 30-hour supplemental course, these applicants will possess the full 75 hours of salesperson education required by 19 NYCRR section 176.4 and will be entitled to credit those hours against the 120 hours of qualifying education required for licensure as a real estate broker. This will benefit those applicants seeking to upgrade their license to that of a real estate broker and will protect consumers by ensuring that real estate licensees have adequate education.

4. Costs:

a. Costs to regulated parties:

The rule making will not impose any new costs on real estate licensees other than the cost of taking the 30-hour course. It is anticipated that the 30-hour course will cost licensees approximately \$200.00. This course will not be mandatory and, rather, will be an option for real estate salespeople.

b. Costs to the Department of State:

The rule does not impose any costs to the agency, the state or local government for the implementation and continuation of the rule.

5. Local Government Mandates:

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

6. Paperwork:

The rule does not impose any new paperwork requirements insofar as prospective licensees are already required to satisfactorily complete qualifying education.

7. Duplication:

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

8. Alternatives:

The Department of State recently proposed a rule making — published in the May 7, 2008 edition of the *State Register*, I.D. No. DOS-19-08-00017-P - to change the qualifying curriculum for real estate salespeople. This proposed rule making is an extension of that proposed rule insofar as the proposed 30-hour supplemental course represents the additional 30 hours that were added to the old 45-hour salesperson qualifying course. In developing the new 75-hour curriculum, which includes the 30-hour supplemental course proposed in this rule making, the New York State Real Estate Board formed a subcommittee to prepare the allocation of course hours within that curriculum. The subcommittee met with representatives of the New York State Association of Realtors (NYSAR) and the Real Estate Board of New York (REBNY) to discuss and consider alternative allocations. NYSAR, specifically, recommended a different allocation of course hours within the new syllabus. After due consideration of this, and other alternatives, the subcommittee determined that the proposed course allocation was the superior option and recommended said proposal to the New York State Real Estate Board. After deliberation, the New York State Real Estate Board approved the course allocation reflected in the rule making proposed in the May 7, 2008 *State Register*, which includes the 30-hour supplemental course proposed by this rule making. During the public comment period, the Department of State and the New York State Real Estate Board will receive and consider all recommended alternatives.

The New York State Real Estate Board is a regulatory board established by Article 12-A of the Real Property Law. The Board is composed of real estate licensees and members of the public. It shares regulatory authority with the Department of State and is authorized to promulgate regulations including those pertaining to the education of real estate licensees.

9. Federal Standards:

There are no federal standards regulating the registration of real estate licensees. Consequently, this rule does not exceed any existing federal standard.

10. Compliance Schedule:

The 30-hour supplemental course will be available on July 1, 2008, the effective date of the statutory amendments. Prospective licensees opting to take this course will therefore be able to take this course as of that date.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will apply to prospective real estate brokers and salespeople ("real estate licensees") who are applying for licensure pursuant to Article 12-A of the Real Property Law. Chapter 183 of the Laws of 2006, which takes effect on July 1, 2008, increased the education requirement for brokers from 90 to 120 hours and increased the education requirement for salespersons from 45 to 75 hours. The proposed rule making merely creates a 30-hour supplemental course for those real estate broker applicants who completed the required 45 hours of qualifying education prior to July 1, 2008, so that these applicants can possess the full 75 hours of salesperson qualifying education. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate licensees.

The rule does not apply to local governments.

2. Compliance requirements:

Insofar as the existing statute and regulations already require qualifying education for licensure, the proposed rule making will not add any new reporting, record-keeping or other compliance requirements.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Real estate licensees will not need to rely on any new professional services in order to comply with the rule. Licensees are already required to complete qualifying education pursuant to Article 12-A of the Real Property Law. Insofar as licensees must already attend and complete approved education courses, creating a 30-hour supplemental course for real estate salespersons who successfully completed the old 45-hour course will not result in the need to rely on any new professional services. The Department expects existing education providers to begin offering the proposed 30-hour supplemental course in accordance with the amended statute and the proposed rule making.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The rule making will result in compliance costs only for those prospective licensees who elect to take the 30-hour supplemental course. It is anticipated that the course will cost licensees approximately \$200.00.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the rule does not impose any new record keeping requirements on prospective licensees, it will be technologically feasible for these persons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State has not identified any adverse economic impact of this rule. The rule does not impose any additional reporting or record keeping requirements on real estate licensees and does not require prospective licensees to take any affirmative acts to comply with the rule other than those acts that are already required pursuant to Real Property Law, Article 12-A.

7. Small business participation:

Prior to proposing the rule, the Department discussed the proposal at a public meeting of the New York State Real Estate Board, the minutes of which were posted on the Department's website. The public was given an opportunity to issue comments during the public comment period of the meeting. In addition, the Notice of Proposed Rule Making will be published by the Department of State in the *State Register*. The publication of the rule in the *State Register* will provide notice to local governments and additional notice to small businesses of the proposed rule making. Additional comments will be received and entertained by the Department.

Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any new reporting, record keeping or other compliance requirements on public or private entities in rural areas.

During the 2006 legislative session, a bill was passed to amend sections 440 and 441 of the Real Property Law to, in relevant part, increase the hours of qualifying education required for licensure as a real estate broker (from 90 to 120 hours) and salesperson (from 45 to 75 hours). The Department of State is permitted by Real Property Law section 441(1)(c) to credit the 75 hours of real estate salesperson qualifying education against the 120 hours required for licensure as a real estate broker.

The proposed rule making merely creates a 30 hour supplemental course for those real estate broker applicants who completed the 45 hours of qualifying education that was required prior to the statutory amendment. By successfully completing the 30 hour supplemental course, these ap-

plicants will possess the full 75 hours of salesperson qualifying education and will be entitled to credit those hours against the 120 hours of qualifying education required for licensure as a real estate broker.

Insofar as the existing statute already requires the successful completion of qualifying education for licensure as a real estate broker or salesperson, the proposed rule making will not add any new reporting, record-keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A job impact statement is not required insofar as the proposed rule will not have a substantial adverse effect on jobs and employment opportunities for licensed real estate salespersons and brokers.

During the 2006 legislative session, a bill was passed to amend sections 440 and 441 of the Real Property Law to, in relevant part, increase the hours of qualifying education required for licensure as a real estate broker (from 90 to 120 hours) and salesperson (from 45 to 75 hours). The Department of State is permitted by Real Property Law section 441(1)(c) to credit the 75 hours of real estate salesperson qualifying education against the 120 hours required for licensure as a real estate broker.

The proposed rule making merely creates a 30 hour supplemental course for those real estate broker applicants who completed the 45 hours of qualifying education that was required prior to the statutory amendment. By successfully completing the 30 hour supplemental course, these applicants will possess the full 75 hours of salesperson qualifying education and will be entitled to credit those hours against the 120 hours of qualifying education required for licensure as a real estate broker.

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Definition of Resident for Personal Income Tax

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

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

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

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

Subject: Definition of resident for personal income tax.

Purpose: To eliminate provisions regarding temporary stays.

Text of proposed rule: Section 1. Paragraph (1) of subdivision (e) of section 105.20 of such regulations is amended to read as follows:

(1) A permanent place of abode means a dwelling place permanently maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. However, a mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode. Furthermore a barracks or any construction which does not contain facilities ordinarily found in a dwelling, such as facilities for cooking, bathing, etc., will generally not be deemed a permanent place of abode. [Also, a place of abode, whether in New York State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such an individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State, because such individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on such individual's income from New York State sources, including such individual's salary or other compensation for services performed in New York State. However, if such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State.]

Section 2. These amendments shall take effect on the date that the Notice of Adoption is published in the *State Register*, and shall apply to taxable years ending on or after December 31, 2008.

Text of proposed rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, State Campus, Albany, NY 12227, (518) 457-1153, email: tax_regulations@tax.state.ny.us

Data, views or arguments may be submitted to: William Ryan, Director, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, State Campus, Albany, NY 12227, (518) 457-1153, email: tax_regulations@tax.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, Subdivision First, 697(a), and 605(b)(1). Section 171, Subdivision First authorizes the Commissioner to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and performance of the Commissioner's duties. Section 697(a) authorizes the Commissioner to adopt regulations relating specifically to the personal income tax. Section 605(b)(1) provides that an individual who is not domiciled in New York is considered a resident if the individual maintains a permanent place of abode in the state and spends more than 183 days of the taxable year in the state.

2. Legislative objectives: This rule is being proposed pursuant to this authority to eliminate problematic provisions of the Personal Income Tax Regulations excepting "temporary stays" from the definition of permanent place of abode for purposes of the personal income tax on resident individuals.

3. Needs and benefits: The purpose of these amendments is to remove provisions of the regulations providing for a "temporary stay" exception from the definition of permanent place of abode for purposes of determining whether an individual is a resident for personal income tax purposes. The elimination of these provisions stems from what the Department believes is a better interpretation of section 605(b)(1) of the Tax Law. Under section 605(b)(1), an individual who is not domiciled in New York is considered a resident if the individual maintains a permanent place of abode in the state and spends more than 183 days of the taxable year in the state. Under section 105.20(e)(1) of the regulations, however, a place of abode will not be considered permanent if it is maintained only during a temporary stay, or "fixed and limited period," for the accomplishment of a "particular purpose." This temporary stay concept does not appear in the statute.

The Department has interpreted the particular purpose requirement to mean that an individual must be present in the state to accomplish a specific assignment with readily ascertainable and specific goals and conclusions, as opposed to a general assignment with general duties having no specified conclusion in order to qualify for the exception. The Department presumes an individual to be present for a fixed and limited period if the period of predetermined duration is reasonably expected to last for three years or less. Taxpayers and practitioners have criticized the temporary stay provisions as confusing and difficult to apply.

In eliminating these provisions, the Department is moving to what it believes is a better interpretation of section 605(b) of the Tax Law, which does not contemplate a temporary stay exception. The proposed rule levels the playing field among non-domiciliary taxpayers, providing equal treatment for all taxpayers who maintain a permanent place of abode within the state for more than eleven months, and spend more than 183 days within the state, irrespective of their purpose for doing so. This interpretation is appropriate because non-domiciliary taxpayers receive the same benefits and services from New York State regardless of their purpose for being in the state.

The temporary stay rule has also proven difficult to administer. Moreover, the effect of eliminating the temporary stay provisions is limited, in that section 105.20(a)(2) of the regulations provides that a place of abode must be maintained for substantially all of the taxable year in order to affect an individual's residency status. The Department has interpreted this requirement to mean that a taxpayer must maintain a permanent place of abode for more than eleven months of the taxable year. Thus, individuals temporarily residing within the state will continue to be considered non-residents unless they maintain a permanent place of abode for more than eleven months of a taxable year.

The elimination of the temporary stay exception from the definition of permanent place of abode will provide taxpayers and the Department with clear, objective, and easily applied rules for assessing residency status for New York State personal income tax purposes.

4. Costs:

(a) Costs to regulated parties: The rule does not impose any new compli-

ance costs on regulated parties. The change in interpretation of section 605(b)(1) may have an impact on the tax liability and reporting responsibilities of particular taxpayers. This is a function of what the Department believes is a better interpretation of the statutory provisions, and the particular circumstances of the affected taxpayers. Only those individuals who would qualify for the temporary stay exception and be considered non-residents but for the amendments will be affected by the change. Such individuals will continue to be considered non-residents if they maintain a permanent place of abode for less than eleven months of the taxable year.

The Department does not have data to precisely identify the affected individuals. However, according to information from the Department's Audit Division, nearly all of the identified cases involving temporary residence (focusing on New York City addresses) involve foreign nationals in the United States on working visas (H-1Bs). Therefore, to estimate the impact of these amendments, data for H-1B visa holders in New York obtained from the US Department of Homeland Security's (DHS) 2006 Yearbook of Immigration Statistics were used along with New York State personal income tax data from the Department's Office of Tax Policy Analysis for 2006. The following revenue analysis does not take into account that some of the taxpayers may be improperly reporting as non-residents, so that the impact on the aggregate tax liability of this group based on the rule might be somewhat lower.

The total number of non-immigrants in New York in 2006 with H-1B visas of 69,709 was adjusted to take out taxpayers who have foreign addresses, but file as full year residents since they would not be affected by these amendments. Next, the number of H-1B visa holders was split between those who are within their first three years and those who renewed for an additional three years. The percentage that renewed their visas (45.5%) was obtained from the average of visas renewed between 2000 and 2003.

The DHS also provided the 2003 median salary for all H-1B visa holders of \$70,000. This value was grown to 2008 by using the New York State Department of Budget forecast for wages from 2003 to 2008. The resulting estimated prospective annual wage in New York for all H-1B visa workers in 2008 is \$93,000. The annual salary was multiplied by the adjusted total number of H-1B visa holders in New York to get estimated total New York wages for these individuals. These total wages were then divided between those in their first three years and those in their second three-year term.

To determine the amount of unearned income that would affect the tax calculation due to these amendments, an estimated ratio of unearned income to earned income of 10% was applied to the total earned income estimates calculated above for each group of H-1B visa holders. The 10% was obtained from 2006 Personal Income Tax data, looking at the unearned and earned income for all New York full-year residents (in New York City) with earned income between \$90,000 and \$95,000. Earned income includes business income and wages and unearned income includes only interest, dividends, and capital gains. Also using the 2006 Personal Income Tax Study data, an average effective tax rate for New York residents with earned income between \$90,000 and \$95,000 was calculated to be 4.7%. Lastly, the tax rate is applied to the estimated unearned income and to the years that the amendments apply to come up with the potential revenue gain from eliminating the temporary stay provisions. For those H-1B visa holders who are here for three years or less, it is assumed that the first and last years are less than eleven months, and therefore they would not be considered statutory residents; and for those H-1B visa holders in New York for over three years, it is assumed that they are in New York for one more three-year term, and the last year is less than eleven months. The potential revenue gain to New York State due to elimination of the temporary stay provisions applied to H-1B visa holders in New York is \$15 million.

The same procedure was applied to estimate New York City's potential revenue gain from these amendments. However, note that New York City presently does not tax non-residents' income (both earned and unearned). Therefore, these amendments would generate more revenue at the city level than at the state level. Thus, the total estimated New York Wages was multiplied by 35.1%, which is the ratio of New York wages that are from New York City (obtained from 2006 Personal Income Tax data) to calculate the New York City wages of H-1B visa holders.

The New York City wages are split again between those that are within their first three years and those who renewed for an additional three years and then multiplied by an average effective tax rate for New York City of 2.8%. The 2.8% was estimated using 2006 Personal Income Tax data for New York City taxes paid for New York residents with non-New York addresses, compared to their New York adjusted gross income.

As with the State estimate, the values are applied to the years to which the amendments apply to calculate the potential revenue gain to New York City from eliminating the temporary stay provisions. Therefore, the potential revenue gain to New York City from eliminating the temporary stay provision, applied to H-1B visa holders in New York, is \$30 million.

The amendments apply to taxable years ending on or after December 31, 2008. Therefore, for State Fiscal Year 2008 - 2009, the impact would be minimal, and for State Fiscal Year 2009 - 2010 and thereafter, there would be an increase of \$15 million annually. Similarly, New York City would experience a minimal impact in State Fiscal Year 2008 - 2009, and an increase of \$30 million in State Fiscal Year 2009 - 2010 and thereafter.

To see the effect on a representative taxpayer, consider a typical H-1B visa holder working in New York City. Assume his or her annual salary is \$93,000, and he or she is in the second year of a three-year stay (in which case, the individual is considered a resident, and his or her income is taxed accordingly). Using the 10% estimated ratio of unearned to earned income would produce unearned income of \$9,300 for the individual. Applying a 4.7% average effective state tax rate, the individual would see his or her state tax liability increase by \$437. In addition, since this individual lives in New York City, and is considered a New York City resident for tax purposes, he or she would also owe New York City income tax (currently, New York City does not tax non-residents). Therefore, the taxpayer would pay an average effective New York City tax rate of 2.8% on \$102,300 (\$93,000 in earned income plus the \$9,300 in unearned income) for a New York City tax liability of \$2,864. As a result of the amendments eliminating the temporary stay exception, a typical H-1B visa holder working in New York City could see his or her State and City tax liability increase by approximately \$3,300 per year.

Additionally, certain individuals with no New York State earned income, previously not required to file a New York State income tax return, may now be required to file a return. It is estimated that the costs associated with complying with this filing requirement for the first time would be approximately \$145, and \$58 annually thereafter. This estimate is based on the estimated number of hours necessary to prepare and file a New York State Resident Income Tax Return. The estimate is higher in the first year due to the time needed to learn about the form and requirements.

(b) Costs to the agency and to the State and local governments including this agency: It is estimated that the implementation and continued administration of this rule will not impose any costs upon this agency, New York State, or its local governments. As discussed above, the rule will result in increased revenue for the State and New York City.

(c) Information and methodology: The methodology employed to estimate the impact of the proposed rule is set forth in detail in the discussion of costs in section four herein. This analysis is based on a review of the rule, on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis, and Office of Budget and Management Analysis, and on data obtained both from the Department's records and from the United States Department of Homeland Security.

5. Local government mandates: This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties. There may be a limited number of individuals with no New York State sourced income who may be required to file a return, where they were not previously required to do so.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: The Department considered retaining the temporary stay rule but determined that the proposed rule represents a better interpretation of section 605(b)(1) of the Tax Law, and treats non-domiciliaries more even-handedly. The Department also considered modifying the rule in keeping with a suggestion made by the New York State Society of Certified Public Accountants. The Society acknowledged the problematic nature of the rule, but suggested a "safe harbor" analysis which would entail consideration of the duration of the individual's stay in New York State, and the individual's ties to his or her domicile. The Department concluded that this alternative would not resolve the fundamental problems caused by the temporary stay concept.

The following organizations were notified that the Department was in the process of developing this rule and were given the opportunity to participate in its development: the National Federation of Independent Businesses; the Division for Small Business of Empire State Development; the New York State Association of Counties; the Association of Towns of New York State; the New York Association of Convenience Stores; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York State Conference of Mayors and Municipal Officials; the Office of Local Government and Community Services of the New York State Department of State; the Tax Section of the New York State Bar Association; the National Tax Committee for the National Conference of CPA Practitioners; and the New York State Society of CPAs. The Department also discussed the rule with the New York City Department of Finance. Only the Society of CPAs

submitted comments. The temporary stay provision has been the subject of frequent criticism from taxpayers and tax practitioners.

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

10. Compliance schedule: The amendment will take effect when the Notice of Adoption is published in the State Register, and apply to taxable years ending on or after December 31, 2008.

Regulatory Flexibility Analysis

1. Effect of rule: This rule amends section 105.20(e)(1) of the personal income tax regulations to remove provisions of the regulation allowing for a "temporary stay" exception from the definition of permanent place of abode in determining residency for personal income tax purposes. The elimination of these provisions results from a what the Department believes is a better and clearer interpretation of section 605(b)(1) of the Tax Law.

This rule will have no effect on local governments, except as to the impact on New York City personal income tax discussed in the Regulatory Impact Statement. It also will also have no effect on small businesses. The rule imposes no reporting requirements, forms, or other paperwork upon small businesses beyond those required by existing law and regulations. The impact of the rule is not on small businesses but on certain non-domiciliaries who maintain a permanent place of abode within New York State. Some small businesses may have to begin withholding New York City income tax for certain non-domiciliary employees working in New York City, which does not impose income tax on non-residents.

2. Compliance requirements: The promulgation of this rule will not require small businesses or local governments to submit any new information, forms or other paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will do nothing to encourage or discourage the use of any of such services.

4. Compliance costs: These changes will place no additional burdens on small businesses and local governments. The change in the definition of resident will affect certain individuals who are not domiciled in the State. See the Regulatory Impact Statement for discussion of the impact on these individuals.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: The rule does not adversely impact small businesses or local governments.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the National Federation of Independent Businesses; the Division for Small Business of Empire State Development; the New York State Association of Counties; the Association of Towns of New York State; the New York Association of Convenience Stores; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York State Conference of Mayors and Municipal Officials; the Office of Local Government and Community Services of the New York State Department of State; the Tax Section of the New York State Bar Association; the National Tax Committee for the National Conference of CPA Practitioners; and the New York State Society of CPAs. The Department also discussed the rule with the New York City Department of Finance. Only the New York State Society of CPAs submitted comments. The Society acknowledged the problematic nature of the temporary stay rule, but suggested a "safe harbor" analysis based on the duration of the individual's stay in New York and the individual's ties to his or her domicile. The Department concluded that this alternative would not resolve the fundamental problems caused by the temporary stay concept.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This rule amends section 105.20(e)(1) of the personal income tax regulations to remove provisions allowing for a "temporary stay" exception from the definition of "permanent place of abode," for determining residency for personal income tax purposes. The change will primarily affect non-domiciliaries maintaining residences in New York City. There may be a limited number, however, in rural areas. There are 44 counties in the State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule may affect the reporting requirements on certain non-domiciliaries who maintain a permanent place of abode within the state for more than eleven months of the taxable year and spend more than 183 days within the state. Such individuals are likely already required

to file a non-resident income tax return, but under this rule may be required to file a resident income tax return instead. In addition, some individuals not currently required to file an income tax return may now need to file a resident income tax return.

3. **Costs:** These changes will place no additional burdens on rural areas. Certain non-domiciliary individuals living in rural areas may have an increased New York State personal income tax liability as a result of this rule, because they will be considered New York State residents for tax purposes and there will be a tax effect related primarily to unearned income. The impact on tax liability depends on the particular circumstances of the taxpayer.

4. **Minimizing adverse impact:** The rule does not adversely impact rural areas. The rule will provide non-domiciliary taxpayers with clear, objective, and easily applied rules for assessing their residency status for New York State personal income tax purposes.

5. **Rural area participation:** The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the National Federation of Independent Businesses; the Division for Small Business of Empire State Development; the New York State Association of Counties; the Association of Towns of New York State; the New York Association of Convenience Stores; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York State Conference of Mayors and Municipal Officials; the Office of Local Government and Community Services of the New York State Department of State; the Tax Section of the New York State Bar Association; the National Tax Committee for the National Conference of CPA Practitioners; and the New York State Society of CPAs. The Department also discussed the rule with the New York City Department of Finance. Only the New York State Society of CPAs submitted comments. The Society acknowledged the problematic nature of the temporary stay rule, but suggested a "safe harbor" analysis based on the duration of the individual's stay in New York and the individual's ties to his or her domicile. The Department concluded that this alternative would not resolve the fundamental problems caused by the temporary stay concept.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no impact on jobs and employment opportunities. The rule amends section 105.20(e)(1) of the personal income tax regulations to eliminate provisions allowing for a "temporary stay" exception from the definition of "permanent place of abode," for purposes of determining residency under the personal income tax.

Office of Temporary and Disability Assistance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Child Support Standards Chart

I.D. No. TDA-42-08-00003-P

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

Proposed Action: This is a consensus rule making to amend section 347.10 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3), 111-a and 111-i

Subject: Child support standards chart.

Purpose: To reflect the revised poverty income guidelines amount, the revised self-support reserve and the updated child support standards chart.

Text of proposed rule: See Appendix in this issue.

Text of proposed rule and any required statements and analyses may be obtained from: Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

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

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

Consensus Rule Making Determination

The Office of Temporary and Disability Assistance (OTDA) is proposing amendments to 18 NYCRR § 347.10 to reflect the revised poverty income guidelines as reported by the federal Department of Health and Human Services, the revised self-support reserve, and the updated child support standards chart which are used to calculate child support obligations. OTDA has determined that no person is likely to object to the adoption of the proposed rule as written.

The proposed amendments to 18 NYCRR § 347.10 are necessary to conform the regulation to the requirements of section 111-i(2) of the Social Services Law (SSL). Section 111-i(2)(a) of the SSL provides that OTDA shall publish annually in its regulations the revised self-support reserve to reflect the annual updating of the poverty income guidelines amount for a single person, and section 111-i(2)(b) of the SSL provides that OTDA shall publish in its regulations a child support standards chart to reflect the dollar amounts yielded through application of the child support percentage. Thus OTDA is required by State statute to update its regulatory provisions on an annual basis.

The updated financial information does not reflect discretion exercised by OTDA. The self-support reserve and the child support percentage are defined in the Domestic Relations Law, and the poverty income guidelines amount for a single person is reported by the federal Department of Health and Human Services. Thus the proposed amendments are not establishing new financial criteria. Instead they are setting forth existing requirements.

The proposed child support standards chart presently is being utilized by the local child support enforcement units to calculate child support obligations. Thus the proposed amendments will conform 18 NYCRR § 347.10 to reflect the actual practices of the local child support enforcement units in the State.

It is expected that no person will object to the proposed amendments contained in this consensus rule since the amendments are necessary to comply with the SSL, and the amendments reflect updated financial information which is being used to calculate child support obligations.

Job Impact Statement

A job impact statement has not been prepared for the proposed regulatory amendments. It is evident from the subject matter of the amendments that the jobs of the persons making the decisions required by the proposed amendments will not be affected in any real way. Thus the changes will not have any impact on jobs and employment opportunities in the State.