

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.

Affordable Housing Corporation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Access to Corporation Records

I.D. No. AHC-43-08-00002-P

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

Proposed Action: Addition of Part 2190 to Title 21 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. AHC-52-05-00025-P.

Statutory authority: Public Officers Law, section 87(b)

Subject: Public access to corporation records.

Purpose: To provide procedures by which records may be obtained from the corporation.

Text of proposed rule: PART 2190

PUBLIC ACCESS TO RECORDS

2190.1 Purpose and scope.

(a) *The people's right to know the process of government decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by secrecy or confidentiality.*

(b) *This Part provides information concerning the procedures by which records may be obtained from the Corporation pursuant to the Freedom of Information Law.*

(c) *Personnel shall furnish to the public the information and records required by the Freedom of Information Law, as well as records otherwise available by law.*

(d) *Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records.*
2190.2 Designation of records access officer.

(a) *The President and Chief Executive Officer is responsible for ensuring compliance with this Part, and designates the following person(s) as records access officer(s):*

Public Information Officer

New York State Affordable Housing Corporation

641 Lexington Avenue

New York, NY 10022

E-mail: FOIOfficer@nyhomes.org

(b) *The records access officer is responsible for ensuring appropriate agency response to public requests for access to records. The designation of records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so. Records access officers shall ensure that personnel:*

(1) *maintain an up-to-date subject matter list;*

(2) *assist the requester in identifying records sought, if necessary, and when appropriate, indicate the manner in which records are filed, retrieved or generated to assist person in reasonably describing records;*

(3) *contact persons seeking records when a request is voluminous or when locating sought records involves substantial effort, so that personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested;*

(4) *upon locating the records, take one of the following actions:*

(i) *make records available for inspection; or*

(ii) *deny access to the records in whole or in part, and explain in writing the reasons for such denial.*

(5) *upon request for copies of records, make a copy available upon payment or offer to pay established fees, if any, in accordance with section 2190.8 of this Part.*

(6) *upon request, certify that a record is a true copy; and*

(7) *upon failure to locate records, certify that:*

(i) *the New York State Affordable Housing Corporation is not the custodian for such records; or*

(ii) *the records of which the New York State Affordable Housing Corporation is a custodian cannot be found after diligent search.*

2190.3 Location.

Records shall be available for inspection and copying at the offices of the New York State Affordable Housing Corporation, including its principal office at:

New York State Affordable Housing Corporation

641 Lexington Avenue

New York, New York 10022

2190.4 Hours for public inspection.

Records of the Corporation shall be produced for inspection by appointment during hours and days regularly open for business. These hours are: Monday through Friday, 9 a.m. to 5 p.m.

2190.5 Requests for public access to records.

(a) *A written request for records is required. Written requests must be received by mail or hand delivery to the offices of the Corporation, or e-mail or facsimile transmission to the respective address or number then currently specified on the Corporation's website. If a requested record is maintained on the internet, the Corporation's response to the request shall inform the requester that the record is accessible via the internet and in printed form, either on paper or other information storage medium.*

(b) *A request should reasonably describe the record or records sought. Whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.*

(c) Within five business days of receipt of the request the Corporation shall:

(i) inform the requester that their request, or a portion of their request, does not reasonably describe record(s) sought, and provide assistance and direction, to the extent possible, which shall assist the person making the request in reasonably describing such records;

(ii) grant or, in writing, deny access to the records requested in whole or in part;

(iii) provide a written acknowledgement of receipt of the request and state the approximate date, which shall be reasonable under the circumstances, and in no instance exceed twenty business days, when the request will be granted or denied; or

(iv) if it is known that circumstances will prevent disclosure of the record(s) within twenty (20) days from the date of the acknowledgement, provide a written explanation for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

If, after having acknowledged the receipt of a request and provided to a requester an approximate date when a request will be granted in whole or in part, it becomes known that circumstances will prevent the Corporation from granting the request in the time specified, the Corporation shall, within twenty business days of the initial acknowledgement, provide a statement in writing stating the reason for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

(d) In determining a reasonable time for granting or denying a request under the circumstances of a request, personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the Corporation, and similar factors that bear on the ability to grant access to records promptly and within a reasonable time.

(e) The Corporation's failure to comply with such time limits and procedures as are set forth in Section (c) of this Part, and/or the failure to respond to a request within a reasonable time after an approximate date given, in conformity with (c)(iii) of this Section, which response shall in no instance be provided in excess of twenty business days after the date of acknowledgement of the receipt of request, unless a written explanation for the inability to grant access to the records is provided, in conformity with (c)(iv) of this Section, shall constitute a denial of a request that may be appealed.

2190.6 Subject matter list.

(a) The records access officer shall maintain a reasonably detailed current list, by subject matter, of all records in its possession, whether or not records are available pursuant to subdivision 2 of section 87 of the Public Officers Law.

(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.

(c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list.

2190.7 Denial of access to records.

(a) Denial of access shall be in writing, stating the reason therefor and advising the requester of the right to appeal to the individual or body established to hear appeals, identified by name, title, business address and business telephone number.

(b) If the Corporation fails to respond to a request as required in section 2190.5(c) and (d) of this Part, such failure shall also be deemed a denial of access.

(c) Any person denied access to records may appeal within 30 days of a denial.

(d) The following person or persons or body shall hear appeals for denial of access to records under the Freedom of Information Law:

Senior Vice President and Counsel
New York State Affordable Housing Corporation
641 Lexington Avenue
New York, NY 10022

(e) The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of a written appeal, identifying:

- (1) the date of the appeal;
- (2) the date and location of the requests for records;
- (3) a description, to the extent possible, of the records to which the requester was denied access;

(4) whether the denial of access was in writing or due to failure to provide records as required by section 2190.5(c) or (d) of this Part; and

(5) the name and return address of the requester.

(f) A failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.

(g) The person or body designated to hear appeals shall transmit to the Committee on Open Government copies of all appeals upon receipt of appeals. Such copies shall be addressed to:

Committee on Open Government
Department of State
41 State Street
Albany, New York 12231

(h) The person or body designated to hear appeals shall inform the Committee on Open Government of its determination in writing within ten business days of receipt of an appeal. The determination shall be transmitted to the Committee on Open Government in the same manner as set forth in subdivision (e) in this section.

2190.8 Fees.

(a) There shall be no fee charged for the following:

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part.

(b) The fee for photocopies not exceeding 9 by 14 inches is 25 cents per page. The fee for copies of records other than photocopies which are 9 by 14 inches or less in size shall be the actual copying cost, excluding fixed agency costs such as salaries.

2190.9 Public notice.

The Corporation shall post in a conspicuous location information regarding the name, title, business address and business telephone number of the records access officer(s) and appeals person or body; the location where records can be inspected and copied; and the right to appeal by any person denied access to a record. Such information shall also be made available by inquiry to the Corporation's general telephone number.

2190.10 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: Jay M. Ticker, Housing Finance Agency, 641 Lexington Ave., New York, NY 10022, (212) 688-4000, email: jayt@nyhomes.org

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 Withdrawal Objection

Objection was received in the form of a letter to the New York State Housing Finance Agency (the "Agency") from New York State Assembly members RoAnn Destito and Ruben Diaz, Jr. dated February 13, 2006. The Assembly members wrote that the Agency's proposed rule contained provisions that were inconsistent with New York State Freedom of Information Law ("FOIL") and the regulations of the Committee on Open Government, and that the inconsistencies could result in diminished access to Agency records.

Regulatory Impact Statement

1. Statutory Authority

The source of the New York State Housing Finance Agency's ("Agency") Statutory authority for the proposed rule is Public Officers Law, Section 87, which reads, in relevant part: "Access to agency records.

1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article. (b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed..." The objective of giving the Agency such responsibility is to ensure that the Agency has procedures in place that will guarantee that information used in Agency decision-making is accessible to the public, subject to certain exceptions detailed in the statute.

2. Needs and Benefits

The proposed rule puts into place efficient procedures for providing the

public with information they are entitled to pursuant to the Freedom of Information Law (“FOIL”).

3. Costs

No substantial costs are associated with the rule either (i) to regulated persons or (ii) to the Agency, the State or Local Governments. Because it is obvious that no substantial costs will result from this rule-making, the Agency need not detail, as required in SAPA Section 202-a.3.(c)(iii) and (iv), the information, sources and methodology used to determine the projected costs of the rule.

4. Paperwork

The rule requires only minimal changes to the documentary requirements already incumbent upon the parties concerned.

5. Local Government Mandates

The rule-making does not impose any service, duty or responsibility upon any county, city, town, school district, fire district, or other special district.

6. Duplication

The Agency’s rule is submitted pursuant to a requirement of New York State’s Public Officers Law. The Agency is not aware of any duplication, overlap or conflict with any rules or legal requirements of the state or federal government.

7. Alternatives

In its rule-making, the Agency has sought to comply with the requirements of statutory and regulatory authority with regard to FOIL. Compliance with such statutes and regulations does not allow for significant alternatives to the rule the Agency has submitted.

8. Federal Standards

The rule exceeds federal standards only in those ways required by the statutory authority of Public Officers Law and the regulatory authority of the Committee on Open Government, as set forth in Title 21. Part 1401.1-10.

9. Compliance Schedule

The proposed rule will take effect as soon as possible under applicable law.

Regulatory Flexibility Analysis

The proposed rule does not impose any adverse economic impact, nor does it impose reporting, recordkeeping or other compliance requirements, on small businesses or local governments. Because the Agency’s finding is obvious, the Agency need not detail, as required in SAPA Section 202-b.3.(a), the reasons upon which the finding was made, including measures the Agency took to ascertain that the rule would not impose such compliance requirements or adverse economic impact.

Rural Area Flexibility Analysis

The proposed rule does not impose any adverse impact, nor does it impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Because the Agency’s finding is obvious, the Agency need not detail, as required in SAPA Section 202-c.3.(a), the reasons upon which the finding was made, including measures the agency took to ascertain that the rule would not impose such compliance requirements or adverse impact.

Job Impact Statement

The proposed rule does not impose any adverse impact, nor does it impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Because the Agency’s finding is obvious, the Agency need not detail, as required in SAPA Section 202-c.3.(a), the reasons upon which the finding was made, including measures the agency took to ascertain that the rule would not impose such compliance requirements or adverse impact.

Education Department

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Special Education Programs and Services

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

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

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

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

Subject: Special education programs and services.

Purpose: To extend date for required use of State’s forms for IEPs, prior written notice (notice of recommendation) and meeting notice.

Text of revised rule: 1. Paragraph (2) of subdivision (d) of section 200.4 of the Regulations of the Commissioner of Education is amended, effective January 8, 2009, as follows:

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

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

2. Paragraph (1) of subdivision (a) of Section 200.5 of the Regulations of the Commissioner of Education is amended, effective January 8, 2009, as follows:

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

3. Paragraph (1) of subdivision (c) of Section 200.5 of the Regulations of the Commissioner of Education is amended, effective January 8, 2009, as follows:

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

Revised rule compared with proposed rule: Substantial revisions were made in sections 200.4(d)(2), 200.5(a)(1) and (c)(1).

Text of revised proposed rule and any required statements and analyses may be obtained from Lisa Struffolino, State Education Dept, Office of Counsel, State Education Building, Rm. 148, 89 Washington Ave., Albany, NY 12234, (518) 473-4921, email: legal@mail.nysed.gov

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

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on July 30, 2008, the proposed amendment has been revised as follows.

Public comment on the proposed amendment requested clarification of the intent of the provision that the forms be “. . . developed consistent with the Commissioner’s guidelines.” This provision was intended to ensure that school districts complete the forms consistent with the instruc-

tions accompanying the forms, which will, consistent with existing statutory and regulatory requirements, identify the information to be entered in the prescribed forms, including where additional information can be added and what regulatory requirements are being addressed when student specific information is added to the forms. It was not the intent of the provision to prescribe new substantive or procedural requirements beyond those established in existing regulations. Nevertheless, in order to remove the potential for confusion or misinterpretation, sections 200.4(d)(2), 200.5(a)(1) and 200.5(c)(1) have been revised to delete this provision.

The above revision requires that the Needs and Benefits, Local Government Mandates and Paperwork sections of the previously published Regulatory Impact Statement be revised as follows:

NEEDS AND BENEFITS:

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

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

LOCAL GOVERNMENT MANDATES:

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

Section 200.4 revises the date by which all school districts must use the form prescribed by the Commissioner to develop IEPs from January 1, 2009 to September 1, 2009.

Section 200.5 revises the date by which all school districts must use the prior written notice (notice of recommendation) and meeting notices prescribed by the Commissioner from January 1, 2009 to September 1, 2009.

PAPERWORK:

The proposed amendment will extend the date for requiring the State's forms for IEPs, prior written notice (notice of recommendation) and meeting notice, and does not impose any additional paperwork requirements.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on July 30, 2008, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revision to the proposed amendment requires that the Compliance Requirements, Costs and Minimizing Adverse Impact sections of the Regulatory Flexibility Analysis for Small Businesses and Local Government be revised as follows:

COMPLIANCE REQUIREMENTS:

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

Section 200.4 revises the date by which all school districts must use the form prescribed by the Commissioner to develop IEPs from January 1, 2009 to September 1, 2009.

Section 200.5 revises the date by which all school districts must use the prior written notice (notice of recommendation) and meeting notices prescribed by the Commissioner from January 1, 2009 to September 1, 2009.

COMPLIANCE COSTS:

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

MINIMIZING ADVERSE IMPACT:

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

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

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on July 30, 2008, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The revision to the proposed amendment requires that the Costs and Minimizing Adverse Impact sections of the Rural Area Flexibility Analysis be revised as follows:

REPORTING, RECORD KEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

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

Section 200.4 revises the date by which all school districts must use the form prescribed by the Commissioner to develop IEPs from January 1, 2009 to September 1, 2009.

Section 200.5 revises the date by which all school districts must use the prior written notice (notice of recommendation) and meeting notices prescribed by the Commissioner from January 1, 2009 to September 1, 2009.

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

COSTS:

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

MINIMIZING ADVERSE IMPACT:

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

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

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on July 30, 2008, the proposed amendment has been revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment, as revised, relates to the provision of special education programs and services to students with disabilities, and is necessary to ensure consistency in procedural safeguards by extending the date for required use of the State's forms for individualized education programs (IEPs), prior written notice (notice of recommendation) and meeting notice. Because it is evident from the nature of the revised 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

Since publication of a Notice of Proposed Rule Making in the State Register on July 30, 2008, the State Education Department received the following comments.

General

1. COMMENT:

Changing the effective date from January 2009 to September 2009 is more reasonable for the implementation of the State forms. Extending the date will allow districts time to better prepare teachers, parents and other stakeholders in the proper use of each form. A later date at the beginning of the school year will minimize potential disruptions to a district and parents.

The mandated individualized education program (IEP) will provide consistency throughout the State with IEP development and implementation. The mandated meeting notice and prior written notice forms will provide districts and parents with required information to make an informed decision and will decrease the number of due process complaints regarding parents not receiving mandated information in the notice.

DEPARTMENT RESPONSE:

The comments are supportive in nature and no response is necessary.

2. COMMENT:

All new forms and the IEP should be made available in Spanish and French to meet the needs of students with cultural diversities.

DEPARTMENT RESPONSE:

Section 200.5(a)(4) of the Regulations of the Commissioner of Education requires that the prior written notice be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. Consistent with this requirement, the Department plans to translate the prior written notice into the five most commonly spoken languages in New York State: Spanish, Haitian-Creole, Korean, Russian and Chinese. While there is no requirement that the IEP or meeting notice be in the native language of the parent, the Department will consider this recommendation.

3. COMMENT:

Clarify the intent of the provision that the forms be “. . . developed consistent with the Commissioner’s guidelines”. Clarify what guidelines the regulation is referring to and if they have been created already. The content of the guidelines should be clearly described in the regulations. The guidelines should be made available for public hearing and comments in accordance with the Individuals with Disabilities Education Act’s (IDEA) public participation requirements and the State Administrative Procedure Act (SAPA) prior to implementation.

DEPARTMENT RESPONSE:

This provision was intended to ensure that school districts complete the forms consistent with the instructions accompanying the forms, which will, consistent with existing statutory and regulatory requirements, identify the information to be entered in the prescribed forms, including where additional information can be added and what regulatory requirements are being addressed when student specific information is added to the forms. It was not the intent of the provision to prescribe new substantive or procedural requirements beyond those established in existing regulations. Nevertheless, in order to remove the potential for confusion or misinterpretation, sections 200.4(d)(2), 200.5(a)(1) and 200.5(c)(1) have been revised to delete this provision.

4. COMMENT:

Clarify to what extent the new forms will be incorporated into the regulations and the manner in which the form will be prescribed by the commissioner. Incorporate the required forms into the regulations. Stakeholders such as parents, individuals with disabilities and the personnel who serve them should participate in the development of the forms pursuant to the IDEA public participation requirements and the State Administrative Procedure Act.

DEPARTMENT RESPONSE:

The comments are outside the scope of the proposed amendment which is to merely extend, from January 1, 2009 to September 1, 2009, the date for required use of the State’s forms for IEPs, prior written notice (notice of recommendation) and CSE and CPSE meeting notices. The regulations requiring use of the State’s forms were adopted in September 2007, as part of a separate rulemaking (EDU-12-07-00004). As part of the process leading to the September 2007 adoption of the regulations requiring use of the

State’s forms, a public hearing was held on the regulations pursuant to the IDEA’s public participation requirements in 20 USC § 1412(a)(19) and 34 CFR 300.165, and a notice of proposed rule making was published in the State Register on March 21, 2007, with a 45-day public comment period pursuant to the SAPA. In addition, two subsequent notices of revised Rule Making were published in the State Register on July 3, 2007 and July 18, 2007, respectively, and each of these revised rule makings included separate 30-day public comment periods pursuant to SAPA. In response to the public comment received on the Notice of Proposed Rule Making, the regulations were revised to extend the date for using the forms from July 1, 2008 to January 1, 2009 to ensure an appropriate period of public comment and conversion time. No further comments were received on the forms following the publication of the Notices of Revised Rule Making.

Over the past year, the Department has sought broad stakeholder input in the development of the forms including, but not limited to, input from parents, teachers, school administrators, technical assistance providers, teachers’ unions, attorneys, the Commissioner’s Advisory Panel for Special Education, and IEP software companies. Extensive revisions have been made to the forms in response to comments received throughout the process. The Department intends to provide an additional period of public review prior to issuing the mandated forms.

State form for IEPs

5. COMMENT:

Clarify whether IEPs developed between December 2008 and January 2009 will be acceptable for use in the 2009-10 school year.

DEPARTMENT RESPONSE:

The revised proposed amendment would require an IEP that is developed on or after September 1, 2009, to be on the form prescribed by the Commissioner. Any IEPs developed between December 2008 and January 2009 would not need to be rewritten on the form prescribed by the Commissioner, unless such IEP is revised on or after September 1, 2009.

6. COMMENT:

Give districts one and a half years to two calendar years from the date on which the new form becomes available to come into full compliance in order to reprogram software, update IEP data base curriculums, IEP guidance documents and initiate staff development on the new form. This requirement may have unnecessary cost implications for districts depending on their databases, and the need to devote significant time and resources to professional development. There should be an assessment of the fiscal implications of the different proposed forms on the districts and an assessment of the proposed forms on parental involvement in the IEP development process.

DEPARTMENT RESPONSE:

The Department believes the September 1, 2009 effective date will provide sufficient time for districts to convert to using the new forms, which only incorporate current regulatory and statutory requirements. We also believe that the use of mandatory forms will minimize the frequency of future changes to IEP software and any associated staff training.

Other

7. COMMENT:

The word “enhancing” in the phrase “the concerns of the parents for enhancing the education of their child” may be interpreted as getting the “best” versus “appropriate”, and should be replaced with “improve”, “add to” or “increase”.

DEPARTMENT RESPONSE:

The term is part of the existing language in section 200.4(d)(2) and is not sought to be amended or revised as part of the proposed rule making, and therefore is beyond the scope of the proposed rule making. However, the current requirement in section 200.4(d)(2) that the committee consider the concerns of the parents for enhancing the education of their child is consistent with section 614(d)(3)(A) of IDEA 2004 and section 300.324(a)(ii) of the federal regulations that implement IDEA.

Department of Environmental Conservation

NOTICE OF ADOPTION

Addition of Specialized Regulations to Control Use on Stewart State Forest

I.D. No. ENV-33-08-00004-A

Filing No. 1000

Filing Date: 2008-10-07

Effective Date: 2008-10-22

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

Action taken: Repeal of Part 92 and addition of section 190.34 to Title 6 NYCRR.

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

Subject: Addition of specialized regulations to control use on Stewart State Forest.

Purpose: To provide the department with control of the Stewart State Forest as public recreational demands on the area increase.

Text of final rule: Repeal Part 92 and add a new section 190.34 to Title 6 of NYCRR to read as follows:

§ 190.34 Stewart State Forest.

In addition to other applicable general provisions of this Part, the following requirements apply to Stewart State Forest. In the event of a conflict, these specific requirements will control.

(a) *Description. For the purposes of this section, Stewart State Forest means all those state lands lying and situated in the Towns of New Windsor, Montgomery, Hamptonburgh and the Village of Maybrook in Orange County and consisting of the State-owned lands designated by the department as State Reforestation Area Orange #4, Stewart State Forest.*

(b) *No person shall operate or possess a mechanically propelled vessel other than an electric powered vessel on any water body on the property.*

(c) *No person shall possess or discharge a rifle or handgun on the property, with the exception of .22 caliber rimfire handguns.*

(d) *Camping is by permit only and limited to designated sites. The permit must be obtained prior to set-up. Camping is prohibited from the first day of the early bowhunting season in the Southern Zone to the last day of the late muzzleloading and bowhunting season in the Southern Zone.*

(e) *No person shall operate or possess a snowmobile except:*

(1) *on trails designated and marked by the department as a "Snowmobile Trail" and only when the trail is completely covered with snow and/or ice; and*

(2) *on frozen lakes and ponds when access to same may be gained by public highways lawfully designated for snowmobile use, or by trails designated and marked by the department as a "Snowmobile Trail".*

(f) *No person shall kindle, build, maintain or use a fire except by permit from the Department.*

(g) *No person shall operate a motor vehicle on the property, except:*

(1) *persons possessing a permit for such use from the Department; or*
(2) *licensed hunters and trappers entering the area between one hour before sunrise and one hour after sunset for the purpose of hunting or trapping from October 1 to December 31, except when unsafe conditions prohibit such access; or*

(3) *adults accompanying youth pheasant hunters participating in the statewide youth pheasant hunt.*

(h) *From October 1 to December 31:*

(1) *Any person hunting must park their motor vehicle in a designated parking area and only then if the parking quota for that parking area is not filled.*

(2) *Hunters shall hunt only on the same side of the road as their vehicles are parked.*

(3) *Crossing of roads while hunting is prohibited.*

(4) *No person shall hunt or trespass in areas posted as restricted areas, except as permitted by the Department.*

(i) *No person shall enter Stewart State Forest during the Regular Hunting Season for deer as provided by Environmental Conservation Law section 11-0907, except for licensed hunters and trappers for the purpose of hunting or trapping or by permit from the Department.*

(j) *No person shall enter Stewart State Forest during the first two days of the Regular Hunting Season for deer without obtaining a reservation from the Department prior to entrance.*

Final rule as compared with last published rule: Nonsubstantial changes were made in section 190.34(j).

Text of rule and any required statements and analyses may be obtained from: Robert Messenger, Department of Environmental Conservation, Bureau of State Land Management, 625 Broadway, Albany, NY 12233-4255, (518) 402-9428, email: stewart@gw.dec.state.ny.us

Additional matter required by statute: A Negative Declaration has been prepared in compliance with Article 8 of the ECL.

Revised Regulatory Impact Statement

1. Statutory Authority

The Environmental Conservation Law (ECL) provides statutory authority for guaranteeing beneficial use of the environment without risk to health and safety (ECL Section 1-0101(3)(b)); promoting and coordinating the management of lands (ECL Section 3-0301(1)(b)); adopting rules and regulations (ECL Section 3-0301(2)(m)); and exercising care, custody, control of reforestation areas (ECL Section 9-0105(1)).

2. Legislative Objectives

By repealing the current provisions of 6 NYCRR Part 92 ("Part 92") and adding a new Section 190.34 to 6 NYCRR Part 190 ("Section 190.34"), public use restrictions on the property will be lessened, thereby furthering the fulfillment of the legislative objective of the ECL to guarantee that the "widest range of beneficial uses of the environment is attained without risk to health or safety" (ECL Section 1-0101(3)(b)).

Part 92 prohibits non-hunters from using the property from the beginning of small game hunting season until the end of big game season; proposed Section 190.34 will allow non-hunters to use the property from the beginning of small game hunting season until the beginning of big game hunting season. Part 92 prohibits fishing on certain waters within the property and prohibits the use of boats on Wilkins, Rowe's and Maroney's ponds; proposed Section 190.34 will allow fishing and the use of electric and human powered boats on all waters within the property. Part 92 does not allow camping or the building of campfires on the property; proposed Section 190.34 will allow camping and campfires at designated sites under permit from the department. Part 92 prohibits hunting parties larger than three people and the use of more than two dogs while hunting; these provisions will be repealed and not replaced. Part 92 prohibits the possession and use of handguns on the property; proposed Section 190.34 will allow only the possession and use of .22 caliber rimfire handguns.

3. Needs and Benefits

The Department's regulations regarding Stewart State Forest located in Orange County need to be updated to eliminate the overlap between existing Parts 92 and 190 of 6 NYCRR, to reflect the fact that additional lands have been incorporated into the property, and to reflect this area's new name and revised land use classification from what was a Fish and Wildlife Cooperator Area (which was managed as a wildlife management area) to a State Forest. Public use of State Forests (also known as Reforestation Areas), is governed by Article 9 of the ECL whereas Cooperator Areas are governed by Article 11 of the ECL. Historically, the Department managed this area through a cooperative agreement with the Department of Transportation (DOT). In 2006, jurisdiction over the remaining acreage was transferred to the Department. In the past, Part 92 governed public use of the area, then known as the Stewart Airport Cooperator Area, which has since become Stewart State Forest. The lands that were transferred to DEC jurisdiction are actually larger than the area that was constituted the Cooperator Area, and therefore the boundary description in Part 92 is no longer accurate. The boundary description in the proposed rule reflects this change.

Currently, Part 190 relating to public use of state lands applies to this area; however, specialized regulations are necessary given the unique history of public use of this area for hunting and fishing. In addition, now that the area is managed as a State Forest, a specialized regulation is needed to address potential user conflicts due to the increasing public recreational demands for snowmobiling, camping, boating, and hiking unique to this State Forest. Stewart State Forest is approximately 6,700 acres in size, and is the largest parcel of state land in Orange County, the fastest growing county in the State. Consequently, there is a high demand for public recreational use of the property. Proposed Section 190.34 will actually reduce the public use restrictions of Part 92, and will allow for more public use throughout the year. Only a select few of the Part 92 restrictions will be retained in the proposed regulation. Finally, the proposed regulation will address public safety issues related to the property's proximity to Stewart Airport.

The Stewart State Forest Unit Management Plan (UMP), approved on December 19, 2006, set forth the underlying reasons for this proposed regulation and was subject to public comment in the Fall of 2006. Proposed Section 190.34 reflects the management actions and needed regulatory amendments discussed in the UMP. Public comment was received at two public meetings on October 26, 2006 and a subsequent 30 day comment period. Public comments in their entirety are on file in the Region 3 DEC Lands and Forests office.

Public comment received in connection with the UMP was considered in drafting this proposed regulation, with hunter access to the property being extended to "one hour after sunset," and the property now being left open for hunters through December 31. A total of forty-five public comments and several petitions were received supporting the continued use of snowmobiles, while thirteen comments were received opposing the use of snowmobiles. The original proposal, which did not allow snowmobiles on the property, was changed to allow snowmobiles and is reflected in the proposed regulation.

ATVs and other off-road vehicles are different from snowmobiles since they do not have the protective cover of snow to buffer their effects on the trail surface. The DEC stands by the guidelines prohibiting ATV's presented in the UMP; thus, ATV's will be prohibited on the property.

This proposed rulemaking has three purposes, the first of which is updating the regulations to reflect the area's new designation as a State Forest by clarifying the rules for public use of the area.

The second purpose is to allow the Division of Lands and Forests to

continue to manage and balance recreational uses consistent with past management under Part 92, by restricting the operation of snowmobiles to designated trails, prohibiting all but electric and human powered vessels on all waters, requiring permits for camping and fires, prohibiting rifles and handguns except .22 caliber rimfire handguns, and limiting the use of motor vehicles on the property. Twenty-two caliber rimfire handguns are commonly used by trappers to quickly and humanely dispatch animals in their traps. Shotguns have a shorter effective range than rifles, and do not pose a significant threat to the safety of adjacent landowners or the airport, and therefore will not be prohibited under the proposed rule. Also, the proposed restrictions on motor vehicle access and campfires at the Stewart State Forest will protect the nearby airport property.

The third purpose is to continue the management of a safe and high quality hunting experience as created under Part 92, by continuing to limit non-hunter use during the Regular Hunting Season for deer, allowing hunters to enter the property by motor vehicles from October 1 through December 31, continuing a limited reservation system around the first weekend of the Regular Hunting Season for deer, and continuing existing guidelines for hunter use of the property.

This "special regulation" is needed because its unique restrictions are not provided for in Part 190 at this time. In addition, the proposed regulation will allow for more access to the property by the general public in October and November by removing existing hunting provisions which are deemed unnecessarily restrictive to non-hunter use of the property.

Changes to existing regulations reflected in the proposed Section 190.34 are as follows:

(1) The use of boats is prohibited on Wilkins Pond and Rowe's Pond under Part 92. Under the proposed regulation the use of electric and human powered vessels will be permitted on all waters, but gasoline-powered motors will be prohibited;

(2) The use of rifles and handguns continues to be prohibited as in Part 92, but an exception will be made for .22 caliber rimfire handguns;

(3) Camping, prohibited under Part 92, will be permitted under the proposed regulation, but by permit only and limited to designated sites. Camping will be prohibited from early bowhunting season in the Southern Zone to the last day of the late muzzleloading/bowhunting season in the Southern Zone;

(4) Although snowmobile use is currently allowed everywhere on the property that use will be limited to designated trails and frozen water;

(5) Fires are currently prohibited under Part 92, but will be allowed by permit under the proposed regulation;

(6) Access to the property for hunting will be expanded from one-half hour before sunrise and after sunset to one hour before sunrise and after sunset; and

(7) A special permit is required under Part 92 for hunter use of the area. This special permit will be replaced with a reservation requirement limited to just the first two days of the Regular Hunting Season for deer.

The "no action" alternative is not acceptable due to the overlap of existing regulations and management issues which are not addressed by the current rules, and the change in jurisdiction and management of the property from a Fish and Wildlife Cooperator Area to a Reforestation Area. The regulatory overlap causes confusion and unnecessary regulation of users on the property. The option of repealing Part 92 without changing Part 190 is not acceptable for the same reasons.

4. Costs

These changes clarify and codify existing practices, replacing for the most part existing regulations which no longer apply because of the transfer of the land making up Stewart State Forest from DOT (governed by a Cooperative Hunting Area agreement, Part 92) to the DEC (governed by State land regulations, Part 190). If anything, financial costs and staff time may be reduced by these changes. Property taxes are already being paid on the property, and will not change as a result of the proposed rule. Law enforcement staff already patrol the property to enforce existing rules and regulations. Staff time for this purpose will not change as a result of the proposed rule. Printed materials such as signs and brochures educating the public about the use of state lands will be produced as part of the approved UMP. The proposed rule will not affect the cost of producing them. Consequently, there are no direct financial impacts attributable to the rule change. The potential cost impact is expected to be negligible.

(a) Costs to State Government

There are no costs projected for state government.

(b) Costs to Local Governments

There are no costs projected for local government. No local governments will be required to take any action as a result of the proposed rule (See Local Government Mandates below).

(c) Costs to Private Regulated Parties

There are no costs projected for private regulated parties. The proposed rule does not require any fee to be paid for camping permits or hunting reservations.

(d) Costs to the Regulating Agency

There are no costs projected for the Regulating Agency.

5. Paperwork

The Department of Environmental Conservation must issue camping permits for State lands as part of its programs. These permit issuance requirements already exist. There will be no other new reporting, or monitoring requirements, and no new forms and other paperwork, as a result of the proposed changes.

6. Local Government Mandates

This proposal will not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

7. Duplication

The only relevant state rules are 6 NYCRR Part 92, which is being repealed in its entirety, and 6 NYCRR Part 190, which is proposed to be modified; there is no relevant state or federal rule which adequately protects the environment, health and safety of Stewart State Forest, so there is no duplication, overlap, or conflict with state or federal rules. The purpose of these changes is to eliminate overlap and conflicts between existing Parts 92 and 190, and to clarify management issues/practices that are currently not addressed by existing regulations.

The proposed changes will eliminate management guidelines for the Stewart Airport Cooperator Area since the property is now a State Reforestation Area. Simultaneously, only the necessary management guidelines have been incorporated into proposed Section 190.34. This proposed regulation is needed to manage an area with unique characteristics for a State Forest located in a relatively densely populated area experiencing rapid growth, adjacent to a major airport, and experiencing heavy recreational use.

8. Alternative Approaches

The alternatives to the proposed action are the "no action" option, or "repeal Part 92 without changes to Part 190" option, which are discussed in detail in Section 3. "Needs and Benefits," above.

9. Federal Standard

There is no relevant federal standard governing the use/management of Stewart State Forest.

10. Compliance Schedule

The proposed rule changes will become effective on the date of filing, with a target date of August 30, 2008, preceding the Fall 2008 hunting season.

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

The statements for the Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and the Job Impact Statement that were published with the proposed regulation were not changed because no substantive revisions were made to the express terms.

Assessment of Public Comment

Comment:

Why isn't Stewart State Forest a shotgun/handgun area as other parts of the State?

Response:

Shotguns are allowed at Stewart State Forest, along with .22 caliber rimfire handguns. Both .22 caliber rimfire handguns and shotguns have a limited effective range (are relatively low powered). These guns have a shorter effective range than rifles and do not pose a significant threat to the safety of adjacent landowners or the airport. Twenty-two caliber rimfire handguns are commonly used by trappers to humanely dispatch animals in their traps. The proximity of the airport to the State Forest poses a safety concern in regards to larger caliber handguns, and therefore they will not be allowed to be used on Stewart State Forest.

Comment:

Twenty-two caliber rimfire handguns are illegal during big game hunting season.

Response:

Twenty-two caliber rimfire handguns may legally be carried during the regular big game season. They may not be carried during special big game seasons (archery and muzzleloading) while the person carrying them is in the pursuit of deer or bear. Handguns may be legally carried during archery and muzzleloading seasons if the person carrying them is not hunting big game. (See ECL Section 11-0931, subsection 6).

Comment:

Commenter would like to see the parking areas increased to two cars in many areas as access permits.

Response:

The parking areas and quotas currently in place are based on years of experience and safe hunting at Stewart, with the goal of dispersing the hunters to allow for a quality hunting experience. The regulations as worded allow some discretion in changing the parking quotas for some lots should the need arise and safe hunting continues to be assured.

Comment:

Speed limit should be 15 mph. (2 comments)

Response:

The official vehicle speed limit for the property is 25 miles per hour and has been in effect since the property was transferred to DEC as a State Forest. No specific speed limit was set under Part 92 under the previous Cooperative Hunting Area Regulations; maximum speed limit for truck trails or roads maintained by the Department of Environmental Conservation (in 6 NYCRR Part 190, Section 190.8(k)) is set at 25 mph. The Department feels that the current speed limitation is appropriate for maintaining safe conditions at Stewart State Forest, but will consider specific signage, if deemed necessary due to special area conditions.

Comment:

Road speeds should not be 55 mph (2 comments) and speeds of 25 mph on trails that have limited visibility, and are used by snowshoers and hikers, are too high and too dangerous. (1 comment received viewing the 55 mph as appropriate).

Response:

The 55 mph road speed applies only to snowmobiles on the main roadways at Stewart State Forest and is based on Parks, Recreation and Historic Preservation Law, Section 25.03: Operations of snowmobiles, general. This statewide law makes it unlawful for snowmobiles to be operated "At a rate of speed greater than reasonable or proper under the surrounding circumstances provided, however, that in no case shall a snowmobile be operated at a speed in excess of fifty-five miles per hour upon public trails or land..." This law sets a maximum speed limit of fifty-five miles per hour. Lower speeds are called for in the Stewart State Forest Unit Management Plan for all snowmobile connector trails. Sections of these connector trails may be posted with warning signs and lower speeds where appropriate. The Department may consider special regulations establishing lower speed limits on certain trails in the future if deemed appropriate and necessary.

Comment:

Do user groups need a permit to access the property? (3 comments)

Response:

The general public, using the property as individuals or small groups do not need a permit to access the property. Larger groups undertaking competitive or organized events are required to obtain a permit from the department. The conditions of the permit designate the area(s) where the permittee is allowed to conduct their activities. The existing Temporary Revocable Permit (TRP) process will be utilized to review larger group events held on the property, as has been Department policy and procedure since we have owned the property.

Comment:

Electric boats should not be allowed on the ponds.

Response:

Fishing is a traditional outdoor recreational pursuit enjoyed on State Forest lands, and a use that the Department encourages. Electric motors are quiet and generally low-powered, thus very unlikely to cause any more disturbance to wildlife than human-powered watercraft.

Comment:

The Department should notify the public of events occurring on the property. (1 comment)

Response:

The Department does post an event calendar on the kiosks and does require TRP permit holders to post information about their events.

Comment:

The use of boats and kayaks should be governed by permit.

Response:

Use of small boats on small ponds tends to be somewhat self-limiting. If someone is already using a pond, other users will seek other waters. However, if the use of the ponds on the property becomes high enough that user conflicts are caused, the department may consider implementing a permit system.

Comment: There should be one north/south road for skiing only.

Response: As proposed in the UMP, there are at least 10 miles of trails that are open for cross-country skiing but not open to snowmobiles. The configuration of trails and uses allowed on those trails was decided during the UMP process, and involved extensive public involvement. The roads on the property are important for access to all users, and are wide enough to accommodate skiers and snowmobiles.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Portable Fuel Containers Which Are Used by New York State Residents to Transport Gasoline and Fill Fuel Tanks

I.D. No. ENV-43-08-00008-P

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

Proposed Action: Amendment of Part 239 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105

Subject: Portable fuel containers which are used by New York State residents to transport gasoline and fill fuel tanks.

Purpose: To allow the manufacturers more flexibility in designing portable fuel containers.

Public hearings will be held at: 1:00 p.m., Dec. 1, 2008 at DEC, 625 Broadway, Public Assembly Rm. 129, Albany, NY; 1:00 p.m., Dec. 3, 2008 at DEC Region 2 Annex, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY; 1:00 p.m., Dec. 4, 2008 at DEC Region 8 Office, Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov):

The proposed revisions to Parts 239 and 200 are consistent with the Federal Rule, 40 CFR Part 59, which will be effective January 1, 2009.

The Department is proposing to revise Section 239-1.1, "Applicability," to expand the applicability of Part 239 to advertising of portable fuel containers (PFCs).

Revisions are also proposed for Section 239-2.1, "Definitions." The proposed rulemaking adds a definition for "kerosene" to Part 239 and expands the definition of "portable fuel container" to include a container which holds kerosene.

The Department is proposing to replace Subpart 239-3, "Performance Standards for Portable Fuel Containers and Spill-Proof Spouts," to establish updated performance standards. The current language in Subpart 239-3 describes very specific design requirements and more complex testing for spouts and containers. The proposed new language defines the more broad standards described in 40 CFR Part 59 which result in lower volatile organic compound (VOC) emissions.

The Department is proposing to eliminate those portions of Subpart 239-4, "Exemptions," and Subpart 239-5, "Innovative Products," which allow exemptions based on California Air Resources Board (CARB). These proposed revisions are necessary in order to conform with the Federal Rule, 40 CFR Part 59, which will be effective January 1, 2009.

The Department is also proposing to revise Subpart 239-6, "Administrative requirements," and Subpart 239-8, "Test procedures," in order to conform with the Federal Rule, 40 CFR Part 59. The proposed revisions to Subpart 239-8 remove references to the CARB test methods.

Throughout the proposed rulemaking, revisions have been made to indicate that the regulations would take effect on July 1, 2009.

Section 200.9 of 6 NYCRR Part 200 contains a list of documents that have been referenced by the Department in regulations contained in 6 NYCRR Chapter III, Air Resources. The Department is proposing to amend this list to reflect references necessary to amending Part 239.

Text of proposed rule and any required statements and analyses may be obtained from: Ona Papageorgiou, DEC Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: 239pfc@gw.dec.state.ny.us

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

Public comment will be received until: Five days after the last scheduled public hearing.

Additional matter required by statute: Pursuant to Article 8 of the State Environmental Quality Review Act, a short environmental assessment form, a negative declaration and a coastal assessment form have been prepared and are on file. This rule must be approved by the Environmental Board.

Summary of Regulatory Impact Statement STATUTORY AUTHORITY

The following sections of the Environmental Conservation Law (ECL), taken together, authorize the New York State Department of Environmental Conservation (Department) to establish and implement the Portable Fuel Container Spillage Control regulations: 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, and 19-0305.

LEGISLATIVE OBJECTIVES

The Legislative goal of these ECL provisions, as stated in 19-0103, is to maintain the purity of New York's air resources. The proposed revisions to Part 239 are intended to meet this goal.

The revisions to Part 239 are among a series of sustained actions undertaken by New York State, in conjunction with EPA and other States, to control emissions of ozone precursors, including nitrogen oxides and volatile organic compounds (VOCs), so that New York State and States in the Ozone Transport Region (OTR) may attain the ozone national ambient air quality standards (NAAQS).

NEEDS AND BENEFITS

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include VOCs.

In 2002, the Department promulgated regulations designed to limit or reduce the amount of VOCs released into the atmosphere from portable fuel containers. 'See 6 NYCRR Part 239 (PFC regulation)'. Consistent with New York's obligations under the Act, New York submitted its PFC regulation to EPA as part of New York's State Implementation Plan (SIP). In turn, EPA approved the incorporation of Part 239 into New York's SIP.

The Department now proposes to revise Part 239 to implement consistent regulations limiting the amount of VOCs released into our atmosphere. Since the adoption of Part 239 in 2002, problems have been identified relating to spillage from the new, compliant, PFCs. The automatic shutoff feature was intended to help eliminate spillage while starting/stopping fuel flow, but it has been found to be incompatible with many types of target fuel tanks. Furthermore, customers have found them difficult to use, resulting in increased spillage. Current regulation requires testing for both evaporation and permeation. This requires more testing than necessary. In addition, PFCs have been manufactured with a large amount of variability in the quality of their parts. The revisions modify the existing spout requirements by eliminating the current automatic shutoff feature, fill height and flow rate standards. This allows the manufacturers more design flexibility to produce PFCs that are easier to use and compatible with target tanks. To address the complicated testing, the revisions combine evaporation and permeation standards into a new diurnal standard to simplify compliance testing. Two test methods will be replaced by one that represents both losses. Finally, to address variability in quality, PFC certification will be required.

There are two types of ozone: stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. In contrast, ground level ozone or smog, which results from the mixing of VOCs and NOx on hot, sunny summer days, can harm humans and plants. The primary ozone NAAQS was established by EPA at a level where the attainment and maintenance of which is requisite to protect the public health. In the northeastern United States the ozone nonattainment problem is pervasive as concentrations of ozone often exceed the level of the NAAQS by mid-afternoon on a summer day.

It is well-settled that ground-level ozone causes a host of major health problems, and recent studies have demonstrated a definitive link between even short-term ozone exposure and death in humans. 'See generally' Senate Committee on Environment and Public Health, S. Rep. No. 101-228 (1990), 'reprinted in' 1990 U.S.C.A.N. 3385. The United States Senate has recognized that a growing body of scientific evidence indicates that over the long term, chronic exposure to ozone may produce accelerated aging of the lung analogous to that produced by cigarette smoke exposure. 'Id'. In 1995, EPA recognized that "[m]uch of the ozone inhaled reacts with sensitive lung tissues, irritating and inflaming the lungs, and causing a host of short-term adverse health consequences including chest pains, shortness of breath, coughing, nausea, throat irritation, and increased susceptibility to respiratory infections" '60 Fed. Reg. 4712-13 (Jan. 24, 1995)'. Moreover, two recent studies have shown a definitive link between short-term exposure to ozone and human mortality. 'See' 292 'Journal of the American Medical Assn.' 2372-78 (Nov. 17, 2004); 170 'Am. J. Respir. Crit. Care Med.' 1080-87 (July 28, 2004) (observing significant ozone-related deaths in the New York City Metropolitan Area). Even exercising healthy adults can experience 15 percent to 20 percent reductions in lung function from exposure to low levels of ozone over several hours.

Children and outdoor workers are especially at risk from exposure to ozone. Because children's respiratory systems are still developing, they are more susceptible than adults; this problem is exacerbated because ozone is a summertime phenomenon. Children are outside playing and exercising more often during the summer which results in children being exposed to ozone more than adults. Outdoor workers are also more susceptible to lung damage because of their increased exposure to ozone

during the summer months when they are more likely to be working outdoors.

In July 2006, EPA again reaffirmed the serious public health consequences of ozone. EPA recognized a number of epidemiological and controlled human exposure studies that suggest that asthmatic individuals are at greater risk for a variety of ozone-related effects including increased respiratory symptoms, increased medication usage, increased doctors' visits, emergency department visits, and hospital admissions; and provide highly suggestive evidence that short-term ambient ozone exposure contributes to mortality. 'See' 'Fact Sheet: Review of National Ambient Air Quality Standards for Ozone Second Draft Staff Paper, Human Exposure and Risk Assessments and First Draft Environmental Report', U.S. Environmental Protection Agency, July 2006.

Furthermore, on March 12, 2008, EPA Administrator Stephen Johnson announced a new ozone NAAQS of 0.075 ppm. In announcing a lower ozone standard, EPA recognized that scientific evidence indicates that adverse health effects occur with ozone levels below the current standard, particularly in those with respiratory illnesses. EPA also recognized that repeated exposures to low levels of ozone damage vegetation, trees and crops, leading to susceptibility to disease, damaged foliage and reduced crop yields.

Ground level ozone also interferes with the ability of plants to produce and store food. This compromises growth, reproduction and overall plant health. By weakening sensitive vegetation, ozone makes plants more susceptible to disease, pests and environmental stresses. Ozone has been shown to reduce yields for many economically important crops ('e.g.', corn, kidney beans, soybeans). Ozone damage to long-lived species such as trees (by killing or damaging leaves) can significantly decrease the natural beauty of an area, such as the Adirondacks.

Implementation of the Part 239 revisions will, in concert with similar regulations adopted by other States and other measures undertaken by New York, lower levels of ozone in New York State and will decrease the adverse public health and welfare effects described above. In enacting the Title I ozone control requirements of the 1990 CAA amendments, Congress recognized the hazards of ozone pollution and mandated that States, especially those in the OTR, implement stringent regulatory programs in order to meet the ozone NAAQS.

COSTS

Costs to Regulated Parties and Consumers:

The cost of the proposed regulations will affect all manufacturers in a similar way. There are currently eight manufacturers that are members of the Portable Fuel Container Manufacturers Association (PFCMA). Most of these members have already designed PFCs which are compliant with the proposed regulation because the State of California is already enforcing these requirements in its regulations. Furthermore, all manufacturers will be required to have compliant PFCs as of January 1, 2009, when the federal regulations take effect. The State of New York will not be placing any additional cost requirements on the manufacturers or consumers.

Costs to State and Local Governments:

There are no direct costs to State and local governments associated with this proposed regulation. No record keeping, reporting, or other requirements will be imposed on local governments. The authority and responsibility for implementing and administering Part 239 resides solely with the Department. Requirements for recordkeeping and reporting are applicable only to the person(s) who manufactures, sells, supplies, or offers for sale portable fuel containers.

Costs to the Regulating Agency:

There will be no increase in administrative costs to the regulating agency.

LOCAL GOVERNMENT MANDATES

No mandates will be imposed on local governments.

PAPERWORK

No additional paperwork will be imposed by this rulemaking on manufacturers, distributors or sellers of PFCs beyond what will be required under federal regulations that take effect on January 1, 2009. Manufacturers will be required maintain records relating to:

- 1) applications to EPA;
- 2) construction and origin of all components of the PFC;
- 3) all emission tests;
- 4) all tests to diagnose emission control performance;
- 5) all other relevant information or events; and
- 6) lot numbers.

All records must be kept for at least five years.

DUPLICATION

The proposed revisions to Part 239 are consistent with the federal rule, 40 CFR Part 59.600-59.699.

ALTERNATIVES

The following alternatives have been evaluated to address the goals set forth above. These are:

1. Take No Action:

The "Take No Action" alternative is not acceptable because New York needs the additional emissions reductions as soon as possible in order to meet its attainment goals. Moreover, this alternative would not address the spillage concerns associated with portable fuel containers under the current regulations and would allow New York residents to continue use of non user-friendly PFCs. It would also result in state regulations which are inconsistent with the federal regulations that will take effect on January 1, 2009. Lastly, failing to adopt the proposed regulations would leave New York without authority to enforce against the sale of PFCs in the State of New York that are not compliant with federal requirements. For these reasons, DEC rejected this option.

2. Adopt the proposed revisions to Part 239:

Under this option, Part 239 will be consistent with 40 CFR Part 59.600-59.699. This will provide the manufacturers with more flexibility to manufacture a more user-friendly PFC. While the regulations will be the same as federal requirements, maintaining Part 239 will allow NYSDEC to enforce this regulation in the future. This enforcement option is necessary because the EPA has not shown any willingness to enforce its consumer products regulations adopted under 40 CFR Part 59. This is the alternative that DEC has elected to pursue.

FEDERAL STANDARDS

The proposed revisions to Part 239 are necessary to comply with the Federal Rule (40 CFR Part 59).

COMPLIANCE SCHEDULE

The proposed revisions would take effect on July 1, 2009, and compliance with the proposed changes would be required as of that date. However, federal regulations also apply to PFCs, and recent changes to those regulations take effect on January 1, 2009. All PFCs manufactured on or after January 1, 2009 will have to be compliant with the federal standards set forth in 40 CFR Part 59.

This proposed rulemaking contains a "sell-through" provision. Between January 1, 2009 and December 31, 2009, PFCs manufactured prior to January 1, 2009 could be sold or distributed if they were compliant on December 31, 2008. As of January 1, 2010, only PFCs compliant with the proposed revisions to Part 239 could be distributed or sold.

Regulatory Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors, which include volatile organic compounds (VOCs). Among other regulatory actions, in 2002, New York promulgated regulations (6 NYCRR Part 239) designed to limit the VOCs emitted by portable fuel containers (PFCs).

On July 18, 1997 the EPA promulgated the eight-hour ozone national ambient air quality standard (NAAQS). EPA has designated several areas within New York State to be in nonattainment with the eight-hour NAAQS. Previously, New York State had been subject to the one-hour ambient air quality standard for ozone which requires New York State to develop plans to attain the ozone NAAQS as expeditiously as practicable.

Furthermore, on March 12, 2008 EPA Administrator Stephen Johnson announced a new ozone NAAQS of 0.075 ppm. In announcing a lower ozone standard EPA recognized that scientific evidence indicates that adverse health effects occur with ozone levels below the current standard, particularly in those with respiratory illnesses. EPA also recognized that repeated exposures to low levels of ozone damage vegetation, trees and crops, leading to susceptibility to disease, damaged foliage and reduced crop yields.

The Department of Environmental Conservation (Department) proposes to revise Part 239 in order to maintain consistency with the Federal Rule found at 40 CFR Part 59.

1. Effects on Small Businesses and Local Governments.

No local governments will be directly affected by the revisions to 6 NYCRR Part 239, "Portable Fuel Container Spillage Control." The known PFC manufacturers are generally larger companies and not small businesses. However, if a PFC manufacturer in New York is a small business (100 or less employees), the proposed revisions should not produce any adverse impacts because they are consistent with federal regulations that take effect on January 1, 2009. DEC's proposed revisions do not go beyond those contained in the federal regulations. Moreover, PFC manufacturers have indicated that they are looking forward to the proposed revisions because they will allow manufacturers the flexibility they need to address certain concerns that customers have with the current PFC design.

2. Compliance Requirements.

No local governments will be directly affected by the revisions to 6 NYCRR Part 239, "Portable Fuel Container Spillage Control." The known PFC manufacturers are generally larger companies and not small businesses. However, if a PFC manufacturer in New York is a small business (100 or less employees), the proposed revisions should not produce any adverse impacts because they are consistent with federal regulations that take effect on January 1, 2009. DEC's proposed revisions do not go beyond those contained in the federal regulations, so no additional compliance requirements on local governments or small businesses are anticipated.

3. Professional Services.

Local governments are not directly affected by the revisions to 6 NYCRR Part 239. It is not anticipated that businesses that manufacture PFCs will need to contract out for professional services to comply with this regulation.

4. Compliance Costs.

There may be costs associated with new designs and testing for PFCs, but any such costs are already necessary in order for manufacturers to comply with the federal rule, even if New York does not revise its regulations.

5. Minimizing Adverse Impact.

Local governments are not directly affected by the revisions to 6 NYCRR Part 239. The known PFC manufacturers are generally larger companies and not small businesses. However, if a PFC manufacturer in New York is a small business (100 or less employees), the proposed revisions should not produce any adverse impacts because they are consistent with federal regulations that take effect on January 1, 2009. DEC's proposed revisions do not go beyond those contained in the federal regulations. Moreover, PFC manufacturers have indicated that they are looking forward to the proposed revisions because they will allow manufacturers the flexibility they need to address certain concerns that customers have with the current PFC design.

In order to allow manufacturers and retailers to sell PFC stock manufactured prior to January 1, 2009, a provision is included in this rulemaking which would allow these PFCs to be sold through December 31, 2009 if: 1) they are properly labeled with the date of manufacture, and 2) they are compliant with the federal and state requirements as of December 31, 2008.

6. Small Business and Local Government Participation.

Since local governments and small businesses are not directly affected by this regulation, the Department did not contact local governments or small business representatives directly. The Portable Fuel Container Manufacturers Association was contacted and expressed support for the rule revisions becoming effective because they will give manufacturers more flexibility in the design of their PFCs, thereby making them more user friendly.

7. Economic and Technological Feasibility.

Local governments are not directly affected by the revisions to 6 NYCRR Part 239. There are currently eight manufacturers that are members of the Portable Fuel Container Manufacturers Association (PFCMA). Most of these members have already designed PFCs which are compliant with the proposed regulation because the State of California is already enforcing these requirements in its regulations. Therefore, DEC believes that compliance with the proposed revisions is both economically and technologically feasible. Furthermore, even if this rule is not adopted, all manufacturers will be required to manufacture compliant PFCs as of January 1, 2009, when the federal regulations take effect.

Rural Area Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by portable fuel containers. "See 6 NYCRR Part 239."

In June of 2004, EPA designated eight areas in New York State as nonattainment under the revised eight-hour ozone national ambient air quality standards (NAAQS). For these areas, New York City Metropolitan Area, Lower Hudson, Buffalo-Niagara Falls and Chautauque County are still not attaining in the ozone NAAQS. As a result, New York State is developing plans to determine how and when these areas will come into attainment. Emissions reductions associated with this regulation are part of the overall plan to reduce ozone levels throughout the State.

The Department of Environmental Conservation (Department) proposes to revise Part 239 to implement rule changes to maintain consistency with the Federal Rule found at 40 CFR Part 59.

1. Types and estimated number of rural areas:

Rural areas are not particularly affected by the revisions. Part 239 will continue to apply on a statewide basis.

2. Reporting, record keeping and other compliance requirements:

The Department is not currently aware of any PFC manufacturers located in rural areas of New York. No additional paperwork will be imposed by this rulemaking on manufacturers, distributors or sellers of PFCs beyond what will be required under federal regulations that take effect on January 1, 2009. Manufacturers will be required maintain records relating to:

- 1) applications to EPA;
- 2) construction and origin of all components of the PFC;
- 3) all emission tests;
- 4) all tests to diagnose emission control performance;
- 5) all other relevant information or events; and
- 6) lot numbers.

All records must be kept for at least five years.

Part 239 will continue to apply on a statewide basis. Rural areas are not uniquely affected by the revisions. Professional services are not anticipated to be necessary to comply with this rule.

3. Costs:

There may be costs associated with new designs and testing for PFCs, but any such costs are already necessary in order for manufacturers to comply with the federal rule, even if New York does not revise its regulations.

4. Minimizing adverse impact:

DEC adopted Part 239 in 2002. Since that time, the Department is unaware of any particular adverse impacts experienced by rural areas or entities in rural areas as a result of the promulgation of Part 239. Rather, the rule is intended to create air quality benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants.

In order to allow manufacturers and retailers to sell PFC stock manufactured prior to January 1, 2009, a provision is included in this rulemaking which would allow these PFCs to be sold through December 31, 2009 if: 1) they are properly labeled with the date of manufacture, and 2) they are compliant with the federal and state requirements as of December 31, 2008.

Job Impact Statement

1. Nature of impact:

The Department of Environmental Conservation (the Department) proposes to revise Part 239 to implement consistent regulations limiting the amount of ozone released into our atmosphere. In addition, this revision will allow for a more user friendly portable fuel container (PFC) to be sold in the State of New York. The current Part 239 contains specific design and testing provisions which limit the design options for portable fuel containers, spouts and portable fuel containers and spouts.

These revisions are not expected to have an adverse impact on jobs and employment opportunities in the State as there are no known PFC manufacturers within the State. Part 239 has applied Statewide since it was promulgated in 2002, and the proposed revisions do not change the statewide applicability. Since Part 239 went into effect in 2002, there has been no indication that the regulation of portable fuel containers has resulted in adverse impacts on employment or job opportunities.

2. Categories and numbers affected:

No jobs should be affected by the proposed rulemaking. These revisions will allow for more options and flexibility in the design of portable fuel containers and spouts while maintaining the VOC limits that were intended with the original rule.

3. Regions of adverse impact:

The Department does not expect there to be adverse impacts or regions of adverse impact in the State. The standards in Part 239 have applied statewide since 2002, and there has been no resulting adverse impact statewide or on any particular region of the State.

4. Minimizing adverse impact:

Since this rule only expands the options that the manufacturers have for PFC design, the Department does not anticipate any adverse impacts on employment from the adoption of these rule revisions.

In order to allow manufacturers and retailers to sell PFC stock manufactured prior to January 1, 2009, a provision is included in this rulemaking which would allow these PFCs to be sold through December 31, 2009 if: 1) they are properly labeled with the date of manufacture, and 2) they are compliant with the federal and state requirements as of December 31, 2008.

Self employment opportunities:

Most PFCs are manufactured by large companies. However, some individuals may have the opportunity to design or manufacture PFCs in the future.

Department of Health

EMERGENCY RULE MAKING

Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content

I.D. No. HLT-43-08-00009-E

Filing No. 972

Filing Date: 2008-10-06

Effective Date: 2008-10-06

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

Action taken: Amendment of Part 59 of Title 10 NYCRR.

Statutory authority: Vehicle and Traffic Law, section 1194(4)(c); Environmental Conservation Law, section 11-1205(6)

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

Specific reasons underlying the finding of necessity: Immediate adoption of this amendment is necessary for preservation of the public safety. The amendment, once adopted, will enable law enforcement agencies to use a breath alcohol testing device, which, while not currently listed in 10 NYCRR Section 59.4, is approved for use by the National Highway Traffic Safety Administration.

A new Conforming Products List was published in the Federal Register on June 29, 2006, adding a state-of-the-art evidential breath test instrument: the DataMaster DMT. Under a Division of Criminal Justice Services project fully funded through the Governor's Traffic Safety Committee, the DataMaster DMT will replace 475 breath test instruments currently used by more than 420 police agencies statewide. The Division of Criminal Justice Services has informed the Department of its expectation to begin distribution of the first lot of approximately 40 DataMaster DMT instruments on or about April 30, 2007.

Failure to update the list by emergency rulemaking will result in confusion as to the DataMaster DMT's approval for use in New York State, resulting in defense challenges to the legal admissibility of evidentiary results obtained with the device. Such failure would obviously impede law enforcement efforts to combat drunk driving, particularly as more and more of the older DataMaster models become unusable, thereby adversely affecting public safety. Moreover, the federal and State lists of approved breath testing devices must be identical to avoid legal challenges to prosecutions for alcohol-related offenses and preclude inadmissibility of evidence, and to ensure effective enforcement of the laws against driving while intoxicated.

Subject: Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content.

Purpose: To update the conforming products list of breath alcohol testing devices currently approved for use by the NHTSA.

Text of emergency rule: Subdivision (c) of Section 59.1 is amended as follows:

(c) Chemical tests/analyses include breath tests conducted on those instruments found on the Conforming Products List of Evidential Breath Measurement Devices as established by the U.S. Department of Transportation/National Highway Traffic Safety Administration, published in the Federal Register on [June 4, 1999] *June 29, 2006*. Such list is set forth in section 59.4 of this Part.

Subdivision (b) of Section 59.4 is amended as follows:

(b) The commissioner has adopted the Conforming Products List of Evidential Breath Measurement Devices, as hereinafter set forth, established by the U.S. Department of Transportation/National Highway Traffic Safety Administration, as meeting the above criteria. Unless otherwise noted, the devices are approved for both mobile and nonmobile use.

Conforming Products List

(1) Alcohol Countermeasure Systems [,] Corp., Mississauga, Ontario, Canada:

(i) Alert J3AD.

(ii) Alert J4X.ec.

[(ii)] (iii) PBA3000C.

- (2) BAC Systems, Inc., Ontario, Canada: Breath Analysis Computer.
- (3) CAMEC Ltd., North Shields, Tyne and Ware, England: IR Breath Analyzer.
- (4) CMI, Inc., Owensboro, KY:
- (i) Intoxilyzer 200.
 - (ii) Intoxilyzer 200D.
 - (iii) Intoxilyzer 300.
 - (iv) Intoxilyzer 400.
 - (v) *Intoxilyzer 400PA*.
 - [(v)] (vi) Intoxilyzer 1400.
 - [(vi)] (vii) Intoxilyzer 4011.
 - [(vii)] (viii) Intoxilyzer 4011A.
 - [(viii)] (ix) Intoxilyzer 4011AS.
 - [(ix)] (x) Intoxilyzer 4011AS-A.
 - [(x)] (xi) Intoxilyzer 4011AS-AQ.
 - [(xi)] (xii) Intoxilyzer 4011AW.
 - [(xii)] (xiii) Intoxilyzer 4011A27-10100.
 - [(xiii)] (xiv) Intoxilyzer 4011A27-10100 with filter.
 - [(xiv)] (xv) Intoxilyzer 5000.
 - [(xv)] (xvi) Intoxilyzer 5000 (with Cal. Vapor Re-Circ.).
 - [(xvi)] (xvii) Intoxilyzer 5000 (with 3/8" ID hose option).
 - [(xvii)] (xviii) Intoxilyzer 5000CD.
 - [(xviii)] (xix) Intoxilyzer 5000CD/FG5.
 - [(xix)] (xx) Intoxilyzer 5000EN.
 - [(xx)] (xxi) Intoxilyzer 5000 (CAL DOJ).
 - [(xxi)] (xxii) Intoxilyzer 5000 VA.
 - (xxiii) *Intoxilyzer 8000*.
 - [(xxii)] (xxiv) Intoxilyzer PAC 1200.
 - [(xxiii)] (xxv) Intoxilyzer S-D2.
 - (xxvi) *Intoxilyzer S-D5*.
- [(5) Decator Electronics, Decator, IL: Alco-Tector model 500 (nonmobile only).]
- [(6)] (5) Draeger Safety, Inc., Durango, CO:
- (i) *Alcotest 6510*.
 - (ii) *Alcotest 6810*.
 - [(i)] (iii) Alcotest 7010.
 - [(ii)] (iv) Alcotest 7110.
 - [(iii)] (v) Alcotest 7110 MKIII.
 - [(iv)] (vi) Alcotest 7110 MKIII-C.
 - [(v)] (vii) Alcotest 7410.
 - [(vi)] (viii) Alcotest 7410 Plus.
 - [(vii)] (ix) Breathalyzer 900.
 - [(viii)] (x) Breathalyzer 900A.
 - [(ix)] (xi) Breathalyzer 900 BG.
 - [(x)] (xii) Breathalyzer 7410.
 - [(xi)] (xiii) Breathalyzer 7410-II.
- [(7)] (6) Gall's Inc., Lexington, KY: Alcohol Detection System-A.D.S. 500.
- (7) *Guth Laboratories, Inc., Harrisburg, PA:*
- (i) *Alcotector BAC-100*.
 - (ii) *Alcotector C2H5OH*.
- (8) Intoximeters, Inc., St. Louis, MO:
- (i) Photo Electric Intoximeter (nonmobile only).
 - (ii) GC Intoximeter MK II.
 - (iii) GC Intoximeter MK IV.
 - (iv) Auto Intoximeter.
 - (v) Intoximeter 3000.
 - (vi) Intoximeter 3000 (rev B1).
 - (vii) Intoximeter 3000 (rev B2).
 - (viii) Intoximeter 3000 (rev B2A).
 - (ix) Intoximeter 3000 (rev B2A) w/FM option.
 - (x) Intoximeter 3000 (Fuel Cell).
 - (xi) Intoximeter 3000 D.
 - (xii) Intoximeter 3000 DFC.
 - (xiii) Alcomonitor (nonmobile only).
 - (xiv) Alcomonitor CC.
 - (xv) Alco-Sensor III.
 - (xvi) *Alco-Sensor III (Enhanced with Serial Numbers above 1,200,000)*.
 - [(xvi)] (xvii) Alco-Sensor IV.
 - [(xvii)] (xviii) *Alco-Sensor IV-XL*.
 - [(xvii)] (xix) Alco-Sensor AZ.
 - [(xx)] (xx) *Alco-Sensor FST*.
 - [(xviii)] (xxi) RBT-AZ.
 - [(xix)] (xxii) RBT III.
 - [(xx)] (xxiii) RBT III-A.
 - [(xxi)] (xxiv) RBT IV.
 - [(xxii)] (xxv) RBT IV with CEM (cell enhancement module).
 - [(xxiii)] (xxvi) Intox EC/IR.
 - (xxvii) *Intox EC/IR II*.
 - [(xxiv)] (xxviii) Portable Intox EC/IR.
- (9) Komyo Kitagawa, Kogyo, K.K., *Japan:*
- (i) Alcolyzer DPA-2.
 - (ii) Breath Alcohol Meter PAM 101B.
- (10) Lifeloc Technologies, Inc. (formerly Lifeloc, Inc.), Wheat Ridge, CO:
- (i) PBA 3000B.
 - (ii) PBA 3000-P.
 - (iii) PBA 3000C.
 - (iv) Alcohol Data Sensor.
 - (v) Phoenix.
 - (vi) *EV 30*.
 - (vii) *FC 10*.
 - (viii) *FC 20*.
- (11) Lion Laboratories, Ltd., Cardiff, Wales, UK:
- (i) Alcolmeter 300.
 - (ii) Alcolmeter 400.
 - [(iii)] Alcolmeter AE-D1.]
 - [(iv)] (iii) Alcolmeter SD-2.
 - [(v)] (iv) Alcolmeter EBA.
 - [(vi)] Auto-Alcolmeter (nonmobile only).]
 - [(vii)] (v) Intoxilyzer 200.
 - [(viii)] (vi) Intoxilyzer 200D.
 - [(ix)] (vii) Intoxilyzer 1400.
 - [(x)] (viii) Intoxilyzer 5000 CD/FG5.
 - [(xi)] (ix) Intoxilyzer 5000 EN.
- (12) Luckey Laboratories, San Bernadino, CA:
- (i) Alco-Analyzer 1000 (nonmobile only).
 - (ii) Alco-Analyzer 2000 (nonmobile only).
- (13) National Draeger, Inc., Durango, CO:
- (i) Alcotest 7010.
 - (ii) Alcotest 7110.
 - (iii) Alcotest 7110 MKIII.
 - (iv) Alcotest 7110 MKIII-C.
 - (v) Alcotest 7410.
 - (vi) Alcotest 7410 Plus.
 - (vii) Breathalyzer 900.
 - (viii) Breathalyzer 900A.
 - (ix) Breathalyzer 900BG.
 - (x) Breathalyzer 7410.
 - (xi) Breathalyzer 7410-II.
- (14) National Patent Analytical Systems, Inc., Mansfield, OH:
- (i) BAC DataMaster (with or without the Delta-1 accessory).
 - (ii) BAC Verifier *Datamaster* [DataMaster] (with or without the Delta-1 accessory).
 - (iii) DataMaster cdm (with or without the Delta-1 accessory).
 - (iv) *DataMaster DMT*.
- * * *
- This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 3, 2009.
- Text of rule and any required statements and analyses may be obtained from:** Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqa@health.state.ny.us
- Regulatory Impact Statement**
Statutory Authority:
- The New York State Vehicle and Traffic Law, Section 1194(4)(c), and Department of Environmental Conservation Law, Section 11-1205(6), authorize the Commissioner of Health to adopt regulations concerning methods of testing breath for alcohol content.
- Legislative Objectives:
- This amendment allows law enforcement/police agencies to use state-of-the-art equipment for breath alcohol testing, as approved by the Commissioner of Health. This action fulfills the legislative objective of ensuring effective enforcement of the law against driving while intoxicated.
- Needs and Benefits:
- In 1986, the Commissioner of Health adopted the Conforming Products List of Evidential Breath Measurement Devices, as established by the National Highway Traffic Safety Administration, under 10 NYCRR Sections 59.1(c) and 59.4(b). The Traffic Safety Administration's list is periodically revised to include additional approved testing devices. Affected parties are law enforcement agencies that train police organizations in the use of breath testing devices and the organizations/agencies whose staff conduct testing, including the New York State Police; the State Division of Criminal Justice Services' Of-

Office of Public Safety; and the Police Departments of Nassau County, Suffolk County, and the City of New York.

A new Conforming Products List was published in the Federal Register on June 29, 2006, adding a state-of-the-art evidential breath test instrument: the DataMaster DMT. Under a Division of Criminal Justice Services project fully funded through the Governor's Traffic Safety Committee, the DataMaster DMT will replace 475 breath test instruments currently used by more than 420 police agencies Statewide. The Division of Criminal Justice Services has informed the Department of its expectation to begin distribution of the first lot of approximately 40 DataMaster DMT instruments on or about April 30, 2007.

Prosecutors and defense attorneys Statewide rely on the provisions of Part 59 daily in adjudicating alcohol-related offenses. By including in Section 59.4 all devices that appear on the latest federal Conforming Products List, this proposed amendment, once adopted, will make these devices available for use by law enforcement agencies without risk of evidentiary challenge to prosecution, and will ensure effective enforcement of the laws against driving while intoxicated.

COSTS:

Costs to Private Regulated Parties:

The requirements of this regulation are not applicable to any private parties regulated by the Department.

Costs to State Government:

Adoption of additions and revisions to the Conforming Products List does not necessitate purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not require affected parties to incur new costs. The Division of Criminal Justice Services has requested timely amendment of Part 59 because the manufacturer of the DataMaster breath analysis device currently in use has begun phasing out production due, in part, to the fact that parts to manufacture and repair these instruments are becoming increasingly unavailable. Moreover, the Division of Criminal Justice Services expects the newer model instrument, which utilizes improved diagnostics, an enhanced operating system and an outboard printer, to generate cost savings from fewer instrument malfunctions, resulting in less downtime. Thus, this amendment's authorizing use of an updated model, the DataMaster DMT, will result in decreased costs to law enforcement agencies.

Costs to Local Government:

Adoption of additions and revisions to the Conforming Products List does not require purchase of new devices or discontinuance of devices currently in use. Therefore, this proposed amendment does not impose any additional costs to police departments operated by local governments, including the City of New York Police Department. Police departments operated by local governments may experience cost savings for the same reasons described under Costs to State Government.

Costs to the Department of Health:

Adoption of additions and revisions to the Conforming Products List does not impose any costs on the Department.

Local Government Mandates:

This regulation does not impose any new mandate on any county, city, town, village, school district, fire district or other special district. Paperwork:

No new reporting requirements or forms are imposed as a result of the proposed amendment.

Duplication:

This regulation is consistent with, but does not duplicate, other State and federal statutes concerning approved breath alcohol measurement devices.

Alternative Approaches:

At the present time, there are no acceptable alternatives. Failure to update the list will result in confusion as to the DataMaster DMT's instrument approval for use in New York State, resulting in defense challenges to the admissibility of results obtained with the device. Such failure will obviously impede law enforcement efforts to combat drunk driving, particularly as more and more of the older DataMaster models become unusable, thereby adversely affecting public safety.

Federal Standards:

The proposed rule does not exceed any minimum standards of the federal government; it merely adds new federally approved devices to the Conforming Products List, to be consistent with federal standards. Compliance Schedule:

Regulated parties should be able to comply with these regulations effective upon filing a Notice of Emergency Adoption with the Secretary of State.

Regulatory Flexibility Analysis

No Regulatory Flexibility Analysis is required pursuant to Section 202-b (3)(b) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse economic impact on small businesses or local governments, and does not impose reporting, record keeping or other compliance requirements on small businesses or local governments. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb (4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse impact on facilities in rural areas, and does not impose any reporting, record keeping or other compliance requirements on regulated parties in rural areas. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The amendment harmonizes state and federal lists of approved breath measurement devices, making the entire range of devices available for use by law enforcement agencies in New York without risk of evidentiary challenge to prosecution for alcohol-related offenses.

Housing Finance Agency

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Access to Agency Records

I.D. No. HFA-43-08-00003-P

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

Proposed Action: Amendment of Part 2150 of Title 21 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. HFA-52-05-00002-P.

Statutory authority: Public Officers Law, section 87(b)

Subject: Public access to agency records.

Purpose: To provide procedures by which records may be obtained from the agency.

Text of proposed rule: Subdivision (a) of section 2150.1 is amended to read as follows:

(a) The people's right to know the process of government decision making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by [shrouding it with the cloak of] secrecy or confidentiality.

Subdivision (b) of section 2150.1 is amended to read as follows:

(b) This Part provides information concerning the procedures by which records may be obtained from the Agency pursuant to the Freedom of Information Law.

Subdivision (a) of section 2150.2 is amended to read as follows:

(a) The [executive director] *President and Chief Executive Officer* is responsible for [insuring] *ensuring* compliance with this Part, and designates the following [persons] *person(s)* as records access [officers] *officer(s)*:

[Associate Administrative Analyst] *Public Information Officer*
New York State Housing Finance Agency
641 Lexington Avenue [Three Park Avenue
33rd Floor]

New York, NY [10016] 10022
E-mail: FOILOfficer@nyhomes.org

Subdivision (b) of section 2150.2 is amended to read as follows:

(b) [Records] *The records access [officers are] officer is responsible for ensuring appropriate agency response to public requests for access to records. The designation of records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so. Records access officers shall [insure] ensure that personnel:*

(1) maintain an up-to-date subject matter list;

(2) assist the requester in identifying [requested] records sought, if necessary[.]; and when appropriate, indicate the manner in which records are filed, retrieved or generated to assist persons in reasonably describing records;

(3) contact persons seeking records when a request is voluminous or when locating sought records involves substantial effort, so that personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested;

[(3)] (4) upon locating the records, take one of the following actions:

(i) make records available for inspection; or

(ii) deny access to the records in whole or in part, and explain in writing the reasons [thereof] for such denial;

[(4)] (5) upon request for copies of records, make a copy available upon payment or offer to pay established fees, if any, in accordance with section 2150.8 of this Part;

[(i); make a copy available upon payment or offer to pay established fees, if any, in accordance with section 2150.8 of this Part [; or (ii) permit the requester to copy those records;]

(6) upon request, certify that a record is a true copy; and

(7) upon failure to locate records, certify that:

(i) the New York State Housing Finance Agency is not the custodian for such records; or

(ii) the records of which the New York State Housing Finance Agency is a custodian cannot be found after diligent search.

Section 2150.3 is amended to read as follows:

Section 2150.3 Location.

Records shall be available for [public] inspection and copying at [Three Park Avenue, 33rd Floor, New York, NY 10016.] *the offices of the New York State Housing Finance Agency, including its principal office at:*

New York State Housing Finance Agency

641 Lexington Avenue

New York, New York 10022

Section 2150.4 is amended to read as follows:

Section 2150.4 Hours for public inspection.

[Requests for public access to records] *Records of the Agency shall be [accepted and records] produced for inspection by appointment during all hours and days regularly open for business. These hours are: Monday through Friday, 9 a.m. to 5 p.m.*

Section 2150.5 is amended to read as follows:

Section 2150.5 Requests for public access to records.

(a) A written request [may be] *for records is required. [, but oral requests may be accepted when records are readily available.] Written requests must be received by mail or hand delivery to the offices of the Agency, or e-mail or facsimile transmission to the respective address or number then currently specified on the Agency's website. If a requested record is maintained on the internet, the Agency's response to the request shall inform the requester that the record is accessible via the internet and in printed form, either on paper or other information storage medium.*

[(b) A response shall be given regarding any request reasonably describing the record or records sought within five business days of receipt of the request.]

[(c)] (b) A request [shall] *should* reasonably describe the record or records sought. Whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.

[(d) If the records access officer does not provide or deny access to the record sought within] (c) *Within* five business days of receipt of [a] *the* request, [he or she] *the Agency shall:*

[furnish] (i) *inform the requester that their request, or a portion of their request, does not reasonably describe record(s) sought, and provide assistance and direction, to the extent possible, which shall assist the person making the request in reasonably describing such records;*

(ii) *grant or, in writing, deny access to the records requested in whole or in part;*

(iii) *provide a written [acknowledgment] acknowledgement of receipt of the request and [a statement of] state the approximate date,*

which shall be reasonable under the circumstances, and in no instance exceed twenty business days, when the request will be granted or denied [. If access to records]; *or*

(iv) *if it is [neither granted nor denied within 10 business days after] known that circumstances will prevent disclosure of the record(s) within twenty (20) days from the date of [acknowledgment of receipt of a request, the request may be construed as a denial of access that may be appealed.] the acknowledgement, provide a written explanation for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.*

If, after having acknowledged the receipt of a request and provided to a requester an approximate date when a request will be granted in whole or in part, it becomes known that circumstances will prevent the Agency from granting the request in the time specified, the Agency shall, within twenty business days of the initial acknowledgement, provide a statement in writing stating the reason for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

(d) *In determining a reasonable time for granting or denying a request under the circumstances of a request, personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the Agency, and similar factors that bear on the ability to grant access to records promptly and within a reasonable time.*

(e) *The Agency's failure to comply with such time limits and procedures as are set forth in Section (c) of this Part, and/or the failure to respond to a request within a reasonable time after an approximate date given, in conformity with (c)(iii) of this Section, which response shall in no instance be provided in excess of twenty business days after the date of acknowledgement of the receipt of request, unless a written explanation for the inability to grant access to the records is provided, in conformity with (c)(iv) of this Section, shall constitute a denial of a request that may be appealed.*

Subdivision (a) of section 2150.7 is amended to read as follows:

(a) Denial of access [to records] shall be in writing, stating the reason therefor and advising the requester of the right to appeal to the individual or body established to hear appeals, *identified by name, title, business address and business telephone number.*

Subdivision (b) of section 2150.7 is amended to read as follows:

(b) [If requested records are not provided promptly] *If the Agency fails to respond to a request as required in section 2150.5(c) and (d) of this Part, such failure shall also be deemed a denial of access.*

Subdivisions (c), (d), (e), (f) and (g) of section 2150.7 are renumbered as (d), (e), (f), (g) and (h). New subdivision (c) shall read:

(c) *Any person denied access to records may appeal within 30 days of a denial.*

Subdivision (d) of section 2150.7 is amended to read as follows:

(d) The following person or persons or body shall hear appeals for denial of access to records under the Freedom of Information Law:

Senior Vice President and Counsel [.]

New York State Housing Finance Agency

[3 Park Avenue

33rd Floor

New York, NY 10016

(212) 736-4949]

641 Lexington Avenue

New York, NY 10022

Subdivision (e) of section 2150.7 is amended to read as follows:

(e) The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of a written appeal, identifying:

(1) the date of the appeal;

(2) the date and location of the requests for records;

(3) *a description, to the extent possible, of the records to which the requester was denied access;*

(4) whether the denial of access was in writing or due to failure to provide records [promptly] as required by section 2150.5(c) or (d) of this Part; and

(5) the name and return address of the requester.

Subdivision (f) of section 2150.7 is amended to read as follows:

(f) [The individual or body designated to hear appeals shall inform the requester of its decision, in writing, within seven business days of receipt of an appeal.] *A failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.*

Subdivision (g) of section 2150.7 is amended to read as follows:

(g) The person or body designated to hear appeals shall transmit to the Committee on [Public Access to Records] *Open Government* copies of all appeals upon receipt of appeals. Such copies shall be addressed to:

Committee on [Public Access to Records] *Open Government*
 Department of State
 [162 Washington Avenue] 41 State Street
 Albany, [NY] New York 12231

Subdivision (h) of section 2150.7 is amended to read as follows:

(h) The person or body designated to hear appeals shall inform [the appellant and] the Committee on [Public Access to Records] *Open Government* of its determination in writing within [seven] *ten* business days of receipt of an appeal. The determination shall be transmitted to the Committee on [Public Access to Records] *Open Government* in the same manner as set forth in subdivision [f] of [g] in this section.

Section 2150.8 is amended to read as follows:

Section 2150.8 Fees.

(a) There shall be no fee charged for the following:

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part.

(b) The fee for photocopies not exceeding [8 ½] 9 by 14 inches is 25 cents per page. The fee for copies of records other than photocopies which are [8 ½] 9 by 14 inches or less in size shall be the actual copying cost, excluding fixed agency costs such as salaries.

Section 2150.9 is amended to read as follows:

Section 2150.9 Public notice.

[A notice containing the title or name and business address of the records access officers and appeals person or body, and the location where records can be seen or copied, shall be posted in a conspicuous location wherever records are kept and/or published in a local newspaper of general circulation.] *The Agency shall post in a conspicuous location information regarding the name, title, business address and business telephone number of the records access officer(s) and appeals person or body; the location where records can be inspected and copied; and the right to appeal by any person denied access to a record. Such information shall also be made available by inquiry to the Agency's general telephone number.*

Text of proposed rule and any required statements and analyses may be obtained from: Jay M. Ticker, Housing Finance Agency, 641 Lexington Ave., New York, NY 10022, (212) 688-4000, email: jayt@nyhomes.org

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 Withdrawal Objection

Objection was received in the form of a letter to the State of New York Mortgage Agency (the "Agency") from New York State Assembly members RoAnn Destito and Ruben Diaz, Jr. dated February 13, 2006. The Assembly members wrote that the Agency's proposed rule contained provisions that were inconsistent with New York State Freedom of Information Law ("FOIL") and the regulations of the Committee on Open Government, and that the inconsistencies could result in diminished access to Agency records.

Regulatory Impact Statement

1. Statutory Authority

The source of the State of New York Mortgage Agency's ("Agency") Statutory authority for the proposed rule is Public Officers Law, Section 87, which reads, in relevant part: "Access to agency records. 1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article. (b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed..." The objective of giving the Agency such responsibility is to ensure that the Agency has procedures in place that will guarantee that information used in Agency decision-making is accessible to the public, subject to certain exceptions detailed in the statute. The rule follows prescriptions relating to access to records set out in Section 89 subdivisions (4), (5), and (6) of this Public Officers Law.

2. Needs and Benefits

The proposed rule puts into place efficient procedures for providing the public with information they are entitled to pursuant to the Freedom of Information Law ("FOIL").

3. Costs

No substantial costs are associated with the rule either (i) to regulated

persons or (ii) to the Agency, the State or Local Governments. Because it is obvious that no substantial costs will result from this rule-making, the Agency need not detail, as required in SAPA Section 202-a.3.(c)(iii) and (iv), the information, sources and methodology used to determine the projected costs of the rule.

4. Paperwork

The rule requires only minimal changes to the documentary requirements already incumbent upon the parties concerned.

5. Local Government Mandates

The rule-making does not impose any service, duty or responsibility upon any county, city, town, school district, fire district, or other special district.

6. Duplication

The Agency's rule is submitted pursuant to a requirement of New York State's Public Officers Law. The Agency is not aware of any duplication, overlap or conflict with any rules or legal requirements of the state or federal government.

7. Alternatives

In its rule-making, the Agency has sought to comply with the requirements of statutory and regulatory authority with regard to FOIL. Compliance with such statutes and regulations does not allow for significant alternatives to the rule the Agency has submitted.

8. Federal Standards

The rule exceeds federal standards only in those ways required by the statutory authority of Public Officers Law and the regulatory authority of the Committee on Open Government, as set forth in Title 21. Part 1401.1-10.

9. Compliance Schedule

The proposed rule will take effect as soon as possible under applicable law.

Regulatory Flexibility Analysis

The proposed rule does not impose any adverse economic impact, nor does it impose reporting, recordkeeping or other compliance requirements, on small businesses or local governments. Because the Agency's finding is obvious, the Agency need not detail, as required in SAPA Section 202-b.3.(a), the reasons upon which the finding was made, including measures the Agency took to ascertain that the rule would not impose such compliance requirements or adverse economic impact.

Rural Area Flexibility Analysis

The proposed rule does not impose any adverse impact, nor does it impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Because the Agency's finding is obvious, the Agency need not detail, as required in SAPA Section 202-c.3.(a), the reasons upon which the finding was made, including measures the agency took to ascertain that the rule would not impose such compliance requirements or adverse impact.

Job Impact Statement

The Agency has reviewed Section 201-a.2(a) of the State Administrative Procedures Act, which Section sets forth the conditions under which a Job Impact Statement ("JIS") is required to be filed with a Notice of Proposed Rule Making. The Agency has determined that its rule will have no impact on jobs and employment opportunities. Because this determination is evident from the subject matter of the rule, no summary of the information and methodology underlying this determination is attached.

Office of Mental Health

NOTICE OF ADOPTION

Medical Assistance Payment for Outpatient Programs

I.D. No. OMH-32-08-00001-A

Filing No. 998

Filing Date: 2008-10-07

Effective Date: 2008-10-22

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

Action taken: Amendment of Part 588 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 43.01

Subject: Medical Assistance Payment for Outpatient Programs.

Purpose: Provide increased reimbursement rates and COLAS for certain mental health treatment programs as per the 2008-09 State budget.

Text or summary was published in the August 6, 2008 issue of the Register, I.D. No. OMH-32-08-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Operation of Outpatient Programs

I.D. No. OMH-32-08-00002-A

Filing No. 999

Filing Date: 2008-10-07

Effective Date: 2008-10-22

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

Action taken: Amendment of Part 587 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 7.15 and 31.04

Subject: Operation of Outpatient Programs.

Purpose: To increase the number of children's designated specialty clinics in NYC, in accordance with the enacted 2008-09 State Budget.

Text or summary was published in the August 6, 2008 issue of the Register, I.D. No. OMH-32-08-00002-P.

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

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

Assessment of Public Comment

The agency received no public comment.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Waiver Authority

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

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

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

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

Subject: Waiver authority.

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

Text of revised rule: 1. Pursuant to the authority granted the Commissioner in § 7.09(b) and 31.04(a) of the Mental Hygiene Law, Title 14 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new Part 501, to read as follows:

PART 501

MENTAL HEALTH SERVICES - GENERAL PROVISIONS

§ 501.1 Legal base.

(a) Section 7.09 of the Mental Hygiene Law gives the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

(b) Section 31.01 of the Mental Hygiene Law charges the Commissioner of the Office of Mental Health with the responsibility to promulgate rules and regulations requiring the development of evaluation criteria and methods including, but not limited to: uniform definitions of services for persons with mental disabilities; uniform financial and clinical reporting procedures; requirements for the generation and maintenance of uniform data for all individuals receiving services from any provider of services; uniform criteria for evaluating categories of need; and uniform standards for all comparable services and programs.

(c) Section 31.04 of the Mental Hygiene Law grants the Commissioner of Mental Health the power and responsibility to adopt regulations to effectuate the provisions and purposes of Article 31 of such law, including

procedures for the issuance and amendment of operating certificates, and for setting standards of quality and adequacy of facilities.

§ 501.2 Definitions. For purposes of this Title:

(a) Commissioner means the Commissioner of the New York State Office of Mental Health.

(b) Office means the New York State Office of Mental Health.

(c) Provider of services means a provider of services, as defined in section 1.03 of the Mental Hygiene Law, which is responsible for the operation of a program or network of programs. Such entity may be an individual, partnership, association, corporation, limited liability company, or public or private agency, other than an agency of the state, which provides services for persons with mental illness.

(d) Mental illness means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.

(e) Minor means a person who has not attained the age of eighteen years.

§ 501.3 Waiver.

(a) Waiver.

(1) The Commissioner shall have the authority to waive regulatory requirements within Chapter XIII of this Title, which are not otherwise required by State or Federal law.

(2) The Commissioner may grant a waiver of a regulatory requirement requested pursuant to this section if he/she determines that:

(i) the rights, health and safety of clients would not be diminished;

(ii) the best interests of clients would be served;

(iii) the benefits of waiving the requirement outweigh the public interest in meeting the requirement; and

(iv) the purpose of the request is to implement/test innovative programs that may increase the efficiency or effectiveness of operations, to provide additional flexibility to better meet local service needs while maintaining program quality and integrity, or other purposes deemed appropriate by the Commissioner.

(3) The granting of waivers will be at the sole discretion of the Commissioner.

(4) A request for a waiver must be submitted in writing, must clearly cite the regulatory requirements at issue, must provide sufficient evidence of prior consultation with the appropriate local governmental unit or units, must contain substantial documentation to support the need for the waiver, including documentation which demonstrates that it is consistent with the provisions of paragraph two of this subdivision, and must include such other information as the Commissioner may require.

(5) Special limits, conditions or restrictions may be established by the Commissioner in granting a waiver.

(6) Waivers issued under this section shall be in effect for no longer than three years. In the case of a waiver granted to a provider of services for whom an operating certificate has been issued pursuant to Article 31 of the Mental Hygiene Law, such waiver shall be in effect no longer than the duration of the operating certificate held by the facility for which such waiver is granted. Waivers shall not be renewed unless the entity to whom the waiver has been issued submits a request for renewal to the Commissioner, provides such other information as the Commissioner may require, and documents to the satisfaction of the Commissioner that there has been consultation with the appropriate local governmental unit or units and that such renewal is consistent with the provisions of paragraph two of this subdivision.

(7) The Office shall provide public notice of applications for waivers by posting such information on its internet site. The Office shall review and consider any public comments which are received regarding the application for a waiver. The Office shall supplement its internet posting with the Commissioner's determination with respect to each application, when such determination is made.

(b) Nothing in this section shall be deemed to limit the ability of the Commissioner to waive regulations, to the extent permitted by law, in extreme emergencies, such as natural disasters, acts of terrorism, or as directed by the Governor.

(c) Nothing in this section shall be deemed to alter the Commissioner's authority to waive regulatory requirements in accordance with specific authority established in other Parts of Chapter XIII of this Title.

§ 501.4 Severability.

If any provision of this Part or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Part which can be given effect without the invalid provision or application, and to this end the provisions of this Part are declared to be severable.

Revised rule compared with proposed rule: Substantial revisions were made in section 501.3.

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

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

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

Revised 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 (b) of Section 31.01 of the Mental Hygiene Law charges the Commissioner of the Office of Mental Health with the responsibility to promulgate rules and regulations requiring the development of evaluation criteria and methods.

Subdivision (a) of Section 31.04 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the power to adopt regulations setting standards of quality and adequacy of facilities and establishing procedures for the issuance, amendment and renewal of operating certificates.

2. Legislative Objectives: Articles 7 and 31 of the Mental Hygiene Law reflect the Commissioner's authority to establish regulations regarding mental health programs.

3. Needs and Benefits: Part 501 of Title 14 NYCRR would grant the Commissioner of the Office of Mental Health the ability to waive regulatory requirements for purposes of testing innovating programs that may increase the efficiency and effectiveness of operations or providing additional flexibility to better meet local service needs while maintaining program quality and integrity. It will serve to encourage innovated approaches to service delivery and, over time, will provide the Office of Mental Health with the ability to assess the need for regulatory amendments on a statewide basis.

The waiver authority granted to the Commissioner of the Office of Mental Health under Part 501 would ultimately allow providers sufficient flexibility to implement innovated approaches which will result in improved service delivery and outcomes for recipients of mental health services. It is important to note that the waiver process is not to be used to circumvent the regulations process. It is merely to enhance the ability of the Commissioner to, on an individual case basis, grant a waiver of regulatory requirements if he or she determines that the rights, health and safety of clients would not be diminished, the best interest of the clients would be served, the benefit of waiving the requirement outweighs the public interest in meeting the requirement, and the purpose of the request is to implement/test innovative programs that may increase the efficiency or effectiveness of operations, or provide additional flexibility to better meet local service needs while maintaining program quality and integrity. Waivers would be in effect for no longer than three years or the duration of an entity's operating certificate and would not be renewed unless sufficient documentation is produced verifying that there has been consultation with the appropriate local governmental unit and that the renewal is consistent with the provisions of Section 501.3(a)(2).

4. Costs:

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

(b) cost to State and local government: This regulatory amendment will not result in any additional costs to State and local government.

5. Paperwork: There would be minimal paperwork associated with the waiver request process.

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

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

8. Alternative Approaches: The only alternative to this regulatory amendment would be inaction. Since the amendment will ultimately result in an improved service delivery system and better outcomes for recipients of mental health services, that alternative was necessarily rejected.

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

10. Compliance Schedule: The regulatory amendment would be effective immediately upon adoption.

Regulatory Flexibility Analysis

The proposed rule will serve to provide the Commissioner of the Office of Mental Health with the ability to waive regulatory requirements for purposes of testing innovative programs that may increase the efficiency and effectiveness of operations or providing additional flexibility to better meet local service needs. Because it is evident from the nature of the proposed rule that there will be no adverse economic impact on small businesses or local governments, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

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

areas. Recipients of mental health services in rural and non-rural programs will benefit from the innovated service delivery system which will be encouraged as a result of this rule.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the proposed rule will not have any adverse impact on jobs and employment opportunities. It merely provides the Commissioner of the Office of Mental Health with the ability to waive regulatory requirements in specific circumstances for purposes of testing innovative programs that may increase the efficiency and effectiveness of operations or providing additional flexibility to better meet local service needs.

Assessment of Public Comment

Issue: The regulation as written is overly broad and the standards for meeting the waiver requirement are unclear.

Response: The revised regulation clarifies the parameters for the granting of waivers.

Issue: There is a lack of transparency with this regulation as written in that there is no requirement that the agency publish the decision regarding a waiver request or allow for public comment.

Response: OMH recognizes that it is important that this process be transparent; therefore, the regulation has been revised to require the agency to provide public notice of applications for waivers, and to post the decision regarding said requests on its website (www.omh.state.ny.us). In addition, the rule has been revised to require any public comment which is received will be reviewed and considered by the agency in making its decision.

Issue: The granting of waiver authority for the Commissioner of the Office of Mental Health will create an uneven playing field for service providers.

Response: Entities shall have an opportunity to apply for a waiver of a regulatory requirement if they meet the criteria established in the revised Part 501 rulemaking. In addition, the agency will post the request and the decision for all waiver requests on its website.

Issue: If a regulation does not serve the public interest or is overly rigid and has outlived its usefulness, it should be repealed and not waived on a case-by-case basis pursuant to individual application. The waiver provision appears to create an "end-run" around the rulemaking process contained within the State Administrative Procedure Act.

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

Issue: The regulation as written appears to limit the availability of a general waiver to a provider of services, even though an entity covered by an OMH regulation may be someone other than a provider.

Response: The revised rulemaking removes the language which specified the request must come from a provider.

Issue: The regulation as written does not provide prior notice to a local governmental unit or grant said unit the opportunity to comment. In addition, many of the regulatory provisions materially impact the programmatic or fiscal obligations or purview of local government, and the regulation as written appears to allow discretionary OMH waiver of such provisions.

Response: The revised rulemaking specifies that a request for waiver must provide sufficient evidence of prior consultation with the appropriate local governmental unit or units (LGU). Further, any renewal requests must also include documentation of consultation with the LGU.

Issue: The regulation as written does not provide the agency with the ability to waive regulatory requirements in order to facilitate a mental health response to a mass disaster.

Response: The revised rulemaking addresses this issue in Section 501.3(b) and explicitly states that the waiver process established in the regulation will not limit the ability of the Commissioner to waive regulations, to the extent permitted by law, in extreme emergencies such as natural disasters, acts of terrorism, or as directed by the Governor.

Issue: The regulation as written was compared to the waiver authority which exists in the Office of Alcoholism and Substance Abuse (OASAS) regulations, and the writer claims that the OASAS waiver authority is granted only for certain regulations.

Response: This comment reflects a misunderstanding of OASAS regulations. 14 NYCRR Section 800.3 provides the Commissioner of OASAS with waiver authority with respect to all regulatory requirements of the Part 800 series of 14 NYCRR, when not specifically required by law.

Issue: The agency may experience a high volume of waiver requests, which will result in the need for additional staffing and high administrative costs associated with this regulation.

Response: Employees of the Office of Mental Health will serve as members of the waiver committee, and the committee will report its findings directly to the Commissioner. There should be no high administrative costs associated with this regulation.

Issue: The burden should be on the entity which received the waiver to prove that the waiver was consistent with the goals of the regulation.

Response: Section 501.3(a)(6) addresses this issue and states that no waivers shall be in effect for longer than three years, and for those entities for whom an operating certificate has been issued pursuant to Article 31 of the Mental Hygiene Law, waivers shall be in effect no longer than the duration of the operating certificate. Waivers will not be renewed unless the request for renewal documents to the satisfaction of the Commissioner that there has been consultation with the appropriate local governmental unit and that the renewal is consistent with the goals specified in the regulation, specifically Section 501.3(a)(2).

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Reimbursement of Property and Capital Equipment Costs in Day Habilitation and Prevocational Services

I.D. No. MRD-43-08-00010-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 635-10.5(c)(4) and (e)(5) of Title 14 NYCRR.

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

Subject: Reimbursement of property and capital equipment costs in day habilitation and prevocational services.

Purpose: To establish a methodology for reimbursement of property/capital equipment costs in day habilitation/prevocational services.

Text of proposed rule: Subparagraph 635-10.5(c)(4)(vi) is replaced as follows:

(vi) The capital cost portion of the unit price for all four types of non-state-operated day habilitation shall be determined by dividing the approved annual budgeted capital costs by 12 and shall be paid monthly.]

(vi) *Allowable capital costs for group day habilitation services shall be reimbursed. Effective January 1, 2009, the capital cost portion for group day habilitation shall be included in the group day habilitation price as follows:*

(a) *OMRDD shall determine the property component add-on by dividing the annual amount specified in the provider's day habilitation sites' total allowable costs of real property by the total number of units of service OMRDD authorized for the period.*

(b) *OMRDD shall determine the capital equipment component add-on by dividing the annual day habilitation allowable capital equipment expense reported by the provider in its cost report by the units of service OMRDD authorized for the current price period. The capital equipment expense will be extracted from the cost report for a reporting period that precedes the price period by two years, provided that the cost report conforms to the requirements in Subpart 635-4 of this Title. Otherwise, OMRDD will use the capital equipment component add-on in the previous price. For providers which have not operated any group day habilitation services during the cost reporting period (two years prior to the beginning of the price period), the annual budgeted capital equipment amount approved by OMRDD will be divided by the units of service OMRDD authorized for the current price period. For providers with an existing group day habilitation site(s) in operation during the cost reporting period two years prior to the price period, and- which open a new group day habilitation site during the price period, the approved annual budgeted capital equipment costs for the new site will be combined with the capital equipment expenses reported on the cost report described above and divided by the new total OMRDD authorized units of service.*

Subparagraph 635-10.5(e)(5)(vi) is replaced as follows:

(vi) The capital portion of the unit price for non-state-operated prevocational services shall be determined by dividing the approved annual budgeted capital costs by 12 and shall be paid monthly.]

(vi) *Effective January 1, 2009, the capital cost portion for prevocational services shall be reimbursed as follows:*

(a) *OMRDD shall determine the property component add-on by dividing the annual amount specified in the provider's prevocational sites' total allowable costs of real property by the total number of units of service OMRDD authorized for the period.*

(b) *OMRDD shall determine the capital equipment component add-on by dividing the annual prevocational allowable capital equipment expense reported by the provider in its cost report by the units of service OMRDD authorized for the current price period. The capital equipment expense will be extracted from the cost report for a reporting period that precedes the price period by two years, provided that the cost report conforms to the requirements in Subpart 635-4 of this Title. Otherwise, OMRDD will use the capital equipment component add-on in the previous price. For providers which have not operated any prevocational services during the cost reporting period (two years prior to the beginning of the price period), the annual budgeted capital equipment amount approved by OMRDD will be divided by the units of service OMRDD authorized for the current price period. For providers with an existing prevocational site(s) in operation during the cost reporting period two years prior to the price period, and which open a new prevocational site during the price period, the approved annual budgeted capital equipment costs for the new site will be combined with the capital equipment expenses reported on the cost report described above and divided by the new total OMRDD authorized units of service.*

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

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

Additional matter required by statute: Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has on file a Negative Declaration with respect to this Action. OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory Authority:

a. The New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility to assure and encourage the development of programs and services in the area of care, treatment, rehabilitation, education and training of persons with mental retardation and developmental disabilities, as stated in the New York State Mental Hygiene Law Section 13.07.

b. OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

c. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates and fees for services in facilities licensed or operated by OMRDD.

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, and 43.02 of the Mental Hygiene Law by making revisions to the regulations governing day habilitation and prevocational services. The proposed amendments will establish a new methodology for pricessetting for property and capital equipment costs in these services.

3. Needs and Benefits: The proposed method of reimbursing capital costs for providers of group day habilitation and prevocational services ties reimbursement to the units of service. By converting the process for reimbursing capital costs to be consistent with the process for reimbursing operational costs, OMRDD is essentially simplifying the mechanics of reimbursement. What was a two step process because it utilized different methods for reimbursing capital vs. operations becomes a one step process and, by using a common denominator, reimbursement for both components can occur simultaneously. The entire group day habilitation or prevocational services payment will now be paid through eMedNY. This allows for better auditing and monitoring, and increases transparency and accountability in the Medicaid program.

4. Costs:

a. Costs to the Agency and to the State and its local governments: There will be no new costs to OMRDD or the State. There will also be no new costs to local governments as a result of the proposed amendments.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. For providers that are at 100% capacity, there will be no reduction in the reimbursement received by utilizing a price-based methodology. For providers which are not at 100% capacity, there will be a minor reduction in the amounts received. Because of the unpredictable nature of vacancies, OMRDD is unable to reliably

quantify this reduction in aggregate or on a provider-specific basis. It may approximate \$300,000 in total.

5. Local Government Mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: There are no new paperwork requirements resulting from this proposed regulation. The calculation of the new price component will be based on information which is already submitted to OMRDD.

7. Duplication: The proposed amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited services for persons with developmental disabilities.

8. Alternatives: OMRDD considered the feasibility of retaining the current two step process instead of the one-step process for reimbursement of costs that is established by the proposed regulation. However, OMRDD determined that because of the heightened importance of increasing accountability, ease and functionality of billing, enhanced clarity, and administrative efficiency, that the proposed methodology was preferable to the current process.

9. Federal Standards: The proposed regulations do not exceed any minimum standards of the federal government.

10. Compliance Schedule: OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act. OMRDD will provide all necessary information and guidance to providers regarding the revised prices before they become effective.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies which provide day habilitation and prevocational services to persons with developmental disabilities. While most services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities operated by these agencies at discrete sites (e.g. small day habilitation programs) employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses. As of September 2008, OMRDD estimates that there were approximately 693 day habilitation programs and 124 prevocational programs that would be affected by the proposed amendments.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not have any negative effects on these small business providers of day habilitation and prevocational services, and that they will continue to provide appropriate funding for the delivery of such services.

The amendments only change the methodology for the reimbursement of property and capital equipment costs in facilities providing day habilitation and prevocational services.

Billing procedures will be simplified by moving from a two-step process with operating costs and capital costs reimbursed through separate mechanisms, to a single-step process with both types of costs reimbursed through one price.

The amendments will have no effect on local governments.

2. Compliance requirements: Providers will not need to submit any additional information to OMRDD for the calculation of the new property component add-on and capital equipment component add-on. OMRDD already has the necessary information for existing programs because of the providers' annual submission of cost reports pursuant to longstanding regulatory requirements. As mentioned previously, billing procedures will be simplified as a result of the proposed regulations.

3. Professional services: No additional professional services are required as a result of these amendments. The amendments will not add to the professional service needs of local governments.

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these proposed amendments.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse impact: There is no adverse economic impact for providers which are at 100% capacity. The amendments may result in a minor reduction in reimbursements for providers whose programs are not at 100% capacity. Because of the unpredictable nature of vacancies, OMRDD is unable to reliably quantify this reduction in aggregate or on a provider-specific basis. It may approximate \$300,000 in total. All providers may realize some modest savings due to billing simplification.

7. Small business and local government participation: The proposal was distributed to provider associations and discussed at provider association meetings on September 11 and 22, 2008.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. This is based on the fact that the amendments are concerned with revising the reimbursement methodologies for property and capital equipment costs for day habilitation and prevocational services. OMRDD expects that adoption of the amendments will have a minor, if any, adverse economic impact on regulated parties. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the reimbursement methodologies are primarily based upon allowed property and capital equipment costs of individual facilities. Thus, the reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. This finding is based on the fact that the amendments are concerned with revising the reimbursement methodologies for property and capital equipment costs for day habilitation and prevocational services. The subject of the amendments does not concern matters related to employment, and the amendments will result in minor economic impact, if any, to providers. Therefore, the amendments will not have any adverse impacts on jobs or employment opportunities in New York State.

New York State Mortgage Agency

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Access to Agency Records

I.D. No. MTG-43-08-00005-P

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

Proposed Action: Amendment of Part 2250 of Title 21 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. MTG-52-05-00002-P.

Statutory authority: Public Officers Law, section 87(b)

Subject: Public access to agency records.

Purpose: To provide procedures by which records may be obtained from the agency.

Text of proposed rule: Subdivision (a) of section 2250.1 is amended to read as follows:

(a) The people's right to know the process of government decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by [shrouding it with the cloak of] secrecy or confidentiality.

Subdivision (b) of section 2250.1 is amended to read as follows:

(b) This Part provides information concerning the procedures by which records may be obtained from the Agency pursuant to the Freedom of Information Law.

Subdivision (c) of section 2250.1 is amended to read as follows:

(c) Personnel shall furnish to the public the information and records required by the Freedom of Information Law [and those which were furnished to the public prior to its enactment.], as well as records otherwise available by law.

Subdivision (a) of section 2250.2 is amended to read as follows:

(a) The [chairman] *President* and [chief executive officer] *Chief Executive Officer* is responsible for [insuring] *ensuring* compliance with this Part, and designates the following person(s) as records access officer(s): [Treasurer, 405 Lexington Avenue, New York, NY 10017]

Public Information Officer
State of New York Mortgage Agency
641 Lexington Avenue
New York, NY 10022

E-mail: FOIOfficer@nyhomes.org

Subdivision (b) of section 2250.2 is amended to read as follows:

(b) The records access officer is responsible for [insuring] ensuring appropriate agency response to public requests for access to records. [However, the public] *The designation of records access officers* shall not be [denied access to records through] construed to prohibit officials who have in the past been authorized to make records or information available [The records] to the public from continuing to do so. Records access [officer] officers shall [assure] ensure that personnel:

(1) maintain an up-to-date subject matter list;

(2) assist the requester in identifying [requested] records sought, if necessary[.], and when appropriate, indicate the manner in which records are filed, retrieved or generated to assist person in reasonably describing records[.];

(3) contact persons seeking records when a request is voluminous or when locating sought records involves substantial effort, so that personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested;

[(3)] (4) upon locating the records, take one of the following actions: [in accordance with section 2250.6(b) of this Part]

(i) make records [promptly] available for inspection; or

(ii) deny access to the records in whole or in part, and explain in writing the reasons [thereof:] for such denial.

[(4)] (5) upon request for copies of records, [:(i)] make [copy] copies available upon payment or offer to pay established fees, if any, in accordance with section 2250.8 of this Part [; or (ii) permit the requester to copy those records;]

[(5)] (6) upon request, certify that a [transcript] record is a true copy [of records copied]; and

[(6)] (7) upon failure to locate records, certify that:

(i) the State of New York Mortgage Agency is not the [legal] custodian for such records; or

(ii) the records of which the State of New York Mortgage Agency is a [legal] custodian[,] cannot be found after diligent search [, cannot be found].

Section 2250.3 is repealed.

A new section 2250.3 is added to read as follows:

Section 2250.3. Subject matter list.

(a) *The records access officer shall maintain a reasonably detailed current list, by subject matter, of all records in its possession, whether or not records are available pursuant to subdivision 2 of section 87 of the Public Officers Law.*

(b) *The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.*

(c) *The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list.*

Section 2250.4. is amended to read as follows:

Records shall be [made] available for [public] inspection and copying at [405 Lexington Avenue, NY 10017, or at the location where they are kept.] the offices of the State of New York Mortgage Agency, including its principal office at:

New York State Housing Finance Agency

641 Lexington Avenue

New York, New York 10022

Section 2250.5 is amended to read as follows:

[Requests for public access to records] *Records of the Agency* shall be [accepted and records] produced for inspection by appointment during all hours and days regularly open for business. These hours are: Monday through Friday, 9 a.m. to 5 p.m.

Section 2250.6 is repealed.

A new section 2250.6 is added to read as follows:

Section 2250.6. Requests for public access to records.

(a) *A written request for records is required. Written requests must be received by mail or hand delivery to the offices of the Agency, or e-mail or facsimile transmission to the respective address or number then currently specified on the Agency's website. If a requested record is maintained on the internet, the Agency's response to the request shall inform the requester that the record is accessible via the internet and in printed form, either on paper or other information storage medium.*

(b) *A request should reasonably describe the record or records sought. Whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.*

(c) *Within five business days of receipt of the request the Agency shall:*

(i) *inform the requester that their request, or a portion of their request, does not reasonably describe record(s) sought, and provide assistance and direction, to the extent possible, which shall assist the person making the request in reasonably describing such records;*

(ii) *grant or, in writing, deny access to the records requested in whole or in part;*

(iii) *provide a written acknowledgement of receipt of the request and state the approximate date, which shall be reasonable under the circumstances, and in no instance exceed twenty business days, when the request will be granted or denied; or*

(iv) *if it is known that circumstances will prevent disclosure of the record(s) within twenty (20) days from the date of the acknowledgement, provide a written explanation for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.*

If, after having acknowledged the receipt of a request and provided to a requester an approximate date when a request will be granted in whole or in part, it becomes known that circumstances will prevent the Agency from granting the request in the time specified, the Agency shall, within twenty business days of the initial acknowledgement, provide a statement in writing stating the reason for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

(d) *In determining a reasonable time for granting or denying a request under the circumstances of a request, personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the Agency, and similar factors that bear on the ability to grant access to records promptly and within a reasonable time.*

(e) *The Agency's failure to comply with such time limits and procedures as are set forth in Section (c) of this Part, and/or the failure to respond to a request within a reasonable time after an approximate date given, in conformity with (c)(iii) of this Section, which response shall in no instance be provided in excess of twenty business days after the date of acknowledgement of the receipt of request, unless a written explanation for the inability to grant access to the records is provided, in conformity with (c)(iv) of this Section, shall constitute a denial of a request that may be appealed.*

Subdivision (a) of section 2250.7 is amended to read as follows:

(a) *Denial of access [to records] shall be in writing, stating the reason therefor and advising the requester of the right to appeal to the individual or body established to hear appeals, identified by name, title, business address and business telephone number.*

Subdivision (b) of section 2250.7 is amended to read as follows:

(b) *If [requested records are not provided promptly,] the Agency fails to respond to a request as required in section 2250.5(c) and (d) of this Part, such failure shall also be deemed a denial of access.*

Subdivision (c) of section 2250.7 is amended to read as follows:

(c) *The following person or persons or body shall hear appeals for denial of access to records under the Freedom of Information Law: [Chairman and Chief Executive Officer, State of New York Mortgage Agency]*

Senior Vice President and Counsel

State of New York Mortgage Agency

[405] 641 Lexington Avenue[.]

New York, NY [10017, telephone (212) 682-1043.] 10022

Subdivision (d) of section 2250.7 is amended to read as follows:

(d) *The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of a written appeal [.] identifying:*

(1) *the date of the appeal;*

(2) *the date and location of the requests for records;*

(3) *a description, to the extent possible, of the records to which the requester was denied access;*

(4) *whether the denial of access was in writing or [was by] due to failure to provide records [promptly] as required by section [2250.6(b)] 2250.5(c) or (d) of this Part; and*

(5) *the name and return address of the requester.*

Subdivision (e) of 2250.7 is repealed.

A new subdivision (e) of section 2250.7 is added to read as follows:

(e) *A failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.*

Subdivision (f) of 2250.7 is repealed.

A new subdivision (f) of section 2250.7 is added to read as follows:

(f) *The person or body designated to hear appeals shall transmit to the Committee on Open Government copies of all appeals upon receipt of appeals. Such copies shall be addressed to:*

Committee on Open Government

Department of State

41 State Street

Albany, New York 12231

A new subdivision (g) of section 2250.7 is added to read as follows:

(g) *The person or body designated to hear appeals shall inform the Committee on Open Government of its determination in writing within ten business days of receipt of an appeal. The determination shall be transmitted to the Committee on Open Government in the same manner as set forth in subdivision (e) in this section.*

Section 2250.8 is amended to read as follows:

(a) There shall be no fee charged for the following:

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part.

(b)

(1) The fee for photocopies not exceeding [8 ½] 9 by 14 inches is 25 cents per page.

(2) The fee for copies of records other than photocopies which are [8 ½] 9 by 14 inches or less in size shall be the actual copying cost, excluding fixed agency costs such as salaries.

Section 2250.9 is repealed.

A new section 2250.9 is amended to read as follows:

Section 2250.9. Public notice.

The Agency shall post in a conspicuous location information regarding the name, title, business address and business telephone number of the records access officer(s) and appeals person or body; the location where records can be inspected and copied; and the right to appeal by any person denied access to a record. Such information shall also be made available by inquiry to the Agency's general telephone number.

2150.10. Severability.

[Any] 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: Jay M. Ticker, Housing Finance Agency, 641 Lexington Ave., New York, NY 10022, (212) 688-4000, email: jayt@nyhomes.org

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 Withdrawal Objection

Objection was received in the form of a letter to the State of New York Mortgage Agency (the "Agency") from New York State Assembly members RoAnn Destito and Ruben Diaz, Jr. dated February 13, 2006. The Assembly members wrote that the Agency's proposed rule contained provisions that were inconsistent with New York State Freedom of Information Law ("FOIL") and the regulations of the Committee on Open Government, and that the inconsistencies could result in diminished access to Agency records.

Regulatory Impact Statement

1. Statutory Authority

The source of the State of New York Mortgage Agency's ("Agency") Statutory authority for the proposed rule is Public Officers Law, Section 87, which reads, in relevant part: "Access to agency records. 1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article. (b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed..." The objective of giving the Agency such responsibility is to ensure that the Agency has procedures in place that will guarantee that information used in Agency decision-making is accessible to the public, subject to certain exceptions detailed in the statute.

2. Needs and Benefits

The proposed rule puts into place efficient procedures for providing the public with information they are entitled to pursuant to the Freedom of Information Law ("FOIL").

3. Costs

No substantial costs are associated with the rule either (i) to regulated persons or (ii) to the Agency, the State or Local Governments. Because it is obvious that no substantial costs will result from this rule-making, the Agency need not detail, as required in SAPA Section 202-a.3.(c)(iii) and (iv), the information, sources and methodology used to determine the projected costs of the rule.

4. Paperwork

The rule requires only minimal changes to the documentary requirements already incumbent upon the parties concerned.

5. Local Government Mandates

The rule-making does not impose any service, duty or responsibility upon any county, city, town, school district, fire district, or other special district.

6. Duplication

The Agency's rule is submitted pursuant to a requirement of New York State's Public Officers Law. The Agency is not aware of any duplication, overlap or conflict with any rules or legal requirements of the state or federal government.

7. Alternatives

In its rule-making, the Agency has sought to comply with the requirements of statutory and regulatory authority with regard to FOIL. Compliance with such statutes and regulations does not allow for significant alternatives to the rule the Agency has submitted.

8. Federal Standards

The rule exceeds federal standards only in those ways required by the statutory authority of Public Officers Law and the regulatory authority of the Committee on Open Government, as set forth in Title 21. Part 1401.1-10.

9. Compliance Schedule

The proposed rule will take effect as soon as possible under applicable law.

Regulatory Flexibility Analysis

The proposed rule does not impose any adverse economic impact, nor does it impose reporting, recordkeeping or other compliance requirements, on small businesses or local governments. Because the Agency's finding is obvious, the Agency need not detail, as required in SAPA Section 202-b.3.(a), the reasons upon which the finding was made, including measures the Agency took to ascertain that the rule would not impose such compliance requirements or adverse economic impact.

Rural Area Flexibility Analysis

The proposed rule does not impose any adverse impact, nor does it impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Because the Agency's finding is obvious, the Agency need not detail, as required in SAPA Section 202-c.3.(a), the reasons upon which the finding was made, including measures the agency took to ascertain that the rule would not impose such compliance requirements or adverse impact.

Job Impact Statement

The Agency has reviewed Section 201-a.2(a) of the State Administrative Procedures Act, which Section sets forth the conditions under which a Job Impact Statement ("JIS") is required to be filed with a Notice of Proposed Rule Making. The Agency has determined that its rule will have no impact on jobs and employment opportunities. Because this determination is evident from the subject matter of the rule, no summary of the information and methodology underlying this determination is attached.

Municipal Bond Bank Agency

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Access to Agency Records

I.D. No. MBB-43-08-00004-P

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

Proposed Action: Addition of Part 1990 to Title 21 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. MBB-52-05-00026-P.

Statutory authority: Public Officers Law, section 87(b)

Subject: Public access to agency records.

Purpose: To provide procedures by which records may be obtained from the agency.

Text of proposed rule: PART 1990

PUBLIC ACCESS TO RECORDS

"1990.1 Purpose and scope."

(a) The people's right to know the process of government decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by secrecy or confidentiality.

(b) This Part provides information concerning the procedures by which records may be obtained from the Agency pursuant to the Freedom of Information Law.

(c) Personnel shall furnish to the public the information and records required by the Freedom of Information Law, as well as records otherwise available by law.

(d) Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records. "1990.2 Designation of records access officer."

(a) The President and Chief Executive Officer is responsible for ensuring compliance with this Part, and designates the following person(s) as records access officer(s):

Public Information Officer
State of New York Municipal Bond Bank Agency
641 Lexington Avenue
New York, NY 10022
E-mail: FOIOfficer@nyhomes.org

(b) The records access officer is responsible for ensuring appropriate agency response to public requests for access to records. The designation of records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so. Records access officers shall ensure that personnel:

(1) maintain an up-to-date subject matter list;

(2) assist the requester in identifying records sought, if necessary, and when appropriate, indicate the manner in which records are filed, retrieved or generated to assist person in reasonably describing records;

(3) contact persons seeking records when a request is voluminous or when locating sought records involves substantial effort, so that personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested;

(4) upon locating the records, take one of the following actions:

(i) make records available for inspection; or

(ii) deny access to the records in whole or in part, and explain in writing the reasons for such denial.

(5) upon request for copies of records, make a copy available upon payment or offer to pay established fees, if any, in accordance with section 1990.8 of this Part.

(6) upon request, certify that a record is a true copy; and

(7) upon failure to locate records, certify that:

(i) the State of New York Municipal Bond Bank Agency is not the custodian for such records; or

(ii) the records of which the State of New York Municipal Bond Bank Agency is a custodian cannot be found after diligent search.

"1990.3 Location."

Records shall be available for inspection and copying at the offices of the State of New York Municipal Bond Bank Agency, including its principal office at:

State of New York Municipal Bond Bank Agency
641 Lexington Avenue
New York, New York 10022

"1990.4 Hours for public inspection."

Records of the Agency shall be produced for inspection by appointment during hours and days regularly open for business. These hours are: Monday through Friday, 9 a.m. to 5 p.m.

"1990.5 Requests for public access to records."

(a) A written request for records is required. Written requests must be received by mail or hand delivery to the offices of the Agency, or e-mail or facsimile transmission to the respective address or number then currently specified on the Agency's website. If a requested record is maintained on the internet, the Agency's response to the request shall inform the requester that the record is accessible via the internet and in printed form, either on paper or other information storage medium.

(b) A request should reasonably describe the record or records sought. Whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.

(c) Within five business days of receipt of the request the Agency shall:

(i) inform the requester that their request, or a portion of their request, does not reasonably describe record(s) sought, and provide assistance and direction, to the extent possible, which shall assist the person making the request in reasonably describing such records;

(ii) grant or, in writing, deny access to the records requested in whole or in part;

(iii) provide a written acknowledgement of receipt of the request and state the approximate date, which shall be reasonable under the circumstances, and in no instance exceed twenty business days, when the request will be granted or denied; or

(iv) if it is known that circumstances will prevent disclosure of the re-

cord(s) within twenty (20) days from the date of the acknowledgement, provide a written explanation for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

If, after having acknowledged the receipt of a request and provided to a requester an approximate date when a request will be granted in whole or in part, it becomes known that circumstances will prevent the Agency from granting the request in the time specified, the Agency shall, within twenty business days of the initial acknowledgement, provide a statement in writing stating the reason for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

(d) In determining a reasonable time for granting or denying a request under the circumstances of a request, personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the Agency, and similar factors that bear on the ability to grant access to records promptly and within a reasonable time.

(e) The Agency's failure to comply with such time limits and procedures as are set forth in Section (c) of this Part, and/or the failure to respond to a request within a reasonable time after an approximate date given, in conformity with (c)(iii) of this Section, which response shall in no instance be provided in excess of twenty business days after the date of acknowledgement of the receipt of request, unless a written explanation for the inability to grant access to the records is provided, in conformity with (c)(iv) of this Section, shall constitute a denial of a request that may be appealed. "1990.6 Subject matter list."

(a) The records access officer shall maintain a reasonably detailed current list, by subject matter, of all records in its possession, whether or not records are available pursuant to subdivision 2 of section 87 of the Public Officers Law.

(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.

(c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list.

"1990.7 Denial of access to records."

(a) Denial of access shall be in writing, stating the reason therefor and advising the requester of the right to appeal to the individual or body established to hear appeals, identified by name, title, business address and business telephone number.

(b) If the Agency fails to respond to a request as required in section 1990.5(c) and (d) of this Part, such failure shall also be deemed a denial of access.

(c) The following person or persons or body shall hear appeals for denial of access to records under the Freedom of Information Law:

Senior Vice President and Counsel
State of New York Municipal Bond Bank Agency
641 Lexington Avenue
New York, NY 10022

(d) The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of a written appeal, identifying:

(1) the date of the appeal;

(2) the date and location of the requests for records;

(3) a description, to the extent possible, of the records to which the requester was denied access;

(4) whether the denial of access was in writing or due to failure to provide records as required by section 1990.5(c) or (d) of this Part; and

(5) the name and return address of the requester.

(e) A failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.

(f) The person or body designated to hear appeals shall transmit to the Committee on Open Government copies of all appeals upon receipt of appeals. Such copies shall be addressed to:

Committee on Open Government
Department of State
41 State Street
Albany, New York 12231

(g) The person or body designated to hear appeals shall inform the Committee on Open Government of its determination in writing within ten business days of receipt of an appeal. The determination shall be transmitted to the Committee on Open Government in the same manner as set forth in subdivision (e) in this section.

“1990.8 Fees.”

(a) There shall be no fee charged for the following:

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to this Part.

(b) The fee for photocopies not exceeding 9 by 14 inches is 25 cents per page. The fee for copies of records other than photocopies which are 9 by 14 inches or less in size shall be the actual copying cost, excluding fixed agency costs such as salaries.

“1990.9 Public notice.”

The Agency shall post in a conspicuous location information regarding the name, title, business address and business telephone number of the records access officer(s) and appeals person or body; the location where records can be inspected and copied; and the right to appeal by any person denied access to a record. Such information shall also be made available by inquiry to the Agency’s general telephone number.

“1990.10 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: Jay M. Ticker, Housing Finance Agency, 641 Lexington Ave., New York, NY 10022, (212) 688-4000, email: jayt@nyhomes.org
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 Withdrawal Objection

Objection was received in the form of a letter to the State of New York Mortgage Agency (the “Agency”) from New York State Assembly members RoAnn Destito and Ruben Diaz, Jr. dated February 13, 2006. The Assembly members wrote that the Agency’s proposed rule contained provisions that were inconsistent with New York State Freedom of Information Law (“FOIL”) and the regulations of the Committee on Open Government, and that the inconsistencies could result in diminished access to Agency records.

Regulatory Impact Statement

1. Statutory Authority

The source of the State of New York Mortgage Agency’s (“Agency”) Statutory authority for the proposed rule is Public Officers Law, Section 87, which reads, in relevant part: “Access to agency records. 1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article. (b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed...” The objective of giving the Agency such responsibility is to ensure that the Agency has procedures in place that will guarantee that information used in Agency decision-making is accessible to the public, subject to certain exceptions detailed in the statute.

2. Needs and Benefits

The proposed rule puts into place efficient procedures for providing the public with information they are entitled to pursuant to the Freedom of Information Law (“FOIL”).

3. Costs

No substantial costs are associated with the rule either (i) to regulated persons or (ii) to the Agency, the State or Local Governments. Because it is obvious that no substantial costs will result from this rule-making, the Agency need not detail, as required in SAPA Section 202-a.3.(c)(iii) and (iv), the information, sources and methodology used to determine the projected costs of the rule.

4. Paperwork

The rule requires only minimal changes to the documentary requirements already incumbent upon the parties concerned.

5. Local Government Mandates

The rule-making does not impose any service, duty or responsibility upon any county, city, town, school district, fire district, or other special district.

6. Duplication

The Agency’s rule is submitted pursuant to a requirement of New York State’s Public Officers Law. The Agency is not aware of any duplication, overlap or conflict with any rules or legal requirements of the state or federal government.

7. Alternatives

In its rule-making, the Agency has sought to comply with the requirements of statutory and regulatory authority with regard to FOIL. Compliance with such statutes and regulations does not allow for significant alternatives to the rule the Agency has submitted.

8. Federal Standards

The rule exceeds federal standards only in those ways required by the statutory authority of Public Officers Law and the regulatory authority of the Committee on Open Government, as set forth in Title 21. Part 1401.1-10.

9. Compliance Schedule

The proposed rule will take effect as soon as possible under applicable law.

Regulatory Flexibility Analysis

The proposed rule does not impose any adverse economic impact, nor does it impose reporting, recordkeeping or other compliance requirements, on small businesses or local governments. Because the Agency’s finding is obvious, the Agency need not detail, as required in SAPA Section 202-b.3.(a), the reasons upon which the finding was made, including measures the Agency took to ascertain that the rule would not impose such compliance requirements or adverse economic impact.

Rural Area Flexibility Analysis

The proposed rule does not impose any adverse impact, nor does it impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Because the Agency’s finding is obvious, the Agency need not detail, as required in SAPA Section 202-c.3.(a), the reasons upon which the finding was made, including measures the agency took to ascertain that the rule would not impose such compliance requirements or adverse impact.

Job Impact Statement

The Agency has reviewed Section 201-a.2(a) of the State Administrative Procedures Act, which Section sets forth the conditions under which a Job Impact Statement (“JIS”) is required to be filed with a Notice of Proposed Rule Making. The Agency has determined that its rule will have no impact on jobs and employment opportunities. Because this determination is evident from the subject matter of the rule, no summary of the information and methodology underlying this determination is attached.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of the Networks between Berkshire/Taconic and Cornerstone for Local Exchange Service and Exchange Access

I.D. No. PSC-43-08-00012-P

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

Proposed Action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a proposal filed by Berkshire/Taconic Tele. Co. and Cornerstone Tele. Co. for approval of a Mutual Traffic Exchange Agreement executed on August 15, 2008.

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

Subject: Interconnection of the networks between Berkshire/Taconic and Cornerstone for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Berkshire/Taconic and Cornerstone.

Substance of proposed rule: Berkshire Telephone Corporation/Taconic Telephone Corporation d/b/a FairPoint Communications and Cornerstone Telephone Company have reached a negotiated agreement whereby Berkshire Telephone Corporation/Taconic Telephone Corporation d/b/a FairPoint Communications and Cornerstone Telephone Company will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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-1142SA1)

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

Area Development Rate and the Business Incentive Rate Program

I.D. No. PSC-43-08-00013-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 proposal filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY to extend the Area Development Rate and the Business Incentive Rate Program for another three years.

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

Subject: Area Development Rate and the Business Incentive Rate Program.

Purpose: To extend the Area Development Rate and the Business Incentive Rate Program for another three years.

Substance of proposed rule: The Commission is considering The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY's (Brooklyn Union) proposal to extend its Area Development Rate and Business Incentive Rate Program for another three years.

The Commission may approve, reject or modify, in whole or in part Brooklyn Union's request.

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

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

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

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

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

(08-G-1154SA1)

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

Annual Reconciliation of Gas Expenses and Gas Cost Recoveries

I.D. No. PSC-43-08-00014-P

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

Proposed Action: The PSC is considering whether to approve, modify, or reject, in whole or in part, the filings made by various local gas distribution companies (LDCs) and municipalities regarding their Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

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

Subject: Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

Purpose: The filings of various LDCs and municipalities regarding their Annual Reconciliation of Gas Expenses and Gas Cost Recoveries.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify, or reject, in whole or in part the filings by sixteen local distribution companies and two municipalities reconciling purchased gas costs and gas cost adjustment recoveries for the twelve months ended August 31, 2008.

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-G-1148SA1)

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

United Water New York Inc. Proposes Accounting Rules to Retain a Portion of the Settlement Amount

I.D. No. PSC-43-08-00015-P

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

Proposed Action: The Commission is considering the petition of United Water New York Inc. to use special accounting treatment to retain a portion of a \$3.6 million settlement and to use a portion of the net proceeds to offset plant additions for forty years.

Statutory authority: Public Service Law, section 89-c

Subject: United Water New York Inc. proposes accounting rules to retain a portion of the settlement amount.

Purpose: To allow United Water New York Inc. to keep a portion of the net proceeds of the settlement amount.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny, or modify, in whole or in part, a petition by United Water New York Inc. (the company) to use special accounting treatment to retain a portion of a \$3.6 million settlement and to use a portion of the net proceeds to offset plant additions for forty years. The company has received \$3.6 million dollars as a result of settling certain multi-district litigation in the United States District Court of the Southern District of New York in the case of In Re Methyl Tertiary Butyl Ether Products Liability Litigation. The Commission will determine the prudence of the settlement and the disposition of the settlement funds. The Commission shall also 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. (08-W-1139SA1)

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

Business Incentive Rate Program

I.D. No. PSC-43-08-00016-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 proposal filed by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island to open a new window for the submission of applications for the Business Incentive Rate Program for another three years.

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

Subject: Business Incentive Rate Program.

Purpose: To open a new window for the submission of applications for the Business Incentive Rate Program.

Substance of proposed rule: The Commission is considering KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI's (KeySpan) proposal to open a new window for the submission of applications for their Business Incentive Rate Program for three years, from January 1, 2009 through December 31, 2011.

The Commission may approve, reject or modify, in whole or in part KeySpan's request.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-G-1155SA1)

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

The Rates and Quality of Service of Groman Shores, LLC and Whether the Company Should be Allowed to Abandon the System

I.D. No. PSC-43-08-00017-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 reviewing the rates charged by Groman Shores, LLC, the quality of service it provides to customers, and whether Groman Shores, LLC should be allowed to abandon its system.

Statutory authority: Public Service Law, section 89-c(1) and (4)

Subject: The rates and quality of service of Groman Shores, LLC and whether the company should be allowed to abandon the system.

Purpose: To investigate the rates, quality of service and proposed abandonment of Groman Shores, LLC.

Substance of proposed rule: Currently, Groman Shores LLC has two open cases before the Commission: Case 07-W-1087 which involves a petition to abandon the water system, and Case 08-W-0996, which involves a proposed rate increase. In the course of investigating the above cases, we have learned that there is a dispute between the owners of the company over the course of action the company should take. Furthermore, there is some question as to which owner has the legal authority to speak for Groman Shores LLC.

As part of the investigation, Department of Public Service Staff visited the Groman Shores system and met with many of its customers. Customers complained of repeated service interruptions and poor response from the company. The system itself suffers from a lack of maintenance and needed improvements. The proximity of the lots to each other and the presence of septic tanks prevent private wells from being used as an alternate source of water.

Given this uncertainty and the Commission's belief, based on statements of ratepayers at a recent public meeting, that the company cannot meet its service obligations with the company's current rates, the Commission is reviewing the rates and quality of service of Groman Shores, LLC and whether its owners should be allowed to abandon the system under its authority in Public Service Law § 89-c(4). The proposed investigation will encompass all issues regarding Groman Shores LLC presently before the Commission and will not be affected by the dispute between its owners.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-W-1170SA1)

Department of State

**EMERGENCY
RULE MAKING**

Continuing Education for Licensed Home Inspectors

I.D. No. DOS-43-08-00011-E

Filing No. 1001

Filing Date: 2008-10-07

Effective Date: 2008-10-07

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

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

Statutory authority: Real Property Law, section 444-f

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

Specific reasons underlying the finding of necessity: This rule was adopted on an emergency basis to preserve and enhance the public welfare. Article 12-B of the Real Property Law (Home Inspection Professional Licensing Act, which became effective December 31, 2005), requires that no person shall conduct a home inspection for compensation unless that person is licensed as a home inspector in accordance with requirements set forth in the statute, including meeting specific standards for education and experience. Further, § 444-f(1) of Article 12-B, requires that applicants for renewal of a license as a home inspector must complete a course of continuing education approved by the Secretary of State. Accordingly, to

ensure that prospective applicants continue to meet the educational standards required for their profession, this rule has been adopted on an emergency basis. As such, it is similar to those required by other regulatory statutes, and provides a greater measure of assurance to the general public that home inspectors are qualified for licensure. As part of fulfilling its ongoing obligation to provide appropriate guidelines and standards for the profession, the state home inspection council has only recently adopted the number of course hours required for meeting the continuing education requirement, thus necessitating the adoption of this rule on an emergency basis.

Subject: Continuing education for licensed home inspectors.

Purpose: Establish standards for continuing education for licensed home inspectors.

Text of emergency rule: Subpart 197-3 is added to 19 NYCRR Part 197 to read as follows:

SUBPART 197-3. HOME INSPECTION CONTINUING EDUCATION COURSES

Section 197-3.1 General requirements.

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

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

Section 197-3.2 Approved entities.

Continuing education home inspection courses (herein referred to as "sponsors") may be given by any college or university accredited by the Commissioner of Education of the State of New York or by a regional accrediting agency approved by the Commissioner of Education; public or private schools; and home inspection related professional societies and organizations. Types of instruction which shall not be acceptable as meeting continuing education requirements include such courses as:

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

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

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

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

Section 197-3.4 Program Approval.

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

Section 197-3.5 Successful completion of course.

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

have received post-instruction approval from the Department of State pursuant to 19 NYCRR 197-3.4, the course administrator must submit this information to the Department of State within 15 days of having been granted post-instruction approval by the Department of State.

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

Section 197-3.6 Equivalency Credit.

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

(b) Individuals who complete a course of study offered outside of the State of New York, which course has not been approved by the Department of State, may file a request to the Department to have such course count as credit toward their New York continuing education requirement. All applications for such consideration must be submitted with official documentation of satisfactory completion and the official descriptions of the course of study as prescribed by the Department of State. Upon receipt of such a request, the Department of State will review and evaluate the out-of-state course to determine if all or a portion of the course may be credited toward the applicant's New York continuing education requirement. Within 30 days of receipt of a request, the Department of State will approve or deny the request for New York continuing education credit.

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

Section 197-3.7 Extension of time to complete courses.

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

Section 197-3.8 Computation of instruction time.

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

Section 197-3.9 Attendance and Record Retention.

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

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

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

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

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

Section 197-3.11 Auditing.

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

Section 197-3.12 Change in approved course of study.

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

Section 197-3.13 Suspensions and denials of school approval.

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

Section 197-3.14 Open to public.

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

Section 197-3.15 Facilities.

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

Section 197-3.16 Faculty.

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

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

Section 197-3.17 Continuing education credit.

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

Section 197-3.18 Registration period.

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 4, 2009.

Text of rule and any required statements and analyses may be obtained from: Whitney A. Clark, 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

Regulatory Impact Statement

1. Statutory authority:

Article 12-B (Home Inspection Professional Licensing Act) of the Real Property Law, enacted as Chapter 461 of the Laws of 2004, and amended by Chapter 225 of the Laws of 2005, provides that no person shall perform a home inspection for compensation unless that person is licensed as a home inspector. The statute sets forth minimum standards of education and experience required to obtain a license as a home inspector. These include the successful completion of an extensive course of study of not less than one hundred forty hours, including at least forty hours of field-based inspections in the presence of a licensed home inspector, professional engineer or architect; performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination.

Real Property Law, § 444-f(1) provides that licenses for home inspectors shall be valid for two years and are subject to renewal only after successful completion of a course of continuing education approved by the Secretary of State in consultation with the home inspection council. This rule fulfills that obligation by outlining the continuing education requirements for home inspectors and setting appropriate standards for approval of home inspection courses. Accordingly, the Secretary of State has express authority to adopt this rule.

2. Legislative objectives:

In enacting Article 12-B of the Real Property Law, the legislature emphasized the significant role played by home inspectors and the reliance consumers place upon their reports in purchasing homes, especially when encouraged to do so by mortgage lenders. Recognizing that not all persons providing this service may be reliable, this legislation was enacted to provide additional assurance to consumers that those individuals performing such inspections are qualified to do so. The statute sets mini-

mum standards for the home inspection profession, which include an extensive course of study of not less than one hundred forty hours, including at least forty hours of field based inspections in the presence of a licensed home inspector, professional engineer or architect; the performance of not less than one hundred home inspections under the direct supervision of a home inspector, professional engineer or architect; and passing a standardized written examination. In addition, all applicants for renewal of a license must have successfully completed a course of continuing education approved by the Secretary of State.

Thus, Article 12-B was designed to "protect the public," especially from those who present themselves as qualified professionals without the necessary education and experience.¹ This rule re-enforces the stated objectives of the Legislature when it enacted Article 12-B by providing appropriate standards for maintaining the skills required by professional home inspectors.

3. Needs and benefits:

Real Property Law § 444-f(1) requires all home inspectors seeking renewal of their licenses to have successfully completed a course of continuing education approved by the Secretary of State, in consultation with the home inspection council. Created by statute, the home inspection council is an advisory board that advises the Secretary of State on the need for certain regulatory action, including continuing education. The home inspection council has advised the Secretary of State that this rule making is necessary to ensure that all home inspectors who apply for renewal of their licenses will have had the opportunity to meet the statutory continuing education requirement.

The rule making will pro rate the continuing education requirement for certain licensees. Licensees whose licenses expire prior to December 31, 2008 will have to complete six hours of approved continuing education. Those whose licenses expire on or after December 31, 2008 will be required to complete the full 24 hours of continuing education.

In addition, consumers benefit from the assurance that persons hired to inspect the homes they purchase continue to meet the qualifications and experience needed to render professional service.

4. Costs:

a. Costs to regulated parties:

Licensees seeking renewal will be required to pay the cost of attending and completing an approved course of study for the required number of hours. The Department has conferred with several education providers throughout the State and estimates that course providers will charge an average of \$480 for 24 hours of continuing education courses. Based on a review of continuing education fees currently being charged by course providers, the Department of State determined that each continuing education unit costs a student approximately \$20.00 per credit; or \$480 for 24 hours of continuing education.

b. Costs to the Department of State:

The Department of State anticipates that the cost and implementation will be minimal, and administration of this rule will be accomplished using existing resources.

c. Costs to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local government mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The rule requires that each applicant seeking renewal of a home inspector's license obtain and retain certificates as evidence of the successful completion of the required number of hours of continuing education.

7. Duplication:

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

8. Alternatives:

During regular meetings, the state home inspection council reviewed and considered various proposals for compliance with the statutory mandate for continuing education standards, ultimately recommending approval of the number of hours, courses of study, and methods of ensuring compliance adopted by this rule. The home inspection council considered waiving the continuing education requirement completely, or reducing the requirement to a de minimus amount. The Department, in consultation with the council determined that six hours of continuing education was appropriate insofar as it provides an accommodation to licensees whose licenses expire prior to December 31, 2008, while providing protections to consumers by guaranteeing that all licensed home inspectors complete an appropriate amount of continuing education.

9. Federal standards:

There are currently no federal standards requiring continuing education courses for licensed home inspectors.

10. Compliance schedule:

Applicants for renewal of a home inspector's license have two years in which to comply with the continuing education requirement, with a prorated reduction for renewal of licenses expiring less than two years from the effective date of this rule. The Department of State maintains a list on its website of approved continuing education providers, with their relevant contact information to assist licensees to locate approved continuing education courses. Therefore, regulated parties will be on notice of, and have adequate time to comply with, the requirements imposed by the proposed rule making.

¹ McKinney's Session Laws of New York, 2005, p. 1951.

Regulatory Flexibility Analysis

Effect of rule:

The rule affects all licensed home inspectors (individuals, firms, companies, partnerships, limited liability companies, or corporations) who seek renewal of a home inspector's license. Each such applicant will be required to expend the time and incur the costs of attending the required number of hours needed for successful completion of an approved course of continuing education, and obtain a certificate as evidence of successful completion of that requirement. However, it is not anticipated that this requirement will place an undue financial burden, or impose a hardship for those applicants seeking to maintain their qualifications for providing professional services to consumers.

The rule does not apply to local governments.

2. Compliance requirements:

Applicants seeking renewal of their licenses will be required to attend and complete an approved course of study of continuing education, and obtain certificates as proof of the successful completion of these courses.

3. Professional services:

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

4. Compliance costs:

It is anticipated that small businesses will incur only the costs of any fees required for attending and completing an approved course of continuing education. It is estimated that the cost of completing 24 hours of continuing education will be \$500 per licensee.

5. Economic and technological feasibility:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs or require technical expertise as a result of implementation of this rule.

6. Minimizing adverse impact:

With the exception of the cost associated with taking the required continuing education courses as set forth under the compliance costs section of this statement, it is not anticipated that small businesses will incur any additional costs as a result of implementation of this rule.

7. Small business and local government participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continuing education adopted by this rule. Members of the home inspection council are diverse and include owners of small businesses. The subject matter of the proposed rule was further discussed at meetings of the home inspection council which were open to public comment.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies equally to all licensed home inspectors in all areas of the state—urban, suburban and rural. The rule does not apply to public entities located in rural areas.

2. Reporting, record-keeping and other compliance requirements:

Reporting and record-keeping requirements include the obligation of all applicants seeking renewal of their licenses to maintain course completion certificates as proof of completing the required continuing education. Applicants for renewal of a home inspector's license in rural areas will not need to employ any additional professional services in order to comply with this rule.

3. Costs:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any costs of compliance as a result of this rule.

4. Minimizing adverse impact:

Other than the estimated cost of \$500 per licensee to complete 24 hours of continuing education, it is not anticipated that small businesses, whether located in urban, suburban or rural areas, will incur any additional costs of compliance.

5. Rural area participation:

The home inspection council, in consultation with the Secretary of State, recommended approval of the minimum requirements for continu-

ing education adopted by this rule. Members of the home inspection council represent geographically diverse areas including rural areas of New York State. In addition, the subject matter of the proposed rule was discussed during open meetings of the home inspection council and which were open to public comment.

Job Impact Statement

This rule will not have any substantial adverse impact on jobs and employment opportunities. As a result of enactment of Article 12-B of the Real Property Law, which became effective December 31, 2005, any person performing a home inspection for compensation in this state must obtain a license. Licenses are valid for two years, and may be renewed only upon successful completion of an approved course of continuing education. Inasmuch as this rule affects only those licensed home inspectors who seek renewal of license, it promotes employment opportunities by ensuring that only those qualified to provide this service will be licensed.

Tobacco Settlement Financing Corporation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Public Access to Corporation Records

I.D. No. TSF-43-08-00006-P

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

Proposed Action: Addition of Part 2100 to Title 21 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. TSF-52-05-00024-P.

Statutory authority: Public Officers Law, section 87(b)

Subject: Public access to corporation records.

Purpose: To provide procedures by which records may be obtained from the corporation.

Text of proposed rule: PART 2100

PUBLIC ACCESS TO RECORDS

"2100.1 Purpose and scope."

(a) *The people's right to know the process of government decision-making and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by secrecy or confidentiality.*

(b) *This Part provides information concerning the procedures by which records may be obtained from the Corporation pursuant to the Freedom of Information Law.*

(c) *Personnel shall furnish to the public the information and records required by the Freedom of Information Law, as well as records otherwise available by law.*

(d) *Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records.*

"2100.2 Designation of records access officer."

(a) *The President and Chief Executive Officer is responsible for ensuring compliance with this Part, and designates the following person(s) as records access officer(s):*

*Public Information Officer
Tobacco Settlement Financing Corporation
641 Lexington Avenue
New York, NY 10022
E-mail: FOILOfficer@nyhomes.org*

(b) *The records access officer is responsible for ensuring appropriate agency response to public requests for access to records. The designation of records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so. Records access officers shall ensure that personnel:*

(1) *maintain an up-to-date subject matter list;*

(2) *assist the requester in identifying records sought, if necessary, and when appropriate, indicate the manner in which records are filed, retrieved or generated to assist person in reasonably describing records;*

(3) *contact persons seeking records when a request is voluminous or*

when locating sought records involves substantial effort, so that personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested;

(4) upon locating the records, take one of the following actions:

(i) make records available for inspection; or

(ii) deny access to the records in whole or in part, and explain in writing the reasons for such denial.

(5) upon request for copies of records, make a copy available upon payment or offer to pay established fees, if any, in accordance with section 2100.8 of this Part.

(6) upon request, certify that a record is a true copy; and

(7) upon failure to locate records, certify that:

(i) the Tobacco Settlement Financing Corporation is not the custodian for such records; or

(ii) the records of which the Tobacco Settlement Financing Corporation is a custodian cannot be found after diligent search.

“2100.3 Location.”

Records shall be available for inspection and copying at the offices of the Tobacco Settlement Financing Corporation, including its principal office at:

Tobacco Settlement Financing Corporation
641 Lexington Avenue
New York, New York 10022

“2100.4 Hours for public inspection.”

Records of the Corporation shall be produced for inspection by appointment during hours and days regularly open for business. These hours are: Monday through Friday, 9 a.m. to 5 p.m.

“2100.5 Requests for public access to records.”

(a) A written request for records is required. Written requests must be received by mail or hand delivery to the offices of the Corporation, or e-mail or facsimile transmission to the respective address or number then currently specified on the Corporation’s website. If a requested record is maintained on the internet, the Corporation’s response to the request shall inform the requester that the record is accessible via the internet and in printed form, either on paper or other information storage medium.

(b) A request should reasonably describe the record or records sought. Whenever possible, a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.

(c) Within five business days of receipt of the request the Corporation shall:

(i) inform the requester that their request, or a portion of their request, does not reasonably describe record(s) sought, and provide assistance and direction, to the extent possible, which shall assist the person making the request in reasonably describing such records;

(ii) grant or, in writing, deny access to the records requested in whole or in part;

(iii) provide a written acknowledgement of receipt of the request and state the approximate date, which shall be reasonable under the circumstances, and in no instance exceed twenty business days, when the request will be granted or denied; or

(iv) if it is known that circumstances will prevent disclosure of the record(s) within twenty (20) days from the date of the acknowledgement, provide a written explanation for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

If, after having acknowledged the receipt of a request and provided to a requester an approximate date when a request will be granted in whole or in part, it becomes known that circumstances will prevent the Corporation from granting the request in the time specified, the Corporation shall, within twenty business days of the initial acknowledgement, provide a statement in writing stating the reason for the inability to grant the request within such time frame, and state a date certain, which shall be reasonable under the circumstances, when the request will be granted in whole or in part.

(d) In determining a reasonable time for granting or denying a request under the circumstances of a request, personnel shall consider the volume of a request, the ease or difficulty in locating, retrieving or generating records, the complexity of the request, the need to review records to determine the extent to which they must be disclosed, the number of requests received by the Corporation, and similar factors that bear on the ability to grant access to records promptly and within a reasonable time.

(e) The Corporation’s failure to comply with such time limits and procedures as are set forth in Section (c) of this Part, and/or the failure to respond to a request within a reasonable time after an approximate date given, in conformity with (c)(iii) of this Section, which response shall in no

instance be provided in excess of twenty business days after the date of acknowledgement of the receipt of request, unless a written explanation for the inability to grant access to the records is provided, in conformity with (c)(iv) of this Section, shall constitute a denial of a request that may be appealed.

“2100.6 Subject matter list.”

(a) The records access officer shall maintain a reasonably detailed current list, by subject matter, of all records in its possession, whether or not records are available pursuant to subdivision 2 of section 87 of the Public Officers Law.

(b) The subject matter list shall be sufficiently detailed to permit identification of the category of the record sought.

(c) The subject matter list shall be updated not less than twice per year. The most recent update shall appear on the first page of the subject matter list.

“2100.7 Denial of access to records.”

(a) Denial of access shall be in writing, stating the reason therefor and advising the requester of the right to appeal to the individual or body established to hear appeals, identified by name, title, business address and business telephone number.

(b) If the Corporation fails to respond to a request as required in section 2100.5(c) and (d) of this Part, such failure shall also be deemed a denial of access.

(c) The following person or persons or body shall hear appeals for denial of access to records under the Freedom of Information Law:

Senior Vice President and Counsel
Tobacco Settlement Financing Corporation
641 Lexington Avenue
New York, NY 10022

(d) The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of a written appeal, identifying:

(1) the date of the appeal;

(2) the date and location of the requests for records;

(3) a description, to the extent possible, of the records to which the requester was denied access;

(4) whether the denial of access was in writing or due to failure to provide records as required by section 2100.5(c) or (d) of this Part; and

(5) the name and return address of the requester.

(e) A failure to determine an appeal within ten business days of its receipt by granting access to the records sought or fully explaining the reasons for further denial in writing shall constitute a denial of the appeal.

(f) The person or body designated to hear appeals shall transmit to the Committee on Open Government copies of all appeals upon receipt of appeals. Such copies shall be addressed to:

Committee on Open Government
Department of State
41 State Street
Albany, New York 12231

(g) The person or body designated to hear appeals shall inform the Committee on Open Government of its determination in writing within ten business days of receipt of an appeal. The determination shall be transmitted to the Committee on Open Government in the same manner as set forth in subdivision (e) in this section.

“2100.8 Fees.”

(a) There shall be no fee charged for the following:

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to this Part.

(b) The fee for photocopies not exceeding 9 by 14 inches is 25 cents per page. The fee for copies of records other than photocopies which are 9 by 14 inches or less in size shall be the actual copying cost, excluding fixed agency costs such as salaries.

“2100.9 Public notice.”

The Corporation shall post in a conspicuous location information regarding the name, title, business address and business telephone number of the records access officer(s) and appeals person or body; the location where records can be inspected and copied; and the right to appeal by any person denied access to a record. Such information shall also be made available by inquiry to the Corporation’s general telephone number.

“2100.10 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: Jay M. Ticker, Housing Finance Agency, 641 Lexington Ave., New York, NY 10022, (212) 688-4000

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 Withdrawal Objection

Objection was received in the form of a letter to the State of New York Mortgage Agency (the "Agency") from New York State Assembly members RoAnn Destito and Ruben Diaz, Jr. dated February 13, 2006. The Assembly members wrote that the Agency's proposed rule contained provisions that were inconsistent with New York State Freedom of Information Law ("FOIL") and the regulations of the Committee on Open Government, and that the inconsistencies could result in diminished access to Agency records.

Regulatory Impact Statement

1. Statutory Authority

The source of the State of New York Mortgage Agency's ("Agency") Statutory authority for the proposed rule is Public Officers Law, Section 87, which reads, in relevant part: "Access to agency records. 1. (a) Within sixty days after the effective date of this article, the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article. (b) Each agency shall promulgate rules and regulations, in conformity with this article and applicable rules and regulations promulgated pursuant to the provisions of paragraph (a) of this subdivision, and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed..." The objective of giving the Agency such responsibility is to ensure that the Agency has procedures in place that will guarantee that information used in Agency decision-making is accessible to the public, subject to certain exceptions detailed in the statute.

2. Needs and Benefits

The proposed rule puts into place efficient procedures for providing the public with information they are entitled to pursuant to the Freedom of Information Law ("FOIL").

3. Costs

No substantial costs are associated with the rule either (i) to regulated persons or (ii) to the Agency, the State or Local Governments. Because it is obvious that no substantial costs will result from this rule-making, the Agency need not detail, as required in SAPA Section 202-a.3.(c)(iii) and (iv), the information, sources and methodology used to determine the projected costs of the rule.

4. Paperwork

The rule requires only minimal changes to the documentary requirements already incumbent upon the parties concerned.

5. Local Government Mandates

The rule-making does not impose any service, duty or responsibility upon any county, city, town, school district, fire district, or other special district.

6. Duplication

The Agency's rule is submitted pursuant to a requirement of New York State's Public Officers Law. The Agency is not aware of any duplication, overlap or conflict with any rules or legal requirements of the state or federal government.

7. Alternatives

In its rule-making, the Agency has sought to comply with the requirements of statutory and regulatory authority with regard to FOIL. Compliance with such statutes and regulations does not allow for significant alternatives to the rule the Agency has submitted.

8. Federal Standards

The rule exceeds federal standards only in those ways required by the statutory authority of Public Officers Law and the regulatory authority of the Committee on Open Government, as set forth in Title 21, Part 1401.1-10.

9. Compliance Schedule

The proposed rule will take effect as soon as possible under applicable law.

Regulatory Flexibility Analysis

The proposed rule does not impose any adverse economic impact, nor does it impose reporting, recordkeeping or other compliance requirements, on small businesses or local governments. Because the Agency's finding is obvious, the Agency need not detail, as required in SAPA Section 202-b.3.(a), the reasons upon which the finding was made, including measures the Agency took to ascertain that the rule would not impose such compliance requirements or adverse economic impact.

Rural Area Flexibility Analysis

The proposed rule does not impose any adverse impact, nor does it impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Because the Agency's finding is obvious, the Agency need not detail, as required in SAPA Section 202-c.3.(a), the reasons upon which the finding was made, including measures the agency took to ascertain that the rule would not impose such compliance requirements or adverse impact.

Job Impact Statement

The Agency has reviewed Section 201-a.2(a) of the State Administrative Procedures Act, which Section sets forth the conditions under which a Job Impact Statement ("JIS") is required to be filed with a Notice of Proposed Rule Making. The Agency has determined that its rule will have no impact on jobs and employment opportunities. Because this determination is evident from the subject matter of the rule, no summary of the information and methodology underlying this determination is attached.

Worker's Compensation Board

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules

I.D. No. WCB-43-08-00007-E

Filing No. 971

Filing Date: 2008-10-03

Effective Date: 2008-10-03

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Claimants are unduly burdened by having to pay out-of-pocket for prescription medications thus reducing the amount of benefits available to them to pay for cost of living expenses.

Subject: Pharmacy and durable medical equipment fee schedules.

Purpose: To adopt pharmacy and durable medical equipment fee schedules.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 450 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price,

brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payor.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances where an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets forth that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 31, 2008.

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

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment.

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and durable medical equipment. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to designate a pharmacy or pharmacy network which requires claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days. This section describes how carriers will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation concurrently. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs and durable medical equipment.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement and pharmacy or network notification, the savings afforded to carriers and self-insured employers will be substantially the same for local governments.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. The notice posted by pharmacies will include the contact information for the listed carriers. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating

the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule: Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills or durable medical equipment bills if they object to any such bills. This process is required by statute. This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small business and local government by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements: Self-insured municipal employers, self-insured non-municipal employers are required by statute to file objections to prescription drug bills or durable medical equipment bills within a forty five day time period if they object to the bill, otherwise they will be liable to pay for the bill if the objection is not timely filed. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

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

4. Compliance costs: This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that utilizes a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility: There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is one source for average whole sale prices and it can be obtained for less than \$100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

6. Minimizing adverse impact: This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement

of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

7. Small business and local government participation: The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills or durable medical equipment bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.

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

To Increase the Arbitration Filing Fees Associated with the WCB's Health Insurers Matching Program (HIMP)

I.D. No. WCB-43-08-00001-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 325-6.15 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13(d), (h) and 117

Subject: To increase the arbitration filing fees associated with the WCB's Health Insurers Matching Program (HIMP).

Purpose: The rule would increase the arbitration filing fees from \$75 (\$15 to the arbitrator and \$60 to the American Arbitration Association).

Text of proposed rule: Subdivision (a) of section 325-6.15 of Title 12 NYCRR is hereby amended as follows:

(a) The health insurer shall, together with its request for reimbursement, submit a non-refundable filing fee in the amount of [§75] \$150 per request, for desk arbitrations, the arbitrator shall receive a fee of [§15] \$40 per arbitration, payable by the dispute forum from the filing fees received by it.

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

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

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

Regulatory Impact Statement

1. Statutory Authority:

The Chair of the Workers' Compensation Board (Chair) is authorized to amend 12 NYCRR § 325-6.15(a). Workers' Compensation Law (WCL) § 117(1) authorizes the Chair to adopt reasonable regulations consistent with the provisions of the WCL and Labor Law. WCL § 13(h)(3) authorizes the Chair to adopt rules and regulations to carry out the provisions of WCL § 13(d)(1) and (2) and WCL § 13(h). The Chair is specifically directed to adopt rules and regulations to provide alternative dispute resolution procedures for settlement of claims by health insurers and health benefit plans for reimbursement for medical bills they paid which should have been paid by the workers' compensation carrier or self-insured employer. Paragraph (3) of subdivision (h) of section 13 requires the amount paid to the prevailing party upon resolution of the reimbursement dispute to be increased by the fee paid to the arbitrator. Therefore, the rules and regulations regarding the alternative dispute resolution procedure shall include the fee to be charged for using such procedure.

2. Legislative Objectives:

By Chapter 924 of the Laws of 1990, and amended by Chapter 364 of the Laws of 1992, the Legislature created a mechanism whereby health insurers and health benefits plans that made payments for medical and/or hospital services would be entitled to reimbursement for such payments. Reimbursement must be made within the limits of the medical and hospital fee schedules if the Board determines that the claim is compensable. Pursuant to WCL § 13(h) the Board is required to perform computer searches to identify injured employees who, with respect to the same injury or illness, have filed claims under the WCL and made claims to a health insurer eligible for reimbursement under WCL § 13(d). This program is known as the Health Insurers Matching Program (HIMP).

WCL § 13(d)(2) provides that the sole remedy of the insurer or health benefits plan to recover on a claim arising pursuant to this subdivision shall be the submission of the controversy to mandatory arbitration or other alternative dispute resolution procedures as defined by the rules and regulations promulgated by the Chair.

WCL § 13(h)(3) requires that the Chair adopt rules and regulations to carry out the provisions of this section, which rules and regulations shall provide for alternative dispute resolution procedures for settlement of disputed claims for reimbursement, including but not limited to referral and submission of disputed claims to mandatory arbitration with private arbitration associations.

The American Arbitration Association (AAA) has served as the dispute

forum for HIMP since the program's creation. The proposed rule would amend one provision of the regulations adopted in 1993 to implement Chapters 924 and 364, to provide for an increase in fees paid to AAA and HIMP arbitrators. These fees have never been adjusted.

3. Needs and Benefits:

The purpose of the regulation is to increase the arbitration filing fees for HIMP. Currently the arbitration filing fee for the program is \$75 per request, with \$15 going to the arbitrator for desk arbitrations and \$60 going to AAA to cover its costs and services. The proposed regulation would increase the arbitration filing fee to \$150, with \$40 going to the arbitrator and \$110 being retained by AAA.

The amendment is necessary because fees for AAA and the arbitrators under HIMP have not been increased in 15 years. The current fee is insufficient to cover the services AAA provides in administering the HIMP arbitration process. A \$15 fee to arbitrators for desk arbitrations is inadequate to recruit and retain qualified arbitrators.

Since 2002 there have been two arbitrators for HIMP. From 2002 to 2006, the number of arbitrators was sufficient for the volume of arbitrations filed which averaged about 66 cases a year. In 2007 the number of HIMP arbitration filings increased to 210. A large number of the filings in 2007 involve one large employer who is self-insured for workers' compensation purposes. One of the arbitrators presently on the HIMP panel cannot handle any claims involving the large self-insured employer due to a conflict of interest. The attempt to recruit new arbitrators has been hindered by the \$15 fee per desk arbitration. Few qualified individuals are willing to serve as a HIMP arbitrator for the very low fee currently being offered. In 2008 AAA is expecting to see at least the same number of filings as 2007.

Among the benefits expected from the amendment of § 325-6.15(a) is the recruitment and retention of qualified HIMP arbitrators. The availability of qualified arbitrators on the HIMP panel will bring stability to the arbitration process and allow unexpected spikes in arbitration filings to be handled expeditiously. Increasing the fees for arbitration filings will allow AAA to receive compensation reflective of its costs in administering the program. It is expected that adequate compensation will result in greater efficiencies in the HIMP arbitration process.

4. Costs:

There are no additional costs for the Board by the amendment to § 325-6.15(a). However, health insurers and agents working on their behalf that present requests for reimbursement to workers' compensation carriers that are rejected will have to pay a higher fee to request arbitration for disputed claims. The current fee has been in place since December 1993. This amount is no longer sufficient to cover the costs incurred by the American Arbitration Association to provide its services. Further, the \$15.00 out of the current \$75.00 fee is not sufficient to attract and retain qualified arbitrators for the HIMP program. In 1994 an increase in the fee to \$115.00 was discussed but not adopted. If the Consumer Price Index of the federal Bureau of Labor Statistics is used as a measure of inflation, it has increased by 40% since 1994. A 40% increase over the discussed 1994 fee amount of \$115.00 results in an increase of \$46.00 to \$161.00. However, the American Arbitration Association only requested a total fee increase to \$150.00 to cover its costs and increase the amount paid to the arbitrators. Further, it proposed that a larger portion of the fee should go to the arbitrators. This is due in part to the fact that there were only two arbitrators available to handle HIMP arbitrations until mid-August of this year when three more arbitrators were added. HIMP needs to have an adequate supply of arbitrators to promptly handle the increased arbitration filings, which results in a better process. If the health insurer is successful at the arbitration, any award is increased by the arbitration fee. Such increase in reimbursement amount increases the cost to the workers' compensation carrier or self-insured employer. However, it is only fair that those involved in the dispute cover the cost of resolving the dispute.

5. Local Government Mandates:

Under WCL § 13(d)(1) the definition of a health insurer or health benefits plan includes a self-insured or self-funded health care benefits plan operated by or on behalf of any business, municipality or other entity. There are no self-funded or self-insured municipalities for health care benefits currently participating in HIMP. Technically a municipality self-insured or self-funded for health care benefits could participate in HIMP. However, as a practical matter, a municipality that is self-insured for health care purposes is probably also self-insured for workers' compensation purposes and would not need to utilize HIMP because reimbursement does not involve an outside party. Therefore, since there are no self-funded or self-insured municipalities participating in HIMP, and it is unlikely that such a municipality would participate in HIMP, the proposed rule does not directly impose any local government mandates. However, some local governments are self-insured for workers' compensation purposes but not self-insured for health benefits provided to their employees. If the health insurer is successful at the arbitration, the amount paid to the health insurer is increased by the filing fee paid for the arbitration. This increase is required by statute, WCL § 13(h)(3), rather than by the regulation.

6. Paperwork:

The amendment to this section does not add or eliminate any paperwork requirements. This rule merely changes the amount of the arbitration filing fee.

7. Duplication:

HIMP is a unique program administered solely by the Board and therefore there is no duplication.

8. Alternatives:

An alternative to amending § 325-6.15(a) would be to keep the current arbitration fees in place. This alternative has proved unsatisfactory and has resulted in an arbitration process that does not adequately meet the present demands of HIMP, and is vulnerable to sharp increases in arbitration filings. Arbitration fees have remained at 1993 levels, and have resulted in a shortage of arbitrators at a time when filings are dramatically increasing. The arbitration fees currently offered has made it difficult for AAA to cover its costs for the services it provides to HIMP. The low fees also make it hard to recruit and retain qualified arbitrators.

Another alternative would be for the Board to request a smaller fee increase. Arbitration fees have been static since 1993. Given the fifteen year gap between the time the arbitration fees were set and the first fee increase, any proposed fee increase would need to be significant. It would be difficult to attract and retain qualified arbitrators for a fee less than \$40 per arbitration. An increase in the HIMP arbitration fee to \$150.00 strikes a fair balance between securing qualified arbitrators as well as providing AAA with adequate resources to administer the program and keeping HIMP arbitration fees reasonable.

9. Federal Standards:

There are no federal standards applicable.

10. Compliance Schedule:

Affected parties will be able to achieve compliance with the rule upon its adoption.

Regulatory Flexibility Analysis

1. Effect of Rule:

Twenty-six health insurers and six agents representing multiple health insurers currently participate in the Health Insurers Matching Program (HIMP). The program provides access to Workers' Compensation records for the purpose of determining a health insurer's entitlement to reimbursement from a Workers' Compensation carrier. Two of the six agents are small businesses. None of the health insurers currently participating in HIMP are self-insured or self-funded local governments.

2. Compliance Requirements:

There are no reporting or recordkeeping requirements associated with the amendment to § 325-6.15(a).

3. Professional Services:

No professional services will be needed to comply with the amendment to § 325-6.15(a).

4. Compliance Costs:

The proposal to amend § 325-6.15(a) will increase the cost to file a request for arbitration from \$75 to \$150.00. Arbitration filing fees have not been adjusted since 1993. The current fee is insufficient to compensate the American Arbitration Association (AAA) for the services it provides in administering HIMP arbitrations, and the fee to arbitrators is inadequate to recruit and retain qualified arbitrators. Small businesses acting as agents for health insurers will incur an increased cost to file arbitrations, which depending on the contract between the agent and the health insurer may or may not be reimbursed by the health insurer. It is anticipated that the increase in filing fees, which initially may provide a financial hardship to small agents, will eventually be built in to the contract between the agent and the health insurer, and subsequently be borne by the health insurer. Local governments who are self-insured for workers' compensation and are directed to reimburse a health insurer, will also be required to reimburse the health insurer the arbitration filing fee. This requirement is set by statute however and is not in the regulation.

5. Economic and Technological Feasibility:

Small businesses that act as agents for health insurers may initially feel an economic impact due to the increase in arbitration filing fees, if the fees are not reimbursed by the health insurer. However, it is anticipated that the increase in filing fees over time will be built into the contract between the parties and ultimately be borne by the health insurer.

6. Minimizing Adverse Impact:

The Board has attempted to minimize any adverse impact on small businesses that act as agents for health insurers by balancing the real need to increase arbitration filing fees against the importance of keeping arbitration filing fees reasonable. In the future, the Board plans to assess the appropriateness of arbitration filing fees on a more regular basis so that any potential fee increases will occur incrementally over time.

7. Small Business and Local Government Participation:

Correspondence was sent to the agents and health insurers that participate in HIMP as well as to several large municipalities who are self-insured for workers' compensation purposes advising them of the potential

increase in arbitration fees and inviting comments on the proposal. To date no comments have been received.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule change applies to all 26 health insurers and 6 agents who participate in HIMP, wherever located in the state.

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

There are no reporting or recordkeeping requirements associated with the changes to § 325-6.15(a).

No additional professional services will be needed to comply with the amendment to § 325-6.15(a).

3. Costs:

The proposal to amend § 325-6.15(a) will increase the cost to file a request for arbitration from \$75 to \$150.00. Arbitration filing fees have not been adjusted since 1993. The current fee is insufficient to reimburse AAA for its costs in administering HIMP arbitrations, and the fee to arbitrators is inadequate to recruit and retain qualified arbitrators. The fee increase applies to agents and health insurers wherever located.

4. Minimizing adverse impact:

The Board has attempted to minimize any adverse impact on agents and health insurers wherever located in the state by balancing the real need to increase arbitration filing fees against the importance of keeping arbitration filing fees reasonable. In the future, the Board plans to assess the appropriateness of arbitration filing fees on a more regular basis so that any potential fee increases will occur incrementally over time.

5. Rural area participation:

Correspondence was sent to the agents and health insurers that participate in HIMP as well as to several large municipalities who are self-insured for workers' compensation purposes advising them of the potential increase in arbitration fees and inviting comments on the proposal. To date no comments have been received.

Job Impact Statement

The purpose of the amendment to § 325-6.15(a) is to increase the arbitration filing fees for HIMP. Currently the arbitration fee for the program is per request \$75, with \$15 going to the arbitrator for desk arbitrations and \$60 going to the American Arbitration Association (AAA) to cover its costs and services. The proposed regulation would increase the arbitration fee to \$ 150, with \$40 going to the arbitrator and \$110 being retained by AAA. Arbitration filing fees have remained the same since 1993. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment, and therefore a Job Impact Statement is not required.