

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Various Trees and Plants of the Prunus Species

I.D. No. AAM-44-08-00004-E

Filing No. 1004

Filing Date: 2008-10-08

Effective Date: 2008-10-08

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

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

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

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

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

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit and ornamental nursery stock that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but seriously debilitates the productive life of the plants. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers

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

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

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

Subject: Various trees and plants of the Prunus species.

Purpose: To establish a plum pox virus quarantine in New York State.

Text of emergency rule: PART 140

CONTROL OF THE PLUM POX VIRUS (POTYVIRUS DIDERON STRAIN)

Section 140.1 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 140.2 Quarantined area.

(a) That area of Niagara County which is bordered on the north by Lake Ontario and bordered on the east by Hartland Road, which extends south to its intersection with Ditch Road; extends west on Ditch Road to its intersection with Hosmer Road; extends south on Hosmer Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Orangeport Road; and extends south on Orangeport Road to its intersection with Slayton-Settlement Road; extends west on Slayton-Settlement Road to its intersection with Route 78 (Lockport-Olcott Road); extends south on Route 78 (Lockport-Olcott Road) to its intersection with Stone Road; extends northwest on Stone Road to its intersection with Sunset Drive; extends south on Sunset Drive

to its intersection with Shunpike Road; extends west on Shunpike to its intersection with Route 93 (Townline Road); extends south on Route 93 (Townline Road) to its intersection with Route 270 (Campbell Boulevard); extends south on Route 270 (Campbell Boulevard) to its intersection with Beach Ridge Road; extends southwest on Beach Ridge Road to its intersection with Townline Road; extends south on Townline Road to its intersection with the Tonawanda Creek; following the Tonawanda Creek west to its entry into the Niagara River; following the Niagara River north to its entry into Lake Ontario.

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

Section 140.3 Regulated area.

The following areas within the quarantined area are regulated areas:

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

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

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

(d) That area bordered on the south by the Erie Canal at its intersection with Culvert Road extending north on Culvert Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Kenyonville Road; extends south on Kenyonville Road to its intersection with Eagle Harbor- Knowlesville Road; extends east on Eagle Harbor- Knowlesville Road to its intersection with the Erie Canal; following west along the Erie Canal to its intersection with Culvert Road, in the Town of Ridgeway, in the County of Orleans, State of New York.

Section 140.4 Nursery stock regulated area.

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

Section 140.5 Conditions governing the propagation of regulated articles.

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

Section 140.6 Conditions governing the intrastate movement of regulated articles.

(a) Prohibited movement.

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

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

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

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

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

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

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

(b) Regulated movement.

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

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

(2) a certificate accompanies the regulated articles; and

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

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

Section 140.7 Records.

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

Section 140.8 Conditions governing the issuance of certificates and permits.

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

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

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

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

(c) Certificates or limited permits issued under these regulations may be withdrawn or canceled by the Commissioner and further certification refused whenever in his or her judgment the further use of such certificates or limited permits may result in the spread of the plum pox virus.

Section 140.9 Inspection and disposition of shipments.

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

Section 140.10 Assembly of regulated articles for inspection.

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

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

Section 140.11 Marking requirements.

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

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

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

Section 140.12 Shipments for experimental and scientific purposes.

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 5, 2009.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

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

3. Needs and benefits:

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

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the Prunus species. This includes spe-

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

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

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

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

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

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

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

The amendments also regulate the movement of regulated articles through the regulated areas. Under the amendments, regulated articles may be moved through the regulated areas if the regulated articles

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

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

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

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

4. Costs:

(a) Costs to the State government:

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

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

(b) Costs to local government: none

(c) Costs to private regulated parties:

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

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

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

(d) Costs to the regulatory agency:

It is anticipated that regulatory oversight and enforcement of the quarantine would require the hiring of two inspectors at an annual cost to the Department of \$150,900. This cost includes salary, fringe benefits, travel costs, computer hardware and support and cell phones for the persons hired.

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business.

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

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

2. Compliance requirements.

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

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

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

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

3. Professional services.

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

4. Compliance costs:

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

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

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

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

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

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

5. Minimizing adverse impact:

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

6. Small business and local government participation:

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

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

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

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

Outreach efforts will continue.

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

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

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

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

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

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

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

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

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

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

3. Costs:

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

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

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

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

Outreach efforts will continue.

Job Impact Statement

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

Office of Alcoholism and Substance Abuse Services

EMERGENCY RULE MAKING

Administration of "Other Approved Agents" Such as Buprenorphine to Treat Opioid Addictions

I.D. No. ASA-44-08-00002-E

Filing No. 1002

Filing Date: 2008-10-08

Effective Date: 2008-10-08

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

Action taken: Amendment of Part 828 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections, 19.07(b), (e), 19.21(b), 19.40, 32.01, 32.05(b), 32.07(a) and (b)

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

Specific reasons underlying the finding of necessity: The proper administration and availability of buprenorphine and other approved agents to treat opioid addiction is necessary to ensure that those persons suffering from addiction can get the most advanced and most appropriate treatment for their disease.

Subject: Administration of "other approved agents" such as buprenorphine to treat opioid addictions.

Purpose: To ensure that all persons will have equal access to the appropriate "approved agent" to treat their opioid addiction.

Text of emergency rule: PART 828

AMENDMENT TO: REQUIREMENTS FOR THE OPERATION OF CHEMOTHERAPY SUBSTANCE ABUSE PROGRAMS.

§ 828.1 Definitions.

(a) Methadone program means a substance abuse program using methadone *or other approved agents*, and offering a range of treatment procedures and services for the rehabilitation of persons dependent on opium, morphine, heroin or any derivative or synthetic drug of that group.

(1) Methadone maintenance means a treatment procedure using methadone or any of its derivatives, *or other approved agents*, administered over a period of time to relieve withdrawal symptoms, reduce craving and permit normal functioning so that, in combination with rehabilitative services, patients can develop productive life styles.

(i) Methadone to abstinence means a treatment procedure using methadone, *or other approved agents*, administered for a period exceeding 21 days, as part of a planned course of treatment involving reduction in dosage to the point of abstinence followed by drug-free treatment.

(ii) Methadone maintenance aftercare means a planned course of treatment for methadone, *or other approved agents* maintenance patients, directed toward the achievement of abstinence and, through the aid of supportive counseling, the continuance of a drug-free life style.

(2) Methadone detoxification means a treatment procedure using methadone, or any of its derivatives, *or other approved agents*, administered in decreasing doses over a limited period of time for the purpose of detoxification from opiates.

(b) Methadone clinic means a single location at which a methadone program provides methadone, *or other approved agent* and rehabilitative services to patients.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 5, 2009.

Text of rule and any required statements and analyses may be obtained from: Patricia Flaherty, Associate Counsel, OASAS, 1450 Western Avenue, Albany, New York 12203, (518) 485-2317, email: patriciaflaherty@oasas.state.ny.us

Regulatory Impact Statement

The proposed emergency revision to Part 828 - Requirements for the operation of chemotherapy substance abuse programs will revise methadone regulations that have existed for 24 years without change. The amendment to the definitions of Part 828 are being adopted by emergency because the need to allow alternative chemotherapy options to methadone clinics is in the interest of the public's health, safety and welfare.

Opioid addiction is a chronic illness which can be treated effectively

with medications that are administered under conditions consistent with their pharmacological efficacy, and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and, when appropriate, vocational rehabilitation. Medication assisted treatment can be effective in facilitating recovery from opioid addiction for many patients. The proposed regulation sets forth standards to guide opioid addiction treatment.

1. Statutory Authority:

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services ("the Commissioner") to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.21(b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

Section 19.21(d) of the Mental Hygiene Law requires the Commissioner to promulgate regulations which establish criteria to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.05 of the Mental Hygiene Law requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services including but not limited to methadone.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

Section 32.09(b) of the Mental Hygiene Law gives the Commissioner the power to withhold an operating certificate for a Methadone provider until statutory requirements are satisfied.

The relevant sections of the Mental Hygiene Law cited above, allow the Commissioner to regulate how chemical dependency services are administered. This regulation will alter the way those services are administered, providing greater flexibility within the State regulations in alignment with Federal rules promulgated by SAMHSA in 2003. The objective is in line with the legislative intent behind the enactment of Sections 19, 22 and 32 of the Mental Hygiene Law, allowing the Commissioner to certify, inspect, license and establish treatment standards for all facilities that treat chemical dependency. Revising policy and procedures with regard to opioid treatment, will establish a standard for all facilities, which is in the best interest of the patient, and will assist opioid treatment programs to provide better health care services and recovery from opioid addiction.

2. Legislative Objectives:

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the State to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The legislature enacted Section 19, enabling the Commissioner to establish best practices for treating chemical dependency.

3. Needs and Benefits:

Research supports that opioid addiction is a chronic illness that can be treated effectively with medications when administered under conditions consistent with their pharmacological efficacy and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and when appropriate vocational rehabilitation (CSAT, 2001). Medication assisted treatment can be effective in facilitating recovery from opioid addiction for many patients.

Approximately 40,000 patients, who represent 36% of patients currently being served in addiction treatment, are in opioid treatment programs in New York State. OASAS Part 828 regulations were written more than 24 years ago and have not been revised despite the fact that SAMHSA promulgated an amendment to the rules in 2003 that allowed opioid treatment programs to offer Buprenorphine treatment along with methadone. The proposed emergency regulation would allow chemotherapy programs to provide Buprenorphine for the maintenance or detoxification treatment of dependence on opioids such as heroin or prescription pain relievers. Consistency between Federal and State regulations is a benefit to providers.

In addition, New York State law currently allows Buprenorphine to be administered by physicians in their private practices in addition to OTP clinics. However, the current OASAS regulation Part 828 does not permit

Buprenorphine administration. Buprenorphine treatment for opioid dependence is well served in the OTP setting, since clients will receive additional services such as counseling, toxicology and medical support. The proposed emergency revision will address this problem and patients will benefit from this added service.

4. Costs:

Additional costs are expected to be minimal. Any costs incurred by providers or the State will be offset by better treatment outcomes and healthier patients, which will result in lower costs for medical and other services.

a. Costs to regulated parties:

Regulated parties include patients and providers of substance abuse services. Patients should not incur additional costs as Buprenorphine is covered by Medicaid. Cost to providers remains the same.

There should be no additional costs for materials.

b. Costs to the agency, state and local governments:

OASAS is not expected to see increased cost related to administering the rule. The decision to provide buprenorphine is voluntary, and the current Part 828 methadone clinics will not be forced to provide it. There will be anticipated cost increases for state and local governments due to the weekly rate of Buprenorphine which is \$ 235.00 and the difference of a weekly rate for Methadone of \$136.02. In addition, providers may need some additional staffing for the induction phase of Buprenorphine. However, it is important to realize that the number of people treated is not changing only their options about treatment. Patients may opt to be placed on Buprenorphine while receiving other services such as toxicology testing and counseling whereas Medicaid patients who opt for Buprenorphine treatment at physicians offices do not receive the benefit of these additional services. There will be no additional costs to counties, cities, towns or local districts.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

6. Paperwork:

Amended Part 828 regulations would not change the paperwork currently required.

7. Duplication:

There is no duplication of other state or federal requirements.

8. Alternatives:

The only other alternative is to keep the existing regulation in place. This would be detrimental to both the opioid treatment providers and patients being served. The only other alternative is to keep the existing regulation in place. This would be detrimental to both the opioid treatment providers and patients being served.

9. Federal Standards:

The CSAT Federal regulations preserve States' authority to regulate OTPs. The Federal regulations are considered minimal and the States are authorized to determine appropriate additional regulations. Federal regulations for dispensing Buprenorphine in opioid treatment programs are more restrictive than minimal Federal regulations for dispensing in physicians. In support of reducing opioid dependence it is demonstrated that there are numerous benefits which include improved retention in treatment for patients, making OTP's more attractive to new patients, and giving patients more control over their treatment experience. In addition, patient quality of life may be improved through the reduction in daily attendance at an OTP clinic.

10. Compliance Schedule:

It is expected that full implementation of Part 828 will be completed within three months of the adoption of the regulation.

Regulatory Flexibility Analysis

Effect of the Rule: The proposed amendments to Part 828 will impact certified and or funded providers. It is expected that the amendment of the methadone regulation will result in better patient care. Local Government will not be effected by the rule. Business that provide Buprenorphine may benefit from increased sales of the drug because of a wider distribution.

Compliance Requirements: Providers will document the use of Buprenorphine in compliance with federal standards. This rule is voluntary and does not place any additional requirements on small businesses or local governments. It is not expected that there will be significant changes in compliance requirements. Since providers are already required to provide utilization review, it is not expected that this regulation, will have significant additional costs.

Professional Services: it is not expected that programs will need to utilize additional professional services.

Compliance Costs: No additional costs are expected. This rule is voluntary, therefore compliance is not mandatory.

Economic and Technological Feasibility: The economic and technological feasibility of compliance with this voluntary rule by small businesses and local governments is such that the implementation may require certain businesses to increase their sale and production of Buprenorphine in order to comply with the demand for the drug.

Minimizing Adverse Impact: Part 828 has been carefully reviewed to ensure minimum adverse impact to providers. Any impact this rule may have on small businesses and the administration of State or local government, will either be a positive impact or the minimal costs for materials and compliance are so small that they will be absorbed into the already existing economic structure.

Small Business and Local Government Participation: These amendments were adopted on an emergency basis.

Rural Area Flexibility Analysis

A rural flexibility analysis is not provided since these proposed regulations would have no adverse impact on public or private entities in rural areas. The majority of Methadone providers are located in NYC. There are a few others upstate, but they are in cities, of various sizes. There are only three providers located in Ulster, Broome and Montgomery which may be considered a rural area however they are in towns where the density is greater than 150 people per square mile. The compliance, recordkeeping and paperwork requirements are the minimum needed to insure compliance with state and federal requirements and quality patient care.

Job Impact Statement

The implementation of emergency regulation Part 828 will have a minimal impact on jobs in that it may require some additional staffing during the induction phase of Buprenorphine. This regulation will not adversely impact jobs outside of the agency.

Department of Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Officials of State Correctional Facilities

I.D. No. COR-44-08-00003-P

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

Proposed Action: This is a consensus rule making to repeal section 50.1(e),(q),(w) and (cc), add section 50.1(n) and amend section 50.1(i) of Title 7 NYCRR.

Statutory authority: Correction Law, section 112; Criminal Procedure Law, sections 1.20, subd. 33 and 2.10, subd. 25

Subject: Officials of State Correctional Facilities.

Purpose: To accurately update the listing of designated officials in section 50.1, 7 NYCRR.

Text of proposed rule: The Department of Correctional Services repeals and reserves sections 50.1(e), (q), (w) and (cc) of 7NYCRR. Additionally, section 50.1(i) is amended as indicated below and section 50.1(n) is added as indicated below.

Section 50.1 Definition.

For the purposes of Criminal Procedure Law, section 1.20, subdivision 33, and section 2.10, subdivision 25, the following are hereby designated as officials of State correctional facilities:

- (a) the commissioner;
- (b) executive deputy commissioner;
- (c) deputy commissioner;
- (d) associate commissioner;
- (e) [assistant deputy commissioner;] *Reserved*
- (f) assistant commissioner;
- (g) superintendents;
- (h) deputy superintendents;
- (i) chief of [correction audit] investigations;
- (j) correctional services investigators;
- (k) correction captains;
- (l) correction lieutenants;
- (m) correction sergeants;
- (n) *assistant chief of investigations;*

- (o) assistant deputy superintendents;
- (p) community correction center assistants;
- (q) [assistant directors of community correctional centers;] *Reserved*
- (r) facility operations specialists;
- (s) [Reserved]
- (t) coordinator, correctional services employee investigations;
- (u) employee investigators;
- (v) senior employee investigators;
- (w) [project coordinators of community contract facility programs;] *Reserved*
- (x) correction officers assigned to a training academy in the department or the central office of the department;
- (y) the director of the Correction Emergency Response Team (C.E.R.T.);
- (z) first deputy superintendent;
- (aa) director and assistant director of special housing and inmate disciplinary procedures;
- (bb) institution safety officers;
- (cc) [confidential assistant;] *Reserved*

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

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

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

Consensus Rule Making Determination

The Department of Correctional Services has determined that no person is likely to object to the proposed actions because they make technical changes that are non-controversial. See SAPA § 102(11)(c).

7 NYCRR 50.1 is a listing of employee job titles that are designated by the Commissioner as officials of State correctional facilities. The Department’s authority to promulgate this regulation resides in section 112 of correction Law, which provides for the Commissioner to appoint and remove, subject to civil service law and rules, subordinate officers and other employees of the department who are assigned to correctional facilities. Additionally, § 1.20, subdivision 33, and § 2.10, subdivision 25 of Criminal Procedure Law provide for the Commissioner to designate persons as “Peace officers” pursuant to the rules of the department.

Job Impact Statement

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

Division of Criminal Justice Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Availability of Records

I.D. No. CJS-44-08-00018-P

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

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

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

Subject: Availability of records.

Purpose: Update provisions regarding availability of Divisions records.

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

PART 6150

AVAILABILITY OF RECORDS [FOR PUBLIC INSPECTION AND COPYING]

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

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

- (a) The term DCJS means the Division of Criminal Justice Services.
- (b) Record or records means any information kept, held, filed, produced or reproduced by, with or for an agency or the State Legislature, in any physical form whatsoever, including but not limited to reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.
- (c) [The term statistical tabulation means a collection or orderly presentation of numerical data logically arranged in columns and rows or graphically.
- (d) The term factual tabulation means a collection of statements of objective information logically arranged which is empirically derived and reflects objective reality, actual existence or an actual occurrence.
- (e) The term workday means any day except Saturday, Sunday, a public holiday or, with respect to a particular office of DCJS, a day on which that office is otherwise closed for regular business.
- (f) The term commissioner means the Commissioner of the Division of Criminal Justice Services.

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

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

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

- (a) Final opinions and orders made in the adjudication of cases;
- (b) Statements of policy and interpretations which have been adopted by DCJS and any statistical or factual tabulations which led to the formulation thereof;
- (c) Minutes of public meetings of any public boards or committees and any final determinations and dissenting opinions of their members, including a record of the final votes of each member of the governing body;
- (d) Minutes of public hearings held by DCJS;
- (e) Internal or external audits and statistical or factual tabulations made by or for DCJS;
- (f) Administrative staff manuals and instructions to staff that affect members of the public;
- (g) An itemized payroll record for DCJS, indicating the name, business address, title, and salary of every officer or employee of DCJS, except that in the case of law enforcement employees the record shall indicate the title and salary only; and
- (h) Any other files, records, papers or documents required by any other provision of law to be made available for public inspection.

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

- (a) Records which are specifically exempt from disclosure by State or Federal statute;
- (b) Records constituting information the disclosure of which would result in an unwarranted invasion of personal privacy. An unwarranted invasion of personal privacy shall include, but not be limited to:
 - (1) disclosure of such personal matters as may have been reported in confidence to DCJS or any other State or local agency or municipality, and the publication of which is not relevant or essential to the ordinary work of DCJS;
 - (2) disclosure of employment, medical or credit histories or personal references of applicants for employment, unless the applicant has provided a written release permitting such disclosure;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Records Access Officer
NYS Division of Criminal Justice Services
4 Tower Place
Albany, NY 12203-3764
FAX: (518) 457-2416
E-mail: foil@dcjs.state.ny.us*

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

- (1) make such record available to the person requesting it;
- (2) deny such request in writing; or
- (3) furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied.

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

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

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

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

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

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

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

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

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

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

- (1) inspection of records;
- (2) search for records; or
- (3) any certification pursuant to section 89 of the Public Officers Law [this Part].

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

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

Section [6150.9.] 6150.7. Trade secrets and critical infrastructure information. A person acting pursuant to law or regulation who submits information to DCJS may request that DCJS except such information from disclosure on the grounds that such information constitutes trade secrets or disclosure would cause substantial injury to the competitive position of the subject enterprise which submitted the information. Such requests shall be submitted and determined in accordance with subdivision 5 of section 89 of the Public Officers Law. [Deletion of information. In accordance with the provisions of subdivision 2 of section 89 of the Public Officers Law, section 6150.4 of this Part, and in conformance with such guidelines as may be promulgated by the State Committee on Public Access to Records, prior to making a record available for public inspection and/or copying, the records access officer may delete from it any identifying details the disclosure of which would result in an unwarranted invasion of personal privacy. In the event that one or more deletions are so made, the records access officer shall give notice of that fact to the person given access to the record. If the record is such that the personal matters cannot be fully deleted without substantively affecting the record or the identifying details cannot be deleted effectively, the records access officer shall deny access to such record as provided in section 6150.10 of this Part.

Section 6150.10. Grant or denial of access to records. If the records access officer determines that an application to inspect and/or copy records

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

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

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

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

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

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

Consensus Rule Making Determination

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

Job Impact Statement

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

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-44-08-00006-E

Filing No. 1006

Filing Date: 2008-10-09

Effective Date: 2008-10-09

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

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

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

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

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

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

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

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

In order to hold businesses more accountable for their commitments and realize annual savings in program costs, these regulatory changes need to be adopted immediately. With 82 empire zones statewide, 10-20 applications are being submitted to the State weekly. Once businesses are in the Program, the annual costs are borne by the State for a 10 year period. These changes are expected to immediately reduce the number of eligible applicants by about 30% in order to achieve the

objectives of strategic focus, improved cost-effectiveness, greater accountability and ultimately help preserve the program during the immediate fiscal crisis and beyond.

Subject: Empire Zones reform.

Purpose: To continue implementing previous reforms and adopt changes that would enhance its strategic focus.

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

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

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

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

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

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

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

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

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

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

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

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

Eleventh, the emergency rule clarifies the status of community development projects as a result of the reconfiguration of the zones pursuant to Chapter 63. The current regulations require the community development projects to be located in an Empire Zone in order for investments in those projects to qualify for tax benefits. Drawing distinct and separate contiguous areas around community development projects would severely limit the ability of Empire Zones to include as many eligible businesses as possible into the new distinct and separate contiguous areas. Community development projects are not necessarily required to be certified. There is a strong public policy preference for these projects and there is an expectation by their sponsors that they continue to offer tax credits to contributors until fundraising for the projects are completed. To that end, all community development projects approved by the Department before April 1, 2005 would be considered to be located within its respective Empire Zone,

and a community development project will be considered to be located in the Empire Zone if it can demonstrate that a zone has been working with the project before April 1, 2005 for the purpose of submitting a boundary revision for inclusion in to the Zone that would include job creation.

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 6, 2009.

Text of rule and any required statements and analyses may be obtained from: Thomas P. Regan, Department of Economic Development, 30 S. Pearl St., Albany, NY 12245, (518) 292-5123, email: tregan@empire.state.ny.us

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

LEGISLATIVE OBJECTIVES:

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

NEEDS AND BENEFITS:

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

COSTS:

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

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

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

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

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

LOCAL GOVERNMENT MANDATES:

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

PAPERWORK:

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

DUPLICATION:

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

ALTERNATIVES:

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

FEDERAL STANDARDS:

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

COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

Participation in the Empire Zones Program is entirely at the discretion of each eligible municipality and business enterprise. Neither General Municipal Law Article 18-B nor the emergency regulations impose an obligation on any local government or business entity to participate in the program. The emergency regulation does not impose any adverse economic impact, reporting, record-keeping, or other compliance requirements on small businesses and/or local governments. In fact, the emergency regulations may have a positive economic impact on the small businesses and local governments that do participate due to clarifying changes, the added flexibility and a new application process. The administrative structure of the program was designed to offer a streamlined application and approval process by extracting only essential information

from the applicants. In addition, the changes to the regulations that track changes in statute and result in a reconfiguration of zones will actually enhance the ability of businesses yet to apply which are located in distressed areas to receive program benefits. Local governments will have the additional short-term burden of taking the legal and administrative steps necessary to reconfigure their zones, but this is a statutorily imposed burden, not solely a regulatory one. Because it is evident from the nature of the emergency rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

State Government Archives and Records Management

I.D. No. EDU-44-08-00010-P

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

Proposed Action: Amendment of Part 188 of Title 8 NYCRR.

Statutory authority: Education Law, section 207 (not subdivided); Arts and Cultural Affairs Law, section 57.05(9)

Subject: State Government Archives and Records Management.

Purpose: To revise and clarify Part 188 regarding State records replacement, retention, disposition and storage fees.

Substance of proposed rule (Full text is posted at the following State website: http://www.archives.nysed.gov/a/records/mr_laws_reg188_proposed.shtml):

The State Education Department proposes to amend Part 188 of the Regulations of the Commissioner of Education, effective February 5, 2009, which establish requirements for state government archives and records management, to revise and clarify various provisions, especially those relating to replacing original records with microforms, the retention and preservation of electronic records, the disposition of damaged records, and fees for records management services and the storage of records at the state records center. The following significant changes have been proposed:

Section 188.1. Terminology used to establish the purpose of the regulations is corrected and revised to match the current organizational name.

Section 188.2. Definitions used in Part 188 are revised.

Section 188.3. Terminology is revised to match the current organizational name.

Section 188.4. Terminology is revised and the procedure for agency designation of records management officers is revised.

Section 188.5. Terminology is revised.

Section 188.6. Terminology is revised.

Section 188.7. Terminology is revised and responsibility for authorizing agency disposition of records is clarified.

Section 188.8. Terminology is revised.

Section 188.9. Terminology is revised.

Section 188.10. Terminology is revised.

Section 188.11. Terminology is revised.

Section 188.12. Responsibilities for requesting and approving the emergency destruction of records are clarified.

Section 188.13. Terminology is clarified and a procedure is established to authorize the destruction of damaged records.

Section 188.14. Terminology is revised and responsibility for operating records center facilities is clarified.

Section 188.15. Terminology is revised.

Section 188.16. Terminology is revised and responsibility for responding to legal orders for access to agency records stored in a records center facility is clarified.

Section 188.17. Terminology is revised.

Section 188.18. The procedures and standards for duplicating original records on microforms are revised based on current industry standards.

Section 188.19. The section is deleted because the needed standards are established through the previous section 188.18.

Section 188.20. The procedures and standards for the retention and preservation of electronic records are revised based on current industry standards and made exclusive to state agencies.

Section 188.21. The list of agencies paying annual fees for records management services is revised based on the current structure of state government and the fees charged for storing records in a records center facility are revised. In addition, terminology is revised and the responsibility for authorizing waivers of agency annual fees is clarified.

Section 188.22. Responsibility for operation of archives facilities is clarified.

Section 188.23. Terminology is revised and responsibility for authorizing transfer of archival records to the State Archives is clarified.

Section 188.24. Terminology is corrected and responsibility for assisting the judiciary in managing archival records is clarified.

Section 188.25. Responsibility for assisting in the management of executive chamber records is clarified.

Section 188.26. Procedures for providing public access to archival records in the State Archives are clarified.

Section 188.27. Terminology is revised and responsibility for protecting and loaning archival records is clarified.

Section 188.28. Terminology is revised and responsibility for archival records of the State University of New York is clarified.

Section 188.29. Terminology is revised and responsibility for authorizing records disposition by boards of elections is clarified.

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

Data, views or arguments may be submitted to: Christine Ward, Assistant Commissioner, New York State Education Department, Office of Cultural Education, CEC Room 9A49, Cultural Ed Center, Albany, NY 12230, (518) 473-7091, email: cward@mail.nysed.gov

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 207 authorizes the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Arts and Cultural Affairs Law section 57.05 provides for the systematic management of State government records. Arts and Cultural Affairs Law section 57.05(9) authorizes the Commissioner of Education to promulgate regulations to implement the provisions of section 57.05, provided that no objection is made to the regulations within thirty days prior to the effective date of the proposed regulations by the speaker of the assembly for regulations relating to records of the assembly, by the president pro-tem of the senate for regulations relating to records of the senate, by the director of the division of the budget for regulations relating to records of the civil departments, and by the chief administrator of the courts for regulations relating to records of the judiciary.

LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the statutes by updating and clarifying various provisions of Part 188 of the Regulations of the

Commissioner of Education, especially provisions relating to replacing original records with microforms, the retention and preservation of electronic records, the disposition of damaged records, and fees for records management services and the storage of records at the State records center.

NEEDS AND BENEFITS:

The proposed amendment is needed to update and clarify various provisions of Part 188. In particular, revisions to section 188.13 establish procedures to authorize the destruction of damaged records. Revisions to section 188.18 clarify and modernize requirements for replacing original records with microforms. Revisions to section 188.20 clarify and modernize requirements for the retention and preservation of electronic records. Revisions to section 188.21 update the list of agencies paying fees for records management services and the fee for storing records at the State records center. These changes establish improved and uniform standards for State government records management operations.

COSTS:

(a) Costs to the State: The proposed amendment will update the list of State agencies paying fees for records management services to reflect changes in State agency organization and will increase the fee for storing records at the State records center.

The proposed amendment will change the fees charged for records center facility storage to a calculation based on the average monthly holdings of the records center facilities at \$2.90 per item. An item is defined as a cubic foot for storage of paper records; a cartridge, tape or disk for storage of computer or other magnetic and optical media; a reel or equivalent microform for storage of microfilm; or other item handled. The existing regulation calculated the fees based on the average monthly holdings of the records center facility according to the following schedule: (1) \$2.20 per cubic foot for storage of paper records; (2) \$1.50 per cartridge, tape, or disk for storage of computer or other magnetic and optical media; and (3) \$.25 per reel or equivalent microform for storage of microfilm.

The State Archives has determined that the increased Records Center storage fee will result in additional annual revenue of \$525,000, based on the quantity of records stored at the facility. There are currently 51 State agencies that store records at the facility, which will thus result in an average increased cost to each of those agencies of \$10,294. The actual costs to particular agencies will vary greatly depending on the volume of records that each agency stores at the facility. There will be no cost to other agencies that do not use the Records Center to store inactive records. The State Archives has also determined that agencies have the option to store records with private vendors, but that the costs charged by those facilities, which range from \$8 to \$14 per box per year, including charges for records retrieval and other services for which the Records Center does not charge, will still be considerably more than the \$2.90 per box/item per year fee which will be assessed by the Records Center. The State Archives has also determined that without increased income, the Archives will not be able to maintain the current level of records services, and that the end result would be more costly to the state as an increasing number of agencies will be forced to use the more expensive services of private vendors for records storage.

(b) Costs to local governments: None.

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

(d) Costs to State Education Department for implementation and continued administration of the rule: None, other than those inherent in section 57.05 of the Arts and Cultural Affairs Law. The proposed amendment updates and clarifies various provisions of Part 188, but does not impose any additional responsibilities or costs on the State Education Department.

LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to the management of State government records and does not impose any additional program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

PAPERWORK:

The proposed amendment does not impose any additional paperwork requirements.

DUPLICATION:

The proposed amendment does not duplicate any existing State or federal requirements for State government records. The federal government has issued no records management standards specifically intended for use by the State government of New York.

ALTERNATIVES:

There are no significant alternatives to the issuance of these requirements for State government records management and none were considered.

FEDERAL STANDARDS:

The proposed amendment is promulgated pursuant to the specific requirements of New York State Arts and Cultural Affairs Law section 57.05. The federal government has issued no records management standards specifically intended for use by the State government of New York.

COMPLIANCE SCHEDULE:

It is anticipated that State agencies will be able to immediately comply with the proposed amendment upon its effective date.

Regulatory Flexibility Analysis

The proposed amendment relates solely to State government archives and records management and does not impose any reporting, recordkeeping or other compliance requirements on small businesses or local government, nor will it impose any adverse economic impact on them. Because it is evident from the nature of the proposed amendment that it will not affect small businesses or local government, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

The proposed amendment relates solely to State government archives and records management and will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas of the state. Because it is evident from the nature of the proposed amendment that it will not affect rural areas of the state, no further steps were needed to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed amendment relates solely to State government archives and records management and will not have a substantial adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) Rules

I.D. No. ENV-44-08-00007-P

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

Proposed Action: This is a consensus rule making to amend Part 200 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303 and 19-0305

Subject: Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) rules.

Purpose: To incorporate by reference the Federal NESHAP regulations and correct existing typographical errors.

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

Text of proposed rule: Sections 200.1 through 200.8 remain unchanged.

Existing Section 200.9 is amended to read as follows:

Table 1

Regulation	Referenced Material	Availability	*S	Pulp and Paper (P&P I and III)	[488-520] 500-532 Vol. 1
6 NYCRR Part/ sec./etc.	CFR (Code of Federal Regulations) or other		*T	Halogenated Solvent Cleaning	[520-548] 532-563 Vol. 1
200.10(b)			*U	Group I Polymer and Resins	[549-671] 563-683 Vol. 1
Table 4	40 CFR Part 63 (July 1, [2005] 2007)	*	*W	National Emission Standards for Hazardous Air Pollutants for Epoxy Resins Production and [n]Non- [n]Nylon Polyamides Production	[672-685] 683-696 Vol. 1
<p>** Available from Department of Environmental Conservation, Air Resources, 625 Broadway, Albany, [N.Y.] <i>New York</i>, 12233-3251 Existing subdivision 200.10(a)-(c) remains unchanged. Existing Section 200.10(d) is amended to read as follows: (d) 'Table 4'.</p>					
<p>Table 4 National Emission Standards for Hazardous Air Pollutants</p>					
'40 CFR 63 Subpart'	'Source Category'	'Page Number in July 1, [2005] 2007 Edition or Date of Promulgation & Federal Register Cite'	*AA	Phosphoric Acid Manufacturing Plants	11-21 Vol. 2
*A	General Provisions	[11-69] 11-70 Vol. 1	*BB	Phosphate Fertilizers Production Plants	21-31 Vol. 2
*B	Requirements for Control Technology Determination for Major Sources in Accordance with Clean Air Sections, Sections 112(g) and 112(j)	[69-91] 70-93 Vol. 1	*CC	Petroleum Refineries	31-93 Vol. 2
*F	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry	[144-179] 153-188 Vol. 1	*DD	Off-[s]Site Waste and Recovery Operations	93-146 Vol. 2
*G	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations and Wastewater	[179-339] 189-349 Vol. 1	*EE	Magnetic Tape Manufacturing Operations	146-174 Vol. 2
*H	Organic Hazardous Air Pollutants for [Certain Processes Subject to the Negotiated Regulation for] Equipment Leaks	[339-380] 349-390 Vol. 1	*GG	Aerospace Manufacturing and Rework Facilities	174-226 Vol. 2
*I	[Polyvinyl Chloride and Copolymers] <i>Organic Hazardous Air Pollutants for Certain Processes Subject to the Negotiated Regulations for Equipment Leaks</i>	[380-390] 390-400 Vol. 1	*HH	Oil and Natural Gas Production Plants	[226-259] 226-263 Vol. 2
*J	[Organic Hazardous Air Pollutants for Certain Processes Subject to the Negotiated Regulations for Equipment Leaks] <i>Polyvinyl Chloride and Copolymers Production</i>	[390-391] 400-401 Vol. 1	*II	Shipbuilding/Ship Repair (Surface Coating)	[260-275] 263-278 Vol. 2
*L	Coke Oven Batteries	[391-418] 401-428 Vol. 1	*JJ	Wood Furniture Manufacturing Operations	[276-304] 279-307 Vol. 2
*M	<i>Perchloroethylene Air Emission Standards for Dry Cleaning Facilities</i>	[418-426] 428-438 Vol. 1	*KK	Printing and Publishing Industry	[304-333] 307-340 Vol. 2
*N	Chromium Electroplating and Anodizing	[426-456] 438-467 Vol. 1	*LL	Primary Aluminum Reduction Plants	[333-353] 340-360 Vol. 2
*O	Ethylene Oxide Commercial Sterilizers	[456-471] 467-482 Vol. 1	*MM	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills	[353-371] 360-378 Vol. 2
*Q	Industrial Process Cooling Towers	[471-474] 482-486 Vol. 1	*OO	National Emission Standards for Tanks-Level 1	[371-376] 378-383 Vol. 2
*R	Gasoline Distribution Facilities	[475-488] 486-499 Vol. 1	*PP	National Emission Standards for Containers	[376-384] 383-391 Vol. 2
			*QQ	Surface Impoundments	[384-390] 391-397 Vol. 2
			*RR	Individual Drain Systems	[390-394] 397-401 Vol. 2
			*SS	Closed Vent Systems, Control Devices, Recovery Devices, and Routing to a Fuel Gas System or a Process	[395-432] 402-439 Vol. 2
			*TT	Equipment Leaks - Control Level 1	[432-454] 439-461 Vol. 2
			*UU	Equipment Leaks - Control Level 2	[454-487] 461-494 Vol. 2
			*VV	Oil-Water Separators and Organic-Water Separators	[487-495] 494-502 Vol. 2
			*WW	Storage Vessels - Control Level 2	[496-502] 503-509 Vol. 2
			*XX	Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations	[502-511] 509-518 Vol. 2
			*YY	Generic Maximum Achievable Control Technology Standards	[511-572] 518-579 Vol. 2

*CCC	Steel Pickling - HCl Facilities and HCl Regeneration	[572-581] 579-588 Vol. 2	*PPPP	Surface Coating of Plastic Parts and Products	[688-739] 711-762 Vol. 4
*DDD	Mineral Wool Production	[581-592] 588-599 Vol. 2	*QQQQ	Surface Coating of Wood Building Products	[739-782] 762-806 Vol. 4
*EEE	Hazardous Air Pollutants From Hazardous Waste Combustors	[8-68] 9-111 Vol. 3	*RRRR	Metal Furniture Surface Coating	[782-824] 806-848 Vol. 4
*GGG	Pharmaceuticals Production	[68-179] 111-222 Vol. 3	*SSSS	Metal Coil Surface Coating	[824-850] 848-874 Vol. 4
*HHH	Natural Gas Transmission and Storage Facilities	[179-208] 222-250 Vol. 3	*TTTT	Leather Finishing Operations	[850-866] 874-890 Vol. 4
*III	Flexible Polyurethane Foam Production	[208-237] 250-280 Vol. 3	*UUUU	Cellulose [Production] Products Manufacturing	[867-913] 890-939 Vol. 4
*JJJ	Group IV Polymer and Resins	[237-358] 280-401 Vol. 3	*VVVV	Boat Manufacturing	[913-942] 939-967 Vol. 4
*LLL	Portland Cement Manufacturing Industry	[358-379] 401-423 Vol. 3	*WWWW	Reinforced Plastic Composites Production	[942-998] 967-1026 Vol. 4
*MMM	Pesticide Active Ingredient Production	[380-461] 423-504 Vol. 3	*XXXX	Rubber Tire Manufacturing	[998-1033] 1026-1061 Vol. 4
*NNN	Wool Fiberglass Manufacturing	[461-476] 504-519 Vol. 3	*YYYY	Stationary Combustion Turbines	[1033-1049] 1061-1077 Vol. 4
*OOO	Amino/Phenolic Resins Manufacturing	[476-541] 519-584 Vol. 3	*ZZZZ	Stationary Reciprocating Internal Combustion Engines	[15-38] 15-37 Vol. 5
*PPP	Polyether Polyols Production	[541-619] 584-663 Vol. 3	*AAAAA	Lime Manufacturing Plants	[38-62] 38-61 Vol. 5
*QQQ	Primary Copper	27-51 Vol. 4	*BBBBB	Semiconductor Manufacturing	[62-71] 61-71 Vol. 5
*RRR	Secondary Aluminum Production	51-94 Vol. 4	*CCCCC	Coke Oven: Pushing, Quenching, Battery Stacks	[72-98] 71-97 Vol. 5
*TTT	Primary Lead Smelting	95-103 Vol. 4	*EEEEE	Iron and Steel Foundries	[149-177] 150-178 Vol. 5
*UUU	Petroleum Refineries: Catalytic Cracking, Catalytic Reforming, and Sulfur [Plant] Recovery Units	[103-180] 103-179 Vol. 4	*FFFFF	Integrated Iron and Steel Manufacturing	[178-200] 178-202 Vol. 5
*VVV	Publicly Owned Treatment Works	[180-189] 179-188 Vol. 4	*GGGGG	Site Remediation	[200-254] 202-258 Vol. 5
*XXX	Ferrous Alloys Production: Ferromanganese and Silicomanganese	[189-201] 188-200 Vol. 4	*HHHHH	Miscellaneous Coating Manufacturing	[255-281] 258-282 Vol. 5
*AAAA	Municipal Solid Waste Landfills	[201-208] 200-207 Vol. 4	*IIIII	Mercury Emissions From Mercury Cell Chlor-Alkali Plants	[281-308] 282-309 Vol. 5
*CCCC	Manufacturing of Nutritional Yeast	[208-221] 207-220 Vol. 4	*LLLLL	Asphalt Roofing and Processing	[355-377] 356-378 Vol. 5
*DDDD	Plywood and Composite Wood Products	[221-270] 220-280 Vol. 4	*MMMMM	Flexible Polyurethane Foam Fabrication	[377-391] 378-392 Vol. 5
*EEEE	Organic Liquid Distribution (Non-Gasoline)	[271-303] 280-322 Vol. 4	*NNNNN	Hydrochloric Acid [& Fumed Silica] Production	[9-27] 10-28 Vol. 6
*FFFF	Miscellaneous Organic Chemical Manufacturing	[304-342] 322-367 Vol. 4	*PPPPP	Engine Test Cells/Stands	[27-53] 28-54 Vol. 6
*GGGG	Solvent Extraction For Vegetable Oil Production	[343-367] 367-391 Vol. 4	*QQQQQ	Friction Products Manufacturing	[53-61] 54-62 Vol. 6
*HHHH	Wet Formed Fiberglass Mat Production	[367-382] 392-407 Vol. 4	*RRRRR	Taconite Iron Ore Processing	[61-86] 62-86 Vol. 6
*IIII	Surface Coating of Automobiles and Light-Duty Trucks	[382-440] 407-467 Vol. 4	*SSSSS	Refractory Products Manufacturing	[86-134] 87-135 Vol. 6
*JJJJ	Paper and Other Web [Surface] Coating	[440-471] 467-499 Vol. 4	*TTTTT	Primary Magnesium Refining	[134-146] 135-147 Vol. 6
*KKKK	Surface Coating of Metal Cans	[471-529] 499-553 Vol. 4	*DDDDDD	Polyvinyl Chloride and Copolymers Production Area Sources	147-148 Vol. 6
*MMMM	Surface Coating of Miscellaneous Metal Parts and Products	[530-584] 553-608 Vol. 4	*EEEEEE	Primary Copper Smelting Area Sources	148-161 Vol. 6
*NNNN	Large Appliance Surface Coating	[584-624] 608-648 Vol. 4	*FFFFFFF	Secondary Copper Smelting Area Sources	161-166 Vol. 6
*OOOO	Printing, Coating, and Dyeing of Fabrics and Other Textiles	[624-688] 648-711 Vol. 4	*GGGGGG	Primary Nonferrous Metals Area Sources - Zinc, Cadmium, and Beryllium	166-176 Vol. 6

*Appendix A	Test Methods	[146-347] 176-375 Vol. 6
*Appendix B	Sources Defined for Early Reduction Provisions	[348] 376 Vol. 6
*Appendix C	Determination of the Fraction Biodegraded in a Biological Treatment Unit	[348-379] 376-407 Vol. 6
*Appendix D	Alternative Validation Procedure For EPA Waste and Wastewater Methods	[379-380] 407-408 Vol. 6
*Appendix E	Monitoring Procedure For Nonthoroughly Mixed Open Biological Treatment Systems at Kraft Pulp Mills Under Unsafe Sampling Conditions	[380-392] 408-420 Vol. 6

[+Promulgated after 7/1/97 - not included in 40 CFR 63 as of the effective date this Part.]

Text of proposed rule and any required statements and analyses may be obtained from: Rick Leone, P.E., Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: neshaps@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.

Consensus Rule Making Determination

6 NYCRR Part 200, Section 200.10 incorporates by reference the Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) which appear in 40 CFR Part 63. The proposed rulemaking will update 6 NYCRR 200.10 to incorporate the new and amended NESHAP regulations which appeared in the July 1, 2007 Code of Federal Regulations and to correct existing typographical errors.

In addition to the amendments to Section 200.10, 6 NYCRR 200.9 will be updated to reflect the new and modified references in Section 200.10.

The proposed rulemaking adopts already existing Federal standards only and therefore does not impose additional requirements on regulated entities. Consequently, no person is likely to object to this rulemaking.

Job Impact Statement

1. Nature of impact:

This proposed rulemaking will have no impact on numbers of jobs or employment opportunities in the State. The purpose of the rulemaking is to update the Table of National Emission Standards for Hazardous Air Pollutants to cite to the 2007 Code of Federal Regulations and to correct existing typographical errors. The proposed rulemaking adopts Federal standards only and does not impose additional requirements on regulated entities.

2. Categories and numbers affected:

This proposed rulemaking will not affect specific categories of jobs nor will it affect the number of jobs or employment opportunities.

3. Regions of adverse impact:

This proposed rulemaking will not affect any region of the state specifically.

4. Minimizing adverse impact:

Since this proposed rulemaking will not affect the number of jobs or employment opportunities, there have been no steps taken to minimize the impact on existing jobs.

Department of Labor

EMERGENCY RULE MAKING

Enhanced Administration of the State's Apprenticeship Training Program and Enhanced Program Sponsor Accountability

I.D. No. LAB-44-08-00009-E

Filing No. 1008

Filing Date: 2008-10-14

Effective Date: 2008-10-15

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

Action taken: Addition of sections 601.4(i) and 601.5(d)-(g) to Title 12 NYCRR.

Statutory authority: Labor Law, section 811; and 29 CFR 29

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

Specific reasons underlying the finding of necessity: The rule enhances consistency in administration of the state's Apprenticeship Training Program, stakeholder participation in program approval, and program sponsor accountability that will ensure a well-trained workforce for the state's future.

Subject: Enhanced administration of the state's apprenticeship training program and enhanced program sponsor accountability.

Purpose: To strengthen the Apprenticeship Training Program in New York and ensure a well-trained, skilled workforce for the future.

Text of emergency rule: Section 601.4 of the regulations of the Commissioner of Labor is amended by adding a new sub-section (i) as follows:

(i) *A written public comment period is required for all new trades and apprenticeship program applications. A list of all new trades and new apprenticeship program applications will be placed on the New York State Department of Labor website for a minimum period of ten business days to solicit public comments. Those individuals who submit comments will be asked to provide their name, title, organizational name and their comments via mail or e-mail. Comments received will be reviewed by the Apprenticeship Training Program Director, and action will be taken, as deemed appropriate.*

Section 601.5 of the regulations of the Commissioner of Labor is amended by adding new sub-sections (d), (e), (f), and (g), as follows:

(d) *All sponsors of apprenticeship training programs, and their signatories - if any, are required to ensure that their apprentices maintain records that document job rotation and the skills acquired. The apprentice must maintain this record in a format approved by the New York State Department of Labor. The apprentice's immediate supervisor is required to sign off on this record at least monthly.*

(e) *Newly approved sponsors seeking registration of new apprenticeship programs must undergo a two year probationary period. Newly approved sponsors will be advised that their programs will be approved contingent upon successful completion of the probationary period.*

(1) *Factors considered during the probationary period include, but are not limited to:*

(i) *Payment of wages as specified in the apprenticeship agreement;*

(ii) *documentation of job rotation;*

(iii) *documentation of participation in related instruction;*

(iv) *provision of proper supervision;*

(v) *provision of a safe work environment; and*

(vi) *compliance with the provisions of Labor Law, Article 23 and 12 NYCRR Parts 600 and 601.*

(2) *After a review of the new sponsor's performance during the probationary period, the sponsor will be notified whether they:*

(i) *passed probation; or*

(ii) *will be placed on an extended probation for a period of no more than one year, informed of the reasons why this decision was made, and issued a corrective action plan; or*

(iii) *failed probation and the reasons why.*

(f) *New sponsors who fail probation will not be permitted to reapply for registration of an apprenticeship program for a period of one year. This prohibition additionally applies to any successor or substantially owned-affiliated entity, as those terms are defined in Labor Law, Section 220, of the new sponsor. The new sponsor may file a written appeal to the deci-*

sion by sending a letter to the Commissioner of Labor putting forth its arguments why the sponsor candidate should not have failed probation.

(g) All Apprenticeship Training Program sponsors will undergo a recertification process for each program at three year intervals. Commencing with enactment of these regulations, for the first three years, these recertifications shall be performed on a basis of older programs, by region, being recertified first.

(1) Each sponsor shall complete a new Apprenticeship Training Program Registration Agreement for each of their programs.

(i) Simultaneously, any sponsors of Group Joint or Group Non-Joint programs must submit a current list of program signatories' names, addresses, Federal Employer Identification Numbers, and Unemployment Insurance Employer Numbers in an electronic format as specified by the Department of Labor.

(ii) The Sponsor shall also collect completed and signed Due Diligence forms from each signatory, provide any such forms with affirmative answers to the Department of Labor with its new Apprenticeship Training Program Registration Agreement, and maintain the rest of the applications in its office for ongoing review and inspection by the Department.

(iii) The program sponsor must provide assurances in writing to the New York State Department of Labor that the sponsor will hold all signatories to the standards of their Apprentice Training Program Registration Agreement with the New York State Department of Labor.

(2) After a review of the sponsor's performance during the period prior to recertification, the sponsor will receive notification that:

(i) Its Apprenticeship Training Program has been renewed; or
(ii) It was found to have committed the violations specified, and is to be issued a corrective action plan; formal deregistration will be pursued only if NO corrective action has been taken by the sponsor within a reasonable period of time to resolve all issues; or

(iii) Its Training Program has been recommended for deregistration and deregistration proceedings will be initiated.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 11, 2009.

Text of rule and any required statements and analyses may be obtained from: Maria Colavito, New York State Department of Labor, Room 508, Building 12, State Office Campus, Albany, NY 12240, (518) 457-4380, email: nysdol@labor.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Labor Law § 811.1(j) states that the Commissioner of Labor shall have the power to adopt such rules and regulations as may be necessary for the effective administration of the purposes and provisions of Article 23. In addition, the emergency regulations are promulgated under authority granted to the Department under federal regulations found at 29 CFR 29.

2. Legislative objectives:

Labor Law Article 23, § 810 makes it the public policy of the State of New York to develop sound apprenticeship training standards and to encourage industry and labor to institute apprenticeship programs as a preferred method of training and preparing workers in New York. These amendments fulfill these legislative objectives and strengthen the Apprenticeship Training program in New York by increasing public participation in the apprenticeship process, reinforcing the need to memorialize skill attainment by apprentices, and reaffirming the accountability of program sponsors for their signatories and apprentices.

3. Needs and benefits:

During the past year, the Commissioner of Labor placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the State's Apprenticeship Training Program was conducted. Two independent reviews were conducted, an internal review - the Process Mapping Report - and an External Review conducted by Coffey Consultant's. These reviews sought input from various stakeholders and partners as well as Apprenticeship Training Program staff. Both the internal and external reviews echoed common themes and consistent recommendations to ensure the development of a world class workforce. Those themes included the need for greater stakeholder involvement in the registration process, increased consistency in program implementation, and increased accountability by program sponsors in ensuring the quality and effectiveness of apprenticeship programs. A number of significant recommendations which surfaced from the internal and external reviews are reflected in these regulatory amendments.

The public comment period for all new program applications affords an opportunity for stakeholders to provide comments on all new programs and new trades initiated in New York State. The requirement for use of Blue Books or other form of documentation of job rotation ensures that apprentices are being rotated to all aspects of their work process resulting in a skilled workforce with portable credentials. Sponsor responsibility for

monitoring program signatories and their compliance with apprenticeship training requirements shores up program oversight and accountability. Finally, the program recertification process allows sponsors an opportunity to ensure the Department has current and accurate information on their programs and signatories and ensures periodic monitoring of all apprenticeship programs on a regular basis.

4. Costs:

The implementation of these regulations will result in the need for the apprentice's on-the-job supervisor to sign the apprentice's Blue Book, or other form of documentation of job rotation approved by the Department. It will also require that new sponsors go through a two-year probation period before being certified. Further, the rules call for triennial sponsor recertification, the reporting and monitoring of employer-members and employer-signatories by program sponsors, and, if needed, the preparation and implementation of corrective action plans for sponsors who fail to measure up to program standards. The amount of time and resources needed will be contingent upon the size of the program and the complexity of the corrective action issues.

It is anticipated that the implementation of the regulations will impact Apprenticeship Training Office staff. The caseloads for field staff will be adjusted accordingly to accommodate for these needs; however, additional staff will be required in central office to process the documents for program probation and recertification, for tracking of signatory information, as well as handling the correspondence regarding public comments on new trades and program applications.

5. Local government mandates:

Municipalities, school districts, fire districts and others who currently, or plan to, serve as program sponsors for apprenticeship training programs will have to comply with the new requirements that will apply to any new programs proposed by them including public notice of program applications. All apprenticeship programs in which these entities participate will be subject to ensuring that current and accurate information is held on program signatories. The Department will be responsible for monitoring the signatories on a random sample basis. However, these requirements apply only to local governments that choose to serve as program sponsors for apprenticeship programs. Moreover, the amendments will benefit such local governments by ensuring consistency and accountability among program sponsors and will assist local governments that have enacted local laws requiring public work contractors to participate in state registered apprenticeship training programs by helping to ensure the quality of such programs.

Apprenticeship Training Program staff will be available to provide technical assistance to program sponsors - including local governments choosing to undertake this role - to assist them in complying with the rule.

6. Paperwork:

Apprenticeship programs traditionally require apprentices and their supervisors to track apprentices' progress through various job rotations included in their overall training program. While "blue books" have traditionally been used for this purpose, the proposed rule allows for flexibility in this regard by providing for skills attainment to be tracked in some other format approved by the Department.

Additional paperwork that will be required from regulated parties as a result of these rule changes include corrective action plans for program sponsors who fail to comply with program requirements and triennial recertification applications.

At the same time, the Department will have to develop and complete a number of new documents including form letters to address probationary and recertification determinations, form letters to acknowledge receipt of public written comments, as well as revisions to the Apprentice Training Program Registration Agreement.

The database currently used by the Apprenticeship Training Program will also need to be revised to track probationary and recertification periods and program signatories' information.

7. Duplication:

No duplication of rules were identified. Rather, these regulations are intended to clarify existing regulations found in 12 NYCRR § 601.4 Standards for Apprenticeship Programs and 12 NYCRR § 601.5 Standards for Apprenticeship Agreements.

8. Alternatives:

Overall there are no viable alternatives to the requirements set forth in the proposed rule. The rule reinforces basic requirements for program registration, monitoring, and accountability recommended by consultants and various stakeholders folding a long and detailed review of the state's administration of its apprenticeship training program.

9. Federal standards:

United States Department of Labor's proposed rule changes to 29 CFR 29 published in the Federal Register on December 13, 2007, contains a requirement for provisional registration, including a one year provisional approval of newly registered programs after which program approval may be permanent, continued as provisional, or rescinded following a review

by the registration agency. New York State's proposed emergency regulation for a probationary period for all new programs mirrors the proposed federal requirement except that the probation period extends for two years. It is believed that this enhanced requirement will result in higher standards for New York's Apprenticeship Training program by offering sponsors additional time to fully develop quality programs, while at the same time, affording the Department an opportunity to assess the success of the program based upon a more representative operating history.

10. Compliance schedule:

The two-year probationary requirement will become effective for new sponsor program applications approved on or after the effective date of these regulations.

The three-year recertification period will be implemented in each geographic region of the state on an incremental scale determined by the age of the program so that one third of the programs within a region - starting with the oldest programs - will be due for recertification each year, commencing on or after the effective date of these regulations.

The establishment of a written public comment period for new trades and program applications will be implemented on or after the effective date of these regulations.

New sponsor mandates with regard to ensuring that current and accurate information is held on their employer signatories will be implemented on or after the effective date of these regulations.

Provisions set forth in the rule clarifying job rotation requirements and acceptable documentation will be effective on or after the effective date of these regulations.

Regulatory Flexibility Analysis

1. Effect of rule:

Apprenticeship Training Programs include building and construction trades, manufacturing trades, state governments (Division of Correctional Services), local governments (such as villages, school districts, and fire districts), as well as other non-traditional trades (such as chef).

There are four types of Apprenticeship Training programs in the state, as follows:

- Individual Non-Joint: --- Involves a non-union employer and one or more apprentices or an employer with a union that does not wish to participate in the apprenticeship program. (584 Programs)
- Individual Joint: --- Involves a single employer and the union representing the employer's apprentices. (70 Programs)
- Group Joint: --- Involves a group of employers and one union, which represents the workers of the trade. (194 Programs)
- Group Non-Joint: --- Involves a group of non-union employers or an employer trade association whose members agree to apprenticeship standards among themselves or which contracts with a service provider to administer the apprenticeship program and to provide related instruction classes for the apprentices. (27 Programs)

Please note the data listed above reflects the number of programs in each category, not individual sponsors. One sponsor may operate multiple programs.

2. Compliance requirements:

Participation in apprenticeship training programs is completely voluntary. Small businesses and local government sponsors who choose to participate in such programs may be required to undertake additional record keeping activities associated with tracking the apprentice's progress through various job rotations, if they were not complying with this requirement previous to the implementation of this rule. Such record keeping may be accomplished through use of a "Blue Book" or, under the proposed rule, some other format approved by the Commissioner. Small businesses and local governments sponsoring apprenticeship training programs will also be responsible for the preparation and implementation of a corrective action plan, if needed, to bring their program into compliance with statutory and regulatory requirements governing apprenticeship programs; completion of paperwork for triennial recertification; and obtaining and tracking of signatory information. The amount of time needed for all these activities is contingent upon the size of the program and the degree to which these programs are already in compliance with requirements of the current regulations governing the program.

3. Professional services:

The adoption of these emergency regulations is not expected to place an undue burden on program sponsors that would require them to retain professional services.

4. Compliance costs:

The adoption of these emergency regulations is not expected to place an undue burden on program sponsors with regard to cost. For example, the completion of blue books or an alternative method of documentation of job rotation is done by the apprentice's supervisor. All Apprentice Training Program Registration Agreements provide for a specified ratio of apprentices to journey workers (supervisors). Therefore, a supervisor will be responsible for a limited number of apprentices and their Blue Books.

The implementation of these regulations will result in the need for

program sponsors to sign the apprentice's Blue Book, or other form of documentation of job rotation, and the preparation and implementation of the completion of a corrective action plan, if needed, completion of paperwork for recertification, and the tracking of signatory information. The amount of time needed is contingent upon the size of the program and the complexity of the corrective action issues.

5. Economic and technological feasibility:

The adoption of these emergency regulations is not expected to place an undue burden on program sponsors. Wherever possible, the Department will utilize technology to make filing of documents with the Department easier. For example, the department encourages sponsors to submit lists of apprenticeship program signatories in an electronic format. Also, public comments on new program applications and new trades will be accepted via an electronic format.

6. Minimizing adverse impact:

For the new regulation regarding sponsors' responsibilities to monitor employer signatories it is presumed that sponsors who conduct Group Joint or Group Non-Joint programs currently maintain a list of program signatories in their normal course of business.

For the new regulation regarding job rotation requirements and acceptable documentation, this change will allow a stricter enforcement of current procedures. Program sponsors should be tracking job rotation at the present time, however, this regulation will provide a more consistent application of this requirement.

While the Department believes that the possibility of adverse impact of the emergency rule should be minimal, the Department will provide apprenticeship program sponsors with reasonable periods of time in which to bring non-compliant programs into compliance with all regulatory requirements, will provide technical assistance to program sponsors, and will provide adjudicatory hearings to program sponsors to challenge any proposed adverse action by the Department. These activities all serve to minimize any adverse impact from the rule.

7. Small business and local government participation:

During the past year, New York State placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the program was conducted. Two independent reviews were conducted which seeking input from various stakeholders and partners as well as Apprenticeship Training Program staff. Small businesses and local governments were given an opportunity to participate in these reviews by responding to questions asked by parties conducting the reviews. The final written Reports authored by Coffey Consulting, LLC, and NYSDOL were posted for public review on NYSDOL's website and seven public forums were held throughout the state in August and September 2008, offering the public, including small businesses and local governments, an opportunity to provide their comments on the reports. All feedback received as a result of these activities was reviewed and considered and a number of recommendations received from stakeholders, interested parties, and the consultants are reflected in this rulemaking.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Apprenticeship training programs may be sponsored by a single employer, a group of employers, or a joint apprenticeship committee representing both employers and a union. These sponsors may be located throughout New York State, including all rural areas of the State.

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

All Apprenticeship Training Program Sponsors in rural areas who conduct Group Joint or Group Non-Joint programs must provide a list of all employer signatories to NYSDOL and will be required to hold all signatories to the standards of their Apprentice Training Program Registration Agreement with NYSDOL.

All program sponsors in rural areas will be required to ensure their apprentices are regularly keeping "Blue Books" or a comparable record to ensure documentation of job rotation and the attainment of skills.

All program sponsors in rural areas will be required to apply for recertification of programs every three years and to undergo a program review at that time. Deficiencies in program administration or operation identified during the review will have to be corrected.

All applications for new apprenticeship training programs by sponsors in rural areas will be subject to publication and public comments. Sponsors may be required to respond to inquiries from Apprenticeship Training Program staff in response to comments received from the public.

3. Costs:

The adoption of these emergency regulations is not expected to place an undue burden on program sponsors located in rural areas as opposed to program sponsors in other geographic areas of the state. The implementation of these regulations will result in the need for the apprentice's on-the-job supervisor to sign the apprentice's Blue Book or other form of documentation of job rotation approved by the Department. It will also require that new sponsors go through a two-year probation period before

being certified. Further, the rules call for triennial sponsor recertification, that sponsors insure current and accurate information is held on program signatories, and, if needed, the preparation and implementation of corrective action plans for sponsors who fail to measure up to program standards. The amount of time and resources needed will be contingent upon the size of the program and the complexity of the corrective action issues. New York State Department of Labor Staff is available to assist in addressing any corrective action issues. It is not anticipated that the rule would require the programs to hire professional staff or consultants to undertake any of these tasks.

4. Minimizing adverse impact:

It is presumed that sponsors located in rural areas who conduct Group Joint or Group Non-Joint programs currently maintain a list of program signatories in their normal course of business. Therefore, the emergency rule should not have an adverse impact from any sponsors in this regard.

The documentation of job rotation requirements for sponsors is currently enacted by procedure. Program sponsors located in rural areas should be tracking job rotation at the present time and the impact from the emergency rule should be minimal.

The Department's Apprenticeship Training Program staff is available to provide technical assistance to program sponsors located in rural areas as well as other areas of the state. Moreover, the Department will provide apprenticeship program sponsors with reasonable periods of time in which to bring non-compliant programs into compliance with all regulatory requirements and will provide adjudicatory hearings to program sponsors to challenge any proposed adverse action by the Department. These activities all serve to minimize any adverse impact from the rule.

5. Rural area participation:

During the past year, New York State placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the program was conducted. Two independent reviews were conducted seeking input from various stakeholders and partners as well as Apprenticeship Training Program staff. Sponsors in rural areas were given an opportunity to participate in these reviews by responding to questions asked by parties conducting the reviews. The final written Reports authored by Coffey Consulting, LLC and NYSDOL were posted for public review on NYSDOL's website and seven public forums were held throughout the state in August and September 2008, offering the public, including sponsors in rural areas, an opportunity to provide their comments on the reports. All feedback received as a result of these activities was reviewed and considered and a number of recommendations received from stakeholders, interested parties, and the consultants are reflected in this rulemaking.

Job Impact Statement

1. Nature of impact:

If a sponsor fails to comply with the requirements of the emergency regulations and a program is ultimately deregistered or not recertified, this would have an impact on an apprentice's status as a registered apprentice and thus affect his or her ability to obtain a portable nationally recognized credential of skills standards. The loss of this credential may have a long term impact on the apprentice's earning potential.

The Department does not anticipate that the proposed rule will impact many jobs as we do not believe it will be necessary to either deregister or refuse to recertify a large number of programs. It is expected that the vast majority of programs would comply with all requirements of the rule. Moreover, except under extreme circumstances, non-compliant program sponsors will be given opportunities to come into compliance before any steps would be taken to terminate a program.

2. Categories and numbers affected:

The Apprenticeship Training Program currently contains 521 construction trades programs and 354 non-construction trades programs, with over 20,000 registered apprentices.

3. Regions of adverse impact:

These emergency regulations impact all program sponsors in New York State regardless of the geographic location of the apprenticeship program.

4. Minimizing adverse impact:

While the Department believes that the possibility of adverse impact of the emergency rule on job holders is going to be negligible, the Department will provide apprenticeship program sponsors with reasonable periods of time in which to bring non-compliant programs into compliance with all regulatory requirements, will provide technical assistance to program sponsors, and will provide adjudicatory hearings to program sponsors to challenge any proposed adverse action by the Department. These activities all serve to minimize any adverse impact from the rule.

5. (IF APPLICABLE) Self-employment opportunities:

N/A

Office of Mental Health

NOTICE OF ADOPTION

Medical Assistance Payments for Comprehensive Psychiatric Emergency Programs

I.D. No. OMH-30-08-00002-A

Filing No. 1007

Filing Date: 2008-10-09

Effective Date: 2008-10-29

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

Action taken: Amendment of Part 591 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04, 31.27 and 43.02

Subject: Medical Assistance Payments for Comprehensive Psychiatric Emergency Programs.

Purpose: To increase rates for Comprehensive Psychiatric Emergency Programs as required by the enacted State budget for FY 2008-2009.

Text or summary was published in the July 23, 2008 issue of the Register, I.D. No. OMH-30-08-00002-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, 8th Floor, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

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

National Grid's Economic Development Plan

I.D. No. PSC-44-08-00011-P

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

Proposed Action: The Public Service Commission is considering a filing from Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) dated August 29, 2008 proposing an economic development plan.

Statutory authority: Public Service Law, sections 5(1)(b), 65 (1), (2), (3), 66 (1), (3), (5), (10), (12), (12-b)

Subject: National Grid's economic development plan.

Purpose: Consideration of the approval of National Grid's economic development plan.

Substance of proposed rule: The Public Service Commission is considering a filing from Niagara Mohawk Power Corporation d/b/a National Grid dated August 29, 2008, proposing, in conformance with an Order Providing for Revised Procedures and Approving in Part Economic Development Plan Filing issued May 27, 2008 in Case 01-M-0075, an economic development plan adding new economic initiatives and modifying existing economic development initiatives. The Commission may adopt, modify or reject, in whole or in part, the relief proposed.

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.

(01-M-0075SA43)

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

Filing of Certificate of Merger with New York Department of State

I.D. No. PSC-44-08-00012-P

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

Proposed Action: The Commission is considering a request by Oriskany Falls Telephone Corporation for approval to file a Certificate of Merger with the New York Department of State.

Statutory authority: Public Service Law, section 108

Subject: Filing of Certificate of Merger with New York Department of State.

Purpose: To determine if the filing of a Certificate of Merger should be approved.

Substance of proposed rule: By amended petition dated October 7, 2008, Oriskany Falls Telephone Corporation sought approval of the transfer of all its issued and outstanding stock held by TDS Telecommunications Corporation to Oriskany Falls Merger Corporation, the merger of Oriskany Falls Telephone Corporation into Oriskany Falls Merger Corporation, and the filing of a Certificate of Merger with the New York Department of State. The Commission is considering whether to grant or deny, in whole or in part, approval of the transactions and the filing of the Certificate of Merger.

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-1134SA1)

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

Interconnection of the Networks between Verizon and Access Integrated Networks for Local Exchange Service and Exchange Access

I.D. No. PSC-44-08-00013-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Verizon New York Inc. for approval of an Interconnection Agreement with Access Integrated Networks, Inc. executed on September 15, 2008.

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

Subject: Interconnection of the networks between Verizon and Access Integrated Networks for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Verizon and Access Integrated Networks.

Substance of proposed rule: Verizon New York Inc. and Access Integrated Networks, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Access Integrated Networks, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until September 14, 2010, or as extended.

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-1173SA1)

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

Mandatory Day-Ahead Hourly Pricing

I.D. No. PSC-44-08-00014-P

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

Proposed Action: The Commission is considering an implementation plan filed by Orange & Rockland Utilities, Inc. on Mandatory Day-Ahead Hourly Pricing in compliance with Commission Order issued July 23, 2008 in Case 07-E-0949.

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

Subject: Mandatory Day-Ahead Hourly Pricing.

Purpose: An implementation plan to expand its Mandatory Day-Ahead Hourly Pricing Program.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, an implementation plan by Orange & Rockland Utilities, Inc. to expand its Mandatory Day-Ahead Hourly Pricing program filed in compliance with Commission Order issued July 23, 2008 in Case 07-E-0949.

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

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

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

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

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

(07-E-0949SA2)

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

Water Rates and Charges

I.D. No. PSC-44-08-00015-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 filing of Heritage Hills Water Works Corporation (Heritage Hills) filed on October 9, 2008, requesting authority to increase its annual revenues by approximately \$300,000 or 22%.

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

Subject: Water rates and charges.

Purpose: For approval to increase Heritage Hills Water Works Corporation's annual revenues by about \$300,000 or 22%.

Substance of proposed rule: On October 9, 2008, Heritage Hills Water Works Corporation (Heritage Hills or the company) filed, to become effective on February 1, 2009, tariff amendments (Leaf No. 67, Revision 10, Leaf No. 68 Revision 2, and Leaf 69 Revision 2) to its paper tariff schedule P.S.C. No. 2 – Water containing new rates designed to produce additional annual revenues of about \$300,000 or 22%. Heritage Hills provides general metered water service to 2,606 residential customers and 37 commercial customers in a condominium complex known as Heritage Hills of Westchester, in the Town of Somers, Westchester County. Fire protection is provided. The company's tariff, along with its proposed changes, will be available for review at the company's office located at Heritage Hills Drive, Somers, New York or at the Commission's offices located at both 90 Church Street, New York, New York or Three Empire State Plaza, Albany, New York. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(08-W-1201SA1)

Racing and Wagering Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Use of Anabolic Steroids in Racehorses

I.D. No. RWB-44-08-00008-P

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

Proposed Action: Amendment of sections 4043.2(e)(9) and 4120.2 and addition of sections 4043.15 and 4120.12 to Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101(1), 301(2)(a), and 902(1)

Subject: The use of Anabolic Steroids in racehorses.

Purpose: To restrict the administration of certain anabolic steroids to racehorses.

Text of proposed rule: Paragraph 9 of subdivision (e) of Section 4043.2 of 9 NYCRR is amended to read as follows:

(9) hormones and steroids (e.g., testosterone, progesterone, estrogens, chorionic gonadotropin, glucocorticoids [e.g., Prednisolone, Depomedrol], and anabolic steroids [e.g., Equipoise]), except in conjunction with joint aspiration as restricted in subdivision (i) of this section; *the use of anabolic steroids is governed by Rule 4043.15;*

New Section 4043.15 is added to 9 NYCRR to read:

4043.15 Anabolic Steroids

(a) *The use of one of four approved anabolic steroids shall be permitted under the following conditions:*

(1) *Not to exceed the following permitted urine or plasma threshold concentrations:*

(i) *16β-hydroxystanozolol (metabolite of stanozolol (Winstrol)) - 1 ng/ml in urine*

(ii) *Boldenone (Equipoise) In male horses other than geldings, including free boldenone and boldenone liberated from its conjugates - 15 ng/ml in urine*

(iii) *Nandrolone - 1 ng/ml in urine*

(iv) *Testosterone*

(a) *In geldings-20 ng/ml in urine*

(b) *In fillies and mares-55 ng/ml in urine*

(2) *Any other anabolic steroids are prohibited to be administered.*

(3) *The presence of more than one of the four approved anabolic steroids above the approved thresholds is not permitted.*

(4) *Post-race urine or plasma samples collected from intact males must be identified to the laboratory.*

(5) *Any horse to which an anabolic steroid has been administered in order to assist in the recovery from an illness or injury may be placed on the veterinarian's list in order to monitor the concentration of the drug in urine. Once the concentration is below the designated threshold the horse is eligible to be removed from the list.*

(b) *A violation of this section shall be considered a positive test within the meaning of Part 4043.*

Paragraph 9 of subdivision (e) of Section 4120.2 of 9 NYCRR is amended to read as follows:

(9) hormones and steroids (e.g., testosterone, progesterone, estrogens, chorionic gonadotropin, glucocorticoids [e.g., Prednisolone, Depomedrol], and anabolic steroids [e.g., Equipoise]), except in conjunction with joint aspiration as restricted in subdivision (i) of this section; *the use of anabolic steroids is governed by Rule 4120.12;*

New section 4120.12 of 9 NYCRR is added to read:

4120.12 Anabolic Steroids

(a) *The use of one of four approved anabolic steroids shall be permitted under the following conditions:*

(1) *Not to exceed the following permitted urine or plasma threshold concentrations:*

(i) *16β-hydroxystanozolol (metabolite of stanozolol (Winstrol)) - 1 ng/ml in urine*

(ii) *Boldenone (Equipoise) In male horses other than geldings, including free boldenone and boldenone liberated from its conjugates - 15 ng/ml in urine*

(iii) *Nandrolone - 1 ng/ml in urine*

(iv) *Testosterone*

(a) *In geldings-20 ng/ml in urine*

(b) *In fillies and mares-55 ng/ml in urine*

(2) *Any other anabolic steroids are prohibited to be administered.*

(3) *The presence of more than one of the four approved anabolic steroids above the approved thresholds is not permitted.*

(4) *Post-race urine or plasma samples collected from intact males must be identified to the laboratory.*

(5) *Any horse to which an anabolic steroid has been administered in order to assist in the recovery from an illness or injury may be placed on the veterinarian's list in order to monitor the concentration of the drug in urine. Once the concentration is below the designated threshold the horse is eligible to be removed from the list.*

(b) *A violation of this section shall be considered a positive test within the meaning of Part 4043.*

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

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

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

Regulatory Impact Statement

1. Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101.1, 902.1, and 301.2(a) authorizes the New York State Racing and Wagering Board ("Board") to prescribe and promulgate regulations to specify the use and testing of drugs and medications in race horses. Section 101.1 creates within the executive department the Board, and provides that the Board has general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state, and over the corporations, associations, and persons engaged therein. Section 301.2(a) authorizes the Board to prescribe rules and regulations for effectually preventing the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed of harness horses in races in which they are about to participate. Section 902.1 authorizes the Board to promulgate any rules and regulations necessary to implement equine drug testing and expenses, and sets forth that

equine drug testing at race meetings shall be conducted by a land grant university within New York State, with a regents approved veterinary college facility. Further, section 902.1 provides that the Board shall promulgate rules and regulations to implement administrative penalties of loss of purse money, fines, or denial, suspension or revocation of a license for drugged horses.

2. Legislative objectives: To enable the Board to assure the public's confidence and preserve the integrity of racing at pari-mutuel betting tracks by regulating the use of drugs and medications in race horses so that their natural racing ability is not compromised or enhanced by such use.

This rulemaking is consistent with Chapter 267 of the Laws of 2008, which authorizes funding related to the testing of racehorses for the presence of elevated anabolic steroids and which was supported by the New York Thoroughbred Horsemen's Association. According to the sponsor's memo from the bill (A.11683/S.7866a), testing for steroids in racehorses has become a racing industry priority.

3. Needs and benefits: This rulemaking is necessary to prevent the use of anabolic steroids in race horses for any purpose other than legitimate therapeutic purposes, and to ensure that anabolic steroids are not used in a manner to effect the performance of a racehorse. The recommended amendments would provide the Board with modern rules to reflect current regulatory needs concerning the virtually unlimited use of anabolic steroids. This situation has been in the public eye recently and there is general consensus in the industry that action is required to assure that these drugs are used solely for legitimate therapeutic purposes and are not used in a manner to effect the performance of a horse, otherwise adversely impact the health or safety of the horse, or impair public confidence in the integrity of racing.

These amendments are based upon the model rule prescribed by the Association of Racing Commissioners International (ARCI) and the Racing Medication and Testing Consortium (RMTC). The Board currently regulates the administration of anabolic steroids pursuant to Board rules 4043.2 and 4120.2. The American Graded Stakes Committee has said that racetracks must - at a minimum - adopt the ARCI/RMTC anabolic steroids rule by January 1, 2009 or the date of the state's or track's first graded stakes next year. Failure to do so would result in the track losing graded stakes races. This year, 37 Grade I Stakes were conducted or are scheduled to be conducted in New York State with \$16.7 million in purse money. These races include such hallmark races as the Belmont Stakes, the Travers, and the Wood Memorial. By adopting the model rule, New York State will assume a leadership role in this critical regulatory undertaking and ensure that the problem of steroids will be addressed in a comprehensive and uniform manner. Conversely, New York State will lag behind other jurisdictions if the rule is not adopted and will be viewed as hindering the goal of uniformity.

The need to adopt the amendments are also supported by the Thoroughbred Safety Committee of the Jockey Club, which in July 2008 endorsed the model rule restrictions and the imposition of penalties of between one and three years for the unlawful administration of steroids to a race horse.

Since the amendments are based upon a model rule that either is now or will be adopted in at least 11 states, the amendments are responsive to the call for uniform standards in equine drug testing. In a sport where horses compete in various jurisdictions and the respective equine drug thresholds and testing may not always be the same, horsemen and owners have long sought uniform thresholds. In cases of therapeutic administration of anabolic steroids, this will allow trainers and veterinarians to calendar appropriately and prevent errant overages when the horse is ready to return to competition, regardless of which jurisdiction the horse will compete in. Adoption of the anabolic steroids standards would benefit the horseracing community in certain cases by eliminating the need to adjust anabolic steroid dosages in anticipation of competing in another racing jurisdiction with a different threshold.

There are four anabolic steroids that have been identified by the ARCI and RMTC for regulatory control: 16 β -hydroxystanozolol, boldenone, nandrolone and testosterone. There are at least two dozen anabolic steroids available worldwide. Anabolic steroids have a history of abuse in both human and equine athletes. They are prohibited in most major racing jurisdictions around the world, including Ireland, England, France, Dubai, Hong Kong, and Japan. National horse racing organizations, in addition to The Jockey Club, have sought the regulation of anabolic steroids in horse racing.

Most United States racing jurisdictions have not effectively prohibited or regulated the use of anabolic steroids, although some have now enacted regulations. The latter include Delaware, Pennsylvania, and California. Most of these jurisdictions have adopted either the ARCI or RMTC rule or variations of these rules. Both the ARCI Model Rule and the RMTC rule allows the presence in a horse's sample of one of four anabolic steroids below an established level. Any other anabolic steroids are prohibited from administration. The only distinction between the ARCI rule and the RMTC rule is that the ARCI establishes threshold levels in both urine and

plasma samples, while the RMTC rule only sets thresholds for urine samples. For all intents and purposes, the two model rules are the same.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule: This rule will not impose any direct costs on owners because the costs of establishing the testing program will be derived from a 1/2 of 1 percent takeout from purses awarded at the race track. The purse takeout is an indirect cost to the owners who are entitled to purse money, but such an indirect cost is mandated by statute and not this rule. The costs of the actual testing are not borne by the owners.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: There are no costs to local governments because the New York State Racing and Wagering Board is solely responsible for the regulation of horseracing. There will be new costs to the Racing and Wagering Board for the administration of the Board's anabolic steroid drug testing program, which is conducted at the veterinary college Cornell University. In order to cover these start-up costs, the Legislature enacted Chapter 267 of the Laws of 2008 that would allocate funds from a 1/2 of 1 percent takeout from race purse money to acquire steroid testing equipment. According to Cornell University, costs for staffing the anabolic steroid testing program can not be determined at this time in light of current state budgetary constraints for the Board's overall equine drug testing program. It is expected that the initial costs of setting up the anabolic steroid testing program will cost \$500,000 in the first year.

Purse money is derived from various public and private sources. Public funds include the New York State Thoroughbred Breeding Fund and the Agriculture and New York State Horsebreeding Development Fund. Private sector funds include nomination fees submitted by owners who enter their horses in a race, and private entities or individuals who provide purse money as sponsors of a race.

(c) The information, including the source(s) of such information and the methodology upon which the cost analysis is based: This information was compiled by Racing and Wagering Board staff in consultation with the veterinary college at Cornell University and John Wayne, executive director of the Delaware Thoroughbred Racing Commission. The Board considered whether any added costs would be incurred in addition to the existing drug and medication testing program. With the exception of the cost of testing program, no new costs to the state were identified. There are no new costs to Cornell University. Mr. Wayne said that the cost of a triple quadrupole mass analyzer system would be \$500,000, and that each machine needs to be replaced every seven years.

5. Local government mandates: None. See above.

6. Paperwork: None. The existing paperwork system used for the equine drug and medication system will be used.

7. Duplication: None.

8. Alternatives:

a) The Board considered plasma samples as an alternative to urine sampling. The ARCI/RMTC model rule allows for both. After consultation with Dr. George Maylin at Cornell University, it was determined that urine sampling was the preferred method of testing.

Board staff considered the impact of banning all steroids, but based upon widespread reliance of the racing industry on the four anabolic steroids for legitimate therapeutic purposes, and the fact that the four steroids would be legitimately administered to horses in other jurisdictions, it was determined that the four steroids should be allowed.

The Board did not consider any significant alternatives to the ARCI/RMTC Model Rule. The model rule would afford uniformity in threshold testing levels among the various racing jurisdictions, and the Board could not identify any compelling reason to deviate from the standards included in the model rule. Failure to amend the existing rule would defeat uniformity and result in the loss of significant stakes racing in New York State.

During the agency's public comment solicitation period, the New York Thoroughbred Horsemen's Association asked whether the Board would allow for a "grace" period for the implementation of the penalty phase, and what penalties will there be for anabolic steroid violations? Board staff is aware of "grace" periods that other states have implemented as part of their anabolic steroid rules, but such grace periods are ineffectual. The "grace" periods in other states were implemented in order to allow time to withdraw horses from their steroids regimen. This period was roughly between 30 and 45 days. In New York State, trainers receive notice that a rule is forthcoming when it will be submitted at the proposed rulemaking phase, which provides for a 45-day public comment period and as many as three to four weeks prior to actual adoption of the rule. There is ample time for withdrawal within that rulemaking period. Furthermore, the anabolic steroid rule needs to be in full force by January 1, 2009 to ensure compliance with the Graded Stakes Committee requirement. Any grace period may prove problematic with that deadline.

Regarding prescribed penalties, the Board considered the alternative of

including express penalties in the rule (as is the case in Kentucky's rule and the Board's TCO2 rule), but it was determined that anabolic steroid penalties should be considered on a case-by-case basis as is currently done with equine drug positives. The Board imposes equine drug penalties based on a trainer's record of violations, Board precedent for similar violations, and aggravating/mitigating circumstances.

9. Federal standards: None.

10. Compliance schedule: Once adopted, the rule can be implemented as soon as the testing equipment is obtained and made operational at Cornell University. The sampling, transportation and adjudication methods used by the Board's existing equine medication testing program will be utilized.

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

This proposal does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement as the amendments merely continue the Board's program governing the administration of medications to race horses on a time basis prior to participating in a race. The rule proposal allows the administration of four anabolic steroids within certain thresholds and prohibits the administration of anabolic steroids to horses pursuant to the model rule prescribed by the Association of Racing Commissioners International and the Racing Medication and Testing Consortium. The Board's current medication rules for both harness and thoroughbred racing restrict the use of anabolic steroids, and this rulemaking will bring the rule into uniformity with the ARCI and RMTC model rules. It is anticipated that the Model Rule will be adopted by other racing jurisdictions, and therefore its adoption will make compliance easier and more uniform for owners who race in multiple jurisdictions. Consequently, the rule neither affects small business, local governments, jobs nor rural areas. Authorizing or prohibiting the administration of medications to race horses does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8), nor does it affect employment. The proposal will not impose an adverse economic impact on reporting, record keeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any significant technological changes on the industry for the reasons set forth above, and because the Board has been previously been monitoring, and regulating the administration of medications to harness and thoroughbred race horses.

Due to the straightforward nature of the rulemaking, there is no need for the development of a small business regulation guide to assist in compliance. The rulemaking permits the use of four anabolic steroids in racehorses, and establishes thresholds for permissible levels. If a racehorse tests positive for elevated levels of the permissible anabolic steroids or prohibited anabolic steroids, the owner and trainer will face punitive action by the Board. Compliance requires the owners and trainers ensure that prohibited steroids or excess amounts of authorized steroids are not administered to a racehorse.

dards for temporary swimming pool enclosures used during the construction or installation of swimming pools requiring that any such enclosure shall sufficiently prevent any access to such swimming pool by any person not engaged in the installation or construction of such swimming pool and shall sufficiently provide for the safety of any such person, and (2) require that any temporary swimming pool enclosure be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in ground swimming pool, whichever is later. Section 3 of Chapter 234 of the Laws of 2007 provides that the regulations necessary to implement the new requirements must be adopted prior to the effective date of Chapter 234. The effective date of Chapter 234 was January 14, 2008. A prior emergency rule similar to this rule was filed on January 14, 2008 and became effective on that date. The prior emergency rule has expired. A second emergency rule similar to this rule was filed on April 11, 2008 and became effective on that date. That rule has also expired. A third emergency rule similar to this rule was filed on July 10, 2008 and became effective on that date. That rule has also expired. Adoption of this rule on an emergency basis is necessary to reduce the number of accidental drownings in swimming pools, and to continue to satisfy the mandate of section 3 of Chapter 234 of the Laws of 2007.

Subject: Temporary swimming pool enclosures.

Purpose: Implement Executive Law section 378(14)(c) and (16), as added by chapter 234 of the Laws of 2007.

Public hearing(s) will be held at: 10:00 a.m., December 15, 2008 at 99 Washington Ave., Rm. 1140, Albany, 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.

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

Section 1228.4. Temporary swimming pool enclosures.

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

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

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

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

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

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

Department of State

EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

Temporary Swimming Pool Enclosures

I.D. No. DOS-44-08-00005-EP

Filing No. 1005

Filing Date: 2008-10-08

Effective Date: 2008-10-08

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

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

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

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

Specific reasons underlying the finding of necessity: This rule is adopted on an emergency basis to preserve public safety and because time is of the essence. Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007, provide that the State Uniform Fire Prevention and Building Code (the Uniform Code) must (1) include stan-

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

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

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

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

(f) *Exceptions.* An above-ground hot tub or spa equipped with a safety cover classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F1346 (2003), entitled "Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs," published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, shall be exempt from the requirements of subdivisions (c) and (d) of this section, provided that such safety cover is in place during the period of installation or construction of such hot tub or spa. The temporary removal of a safety cover as required to facilitate the installation or construction of a hot tub or spa during periods when at least one person engaged in the installation or construction of the hot tub or spa is present shall not invalidate the exception provided in this subdivision.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire January 5, 2009.

Text of rule and any required statements and analyses may be obtained from: Raymond Andrews, Department of State, 99 Washington Ave., Albany, NY 12231-001, (518) 474-4073, email: Raymond.Andrews@dos.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.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

2. LEGISLATIVE OBJECTIVES:

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

3. NEEDS AND BENEFITS:

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

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

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

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

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

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

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

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

4. COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing and installing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows:

orange fence material, approximately \$225 to \$275; green wire “yard guard” fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation.

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

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

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

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

5. PAPERWORK:

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

6. LOCAL GOVERNMENT MANDATES:

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

7. DUPLICATION:

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

8. ALTERNATIVES:

This rule provides an exemption from the temporary enclosure requirement for above-ground spas and hot tubs equipped with a safety cover. The alternative of not providing such an exemption was considered, but rejected, because hot tubs and spas equipped with a safety cover are exempt from the permanent enclosure requirements, and it would be illogical to require such hot tubs and spas to be enclosed with a temporary enclosure during the installation / construction period when they are not required to be enclosed with a permanent enclosure after installation / construction is complete. The alternative of providing an exemption for in-ground hot tubs and spas was considered and rejected, since there would be an unprotected and uncovered hole in the ground during the installation / construction of such a hot tub or spa, and a temporary enclosure would provide a mea-

sure of protection against children and others falling into the hole during the installation / construction period. No other significant alternatives to this rule were considered, since other alternatives would not provide the safety protections contemplated by Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007.

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

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

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

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

2. COMPLIANCE REQUIREMENTS:

No reporting or record keeping requirements are imposed upon regulated parties by the rule.

Small businesses and local governments that install or construct swimming pools will be required to erect a temporary enclosure around the pool during the installation / construction period, and to replace the temporary enclosure with a permanent enclosure (as required by existing laws and regulations) within 90 days after issuance of the building permit or commencement of installation or construction. Local governments that enforce the Uniform Code will be required to consider the requirements of this rule when reviewing plans for installation or construction of a pool by any person or entity, public or private, and when inspecting work.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing and installing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire “yard guard fence” type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows: orange fence material, approximately \$225 to \$275; green wire “yard guard” fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation. Regulated parties will be able to minimize the

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

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

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

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

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

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

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

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

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements. The rule will impose the following compliance requirements: swimming pools will be required to be enclosed by temporary enclosures during the period of installation or construction of the pool, and such temporary enclosures will be required to be

replaced with a permanent enclosure as required by existing laws and regulations within 90 days after issuance of the building permit or commencement of installation or construction. No professional services are likely to be needed in a rural area in order to comply with such requirements.

3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows: orange fence material, approximately \$225 to \$275; green wire "yard guard" fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation. Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool installation / construction activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction / installation period. Any variation in such costs for different types of public and private entities in rural areas will be attributable to the size and configuration of the swimming pools owned or operated by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

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

4. MINIMIZING ADVERSE IMPACT.

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

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

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

5. RURAL AREA PARTICIPATION.

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

Job Impact Statement

The Department of State and the State Fire Prevention and Building Code Council have concluded after reviewing the nature and purpose

of the rule that it will not have a “substantial adverse impact on jobs and employment opportunities” (as that term is defined in section 201-a of the State Administrative Procedure Act) in New York.

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

Regulated parties may comply with this rule by installing a temporary enclosure during installation or construction of the pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire “yard guard fence” type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows: orange fence material, approximately \$225 to \$275; green wire “yard guard” fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation. Regulated parties will be permitted to use components of the permanent enclosure that will be required by existing laws and regulations after installation or construction is complete as all or part of the temporary enclosure during the installation / construction period. This would permit regulated parties to minimize the cost of the temporary enclosure by constructing as much of the permanent enclosure as can be installed without restricting pool installation / construction activities, and enclosing only the remaining portion of the pool area with a temporary enclosure.

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

NOTICE OF ADOPTION

Installation, Servicing or Maintaining of Security or Fire Alarm Systems

I.D. No. DOS-32-08-00006-A

Filing No. 1003

Filing Date: 2008-10-08

Effective Date: 2009-06-01

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

Action taken: Amendment of sections 196.1, 196.2, 196.8 and 196.10 of Title 19 NYCRR.

Statutory authority: General Business Law, section 69-n

Subject: Installation, servicing or maintaining of security or fire alarm systems.

Purpose: To add an additional education module which must be satisfactorily completed prior to licensure.

Text or summary was published in the August 6, 2008 issue of the Register, I.D. No. DOS-32-08-00006-P.

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

Text of rule and any required statements and analyses may be obtained from: Whitney A. Clark, NYS Department of State, Division of Licensing Services, 80 South Swan Street, P.O. Box 22001, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

Assessment of Public Comment

Prior to proposing the rule, the Department of State solicited comments from licensed alarm installers. Fourteen comments were receiving arguing

that the proposed rule was not necessary. After considering these comments, the Department of State determined that the rule making is necessary in order to adequately protect the public health, safety and welfare.

The Department of State has not received any public comments since the rule was proposed.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Qualifying School Requirements for Bail Enforcement

I.D. No. DOS-44-08-00001-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 171 to Title 19 NYCRR.

Statutory authority: General Business Law, section 72

Subject: Qualifying school requirements for bail enforcement.

Purpose: To set forth requirements for schools to teach qualifying education to prospective bail enforcement agents.

Text of proposed rule: A new Part 171 is added to Title 19 NYCRR to read as follows:

Qualifying School Requirements for Bail Enforcement

171.1 Approved Entities

Courses of instruction may be given by any college or university accredited by the Commissioner of Education of the State of New York, any public and/or private vocational school, any bail enforcement professional society or organization.

171.2 Application for approval of course of study

An application for approval to conduct a 25 hour bail enforcement course shall be made 60 days before the proposed course is to begin and shall be submitted on a form prescribed by the Department. The application shall include the following:

(a) The name and business address of the school;

(b) The name and business address of the owners;

(1) If the owner is an individual, the name and business address of the individual;

(2) If the owner is a partnership, the name and business address of each partner;

(3) If the owner is a corporation, the name and business address of each shareholder owning five per cent or more of the corporate stock;

(4) If the owner is a limited liability company, the name and business address of each member of the limited liability company;

(5) If the owner is a not-for-profit corporation or education corporation, the name and business address of the corporation's president or chief executive officer;

(c) The name, business address and telephone number of the education coordinator who will be responsible for compliance with the rules contained in this Part;

(d) The locations where classes will be conducted;

(e) A description of any materials that will be distributed during the course;

(f) A copy of any book(s) that will be used for the course;

(g) A course outline including the instructional time for each subject being presented; and

(h) Lesson plans along with learning objectives for the established curriculum.

171.3 Subjects of study for bail enforcement agents

The following are the subject to be included in the 25 hour course of instruction for bail enforcement agents. All approved schools must use this course outline in their programs.

(a) New York State Licensing Law and Regulations

(b) Liability Issues

(1) Civil;

(2) Criminal;

(3) Search or seizure of bailee/fugitive, and

(4) Entering homes, businesses and vehicles;

(c) Rights of bailee/fugitive:

(1) Taylor v. Taintor;

(2) Rights of accused under State Law;

(3) Rights of accused under Federal Law;

(4) Extradition;

(d) Criminal and civil law relating to bail bonds;

(e) Basic concepts of criminal justice law;

(f) Ethics and professionalism; and

(g) Report writing.

171.4 Attendance

To receive credit, a student must complete the entire 25 hour course of instruction.

171.5 Certificate of successful completion

Upon satisfactory completion of the 25 hour course of instruction by a student, the school must give the student a certificate of completion which shall be signed and dated by the school's course coordinator. The certificate must include the following information:

- (a) The name of the school;
- (b) The title of the course, which shall be "Bail Enforcement Course, 25 hours";
- (c) The school's code number;
- (d) A statement that the student, who shall be named, has satisfactorily completed a 25 hour course of study in bail enforcement subjects approved by the Secretary of State in accordance with Article 7 of the General Business Law; and
- (e) The date on which the student completed the course.

171.6 Faculty

An individual who wishes to teach any part of the 25 hour course shall submit a resume to the Department of State along with evidence that the applicant meets one of the following qualifications:

- (a) Is an attorney;
- (b) Is a police instructor;
- (c) Is an FBI instructor;
- (d) Has a teacher's certificate from the New York State Education Department;
- (e) Has 5 years of full-time experience as a police officer;
- (f) Has a four-year college degree majoring in criminal justice; or
- (g) Has five years, full-time experience as a licensed private investigator with significant bail enforcement experience.

171.7 Retention of Records

Schools conducting approved courses shall retain records for students completing the school's courses for a period of three years after completion of the course. Such records shall, at all times during that period, be available for inspection by a duly authorized representative of the Department of State.

171.8 Lists

Within 30 days of the completion of a 25 hour course, a school must submit to the Department of State a list of the names and addresses of each student who successfully completed the course.

171.9 Facilities

Each 25 hour course shall be presented at a facility as necessary to properly present the course.

171.10 Auditing

A duly authorized representative of the Department of State may audit any course, verify attendance and inspect the records of attendance, at any time during its presentation and for a period of three years after the completion of the course.

171.11 Suspensions and denials of course approval

(a) Within 60 days after receipt of the application for approval of a 25 hour course, the Department of State shall inform the school whether the course has been approved or denied, or whether additional information is needed.

(b) The Department of State may deny, suspend or revoke the approval of a bail enforcement course or instructor if it is determined that either is not in compliance with Article 7 of the General Business Law or the rules promulgated thereunder, or if it is determined that either has not adequately presented the course material set forth in section 171.3 of this Part.

171.12 Credit for equivalent education in the bail enforcement field

The Department of State may grant credit for equivalent education if the applicant provides evidence, satisfactory to the Department of State, of having completed a course of study at an accredited college or university, which course of study includes course work substantially similar to that set forth in section 171.3 of this Part. To qualify for credit, the equivalent education may not be less than 25 hours.

171.13 Registration Period and Fees

Each registration or renewal period for an approved course shall be 12 months or a part thereof. The registration or renewal period shall commence on January 1st or on the date on which the course is approved and shall expire on December 31st of the same year. The fee for registering a course with the Department of State shall be \$25.00 for each registration period. Those registrants who wish to provide courses at locations other than the primary location listed on their initial application shall pay a fee of \$25.00 for each additional location.

Text of proposed rule and any required statements and analyses may be obtained from: Whitney A. Clark, NYS Department of State, Division of Licensing Services, 80 South Swan Street, P.O. Box 22001, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

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

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

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

Regulatory Impact Statement**1. Statutory authority:**

General Business Law section 72 authorizes the Department of State to prescribe the 25 hours of training required for licensure as a bail enforcement agent and to approve education providers to offer said training.

2. Legislative objectives:

General Business Law, Article 7, requires the Department of State to license and regulate bail enforcement agents. The statute requires prospective licensees to complete qualifying education prior to obtaining a license.

3. Needs and benefits:

The proposed rule making will protect consumers and meet the legislative intent in enacting Article 7. By setting forth the procedure to be followed in obtaining approval from the Department of State to offer the qualifying course, the content of the course itself and the administrative requirements for offering the course, licensees and education providers will be provided with guidance and the public will be protected by ensuring that licensed bail enforcement agents have obtained proper education prior to being licensed by the State.

4. Costs:**a. Costs to regulated parties:**

The rule making will not impose any new costs on bail enforcement licensees other than the cost of taking the 25 hour qualifying course. Prior to the proposed regulation, educational providers were routinely offering the course in its proposed 25 hour format for costs ranging from \$500-\$700. It is anticipated that providers will continue to offer the 25 hour course for a similar cost.

b. Costs to the Department of State:

The rule does not impose any costs to the agency, the state or local government for the implementation and continuation of the rule.

5. Local government mandates:

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

6. Paperwork:

The rule does not impose any new paperwork requirements insofar as prospective licensees are already required to satisfactorily complete qualifying education.

7. Duplication:

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

8. Alternatives:

The Department of State contemplated not proposing this rule making. To do so, however, would result in education providers not being made aware of the requirements for submitting and obtaining course approval through the Department of State. It was determined that the benefit of providing guidelines to the regulated public outweighed the option of not proposing this rule making.

The Department of State currently has ten approved providers. These providers have been offering the proposed 25 hour course in its proposed format. No comments have been received from these or other providers regarding alternatives to the proposed rule. The lack of negative comment from providers indicates that the proposed rule provides necessary guidance with content that is acceptable to the industry.

9. Federal standards:

There are no federal standards regulating the registration of bail enforcement licensees. Consequently, this rule does not exceed any existing federal standard.

10. Compliance schedule:

The rule making will be effective as of the date of adoption. Prospective licensees are already required to take the 25 hour qualifying course and will therefore be able to comply with this rule as of its effective date.

Regulatory Flexibility Analysis**1. Effect of rule:**

The rule will apply to prospective bail enforcement agents. Article 7 of the General Business Law requires that applicants for licensure as a bail enforcement agent complete 25 hours of qualifying education. This rule making merely codifies the procedure to obtain Department of State approval to offer the qualifying course, the content of the course itself and the procedures for administering the course.

The rule does not apply to local governments.

2. Compliance requirements:

Insofar as the existing statute already require qualifying education for licensure, the proposed rule making will not add any new reporting, record-keeping or other compliance requirements for licensees. The rule will add new reporting, record-keeping and compliance requirements for education providers who wish to offer the 25 hour qualifying education course. Providers are already required to obtain approval to offer the

course from the Department of State. The rule sets forth the information required on the application for said approval, specifies the content of the course, and sets forth administration procedures for offering the course including the facility, faculty and attendance requirements, issuing certificates of course completion, record retention and issuing reports to the Department of State.

3. Professional services:

Neither licensees nor educational providers will have to rely on any new professional services in order to comply with the rule. Article 7 of the General Business Law already requires 25 hours of qualifying education. The Department of State has approved approximately 10 providers, all of whom have submitted course outlines that are in compliance with the course content required by this rule.

4. Compliance costs:

The rule making will not result in any compliance costs insofar as prospective licensees are already required, by the statute, to complete 25 hours of qualifying education prior to licensure.

5. Economic and technological feasibility:

It is anticipated that the education providers already approved by the Department of State to offer the bail enforcement qualifying course will continue to do so. The proposed rule does not involve technology and is both economically and technologically feasible.

6. Minimizing adverse economic impact:

The Department of State has not identified any adverse economic impact of this rule. The rule does not impose any additional reporting or record keeping requirements on licensees and merely codifies procedures currently being followed by the education providers already approved by the Department of State to offer qualifying education for bail enforcement agents.

7. Small business participation:

The Department of State does not anticipate any objection to the proposed rule by small businesses insofar as it merely codifies procedures currently being followed by the education providers already approved by the Department of State to offer qualifying education for bail enforcement agents, many of which are small businesses. The Department of State has not received any objection to these procedures from education providers. The Notice of Proposed Rule Making will be published by the Department of State in the State Register. The publication of the rule in the State Register will provide notice to local governments and notice to small businesses of the proposed rule making. Additional comments will be received and entertained.

Rural Area Flexibility Analysis

This rule does not impose any adverse impact on rural areas and does not impose any new reporting, record-keeping or other compliance requirements for licensees. The rule will add new reporting, record-keeping and compliance requirements for education providers who wish to offer the 25 hour qualifying education course. Providers are already required to obtain approval to offer the course from the Department of State. The rule merely codifies the procedures already being followed by approved education providers. The Department of State has not received any objection to these procedures from approved providers.

Job Impact Statement

The proposed rule will not have a substantial adverse effect on jobs and employment opportunities for licensed bail enforcement agents insofar as Article 7 of the General Business Law already requires that they complete 25 hours of qualifying education prior to licensure. This rule making merely codifies the procedure to obtain Department of State approval to offer the qualifying course, the content of the course itself and the procedures for administering the course.

Department of Taxation and Finance

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Taxable Sales by Certain Exempt Organizations

I.D. No. TAF-44-08-00016-P

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

Proposed Action: Amendment of sections 526.10, 529.7, 529.8 and 529.9 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 1116(b)(1), 1142(1), (8) and 1250 (not subdivided); and L. 2008, ch. 57, part KK-1

Subject: Taxable sales by certain exempt organizations.

Purpose: To provide rules regarding sales tax on sales, including auction sales, by certain exempt organizations.

Text of proposed rule: Section 1. Paragraph (10) of subdivision (a) of section 526.10 of such regulations is amended to read as follows:

(10) Any organization [that has received an Exempt Organization Certificate certifying it is exempt from sales and use tax under paragraph (4) or (5) of] or *entity described in* subdivision (a) of section 1116 of the Tax Law[, which] *that makes taxable sales* [or tangible personal property through a shop or store operated by the organization, or sells food and drink, in the State] *described in such section* is a vendor.

Section 2. Paragraph (1) of subdivision (i) of section 529.7 of such regulations is amended to read as follows:

(1) Except as provided in [paragraphs (2) through (4) of this subdivision] *section 1116 of the Tax Law or other law*, sales of tangible personal property and services by exempt organizations are exempt from the sales and use tax.

Section 3. Paragraph (2) of subdivision (i) of section 529.7 of such regulations is renumbered to be subparagraph (i) of such paragraph.

Section 4. Example 1 in subdivision (i) of section 529.7 of such regulations is amended to read as follows:

“Example 1.” An exempt organization [owning] *owns* a fleet of automobiles [decides to sell, at auction.]. *It sells* a number of the automobiles *at auction. The organization conducts one auction each calendar year, and it is held in its parking lot.* The automobiles sold at the auction are *not sold from a shop or store and are not* subject to sales or use tax. *See subparagraph (vi) of this paragraph for rules concerning auctions of this nature.*

Section 5. New subparagraphs (ii) through (vii) are added to paragraph (2) of subdivision (i) of section 529.7 of such regulations, following Example 6, to read as follows:

(ii) *If an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law operates a shop or store and also makes retail sales of similar (though not necessarily identical) items of tangible personal property by any means other than at its shop or store (such as by remote means or at an auction), those additional sales are considered to be made from its shop or store.*

(iii) *Sales, other than for resale, of the services described in section 1105(b) or section 1105(c)(5) of the Tax Law by an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law are subject to tax, whether or not made at a shop or store. These services include the sales of:*

(“a”) *gas, electricity, refrigeration, and steam, and gas, electric, refrigeration, and steam services of whatever nature (see section 1105(b)(1) of the Tax Law and section 527.2 of this Title);*

(“b”) *telephony, telegraphy, and telephone and telegraph services of whatever nature, except sales of interstate and international telephony, telegraphy, and telephone and telegraph services (see section 1105(b)(1) of the Tax Law and section 527.2 of this Title);*

(“c”) *telephone answering services (see sections 1101(b)(13) and 1105(b)(1) of the Tax Law);*

(“d”) *prepaid telephone calling services (see sections 1101(b)(22) and 1105(b)(1) of the Tax Law);*

(“e”) *mobile telecommunications services (see sections 1101(b)(24) and 1105(b)(2) and (3) of the Tax Law); and*

(“f”) *maintaining, servicing, or repairing real property, property, or land (see section 1105(c)(5) of the Tax Law and section 527.7 of this Title).*

(iv) *Retail sales of tangible personal property by an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law are subject to tax if the sales are made with a degree of regularity, frequency, and continuity by remote means. Sales by remote means include, but are not limited to, sales made by telephone, over the Internet, and by mail order.*

(v) *Retail sales of tangible personal property by lease or rental by an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law are subject to tax, whether or not made at a shop or store.*

(vi) *For calendar years beginning on or after January 1, 2009, the following provisions apply to sales made at auction events other than by remote means (“i.e.,” bidders or their representatives are physically present at the auction event).*

(“a”) *For purposes of subparagraph (i) of this paragraph, if an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law conducts no more than two auction events during a calendar year, then sales made at these events are not considered to be made with a degree of regularity, frequency, and continuity from a shop or store and are not subject to tax provided:*

(“1”) the exempt organization does not otherwise make sales of similar (though not necessarily identical) items of tangible personal property at a shop or store; and

(“2”) the auction events are not conducted on the premises of a commercial auction house or on any premises where an auctioneer is conducting other auction sales.

(“b”) An auction event is any day or portion of a day during which auction sales take place. Accordingly, if an exempt organization conducts only one or two one-day auctions during a calendar year or only one auction over a two-day period during a calendar year (as described in clause (“a”) of this subparagraph), the sales made at any of these auction events are not taxable. Auctions conducted by different auctioneers or auction services constitute separate auction events.

(“c”) If an exempt organization conducts, or schedules or otherwise intends to conduct, three or more auction events during a calendar year, sales made at these events are considered to be made with a degree of regularity, frequency, and continuity from a shop or store, and it must collect tax on all taxable sales commencing with the first event. However, if an exempt organization does not schedule or otherwise intend to conduct more than two auction events during a calendar year, but in fact conducts more than two auction events that year, it does not have to collect tax on sales made at the first two auction events provided they meet the requirements described in clause (“a”) of this subparagraph. But it must collect tax on all taxable sales made at the third and any subsequent auction events.

(vii) For calendar years beginning on or after January 1, 2009, the following provisions apply to sales made at auction events by remote means (“i.e.,” bidders or their representatives are not physically present at the auction event).

(“a”) For purposes of subparagraph (iv) of this paragraph, if an exempt organization described in section 1116(a)(4), (5), or (6) of the Tax Law conducts no more than two auction events during a calendar year by remote means, then sales made at these events are not considered to be made with a degree of regularity, frequency, and continuity and are not subject to tax provided the exempt organization does not otherwise make sales of similar (though not necessarily identical) items of tangible personal property at a shop or store or by remote means.

(“b”) An auction event by remote means is an auction conducted for a period of time beginning with a common date and closing on a common date during which one or more taxable items of tangible personal property are offered for sale to the highest bidder. Generally, each item must be offered for sale for the entire duration of the event for it to be considered a single auction event; however, the occasional late addition of an item or items after the start of the event, to end on the common closing date, will not be considered a new auction event. In addition, if items are offered for bid and bidding for those items ends on the same day, that day will be considered one auction event. Auctions conducted by different auctioneers or auction services constitute separate auction events. Accordingly, if an exempt organization has only one or two auction events during a calendar year by remote means (as described in clause (“a”) of this subparagraph), the sales made at either of these auction events are not taxable.

(“c”) If an exempt organization conducts, or schedules or otherwise intends to conduct, three or more auction events during a calendar year by remote means, sales made at these events are considered to be made with a degree of regularity, frequency, and continuity, and it must collect tax on all taxable sales commencing with the first event. However, if an exempt organization does not schedule or otherwise intend to conduct more than two auction events by remote means during a calendar year, but in fact conducts more than two auction events by remote means that year, it does not have to collect tax on sales made at the first two auction events provided they meet the requirements described in clause (“a”) of this subparagraph. But it must collect tax on all taxable sales made at the third and any subsequent auction events.

Section 6. Subparagraph (ii) of paragraph (2) of subdivision (d) of section 529.8 of such regulations is amended to read as follows:

(ii) spouses, widows, [or] widowers, ancestors, or lineal descendants of the individuals referred to in paragraphs (1) and (2)(i) of this subdivision.

Section 7. Paragraph (1) of subdivision (k) of section 529.8 of such regulations is amended to read as follows:

(1) Except as provided in [paragraphs (2), (3) and (4) of this subdivision] section 1116 of the Tax Law or other law, sales of tangible personal property and services by exempt posts, organizations, and affiliates are exempt from the sales and use tax.

Section 8. Paragraph (2) of subdivision (k) of section 529.8 of such regulations is renumbered to be subparagraph (i) of such paragraph.

Section 9. New subparagraphs (ii) and (iii) are added to paragraph (2) of subdivision (k) of section 529.8 of such regulations, following Example 6, to read as follows:

(ii) If an exempt post, organization, or affiliate operates a shop or store and also makes retail sales of similar (though not necessarily identical) items of tangible personal property by any means other than at its shop or store (such as by remote means or at an auction), those additional sales are considered to be made from its shop or store.

(iii) Notwithstanding any other provision of this paragraph and except as provided by law, all of the provisions of paragraph (2) of subdivision (i) of section 529.7 of this Part apply to sales of tangible personal property and services by an exempt post, organization, or affiliate.

Section 10. Paragraph (1) of subdivision (d) of section 529.9 of such regulations is amended to read as follows:

(1) Except as provided in [paragraphs (2) and (3) of this subdivision] section 1116 of the Tax Law or other law, sales of tangible personal property and services by exempt Indian nations or tribes are exempt from the sales and use tax.

Section 11. New subparagraphs (iii) and (iv) are added to paragraph (2) of subdivision (d) of section 529.9 of such regulations, following Example 1, to read as follows:

(iii) If an exempt Indian nation or tribe operates a shop or store and also makes retail sales of similar (though not necessarily identical) items of tangible personal property by any means other than at its shop or store (such as by remote means or at an auction), those additional sales are considered to be made from its shop or store.

(iv) Notwithstanding any other provision of this paragraph and except as provided by law, all of the provisions of paragraph (2) of subdivision (i) of section 529.7 of this Part apply to sales of tangible personal property and services by an exempt Indian nation or tribe.

Section 12. This rule will take effect on January 1, 2009.

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

Data, views or arguments may be submitted to: William Ryan, Director, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 457-1153, email: tax_regulations@tax.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, First; 1116(b)(1); 1142(1) and (8); and 1250 (not subdivided) and L. 2008, Ch. 57, Part KK-1. Section 171, First provides for the Commissioner of Taxation and Finance to make reasonable rules, consistent with law, that may be necessary for the exercise of the Commissioner’s powers and the performance of the Commissioner’s duties under the Tax Law. Section 1116(b)(1), amended by Part KK-1 of Chapter 57 of the Laws of 2008 (“Part KK-1”), provides limitations on the exemptions for sales by certain exempt organizations. Sections 1142(1) and (8) of Article 28 and section 1250 of Article 29 of the Tax Law provide for the adoption of rules that are appropriate to carry out and jointly administer the New York State and local sales and compensating use taxes imposed by and pursuant to the authority of these Articles.

2. Legislative objectives: This rule is proposed pursuant to the above authority to update the sales and use tax regulations and provide the department’s interpretations regarding the sales tax on sales by certain exempt organizations. The rule updates the regulations to reflect Part KK-1, which requires certain exempt organizations to collect sales tax on additional sales, including collecting tax on sales at online stores as they would if the organizations were operating brick and mortar stores.

3. Needs and benefits: This rule updates the regulations. Part KK-1 amended section 1116(b)(1) of the Tax Law to expand the existing “shop or store” provision so that certain additional sales of tangible personal property and services are subject to sales tax when sold by organizations that are otherwise exempt from tax pursuant to sections 1116(a)(4), (5), and (6) of the Tax Law. These provisions exempt religious, charitable, scientific, testing for public safety, literary, and educational organizations; organizations that foster national or international amateur sports competition; organizations for the prevention of cruelty to children or animals; veterans’ posts and organizations; and Indian nations or tribes (collectively referred to as “exempt organizations”). Generally, retail sales of tangible personal property from shops or stores operated by these exempt organizations have historically been subject to tax. Sections 529.7(i), 529.8(k), and 529.9(d) of the regulations are being amended to reflect the additional sales made taxable by Part KK 1, which include sales of consumer utility services and services to real property; remote sales (e.g., sales over the Internet) of tangible personal property if made with a degree of regularity, frequency, and continuity; and leases and rentals of tangible

personal property, whether or not made at a shop or store. The rule also provides that if an exempt organization operates a shop or store and sells similar items of tangible personal property by any other means (e.g., over the Internet, by mail order, door to door, or at auction), those other sales are considered to be made by the shop or store. Because the new legislation applies to remote auction sales, this rule provides guidance regarding when both remote and traditional auction sales are considered to be made with a degree of regularity, frequency, and continuity, as provided in Part KK 1 and the department's existing regulations. The rule also makes editorial and technical changes to the affected regulations. This rule harmonizes the regulations with current law and provides guidance with respect to other taxable sales made by exempt organizations.

4. Costs: (a) Costs to regulated parties. There are limited costs to exempt organizations for the implementation of and continuing compliance with this rule. Three aspects of the rule itself will result in a total estimated increase in state and local sales tax revenue in the amount of \$2.6 million annually, beginning with the 2009-2010 fiscal year. Consequently, exempt organizations will incur costs associated with collecting this tax from their customers and remitting it to the department.

The first aspect provides that if an exempt organization operates a shop or store and makes other sales of similar taxable items, sales tax must be collected on these other sales. Because the majority of these sales are taxable pursuant to Part KK-1, the resulting sales tax revenue attributable to this rule should be minimal and is accounted for as auction sales in the estimate below. Any costs associated with collecting this tax should also be minimal because these organizations are already operating shops or stores and should be in compliance with the Tax Law.

The second aspect provides, in general, that traditional auction sales by an exempt organization are subject to tax if the organization holds three or more auction events (as described in the rule) during a calendar year. In this case, the sales would be considered made with a degree of regularity, frequency, and continuity. Data from sales tax returns does not provide information about auction sales by exempt organizations. Thus, this estimate is based on indirect sources and the expertise of department personnel whose responsibilities encompass exempt organization activities. The National Center for Charitable Statistics, in conjunction with the Urban Institute, has compiled data that includes the financial information of tax-exempt organizations in New York. The data is culled from Internal Revenue Service Form 990, which is filed by organizations that are exempt from federal tax and includes information related to their revenues. These organizations do not necessarily parallel the exempt organizations affected by this rule; however, Form 990 is the best available data regarding sources of exempt organization revenue. New York "net special events income" and "inventory sales and other income," as reported, totaled \$888 million in 2006. The department estimated that approximately 10%, or \$88 million, was derived from traditional auction sales, but that only 75%, or \$67 million, of those sales were taxable. The department believes the most common auction pattern is for an exempt organization to have a spring and/or a fall fund-raising auction and that only one-third of auction sales come from organizations that hold more than two auctions per year. This results in approximately \$22 million in taxable sales from organizations having more than two auctions a year. Under the rule, if more than two auctions are planned in a calendar year, tax must be collected for all taxable sales, including those during the first two auctions. Therefore, most of the \$22 million would come from organizations that know they will be having more than two events, making all of their auction sales taxable. However, there will be a small portion of that \$22 million attributable to organizations that had not planned a third auction. For those organizations, only sales made at the third and subsequent auctions are taxable. These sales were accounted for by reducing the \$22 million by 5% to \$20.8 million. Applying an average combined state and local sales tax rate of 8% resulted in an estimated increase in tax of approximately \$1.6 million. Exempt organizations would incur routine costs of registering for sales tax purposes, if not already registered, collecting this tax from their customers, and filing returns.

The last aspect concerns traditional auctions held at commercial auction houses or at other auction premises. There is no available data on auctions of this nature. However, anecdotal evidence suggests that the amount of sales at these auctions is minimal. The department estimated that not more than \$12.5 million of taxable property would be subject to tax under this aspect of the rule, resulting in an increase in revenue of approximately \$1 million (average combined rate of 8%). Exempt organizations would incur costs associated with collecting this tax and filing returns.

It is noted that while these exempt organizations become liable for the tax at issue, the tax is collected from their customers by the organizations as trustees for the state and local governments imposing tax.

The department estimates that it should take an exempt organization that is not registered about 2 hours to learn its new responsibilities and to file Form DTF-17, Application to Register for a Sales Tax Certificate of Authority. Once registered, the organization must collect tax from custom-

ers, maintain accurate sales records, file returns, and remit tax due. (Most exempt organizations currently maintain records for other purposes.) Depending upon the extent of sales, the department estimates it should average about 5 hours per sales-tax quarter to accomplish these tasks. Assuming an hourly rate of \$29 an hour, the average cost to comply with this rule for the first time would be approximately \$200. After registration, the quarterly cost of compliance would be approximately \$145.

(b) Costs to the state and its local governments including this agency. There are no costs to the state or its local governments for the implementation and continuing administration of this rule. To the extent that any exempt organizations are required to collect tax based on the interpretations in this rule alone, this agency will incur minimal costs associated with registering these organizations for sales tax purposes, processing their tax returns, and collecting tax due.

(c) Information and methodology. The information and methodology are described above and additionally are based on discussions among personnel from the department's Office of Tax Policy Analysis, Management Analysis and Project Services Bureau, Office of Budget and Management Analysis, and Office of Counsel.

5. Local government mandates: None.

6. Paperwork: Among other responsibilities, the Tax Law requires "persons required to collect tax" (Tax Law, section 1131[1]) to register for sales tax purpose, keep records, file returns, and pay over to the department sales tax collected from customers. For tax exempt organizations affected by Part KK-1, this rule imposes no requirements beyond those required by law. To the extent that any exempt organizations are required to collect tax based on the interpretations in this rule alone, such organizations must meet their statutory responsibilities.

7. Duplication: None.

8. Alternatives: No alternatives were considered for those nondiscretionary provisions of the rule that simply reflect Part KK-1. In developing this rule, the department reached out to 23 organizations, as mentioned in the Regulatory Flexibility Analysis for Small Businesses and Local Governments and the Rural Area Flexibility Analysis filed with this rule. No comments were received. The department considered whether to continue its current non-taxable approaches to collateral sales by exempt organizations that operate shops or stores and to traditional auction sales by these organizations. However, in the interest of consistent treatment, the department did not consider this viable. In addressing auction sales, the department also considered the need to quantify "sales... made with a degree of regularity, frequency, and continuity." While this phrase is new to Part KK-1, it is a long-standing regulatory concept that has traditionally been determined based on the facts and circumstances of each situation. However, because the department has not previously issued general guidance on auction sales by exempt organizations, the department concluded that some guidance was appropriate. The three-or-more threshold prescribed by the rule is considered by the department to be reasonable, while still affording exempt organizations some latitude to conduct their fund raising auctions without being responsible for the collection of tax.

9. Federal standards: This rule does not exceed any minimum standards of the federal government.

10. Compliance schedule: Part KK-1, as reflected in the rule, became effective on September 1, 2008. On August 11, 2008, the department published TSB-M-08(5)S, Tax Law Amendments Related to Sales Made by Certain Sales Tax Exempt Organizations Effective September 1, 2008, to provide guidance with respect to the new legislation. Exempt organizations should currently be in compliance with these provisions. This rule will take effect on January 1, 2009, giving exempt organizations time to comply. Once this rule has been adopted and published in the *State Register*, the department intends to issue further guidance on taxable sales by exempt organizations.

Regulatory Flexibility Analysis

1. Effect of rule: Approximately 119,500 exempt organizations that have obtained Exempt Organization Certificates from the Department of Taxation and Finance are classified as active. This figure is subject to change daily. Whether all of these organizations are, in fact, currently operating as exempt organizations in New York State cannot be determined. Moreover, of the approximately 119,500 exempt organizations, it cannot be ascertained how many are exempt from tax pursuant to sections 1116(a)(4), (5), or (6) of the Tax Law (i.e., those organizations affected by this rule); however, it is the vast majority. See section 3, "Needs and benefits," of the Regulatory Impact Statement filed with this rule for a description of the subject exempt organizations. In addition, of the currently active section 1116(a)(4), (5), and (6) exempt organizations, both the number of those that are making taxable sales that are covered either by Part KK 1 of Chapter 57 of the Laws of 2008 ("Part KK-1") or by this rule and the number of those that constitute "small businesses," as defined in section 102(8) of the State Administrative Procedure Act, are undeterminable. Accordingly, the effect of the rule on small businesses in distinction from others cannot be determined with any degree of accuracy.

The rule affects all section 1116(a)(4), (5), and (6) exempt organizations in the same manner, some of which might be considered small businesses. The rule does not impose any adverse economic impact, compliance requirements, or implementation or administration costs on local governments, which will not be addressed any further in this statement.

2. Compliance requirements: The rule reflects the statutory amendments enacted by Part KK-1 and provides related rules concerning other taxable sales made by section 1116(a)(4), (5), and (6) exempt organizations. As discussed in the Regulatory Impact Statement, every person required to collect sales tax must register for sales tax purposes, keep records, file returns, remit taxes, and otherwise comply with all of the obligations of a person required to collect sales tax that are imposed under the Tax Law and under the existing regulations. Such persons include small businesses.

3. Professional services: The rule itself imposes no requirements upon small businesses concerning professional services. However, section 1116(a)(4), (5), and (6) exempt organizations that are also small businesses may, depending upon their own expertise and on the extent of their taxable sales, elect to employ professional services, such as bookkeepers and accountants, in meeting their compliance requirements.

4. Compliance costs: Section 1116(a)(4), (5), and (6) exempt organizations that are also small businesses may incur some of the limited costs to regulated parties that are discussed in detail in the Regulatory Impact Statement. No variations in these costs exist solely because an exempt organization may be a resident in this state, independently owned and operated, and employs 100 or less individuals.

5. Economic and technological feasibility: The rule does not impose any economic or technological compliance burdens on small businesses.

6. Minimizing adverse impact: In developing this rule, the department was aware of the need to consider approaches to implement Part KK-1 while minimizing any adverse economic impact on small businesses. However, the legislation requires all section 1116(a)(4), (5), and (6) exempt organizations to collect sales tax on specific taxable sales. Part KK-1 does not distinguish between affected exempt organizations that are small businesses and any other section 1116(a)(4), (5), and (6) exempt organizations. The rule likewise treats all of these exempt organizations in the same manner. Accordingly, different compliance and reporting requirements or timetables unique to small businesses are not practical approaches for this rule. That is not to say that the Tax Law and the existing regulations do not already have provisions that minimize the compliance requirements imposed on persons required to collect tax, including vendors. For example, at their discretion, vendors may keep records electronically and certain vendors may file returns and pay taxes on an annual basis, rather than monthly or quarterly. In addition, the nature of the rule and the applicable provisions of law do not lend themselves to the use of performance standards nor do they allow for any discretionary exemptions.

7. Small business participation: The following organizations were notified that the department was in the process of developing this rule and were given the opportunity to participate in its development: the Association of Towns of New York State; the Division of Local Government Services of the New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York State Association of Convenience Stores; the New York State Auctioneers Association, Inc.; the United Way of New York; the Statewide SEFA Council; the National Council of Nonprofit Associations; the Greater New York Hospital Association; the Healthcare Association of New York State; the Medical Society of the State of New York; the New York Health Information Management Association; the New York State School Boards Association; the New York State Parent-Teacher Association; the Nonprofit Coordinating Committee of New York; the Charities Bureau of the New York State Department of Law; the Department of New York Veterans of Foreign Wars; and the American Legion's Department of New York. As part of our outreach, we invited most of these organizations to extend our invitation for input to other exempt organizations that may be affected by this rule. No comments were received concerning the rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: As explained in the Regulatory Flexibility Analysis for Small Businesses and Local Governments filed with this rule, there are approximately 119,500 exempt organizations registered with this department, but the number directly affected by the rule is not quantifiable with any degree of certainty. However, based on the National Center for Charitable Statistics ("NCCS") data referred to in the accompanying Regulatory Impact Statement and discussed further below, it is reasonable to assume that some of these organizations are located in rural areas as defined by section 102

(10) of the State Administrative Procedure Act. There are 44 counties in New York State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile.) This rule affects all section 1116(a)(4), (5), and (6) exempt organizations in the same manner; that is, it does not distinguish between exempt organizations located in rural, suburban, or metropolitan areas of this state.

2. Reporting, recordkeeping, and other compliance requirements; and professional services: The rule reflects the statutory amendments enacted by Part KK-1 of Chapter 57 of the Laws of 2008 ("Part KK 1") and provides related rules concerning other taxable sales made by section 1116(a)(4), (5), and (6) exempt organizations. As noted in the accompanying statements, every person required to collect sales tax must register for sales tax purposes, keep records, file returns, remit taxes, and otherwise comply with all of the obligations of a person required to collect sales tax that are imposed under the Tax Law and under the existing regulations. This includes affected exempt organizations located in rural areas. Depending upon their own expertise and on the extent of their taxable sales, these organizations may elect to employ professional services, such as bookkeepers and accountants, in meeting their compliance requirements.

3. Costs: Section 1116(a)(4), (5), and (6) exempt organizations that are located in rural areas may incur some of the limited costs to regulated parties that are discussed in detail in the Regulatory Impact Statement. For example, based on the previously mentioned NCCS data, approximately 12.7% of total revenue comes from rural areas. Using the same methodology as used in the impact statement, the department estimates that of the \$2.6 million increase in state and local sales tax revenue attributable to this rule, approximately \$212,000 comes from exempt organizations located in rural areas. Such organizations would incur costs associated with collecting this tax from their customers and remitting it to the department. There are no variations in costs based on whether the public or private entities are in rural areas.

4. Minimizing adverse impact: In developing this rule, the department was aware of the need to consider approaches to implement Part KK-1 while minimizing any adverse impacts on public and private sector interests in rural areas. However, as explained with respect to small businesses, the legislation requires all section 1116(a)(4), (5), and (6) exempt organizations to collect sales tax on certain taxable sales. Part KK-1 does not distinguish between exempt organizations that are located in rural areas and any other section 1116(a)(4), (5), and (6) exempt organizations. The rule likewise treats all of these exempt organizations in the same manner, regardless of where they might be located in the state. Consequently, different compliance and reporting requirements or timetables that take into account the resources available to rural areas are not practical approaches for this rule. In addition, as previously mentioned, the nature of the rule and the applicable provisions of law do not lend themselves to the use of performance or outcome standards nor do they allow for any discretionary exemptions.

5. Rural area participation: The following organizations were notified that the department was in the process of developing this rule and were given the opportunity to participate in its development: the Association of Towns of New York State; the Division of Local Government Services of the New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York State Association of Convenience Stores; the New York State Auctioneers Association, Inc.; the United Way of New York; the Statewide SEFA Council; the National Council of Nonprofit Associations; the Greater New York Hospital Association; the Healthcare Association of New York State; the Medical Society of the State of New York; the New York Health Information Management Association; the New York State School Boards Association; the New York State Parent-Teacher Association; the Nonprofit Coordinating Committee of New York; the Charities Bureau of the New York State Department of Law; the Department of New York Veterans of Foreign Wars; and the American Legion's Department of New York. As part of our outreach, we invited most of these organizations to extend our invitation for input to other exempt organizations that may be affected by this rule. Such organizations include public and private interests in rural areas. No comments were received concerning the rule.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter that the rule will have no impact on jobs or employment opportunities beyond that, if any, required by statute. This rule updates the sales and compensating use tax regulations to reflect Part KK 1 of Chapter 57 of the Laws of 2008 concerning taxable sales by

certain exempt organizations, and it provides related rules concerning other taxable sales by these organizations, including sales at auctions.

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

Fees Charged for Business Corporation Franchise Tax Searches, Bulk Orders of Forms, and Publication 352

I.D. No. TAF-44-08-00017-P

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

Proposed Action: Repeal of Part 11 and amendment of Part 200 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 697(a) and 1096(a)

Subject: Fees charged for business corporation franchise tax searches, bulk orders of forms, and Publication 352.

Purpose: To eliminate unnecessary provisions of the regulations.

Text of proposed rule: Section 1. Part 11 of such regulations is REPEALED.

Section 2. Section 200.2 of such regulations is amended to read as follows:

As used in this Subchapter, form numbers and titles are for information only and each such number and title includes all successor form numbers and titles assigned by the New York State Department of Taxation and Finance. All such forms and successor forms may be obtained by forwarding a request to the New York State Department of Taxation and Finance[, Taxpayer Assistance Bureau, Forms Control Section, W.A. Harriman Campus, Albany, NY 12227].

Section 3. Section 200.4 of such regulations is REPEALED.

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

Data, views or arguments may be submitted to: William Ryan, Director, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W.A. Harriman State Campus, Albany, NY 12227, (518) 457-1153, email: tax_regulations@tax.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, Subdivision First; 697(a); and 1096(a). Section 171, Subdivision First authorizes the Commissioner to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and performance of the Commissioner's duties. Sections 697(a) and 1096(a) authorize the Commissioner to adopt regulations relating specifically to the personal income tax and the business corporation franchise tax, respectively.

2. Legislative objectives: This rule is being proposed pursuant to this authority to eliminate unnecessary provisions of the Personal Income Tax and Business Corporation Franchise Tax Regulations.

3. Needs and benefits: The purpose of these amendments is to remove unnecessary provisions of the regulations regarding the setting of fees for corporation franchise tax searches, bulk orders of forms, and a publication containing certain forms and instructions. Under section 102.2(b)(xi)(2) of the State Administrative Procedure Act, fees of less than \$100 are excluded from the definition of "rule". The subject fees are nominal and well beneath this threshold. For instance, the bulk order fees are \$10 plus \$1 for each 100 forms after the first 200. These fees have not changed in many years. The Department expects modest increases in these fees. However, in accordance with State Administrative Procedure Act section 102.2, the fees will not be set by rule. In addition, it is noted that, with the advent of technology which enables taxpayers and preparers to obtain forms from the Department's website and to file returns electronically, the need for tax preparers to order forms in bulk has declined. Tax preparers preparing more than one hundred returns a year and using tax

software are required by law to file returns electronically. (see, Tax Law sections 29, 658[g]) The amendments would allow the Department flexibility in responding to fluctuations in cost and demand.

4. Costs:

(a) Costs to regulated persons: It is estimated that there would be no costs to regulated parties associated with implementation of this rule.

(b) Costs to the agency and to the State and local governments including this agency: It is estimated that the implementation and continued administration of this rule will not impose any costs upon this agency, New York State, or its local governments.

(c) Information and methodology: This analysis is based on a review of the rule and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis, and Office of Budget and Management Analysis.

5. Local government mandates: This rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: There were no significant alternatives to this proposal considered by this agency.

9. Federal standards: The rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

10. Compliance schedule: The amendment will take effect when the Notice of Adoption is published in the State Register. No additional time is needed in order for regulated parties to comply with this rule.

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

A Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis, and Job Impact Statement are not being submitted with this rule because this rule will not impose any adverse economic impact on small businesses or local governments, or on public or private entities in rural areas, nor any additional reporting, recordkeeping, or other compliance requirements on these entities. Further, it is evident from the subject matter of the rule that it will have no adverse impact on jobs and employment opportunities.

This rule merely updates the Personal Income Tax and Business Corporation Franchise Tax Regulations to eliminate unnecessary provisions regarding the setting of fees for corporation franchise tax searches, bulk orders of forms, and a publication containing certain forms and instructions. Under section 102.2(b)(xi)(2) of the State Administrative Procedure Act, fees of less than \$100 are excluded from the definition of "rule".