

# RULE MAKING ACTIVITIES

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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.

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## Department of Agriculture and Markets

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### EMERGENCY RULE MAKING

**Firewood (all Hardwood Species), Nursery Stock, Logs, Green Lumber, Stumps, Roots, Branches and Debris**

**I.D. No.** AAM-13-09-00012-E

**Filing No.** 261

**Filing Date:** 2009-03-18

**Effective Date:** 2009-03-18

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

**Action taken:** Repeal of section 139.2 and addition of new section 139.2 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:** The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States, was first detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities detected infestations of this pest in other areas of Brooklyn as well as in and about Amityville, Queens, Manhattan and Staten Island. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend the existing

quarantine area on Staten Island. This rule contains the needed modification.

The Asian Long Horned Beetle (ALB) is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut), Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); and Ulmus (Elm); Celtis (Hackberry), Fraxinus (Ash), Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the quarantine imposed by this rule has been determined to be the most effective means of preventing the spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

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 the failure to immediately modify the quarantine area and restrict the movement of trees and materials from the areas of the State infested with Asian Long Horned Beetle could result in the spread of the pest beyond those areas and damage to the natural resources of the State and could result in a federal quarantine and quarantines by other states and foreign countries affecting the entire State. This would cause economic hardship to the nursery and forest products industries of the 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. Given the

potential for the spread of the Asian Long Horned Beetle beyond the areas currently infested and the detrimental consequences that would have, it appears that the rule modifying the quarantine area 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:** Firewood (all hardwood species), nursery stock, logs, green lumber, stumps, roots, branches and debris.

**Purpose:** To modify the Asian Long Horned Beetle quarantine to prevent the spread of the beetle to other areas.

**Text of emergency rule:** Subdivision (d) of section 139.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed and a new subdivision (d) is added to read as follows:

*(d) That area in the Borough of Richmond in the City of New York bound by a line beginning at a point along the State of New York and the State of New Jersey border due north of the intersection of Richmond Terrace and Morningstar Road; then south to the intersection of Morningstar Road and Richmond Terrace; then southwest along Morningstar Road to its intersection with Forest Avenue; then east along Forest Avenue to its intersection with Willow Road East; then south and then southeast along Willow Road East to its intersection with Victory Boulevard; then west along Victory Boulevard to its intersection with Arlene Street; then south along Arlene Street until it becomes Park Drive North; then south on Park Drive North to its intersection with Rivington Avenue; then east along Rivington Avenue to its intersection with Mulberry Avenue; then south on Mulberry Avenue to its intersection with Travis Avenue; then northwest on Travis Avenue until it crosses Main Creek; then along the west shoreline of Main Creek to Fresh Kills Creek; then along the north shoreline of Fresh Kills Creek to Little Fresh Kills Creek; then along the north shoreline of Little Fresh Kills Creek to the Arthur Kill; then west to the border of the State of New York and the State of New Jersey in the Arthur Kill; then north along the borderline of the State of New York and the State of New Jersey; then east along the borderline of the State of New York and New Jersey excluding Shooters Island to the point of beginning.*

**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 June 15, 2009

**Text of rule and any required statements and analyses may be obtained from:** Robert J. Mungari, Director, Division of Plant Industry, NYS 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. Section 167 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 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 spread within the State of an injurious insect, the Asian Long Horned Beetle.

##### 3. Needs and benefits:

The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States was detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, Queens, Manhattan and Staten Island.

As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend by approximately two square miles, the existing quarantine area on Staten Island. The proposed rule contains the needed modifications.

The Asian Long Horned Beetle is a destructive wood-boring insect na-

tive to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut); Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); and Ulmus (Elm); Celtis (Hackberry), Fraxinus (Ash), Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the extension of the quarantine on Staten Island imposed by this rule has been determined to be the most effective means of preventing the further spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

##### 4. Costs:

- (a) Costs to the State government: none
- (b) Costs to local government: none
- (c) Costs to private regulated parties:

Nurseries exporting host material from the quarantine area established by this rule, other than pursuant to compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.

Most shipments will be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the quarantine area established by this rule may not move outside that area due to the fact that it is not practical at this time to determine for certification purposes that the material is free from infestations.

The extension of the existing quarantine area on Staten Island would affect eight nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area.

##### (d) Costs to the regulatory agency:

- (i) The initial expenses the agency will incur in order to implement and administer the regulation: None
- (ii) It is anticipated that the Department will be able to administer the proposed quarantine with existing staff.

##### 5. Local government mandates:

Yard waste, storm clean-up and normal tree maintenance activities involving twigs and/or branches of 1/2" or more in diameter of host species will require proper handling and disposal, i.e., chipping and/or incinera-

tion if such materials are to leave the quarantine area established by this rule. An effort is underway to identify centralized disposal sites that would accept such waste from cities, villages and other municipalities at no additional cost.

6. Paperwork:

Regulated articles inspected and certified to be free of Asian Long Horned Beetle moving from the quarantine area established by this rule will have to be accompanied by a state or federal phytosanitary certificate and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None

8. Alternatives:

The failure of the State to extend the existing quarantine on Staten Island where the Asian Long Horned Beetle has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of Asian Long Horned Beetle that could result from the unrestricted movement of regulated articles from the areas covered by the modified quarantine. In light of these factors there does not appear to be any viable alternative to the modification of quarantine proposed in this rulemaking.

9. Federal standards:

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

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 small businesses affected by extending the existing quarantine area on Staten Island are the nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area. There are eight such businesses within that area. Since there is already a quarantine area on Staten Island, the City of New York and the borough of Staten Island will remain involved in the proposed extension of this quarantine.

Although it is not anticipated that local governments will be involved in the shipment of regulated articles from the proposed quarantine area, in the event that they do, they would be subject to the same quarantine requirements as other regulated parties.

2. Compliance requirements.

All regulated parties in the new quarantine area on Staten Island established by this amendment will be required to obtain certificates and limited permits in order to ship regulated articles from those areas. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

3. Professional services.

In order to comply with the rule, small businesses and local governments shipping regulated articles from the new quarantine area on Staten Island will require professional inspection services, which would be provided by the Department and the United States Department of Agriculture (USDA).

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:

Nurseries exporting host material from the new quarantine area on Staten Island, other than pursuant to a compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most such inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year, with a total cost of less than \$1,000. Most shipments would be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the new quarantine areas may not move outside those areas due to the fact that it is not practical at this time to determine for certifications purposes that the material is free from infestation.

Local governments shipping regulated articles from the new quarantine areas would incur similar costs.

5. Minimizing adverse impact.

The Department has designed the rule to minimize adverse economic impact on small businesses and local governments. This is done by limiting the new quarantine area to only those parts of Staten Island where the Asian Long Horned Beetle has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the pres-

ence of the Asian Long Horned Beetle and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the 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.

The Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of Asian long horned beetle quarantines. The Department has also had extensive consultation with the USDA on the efficacy of such quarantines. Most recently, the Department has had discussions with the City of New York and the borough of Richmond concerning this amendment to extend the existing quarantine on Staten Island. Representatives of the city and borough governments expressed support for the amendment.

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 rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping host materials from the new quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, will be made pursuant to compliance agreements for which there is no charge.

**Rural Area Flexibility Analysis**

The rule will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that the extension of the existing quarantine area established by this rule is situated on Staten Island, which does not fall within the definition of "rural areas" set forth in section 481(7) of the Executive Law.

**Job Impact Statement**

The rule will not have a substantial adverse impact on jobs and employment opportunities. The extension of the existing quarantine area on Staten Island is designed to prevent the spread of the Asian Long Horned Beetle to other parts of the State. A spread of the infestation would have very adverse economic consequences to the nursery, forestry, fruit and maple product industries of the 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, other states and foreign countries. By helping to prevent the spread of the Asian Long Horned Beetle, the rule will help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's nursery, forestry, fruit and maple product industries.

Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

As set forth in the regulatory impact statement, the cost of the rule to regulated parties is relatively small. The responses received during the Department's outreach to regulated parties indicate that the rule will not have a substantial adverse impact on jobs and employment opportunities.

**NOTICE OF ADOPTION**

**Animal Health Requirements for Animals Entering Fairs**

**I.D. No.** AAM-02-09-00005-A

**Filing No.** 260

**Filing Date:** 2009-03-18

**Effective Date:** 2009-04-01

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

**Action taken:** Amendment of Part 351 of Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18(6), 31-b and 72(3)

**Subject:** Animal health requirements for animals entering fairs.

**Purpose:** To clarify regulatory requirements, make technical changes to existing rules and better protect the health of animals at fairs.

*Text or summary was published* in the January 14, 2009 issue of the Register, I.D. No. AAM-02-09-00005-P.

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

*Text of rule and any required statements and analyses may be obtained from:* John P. Huntley, DVM, Director, Division of Animal Industry, NYS Department of Agriculture and Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-3502

**Assessment of Public Comment**

The agency received no public comment.

## 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-49-08-00007-E

**Filing No.** 256

**Filing Date:** 2009-03-11

**Effective Date:** 2009-03-11

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), (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 are 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:** AMENDMENT TO: REQUIREMENTS FOR THE OPERATION OF CHEMOTHERAPY SUBSTANCE ABUSE PROGRAMS.

§ 828.1Definitions.

(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 a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a

notice of proposed rule making, I.D. No. ASA-49-08-00007-P, Issue of December 3, 2008. The emergency rule will expire May 9, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Deborah Egel, OASAS, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: DeborahEgel@oasas.state.ny.us

**Regulatory Impact Statement**

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 ensure that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment which is effective and of high quality.

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 19.15(a) of the Mental Hygiene Law bestows upon the Commissioner the responsibility of promoting, establishing, coordinating, and conducting programs for the prevention, diagnosis, treatment, aftercare, rehabilitation, and control in the field of chemical abuse or dependence.

Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue a single operating certificate for the provision of chemical dependence services.

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 32.07(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 of the Mental Hygiene Law gives the Commissioner the authority to issue operating certificates to providers of chemical dependence services.

2. Legislative Objectives

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and ensure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk of becoming chemical abusers. The amendment of Part 828 will allow methadone clinics to dispense buprenorphine to clients of the service as an alternative to methadone and thereby reducing the number of persons dependent on street drugs or illegally obtained prescription opioids.

3. Needs and Benefits

The use of additional agents to treat opioid addiction will decrease the number of addicted persons using street drugs such as heroin or illegally obtained prescription opioids. The need for additional and varied treatment methodology's to treat opioid addiction is apparent, and the benefit to the service to be able to offer choices to their patients is that they may be able to keep more people on a "maintenance" program than if they have only one option.

4. Costs:

a. Costs to regulated parties.

There may be a change in the reporting requirements or the documentation requirements which may have a fiscal impact on regulated parties.

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

The state and local impact of the amendment of 828 will be minimal if at all. There is a difference between the reimbursement rates between methadone and buprenorphine. The weekly rates for buprenorphine are between \$170.78 and 259.78, depending on the dose, and for methadone the weekly reimbursement rates are \$136.05. Therefore it may cost the state, federal or local governments more money to provide buprenorphine. However, the number of persons receiving buprenorphine may not rise because the dispensing of this approved agent is completely voluntary.

5. Local Government Mandates

The proposed rule does not impose any new local government mandates.

6. Paperwork

The proposed rule does not impose additional paperwork requirements.

7. Duplication

The proposed rule does not duplicate of other state or federal regulations.

8. Alternatives

The only alternative to the proposed regulation is to continue to use only methadone in clinics regulated under 828.

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 these Part 828 amendments shall become effective immediately.

#### **Regulatory Flexibility Analysis**

**Effect of the Rule:** The proposed emergency revision to Part 828 will impact certified and/or funded providers. It is expected that the emergency revision will require providers to amend some of their policies and procedures in their treatment modality. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking medication assisted treatment for opioid addiction due to more treatment options. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts may see a nominal increase in cost due to the weekly Buprenorphine rate but this should be offset by better patient outcomes.

**Compliance Requirements:** It is expected that there will be no significant changes in compliance requirements. Since providers are already required to provide utilization review, it is not expected that this regulation, will have additional costs.

**Professional Services:** While it is expected that programs may require additional professional services the impact is nominal because induction of Buprenorphine lasts only a few days.

**Compliance Costs:** Some programs may need to formally train staff to understand the pharmacology of Buprenorphine.

**Economic and Technological Feasibility:** Compliance with the record-keeping and reporting requirements of the emergency revision to Part 828 is not expected to have an economic impact or require any changes to technology for small businesses and government.

**Minimizing Adverse Impact:** This is an emergency adoption, no public comment is required, however, the subject matter experts within our agency, including the Medical Director have concluded that, in line with the Federal Standards, the addition of buprenorphine through emergency regulation is necessary for the health, safety and welfare of the public. Any impact this rule may have on small businesses and the administration of State or local governments and agencies will either be a positive impact or the nominal costs and compliance are small and will be absorbed into the already existing economic structure. The positive impact for our patients and our health care system, out weigh any potential minimal costs.

**Small Business and Local Government Participation:** This is an emergency adoption, therefore even though there have been informal conversations with persons affected by this regulation and the subject matter experts within the agency have decided that this emergency is necessary to protect the health, safety and welfare of the public, a formal outreach to the business community was not performed. Small businesses should not be affected by this change, and local governments running methadone clinics are not required to provide buprenorphine.

#### **Rural Area Flexibility Analysis**

A rural area 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.

#### **Assessment of Public Comment**

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

## EMERGENCY RULE MAKING

### Detoxification of Substance and Stabilization Services

**I.D. No.** ASA-49-08-00009-E

**Filing No.** 257

**Filing Date:** 2009-03-11

**Effective Date:** 2009-03-11

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

**Action taken:** Repeal of Part 816, and addition of new Part 816 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.09, 19.15, 19.40, 21.09 and 23.02

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

**Specific reasons underlying the finding of necessity:** This regulation must remain in place otherwise OASAS will not be in compliance with Public Health Law Section 2708 © and upon CMS approval the rates Department of Health will implement.

**Subject:** Detoxification of substance and stabilization services.

**Purpose:** To repeal and then add Part 816 services that are in alignment with NYS statutory language in the 2008-2009 Article 7 bill.

**Substance of emergency rule:** Amendment of Part 816 of Title 14 of the New York Codes, Rules and Regulations (Chemical Dependence Crisis Services) is proposed to allow for implementation of Chapter 58 of the Laws of 2008, Part C, § 14-b, which added language to Section 2807-c of the Public Health Law changing rates from a Diagnostic Related Group (DRG) system to a per diem system.

The amendment adds definitions in section 816.5 for Detoxification, Medically Managed Withdrawal Services, Medically Supervised Withdrawal services-Inpatient, Medically Supervised Withdrawal Services-Outpatient, Medically Monitored, Observation Bed, Prescribing Professional, Program Sponsor, Recovery Care Plan, and updates Qualified Health Professionals to include Licensed Mental Health Counselors, in order to effectively integrate operation of the proposed regulation.

The proposed regulations updates section 816.7 (Standards applicable to medically managed withdrawal and stabilization services) defining inpatient services that can be offered by providers in this service. The proposed regulation establishes that providers of medically managed services could also provide medically supervised services within the same setting with no change to their OASAS certification. The proposed regulation also defines the differences in the two services.

The proposed regulation was developed by OASAS staff and providers of withdrawal and stabilization services to allow for greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on crisis stabilization and linkage to treatment. Recommendations from the Detoxification Task Force convened by the Commissioner in the summer of 2007 included revising Part 816 regulations and "identify and modify, where appropriate the regulatory requirements that currently impede development of community-based medically supervised withdrawal programs". The proposed regulations have been revised to protect patient safety and quality of care while providing greater flexibility to the role of medical and clinical staff to exercise clinical judgment.

These changes are one means of encouraging communities to develop increased community-based withdrawal and stabilization programs to meet the overall goal of the Detoxification Task Force of reducing unnecessary hospital detoxifications and increasing access to community based care where safe and appropriate.

The proposed changes to Part 816 also update section 816.8 (Standards applicable to inpatient medically supervised withdrawal and stabilization services). The regulation changes the type of paperwork required and staffing configuration for outpatient settings. The proposed regulation provides a separate section, 816.9, applying to medically supervised outpatient withdrawal and stabilization services. Changes to the outpatient regulation allow for a face to face visit with a medical professional including a registered nurse and allow for the physician to schedule visits less than daily if deemed safe and appropriate. These changes address the biggest previous barrier to the provision of outpatient services: the need for daily physician contact.

The proposed regulation would reduce the amount of paperwork in both the inpatient and outpatient medically managed and medically supervised setting. The proposed regulation no longer requires vocational and educa-

tion assessments, changes the language from biopsychosocial assessment to a crisis assessment targeting only the information necessary to safely stabilize the patient, engage them in a change process and link them to appropriate treatment services. The proposed regulation requires targeted assessments aimed at crisis stabilization and linkages, thereby allowing more time for counseling services and providing more time to engage the client in the recovery process.

The proposed regulation expands clinical flexibility by providing individualized treatment when a patient is interested in withdrawal and stabilization services. By triaging the patient a more efficient and cost effective level of care determination can be made, allowing for more individualized crisis assessment and stabilization.

The proposed Part 816 regulation supports implementation of the enacted 2008-2009 Health and Mental Hygiene Budget, which amended section 2807-c of the Public Health Law to: reconfigure reimbursement for hospital based medically managed withdrawal / detoxification; and authorize the reimbursement methodology for a 48 hour detoxification observation period.

Section 816.9, entitled medically monitored withdrawal and stabilization services, remains the same.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. ASA-49-08-00009-P, Issue of December 3, 2008. The emergency rule will expire May 9, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Deborah Egel, OASAS, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: DeborahEgel@OASAS.state.ny.us

#### **Regulatory Impact Statement**

The proposed Chemical Dependence Withdrawal and Stabilization Services regulations are being submitted for public review and comment. The current Part 816 Chemical Dependence Crisis Services will be repealed and the proposed regulations will be added in order for OASAS to be in alignment with the enacted 2008-2009 Health and Mental Hygiene Budget. The 2008-09 Health and Mental Hygiene Budget amended section 2807-c of the Public Health Law to reconfigure reimbursement for hospital based medically managed withdrawal/detoxification and authorize the reimbursement methodology for a 48 hour detoxification observation period, which has an effective date of December 1, 2008.

Chemical dependence is a chronic illness which can be treated effectively when medications are administered under conditions consistent with their pharmacological efficacy, and when withdrawal and stabilization services include necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, and medical services as needed. Chemical Dependence withdrawal and stabilization is the first step in facilitating recovery from addiction for many patients. The proposed regulations set forth standards to guide withdrawal services 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.

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.

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 and aligning the regulation with Statutory language. Chapter 58 of the Laws of

2008, Part C, § 14-b.. The objective is to be aligned with the legislative intent behind 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 this regulation will establish a new standard for all facilities, which will assist withdrawal program in providing better health care services and withdrawal from chemical dependence.

##### 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 of the Mental Hygiene Law, enabling the Commissioner to establish best practices for treating chemical dependency.

##### 3. Needs and Benefits:

Detoxification is a medical intervention that manages an individual safely through the process of withdrawal (McCorry et. al. 2000). The three successful components of detoxification have been identified in the Treatment Improvement Protocol (TIP) #45 as evaluation, stabilization and linkage to treatment (CSAT, 2006). In addition, the American Society of Addiction Medicine (ASAM) recognizes that patients should be placed in the least restrictive setting that provides safe and effective treatment.

Under the proposed Part 816 regulations, hospital based detoxification units will be able to operate two levels of care simultaneously: medically managed and medically supervised. Medically managed services are designed for patients who are acutely ill from alcohol-related and/or substance-related addictions or dependence, including the need for medical management of persons with severe withdrawal or risk of severe withdrawal symptoms, and may include individuals with or at risk of acute physical or psychiatric co-morbid conditions. This level of care includes the 48 hour observation bed. Inpatient medically supervised withdrawal and stabilization services are appropriate for persons who are intoxicated by alcohol and/or substances, who are suffering from mild to moderate withdrawal, coupled with situational crisis, or who are unable to abstain with an absence of past withdrawal complications. Medically supervised services may require less staff due to the decreased medical needs of patients who are appropriate for this level of care.

The proposed regulations provide more clinical expertise in the management of patients. The proposed regulations will encourage the appropriate use of a broader array of withdrawal and stabilization services. Hospitals will be required to more thoroughly assess patients for appropriate level of care and community providers have been provided more flexibility in providing community-based care. This approach to detoxification has been supported by consensus opinion (CSAT, 2006).

This is supported by OASAS statistics. In 2007, 72,099 patients, representing 24% of all patients admitted in addiction treatment, entered hospital and community based withdrawal and stabilization services in New York State. Among the 2007 admissions to Medically Managed detoxification services 10,029 patients representing 19% of all patients, arrived at another level of care within 14 days of discharge. Among the 2007 admissions to medically supervised withdrawal, 8,265 patients representing 40% of all patients arrived at another level of care within 14 days of discharge.

The purpose of this regulatory change is to capitalize on better linkage and engagement to prevent multiple admissions without sustained recovery. Patients are more likely to enter and remain in subsequent substance abuse treatment if they believe that the services will help them with life problems (Fiorentine et. al 1999). Better linkages to inpatient or outpatient rehabilitation have been found when case managers are able to directly link patients through a warm-hand-off or provide incentives. (Chutuape, et.al. 2001; CSAT 2006).

Furthermore, information disseminated in the process of rewriting, reorganizing, and promulgating the Part 816 regulations will provide both patients and withdrawal services clear understanding of the intent of the regulation. This will result in better implementation and homogeneous services, improving patient care and more efficient use of staff resources.

##### 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:

There should be no additional outlay to regulated parties as a result of this regulation. The regulation changes the focus of withdrawal services from treatment to stabilization and discharge planning. The regulation is also necessary to support the enacted 2008-09 New York State Budget which:

- The current hospital detoxification reimbursement methodology will change from a Diagnostic Related Group (DRG) case payment to a

per diem methodology effective December 1, 2008 (pending Centers for Medicare and Medicaid Services (CMS) approval).

- The transition to per diem rates, based on 100 percent on the prices (established with 2006 base year cost, trended to the rate year) will take place over a four year period.
- The Phase in period begins December 1, 2008, and will ultimately end in the complete transition from DRGs to the reweighted and rebased per diem rate:
  - Effective December 1, 2008 thru December 31, 2009, the per diem rate will be based on 75 percent on the 2007 DRG rate converted to a per diem rate (trended to the rate year) and 25 percent on the regional prices (trended to the rate year).
  - In 2010 the per diem rate will be evenly split between these two components.
  - In 2011, the rate will be based 25 percent on the DRG rate (converted to a per diem and trended) and 75 percent regional prices trended).
  - By 2012, the rate will be at 100 percent based on the regional prices.

#### Year One:

- All Part 816 hospital inpatient detoxification services: Observation period services; Medically Managed Detoxification; and Medically Supervised Inpatient Withdrawal Services, provided in an OASAS certified Part 816 bed will receive the same, hospital specific amount.

#### Years Two through Four:

- The Part 816 Hospital Based Observation Period and Medically Managed Detoxification (MMD) Services will be reimbursed at the same amount. The Part 816 Hospital Based Medically Supervised Inpatient Withdrawal Period will be reimbursed at 75 percent of the prevailing hospital specific MMD rate in 2010.

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

OASAS is not expected to see increased costs related to administering the rule. OASAS will need to modify the program review instrument currently used to certify chemical dependence withdrawal services along with providing technical assistance; however, this is not expected to result in a undue burden on OASAS.

Additionally, there is an anticipated cost saving with the regulation changing from a DRG to a per diem rate. DRGs are a system used to classify hospital cases into one of approximately 500 groups that are expected to have similar hospital resource use, developed for Medicare as part of the prospective payment system. DRGs are assigned by a "grouper" program based on International Classification of Diseases (ICD) diagnoses, procedures, age, sex, and the presence of complications or co morbidities. DRGs have been used since 1983 to determine how much Medicare pays a hospital, since patients within each category are similar clinically and are expected to use the same level of hospital resources.

Therefore, patients will be treated within a system that is designed to appropriately place patients and move them from more intensive services into other levels of care that are more less expensive and effective in treating the patient resulting in savings for the State and local government.

#### 5. Local Government Mandates:

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

#### 6. Paperwork:

The proposed Part 816 regulation will decrease the amount of individual patient assessments and treatment plans, saving providers considerable time and effort. Assessments will be targeted for this distinct population. Time previously spent on vocation and educational assessments will be eliminated. Services will be focused on crisis intervention, stabilization and discharge planning. On average, 60 percent of counselors' time is currently spent filling in required paperwork which will now be dedicated to serving the patient population.

The proposed regulations also include changes to allow more flexibility by reducing paperwork, targeting interventions to crisis stabilization and linkages, which will allow clinicians more time for individual contact.

#### 7. Duplications:

There is no duplication of other state or federal requirements.

#### 8. Alternatives:

A Task Force was convened by the Commissioner in June 2007 to review and make recommendations on chemical dependence crisis services. The Task Force published recommendations in January 2008. To the extent possible the proposed Part 816 regulations reflect the task force recommendations. There no alternatives considered.

OASAS continues to elicit comments on the proposed regulations. The regulation was shared with New York's treatment provider community, representing a cross-section of upstate and downstate, as well as urban and rural programs. All comments received were reviewed and changes were made. Additionally, these proposed regulations were shared with New York State Alcoholism and Substance Abuse Providers (ASAP).

Finally, the proposed regulations were shared with New York State's

Advisory Council at the August meeting. At this meeting there were no comments generated by the group because the providers appeared to be comfortable with the current proposal.

#### 9. Federal Standards:

Federal standards governing Medicaid requirements for these services are incorporated into the proposed changes to Part 816.

#### 10. Compliance Schedule:

It is expected that full implementation of Part 816 will be completed by December 1, 2008 in order to be compliant with statutory language.

#### References

Center for Substance Abuse Treatment. *Detoxification and Substance Abuse Treatment*. Treatment Improvement Protocol (TIP) Series 45. DHHS Publication no. (SMA) 06-4131. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2006.

Chutuape, M.A., Jasinski, D.R., Fingerhood, M.I., and Stitzer, M.I. One- Three- and Six- Month Outcomes After Brief Inpatient Opiate Detoxification. *American Journal of Drug and Alcohol Abuse* 27(1): 19-44, 2001.

Fiorentine, R., Nakashima, J., and Anglin, M.D. Client Engagement in Drug Treatment. *Journal of Substance Abuse Treatment* 17(3): 199-206, 1999.

McCorry, F., Garnick, D.W., Bartlett, J., Cotter, F., and Chalk, M. Developing Performance Measures for Alcohol and Other Drug Services in Managed Care Plans. Washington Circle Group. *Joint Commission Journal on Quality Improvement* 26(11): 633-643, 2000.

#### Regulatory Flexibility Analysis

**Effect of the Rule:** The proposed Part 816 will impact certified and/or funded providers. It is expected that the development of Crisis Withdrawal and Stabilization services will require providers to amend some of their policies and procedures. The new service will result in greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on crisis stabilization and linkage to treatment. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking crisis withdrawal and stabilization services due to less restrictive procedures. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts will not be affected because any nominal increase in cost will be offset by better patient outcomes.

**Compliance Requirements:** There are some minor changes in compliance requirements. In addition, providers are already required to provide utilization review, therefore, it is not expected that the proposed regulation will have additional costs.

**Professional Services:** Additional professional services are not expected.

**Compliance Costs:** Some programs may need additional formally trained staff to meet the proposed requirements. Training will be made available to hospital providers by OASAS and Island Peer Review Organization (IPRO), an independent, not-for-profit corporation which specializes in health care evaluation and quality improvement.

**Economic and Technological Feasibility:** Compliance with the record-keeping and reporting requirements of the proposed Part 816 is expected to have a nominal economic impact on small businesses and government.

**Minimizing Adverse Impact:** Part 816 has been carefully reviewed to ensure minimum adverse impact to providers by Alcoholism and Substance Abuse Providers of NYS, Inc., New York State's Council of Local Mental Hygiene Directors and the New York State Advisory Council on Alcoholism and Substance Abuse Services, Greater New York Hospital Association, Healthcare Association of New York, and a statewide representative coalition from hospital and community based organizations that provide Withdrawal and Stabilization services. All comments received were reviewed and numerous changes were made. Any impact this rule may have on small businesses and the administration of State or local governments and agencies will either be a positive impact or have nominal costs. Compliance requirements are small and will be absorbed into the already existing economic structure. The positive impact for patients and the state health care system outweigh any potential minimal costs.

**Small Business and Local Government Participation:** The proposed regulations were shared with New York's treatment provider community including Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare Association of New York, the Council of Local Mental Hygiene Directors and the New York State Advisory Council on Alcoholism and Substance Abuse Services and a statewide representative coalition from hospital and community based organizations that provide Withdrawal and Stabilization services.

#### Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: There are six (6) certified providers of medically managed detoxification services that are located in rural areas of the State, five of which are public.

2. Reporting: There will be new documentation requirements to maintain clients in the higher level of care that will have some impact on providers.

3. Costs: There will be minimum impact for rural providers to implement Part 816. Under the Proposed 816 hospital based units can now operate two levels of care simultaneously: medically managed and medically supervised. Medically supervised services may require less staffing.

4. Minimizing adverse impact: Regulatory reform of detoxification rates was driven by language in the enacted 2008-09 budget. In order to achieve optimal results, OASAS solicited input from over 40 providers of service representing each modality statewide. This group met for a period of six months and the hospitals agreed that it was important to align detoxification care with detoxification rates. Hospitals also realized this could increase opportunities for outpatient detoxification units with increased income.

5. Rural area participation: These amendments were shared with New York's treatment provider community and included a cross-section of up-state and downstate, as well as urban and rural programs.

#### **Job Impact Statement**

The implementation of Part 816 may have a minor impact on staffing at hospital based detoxification units. Hospital based units under the current Part 816 solely operate as medically managed units which requires more staffing than any other withdrawal service. Under the proposed Part 816, hospital based units can now operate two levels of care simultaneously; medically managed and medically supervised. Staffing for medically supervised services may require less staffing. This regulation will not adversely impact jobs outside of the few hospital based detoxification units.

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## Department of Correctional Services

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

#### **Alcohol and Substance Abuse Treatment Correctional Annexes (ASATCA)**

**I.D. No.** COR-13-09-00003-P

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

**Proposed Action:** Repeal of section 100.126(a) of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 70

**Subject:** Alcohol and substance abuse treatment correctional annexes (ASATCA).

**Purpose:** Amend designation of Marcy Correctional Facility.

**Text of proposed rule:** Subdivision (a) of section 100.126 of Title 7 NYCRR is hereby repealed and reserved.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2 - State Campus, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@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.

#### **Regulatory Impact Statement**

The New York State Department of Correctional Services (DOCS) seeks to repeal subdivision (a) of section 100.126 of Title 7 NYCRR.

##### **Statutory Authority**

Section 70 of Correction Law mandates that each correctional facility must be designated in the rules and regulations of the department and assigns the commissioner the duty to classify each facility with respect to the type of security maintained and the function as specified in Correction Law section 70(6).

##### **Legislative Objective**

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner to designate and classify correctional facilities in the best interest of the public safety and welfare as well as for the rehabilitation of the inmate population.

#### **Needs and Benefits**

Marcy Correctional Facility Annex no longer functions as an alcohol substance abuse treatment correctional annex (ASATCA), therefore the designation and classification is being amended to properly reflect that purpose. The former alcohol and substance abuse treatment correctional annex now houses a Residential Substance Abuse Treatment (RSAT) program, which is a function of the general confinement facility classification of Marcy Correctional Facility, per 7 NYCRR § 100.124.

#### **Costs**

a) To agency, the state and local governments: None.

b) Costs to private regulated parties: None. The proposed amendment does not apply to private parties.

c) This cost analysis is based upon the fact that this proposal merely amends the designation and classification of Marcy Correctional Facility as required by the Correction Law.

#### **Local Government Mandates**

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments. Marcy Correctional Facility is State funded and operated.

#### **Paperwork**

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

#### **Duplication**

These proposed amendments do not duplicate any existing State or Federal requirement.

#### **Alternatives**

No alternatives are apparent and none have been considered. Due to the change in the facility purpose, the facility classification must also be changed pursuant to Correction Law section 70.

#### **Federal Standards**

There are no minimum standards of the Federal government for amending the designation of a correctional facility.

#### **Compliance Schedule**

The Department of Correctional Services will achieve compliance with the proposed rules immediately.

#### **Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal merely amends the designation and classification of Marcy Correctional Facility.

#### **Rural Area Flexibility Analysis**

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on rural areas. This proposal merely amends the designation and classification of Marcy Correctional Facility.

#### **Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely amends the designation and classification of Marcy Correctional Facility.

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

#### **Death Sentence**

**I.D. No.** COR-13-09-00005-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 103.45 of Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 70 and 652

**Subject:** Death sentence.

**Purpose:** To repeal the section since it no longer applies to any person due to New York State Court of Appeals ruling.

**Text of proposed rule:** The Department of Correctional Services repeals section 103.45 of 7 NYCRR and reserves the section number for future use.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2 - State Campus, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@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 action because it merely repeals regulatory provisions which no longer apply to any person. See SAPA 102(11)(a).

7 NYCRR 103.45(a) currently states that all warrants stating a sentence of death shall be directed to the commissioner. 7NYCRR 103.45(b) authorizes male persons sentenced to death to be delivered to Clinton Correctional Facility and 103.45(c) authorizes female persons sentenced to death to be delivered to Bedford Hills Correctional Facility.

The New York State Court of Appeals in *People vs. Taylor*, 9N.Y.3d 129 (2007), determined that the New York State death penalty sentencing statute enacted in 1995 violates the New York State Constitution on its face and that it is not within the power of the judiciary to save the statute. Since then, the New York State Legislature has not passed a new death penalty statute. Accordingly, 7 NYCRR 100.15(d) which authorized Clinton Correctional Facility to be used to house male persons sentenced to death and 7 NYCRR 100.80(c)(5) which authorized Bedford Hills Correctional Facility to be used to house female persons sentenced to death, have both been repealed. Therefore, it is unnecessary to maintain this regulation.

The Department's authority resides in sections 70 and 130 of Correction Law. Section 70 mandates that each correctional facility must be designated in the rules and regulations of the Department and assigns the Commissioner the duty to classify each facility with respect to the type of security maintained and the function as specified. See Correction Law section 70(6). Section 130 assigns the Commissioner the discretion to designate appropriate correctional facilities to receive any person convicted of any crime punishable by death. See Correction Law section 130.

#### Job Impact Statement

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

**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: New York State Executive Law, section 623 grants the Crime Victims Board (the Board) the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. New York State Executive Law, section 624(d) provides that any person, who has paid for or incurred the burial expenses of a victim who died as a direct result of such crime, be eligible for awards from the Board. Section 626(1) provides that the Board may make awards for out-of-pocket losses which include unreimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which such claim is based. Section 631(2) provides a statutory cap of \$6,000 for awards related to burial expenses.

2. Legislative objectives: By enacting the New York State Executive Law, sections 624, 626 and 631, the Legislature sought to ensure that the Board could reimburse claimants' out-of-pocket losses reasonably incurred for the burial expenses of crime victims.

3. Needs and benefits: Currently, New York State Executive Law, section 624 provides that any person, who has paid for or incurred the burial expenses of a victim who dies as a direct result of such crime, be eligible for an award from the Board. Section 626 relates to the reimbursement of general out-of-pocket expenses, which include unreimbursed and unreimbursable expenses or indebtedness reasonably incurred for medical care or other services necessary as a result of the injury upon which such claim is based. Section 631, subdivision 2 permits the Board to make awards not exceeding \$6,000 for the burial expenses of a victim who has died as a direct result of a crime. From recent history to date, the Board has consistently interpreted these sections of law and their related, current and historical regulations to mean that the costs associated with burial expenses may only be made to those eligible, and in the amounts to which such expenses were capped, at the time the victim died. The Board has consistently determined that compensable costs shall be limited to how the statute and its regulations themselves were at the time of the death of the victim. This proposed regulation would specifically outline those eligible and the caps in place at different points in history, so the Board may make consistent determinations for awards related to the reimbursement of the costs associated with burial expenses, and will allow claimants or potential claimants to be aware of who is eligible and what expenses the Board may consider reimbursable under its statutory authority.

4. Costs: a. Costs to regulated parties. For the most part, these proposed regulations would be codifying the Board's current interpretation of its statutory authority, therefore it is not expected that the proposed regulations would impose any additional costs to the agency or State.

b. Costs to local governments. These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

c. Costs to private regulated parties. The proposed regulations do not apply to private regulated parties and would not impose any additional costs on private regulated parties.

5. Local government mandates: These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. Paperwork: These proposed regulations do not require any additional paperwork requirements more than is currently required of the Board's claimants.

7. Duplication: These proposed regulations do not duplicate any other existing state or federal requirements.

8. Alternatives: Although the current Board has consistently applied its interpretation of Executive Law, sections 624, 626 and 631 and related regulations, not implementing this proposed regulatory change could result in inconsistent claimant award decisions in the future. An alternative would be to apply the current statutory cap and eligibility to all cases, regardless of when the victim died. That would, however, be unfair to those claimants who applied to the Board in the past and were either denied or limited in their awards by the application of earlier versions of the statute or regulations.

9. Federal standards: Permissible under 42 USCS 10602.

10. Compliance schedule: The regulations will be effective on the date they are adopted.

#### Regulatory Flexibility Analysis

The New York State Crime Victims Board (the Board) projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of this proposed rule change. This proposed rule change simply establishes the caps on, and those eligible for, the reimbursement of the costs associated with burial expenses. Since nothing

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## Crime Victims Board

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

#### Providing Award Caps and Eligibility for Burial Expenses

I.D. No. CVB-13-09-00004-P

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

**Proposed Action:** Amendment of section 525.12(g)(1) of Title 9 NYCRR.

**Statutory authority:** Executive Law, sections 624, 626 and 631

**Subject:** Providing award caps and eligibility for burial expenses.

**Purpose:** To enumerate the caps and those eligible for burial expenses for homicide victims at certain periods in history.

**Text of proposed rule:** Part 525.12 is amended to read as follows:

(g)(1) Any compensation award made pursuant to Executive Law, article 22, shall be in an amount not exceeding out-of-pocket expenses, including indebtedness reasonably incurred for medical or other services necessary as a result of the injury upon which the claim is based, together with loss of earnings or support resulting from such injury. If the injury causes death, the award shall include funeral, burial plot and marker cost, not exceeding [\$2,500.]:

\$6,000 for crimes occurring on and after 11/1/96, claims submitted by any person who incurs such costs;

\$2,000 for crimes occurring on and after 6/12/91 until 10/31/96, claims submitted by any person who incurs such costs;

\$2,500 for crimes occurring on and after 8/1/85 until 6/11/91, claims submitted by any person who incurs such costs;

\$1,500 for crimes occurring on and after 7/30/83 until 7/31/85, claims submitted by any person who incurs such costs;

\$1,500 for crimes occurring on and after 6/15/82 until 7/29/83, claims submitted by family members;

\$1,500 for crimes occurring on and after 6/16/68 until 6/14/82, claims submitted by a surviving spouse, parent or child;

\$1,000 for crimes occurring on and after 8/1/66 until 6/15/68, claims submitted by a surviving spouse or child.

**Text of proposed rule and any required statements and analyses may be obtained from:** John Watson, General Counsel, New York State Crime Victims Board, One Columbia Circle, Suite 200, Albany, New York 12203, (518) 457-8066, email: johnwatson@cvb.state.ny.us

in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and one were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

**Rural Area Flexibility Analysis**

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in the State of New York as a result of this proposed rule change. This proposed rule change simply establishes the caps on, and those eligible for, the reimbursement of the costs associated with burial expenses. Since nothing in this proposed rule change will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

**Job Impact Statement**

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply establishes the caps on, and those eligible for, the reimbursement of the costs associated with burial expenses. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.

**Department of Environmental Conservation**

**NOTICE OF ADOPTION**

**Management of Marine Commercial Fisheries for Weakfish and Black Sea Bass**

**I.D. No.** ENV-51-08-00001-A

**Filing No.** 232

**Filing Date:** 2009-03-13

**Effective Date:** 2009-04-01

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

**Action taken:** Amendment of sections 40.1(f), (i) and 40.6(e) of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0340-a and 13-0340-f

**Subject:** Management of marine commercial fisheries for weakfish and black sea bass.

**Purpose:** To amend regulations for commercial limits on weakfish, construction of traps for black sea bass, and definition of total length.

**Text or summary was published in** the December 17, 2008 issue of the Register, I.D. No. ENV-51-08-00001-P.

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

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

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

**Assessment of Public Comment**

The agency received no public comment.

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

**Deer Hunting Regulations**

**I.D. No.** ENV-13-09-00011-P

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

**Proposed Action:** Amendment of sections 1.22 and 1.27 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303 and 11-0907

**Subject:** Deer hunting regulations.

**Purpose:** To expand antler restrictions in the Catskills and update muzzleloading regulations in the Northern Zone.

**Text of proposed rule:** Subdivision (a) of 6 NYCRR section 1.22 is amended as follows:

(a) "Northern Zone." The types of deer that may be legally harvested, the open Wildlife Management Units (WMUs) as described in section 4.1 of this Title and the open season dates (First and Second splits) for muzzleloading in the Northern Zone are set forth below.

	“Open WMUs for harvest of deer of either sex”	“Open WMUs for harvest of antlerless deer or deer having both antlers less than three inches in length”	“Open WMUs for harvest of antlered deer only”
FIRST SPLIT of the muzzleloading season for deer shall be the seven days immediately proceeding the Northern Zone regular big game season:	5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K		6N
SECOND SPLIT of the muzzleloading season for deer shall be the seven days immediately following the Northern Zone regular big game season:	5A, 5G, [5J,] 6A, 6C, 6G, 6H		

Paragraph (2) of 6 NYCRR subdivision 1.27 (a) is amended as follows:  
(2) The table below describes the minimum antler requirements, by Wildlife Management Unit (WMU) as described in section 4.1 of this title, for an antlered deer to be legally taken.

Minimum Antler Requirements	Wildlife Management Unit
(i) At least one antler with at least 3 points. Each point must be at least 1 inch long measured from the main antler beam.	3A, 3C, 3H, 3J, 3K, 4G, 4O, 4P, 4R, 4S, 4W, 4X
(ii) Any antlered deer	all other WMUs

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeremy Hurst, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8883, email: jehurst@gw.dec.state.ny.us

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

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

**Additional matter required by statute:** A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

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

**Regulatory Impact Statement**

1. Statutory authority:

Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (department) to develop

and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to: ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. ECL section 11-0907 provides for the regulation of deer and black bear hunting seasons.

#### 2. Legislative objectives:

The legislative objective behind the statutory provisions listed above is to establish, or authorize the department to establish by regulation, certain basic wildlife management tools, including the setting of open areas, and restrictions on methods of take and possession. These tools are used by the department to maintain desirable wildlife species in ecological balance, while observing sound management practices.

#### 3. Needs and benefits:

The department proposes to amend 6 NYCRR section 1.22 (Muzzleloading firearm deer season) to open wildlife management unit (WMU) 5A and close WMU 5J for either-sex deer harvest during the late muzzleloading season. The department also proposes to amend 6 NYCRR section 1.27 (Alternative deer harvest strategies) to include WMUs 3A, 4G, 4O, 4P, 4R, 4S, 4W, and 4X in the list of units where the minimum antler requirement is at least one antler with at least 3 points. These proposals are described as follows:

##### Northern Zone Muzzleloading Seasons

WMU 5A (primarily in Clinton County) was previously open for the late muzzleloading season from 1999 through 2002. Harsh winters in the unit in 2000 and 2003 reduced the deer population and the deer harvest, and the late muzzleloading season was closed beginning in 2003 to allow the deer herd to recover. Deer harvests since 2003 have increased, and winter weather has not been a major factor since then, so the harvest of more antlerless deer is appropriate.

WMU 5J has experienced harsh winter weather in three of the last four years, especially in the northern part of Fulton County and extreme southern Hamilton County. Above average snow depths for extended periods have caused winter deer mortality, and the current winter will likely have a similar impact. Deer have been documented concentrating in wintering areas in early December, well before the end of the muzzleloading season, making them extremely vulnerable to hunters, resulting in high harvests and high hunting pressure near roads. A field inspection of a wintering area in Fulton County during the late muzzleloading season last fall revealed vehicles lining the roads and numerous drag trails in the snow at each access point, indicating the removal of a shot deer. Closing the late muzzleloading season will reduce the harvest of deer in the WMU, allowing the population to rebound from recent losses. It will also protect those deer that move into wintering areas early in the winter from harvest when they are especially vulnerable to hunters.

##### Antler Restrictions

In recent years there has been growing interest and debate among hunters about programs to establish antler restrictions for deer hunting. Antler restrictions prohibit hunters from taking bucks unless the buck meets a specific antler standard (e.g., 3 or more points on one antler). Simply stated, antler restrictions protect a majority of young bucks from harvest allowing them to live another year or two so that they become slightly larger and heavier, and grow larger antlers with more points.

A coalition of hunters from Sullivan, Delaware, Ulster, Greene, and Schoharie Counties proposed an expansion of the existing antler restriction program to include WMUs 3A, 4G, 4O, 4P, 4R, 4S, 4W, and 4X. Endorsement for expanding the antler restriction area has come from the Sullivan County Federation of Sportsmen, Ulster County Federation of Sportsmen, Greene County Federation of Sportsmen, Schoharie County Conservation Association, and others.

While antler restriction programs do not meet a critical biological or management need, the department recognizes that antler restrictions can be part of a viable deer management program when hunter support for such restrictions is widespread. Because interest in antler restrictions reflects social values of hunters rather than essential management changes for biological purposes, and because antler restrictions would entail a substantial change for New York hunters, the department has established a guideline: at least two thirds (67 percent) support and no more than 20 percent strong opposition should be evident before considering formal rule making proposals. This proposal is consistent with those guidelines.

To fully evaluate the level of support for antler restrictions, questionnaires were mailed in early February 2009 to a random sample of over 3,900 hunters who hunt in the WMUs included in the antler restriction proposal, and responses were evaluated in 4 WMU groupings: 3A-4X, 4O-4P-4W, 4R-4S, and 4G. The mail survey response rate was 53.3 percent and results varied significantly ( $P < 0.0001$ ) from a subsequent phone survey of non-respondents. When adjusted for non-response bias, hunter support for mandatory antler restrictions exceeded the department's guidelines in WMUs 4O-4P-4W (67.4 percent) and WMUs 3A-4X (69.5

percent). However, strong opposition for the proposed restriction also exceeded the department's guidelines in both WMUs 4O-4P-4W (22.1 percent) and WMUs 3A-4X (20.1 percent). The statistical confidence intervals for the survey results "bracket" the guidelines established by the department. This means that the data could be interpreted to either support moving forward with antler restrictions (as proposed) or to support taking no action. The department has determined that it is appropriate to propose the antler restriction amendments to benefit from the additional statewide 45 day comment period that commences upon publication of this notice. Moreover, given the equivocal results, the department intends to continue evaluating hunter attitudes towards antler restrictions in these WMUs five years following the potential implementation of the proposed regulations.

Additionally, because an antler restriction program will result in a multi-year period of reduced buck harvest opportunity, there is potential that the proposed antler restriction may increase antlerless harvest rates. In units with low deer densities, such as WMUs 3A and 4X, additional antlerless harvest may negatively impact the deer population. The department will monitor changes in buck harvest and antlerless harvest to evaluate the impact of the proposed rule making on the deer populations.

#### 4. Costs:

Implementation of this regulation has no additional costs, other than the normal administrative expenses.

#### 5. Local government mandates:

This rule making imposes no mandates upon local governments.

#### 6. Paperwork:

No additional paperwork is associated with this rule-making.

#### 7. Duplication:

None.

#### 8. Alternatives:

The department did not consider any alternatives to the changes in the muzzleloading seasons in the Northern Zone because the proposal is needed to meet deer population management needs. The department considered not proposing the new regulations on antler restrictions because of the equivocal results from the survey of hunters, as explained above, or to only move forward with a few WMUs. However, the department concluded that the formal 45 day public comment period that starts upon publication of this notice should provide an opportunity to further clarify the attitudes of deer hunters towards antler restrictions in this area.

#### 9. Federal standards:

There are no federal standards associated with this rule making.

#### 10. Compliance schedule:

Hunters will need to comply with the new regulations during the 2009-2010 hunting seasons.

### **Regulatory Flexibility Analysis**

The Department of Environmental Conservation (department) has determined that the proposed amendments to the late muzzleloader season for deer hunting in the Northern Zone and expansion of the antler restriction program for deer hunting in southeastern New York will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. All reporting or record-keeping requirements associated with hunting are administered by the department. Therefore, the department has concluded that a regulatory flexibility analysis is not needed.

### **Rural Area Flexibility Analysis**

The Department of Environmental Conservation (department) has determined that the proposed amendments to the late muzzleloader season for deer hunting in the Northern Zone and expansion of the antler restriction program for deer hunting in southeastern New York will not impose any adverse impact on rural areas or reporting, record keeping, or other compliance requirements on public or private entities in rural areas. All reporting or record-keeping requirements associated with hunting are administered by the department. Therefore, the department has concluded that a regulatory flexibility analysis is not needed.

### **Job Impact Statement**

The Department of Environmental Conservation (department) has determined that the proposed amendments to the late muzzleloader season for deer hunting in the Northern Zone and expansion of the antler restriction program for deer hunting in southeastern New York will have no direct effect on jobs or employment. Therefore, the department has concluded that a job impact statement is not needed.

## Department of Health

### EMERGENCY RULE MAKING

#### Criminal History Record Check

**I.D. No.** HLT-41-08-00005-E

**Filing No.** 258

**Filing Date:** 2009-03-17

**Effective Date:** 2009-03-17

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

**Action taken:** Addition of Part 402 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2899-a(4); and Executive Law, section 845-b(12)

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

**Specific reasons underlying the finding of necessity:** Emergency agency action is necessary for preservation of the public health, public safety and general welfare.

The regulation is needed on an emergency basis to implement the Department of Health's statutory duty to act on requests for criminal history record checks which are required by law. The law is intended to protect patients, residents, and clients of nursing homes and home health care providers from risk of abuse or being victims of criminal activity. These regulations are necessary to implement the law as of its effective date so that the Department of Health can fulfill its statutory duty of ensuring that the health, safety and welfare of such patients, residents and clients are not unnecessarily at risk.

**Subject:** Criminal History Record Check.

**Purpose:** Criminal background checks of certain prospective employees of NHs, CHHAs, LHCSAs & long term home health care programs.

**Substance of emergency rule:** This regulation adds a new Part 402 to Title 10 NYCRR, which relates to prospective unlicensed employees of nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs who will provide direct care or supervision to patients, residents or clients of such providers.

The regulation establishes standards and procedures for criminal history record checks required by statute. Provisions govern the procedures by which fingerprints will be obtained and describe the requirements and responsibilities of the Department and the affected providers with regard to this process. The regulations address the identification of provider staff responsible for requesting the criminal history checks, supervision of temporary employees, notice to the Department when an employee is no longer employed, the content and procedure for obtaining consent and acknowledgment for finger printing from prospective employees. The Department's responsibilities for reviewing requests are set forth and specify time frames and sufficient information to process a request.

The proposed rule also describes the extent to which reimbursement is available to such providers to cover costs associated with criminal history record checks and obtaining the fingerprints necessary to obtain the criminal history record check.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. HLT-41-08-00005-P, Issue of October 8, 2008. The emergency rule will expire May 15, 2009.

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

#### Regulatory Impact Statement

Statutory Authority:

Section 2899-a (4) of the Public Health Law requires the State Commissioner of Health to promulgate regulations implementing new Article 28-E of the Public Health Law which requires all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs ("the providers") to request, through the Department of Health ("the Department"), a criminal history record check for certain unlicensed prospective employees of such providers.

Subdivision (12) of section 845-b of the Executive Law requires the

Department to promulgate rules and regulations necessary to implement criminal history information requests.

Legislative Objectives:

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 establish a requirement for all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs to obtain criminal history record checks of certain unlicensed prospective employees who will provide direct care or supervision to patients, residents or clients of such providers. This is intended to enable such providers to identify and employ appropriate individuals to staff their facilities and programs and to ensure patient safety and security.

Needs and Benefits:

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hands of the very persons charged with providing care to them. While the majority of unlicensed employees in all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs are dedicated, compassionate workers who provide quality care, there are cases in which criminal activity and patient abuse by such employees has occurred. While this proposal will not eliminate all instances of abuse, it will eliminate many of the opportunities for individuals with a criminal record to provide direct care or supervision to those most at risk. Pursuant to Chapter 769 of the laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 ("the Chapter Laws"), this proposal requires the providers to request the Department to obtain criminal history information from the Division of Criminal Justice Services ("the Division") and a national criminal history check from the FBI, concerning each prospective unlicensed employee who will provide direct care or supervision to the provider's patients, residents or clients.

Each provider subject to these requirements must designate "authorized persons" who will be empowered to request, receive, and review this information. Before a prospective unlicensed employee who will provide direct care or supervision to patients, residents or clients can be permanently hired, he or she must consent to having his/her fingerprints taken and a criminal history record check performed. Two sets of fingerprints will be taken and sent to the Department, which will then submit them to the Division. The Division will provide criminal history information for each person back to the Department.

The Department will then review the information and will advise the provider whether or not the applicant has a criminal history, and, if so, whether the criminal history is of such a nature that the Department disapproves the prospective employee's eligibility for employment, (e.g., the person has a felony conviction for a sex offense or a violent felony or for any crime specifically listed in section 845-b of the Executive Law and relevant to the prospective unlicensed employees of such providers). In some cases, a person may have a criminal background that does not rise to the level where the Department will disapprove eligibility for employment. The proposed regulations allow the provider, in such cases, to obtain sufficient information to enable it to make its own determination as to whether or not to employ such person. There will also be instances in which the criminal history information reveals a felony charge without a final disposition. In those cases, the Department will hold the application in abeyance until the charge is resolved. The prospective employee can be temporarily hired but not to provide direct care or supervision to patients, residents or clients of such providers.

The proposal implements the statutory requirement of affording the individual an opportunity to explain, in writing, why his or her eligibility for employment should not be disapproved before the Department can finally inform a provider that it disapproves eligibility for employment. If the Department maintains its determination to disapprove eligibility for employment, the provider must notify the person that the criminal history information is the basis for the disapproval of employment.

The proposed regulations establish certain responsibilities of providers in implementing the criminal history record review required by the law. For example, a provider must notify the Department when an individual for whom a criminal history has been sought is no longer subject to such check. Providers also must ensure that prospective employees who will be subject to the criminal history record check are notified of the provider's right to request his/her criminal history information, and that he or she has the right to obtain, review, and seek correction of such information in accordance with regulations of the Division, as well as with the FBI with regard to federal criminal history information.

Costs:

Costs to State Government:

The Department estimates that the new requirements will result in approximately 108,000 submissions for a criminal history record check on an annual basis. This number of submissions for an initial criminal history record check will decrease overtime as the criminal history record check

database (CHRC) is populated. The Department will allow providers to access any prior Department determination about a prospective employee at such time as the prospective employee presents himself or herself to such provider for employment. In the event that the prospective employee has a permanent record already on file with the Department, this information will be made available promptly to the provider who intends to hire such prospective employee.

The provider will forward with the request for the criminal history review, \$75 to cover the projected fee established by the Division for processing a State criminal history record check, and a \$19.25 fee for a national criminal history record check. The Department estimates that the provider's administrative costs for obtaining the fingerprints will be \$13.00 per print. The total annual cost to providers is estimated to be approximately \$12 million.

Requests by licensed home care services agencies (LHCSAs) are estimated to constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual cost to LHCSAs is estimated to be approximately \$6 million. Reimbursement shall be made available to LHCSAs in an equitable and direct manner for the above fees and costs subject to funds being appropriated by the State Legislature in any given fiscal year for this purpose. Costs to State government will be determined by the extent of the appropriations.

The Department estimates that nursing homes, certified home health agencies and long term home health care programs will constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual costs to nursing homes, certified home health agencies and long term home health care programs is estimated to be approximately \$6 million. These providers may, subject to federal financial participation, claim the above fees and costs as reimbursable costs under the medical assistance program (Medicaid) and may recover the Medicaid percent of such fees and costs. Reimbursement to such providers will be determined by the percent of Medicaid days of care to total days of care. Therefore, approximately \$6 million of the total costs for these providers will be subject to a 50 percent federal share and approximately \$2.3 million will be borne entirely by the State.

#### Costs to Local Governments:

There will be no costs to local governments for reimbursement of the costs of the criminal history record check paid by LHCSAs. LHCSAs will receive reimbursement from the State subject to an appropriation (See "Costs to State Government").

Costs to local governments for reimbursement of the costs of the criminal history record check paid by nursing homes, certified home health agencies, and long term home health care programs will be the local government share of Medicaid reimbursement to such providers which is estimated to be annual additional cost to local governments of approximately \$700,000 (See "Costs to State Government").

#### Costs to Private Regulated Parties:

Costs to LHCSAs will be determined by the extent of annual appropriations by the State Legislature (See "Costs to State Government").

Costs to nursing homes, certified home health agencies and long term home health care programs will be determined by their Medicaid percentage of total costs (See "Costs to State Government").

#### Costs to the Department of Health:

Estimated start-up costs for the Department of Health which includes the purchase of equipment, activities and systems and staffing costs are approximately \$2.8 million.

#### Local Government Mandates:

The required criminal history record check is a statutory requirement, which does not impose any new or additional duties or responsibilities upon county, city, town, village, school or fire districts. The Chapter Laws state that they supercede any local laws or laws of any political subdivision of the state to the extent provided for in such Chapter Laws.

#### Paperwork:

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 require that new forms be developed for use in the process of requesting criminal history record information. The forms are, for example, an informed consent form to be completed by the subject party and the request form to be completed by the authorized person designated by the provider. Temporarily approved employees are required to complete an attestation regarding incidents/abuse. Provider supervision of temporary employees must be documented. In addition, other forms will be required by the department such as a form to designate an authorized party or forms to be completed when someone who has had a criminal history record check is no longer subject to the check.

The regulations also contain a requirement to keep a current roster of subject parties.

#### Duplication:

This regulatory amendment does not duplicate existing State or federal requirements. The Chapter Laws state that they supercede and apply in lieu of any local laws or laws of any political subdivision of the state to the extent provided for in such Chapter Laws.

#### Alternatives:

No significant alternatives are available. The Department is required by the Chapter Laws to promulgate implementing regulations.

#### Federal Standards:

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

#### Small Business Guide:

A small business guide as required by section 102-a of the State Administrative Procedure Act is unnecessary at this time. The Department provided an intensive orientation of program operations to those providers affected by criminal history record program.

Information was provided and continues to be provided to providers about implementation; process and procedures; and compliance with rules and regulations through a message board, staff attendance at trade association meetings, dear administrator letters, a training script or frequently asked questions document, and a dedicated e-mail log.

#### Compliance Schedule:

The Chapter Laws mandate that the providers request criminal history record checks for certain unlicensed prospective employees on and after September 1, 2006. These regulations are proposed to be effective upon filing with the Secretary of State.

#### Regulatory Flexibility Analysis

##### Effect of Rule on Small Businesses and Local Governments:

For the purpose of this Regulatory Flexibility Analysis, small businesses are considered any nursing home or home care agency within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes and 200 home care services agencies would therefore be considered "small businesses," and would be subject to this regulation.

For purposes of this regulatory flexibility analysis, small businesses were considered to be long term home health care programs with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the long term home health care program cost report 77 out of 110 long term home health care programs were identified as employing fewer than 100 employees. Twenty-eight local governments have been identified as operating long term home health care programs.

##### Compliance Requirements:

Providers must, by statute, on and after September 1, 2006, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform prospective unlicensed employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State and the FBI. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not the prospective employee's eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervision requirements imposed on providers by the regulations.

##### Professional Services:

No additional professional services will be required by small businesses or local governments to comply with this rule.

##### Compliance Costs:

For programs eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers (See "Regulatory Impact Statement - Costs to State Government").

For LHCSAs which are unable to access reimbursement from state and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to an appropriation by the State Legislature (See "Regulatory Impact Statement - Costs to State Government").

There will be costs to local governments only to the extent such local governments are providers subject to the regulations.

##### Economic and Technological Feasibility:

The proposed regulations do not impose on regulated parties the use of any technological processes. Fingerprints will be taken generally by the traditional "ink and roll" process. Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. Two cards would then need to be mailed to the Division by the Department. However, before the Department could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into the Department databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint cards is difficult to read.

The Department hopes to move in the future to Live Scan. Live Scan is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Department to obtain criminal history information.

**Minimizing Adverse Impact:**

The Department considered the approaches for minimizing adverse economic impact listed in SAPA Section 202-b (1) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

**Small Businesses and Local Government Participation:**

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments were solicited from all affected parties. Informational briefings were held with such associations. There will be informational letters to providers prior to the effective date of the regulations.

**Rural Area Flexibility Analysis**

**Effect of Rule:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population of greater than 200,000 includes towns with population densities of 150 persons or less per square mile. The following 42 counties have a population less than 200,000.

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Reporting, Recordkeeping and Other Compliance Requirements:**

Providers, including those in rural areas, must, by statute, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform covered unlicensed prospective employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervision requirements imposed on providers by the regulations.

**Professional Services:**

No additional professional services will be necessary to comply with the proposed regulations.

**Compliance Costs:**

For programs located in rural areas eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers. (See "Regulatory Impact Statement – Costs to State Government").

For LHCSAs located in rural areas which are unable to access reimbursement from state/and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to appropriation by the State Legislature. (See "Regulatory Impact Statement – Costs to State Government").

**Minimizing Adverse Impact:**

The Department considered the approaches for minimizing adverse economic impact listed in SAPA section 202-bb (2) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

**Rural Area Participation:**

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments solicited from all affected parties. Such associations include members from rural areas. Informational briefings were held with such associations. There will be informational letters to providers to include rural area providers prior to the effective date of the regulations.

**Job Impact Statement**

A Job Impact statement is not necessary for this filing. Proposed new 10 NYCRR Part 402 does not have any adverse impact on the unlicensed employees hired before September 1, 2006 as they apply only to future prospective unlicensed employees. The number of all future prospective unlicensed employees of providers who provide direct care or supervision to patients, residents or clients will be reduced to the degree that the criminal history record check reveals a criminal record barring such employment.

Since the inception of the program approximately 14% of all unlicensed employees applying for positions with nursing homes or home health care providers were found to have a criminal record barring such employment.

**Assessment of Public Comment**

The Department received comments from 16 individuals/organizations in regard to the Criminal History Record Check (CHRC) regulations. The Department believes this regulation simply fulfills the statutory requirement of Chapter 331 of the Laws of 2006, amending Public Health Law (PHL) Article 28-E and Executive Law (EL) Section 845-b relating to requiring the review of criminal history of prospective employees of nursing homes and home health care services agencies, and that most of the comments submitted are in opposition to several provisions of the Department of Health (DOH) regulations at 10 NYCRR Part 402 which were promulgated following the enactment of the statute. The specific issues raised and responses to those issues follow:

**Comment:**

In response to the provision that would require PHL Article 28 and Article 36 covered providers to designate one or more "Authorized Persons" to request, receive and maintain the confidentiality of criminal history information provided by the Department, virtually all comments received emphasized that this provision is unduly restrictive and recommended the automatic designation of two "Authorized Persons". Likewise, the commenters also stated concerns that the need for backup "Authorized Persons" to cover potential employee absences such as vacation, employee turnover or other employment issues also requires the designation of at least two "authorized persons". As such, the commenters stated that this change eliminates additional administrative burden for both providers and DOH.

**Response:**

The DOH disagrees because the designation of at least two authorized persons is already permitted by regulation. An "Authorized Person" is defined by the 2006 statute to mean the "one individual designated by a provider who is authorized to request, receive and review criminal history information, except that where the number of applications received by a provider is so great that one person cannot reasonably perform the functions of the authorized person, a provider may designate one or more additional persons to serve as authorized persons". Executive Law 845-b(1)(b). Similarly, 10 NYCRR Section 402.4(a)(1) requires the designation of as many authorized persons as are needed to assure compliance with the CHRC requirements. In order for covered providers to comply with the timely access and response to criminal history information provided by the DOH, covered providers have been instructed in both DOH training sessions and CHRC administrative letters that the designation of at least two authorized persons is encouraged and will not require DOH pre-approval. This was encouraged because the Department requires that the providers not allow prospective employees to provide direct care or supervision to patients, residents or clients in response to CHRC correspondence concerning proposed or final disapproval of eligibility for employment. It follows that due to the provider response requirements to CHRC correspondence, an authorized person should be made available at all times and notwithstanding a provider's internal staffing issues. Moreover, the larger PHL Article 28 and 36 entities have historically been encouraged by the Department to designate more than two authorized persons in recognition of the high volume of criminal history record checking requests submitted by them.

**Comment:**

Most raised the comment that the supervision requirements concerning prospective employees awaiting the results of the CHRC be revised to require one direct on-site visit and 3 telephone calls for the first month and then monthly calls thereafter to check-in with the patient/client or the patient/client's representative. The commenters also stated since providers speak with patients/clients on a continual basis already, such a requirement would provide financial relief from the restrictive supervision

requirements currently imposed, while continuing to maintain appropriate supervision of those temporary employees. The commenters also stated that the supervision requirements be revised to allow the direct on-site visit to be completed by a licensed health care professional, senior aide or other paraprofessional who meets the one year requirement of employment in home care.

Response:

The DOH agrees in part, and to the extent that the current regulation requirement requires Certified Home Health Agencies (CHHAs), Licensed Home Care Services Agencies (LHCSAs) and Long Term Home Health Care Providers (LTHHCPs) to provide direct observation and evaluation of the temporary employee on-site in the home the first week by a registered professional nurse, licensed practical nurse or other professional personnel and should be modified. PHL 2899-a(10) requires that for the purposes of providing direct observation and evaluation, the provider shall utilize an individual employed by such provider with a minimum of one-year's experience working in an agency certified, licensed or approved under Article 36 of the Public Health Law. The DOH agrees that the language in the statute ensures appropriate oversight while allowing the health care agencies to determine what level of supervision is appropriate for the prospective employees. Therefore, the regulation will be changed to allow, solely for the purposes of the CHRC supervision, the direct on-site visits to be completed by a licensed health care professional, senior aide or other paraprofessional who meets the one year requirement of employment in home care. This regulation change, however, does not supplant the existing clinical supervision requirement to be completed by a Registered Nurse or Licensed Practical Nurse. The DOH, however, also recognizes that the home health care setting poses a greater risk to the home care client pending the completion of the criminal history record checking process. On several occasions, the DOH has been informed by law enforcement or media sources of criminal offenses, both physical and financial in nature, by prospective employees during the supervisory period. The regulations at 402.4(b)(2)(ii) provide for a minimal level of CHRC supervisory contacts that ensures providers are supervising individuals while awaiting a response from the Department. Commenters also noted that some providers are still experiencing long delays in turnaround time for processing and finalizing criminal record checks, thereby increasing their supervision costs. Current CHRC processing time has been reduced to about 7 to 10 days for a non-indent (no criminal history information on file) response. The Department strives to further reduce the response time to a provider's or applicant's request for a criminal history record check determination. Several factors may delay issuing a determination to the provider and the prospective employee where there is criminal history. Once the CHRC Legal unit receives a criminal history from the Division of Criminal Justice Services (DCJS) it must be reviewed for completeness and accuracy. Very often the information provided by the FBI and to a lesser extent, the DCJS, is incomplete. The legal unit's responsibility is to assure the completeness and the accuracy of the criminal history provided and the outcome of criminal charges before making a final determination about the individual's suitability for employment. Perfection of a criminal history requires the CHRC unit to contact a number of sources including courts, parole officers, probation officers and district attorneys in New York and other jurisdictions. This process can take several days to weeks. We appreciate that this may delay some responses and providers are incurring supervisory costs while awaiting a response from the Department, but we must resolve these issues first in order to protect the health, safety, and welfare of the resident or home care patient. The protections are wholly within the purview of the Department.

Comment:

Most also recommended the removal of the regulation provision allowing prospective employees to withdraw applications for employment prior to the completion of the CHRC process. Commenters stated that this provision subjects providers to additional CHRC related costs while waiting for DOH reimbursement for applicants who may not complete the employment process because of withdrawal.

Response:

The DOH disagrees. Executive Law Section 845-b(3)(d) provides that a prospective employee may withdraw his or her application for employment, without prejudice, at any time before employment is offered or declined, regardless of whether the subject individual or provider has reviewed such individual's criminal history information. Furthermore, CHRC initial fingerprinting costs for the prospective employee remains reimbursable based on availability, whether or not the applicant completes the employment process. The DOH also wishes to underscore that the intent of the DOH CHRC Form 102 "Acknowledgement and Consent Form for Fingerprinting and Disclosure of Criminal History Record Information" is to also inform prospective employees of their right to withdraw their application for employment at any time. This right to withdraw is clearly noted on the consent form. This form was drafted with the intent of full disclosure. Moreover, the DOH CHRC Form 102 also required ap-

proval by both the NYS Division of Criminal Justice Services and the FBI prior to its implementation.

Comment:

Several commenters stated that there should be strict time lines, for example 5 days, for the DOH to review criminal history information and make employment eligibility determinations. In large part, due to the supervision costs associated with prospective employees waiting for the results of the CHRC, commenters added that such time limits would reduce their CHRC costs and also enable the DOH to more promptly notify the provider whether or not the CHRC has revealed any criminal history information, and if so, what actions shall or may be taken by the DOH and the provider.

Response:

Executive Law 845-b(5)(e) explicitly states that upon receipt of criminal history information from the division (NYS Division of Criminal Justice Services), the DOH may request, and is entitled to receive, information pertaining to any crime identified in such criminal history information from any state or local law enforcement agency, district attorney, parole officer, probation officer or court for the purposes of determining whether any ground relating to such crime exists for denying an application, renewal, or employment. Furthermore, paragraph (f) of the same subsection follows and states that the DOH shall thereafter promptly notify the provider concerning whether its check has revealed any criminal history information, and if so, what actions shall or may be taken by the DOH and the provider. As mentioned above, several factors may delay issuing a determination to the provider and the prospective employee where there is criminal history. Once the CHRC Legal unit receives a criminal history from the Division of Criminal Justice Services (DCJS) it must be reviewed for completeness and accuracy. Very often the information provided by the FBI and to a lesser extent, the DCJS, is incomplete. The legal unit's responsibility is to assure the completeness and the accuracy of the criminal history provided and the outcome of criminal charges before making a final determination about the individual's suitability for employment. Therefore, it is not practical to limit the CHRC response time to 5 days.

Comment:

The proposed regulation at 10 NYCRR Section 402.9(a)(1) requiring providers to establish, maintain, and keep current, a record of employees should be withdrawn given the high turnover rate in the home care industry.

Response:

DOH does not agree. Executive Law Section 845-b(8) requires that providers notify DOH when an employee is no longer subject to a criminal history record check so that the Division of Criminal Justice Services and DOH no longer provides subsequent criminal history information to that provider. Further, the DOH is required by law to annually validate the records maintained on its behalf by the Division of Criminal Justice Services.

Comment:

The proposed regulation at 10 NYCRR Section 402.9(c)(1) requiring providers to retain CHRC records for six years is administratively burdensome.

Response:

The Departmental standard document retention requirement is six years.

## NOTICE OF ADOPTION

### Physical Therapist Assistants and Occupational Therapy Assistants

**I.D. No.** HLT-50-08-00011-A

**Filing No.** 259

**Filing Date:** 2009-03-17

**Effective Date:** 2009-04-01

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

**Action taken:** Amendment of section 505.11 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 365-a

**Subject:** Physical Therapist Assistants and Occupational Therapy Assistants.

**Purpose:** To allow physical therapist assistants and occupational therapy assistants to provide services to Medicaid recipients.

**Text or summary was published in:** the December 10, 2008 issue of the Register, I.D. No. HLT-50-08-00011-P.

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

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

**Assessment of Public Comment**

The Department of Health received one comment on the proposed regulation. The New York Physical Therapy Association sent a letter in support of the proposed amendments.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Flexible Rating for Nonbusiness Automobile Insurance Policies

**I.D. No.** INS-13-09-00006-E

**Filing No.** 233

**Filing Date:** 2009-03-16

**Effective Date:** 2009-03-16

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

**Action taken:** Repeal of Part 163 and addition of new Part 163 (Regulation 153) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2350 and art. 23

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

**Specific reasons underlying the finding of necessity:** This regulation was previously promulgated on an emergency basis on December 24, 2008. The emergency regulation will expire on March 25, 2009. Regulation No. 153 needs to remain effective for the general welfare.

Chapter 136 of the Laws of 2008, which became effective on January 1, 2009, enacts a new Section 2350 of the Insurance Law, which replaces the prior approval system, in effect since 2001 for nonbusiness motor vehicle insurance rates, with a flexible rating (flex-rating) system. Section 2350 requires the superintendent to promulgate rules and regulations implementing the new flexible rating system. Since insurers are authorized to use the new flexible rating system as of the effective date of the new law, January 1, 2009, it is essential that this regulation be promulgated on an emergency basis in order to have procedures in place that implement the provisions of the law. It also is essential that insurers be made aware of the rules and standards governing the notice requirements as soon as possible.

For the reasons cited above, this regulation is being promulgated on an emergency basis for the preservation of the general welfare.

**Subject:** Flexible Rating for Nonbusiness Automobile Insurance Policies.

**Purpose:** This rule re-establishes flexible rating for nonbusiness automobile insurance policies required by section 2350 of the Insurance Law.

**Text of emergency rule:** A new Part 163 is added to read as follows:

§ 163.0 Preamble.

On June 30, 2008, the Governor signed Chapter 136 of the Laws of 2008 into law to enhance competition in the nonbusiness motor vehicle market, by adding a new Insurance Law section 2350. Chapter 136 replaces the prior approval system, in effect since 2001 for nonbusiness motor vehicle insurance rates, with a flexible rating (flex-rating) system. The new system, which takes effect on January 1, 2009, is a blend of prior approval and competitive rating. The system allows periodic overall average rate changes up to five percent on a file and use basis, and requires the superintendent's prior approval of overall average rate increases above five percent in any twelve-month period. The new section 2350 requires the superintendent to promulgate rules and regulations implementing the new flex-rating system.

§ 163.1 Definitions.

For the purpose of this Part, the following definitions shall apply:

(a) Base rate means the dollar charge for a given coverage for one car year prior to the application of rating factors.

(b) Car year means insuring a motor vehicle for one year.

(c) Coverage means the following motor vehicle insurance coverages:

(1) no-fault (personal injury protection), residual bodily injury liability, property damage liability, statutory uninsured motorists, supplementary uninsured/underinsured motorists, comprehensive, and collision; and

(2) any other motor vehicle coverage.

(d) Current average rate for a given coverage means the weighted average of an insurer's latest filed base rates modified by the applicable rating factors for each motor vehicle for the given coverage with the weights proportional to the latest available number of car years associated with each rating factor, or any materially equivalent calculation.

(e) Current overall average rate means:

(1) the weighted average of the current average rate for:

(i) all coverages listed in paragraph (1) of subdivision (a) of this section; and

(ii) any other motor vehicle coverages not listed in paragraph (1) of subdivision (a) of this section, if the insurer proposes a change in the rate for that coverage, with the weights proportional to the latest available number of car years for the respective coverages; or

(2) any materially equivalent calculation.

(f) Effective date means the date a revised set of base rates or rating factors shall apply to all existing nonbusiness automobile insurance policies as such policies are renewed. If a filing only applies to new business, then the effective date means the date that an insurer may first write new business.

(g) File and use means the process by which an insurer files with the superintendent a proposed overall average rate change that is within the flex-band, and then uses the proposed overall average rate change without having to obtain the superintendent's prior approval.

(h) Flexibility band or flex-band means the range of overall average rate increase or decrease (up to +5%) within which an insurer may change its motor vehicle insurance rates without having to obtain the superintendent's prior approval.

(i) Motor vehicle has the meaning set forth in section 5102(f) of the Insurance Law.

(j) Nonbusiness automobile insurance policy means a contract of insurance covering losses or liabilities arising out of the ownership, operation or use of a motor vehicle that is predominately used for nonbusiness purposes, when a natural person is the named insured.

(k) Proposed average rate for a given coverage means the weighted average of an insurer's proposed base rates modified by the applicable rating factors for each motor vehicle for the given coverage with the weights proportional to the latest available number of car years associated with each rating factor, or any materially equivalent calculation.

(l) Proposed overall average rate means:

(1) the weighted average of the proposed average rate for:

(i) each coverage listed in paragraph (1) of subdivision (a) of this section regardless of whether the insurer is filing a change for that coverage; and

(ii) any other motor vehicle coverages not listed in paragraph (1) of subdivision (a) of this section if the insurer proposes a change in the rate for that coverage, with the weights proportional to the latest available number of car years for the respective coverages; or

(2) any materially equivalent calculation.

(m) Proposed overall average rate change means the percentage difference between the proposed overall average rate and the current overall average rate. For example, if the proposed overall average rate is \$1,200 and the current overall average rate is \$1,000, then the proposed overall average rate change is 20%  $((1,200/1,000)-1) \times 100$ .

(n) Rating factors means the various elements that are applied or added to the base rates to obtain the actual nonbusiness automobile insurance policy premiums. These include classification factors based on the age, sex, and marital status of the insured, territorial rating factors, merit rating factors based on the driving record of the insured, increased limit factors, motor vehicle symbol and model year rating factors, and multi-tier rating factors.

§ 163.2 Rules and standards governing proposed file and use overall average rate changes for nonbusiness automobile insurance policies.

(a) An insurer may implement a proposed overall average rate increase on a file and use basis provided that the change is within the five percent flex-band. If the proposed overall average rate increase exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change.

(b) During any twelve-month period, an insurer may implement no more than two overall average rate increases on a file and use basis provided that the cumulative effect of the increases shall be within the five percent flex-band. If a proposed overall average rate increase combined with a prior rate increase implemented within a twelve-month period of the proposed effective date of the request exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change. The cumulative effect of two or more rate changes in a twelve-month period is derived in a multiplicative manner. For example, if an insurer implements on a file and use basis a +2.9% overall average rate increase effective February 1, 2009 and a +2% overall average rate increase effective August 1, 2009, then the insurer may not implement another file and use overall average rate increase before February 1, 2010. However, at such time, the insurer may implement an overall average rate increase up to a maximum of +2.9%.

(c) An insurer may implement an overall average rate decrease on a file and use basis up to a maximum of five percent at any one time from the overall average rate currently in effect.

(d) Notwithstanding any provision of this Part, an insurer shall not implement an overall average rate increase on a file and use basis subsequent to an overall average rate increase greater than the five percent flex-band that the superintendent has already prior approved in the twelve-month period immediately preceding the effective date of the proposed increase.

§ 163.3 Rules and standards governing changes in rating factors.

(a) An insurer may adjust its rating factors as part of a file and use change. The insurer shall incorporate the rate impact of these adjustments in the overall average rate change. These changes shall be consistent with the rate change limitations for individual insureds contained in section 163.4 of this Part.

(b) An insurer may adjust its rating factors in separate and distinct filings independent of an overall average rate change. If these filings have no overall average rate impact, then the insurer may implement them on a file and use basis and the insurer shall not be precluded from implementing a file and use change for an overall average rate increase within the time periods specified in section 163.2(b) of this Part. For example, the introduction of a physical damage coverage's model year rating factor for a new model year that is consistent with an existing model year rating rule is not subject to prior approval. These filings shall be consistent with the rate change limitations for individual insureds contained in section 163.4 of this Part.

§ 163.4 Rules and standards governing nonbusiness automobile insurance policy premium change limitations for individual insureds as a consequence of file and use filings.

(a) In any twelve-month period, the total premium on any nonbusiness automobile insurance policy shall not change by more than 30% as a consequence of file and use filings. An insurer shall meet this requirement by adjusting the base rates or rating factors in the file and use filing. An insurer shall not cap an individual insured's premium as a final step. If a filing produces an annual total premium change on an insurance policy that exceeds the 30% maximum, then the filing shall be subject to the superintendent's prior approval.

(b) Changes in the premium of a nonbusiness automobile insurance policy as a consequence of changes in an insured's rating characteristics or changes in the coverages or the amounts of coverage being purchased shall not be considered within the calculation of the individual insured premium limitation contained in subdivision (a) of this section. For example, if an insured has an accident during the prior year and incurs a 25% surcharge or uptier, then this 25% surcharge/uptier shall not be considered within the individual premium limitation. Similarly, if a change in the age of an insured results in the application of a different classification factor, the rate effect attributable to that classification change shall also not be considered within the individual premium limitation.

§ 163.5 Support for filings submitted on a file and use basis.

An insurer shall include support for all proposed changes specified in each filing submitted on a file and use basis. The support shall include the specific reasons for the proposed changes, and any other material information required by section 2304 of the Insurance Law (e.g., the underlying data upon which the change is based). Filings submitted on a file and use basis shall be subject to the superintendent's review in accordance with Article 23 of the Insurance Law.

§ 163.6 Support for filings subject to prior approval.

(a) An insurer shall include support for all proposed changes specified in each filing subject to the superintendent's prior approval. The support shall include the specific reasons for the proposed changes, and any other material information as required by section 2304 of the Insurance Law.

(b) Subject to all other requirements of this Part and article 23 of the Insurance Law, an insurer may adjust rating factors associated with territories or classifications as part of its file and use filing, provided that there are no changes to the underlying definitions which remain subject to the superintendent's prior approval pursuant to article 23 of the Insurance Law. Examples of rating classifications include discounts, surcharges, merit rating plans or multi-tier programs.

(c) If any one element of a filing is subject to prior approval, then the entire filing shall be subject to prior approval.

§ 163.7 Notification to insureds of rate changes.

(a) An insurer shall mail or deliver to every named insured affected by a rate increase due to a flex-band rate filing, at least 30 but not more than 60 days in advance of the end of the policy period, a notice of its intention to change the insured's rate. The notice shall set forth the specific reason or reasons for the rate change.

(b) An insurer shall not implement a rate increase due to a flex-band rate filing unless the insurer has mailed or delivered to the named insured affected by the rate increase the notice required by subdivision (a) of this section.

(c) An insurer shall submit a flex-band rate filing to the superintendent in a timely manner. An insurer shall not submit a flex-band rate filing to the superintendent after insureds have received notification pursuant to subdivision (a) of this section.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires June 13, 2009.

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

**Regulatory Impact Statement**

1. Statutory authority: Sections 201, 301, and Article 23 of the Insurance Law (most specifically, section 2350).

These sections establish the superintendent's authority to promulgate regulations establishing standards for flexible rating systems providing nonbusiness automobile insurance policies. Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Article 23 promotes the public welfare by regulating insurance rates to the end that they not be excessive, inadequate or unfairly discriminatory, to promote price competition and competitive behavior among insurers.

Chapter 136 of the Laws of 2008 adds a new section 2350 to the Insurance Law, which reintroduces flexible rating for nonbusiness automobile insurance rates.

2. Legislative objectives: The stated purpose of Article 23 of the Insurance Law is to ensure the availability and reliability of insurance, and to promote public welfare, by regulating insurance rates to assure that they are not excessive, inadequate or unfairly discriminatory and are responsive to competitive market conditions. Chapter 136 of the Laws of 2008 reestablished flexible rating for nonbusiness automobile insurance. It should strengthen the high level of competition that already exists in this market. The nonbusiness automobile market can benefit from the additional competitive impetus of a flexible rating system.

3. Needs and benefits: Flexible rating, which is a hybrid system borrowing elements from open competition and prior approval, has been applicable to commercial risk, professional liability and public entity insurance since 1986. In those markets, flexible rating has proved successful in restoring stability, promoting fair competition, and providing a firm foundation for long-term thinking and strategic planning, not only on the part of the insurance industry, but for the benefit of businesses and consumers that must rely upon, and budget for, insurance protection.

The above benefits are pertinent to the application of flex rating for the nonbusiness automobile market. Competition and market forces have always been strong determinants of rates for nonbusiness automobile coverages, and flex rating should strengthen the high level of competition that already exists in this market.

Chapter 113 of the Laws of 1995 first introduced flex rating to nonbusiness automobile insurance effective July 1, 1995 until it expired on August 2, 2001 and was replaced by prior approval requirements. However, section 13 of Chapter 136 of the Laws of 2008 adds a new section 2350 to the Insurance Law, which reintroduces flexible rating for nonbusiness automobile insurance rates. It permits insurers to place nonbusiness automobile insurance rates in effect without the superintendent's prior approval, provided that the overall average rate level does not result in an increase above five percent from the insurer's prior rate level in effect during the preceding 12 months. Section 2350 also limits the overall average rate level decreases without prior approval up to five percent from the insurer's current rate level regardless of when it went into effect. The prior regulation, which implemented the former flex rating system, is hereby being repealed pursuant to this new Part 163 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 153). In accordance with section 2350(c), Insurance Department Regulation No. 153 (11 NYCRR 163) is being promulgated to provide guidance to insurers in implementing the new law's requirements.

4. Costs: This rule imposes no compliance costs on state or local governments. There are no additional costs incurred by the Insurance Department. For regulated parties, the costs of submitting a flexible rate filing should be no different than the costs of submitting a rate filing under the prior law. Since insurers will be able to implement flexible rate changes without having to wait for the Insurance Department's formal approval, they will be able to respond more quickly to competitive forces in the marketplace. However, there is an additional requirement to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. Compliance with this notice requirement of premium increases pursuant to the flexible rating regulation will have a minimal cost, since the notice language may be included along with the renewal policy information sent to insureds. In any event, the notice requirement is imposed by the statute, not the regulation.

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

6. Paperwork: There is no additional paperwork required under the

private passenger automobile flexible rating system. While the paperwork associated with the submission and monitoring of a flexible rate filing is essentially the same as that associated with private passenger automobile insurance rate filings under the prior law, there is an additional requirement imposed by the statute to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. This notice language may be included along with the renewal policy information sent to insureds.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Alternatives: The Department performed outreach with three property/casualty insurer trade organizations (individually "insurer trade organization") and two property/casualty insurance agents and brokers trade organizations (individually "agents and brokers trade organization") and received comments from four out of the five organizations.

a. The legislative intent was for any rate change that results in an overall rate increase above 5% during a 12-month period to require prior approval. The alternative approach would be not to consider any rate increase that exceeds the 5% overall flex band limit that has been prior approved during the same 12-month period. While this approach would require newer data to support any flex rate filing made subsequent to a prior approved rate filing, it still seems to be clearly against the legislative intent to keep significant automobile rate increases occurring within a 12-month period to be subject to prior approval. For example, if an insurer received approval for a rate increase of 7% effective February 1, 2009, the insurer may not implement an additional increase to be effective before February 1, 2010 on a flexible rating basis.

b. The Department considered reducing the limitation from the prior regulation standard of a 30% maximum individual premium change as a consequence of file and use filings to 25%, with the understanding that such maximum policyholder change bears some relationship to the overall flex band (which has decreased from 7% in the prior flex rating statute to 5% in the new statute). However, in consideration of comments received, the Department agreed that the maximum individual premium change is not truly relevant to the overall average rate change resulting from a flexible rate filing made by an insurer. It is quite common for rate filings with little or no overall rate effect to still produce significant individual policyholder impacts.

c. An insurer trade organization objected to the provision of Section 163.4, which precludes an insurer from capping an individual insured's premium to comply with the maximum individual premium change provision. This organization asserted that "capping" is a method that is considered acceptable in other states to achieve that result as opposed to making adjustments to base rates and factors for an entire class of policyholders. However, it has long been the Department's view that the capping of individual policy premiums is unfairly discriminatory to new policyholders with the same characteristics as current policyholders whose rates have been capped and therefore contrary to Article 23.

d. An insurer trade organization inquired as to whether the cumulative effect of two flexible rate increases would be measured, by simple addition or by multiplication. In response to this comment, further clarification has been added to Section 163.2 of this regulation, stating that the cumulative effect is determined in a multiplicative manner and an example has been included.

e. Two insurer trade organizations commented that the regulation fails to specify the instances under which the superintendent may order an insurer to make a change in its rates filed under file and use basis. However, section 2320 of the Insurance Law provides procedures that must be followed by the superintendent and insurers in addressing issues related to rate filings that are not subject to prior approval. Thus, no change to the proposal was made in response to this comment.

f. An insurer trade organization and an agents and brokers trade organization suggested that the Department clarify that the maximum permitted increase for an individual insured's premium should be applied to the full coverage or total premium of a nonbusiness automobile insurance policy. Consequently, the Department modified section 163.4(a) of the regulation to clarify that the provision applies to an insured's total policy premium and not to a specific coverage.

g. Two insurer trade organizations and an agents and brokers trade organization requested a definition of the term "predominantly" with regard to the definition of "nonbusiness automobile insurance policy" and a revision to the definition of the term "effective date" with regard to new business and renewals. However, the term "predominantly" is not unique to the flexible rating statute, and is used elsewhere in the Insurance Law, such as section 3425. In addition, the term "predominantly" has been previously clarified through opinions of the Department's Office of General Counsel. Thus, the Department made no changes to the regulation in response to this comment. The Department considered the request for revision of the definition of the term "effective date" but determined that the current definition, contained in section 163.1 of the regulation, was appropriate.

h. An agents and brokers trade organization inquired if an insurer may increase the premium on a six month policy at each policy renewal. However, article 23 of the Insurance Law requires an insurer to use the rates in effect upon renewal of each policy, regardless of the rate filing system used to make the rate filing (i.e., regardless of whether the filing was made as file and use or in accordance with prior approval). Thus, the Department made no changes to the regulation in response to this comment.

i. An insurer trade organization commented on the fact that the regulation would allow an insurer to file multiple file and use rate reductions while being limited to only two file and use increases within any 12-month period. The flexible rating statute provides for a maximum of two file and use overall average rate increases within any 12-month period, up to an overall maximum increase of 5%. The statute does not, however, provide any restrictions on the number of file and use overall average rate decreases, provided that the overall average rate decrease does not exceed the 5% flex-band from the rate currently in effect. All rate filings must include support for the proposed changes as required by Article 23 of the Insurance Law, as the Department will monitor the cumulative effect of the decreases to ensure that the rates are not inadequate or otherwise in violation of the Insurance Law.

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

10. Compliance schedule: Insurers should be able to comply with the requirements of this rule as soon as they are effective.

#### **Regulatory Flexibility Analysis**

##### **1. Small businesses:**

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at property/casualty insurance companies licensed to do business in New York State, none of which falls within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has monitored Annual Statements and Reports on Examination of authorized property/casualty insurers subject to this rule, and believes that none of the insurers falls within the definition of "small business", because there are none that are both independently owned and have fewer than one hundred employees.

##### **2. Local governments:**

The rule does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at property/casualty insurance companies, none of which are local governments.

#### **Rural Area Flexibility Analysis**

##### **1. Types and estimated numbers of rural areas:**

This regulation applies to all property/casualty insurance companies licensed to write insurance in New York State (specifically, those writing automobile insurance). Property/casualty insurance companies do business throughout New York State, including rural areas as defined under State Administrative Procedure Act Section 102(10).

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

This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This regulation re-establishes flexible rating for nonbusiness automobile insurance policies, as required by section 2350 of the Insurance Law. While the paperwork associated with the submission and monitoring of a flexible rate filing is essentially the same as that associated with private passenger automobile insurance rate filings under the prior law, there is an additional requirement imposed by the statute to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. This notice language may be included together with the renewal policy information that is sent to insureds.

##### **3. Costs:**

The costs to regulated parties of submitting a flexible rate filing should be no different than the costs for submitting a rate filing under the prior law. Since insurers will be able to implement flexible rate changes without having to wait for the Insurance Department's formal approval, they will be able to respond more quickly to competitive forces in the marketplace. However, there is an additional requirement to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. Compliance with this notice requirement of premium increases pursuant to the flexible rating regulation will have a minimal cost, since the notice language may be included along with the renewal policy information sent to insureds. In any event, the notice requirement is imposed by the statute, not the regulation.

##### **4. Minimizing adverse impact:**

The regulation does not impose any impact unique to rural areas.

5. Rural area participation:

This regulation is required by statute.

#### **Job Impact Statement**

The Insurance Department finds that this rule will have no adverse impact on jobs and employment opportunities. It merely implements section 2350 of the Insurance Law, which directs the superintendent to establish standards for flexible rating systems providing nonbusiness automobile insurance policies. The number of insurance company personnel necessary to submit a flexible rating filing should be no different than submitting a rate filing under the prior law.

### **NOTICE OF ADOPTION**

#### **The Processing of Coordination of Benefit (COB) Claims**

**I.D. No.** INS-52-08-00006-A

**Filing No.** 231

**Filing Date:** 2009-03-13

**Effective Date:** 2009-07-15

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

**Action taken:** Amendment of Parts 52 (Regulation 62), and 217 (Regulation 178-B) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 2403, 3216, 3221, 3224-a, 3224-b, 4304 and 4305; and art. 43

**Subject:** The processing of Coordination of Benefit (COB) claims.

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

**Text or summary was published** in the December 24, 2008 issue of the Register, I.D. No. INS-52-08-00006-P.

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

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

#### **Assessment of Public Comment**

A comment letter was received from Kathleen Shure, Sr., Vice President of the Greater New York Hospital Association. Ms. Shure stated that insurers routinely pend claims while sending out a Coordination of Benefits ("COB") questionnaire even when there is no evidence of other coverage. Ms. Shure suggested that we incorporate two provisions. One that would prohibit a delay in payment of the claim pending a response to a COB questionnaire and another that would require an insurer to pay the claim if the consumer fails to respond within 30 days.

A second comment was received from Dov Schwartzben, Sr., Vice President of New York-Presbyterian Healthcare Systems. Mr. Schwartzben expressed similar concerns, and suggested that where individuals do not respond to the COB questionnaire insurers shall be required to make payment to providers for covered services without regard to any secondary payers.

**RESPONSE:** This rule making was negotiated at the Healthcare Roundtable discussions. These discussions were attended by representatives of health care providers (Medical Society of the State of New York, Greater New York Hospital Association and Health care Association of New York), insurers, HMOs and PHSPs (Health Plan Association and Conference of the Blue Cross Blue Shield Association) and the New York State Departments of Health and Insurance. It was agreed during the discussions that the issues to be discussed and resolved would be limited to those situations when it has been determined that other coverage exists. Other COB issues would be discussed and resolved at a later time.

The suggested additions to the COB Regulation would address valid concerns that currently exist in the COB arena and this Department would support such changes. However, given the negotiated nature of this rule making, these changes will be considered for future amendments.

suppliers, wireless telephone service suppliers and appropriate state agencies by facilitating the most efficient and effective routing of wireless 911 emergency calls; developing minimum standards for public safety answering points; promoting the exchange of information, including emerging technologies; and encouraging the use of best practice standards among the public safety answering point community. The Board is exempt from the requirements of the New York State Administrative Procedure Act, but is required to publish its proposed and final standards pursuant to the provisions of County Law § 327. This Notice is published pursuant to those provisions.

Proposed Amendments to: *Minimum Standards Regarding Staffing of Public Safety Answering Points (PSAPs); Minimum Standards Regarding Minimum Standards Regarding Equipment, Facilities and Security for Public Safety Answering Point; and Minimum Standards Regarding Jurisdictional Protocols.* Proposed Addition of *Minimum Standards Regarding Designated PSAPs.* Summary: At its meeting of March 10, 2009, the Board proposed amendments to the above-referenced standards, which are found in their present form in their entirety at Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR): Parts 5202, 5203 and 5250, respectively. In addition, the Board proposed the establishment of a new Part (regarding designated PSAPs) at 21 NYCRR 5251.

The amendments to three of the existing standards and the addition of one new standard are proposed by the Board as part of a regular cycle of reviewing and updating regulations. Many of the proposed amendments make minor technical changes to improve or clarify the wording or structure of the standards. Other proposed amendments are more substantive in nature and address changes in technology or other issues that have been brought to the attention of the Board. While many of the changes are self-evident, additional explanation is provided as follows for the proposed substantive changes and the new standard.

Part 5202 is amended to clarify that a minimum of one person must be designated as "in charge" of each PSAP.

Part 5203 is amended to: include references to the "eJusticeNY" system, which would serve as a new internet browser-based application for accessing criminal justice information; clarify that each PSAP must maintain a written procedure for using a manual backup system in the event of operational failure of any computer-aided dispatch system; ensure that PSAP recordings are maintained for a minimum period of 90 days to match the period of time allotted in New York State for serving a notice of intent to commence a civil action; enhance computer security measures by requiring each PSAP to use a procedure whereby each authorized user enters a unique identifier (i.e., username and password unique to each individual user) to access any system; clarify that a backup PSAP site does not need to replicate a primary PSAP site, but a backup sites must have the basic ability to receive and dispatch emergency calls from a site other than the primary PSAP site; incorporate terminology from federal regulatory language "continuity of operations plan," which includes the procedures to be followed in the event of a need to evacuate a site and transfer operations to a backup site; and reduce the required frequency of exercises, which incorporate evacuation and transfer of operations, from quarterly to annually.

Part 5250 is amended to: clarify the need for jurisdictional protocols of law enforcement agencies to be in the form of a written agreement; acknowledge that some PSAPs are established under separate agencies that do not have authority over local police agencies; and to remove the model protocol titled "Memorandum of Understanding (Jurisdictional Protocol for Wireless 911 Call Services)," in order to allow the Board to more readily revise the model protocol. An updated sample, currently titled "Memorandum of Understanding (Jurisdictional Protocol for Law Enforcement Agencies)" will continue to be available through the New York State Office of Fire Prevention and Control.

Part 5251 is added: pursuant to County Law § § 328 & 330; to clarify county responsibility to designate a PSAP; to set forth procedures for creating and changing a designated PSAP; and to clarify - necessitated by technological advances - that the term "answering" refers to the act of connecting to a 911 call for the purpose of obtaining information from the caller.

Further information, contacts: Written comments may be submitted to David Treacy, Esq., at the New York State Department of State, Office of General Counsel, One Commerce Plaza, 99 Washington Avenue, Suite 1120, Albany NY 12231, fax: 518-473-9211, phone: 518-474-6740.

Text of proposed rules: Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended as follows. Material deleted appears within brackets [ ]; material added appears in *italics*.

21 NYCRR Part 5202 (Minimum Standards Regarding Staffing of Public Safety Answering Points) is amended as follows:

§ 5202.1 Definitions.

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## **New York State 911 Board**

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### **INFORMATION NOTICE**

#### **Notice of Proposed Amendments and Addition**

The New York State 911 Board is established pursuant to County Law § 326. The Board is charged with assisting local governments, service

(b) [W-911 means wireless] Call-taker/dispatcher means any person employed by or in any local or state government agency either full- or part-time whose duties include the answering of emergency telephone calls and/or the dispatching of emergency services personnel.

(c) Certified means having a formal program of related instruction and testing as provided either by a recognized organization or by the authority having jurisdiction over the PSAP.

(d) Qualified means that the employee has been properly trained and credentialed pursuant to all applicable laws and regulations.

[(e)]

§ 5202.2 Standards.

(a) All PSAPs shall be staffed 24 hours a day, seven days a week, by a minimum of two qualified, certified call-takers/dispatchers *with at least one person designated as in charge*.

(b) All PSAPs shall have staffing adequate to answer 90 percent of all incoming [W-] *wireless* 911 calls within ten seconds of connection.

(c) All [W-] *wireless* 911 requests shall be dispatched immediately, or as soon thereafter as possible within the practicalities of responding to other 911 calls, in accordance with the PSAP's written policies and procedures for prioritizing service needs.

§ [5202.4]5202.3 Variances.

§ [5202.3]5202.4 Appendix A.

21 NYCRR Part 5203 (Minimum Standards Regarding Equipment, Facilities and Security for Public Safety Answering Points) is amended as follows:

§ 5203.1 Definitions.

(m) *eJusticeNY* means the browser-based application for access to criminal justice information systems in New York State.

§ 5203.2 Equipment.

(a) Intelligent workstations (IWS).

(4) *The authority shall have a written procedure for the use of a manual backup system in the case of failure of the CAD system.*

(e) Recorder system. The authority shall:

(5) [maintain a schedule for retention of] *retain* PSAP recordings for at least 90 days; and

(h) [New York statewide police information network (NYSPIN)] *Criminal justice information system.*

(1) All PSAPs shall have direct access to the NYSPIN [system] *or eJusticeNY systems.*

(2) The authority shall have a written procedure for participation in the [NYSPIN] system *or systems the PSAP utilizes.*

§ 5203.4 Security.

(b) System protection. All PSAPs shall be equipped with software protection as required by the authority *including a means of access that requires each authorized user to utilize unique identifiers to enter the systems.*

§ 5203.5 General.

(a) Backup site. The authority shall:

(1) maintain a [redundant] backup PSAP site, *separate and apart from the primary PSAP site, wired and ready[,] with the ability to receive and dispatch emergency calls*, for use in case of the necessity to vacate the primary PSAP;

(2) have a written [procedure] *continuity of operations plan* for evacuating the primary PSAP and transferring [of] operations to the backup site; and

(3) [document the testing of the backup site on a quarterly basis] *conduct and document no less than one exercise per year that utilizes the continuity of operations plan.*

Part 5250 (Minimum Standards Regarding Jurisdictional Protocols) is amended as follows:

§ 5250.2 Definitions.

(a) A jurisdictional protocol is a written agreement entered into by two or more law enforcement agencies setting forth procedures to ensure the organized, coordinated, and prompt mobilization of personnel, equipment, services, or facilities in order to achieve the fastest response to a 911 emergency.

(b) *AVL means Automatic Vehicle Locator.*

(c) *CAD means Computer Aided Dispatch.*

§ 5250.3 Contents.

[Wireless 911 calls shall be routed pursuant to County Law § 330.] The jurisdictional protocols utilized by the law enforcement agencies [responding to such calls] shall be *in the form of a written agreement that, at a minimum, includes or provides for the following:*

(b) *if the PSAP has the authority to do so, a method of providing for the dispatch of the closest police unit, which may be via any of the following:*

(c) a method of transferring calls to the proper agency or jurisdiction [after dispatching];

(d) that the methods provided for pursuant to subdivisions (b) and (c) of this section shall be used in the case of all 911 calls, *and all emergency calls received by any other means*, dispatched for service;

[(e) that in all other respects, the direct dispatch protocol developed by the New York State 911 Board shall apply;]

[(f)](e) that [dispatch procedures] *the agreement* shall be reviewed at least annually to ensure that the most efficient procedures are being used;

[(g)](f) that all investigative duties shall be conducted by [the] a law enforcement agency having ordinary investigative jurisdiction in any area, regardless of initial response to an emergency, provided, that no law enforcement agency shall be prohibited from requesting assistance from any other agency as may be provided under current law or regulation; and

[(h)](g) a procedure for resolving all disputes among the parties relating to the operation of the protocol, which may include referral of such disputes to a body designated by agreement among the parties.

§ 5250.4 Model protocol.

The 911 Board has approved as a model the jurisdictional protocol titled "Memorandum of Understanding (Jurisdictional Protocol for [Wireless 911 Call Services] *Law Enforcement Agencies*)." [which is attached hereto as Appendix A.

[which is attached hereto as Appendix A.

NEW YORK STATE 911 BOARD MINIMUM STANDARDS  
REGARDING JURISDICTIONAL PROTOCOLS

APPENDIX A

MODEL MEMORANDUM OF UNDERSTANDING  
(JURISDICTIONAL PROTOCOL FOR WIRELESS 911 CALL SERVICES)

COUNTY of \_\_\_\_\_ COMMUNICATIONS CENTER DISPATCH PROCEDURES FOR REQUESTS FOR POLICE SERVICES  
NEAREST AVAILABLE UNIT CONCEPT

WHEREAS, the Legislative Body of the County of \_\_\_\_\_ (the "County") has established a County Public Safety Answering Point (PSAP); and

WHEREAS, the primary goal of the County PSAP Communications Center is to provide call taking services for, and dispatch services to, all emergency service providers in the County; and

WHEREAS, all emergency services are publicly supported, maintained, and operated by public funding and through the election and appointment of officers and employees; and

WHEREAS, the residents of the County deserve and expect the availability of all public safety resources; and that such resources shall be provided in the most expeditious manner; now, therefore, be it

RESOLVED, that the operation of the "nearest available unit concept" as related to police dispatch procedures shall be as described below:

Section 1. PSAP Communications Center Operations. PSAP Operation Practices Board.\*

A. The PSAP Communications Center shall be under the direct control and supervision of the E-911 Supervisor, reporting to the \_\_\_\_\_ [Sheriff, County Executive, or other supervisory official].

B. The County PSAP Operation Practices Board shall ensure compliance with all sections of this agreement, thereby fostering mutual cooperation and effective use of all police resources. The Operation Practices Board shall be appointed by the County Legislative Body and shall consist of at least five (5) members, one of whom shall be a member of the County Legislative Body, one of whom shall represent the State Police, one of whom shall represent the County Sheriff, one of whom shall represent a local police agency, and one of whom shall represent a fire or emergency services agency. The procedures outlined in this document may be reviewed at the request of any one principal whose agency is so represented through this agreement but may only be altered by action of the Operation Practices Board. All changes, additions, or deletions shall be made a part of and attached to this document and shall bear the signature of each principal or designee.

C. The County Operation Practices Board shall meet as necessary for the purpose of reviewing dispatch protocols, thereby ensuring the adoption of the most professional and efficient procedures. The review should include call taking, information routing during the dispatch process, command and control, and nearest available car protocols. Agencies patrolling in areas of the county secured by multiple police departments hereby agree to work continuously to improve coordinated coverage of posts or sectors.

D. The agencies represented in this agreement recognize that the complexities involved in multi-agency emergency dispatching will require

continuous review and improvement. On occasion, problems or concerns between agencies or disciplines will occur. First and second line supervisors assigned to those agencies, departments, or organizations experiencing those concerns shall work to resolve such issues at their level. Should the issue rise to the level of Chief Law Enforcement Executive and a resolution is not reached in satisfaction of all parties, the issue shall be brought before the PSAP Operation Practices Board for its action.

Section 2. Dispatch Procedures.

A. The County PSAP Communications Center shall have the ability to cause the dispatch of emergency service agencies whose jurisdiction is, in whole or in part, within the County.

B. Dispatch procedures for requests for police services shall be in accordance with applicable laws and policies.

C. The following dispatch procedures are applicable to all state, county, and local law enforcement agencies operating within the County: All citizens requesting the non-emergency services of a specific police agency shall be dispatched through the County PSAP Communications Center to the requested agency's post car, unless otherwise directed by that agency due to its unavailability. Walk-in requests for non-emergency services which involve the jurisdiction of a particular police agency shall be treated as a request for that specific agency, thus requiring referral of that request to the appropriate agency.

D. The County PSAP Communications Center shall adhere to the following dispatch protocols regarding all requests for police services within the County:

1. All 911 and seven digit wireline and wireless calls for police services in a city, town or village that is patrolled by a police department other than the Sheriff's Department or the New York State Police shall be assigned to such city, town or village department unless the primary agency in that jurisdiction instructs the PSAP Communications Center otherwise due to the unavailability of that agency. This should not preclude any police officer traveling through the jurisdiction or another police department from responding to an emergency request and rendering assistance until the arrival of the primary agency.

2. All 911 calls, seven digit emergency wireline and wireless calls for police services in areas of the County served by multiple police agencies, including walk-in complaints of an emergency nature, shall be dispatched through the County PSAP Communications Center to the nearest available patrol regardless of agency affiliation. However, such calls or walk-ins that are for complaints occurring within cities, towns or villages with an on-duty police force shall be referred to any of such city, town or village department as established by local protocol.

3. The County PSAP Communications Center will dispatch all calls for police service on a frequency or talk-group of a trunking system designated for that purpose.

E. The following investigative protocols shall guide all State, County, and local police officers working under this agreement:

1. In all cities, towns and villages with a sworn police department, all investigations within their jurisdiction will be conducted by that respective police department, regardless of which agency may have arrived on the scene first, unless the agencies are guided by other established and agreed-upon protocols.

2. In the areas of the County patrolled by multiple police agencies, the agency assigned to the call will be responsible for the investigation pursuant to existing local protocols.

3. This memorandum of understanding in no way precludes any police agency from requesting assistance from any other police agency.

Section 3. Effective Date.

The conditions and procedures outlined in this Memorandum of Understanding shall be in full force and effect immediately upon execution of this agreement.

Section 4. Agreements.

Compliance with the terms and conditions of this Memorandum of Understanding shall be effectuated by the signatures of the following:

[Agency], by \_\_\_\_\_ Date \_\_\_\_\_  
 [Agency], by \_\_\_\_\_ Date \_\_\_\_\_  
 [Agency], by \_\_\_\_\_ Date \_\_\_\_\_  
 [Agency], by \_\_\_\_\_ Date \_\_\_\_\_

\* In lieu of an Operation Practices Board, the parties may include in the Memorandum of Understanding a process by which disputes are resolved by designated supervisors, culminating, if necessary, by a resolution by the chief officer of each of the respective police agencies, and if no such resolution is made by such chief officers, then by the appropriate county legislative committee.]

21 NYCRR Part 5251 (Minimum Standards Regarding Designated PSAPs) is added to read as follows:

PART 5251

MINIMUM STANDARDS REGARDING DESIGNATED PSAPs

(Statutory Authority: County Law, § 328, 330)

Sec.

- 5251.1 Definitions
- 5251.2 Designated PSAPs
- 5251.3 Creating a designated PSAP
- 5251.4 Changing a designated PSAP

§ 5251.1 Definitions.

(a) "PSAP" means public safety answering point, a site designated and operated by a local governmental entity for the purpose of receiving emergency calls from customers of wireless telephone service suppliers.

(b) "Designated PSAP" means a PSAP, or multiple PSAPs connected to a router designated pursuant to County Law, section 330 for the purpose of answering wireless 911 calls.

(c) "Answering" means to connect to a 911 call for the purpose of obtaining information from the caller.

(d) "Board" means the New York State 911 Board.

§ 5251.2 Designated PSAPs.

Counties have the responsibility of designating a PSAP that has the capacity to most effectively handle 911 calls for the entire county. Because technology and county needs can change over time, the county must also be able to change the designated PSAP to best suit the needs of the people.

§ 5251.3 Creating a Designated PSAP.

(a) To create a Designated PSAP, a county must submit the following items to the NYS Office of Fire Prevention and Control:

(1) a duly adopted resolution of the county governing board stating the entity to be designated and that such entity complies with the standards promulgated by the 911 Board pursuant to County Law, section 328(4); and

(2) the 10 digit number that the wireless 911 calls should be routed to.

(b) Upon approval by the 911 Board, the Board shall:

(1) notify all federally licensed wireless service providers of the routing change;

(2) notify all federally licensed wireless service providers of the 10 digit number to direct calls to; and

(3) notify the Superintendent of the New York State Police of the routing change if the New York State Police were previously answering the wireless 911 calls for that county.

§ 5251.4 Changing a Designated PSAP.

(a) To change a Designated PSAP, a county must submit the following items to the NYS Office of Fire Prevention and Control:

(1) a duly adopted resolution of the county governing board stating the previously designated PSAP and the entity that will serve as the designated PSAP; and

(2) the 10 digit number that the wireless 911 calls should be routed to.

(b) Upon approval by the 911 Board, the Board shall:

(1) notify all federally licensed wireless service providers of the routing change;

(2) notify all federally licensed wireless service providers of the 10 digit number to direct calls to; and

(3) notify the head of the previously designated PSAP of the routing change.

Public Service Commission

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-08-07-00011-A

Filing Date: 2009-03-17

Effective Date: 2009-03-17

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

Action taken: On March 12, 2009, the PSC adopted an order directing

Bristol Water Works Corporation, to address the complaint filed by the homeowners of Bristol Harbour Condominiums, requesting that the company switch from flat rate billing to metered rates.

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

**Subject:** Water rates and charges.

**Purpose:** To review the metering and billing practices of Bristol Water Works Corporation.

**Substance of final rule:** The Commission on March 12, 2009, adopted an order directing Bristol Water Works Corporation, to address the complaint filed by the homeowners of Bristol Harbour Condominiums, requesting that the company switch from flat rate billing to metered rates, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(06-W-1546SA1)

**NOTICE OF ADOPTION**

**Denying the Petition of Groman Shores LLC to Abandon its Water System**

**I.D. No.** PSC-42-07-00017-A

**Filing Date:** 2009-03-16

**Effective Date:** 2009-03-16

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

**Action taken:** On March 12, 2009, the PSC adopted an order denying the petition of Groman Shores LLC to abandon its water system, until a new water district is expanded and available.

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

**Subject:** Denying the petition of Groman Shores LLC to abandon its water system.

**Purpose:** To deny the petition of Groman Shores LLC to abandon its water system.

**Substance of final rule:** The Commission on March 12, 2009, adopted an order denying the petition of Groman Shores LLC to abandon its water system, until a new water district is expanded and available, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(07-W-1087SA1)

**NOTICE OF ADOPTION**

**Denying the Filing of Groman Shores LLC to Increase its Water Revenues by \$14,571 or Approximately 155.49%**

**I.D. No.** PSC-38-08-00018-A

**Filing Date:** 2009-03-16

**Effective Date:** 2009-03-16

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

**Action taken:** On March 12, 2009, the PSC adopted an order denying the filing of Groman Shores LLC to increase its water revenues by \$14,571 or approximately 155.49%.

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

**Subject:** Denying the filing of Groman Shores LLC to increase its water revenues by \$14,571 or approximately 155.49%.

**Purpose:** To deny the filing of Groman Shores LLC to increase its water revenues by \$14,571 or approximately 155.49%.

**Substance of final rule:** The Commission on March 12, 2009, adopted an order denying the filing of Groman Shores LLC to increase its water revenues by \$14,571 or approximately 155.49%, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(08-W-0996SA1)

**NOTICE OF ADOPTION**

**To Deny Groman Shores LLC's Request to Abandon its Water System and to Increase Rates**

**I.D. No.** PSC-43-08-00017-A

**Filing Date:** 2009-03-16

**Effective Date:** 2009-03-16

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

**Action taken:** On March 12, 2009, the PSC adopted an order denying Groman Shores LLC's request to abandon its water system and to increase rates.

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

**Subject:** To deny Groman Shores LLC's request to abandon its water system and to increase rates.

**Purpose:** To deny the request of Groman Shores LLC to abandon its water system and to increase rates.

**Substance of final rule:** The Commission on March 12, 2009, adopted an order denying Groman Shores LLC's petition to abandon its water system, to increase rates and directed the Company to file a cancellation supplement announcing the cancellation of its electronic tariff schedule effective March 31, 2009, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(08-W-1170SA1)

**NOTICE OF ADOPTION**

**To Remove Restrictions on Payment of Dividends**

**I.D. No.** PSC-45-08-00020-A

**Filing Date:** 2009-03-13

**Effective Date:** 2009-03-13

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

**Action taken:** On March 12, 2009, the PSC adopted an order approving

Corning Natural Gas Corporation's request to issue dividends to its shareholders, subject to restrictions.

**Statutory authority:** Public Service Law, section 66

**Subject:** To remove restrictions on payment of dividends.

**Purpose:** To allow Corning Natural Gas Corporation to issue dividends to shareholders, subject to restrictions.

**Substance of final rule:** The Commission, on March 12, 2009, adopted an order approving Corning Natural Gas Corporation's request to resume paying dividends on its common stock subject to certain new restrictions, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(07-G-0772SA2)

### NOTICE OF ADOPTION

#### Adopt Accrual Method of Revenue Recognition for Accounting and Regulatory Purposes

**I.D. No.** PSC-46-08-00013-A

**Filing Date:** 2009-03-17

**Effective Date:** 2009-03-17

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

**Action taken:** On March 12, 2009, the PSC adopted an order authorizing Consolidated Edison Company of New York, Inc. to recognize unbilled revenues for its electric, gas and steam operations for financial accounting and regulatory purposes.

**Statutory authority:** Public Service Law, section 66(4) and (9)

**Subject:** Adopt accrual method of revenue recognition for accounting and regulatory purposes.

**Purpose:** To approve accrual method of revenue recognition for unbilled revenues for accounting and regulatory purposes.

**Substance of final rule:** The Commission, on March 12, 2009, adopted an order authorizing Consolidated Edison Company of New York, Inc. to recognize unbilled revenues for its electric, gas and steam operations for financial accounting and regulatory purposes, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(08-M-1150SA1)

### NOTICE OF ADOPTION

#### Water Rates and Charges

**I.D. No.** PSC-46-08-00015-A

**Filing Date:** 2009-03-17

**Effective Date:** 2009-03-17

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

**Action taken:** On March 12, 2009, the PSC approved a request filed by Bristol Water Works Corporation to make a change in the rates and charges contained in its tariff schedule P.S.C. No. 3—Water, to become effective to April 1, 2009.

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

**Subject:** Water rates and charges.

**Purpose:** To approve an increase in annual revenues by \$11,930 or 10.46%.

**Substance of final rule:** The Commission on March 12, 2009, adopted an order approving the request of Bristol Water Works Corporation, to increase its tariff rates to produce additional annual revenues of \$11,930 or 10.46%, effective April 1, 2009, and allow the company to change its current residential rate structure and increase its restoration of service charge, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(08-W-1272SA1)

### NOTICE OF ADOPTION

#### Issuance of Securities

**I.D. No.** PSC-48-08-00017-A

**Filing Date:** 2009-03-12

**Effective Date:** 2009-03-12

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

**Action taken:** On March 12, 2009, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to issue securities, subject to conditions, through December 31, 2012.

**Statutory authority:** Public Service Law, section 69

**Subject:** Issuance of securities.

**Purpose:** To approve the issuance of securities.

**Substance of final rule:** The Commission, on January 15, 2009, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to issue up to \$4.8 billion of new debt for traditional utility purposes, to enter into revolving credit agreements up to \$2.25 billion, and to refinance up to \$2.5 billion of existing debt, through December 31, 2012, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(08-M-1244SA1)

### NOTICE OF ADOPTION

#### Modifications to the System Benefits Charge Program

**I.D. No.** PSC-52-08-00010-A

**Filing Date:** 2009-03-13

**Effective Date:** 2009-03-13

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

**Action taken:** On March 12, 2009, the PSC adopted an order approving modifications to the System Benefits Charge program creating a new major program category entitled "Statewide Evaluation Protocol Development".

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

**Subject:** Modifications to the System Benefits Charge program.

**Purpose:** To approve modifications to the System Benefits Charge program.

**Substance of final rule:** The Commission, on March 12, 2009, adopted an order approving modifications to the System Benefits Charge program creating a new major program category entitled "Statewide Evaluation Protocol Development. The new category of funding will enable New York to participate in and provide financial support of up to an annual level of \$750,000 to the Northeast Evaluation, Measurement and Verification Forum a project of the Northeast Energy Efficiency Partnership (NEEP), subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(05-M-0090SA4)

### NOTICE OF ADOPTION

#### To Extend the "Partnership for Distributed Generation" Pilot Program for an Additional Three Years

**I.D. No.** PSC-01-09-00017-A

**Filing Date:** 2009-03-12

**Effective Date:** 2009-03-12

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

**Action taken:** On March 12, 2009, the PSC adopted an order approving National Fuel Gas Distribution Corporation's request to make various changes to its schedule for Gas Service PSC No. 8—Gas, eff. 3/31/09.

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

**Subject:** To extend the "Partnership for Distributed Generation" pilot program for an additional three years.

**Purpose:** To approve the extension of the "Partnership for Distributed Generation" pilot program for an additional three years.

**Substance of final rule:** The Commission, on March 12, 2009, adopted an order approving National Fuel Gas Distribution Corporation's tariff revisions to extend its "Partnership for Distributed Generation" pilot program for an additional three years beyond the current expiration date of March 31, 2009, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

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

(08-G-1483SA1)

### NOTICE OF ADOPTION

#### Revisions to Modify the Company's Capacity Release Provisions

**I.D. No.** PSC-03-09-00015-A

**Filing Date:** 2009-03-12

**Effective Date:** 2009-03-12

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

**Action taken:** On March 12, 2009, the PSC adopted an order approving National Fuel Gas Distribution Corporation's request to make various changes to its schedule for Gas Service PSC No. 8—Gas, eff. 3/16/09.

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

**Subject:** Revisions to modify the Company's capacity release provisions.

**Purpose:** To approve revisions to modify the Company's capacity release provisions.

**Substance of final rule:** The Commission, on March 12, 2009, adopted an order approving National Fuel Gas Distribution Corporation's (Company) tariff revisions to modify its retail access tariff (Supplier Transportation Balancing and Aggregation) by adding a provision to charge replacement shipper Energy Services Companies a price for released capacity equal to the Company's weighted average cost of capacity.

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

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

**Assessment of Public Comment**

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

(08-G-1503SA1)

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

#### Options for Making Additional Central Office Codes Available in the 718/347 Numbering Plan Area

**I.D. No.** PSC-13-09-00008-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 options for making additional central office codes available in the 718/347 numbering plan area.

**Statutory authority:** Public Service Law, section 97(2) and 47 C.F.R., section 52.19

**Subject:** Options for making additional central office codes available in the 718/347 numbering plan area.

**Purpose:** To consider options for making additional central office codes available in the 718/347 numbering plan area.

**Substance of proposed rule:** The North American Numbering Plan Administrator (NANPA) advised the Commission that the supply of central office codes for the 718/347 numbering plan area, which covers the Bronx, Brooklyn, Queens and Staten Island areas of New York, will expire during the fourth quarter of 2011. As a result, a Numbering Plan Area Code Relief Plan needs to be developed and implemented prior to that date to ensure code continued availability of telephone numbers in the 718/347 numbering plan area. On January 20, 2009, NANPA petitioned the Commission to approve the New York Telecommunications Industry (Industry) consensus plan, an all-services distributed overlay over the 718/347 numbering plan area that would assign a new area code to the same geographic area as the existing 718/347 numbering plan area. Under the Industry plan, existing customers would retain their 718 or 347 area code and would not have to change their telephone numbers. All local calls within and between the 718/347 NPA and the new NPA would continue to require dialing 1+10 digits. The Commission is considering options, including the Industry plan, for making additional central office codes available in the 718/347 numbering plan area.

**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.

(09-C-0058SA1)

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

**Consideration of Sanctioning Certain ESCOs for Failing to Make Required Filings**

**I.D. No.** PSC-13-09-00009-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 imposition of sanctions on certain Energy Service Companies (ESCOs) for their failure to make required filings pursuant to a Commission Order issued on October 27, 2008.

**Statutory authority:** Public Service Law, section 66(1)

**Subject:** Consideration of sanctioning certain ESCOs for failing to make required filings.

**Purpose:** Consideration of the imposition of sanctions on certain ESCOs for failing to make required filings pursuant to a prior Order.

**Substance of proposed rule:** On October 27, 2008 the Public Service Commission (Commission) issued an Order requiring Energy Service Companies (ESCOs) to make specified filings within 30 days. The Secretary to the Commission granted an extension, giving all ESCOs until January 5, 2009 to make the required filings. The following ESCOs have not yet made the required filings: Approved Energy, LLC; Atlantic Utilities LLC; Clearview Electric, Inc.; Crown Energy Services, Inc.; Enercon, Inc.; Energy One LLC; Highway 3 MHP LLC d/b/a eTricity; Macquarie Cook Energy, LLC; Scaran Energy Services, Inc.; and United Energy Group, LLC d/b/a Respond Power. Additionally, each of these ESCOs failed to make its annual "January 31 Statement" by January 31, 2009 as required by Uniform Business Practices (UBP) section 2.D.1. The Commission will consider the imposition of sanctions in accordance with UBP section 2.D.5 up to and including the revocation of the ESCO's eligibility to operate in New York, and may also consider related matters.

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

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

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

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

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

(98-M-1343SA17)

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

**Whether to Permit the Use of TransData SSR-6000 Data Recorder to Collect Electric Meter Data in Revenue Meter Accounts**

**I.D. No.** PSC-13-09-00010-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by TransData Incorporated for the approval to use of TransData Model SSR-6000 Recorder in collecting meter data pulses.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Whether to permit the use of TransData SSR-6000 data recorder to collect electric meter data in revenue meter accounts.

**Purpose:** Pursuant to 16 NYCRR Part 93, is necessary to permit electric utilities in New York State to use the TransData SSR-6000.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by TransData, to use the TransData SSR-6000 solid-state interval data recorder used to collect, store and totalize electronic pulse data from electricity meters.

**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, Three Empire State Plaza, Albany, New York 10007, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: jaclyn\_brilling@dps.state.ny.us

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

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

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

(09-E-0212 SA1)

**Department of State**

**NOTICE OF ADOPTION**

**Qualifying School Requirements for Bail Enforcement**

**I.D. No.** DOS-44-08-00001-A

**Filing No.** 229

**Filing Date:** 2009-03-11

**Effective Date:** 2009-05-04

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

**Action taken:** 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 procedural requirements for schools to obtain approval to teach qualifying bail enforcement education.

**Text or summary was published** in the October 29, 2008 issue of the Register, I.D. No. DOS-44-08-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** 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**

The agency received no public comment.

**Urban Development  
Corporation**

**EMERGENCY  
RULE MAKING**

**Economic Development and Job Creation Throughout New York State and Preservation of Public Health and Public Safety**

**I.D. No.** UDC-13-09-00002-E

**Filing No.** 230

**Filing Date:** 2009-03-13

**Effective Date:** 2009-03-13

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

**Action taken:** Addition of Part 4245 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, section 5(4); L. 1968, ch. 174; L. 2006, ch. 109

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

**Specific reasons underlying the finding of necessity:** Effective provision of economic development assistance in accordance with the enabling legislation (including recent amendments thereto) requires the creation of the Rule to address dangers posed by vacant, abandoned, surplus or condemned buildings.

**Subject:** Economic development and job creation throughout New York State and preservation of public health and public safety.

**Purpose:** The Rule provides the framework for administration of the Restore New York's Communities Initiative.

**Text of emergency rule:** RESTORE NEW YORK'S COMMUNITIES INITIATIVE

#### Section 4245.1 Purpose

These regulations set forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in section 16-n of the Urban Development Corporation Act (the "Act"). The initiative promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing financial assistance to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

#### Section 4245.2 Definitions

For purposes of these regulations, the terms below will have the following meanings:

(a) "deconstruction" shall mean the careful disassembly of buildings of architectural or historic significance with the intent to rehabilitate, reconstruct the building or salvage the material disassembled from the building;

(b) "economically distressed community" shall mean communities determined by the Commissioner of Economic Development based on criteria that are indicative of economic distress including numbers of persons receiving public assistance, poverty rates, unemployment rates, rate of employment decline, population loss, per capita income change, decline in economic activity and private investment to the extent that they are measurable at the municipal level and such other criteria indicators as the Commissioner deems appropriate to be in need of economic assistance;

(c) "municipality" shall mean a municipal subdivision that is a city, town, or village;

(d) "property assessment list" shall mean a list (in such form as the Corporation may require) compiled by a municipality containing description (location, size and residential or commercial nature of each building, and whether the building is proposed to be demolished, deconstructed, rehabilitated or reconstructed) and an assessment of whether each building is vacant, abandoned, surplus or condemned within its jurisdiction;

(e) "reconstruction" shall mean the construction of a new building which is similar in architecture, size and purpose to a previously existing building at such location, provided, however, to the extent possible, all such reconstruction program real property shall be architecturally consistent with nearby and adjacent properties or in a manner consistent with a local revitalization or urban development plan;

(f) "rehabilitation" shall mean structural repairs, mechanical systems repair or replacement, repairs related to deferred maintenance, emergency repairs, energy efficiency upgrades, accessibility improvements, mitigation of lead based paint hazards, and other repairs which result in a significant improvement to the property, provided, however, to the extent possible, all such rehabilitation program real property shall be architecturally consistent with nearby and adjacent properties or in a manner consistent with a local revitalization or urban development plan;

#### Section 4245.3 Request for Proposals

The Corporation may, within available appropriations, issue requests for proposals to municipalities at least once per fiscal year to provide grants to municipalities, for demolition, deconstruction, reconstruction, and rehabilitation projects set forth in a property assessment list submitted by the municipality.

#### Section 4245.4 Eligibility

(a) To be eligible for the demolition and deconstruction program or rehabilitation and reconstruction program assistance, as described in sections 4245.5 and 4245.6 of this Part, municipalities must conduct an assessment of vacant, abandoned, surplus or condemned buildings in communities within their jurisdiction. Such real property may include both residential and commercial real properties. Such properties shall be selected for the purpose of revitalizing urban centers, encouraging commercial investment and adding value to the municipal housing stock. Such

information shall be set forth in the property assessment list. Such properties and the other information on the property assessment list shall be published in a local daily newspaper for no less than three consecutive days. Additionally, the municipality shall conduct a public hearing in the municipality where the buildings identified on the property assessment list are located. Such public hearing shall be held before the Corporation accepts an application.

(b) No full-time employee of the State or full-time employee of any agency, department, authority or public benefit corporation (or any subsidiary of a public benefit corporation) of the State shall be eligible to receive assistance under this initiative, nor shall any business, the majority ownership interest of which is beneficially controlled by any such employee, be eligible for assistance under this initiative.

#### Section 4245.5 Demolition and Deconstruction Projects

Demolition and deconstruction projects for real property in need of demolition or deconstruction on the property assessment list may receive grants of up to twenty thousand dollars per residential real property. The Corporation shall determine the cost of demolition and deconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly, and such costs and maximum grant award amounts shall be made available to eligible municipalities. The Corporation shall also consider geographic differences in the cost of demolition and deconstruction in the establishment of maximum grant awards.

#### Section 4245.6 Rehabilitation and Reconstruction Projects

Rehabilitation and reconstruction projects for real property in need of rehabilitation or reconstruction on the property assessment list may receive grants of up to one hundred thousand dollars per residential real property. The Corporation shall determine the cost of rehabilitation and reconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly, and such costs and maximum grant award amounts shall be made available to eligible municipalities. The Corporation shall also consider geographic differences in the cost of rehabilitation and reconstruction in the establishment of maximum grant awards. Provided, however, to the extent possible, all such rehabilitation and reconstruction projects real property shall be rehabilitated or reconstructed in a manner that is architecturally consistent with nearby and adjacent properties or consistent with a local revitalization or urban development plan. Provided, further, such grants may be used for site development needs including but not limited to water, sewer and parking as specified in the grant agreement entered into between the Corporation and the municipality.

#### Section 4245.7 Required Considerations and Priorities

In considering the awarding of initiative grant assistance, the Corporation:

(a) shall review all qualified applications to determine the awards to be made pursuant to sections 4245.5 and 4245.6 of this Part and shall, to the fullest extent possible, provide such assistance in a geographically proportionate manner throughout the State based on the qualified applications received pursuant to this section.

(b) shall give priority in granting such assistance to eligible properties that have approved applications or are receiving grants pursuant to other state or federal redevelopment, remediation or planning programs including, but not limited to, the brownfield opportunity areas program adopted pursuant to section 970-r of the General Municipal Law or empire zone development plans pursuant to article 18-B of the General Municipal Law.

(c) shall give priority to properties in economically distressed communities.

#### Section 4245.8 Required Matching Contribution

A municipality that is granted an award or awards under this section shall provide a matching contribution of no less than ten percent of the aggregated award or awards amount. Such matching contribution may be in the form of a financial and/or in kind contribution by the municipality, a government entity, or a private entity. In establishing the matching contribution, a municipality's financial contribution may include grants from federal, state and local entities. In kind contributions may include but shall not be limited to the efforts of municipalities to conduct an inventory and assessment of vacant, abandoned, surplus, condemned, and deteriorated properties and to manage and administer grants pursuant to sections 4245.5 and 4245.6 of this Part.

#### Section 4245.9 Application and Approval Process

(a) Promptly after receipt of the application, including the property assessment list, the Corporation shall review the application for eligibility, completeness, and conformance with the applicable requirements of the Act and this Part. Applications shall be processed in full compliance with the applicable provisions of section 16-n of the Act as it may be in effect from time to time.

(b) If the proposal satisfies the applicable requirements and initiative funding is available, the proposal may be presented to the Corporation's directors for adoption consideration in accordance with applicable law and regulations. The directors normally meet once a month. If the project

is approved for funding and if it involves the demolition or deconstruction or rehabilitation or reconstruction of any property, the Corporation will schedule a public hearing in accordance with the Act and will take such further action as may be required by the Act and applicable law and regulations. After approval by the Corporation and a public hearing the project may then be reviewed by the State Public Authorities Control Board ("PACB"), which also generally meets once a month, in accordance with PACB requirements and policies. Notwithstanding the foregoing, no initiative project shall be funded if sufficient initiative monies are not received by the Corporation for such project.

#### Section 4245.10 Confidentiality

To the extent permitted by law and regulations, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting initiative assistance from the Corporation, which is submitted by or on behalf of such person or entity to the Corporation in connection with an application for initiative assistance, shall be confidential and exempt from public disclosures.

#### Section 4245.11 Affirmative action and non-discrimination

Program applications shall be reviewed by the Corporation's Affirmative Action Department, which shall, in consultation with the applicant and/or proposed recipient of the Program assistance and any other relevant involved parties, develop appropriate goals, in compliance with applicable law (including section 2879 of the Public Authorities Law, article 15-A of the Executive Law, and section 6254(11) of the Unconsolidated Laws) and the Corporation's policy, for participation in the proposed project by minority group members and women. Compliance with laws and the Corporation's policy prohibiting discrimination in employment on the basis of age, race, creed, color, national origin, gender, sexual preference, disability or marital status shall be required.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires June 10, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@empire.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Chapter 109, Laws of 2006 (Unconsolidated Laws, section 6266-n. Another Unconsolidated Laws section 6266-n was added by another act) authorized the Urban Development Corporation, d/b/a Empire State Development Corporation (the "Corporation") to implement the Restore New York's Communities Initiative (the "Program") to promote economic development in the State by encouraging economic and employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers municipalities assistance for the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities. Section 5(4) of the New York State Urban Development Corporation (UDC) Act (Unconsolidated Laws, section 6255(4)), which was originally enacted as Chapter 174 of the Laws of 1968, authorizes the Corporation to make rules and regulations with respect to its projects, operations, properties and facilities, in accordance with section 102 of the Executive Law.

##### 2. Legislative Objective:

The objective of the statute authorizing the Program is to revitalize urban areas and stabilize neighborhoods to attract industry and people to urban areas thereby improving municipal finances, giving municipal governments the wherewithal to grow their tax and resource base and attract individuals, families, industry and commercial enterprises, and lessen distressed municipalities' reliance on state aid, achieving stable and diverse economies and vibrant communities.

##### 3. Need and Benefits:

The Program's legislation assists the revitalization of urban areas and stabilization of neighborhoods throughout the State by providing the following types of assistance:

a) Demolition and Deconstruction Grants of up to twenty thousand dollars per residential real property in need of demolition or deconstruction on the property assessment list.

b) Rehabilitation and Reconstruction Grants of up to one hundred thousand dollars per residential real property in need of rehabilitation or reconstruction on the property assessment list.

c) Demolition and Deconstruction Grants and Rehabilitation and Reconstruction Grants for commercial properties. The Corporation shall determine the cost of demolition/deconstruction and rehabilitation/reconstruction of commercial properties on a per-square foot basis and establish maximum grant awards accordingly. The Corporation shall also consider geographic differences in the establishment of maximum grant awards.

The proposed new Rule sets forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in section 16-n of the UDC Act. The initiative promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing the financial assistance mentioned above to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

1. Evaluation Criteria - The Corporation will review and evaluate applications for assistance pursuant to eligibility requirements and criteria set forth in the UDC Act and the Rule.

2. Application procedure - Approval of applications shall be made only upon a determination by the Corporation:

(i) that the proposed project would promote the economic health of the State by facilitating the revitalization of urban areas and the stabilization of neighborhoods within a political subdivision or region of the State or would enhance or help to maintain the economic viability of the State.

(ii) that the project would be unlikely to take place in the State without the requested assistance; and

(iii) that the project is reasonably likely to accomplish its stated objectives and that the likely benefits of the project exceed costs.

##### 4. Costs:

The funding source is appropriation funds (2006-07 Supplemental Bill (S8470/A12044) page 227, lines 8-14). \$150,000,000 is available for 2008. Discussions regarding funds were conducted by Ray Richardson on behalf of the Corporation and Andrew Kennedy on behalf of the Division of Budget.

##### 5. Local Government Mandates:

There is no imposition of any mandates upon local governments by the amended rule.

##### 6. Paperwork:

As instructed by the legislation, a Request for Proposal was developed for this program.

##### 7. Duplication:

There are no duplicative, overlapping or conflicting rules or legal requirements, either federal or state.

##### 8. Federal Standards:

There are no applicable federal government standards which apply.

##### 9. Alternatives:

The Corporation considered the alternative of not promulgating this rule. However, this rulemaking was necessary in order to complete aspects of the Program that were not addressed by the enacting legislation.

##### 10. Compliance Schedule:

No significant time will be needed for compliance.

#### Regulatory Flexibility Analysis

##### 1. Effect of the Rule:

The proposed Rule will provide the framework for administration of the Restore New York's Communities Initiative (the "Program") to promote economic development in the State by encouraging economic and employment opportunities for the State's citizens and stimulating development of communities throughout the State. The program, in furtherance of the foregoing, offers municipalities assistance for the demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities.

The objective of the statute authorizing the Program is to promote the economic health of New York State by facilitating the creation or retention of jobs or increasing business activity within municipalities or regions of the State.

The proposed new Rule sets forth the types of available assistance, eligibility, evaluation criteria, process and related matters, including implementation and administration of the Restore New York's Communities Initiative set forth in Section 16-n of the Urban Development Corporation Act. The Program promotes demolition, deconstruction, reconstruction and rehabilitation of vacant, abandoned, surplus or condemned buildings in municipalities by providing the financial assistance mentioned above to municipalities for the demolition, deconstruction, reconstruction and rehabilitation of such buildings.

The Program emphasizes the effective provision of economic development throughout New York State. Program funds are available only to municipalities. Small business will benefit from the aid to municipalities provided for this economic development. Therefore, the effect of the Rule on small business and local government will be beneficial.

##### 2. Compliance Requirement:

No affirmative acts will be needed to comply.

##### 3. Professional Services:

No professional services will be needed to comply.

##### 4. Compliance Costs:

No initial costs will be needed to comply with the proposed Rule.

## 5. Economic Feasibility:

The Rule makes the Program assistance feasible for local governments, by expressly stating that municipalities are eligible for certain types of Program assistance while permitting local governments access to all other types of Program assistance for which they may be eligible. It is also economically feasible for local governments to coordinate their respective economic development and job retention and attraction efforts.

## 6. Minimizing Adverse Impact:

The revised rule will have no adverse economic impact on small business or local governments.

## 7. Small Business and Local Participation:

Program funds are available only to municipalities. Comments were received from applicants under the Program including Albany, Syracuse, Yonkers, Buffalo, Utica, Watervliet, Rochester, Binghamton, Elmira, Wappingers Falls and Amherst. The response was overwhelmingly positive. There were some requests to reduce the requirements of the application process. However, given that the Rule's application requirements are prescribed by the enabling legislation, the corporation has determined that this is not possible.

There were also requests to expand the types of property covered and the types of entities eligible for assistance. However these are legislative matters beyond the scope of the corporation's powers.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis Statement is not submitted because the amended rule will not impose any adverse economic impact, reporting requirements, record keeping or other compliance requirements on public or private entities in rural areas.

**Job Impact Statement**

A JIS is not submitted because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities. In fact, the proposed amended rule should have a positive impact on job creation because it will facilitate administration of and access to the Empire State Economic Development Fund, which should improve the opportunities for the creation of jobs throughout the State by encouraging business expansion and attraction.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

**The Upstate Regional Blueprint Fund Program**

**I.D. No.** UDC-13-09-00001-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 4247 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, section 5(4); L. 1968, ch. 174; L. 2008, ch. 57, part QQ, section 16-q

**Subject:** The Upstate Regional Blueprint Fund Program.

**Purpose:** To set forth the available assistance, evaluation criteria, application and project process.

**Text of proposed rule:** A new Part 4247 of 21 NYCRR is added as follows:

### UPSTATE REGIONAL BLUEPRINT FUND PROGRAM

#### Section 4247.1 General

*These regulations set forth the types of available assistance, evaluation criteria, application and project process and related matters for the Upstate Regional Blueprint Fund (the "Program"). The Program was created pursuant to section 16-q of the New York State Urban Development Corporation Act, as added by Part QQ of Chapter 57 of the Laws of 2008, and promotes economic development in the State of New York by encouraging economic and employment opportunities for Upstate New York's citizens by supporting: intellectual capital capacity building; investment products; applied research and development; opportunities for foreign investment and international export; and infrastructure requirements to attract new businesses or expand existing businesses.*

#### Section 4247.2 Definitions

*For the purposes of this Part 4247, the terms below should have the following meanings:*

(a) "The Act" shall mean the New York State Urban Development Corporation Act, added by Chapter 174 of the Laws of 1968 (as amended).

(b) "The Corporation" shall mean the Upstate Empire State

*Development Corporation, a subsidiary of the New York State Urban Development Corporation.*

(c) "Distressed communities" shall mean areas as determined by the Corporation meeting criteria indicative of economic distress, including land value, employment rate, rate of employment change, private investment, economic activity, percentages and numbers of low income persons, per capita income and per capita real property wealth, and such other indicators of distress as the Corporation shall determine.

(d) "Not-For-Profit Corporation" shall mean a corporation organized under the provisions of the Not-For-Profit Corporation Law.

(e) "Upstate New York" shall mean the geographical area defined by the chairperson of the Urban Development Corporation, in consultation with the chairperson of the Corporation or if no such chairperson is appointed, the president of the Corporation, subject to approval by the board of directors of the Urban Development Corporation. The approved geographical area will be disseminated to eligible parties by the Urban Development Corporation's regional offices at the time of approval.

#### Section 4247.3 Types of Assistance

*The Program offers assistance in the form of loans and/or grants to for-profit businesses, not-for-profit corporations, public benefit corporations, municipalities, and research and academic institutions, for activities including, but not limited to, the following:*

(a) those identified through region-wide collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to smart growth and energy efficiency initiatives;

(b) activities that involve the attraction or expansion of a business, including, but not limited to, those primarily engaged in activities identified as a strategic industry, and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the General Municipal Law;

(c) activities that involve land acquisition and/or the construction, acquisition or expansion of buildings, machinery and equipment associated with a project;

(d) those identified as a city by city or regional blueprint priority.

#### Section 4247.4 Eligibility

(a) *Eligible applicants shall include, but not be limited to, business improvement districts, local development corporations, economic development organizations, institutions of higher education, incubators, technology parks, private firms, municipalities, counties, regional planning councils, tourist attractions and community facilities.*

(b) *The Corporation shall be eligible for assistance in the form of loans, grants, or monies contributing to projects for which the Corporation or a subsidiary acts as developer.*

(1) *The Corporation may act as developer in the acquisition, renovation, construction, leasing or sale of development projects authorized pursuant to this Program in order to stimulate private sector investment within the affected community.*

(2) *In acting as a developer, the Corporation may borrow for purposes of this subdivision for approved projects in which the lender's recourse is solely to the assets of the project, and may make such arrangements and agreements with community-based organizations and local development corporations as may be required to carry out the purposes of this section.*

(3) *Prior to developing any such project, the Corporation shall secure a firm commitment from entities, independent of the Corporation, for the purchase or lease of such project. Such firm commitment shall be evidenced by a memorandum of understanding or other document describing the intent of the parties.*

(4) *Projects authorized under this subdivision whether developed by the Corporation or a private developer, must be located in distressed communities, for which there is demonstrated demand within the particular community.*

(c) *No full-time employee of the state or full-time employee of any agency, department, authority or public benefit corporation (or any*

subsidiary of a public benefit corporation) of the state shall be eligible to receive assistance under this initiative, nor shall any business, the majority ownership interest of which is beneficially controlled by any such employee, be eligible for assistance under this initiative.

#### Section 4247.5 Evaluation Criteria

The Corporation shall give priority in granting assistance to those projects:

- (a) with significant private financing or matching funds through private or other public entities;
- (b) likely to produce a high economic return on public investment;
- (c) with existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties;
- (d) with significant regional breadth or likely to have wide regional impact;
- (e) with cost benefit analysis that demonstrates clear economic benefits from new private sector job creation and/or investments;
- (f) located in distressed communities; or
- (g) whose application is supported by multiple entities, both public and private.

#### Section 4247.6 Application and project process

(a) The Corporation may, at its discretion and within available appropriations, issue requests for proposals and may at other times accept direct applications for program assistance.

(b) Promptly after receipt of the application, the Corporation shall review the application for eligibility, completeness, and conformance with the applicable requirements of the Act and this Rule. Applications shall be processed in full compliance with the applicable provisions of Section 16-q of the Act.

(c) If the proposal satisfies the applicable requirements and initiative funding is available, the proposal may be presented to the Corporation's directors for adoption consideration in accordance with applicable law and regulations. The directors normally meet once a month. If the project is approved for funding and if it involves the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of any property, the Corporation will schedule a public hearing in accordance with the Act and will take such further action as may be required by the Act and applicable law and regulations. After approval by the Corporation and a public hearing the project may then be reviewed by the State Public Authorities Control Board ("PACB"), which also generally meets once a month, in accordance with PACB requirements and policies. Following directors' approval, and PACB approval, if required, documentation will be prepared by the Corporation. Notwithstanding the foregoing, no initiative project shall be funded if sufficient initiative monies are not received by the Corporation for such project.

(d) Nothing herein shall prevent the Corporation from requiring applicants to submit materials prior to submission of a formal application to determine if the proposal meets eligible criteria for Program assistance.

#### Section 4247.7 Confidentiality

(a) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Corporation, which is submitted by such person or entity to the Corporation in connection with an application for assistance, shall be confidential and exempt from public disclosures.

#### Section 4247.8 Expenses

(a) An application fee of \$250 must be paid to the Corporation for projects that involve acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property, the financing of machinery and equipment and working capital loans and loan guarantees before final review of an application can be completed. This fee will be refunded in the event the application is withdrawn or rejected.

(b) The Corporation will assess a commitment fee of up to two percent of the amount of any Program loan involving projects for

acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property, the financing of machinery and equipment and working capital payable upon acceptance of commitment with up to one percent rebated at closing. No portion of the commitment fee will be repaid if the commitment lapses and the project does not close. The Corporation will assess a fee of up to one percent, payable at closing, of the amount of any Program grant involving the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property or the financing of machinery and equipment or any loan guarantee.

(c) The applicant will be obligated to pay for expenses incurred by the Corporation in connection with the project, including, but not limited to, expenses related to attorney, appraisals, surveys, title insurance, credit searches, filing fees, public hearing expenses and other requirements deemed appropriate by the Corporation.

#### Section 4247.9 Affirmative action and non-discrimination

Program applications shall be reviewed by the Corporation's affirmative action department, which shall, in consultation with the applicant and/or proposed recipient of the program assistance and any other relevant involved parties, develop appropriate goals, in compliance with applicable law (including section 2879 of the public authorities law, article fifteen-A of the executive law and section 6254(11) of the unconsolidated laws) and the Corporation's policy, for participation in the proposed project by minority group members and women. Compliance with laws and the Corporation's policy prohibiting discrimination in employment on the basis of age, race, creed, color, national origin, gender, sexual preference, disability or marital status shall be required.

**Text of proposed rule and any required statements and analyses may be obtained from:** Stephen Gawlik, Deputy General Counsel, Urban Development Corporation d/b/a Empire State Development, 95 Perry Street, Suite 500, Buffalo, New York 14203, (716) 846-8257, email: sgawlik@empire.state.ny.us

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

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

#### Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation, as added by Chapter 174 of the Laws of 1968 (the Act)(Unconsolidated Laws § 6259-c) provides, in part, that the New York State Urban Development Corporation (Corporation) shall, assisted by the commissioner of economic development and in consultation with the department of economic development, promulgate rules and regulations in accordance with the state administrative procedure act.

Section 12 of the Act provides that the Corporation shall have the right to exercise and perform its powers and functions through one or more subsidiary corporations.

Section 16-q of Part QQ of Chapter 57 of the Laws of 2008 provides for the creation of the upstate regional blueprint fund. The Upstate Empire State Development Corporation, a subsidiary of the Corporation, is authorized to provide financial, product development, or other assistance from such fund to eligible entities as set forth in this subdivision to support the upstate revitalization fund, and in support of such projects that focus on: intellectual capital capacity building; investment products; applied research and development; opportunities for foreign investment and international export; and infrastructure requirements to attract new businesses or expand existing businesses.

2. Legislative Objectives: Section 16-q of the Act, sets forth the Legislative intent of the Upstate Regional Blueprint Fund to provide financial assistance to eligible entities by supporting projects in Upstate New York that focus on: intellectual capital capacity building; investment products; applied research and development; opportunities for foreign investment and international export; and infrastructure requirements to attract new businesses or expand existing businesses. It further states such activities include but are not limited to: support for projects identified through region-wide collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to smart growth and energy efficiency initiatives; support for the attraction or expansion of a business, including, but not

limited to, those primarily engaged in activities identified as a strategic industry, and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the general municipal law; support for land acquisition and/or the construction, acquisition or expansion of buildings, machinery and equipment associated with a project; and support for projects identified as a city by city or regional blueprint priority.

The Legislative intent of Section 16-q of the Act is to assist business in Upstate New York in a time of great need and to promote the retention and creation of jobs and investment in the region.

The adoption of 21 NYCRR Part 4247 will further these goals by setting forth the types of available assistance, evaluation criteria, application and project process and related matters for the Upstate Regional Blueprint Fund.

3. Needs and Benefits: Chapter 53 of the Laws of 2008, page 884, lines 17 thru 27 allocates \$120 million in capital funding to the Upstate Regional Blueprint Fund Program (the Fund) for regional economic development and revitalization. Many areas in the upstate economy show the effects of decades of economic decline. The scale of investments in infrastructure and in the development of strategic industries required to support growth is far beyond the ability of municipalities to undertake. The Fund would provide the necessary stimulus for strategic capital investment by both the public and private sectors.

The Fund allocation of \$120 million in new capital spending could support approximately 1,405 construction-related jobs, generating an additional \$66.7 million in personal income in upstate communities. The Corporation used the Implan® regional economic analysis system to model employment and personal income multipliers for construction spending to estimate the direct, indirect and induced jobs related to the Fund amounts assumed to be devoted to capital spending on infrastructure and construction-related activity. Implan® is used by a number of state and federal agencies to include the U.S. Forest Service and the U.S. Census Bureau. Over the past fifteen years, Implan® has grown to become the industry standard for determining the total economic outputs of an industry or specific project.

New York State may collect over \$4 million in personal income tax and sales tax on income spending. To estimate the personal income tax revenues generated by this spending, the Corporation assumed the tax calculation for single or married filing separately on taxable income over \$20,000, using the standard deduction and 6.85% on income over \$20,000. Sales tax was estimated on taxable disposable income earned by wage earners. The Corporation assumed that 75% of gross income is disposable income and 40% of that is taxable.

This level of capital spending (assumed to be primarily on infrastructure and rehabilitation and new construction of facilities related to tourism, R&D, incubator space, technology parks, and central business district redevelopment) will provide the basis for significant follow-on investment in a broad range of high-growth economic activity.

4. Costs: The Fund as identified in Chapter 53 of the Laws of 2008, page 884, lines 17 thru 27 will be funded through the issuance of Personal Income Tax bonds. In addition to the interest costs, it is expected that fees and costs associated with issuing bonds, including the Corporation's fee, underwriting, banking and legal fees, will be approximately 1.6% of the total amount borrowed.

The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development. Participation is voluntary and would be considered on a case-by-case basis depending on the location of the municipality involved.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule on regulated parties. Standard applications used for most other Corporation assistance will be employed keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients. The rule provides that the Corporation may, however, require applicants to submit materials prior to submission of a formal application to determine if a proposal meets eligible criteria for Fund assistance.

6. Local Government Mandates: The Fund imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district. To the contrary, the Fund offers local governments potentially enhanced resources, either directly or indirectly, to encourage economic and employment opportunities for their citizens. Participation in the program is optional; local governments that do not wish to be considered for funding do not need to apply.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: The Fund proposed regulations provide for a variety of potential program outcomes, by type of assistance (loans, loan guarantees, and grants), eligible applicants (municipalities, industrial development agencies, local development companies, public authorities and public benefit corporations, private developers or businesses, and other entities), and eligible uses (planning, sewer and water systems, energy facilities, transportation facilities and systems, pipelines, land acquisition, demolition and site clearing, etc.)

The Fund criteria were developed through an extensive outreach process conducted by Upstate ESDC in Fall 2007. These seven, half-day regional blueprint sessions (1 in each Upstate economic development region designated as Western New York, Finger Lakes, Central New York, Southern Tier, North Country, Mohawk Valley, and Capital Region) gathered input from regional economic leaders across five categories: infrastructure, innovation, intellectual capital, international, and investment. After the meetings the input was summarized and used in design of the program.

The following are three examples of alternatives that were provided during the outreach portion of the rulemaking process. All of the suggestions offered were from members of the small business community and local governments who responded to the Corporation's request for input. All of the suggestions were included in the rules and regulations submitted with this Regulatory Impact Statement.

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4247.3, Part (a) provides for "support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives."

2. Regulations should allow the Upstate program to include Suffolk County and the Hudson Valley/Catskill regions.

Section 4247.2, Part (e) states that "Upstate New York" shall mean the geographical area defined by the chairperson of the Urban Development Corporation, in consultation with the chairperson of the Corporation or if no such chairperson is appointed, the president of the Corporation, subject to approval by the board of directors of the Urban Development Corporation. The approved geographical area will be disseminated to eligible parties by the Urban Development Corporation's regional offices at the time of approval.

3. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4247.6 "Application and project process" from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

#### **Regulatory Flexibility Analysis**

1. Effects of Rule: "Small business" is defined by the State Economic Development law to be an enterprise with 100 or fewer employees. The vast majority - roughly 98 percent - of New York State businesses are small businesses.

We applied this criterion to ESD's models of the Upstate economy

to determine how many small businesses could benefit from the Upstate Blueprint Fund. We limited the analysis to industries that are likely to have eligible businesses: manufacturing, transportation and warehousing, information, finance and insurance, professional and technical services, management of companies and enterprises, and arts, entertainment and recreation.

Across these 7 broad sectors our analysis indicates that approximately 40,000 small businesses will be eligible for funding under the Upstate Blueprint Fund.

In addition approximately 2,000 municipalities and local economic development-oriented organizations will be eligible for funding.

2. Compliance Requirements: There are no compliance requirements for small businesses and local governments in these regulations.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: To the extent that there are existing capabilities at the local level to administer the projects funded through this program, there should be relatively little, if any additional administration costs.

5. Economic and Technological Feasibility: Compliance with these regulations should be economically and technologically feasible for small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide financing for discretionary and competitive economic development infrastructure projects. Reporting requirements for loans, loan guarantees, and grants are limited to those customary to effectuate financial due diligence for all parties.

7. Small Business and Local Government Participation: The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also notified.

ESDC received 10 responses to its outreach to interested parties on the proposed regulations. Much of the responses received consisted of general supporting statements for the programs or critique of the enabling legislation.

Listed are several comments received on the proposed rules related to the Upstate Regional Blueprint Fund and our response to the comment.

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4247.3, Part (a) provides for “support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives.”

2. Regulations should clearly define “distressed communities” using specific, objective criteria.

Section 4247.2, Part (a) defines “Distressed Communities”

3. For the Upstate Regional Blueprint program, define “strategic industries.”

Section 4247.3, Part (b) refers to a section of the General Municipal Law where “strategic industries” is defined.

4. Regulations should allow the Upstate program to include Suffolk County and the Hudson Valley/Catskill regions.

Section 4247.2, Part (e) states that “Upstate New York” shall mean the geographic area defined by the chairperson, in consultation with the chairperson of the upstate empire state development corporation, subject to approval by the board of directors of the Urban Development Corporation.” These definitions are decided apart from the rulemaking process.

5. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Sec-

tion 4247.6 “Application and project process” from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

6. Regulations should allow for municipal comments when the applicant is not a municipality.

Section 4247.5, Part (c) gives preference to projects with the “existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties.”

#### *Rural Area Flexibility Analysis*

1. Types and Estimated Numbers of Rural Areas: Much of New York State is rural. According to the Executive Law § 481 (7), some 44 counties, all located in the ESD Upstate Region, are rural, defined as having a population less than 200,000. Portions of an additional 9 counties have certain townships with population densities of 150 persons or less per square mile. Only 10 counties - all Downstate - have no rural character, according to Executive Law.

We applied these criteria to ESD’s models of the Upstate economy to determine how many rural businesses could benefit from the Upstate Blueprint Fund. We limited the analysis to industries that are likely to have eligible businesses: manufacturing, transportation and warehousing, information, finance and insurance, professional and technical services, management of companies and enterprises, and arts, entertainment and recreation.

Across these 7 broad sectors our analysis indicates that approximately 20,000 rural businesses will be eligible for funding under the Upstate Blueprint Fund. In addition approximately 2,000 municipalities and local economic development-oriented organizations will be eligible for funding.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements; no affirmative acts will be needed to comply; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development.

4. Minimizing Adverse Impact: The purpose of the Upstate Regional Blueprint Fund program is to maximize the economic benefit of new capital investment in areas in need of economic revitalization. The program requires that such investments coordinate with local area comprehensive development plans in order to maximize its effectiveness and minimize any negative impacts. It also requires that cost-benefit analyses be completed to demonstrate the effectiveness of projects undertaken and contribute to the assessment of overall impact.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those only in urban areas or only in rural areas, except for the requirement that applicants must be in upstate counties. The extent of rural local government support and involvement for loan, loan guarantee, and grant project applicants are two of the criteria for project acceptance. A public hearing may also be required under the NYS Urban Development Corporation Act. The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also notified. Examples of questions that were received and the Corporation’s answers to these questions include the following:

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4247.3, Part (a) provides for “support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives.”

2. Regulations should allow the Upstate program to include Suffolk County and the Hudson Valley/Catskill regions.

Section 4247.2, Part (e) states that "Upstate New York" shall mean the geographic area defined by the chairperson, in consultation with the chairperson of the upstate empire state development corporation, subject to approval by the board of directors of the Urban Development Corporation." These definitions are decided apart from the rulemaking process.

3. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4247.6 "Application and project process" from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

#### **Job Impact Statement**

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of Upstate New York through strategic investments in intellectual capital capacity building; investment products; applied research and development; opportunities for foreign investment and international export; and infrastructure requirements to attract new businesses or expand existing businesses.

There will be no adverse impact on job opportunities in the state.

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## Workers' Compensation Board

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### EMERGENCY RULE MAKING

#### **Filing Written Reports of Independent Medical Examinations (IMEs)**

**I.D. No.** WCB-13-09-00007-E

**Filing No.** 255

**Filing Date:** 2009-03-16

**Effective Date:** 2009-03-16

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

**Action taken:** Amendment of section 300.2(d)(11) of Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117 and 137

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

**Specific reasons underlying the finding of necessity:** Decisions of Board Panels have held the current regulation requires reports of independent medical examinations (IMEs) be received by the Board within ten calendar days of the exam. This is not enough time to timely file preventing proper defense of claim.

**Subject:** Filing written reports of Independent Medical Examinations (IMEs).

**Purpose:** To amend the time for filing written reports of IMEs with the Board and furnished to all others.

**Text of emergency rule:** Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

**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 June 13, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Esq., NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118),

and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

#### 4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

#### 6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

#### 7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

#### 8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

#### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

#### *Regulatory Flexibility Analysis*

##### 1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured local governments will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that are self-insured will also be affected by the proposed rule. These small businesses will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

##### 2. Compliance requirements:

Self-insured municipal employers, self-insured non-municipal employers, independent medical examiners, and entities that derive income from independent medical examinations will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

##### 3. Professional services:

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

##### 4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

##### 5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

##### 6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

##### 7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal

Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Rural Area Flexibility Analysis****1. Types and estimated numbers of rural areas:**

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

**2. Reporting, recordkeeping and other compliance requirements:**

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

**3. Costs:**

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

**4. Minimizing adverse impact:**

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

**5. Rural area participation:**

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

**Job Impact Statement**

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.