RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Species of Ash Trees, Parts Thereof and Products and Debris Therefrom Which Are at Risk of Infestation by the Emerald Ash Borer

I.D. No. AAM-32-09-00004-E
Filing No. 869
Filing Date: 2009-07-24
Effective Date: 2009-07-24

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

Action taken: Addition of Part 141 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 Emerald Ash Borer, Agrilus planipennis, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. It was first discovered in Michigan in June 2002, and has since spread to twelve other states as well as to two provinces in Canada. The most recent detection of this pest occurred on June 16, 2009 in the Town of Randolph, New York which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County.

The Emerald Ash Borer can cause serious damage to healthy trees by boring through their bark, consuming cambium tissue, which contains growth cells, and phloem tissue, which is responsible for carrying nutrients throughout the tree. This boring activity results in loss of bark, or girdling, and ultimately results in the death of the tree within two years.

The average adult Emerald Ash Borer is 3/4 of an inch long and 1/6 of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to 1 1/4 inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of ther Emerald Ash Borer includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree.

Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Materials at risk of attack and infestation by the Emerald Ash Borer include the following species of North American ash trees: White Ash (Fraxinus Americana); Green Ash (Fraxinus pennsylvanica); Black Ash (Fraxinus nigra); and Blue Ash (Fraxinus quadrangulata).

Since the Emerald Ash Borer is not considered established in the State, 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 susceptible ash trees in forests as well as in parks and yards throughout the State.

To date, 39 infested trees in and around the Town of Randolph in Cattaraugus County have been cut and chipped. As the inspection and survey of susceptible ash trees continues in and around the Town of Randolph, the establishment of a quarantine in Cattaraugus and Chautauqua Counties is the most effective means of preventing the artificial spread of the Emerald Ash Borer. The amendments establishing the quarantine will help ensure that as control measures are undertaken, the Emerald Ash Borer infestation does not spread beyond those areas via the artificial movement of infested trees and materials.

The effective control of the Emerald Ash Borer 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 establish the quarantine in Cattaraugus and Chautauqua Counties could result in the spread of the Emerald Ash Borer beyond those areas and damage to the natural resources of the State. This could result in a federal quarantine and quarantines by other states and foreign countries affecting the entire State. Such actions 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 Emerald Ash Borer beyond the areas currently infested and the detrimental consequences that would have, it appears that the rule establishing the quarantine 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: Species of ash trees, parts thereof and products and debris therefrom which are at risk of infestation by the Emerald Ash Borer.

Purpose: To establish an Emerald Ash Borer quarantine to prevent the spread of the beetle to other areas.

Text of emergency rule: *Part 141*

Control of the Emerald Ash Borer

Section 141.1. Definitions

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

(a) Certificate of inspection. A valid form certifying the eligibility of products for intrastate movement under the requirements of this Part.

(b) Compliance agreement. An approved document, executed by persons or firms, covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement.

(c) Emerald Ash Borer. The insect known as the Emerald Ash Borer, Agrilus planipennis, in any stage of development.

(d) Firewood. This term applies to any kindling, logs, chunkwood, boards, timbers or other wood cut and split, or not split, into a form and size appropriate for use as fuel.

(e) Infestation. This term refers to the presence of the Emerald Ash Borer in any life stage or as determined by evidence of activity of one or more of the life stages.

(f) Inspector. An inspector of the New York State Department of Agriculture and Markets, or cooperator from the New York State Department of Environmental Conservation (DEC) or the United States Department of Agriculture (USDA), when authorized to act in that capacity.

(g) Limited permit. A valid form authorizing the restricted movement of regulated articles from a quarantine area to a specified destination for specified processing, handling or utilization.

(h) Moved; movement. Shipped, offered for shipment to a common carrier received for transportation or transported by a common carrier, or carried, transported, moved or allowed to be moved into or through any area of the State.

(i) Nursery stock. This term applies to and includes all trees, shrubs, plants and vines and parts thereof.

(j) Quarantine Area. This term applies to Chautauqua and Cattaraugus Counties.

(k) Regulated article. This terms applies to firewood from any species of tree, and any trees and all host material, living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of the following genera: White Ash (Fraxinus Americana); Green Ash Fraxinus pennsylvanica); Black Ash (Fraxinus nigra); and Blue Ash (Fraxinus quadrangulata), and any wood material that is commingled and otherwise indistinguishable from the regulated article.

Section 141.2. Quarantine area.

Regulated articles as described in section 141.3 of this Part shall not be shipped, transported or otherwise moved from any point within Chautauqua and Cattaraugus Counties to any point outside of said counties, except in accordance with this Part.

Section 141.3. Regulated articles.

(a) Prohibited movement.

(1) The intrastate movement of living Emerald Ash Borer in any stage of development, whether moved independent of or in connection with any other article, except as provided in section 141.9 of this Part.

(2) The intrastate movement of nursery stock from the quarantine area to any point outside the quarantine area.

(3) The intrastate movement of regulated articles other than nursery stock from the quarantine area to any point outside the quarantine area, except as provided in section 141.5 of this Part.

(b) Regulated movement.

(1) Regulated articles shall not be moved within the quarantine area, except pursuant to a compliance agreement.

(2) Regulated articles shall not be moved from the quarantine area to any point outside the quarantine area, except under a limited permit or unless accompanied by a certificate of inspection indicating freedom from infestation.

(3) Regulated articles may be moved through the quarantine area if the regulated articles originated outside the regulated area and:

(i) the points of origin and destination are indicated on a waybill accompanying the regulated article; and

(ii) the regulated articles, if moved through the quarantine area during the period of May 1 through August 31 or when the ambient air temperature is 40 degrees F or higher, are moved in an enclosed vehicle or are completely covered to prevent access by the Emerald Ash Borer; and

(iii) the regulated articles are moved directly through the quarantine area without stopping, except for refueling and traffic conditions, or have been stored, packed, or handled at locations approved by an inspector as not posing a risk of infestation by the Emerald Ash Borer.

Section 141.4. Conditions governing the intrastate movement of regulated articles

(a) Movement from quarantine area. Unless exempted by administrative instructions of the Commissioner of Agriculture and Markets of the State of New York, regulated articles shall not be moved intrastate from the quarantine area to or through any point outside thereof unless accompanied by a valid certificate or limited permit issued by an inspector, authorizing such movement.

Section 141.5. Conditions governing the issuance of certificates and permits

(a) Certificates of inspection. Certificates of inspection may be issued for the intrastate movement of regulated articles when those articles have been inspected and determined to have been:

(1) treated, fumigated, or processed by approved methods; or

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

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

(c) Cancellation of certificates of inspection or limited permits. Certificates or limited permits issued under these regulations may be withdrawn or canceled by the inspector and further certification refused whenever in his or her judgment the further use of such certificates or permits might result in the dissemination of infestation.

Section 141.6. Inspection and disposition of shipments

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the quarantine area, which contains, or which the inspector has probable cause to believe may contain, infestations of the Emerald Ash Borer, or articles or things regulated under this quarantine, may be examined by an inspector at any time or place. When articles or things are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he or she deems necessary to eliminate the danger of dissemination of the Emerald Ash Borer. If found to be infested, such articles or things must be freed of the infestation without cost to the State except that for inspection and supervision.

Section 141.7. Assembly of regulated articles for inspection

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

(b) The New York State Department of Agriculture and Markets will not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

Section 141.8. Marking requirements

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

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

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

Section 141.9. Shipments for experimental and scientific purposes.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 21, 2009.

Text of rule and any required statements and analyses may be obtained from: Robert J. Mungari, Director, Division of Plant Industry, New York State 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 additions accord 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 Emerald Ash Borer.

3. Needs and benefits:

The Emerald Ash Borer, Agrilus planipennis, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. It was first discovered in Michigan in June 2002, and has since spread to twelve other states as well as to two provinces in Canada. The most recent detection of this pest occurred on June 16, 2009 in the Town of Randolph, New York which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County.

The Emerald Ash Borer can cause serious damage to healthy trees by boring through their bark, consuming cambium tissue, which contains growth cells, and phloem tissue, which is responsible for carrying nutrients throughout the tree. This boring activity results in loss of bark, or girdling, and ultimately results in the death of the tree within two years.

The average adult Emerald Ash Borer is 3/4 of an inch long and 1/6 of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to 1 1/4 inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of ther Emerald Ash Borer includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree.

Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Materials at risk of attack and infestation by the Emerald Ash Borer include the following species of North American ash trees: White Ash (Fraxinus Americana); Green Ash (Fraxinus pennsylvanica); Black Ash (Fraxinus nigra); and Blue Ash (Fraxinus quadrangulata).

Since the Emerald Ash Borer is not considered established in the State, 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 susceptible ash trees in forests as well as in parks and yards throughout the State.

To date, 39 infested trees in and around the Town of Randolph in Cattaraugus County have been cut and chipped. As the inspection and survey of susceptible ash trees continues in and around the Town of Randolph, the establishment of a quarantine in Cattaraugus County and in neighboring Chautauqua County is the most effective means of preventing the artificial spread of the Emerald Ash Borer. The regulations establishing the quarantine will help ensure that as control measures are undertaken, the Emerald Ash Borer infestation does not spread beyond those areas via the movement of infested trees and materials.

The regulations prohibit the movement of any article infected with Emerald Ash Borer, regardless of where the articles are located in the State. Otherwise, only the movement of regulated articles, *i.e.* trees, firewood and all host material living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of the White Ash, Green Ash, Black Ash and Blue Ash genera susceptible to the pest, is restricted under the regulations. The extent of the restrictions depends on the regulated articles in question.

In the case of nursery stock, the regulations prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area; and the movement of these articles within the quarantine area, except pursuant to a compliance agreement.

In the case of all other regulated articles, the regulations prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area, except under a limited permit or unless accompanied by a certificate of inspection indicating freedom of infestation; and the movement of these articles within the quarantine area, except pursuant to a compliance agreement.

In the case of all regulated articles, the regulations permit movement of these articles through the quarantine area if the regulated articles originate outside the quarantine area and the point of origin of the regulated articles is on the waybill or bill of lading; a certificate of inspection accompanies the regulated articles; the vehicle moving the regulated articles does not stop in the quarantine area except for refueling or traffic conditions; and the vehicle moving the regulated articles during the period May 1 through August 31 is either an enclosed vehicle or is completely covered by canvas, plastic or closely woven cloth.

Under the regulations, certificates of inspection may be issued when the regulated articles have been inspected and found to be free of infestation or have been grown, produced, stored or handled in such a manner that, in the judgment of the inspector, no infection is present in the articles.

Limited permits may be issued for the movement of noncertified regulated articles from the quarantine area to a specified destination outside the quarantine area for specified processing, handling or utilization.

Under the regulations, certificates of inspection and limited permits may be withdrawn or canceled whenever an inspector determines that further use of such certificate or permit might result in the spread of infestation.

The regulations also provide that persons shipping, transporting, or receiving regulated articles may be required to enter into written compliance agreements. These agreements would allow the shipment of these articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that Emerald Ash Borer is not spread.

The regulations are necessary, since the effective control of the Emerald Ash Borer within the limited areas of the State near and where this insect has been found is 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. Annual surveys will be required to monitor the natural spread of the beetle at a cost of $200,000 to $250,000. However, it is anticipated that this survey program will be funded by the United States Department of Agriculture (USDA) through a continuing cooperative agreement with the New York State Department of Environmental Conservation (DEC).

(b) Costs to local government: None.

(c) Costs to private regulated parties:

There are 51 nurseries in Cattaraugus County and 28 nurseries in Chautauqua County which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol for ash nursery stock. Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the regulations, other than pursuant to compliance agreement, will require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate

of $25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 25 or fewer such inspections each year with a total annual cost of less than $1,000.00.

Most shipments will be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of $25 per hour.

Tree removal services will have the option of leaving host materials within the quarantine area or transporting them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

(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 quarantine with existing staff.

5. Local government mandate:

None.

6. Paperwork:

Regulated articles inspected and certified to be free of Emerald Ash Borer moving from the quarantine area established by this rule would have to be accompanied by a state or federal certificate of inspection and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

The failure of the State to establish a quarantine in Cattaraugus and Chautauqua Counties in and near where the Emerald Ash Borer 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 Emerald Ash Borer that could result from the unrestricted movement of White Ash, Green Ash, Black Ash and Blue Ash from the quarantine areas. In light of these factors, there does not appear to be any viable alternative to the quarantine set forth in this rule.

9. Federal standards:

The regulations do 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 regulations immediately.

Regulatory Flexibility Analysis

1. Effect on small business:

The small businesses affected by the regulations establishing an Emerald Ash Borer quarantine in Cattaraugus and Chautauqua Counties are the nursery dealers, nursery growers and landscaping companies located within those counties. There are 79 such businesses in those counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, it is anticipated that the appearance of the Emerald Ash Borer and its destructive potential is likely to reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings. There are also approximately 600 firewood dealers and other forest products businesses in these counties. An undetermined number of these businesses are small businesses.

It is not anticipated that local governments will be involved in the shipment of regulated articles from the quarantine area.

2. Compliance requirements:

There is no approved protocol to diagnose or treat nursery stock, since approved methods (*e.g.* debarking) would kill the plants. All regulated parties in the quarantine area established by the regulations will be required to obtain certificates and limited permits in order to ship other regulated articles (*e.g.* firewood and forest products) from that area. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

It is not anticipated that local governments will be involved in the shipment of regulated articles from the quarantine area.

3. Professional services:

In order to comply with the regulations, small businesses shipping regulated articles from the quarantine area will require professional inspection services, which will be provided by the Department, the Department of Environmental Conservation (DEC) or the United States Department of Agriculture (USDA).

It is not anticipated that local governments will be involved in the shipment of regulated articles from the quarantine area.

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 rule: None

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

There are 79 nurseries in Cattaraugus and Chautauqua Counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol to diagnose or treat nursery stock, since approved methods (*e.g.* debarking) would kill the plants. Regulated parties exporting other types of host materials (*e.g.* firewood and forest products) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. 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 $1,000.00.

Most shipments will be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of $25 per hour.

Tree removal services would have the option to leave host materials within the quarantine area or transport them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

It is not anticipated that local governments will be involved in the shipment of regulated articles from the quarantine area.

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 quarantine area to only those parts of New York State near or where the Emerald Ash Borer has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Emerald Ash Borer 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 regulations minimize 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 the Emerald Ash Borer quarantine.

On June 25, 2009, the Department sent a letter to licensed nursery growers and nursery dealers, providing information regarding the threat the Emerald Ash Borer is posing to the State's ash trees and the State's response to that threat.

On June 25, 2009, the Department sent a letter to licensed nursery growers and nursery dealers, providing information regarding the threat the Emerald Ash Borer is posing to the State's ash trees and the State's response to that threat.

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to control the artificial spread of this pest. Representatives of the Empire State Forrest Products Association, New York State Nursery Landscape Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

On July 14, 2009, the Empire State Forrest Products Association hosted an informational meeting on the Emerald Ash Borer in Randolph, New York. Approximately 90 people attended this informational meeting. A general public meeting on the Emerald Ash Borer was held following the informational meeting. Approximately 150 people attended the public meeting.

Those in attendance at the meetings on July 9th and July 14th appeared to understand the threat posed by the Emerald Ash Borer and expressed support for the regulations. Outreach efforts will continue.

The Department is also working with DEC and the USDA in surveying and inspecting susceptible trees in and around the area where the Emerald Ash Borer was detected in New York State in hopes of containing this pest.

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 regulated articles (exclusive of nursery stock) from the quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a certificate of inspection. Most shipments, however, will be made pursuant to compliance agreements.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The regulations establishing an Emerald Ash Borer quarantine in

Cattaraugus and Chautauqua Counties would affect the nursery dealers, nursery growers and landscaping companies located within those counties. There are 79 such businesses in these counties. There are also approximately 600 firewood dealers and other forest products businesses in these counties. All of these businesses are in rural areas as defined by section 481(7) of the Executive Law.

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

There is no approved protocol to diagnose or treat nursery stock, since approved methods (*e.g.* debarking) would kill the plants. All regulated parties in the quarantine area established by the regulations will be required to obtain certificates and limited permits in order to ship other regulated articles (*e.g.* firewood and forest products) from that area. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

In order to comply with the regulations, all regulated parties shipping regulated articles from the quarantine area will require professional inspection services, which would be provided by the Department, the Department of Environmental Conservation (DEC) and the United States Department of Agriculture (USDA).

3. Costs:

There are 79 nurseries in Cattaraugus and Chautauqua Counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol to diagnose or treat nursery stock, since approved methods (*e.g.* debarking) would kill the plants. Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. 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 $1,000.00.

Most shipments will be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of $25 per hour.

Tree removal services would have the option to leave host materials within the quarantine area or transport them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the regulations were drafted to minimize adverse economic impact on all regulated parties, including those in rural areas. This is done by limiting the quarantine area to only those parts of New York State near and where the Emerald Ash Borer has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Emerald Ash Borer and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the regulations provide 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. Given all of the facts and circumstances, it is submitted that the regulations minimize adverse economic impact as much as is currently possible.

5. Rural area participation:

The Department has had ongoing discussions with representatives of various nurseries and arborists as well as members of the forestry industry, regarding the general needs and benefits of the Emerald Ash Borer quarantine. These regulated parties are located in rural areas.

On June 25, 2009, the Department sent a letter to licensed nursery growers and nursery dealers, providing information regarding the threat the Emerald Ash Borer is posing to the State's ash trees and the State's response to that threat.

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to control the artificial spread of this pest. Representatives of the Empire State Forrest Products Association, New York State Nursery Landscape Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

On July 14, 2009, the Empire State Forrest Products Association hosted an informational meeting on the Emerald Ash Borer in Randolph, New York. Approximately 90 people attended this informational meeting. A general public meeting on the Emerald Ash Borer was held following the informational meeting. Approximately 150 people attended the public meeting.

Those in attendance at the meetings on July 9th and July 14th appeared to understand the threat posed by the Emerald Ash Borer and expressed support for the regulations. Outreach efforts will continue.

The Department is also working with DEC and the USDA in surveying and inspecting susceptible trees in and around the area where the Emerald Ash Borer was detected in New York State in hopes of containing this pest.

Job Impact Statement

The rule will not have a substantial adverse impact on jobs or employment opportunities and in fact, will likely aide in protecting jobs and employment opportunities for now and in the future. 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.

By establishing an Emerald Ash Borer quarantine in Cattaraugus County, the rule is designed to prevent the further spread of this pest to other parts of the State. There are an estimated 750-million ash trees in New York State (excluding the Adirondack and Catskill Forest Preserves), with ash species making up approximately seven percent of all trees in our forests. A spread of the infestation would have very adverse economic consequences to the nursery, forestry and wood-working (*e.g.* lumber yard, flooring and furniture and cabinet making) industries of the State, due to the destruction of the regulated articles upon which these industries depend. Additionally, a spread of the infestation could result in the imposition of more restrictive quarantines by the federal government, other states and foreign countries, which would have a detrimental impact upon the financial well-being of these industries.

By helping to prevent the spread of the Emerald Ash Borer, 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 and wood-working industries.

Office of Alcoholism and Substance Abuse Services

EMERGENCY RULE MAKING

Detoxification of Substance and Stabilization Services

I.D. No. ASA-49-08-00009-E
Filing No. 862
Filing Date: 2009-07-22
Effective Date: 2009-07-22

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 and 19.40

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, prescription and availability of buprenorphine along with the ability to administer any 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: Detoxification of substance and stabilization services.

Purpose: To repeal and add Part 816 services that are in statutory alignment with the 2008-2009 Article 7 of the Executive budget.

Substance of emergency rule: The emergency regulation would revise Part 816 of Title 14 of the New York Codes, Rules and Regulations (Chemical Dependence Crisis Services) 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 emergency regulation 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 emergency 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 regulation also defines the differences in the two services.

The emergency 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 regulation has 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 emergency 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 emergency regulation would reduce the amount of paperwork in both the inpatient and outpatient medically managed and medically supervised setting. The regulation no longer requires vocational and education 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 emergency 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 emergency 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 emergency 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.

In addition, the section entitled 816.12, savings and renewal clause has been added in order to provide continuity of the operating certificate during rule proposal and rule promulgation.

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 September 19, 2009.

Text of rule and any required statements and analyses may be obtained from: Deborah Egel, RN, CARN, Esq, OASAS, 1450 Western Ave., Albany, NY 12203, (518) 485-6244, email: DeborahEgel@OASAS.state.ny.us

Regulatory Impact Statement

The emergency Chemical Dependence Withdrawal and Stabilization Services regulations are being promulgated 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. Promulgating this emergency 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:

o 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).

o In 2010 the per diem rate will be evenly split between these two components.

o 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).

o 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 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 all options and make recommendations on chemical dependence crisis services. The Task Force published recommendations in January 2008. To the extent possible the emergency Part 816 regulations reflect the task force recommendations.

OASAS continues to elicit comments on the regulation. 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. Many comments were received, reviewed and changes were made. Additionally, these proposed regulations were shared with New York State Alcoholism and Substance Abuse Providers (NYSASAP).

Finally, the regulation was 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 complaint 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 emergency 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 emergency 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 recordkeeping and reporting requirements of the emergency 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 out weigh any potential minimal costs.

Small Business and Local Government Participation: The 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 emergency Part 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 upstate and downstate, as well as urban and rural programs.

Job Impact Statement

The implementation of an emergency 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 emergency 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.

Assessment of Public Comment

The agency received no public comment

Department of Audit and Control

NOTICE OF ADOPTION

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

I.D. No. AAC-42-08-00002-A
Filing No. 864
Filing Date: 2009-07-23
Effective Date: 2009-08-12

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

Action taken: Amendment of sections 315.4 and 315.5 of Title 2 NYCRR.

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

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

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

Text or summary was published in the October 15, 2008 issue of the Register, I.D. No. AAC-42-08-00002-P.

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

Revised rule making(s) were previously published in the State Register on May 27, 2009.

Text of rule and any required statements and analyses may be obtained from: Jamie Elacqua, Office of the State Comptroller, 110 State Street, Albany, New York 12306, (518) 473-4146, email: JElacqua@osc.state.ny.us

Assessment of Public Comment

The agency received no public comment.

State Commission of Correction

NOTICE OF ADOPTION

OCFS Secure Facilities

I.D. No. CMC-10-09-00001-A
Filing No. 866
Filing Date: 2009-07-23
Effective Date: 2009-08-12

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

Action taken: Addition of Subtitle AA, Chapter III to Title 9 NYCRR.

Statutory authority: Correction Law, sections 45(6-b) and (10)

Subject: OCFS secure facilities.

Purpose: To enact minimum standards and regulations for the management of secure facilities operated by OCFS.

Text or summary was published in the March 11, 2009 issue of the Register, I.D. No. CMC-10-09-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Brian M. Callahan, Associate Attorney, New York State Commission of Correction, 80 Wolf Road, 4th Floor, Albany, New York 12205, (518) 485-2346, email: Brian.Callahan@scoc.state.ny.us

Assessment of Public Comment

The State Commission of Correction (hereinafter ''Commission'') received formal comment from collective members of the New York State Office of Children and Family Services' Independent Review Board (hereinafter ''Board'') and Nancy Ginsburg, Director, Adolescent Intervention and Diversion Project, and Steven Banks, Attorney-In-Chief, of the Legal Aid Society of New York City (hereinafter ''Legal Aid''). The Board is a statutorily created advisory board which serves to advise the Commissioner of OCFS on matters pertaining to young people in care and on all matters addressed by the Office of the Ombudsman. Legal Aid is the nation's largest and oldest provider of legal services to poor families, contracting with the City of New York to represent, among others, hundreds of juvenile offenders annually facing sentences in Office of Children and Family Services (hereinafter ''OCFS'') secure facilities.

Initially, the Commission would like to extend its appreciation to both the Board and Legal Aid for the comments and suggestions provided. Although such propositions are not incorporated into the Commission's final adoption, it should be noted that Commission staff found several of the suggestions to be potentially beneficial and worthy of further study and possible future incorporation. While an assessment of the comments received follows, the word limitation thereon prohibits a thorough examination.

As required by section 45(6-b) of the Correction Law, the regulations herewith adopted were developed in consultation with OCFS and are ''minimum standards'' for the care, custody, rehabilitation, treatment, supervision, discipline and other programs of secure facilities operated by OCFS. This adoption signifies the beginning of both the oversight relationship between the Commission and OCFS, as well as the Commission's involvement in correctional facilities operated for the confinement of juveniles. The Commission is not under the illusion that the adopted regulations, in their current form, will continue to serve the needs of either agency in perpetuity. Rather, the current regulations were negotiated and agreed to by the Commission and OCFS as the optimal initial regulatory body with which to initiate their oversight and regulatory relationship. Following adoption, the regulations will move beyond mere concept and be subject to actual practice and facility evaluations by Commission staff, a process which regularly demonstrates the need for additional or improved minimum standards and exposes existing regulations which are impractical or ineffective. As the adopted regulations are thus not ''set in stone,'' several of the comments received may be revisited where revision is required.

With regard to specific comments and in the interest of efficiency, comments contained in both submissions will be addressed first. The Board noted that the ''correctional tenor of these complex proposed regulations is out of step with OCFS' present direction...'' while Legal Aid opined that the regulations should ''provide direction for OCFS to move away from the traditional model based on adult correctional practices...'' In charging the Commission with oversight and regulatory responsibilities, the Legislature added OCFS secure facilities to the definition of ''correctional facility'' provided by section 40(3) of the Correction Law. Further, a secure facility is statutorily defined by section 504-a(1) of the Executive Law as ''characterized by physically restricting construction, hardware and procedures.'' Nevertheless, the Commission is of the opinion that the adopted regulations, while ''correctional'' in the endeavour to ensure facility safety and security, also allow OCFS and its staff the capability to employ a therapeutic model and environment for the rehabilitation of the residents confined therein.

The comments of Legal Aid provide that ''[i]t is critical that the regulation encourages and permits necessary reform in OCFS secure facilities,'' and thus urges the Commission ''to incorporate specific guidance criteria to steer the agency to compliance with best practices,'' including ''[a]doption of a therapeutic model acknowledging the youths' social needs and developmental potential has been proven to yield better results for incarcerated youth'' and the ''implementation of a system which addresses the root causes of misbehavior, rather than a punitive model which warehouses teenagers.'' Similarly, the Board comments that ''a therapeutic, trauma informed environment that recognizes and addresses the unique stages of adolescent development in regulating behaviour is what is needed for positive change.'' While the Commission does not entirely disagree with these positions, establishing requirements for compliance with established best practices is not the Commission's regulatory role. Although the Commission has been granted oversight and regulatory responsibility of secure facilities, it remains the statutory function and duty of OCFS to ''establish, operate and maintain treatment programs and other services for youth placed with or committed to'' OCFS, and ''to advance the moral, physical, mental and social well-being of the youth in this state.'' Executive Law § 501. With specific regard to secure facilities, OCFS is charged with providing appropriate services to the residents, including ''residential care, educational and vocational training, physical and mental health services, and employment counselling.'' Executive Law § 504-a(2). While the Commission has oversight and regulatory responsibility to establish ''minimum standards'' for the operation of secure facilities, it is not the Commission's statutory role to dictate OCFS policy with regard to best practices of care, treatment and rehabilitation.

The complicated balance between oversight and policymaking is dem-

onstrated by the comments received regarding resident exercise, wherein Part 7418 generally requires 45 minutes of outdoor exercise per day. While Legal Aid recommended ''opportunities for exercise and constructive leisure-time activity'' for at least 2 hours on school days and 3 hours on nonschool days, the Board opined that the adopted 45 minute requirement ''is not possible, particularly when daylight is so short... in light of other, countervailing requirements regarding mandatory school attendance.'' Considering the Commission's position that daily outdoor exercise is imperative to promote both resident physical fitness and facility security by relieving resident tension, together with assurances received from OCFS that the 45 minute requirement could be accomplished, the regulation will be adopted as proposed.

In addition to the above comments, the Board commented that the regulations failed to address the Office of the Ombudsman and ''the special role that the Office of the Ombudsman has to play in addressing the needs of children and young adults in OCFS' care.'' The Commission respectfully disagrees with this assertion, as the regulations require the facility written rules to notify residents of the availability of the Ombudsman [section 7403.10(a)(13)], include the Ombudsman with a resident's right to legal counsel [section 7421.1(c)], allow for resident visitation with the Ombudsman [section 7422.4(a)], and designate correspondence to and from the Ombudsman as privileged [section 7423.4(a)].

Lastly, the Board requests that the Commission withdraw the proposed regulations ''pending issuance and review of the report and recommendations from the Governor's Task Force on Transforming the Juvenile Justice System.'' While the Commission anticipates the issuance of the Task Force's findings and welcomes any recommendations therefrom, the Correction Law's statutory mandate to promulgate minimum standards for OCFS secure facilities may not be set aside for such a reason.

Legal Aid also requests that promulgation of the regulations be held in abeyance, for the purpose of holding public hearings to hear from ''national and local experts with tremendous experience in the field of juvenile corrections.'' It should be noted that, in addition to collaborative efforts of experienced OCFS and Commission staff, the regulations were also subject to an external review committee of juvenile justice professionals whose comments and suggestions were incorporated into the final product. As a public hearing is not required by the State Administrative Procedure Act, together with the Commission's statutory mandate to promulgate minimum standards for OCFS secure facilities, the request for a public hearing is denied.

Throughout its comments, Legal Aid requests that the minimum standards provide ''guidance'' to OCFS with regard to several issues. The Commission finds that regulations are an improper vehicle for guidance, and expects OCFS to establish and maintain appropriate policies and procedures. Additionally, Legal Aid requests additional standards of mandatory incident reporting, which the Commission finds to be unnecessary, noting such data would be available upon request pursuant to Correction Law § 44(4). The following is a brief synopsis of Legal Aid's specific regulation comments not addressed above, by section, together with the Commission's response thereto:

§§ 7404.3-7404.7

Legal Aid requests that the language used, including the term ''security post,'' be flexible to ensure compliance should a secure facility become ''less traditionally correctional.'' The term security post is generally a work station in a housing unit at which staff can hear the activities of each resident and intervene accordingly, and is therefore necessary.

§ 7404.9

Legal Aid comments that the regulation is unclear as to what, if any, law applies to the use of physical force and mechanical restraints in OCFS facilities. The allowable uses of physical force, in a secure facility and elsewhere, are governed by Article 35 of the Penal Law. Additionally, Legal Aid proposes, in this and several other sections, that the regulations require certain incidents and outcomes to be reported to the statewide child abuse hotline. Finding that such hotline is controlled both by statute and the regulations of another agency, together with the fact that section 413 of the Social Services Law lists staff of OCFS facilities as ''mandatory reporters,'' the Commission finds that such a requirement would be improper and oftentimes duplicitous.

§§ 7405.2 and 7405.6

Legal Aid requests that the written rules of resident conduct be translated into Spanish or any other primary language of a resident. Additionally, it is requested that an impartial advocate be assigned to residents charged with serious rule violations, and that a proscription be listed of non-allowable sanctions. The Commission elects to maintain the language of the regulations as proposed, which require ''reasonable efforts of assistance'' be provided to incapable residents charged with rule violations, but will monitor the circumstances to determine if stricter regulation is justified. Considering section 7405.7 provides a list of allowable disciplinary sanctions, it would appear unnecessary to also list all non-allowable sanctions.

Part 7410

Legal Aid requests that the regulation provide additional protections and assurances for residents diagnosed with HIV/AIDS, mirroring similar Commission regulations previously established for adult correctional facilities. Finding that such protections are already provided by OCFS regulations and Article 27-F of the Public Health Law, the Commission finds such addition to be unnecessary.

§§ 7416.1 and 7416.2

Legal Aid proposes additional regulations for resident educational services, pertaining to time periods of enrolment, time periods of instruction, adequacy of staff and assessments, etc. The Commission views the requested additional regulations to be in the purview of the New York State Education Department.

§ 7417.3

Legal Aid requests that residents be afforded additional portions of meals and fresh fruit and vegetables if requested, evening snacks, and two hot meals daily. While OCFS is free to so provide, the Commission finds it sufficient as a minimum standard that meals are certified by a dietician to provide the necessary calories and nutrients.

§§ 7420.4 and 7420.7

Legal Aid requests that grievance procedures and ombudsman information be posted next to each grievance box. The Commission finds it sufficient to provide such information in the resident handbook.

§ 7421.3

Legal Aid requests that OCFS report any resident request for legal counsel that went unmet. The Commission finds this unnecessary as OCFS is not required to provide legal counsel, only access thereto.

Part 7422

Legal Aid comments that arrangements must be made to allow confidential visits with attorneys and that visitation rights should not be restricted, except where there exists a substantial justification. The Commission finds that the existing regulations provide for such safeguards, in that attorney visits may only be monitored visually [7421.3(b)], and that visitation may only be limited where it would constitute ''a threat to the safety, security or good order of the facility or the safety, security or health of the resident or be detrimental to the resident's treatment and rehabilitation program'' [7422.7(a)].

Part 7435

Legal Aid requests that OCFS permit deathbed visits to individuals not of the biological family, but ''who have a place in the youth's life similar to family.'' The Commission finds such a standard problematic to both regulate and employ at the facility level, where such determinations must often be made instantaneously.

Department of Correctional Services

NOTICE OF ADOPTION

Forwarding Inmate Mail

I.D. No. COR-19-09-00001-A

Filing No. 867

Filing Date: 2009-07-24

Effective Date: 2009-08-12

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

Action taken: Amendment of Part 722 of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Forwarding Inmate Mail.

Purpose: To provide clarity and to update current Department policy and practice with US Postal Service rules and practices.

Text or summary was published in the May 13, 2009 issue of the Register, I.D. No. COR-19-09-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Contraband Drugs

I.D. No. COR-20-09-00020-A
Filing No. 868
Filing Date: 2009-07-24
Effective Date: 2009-08-12

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

Action taken: Amendment of sections 1010.3, 1010.4(b), (c), (e) and (f) and 1010.5; addition of sections 1010.5(e), 1010.6, 1010.7 and 1010.8; and repeal of section 1010.4(h) and (i) of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Contraband Drugs.

Purpose: To provide clarity for staff and to ensure consistency between department policy and the corresponding section of 7 NYCRR.

Text or summary was published in the May 20, 2009 issue of the Register, I.D. No. COR-20-09-00020-P.

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

Text of 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

Assessment of Public Comment
The agency received no public comment.

Division of Criminal Justice Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Forensic Laboratory Accreditation & the State DNA Databank

I.D. No. CJS-32-09-00006-P

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

Proposed Action: Amendment of sections 6190.1(a)(8), (9) and (11), 6192.1(t), 6192.3(a) and (b) and 6192.4 of Title 9 NYCRR.

Statutory authority: Executive Law, sections 837(13), 995-b(1) and 995-c

Subject: Forensic laboratory accreditation & the State DNA Databank.

Purpose: To update references to documents incorporated by reference and the address of the Department of State.

Text of proposed rule: 1. Paragraphs (8), (9), and (11) of subdivision (a) of section 6190.1 of Title 9 NYCRR are amended to read as follows:

(8) The term ASCLD/LAB refers to the American Society of Crime Laboratory Directors/Laboratory Accreditation Board. Current ASCLD/LAB accreditation guidelines are contained in the [2003] *2008* edition of the ASCLD/LAB *Legacy* manual *and the 2006 edition of the ASCLD/LAB International manual*, which may be obtained from the ASCLD/LAB, 139 Technology Drive, Garner, NC 27529. These guidelines may also be viewed at the Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, and the Department of State, [41 State Street] *One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231.

(9) The phrase Quality Assurance Standards for Forensic DNA Testing Laboratories refers to standards recommended by the Federal DNA Advisory Board, and approved by the Director of the Federal Bureau of Investigation [on July 15, 1998], which took effect [October 1, 1998] *July 1, 2009*. These standards may be obtained from the Federal Bureau of Investigation, Laboratory Division, [935 Pennsylvania Avenue, N.W., Washington, DC 20535] *2501 Investigation Parkway, Quantico, Va. 22135*. These standards may also be viewed at the Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, and the Department of State, [41 State Street] *One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231.

(11) The term ABFT refers to the American Board of Forensic Toxicology, Inc. The current ABFT laboratory accreditation program is found in the [2002] *2006* Forensic Toxicology Laboratory Accreditation Manual, which may be obtained from ABFT, [Administrative Office, P.O. Box 669] *410 North 21st Street*, Colorado Springs, CO [80901-0669] *80904*. This program may also be viewed at the Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, and the Department of State, [41 State Street] *One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231.

2. Subdivision (t) of section 6192.1 of Title 9 NYCRR is amended to read as follows:

The term NDIS [Standards for Acceptance of] DNA Data *Acceptance Standards* refers to the document prepared by the FBI specifying the requirements for DNA data to be accepted for searching and storage at the national level, which was [authored] *created* by the FBI, Laboratory Division, [935 Pennsylvania Avenue, NW, Washington, DC 20535] *2501 Investigation Parkway, Quantico, Va. 22135*, [effective] *on* January 11, 2000 *and revised May 4, 2005*. This document may be reviewed at the Division of Criminal Justice Services, Four Tower Place, Albany, NY 12203, and the Department of State, [41 State Street] *One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231.

3. Subdivisions (a) and (b) of section 6192.3 of Title 9 NYCRR are amended to read as follows:

(a) The DNA databank shall be comprised of data generated from DNA testing methods approved in the NDIS [Standards for Acceptance of] DNA Data *Acceptance Standards*. Loci required for the upload of authorized DNA profiles to the national system shall be in accordance with the NDIS [Standards for Acceptance of] DNA Data *Acceptance Standards*.

(b) Casework evidence DNA profiles to be maintained in the DNA databank shall be comprised of information for at least six of the STR loci or other combinations of loci using alternative technologies approved for use in the NDIS [Standards for Acceptance of] DNA Data *Acceptance Standards*. This requirement for a minimum number of loci applies only to those casework evidence DNA profiles which an authorized laboratory desires to have maintained in the forensic index of the DNA databank.

4. Section 6192.4 of Title 9 NYCRR is amended to read as follows:

6192.4 Accuracy and completeness of DNA records. The accuracy and completeness of all DNA records maintained as part of the DNA databank will be assured through compliance with laboratory accreditation standards as promulgated by the commission in Part 6190 of this Title. In addition, accuracy and completeness of all DNA records maintained as part of the DNA databank will be assured through compliance by all forensic DNA laboratories with the requirements of the NDIS [Standards for Acceptance of] DNA Data *Acceptance Standards*. Each DNA profile (for either convicted offender or forensic samples) submitted must be certified by the submitting laboratory as being associated with the appropriate controls and blanks. Copies of all official correspondence between the DNA databank and participating laboratories will be maintained in the appropriate division file.

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

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

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

Regulatory Impact Statement

1. Statutory authority: Executive Law sections 837(13), 995-b(1), and 995-c(1).

2. Legislative objectives: The Commission on Forensic Science is established pursuant to Executive Law section 995-a. Although it is technically an independent entity, the Commission has no staff or budget and relies on the Division of Criminal Justice Services for the staff, administrative assistance, and other resources necessary to carry out it powers and duties. Pursuant to Executive Law section 995-b(1), the Commission must ''develop minimum standards and a program of accreditation for all forensic laboratories in New York state.'' The forensic laboratory accreditation program became effective in 1996. Since the inception of the forensic laboratory accreditation program, the minimum standards and program of accreditation developed by the Commission pursuant to Executive Law section 995-b(1) have been promulgated by the Division of Criminal Justice Service in Part 6190 of Title 9 of the NYCRR.

In addition, Executive Law section 995-c(1) authorizes the Commissioner of the Division of Criminal Justice Services to promulgate a plan for the establishment of a computerized State DNA identification index within the Division. The State DNA identification index became operational in 1996. Since 1996, the plan for the establishment of the State DNA identification Index has been promulgated by the Division of Criminal Justice Service in Part 6192 of Title 9 of the NYCRR.

The proposed rule updates (1) references to accreditation manuals and other documents which are incorporated by reference in Parts 6190 and

6192; and (2) addresses for accrediting entities, the FBI Laboratory, and the Department of State.

3. Needs and benefits: Regulations must set forth the current edition of a document incorporated by reference. Accreditation and DNA testing documents are updated periodically, necessitating amendment of the regulation each time they are so updated. In addition, the Department of State recently moved its offices and the correct address must be referenced in the regulations.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: None.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: None.

c. The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The cost analysis is based on the fact the proposal does not make any substantive changes to either the laboratory accreditation program or the DNA Databank implementation plan.

5. Local government mandates: There are no new programs, service, duties, or responsibilities imposed by the rule upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: There are no new reporting requirements, forms, or other paperwork that would be required as a result of the rule.

7. Duplication: No other legal requirements of the state and federal governments, duplicate, overlap, or conflict with the rule.

8. Alternatives: None. Regulations must set forth the current edition of a document incorporated by reference.

9. Federal standards: There are no applicable federal standards.

10. Compliance schedule: Regulated parties are expected to be able to comply with the rule immediately.

Regulatory Flexibility Analysis

1. Effect of rule: The proposed rule applies to 22 State, county, and city laboratories. The proposed rule does not apply to small businesses.

2. Compliance requirements: None. There are no reporting, recordkeeping, or other affirmative acts that a small business or local government will have to undertake to comply with the rule.

3. Professional services: No professional services will be needed to comply with the proposed rule.

4. Compliance costs: None. The proposed rule does not make any substantive changes to either the accreditation program or the DNA Databank implementation plan.

5. Economic and technological feasibility: No economic or technological impediments to compliance have been identified.

6. Minimizing adverse impact: Because the proposed rule does not make any substantive changes to either the accreditation program or the DNA Databank implementation plan no adverse impacts were identified.

7. Small business and local government participation: The Commission on Forensic Science reviewed and approved this proposal. The Commission members includes four members representing local laboratories and municipal governments. The proposed rule does not apply to small businesses.

Rural Area Flexibility Analysis

Regulations must set forth the current edition of a document incorporated by reference. The proposed rule updates (1) references to accreditation manuals and other documents which are incorporated by reference in Parts 6190 and 6192; and (2) addresses for accrediting entities, the FBI Laboratory, and the Department of State. It does not make any substantive changes to either the laboratory accreditation program or the State DNA identification index implementation plan. There are no reporting, recordkeeping, professional services, or other affirmative acts that that are likely to be needed in a rural area to comply with the rule. It is apparent from the nature and purpose of the proposal that it will not impose any adverse impact on rural areas.

Job Impact Statement

Regulations must set forth the current edition of a document incorporated by reference. The proposed rule updates (1) references to accreditation manuals and other documents which are incorporated by reference in Parts 6190 and 6192; and (2) addresses for accrediting entities, the FBI Laboratory, and the Department of State. It does not make any substantive changes to either the laboratory accreditation program or the State DNA identification index implementation plan. It is apparent from the ministerial nature and purpose of the proposal that it will have no impact on jobs and employment opportunities.

Education Department

EMERGENCY RULE MAKING

Definition of Unprofessional Conduct and the Licensure Requirements for Certified Public Accountants and Public Accountants

I.D. No. EDU-26-09-00003-E

Filing No. 870

Filing Date: 2009-07-24

Effective Date: 2009-07-26

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

Action taken: Amendment of sections 29.10 and 52.13; repeal of Part 70 and addition of new Part 70 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6501(not subdivided), 6504(not subdivided), 6506(1), (2) and (6), 6507(2)(a), (3), (4)(a), 6508(1), 7401, 7401-a, 7402, 7404, 7406, 7406-a, 7408, 7409 and 7410; and L. 2008, ch. 651

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

Specific reasons underlying the finding of necessity: The proposed amendment implements the requirements of Chapter 651 of the Laws of 2008, which, among other things, expands the scope of practice of public accountancy; recognizes certain foreign education as an alternative to meeting the education requirements for licensure as a certified public accountant; allows the issuance of a foreign limited permit to applicants with professional qualifications determined to be significantly comparable to the licensure requirements of certified public accountants in New York State; authorizes the issuance of temporary permits to CPAs licensed in another state that the Board of Regents has determined to have significantly comparable CPA licensure requirements; permits out-of-state licensed CPAs to provide non-attest services in this State without a temporary practice permit in certain circumstances; amends the continuing professional education requirements for certified public accountants; and expands registration requirements for accounting firms. The statute becomes effective on July 26, 2009.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare, by timely implementing Chapter 651 of the Laws of 2008 to ensure that standards and procedures are in place by July 26, 2008, the effective date of Chapter 651 of the Laws of 2008, to establish firm registration standards and to ensure that certified public accountants and public accountants may apply for foreign limited permits and temporary practice permits and meet licensure standards and continuing professional education requirements in accordance with the provisions of the new law.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption as a permanent rule at its September 2009 Meeting.

Subject: Definition of unprofessional conduct and the licensure requirements for certified public accountants and public accountants.

Purpose: To implement Chapter 651 of the Laws of 2008.

Substance of emergency rule: The Commissioner of Education proposes to amend section 29.10 of the Rules of the Board of Regents and section 52.13 of the Regulations of the Commissioner of Education and repeal and repeal and add a new Part 70 to the Regulations of the Commissioner of Education, relating to the education, examination and experience requirements for licensure of certified public accountants; endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits; registration of accounting firms; continuing education requirements and the definition of unprofessional conduct. The following is a summary of the proposed amendment:

A new paragraph 13 is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents to define as unprofessional conduct in the practice of public accountancy a licensee's failure to meet certain competency requirements when supervising attest or compilation services or signing or authorizing someone to sign an accountant's report on financial statements. Required competencies include at least 1,000 hours of experience in the preparation or review of financial statements or reports on financial statements within the last five years; at least 40 hours of continuing education in the area of accounting, auditing or attest during

the three years immediately prior to the performance of such services; and maintaining the level of education, experience and professional conduct required by generally accepted accounting standards.

A new paragraph (14) is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents defining as unprofessional conduct a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy or uses the title ''certified public accountant'' or the designation ''CPA'' or the title ''public accountant'' or the designation ''PA''. Any certified public accountant or public accountant licensed in New York State who is not practicing public accountancy pursuant to Education Law section 7401 and does not use the title ''certified public accountant'' or the designation ''CPA'' or the title ''public accountant'' or designation ''PA'' may request an inactive status from the Department and will not be required to register with the Department.

A new subdivision (h) is added to section 29.10 of the Rules of the Board of Regents, defining as unprofessional conduct any willful or grossly negligent failure to comply with substantial provisions of Federal, State or local laws, rules or regulations governing the practice of public accountancy by a CPA licensed in another state or any firm that employs such CPA to perform non-attest services pursuant to Education Law section 7406-a.

A new subdivision (i) is added to section 29.10 of the Rules of the Board of Regents to amend the definition of unprofessional conduct to prohibit a licensee or the public accounting firm employing such licensee to directly or indirectly, offer, give, solicit, or receive or agree to receive, a commission for the referral of any product or service to a client if the licensee is performing: attest services; compilation services when the licensee expects, or reasonably might expect that a third party will rely upon the financial statements and the licensee's compilation report does not disclose a lack of independence; an examination of prospective financial information; and/or any other service that may require a licensee to utilize independent judgment. This subdivision does not prohibit the receipt of a payment by a licensee or firm for the purchase of a public accounting practice or retirement payments paid to individuals presently or formerly engaged in the practice of public accountancy or payments to their heirs or estates. The prohibitions apply during the period in which the licensee is engaged to perform any of the services defined in the subdivision and the period covered by any financial, accounting or related statements involved in such services. A licensee providing services other than those described in this subdivision may accept a commission for recommending products or services of a third party to a client, provided that the licensee discloses the receipt of the commission to the client. The provisions of this subdivision do not apply to licensees who perform accounting, management advisory, financial advisory, consulting or tax services for an entity that is not required to register with the department under Education Law section 7408.

Paragraph (1) of subdivision (b) of section 52.13 of the Regulations of the Commissioner of Education is amended to define specific curricular content in the professional accounting content area that is required for licensure and those subjects that may be taken to fulfill the credit hour requirement in this area for licensure. This paragraph is also amended to eliminate the requirement for mandatory subjects in the general business content area and replaces these requirements with a list of content areas that may be used to meet the credit hour requirement in this area for licensure.

Section 70.1 of the Regulations of the Commissioner of Education defines the practice of public accountancy and defines the professional skills and competencies used by a licensee when he/she performs accounting, management advisory, financial advisory, and tax services.

Section 70.2 defines the professional study requirements for licensure and requires an applicant to submit evidence of completion of a baccalaureate or higher degree in accountancy that is either registered with the Department; accredited by an acceptable accrediting body; or a degree that the Department has determined to be the substantial equivalent of a registered or accredited program. An applicant who applies for licensure on or after August 1, 2009 must have satisfactorily completed a curriculum of at least 150 semester hours in a program described above unless the applicant was licensed in another state prior to August 1, 2009, in which case, they may meet the education requirements through completion of at least 120 semesters in a program described above. An applicant who applies to the Department for licensure prior to August 1, 2009 is required to have satisfactorily completed a curriculum of at least 120 semester hours in a program prescribed in this section prior to August 1, 2009 and have submitted the required application forms for licensure to the Department prior to August 1, 2009. In lieu of meeting these education requirements and any experience requirements, the applicant may meet the following requirement: at least 15 years of full-time experience in the practice of public accountancy satisfactory to the State Board.

A new section 70.3 broadens acceptable experience for licensure to include providing any type of service or advice involving the use of accounting, attest, compilation, management advisory, financial advisory, tax or consulting skills under the direct supervision of a certified public accountant licensed in the United States or a public accountant licensed in New York. Two years of acceptable experience are required for applicants who meet the education requirement through completion of 120 semester hours and one year of acceptable experience is required for applicants who complete the education requirement through completion of 150 semester hours. Experience may be gained through employment in public practice, government, private industry or educational institutions. An applicant is required to obtain the necessary experience within 10 years of having passed the licensing examination or they will be required to complete continuing professional education, in an amount determined by the State Board for Public Accountancy.

A new section 70.4 defines the content, passing score and retention of credit criteria for the licensing examination. The proposed amendment provides students with the opportunity to apply for admission to the Uniform CPA Examination upon completion of 120 semester hours of professional study in a regionally accredited college or university which shall include at least one course in each of the mandatory professional accountancy content areas: financial accounting, cost or managerial accounting, taxation, and auditing and attestation services.

A new section 70.5 provides that a license as a certified public accountant in New York may be issued to an applicant licensed in another state or foreign country if the applicant has met licensure requirements significantly comparable to New York. An applicant licensed by a state with significantly comparable licensure requirements, meaning those states recognized by the Department to have significantly comparable requirements, is eligible for a license through endorsement. If the applicant was licensed in a state that did not have significantly comparable licensing requirements, the individual's credentials will be evaluated to determine if his or her credentials are significantly comparable to New York's requirements. In either case, the applicant shall demonstrate four years of professional experience in public accounting in the last 10 years immediately preceding the application for licensure by endorsement.

This section also permits licensure by endorsement of a foreign applicant with an acceptable license, certificate or degree from a foreign country with significantly comparable licensure requirements provided that the applicants meets certain requirements.

Section 70.6 authorizes the Department to issue a two-year limited permit to practice public accountancy in this State to a foreign credentialed accountant if the applicant meets certain requirements described in the proposed amendment. The regulation requires a $250 fee for issuance of the limited permit.

Section 70.7 authorizes CPAs licensed in another state, with a principal place of business in another state, to apply for a temporary practice permit in order to provide attest and compilation services in New York. The temporary practice permit is valid for up to 180 days during a twelve-month period and would be renewable no more than three times. The proposed regulations also require the submission of application materials and the payment of a $125 application fee and renewal fee.

Section 70.8 requires all firms, including sole proprietorships, partnerships, LLPs, LLCs, and PCs, to maintain a registration with the Department if the firm is performing attest or compilation services or using the title ''CPA'' or ''CPA firm'' or the title ''PA'' or ''PA firm''. Firms performing only non-attest services described in Education Law § 7401(3) are not required to, but may, register with the Department.

Section 70.9 implements statutory changes, deletes prior exemptions from mandatory continuing education for individuals who work in private industry or government and specifies that all registered CPAs and PAs are required to pay a $50 continuing education fee. Any licensee who does not engage in professional practice as defined in § 7401 may file a written request for an exemption from mandatory continuing education.

The proposed amendment also implements a statutory change in the tracking year for continuing education credit from a September 1 - August 31 year to a January 1 - December 31 year. The proposed amendment also allow licensees to meet their continuing education requirement by completing either 40 credits in any combination of the following subject areas: accounting, attest, auditing, taxation, advisory services, specialized knowledge and applications related to specialized industries, and such other areas appropriately related to the practice of accounting as may be acceptable to the Department or by completing 24 credits concentrated in any one subject area. Before this change, licensees were required to complete 40 credits in a combination of the following areas: accounting, auditing or taxation, or 24 credits concentrated, in either accounting, auditing or taxation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-09-00003-P, Issue of July 1, 2009. The emergency rule will expire October 21, 2009.

Text of rule and any required statements and analyses may be obtained from: Christine Moore, New York State Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-4921, email: cmoore@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6501 of the Education Law provides that in order for an applicant to qualify for a professional license, the requirements prescribed in the article for each particular profession must be met.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules in the supervision of the practice of the professions.

Subdivision (2) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules relating to pre-professional, professional other educational qualifications required for licensure in the professions.

Subdivision (6) of section 6506 of the Education Law authorizes the Board of Regents to endorse a license issued by a licensing board of another state or country.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (3) of section 6507 of the Education Law authorizes the State Education Department, assisted by the board for each profession, to establish standards for pre-professional and professional education, experience and licensing examinations as required to implement the article governing each profession, review qualifications in connection with licensing requirements and provide for licensing examinations and re-examinations.

Paragraph (a) of subdivision (4) of section 6507 of the Education Law authorizes the State Education Department to register or approve educational programs designed for the purpose of providing professional preparation which meet standards established by the Department.

Subdivision (1) of section 6508 of the Education Law authorizes the Board of Regents to appoint a State Board for Public Accountancy for the purpose of assisting the Board of Regents and the State Education Department on matters of professional licensing, practice, and conduct.

Chapter 651 of the Laws of 2008 amended sections 7401, 7402, 7404, 7406, 7407, 7408 and 7409 of the Education Law and adds new sections 7401-a and 7406-a and 7410 to the Education Law.

Section 7401 of the Education Law defines the practice of public accountancy.

Section 7401-a defines attest, certified public accountant or CPA, compilation, firm, principal place of business, public accountant or PA and State.

Section 7402 of the Education Law provides that only an individual licensed or otherwise authorized to practice shall practice public accountancy or use the title certified public accountant or public accountant.

Section 7403 of the Education Law establishes and defines the duties and responsibilities of the State Board for Public Accountancy.

Section 7404 of the Education Law defines the requirements for licensure as a certified public accountant.

Section 7406 of the Education Law authorizes the State Education Department to issue a limited permit to certain applicants licensed by another state which the Board of Regents has determined to have significantly comparable certified public accountant licensure requirements and to issue temporary permits to certified public accountants licensed by another state which the Board of Regents has determined to have significantly comparable licensure requirements, or whose individual licensure qualifications are verified by the Department to be significantly comparable to New York State's requirements. Temporary permits allow the holder to practice in New York State for an aggregate total of 180 days during a twelve month period beginning on the effective date of the permit.

Section 7406-a of the Education Law authorizes certified public accountants, licensed by another state and in good standing, to perform non-attest services in New York without a license or temporary practice permit and provides that certified public accountants performing such services agree to be subject to the disciplinary authority of the Board of Regents.

Section 7407 of the Education Law provides individual and corporate exemptions to the provisions of Article 149.

Section 7408 of the Education Law establishes a registration requirement for public accounting firms that perform attest and/or compilation services and professional services that are incident to attest and/or compilation services or that use the title CPA or CPA firm or the title PA or PA firm, including authorizing the Board of Regents to establish a registration process for public accounting firms. This section also restricts the use of certain titles and designations by non-licensed accountants and establishes reporting requirements for non-licensed accountants issuing financial statements.

Section 7409 of the Education Law establishes mandatory continuing education requirements for certified public accountants and public accountants and authorizes the Board of Regents to establish a registration process for continuing education sponsors.

2. LEGISLATIVE OBJECTIVES:

The proposed amendments to the Rules of the Board of Regents and to the Regulations of the Commissioner of Education are necessary to implement Chapter 651 of the Laws of 2008, which becomes effective on July 26, 2009.

3. NEEDS AND BENEFITS:

The proposed amendment is needed to implement Chapter 651 of the Laws of 2008. This legislation enhances public protection by ensuring that certified public accountants (CPAs) and public accountants (PAs) are professionally accountable for all of the business functions they currently perform by clarifying and expanding the statutorily regulated scope of practice. The law expands the scope of practice to include the types of services that involve the use of professional skills and competencies in matters related to accounting concepts, the recording of financial data or information, and the preparation or presentation of financial statements, including but not limited to management advisory, financial advisory, and tax preparation and advisory services. The proposed amendment would enhance public protection by requiring all licensees and firms to be registered with the Department when providing attest and compilation services; providing for temporary practice permits when out-of-state licensed CPAs perform attest and compilation services in New York and providing an exemption from participation in continuing professional education only for licensees who are not engaged in the practice of public accountancy.

Public protection is also enhanced by providing greater clarity regarding the issuance of foreign limited permits and requiring participation in mandatory continuing education for all CPAs, even if employed in private industry, government or academia and changes the requirement for complying with mandatory continuing education from a registration year to a calendar year. The law expands the recognized areas of continuing education study to those that contribute to professional practice and growth in professional knowledge, professional competence and ethics.

The existing law was also amended to specifically allow out-of-state licensed CPAs to perform non-attest services such as accounting, management advisory, financial advisory, and tax in New York without a temporary practice permit. As a condition of practicing in New York under this provision, the CPA and the firm that employs him or her agrees to be subject to the disciplinary authority of the Board of Regents.

The expanded definition of the scope of practice includes non-attest services provided by a licensed CPA or PA to one's employer not otherwise required to register with the Department. CPAs and PAs working for business corporations may be employed in positions that result in the payment of commissions or referral fees. The Rules of the Board of Regents need to be amended to clearly define unprofessional conduct for those instances when the acceptance of a commission or referral fee would impair a licensee's independence to perform attest and compilation services.

4. COSTS:

(a) Cost to State government: None.

(b) Cost to local government: There are no additional costs to local government.

(c) Cost to private regulated parties: The proposed amendment does not impose any costs beyond those imposed by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is (1) $50 for each office of the firm located in New York; and an additional; (2) $10 for the sole proprietor or each general partner of a partnership or limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is New York or who is otherwise authorized to practice in New York through a temporary practice permit. There is also a $250 fee for individuals applying for limited permits or a renewal of limited permits; $125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars ($50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404 any licensee who is required to register triennially with the Department at the beginning of each triennial registration period.

(d) Costs to the regulatory agency: As stated above in ''Costs to State Government,'' the proposed amendment will impose additional costs on

the State Education Department to implement new provisions of Education Law.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to the registration and use of a professional title or designation by certified public accountants (CPAs) and public accountants (PAs); to the performance of non-attest services by out-of-state licensed CPAs; the receipt of commissions and referral fees by CPAs and PAs; the registration of curricula in public accountancy programs. The amendment does not impose any programs, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendment requires public accounting firms that are established for the business purpose of lawfully engaging in the practice of public accountancy pursuant to Education Law section 7401(1) and (2) or that uses the title ''CPA'' or ''CPA firm'' or the title ''PA'' or ''PA firm'' to register with the Department.

The proposed amendment also requires any licensee that may accept a commission for recommending the products or services of a third party to the client to disclose the receipt of the commission to the client by way of a written disclosure statement to describe the product or service recommended the amount of the commission.

The proposed amendment also requires applicants seeking a limited permit or temporary permit to submit an application form to the Department.

7. DUPLICATION:

The proposed amendment does not duplicate any other existing State or Federal requirements, except as discussed below in the Federal Standards section.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

There are no Federal standards that relate to the registration of public accounting firms and/or the use of a professional title or designation by certified public accountants (CPAs) and public accountants (PAs); to the performance of non-attest services by out-of-state licensed CPAs or to the licensure requirements of CPAs and PAs.

However, the Sarbanes-Oxley Act of 2002 does address commission and referral fees for audit partners in public accounting firms.

Section 210-2.01(c)(8) of the Code of Federal Regulations provides, in pertinent part, as follows:

(8) Compensation. An accountant is not independent of an audit client if, at any point during the audit and professional engagement period, any audit partner earns or receives compensation based on the audit partner procuring engagements with that audit client to provide any products or services other than audit, review or attest services. Any accounting firm with fewer than ten partners and fewer than five audit clients that are issuers (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(f))) shall be exempt from the requirement stated in the previous sentence.

The proposed amendment prohibits licensed public accountants and certified public accountants from receiving a commission or referral fee for the product or service of a third party to a client when performing services that require a licensee's independent judgment. The proposed amendment is more restrictive than the federal law. The federal law only applies to a small segment of the engagements performed by CPAs and PAs employed by publicly traded companies and it only prohibits audit partners from receiving a commission fee, as opposed to the proposed amendment which prohibits all licensees performing certain audit and attest services from receiving commissions. The proposed amendment is needed to ensure public protection by maintaining the independent judgment of licensees when performing certain engagements that require independence.

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

(a) Small Businesses:

1. EFFECT OF RULE:

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants (CPAs) and public accountants (PAs) and to add provisions relating to the endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits and temporary practice permits, and to amend the definition of unprofessional conduct for CPAs and PAs licensed in New York State.

It is estimated that approximately 2,000 individuals apply for licensure as CPAs each year. As of January 2009, there are approximately 27,300 registered CPAs in New York, 160 registered PAs in New York, and 3,200 registered public accounting firms in New York State. Demographic information provided by the national membership organization of CPAs indicates that approximately 42% of its membership is employed in public accounting and approximately 48.5% of its members are employed in small firms with nine or fewer owners. Based on these statistics, approximately 5,500 CPAs and PAs are likely to be employed by approximately 1,550 small firms.

2. COMPLIANCE REQUIREMENTS:

The purpose of the proposed amendment is to establish in the definition of unprofessional conduct in the practice of public accountancy: (1) a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy pursuant to Education Law section 7401 or uses the title ''certified public accountant'' or the designation ''CPA'' or the title ''public accountant'' or the designation ''PA''; (2) any willful violation of any State, federal or local law by out-of-state licensed CPA performing non-attest services; and (3) a licensee's failure to meet certain competency requirements when a licensed CPA or PA supervises and signs or authorizes someone to sign the accountant's report on financial statements; and defines those instances when a licensed CPA or PA may accept a commission or referral fee and establishes disclosure requirements when such a fee is received.

The proposed amendment also amends the education, examination and experience requirements for licensure as a CPA in New York; the continuing education requirements for CPAs in New York; the registration process for public accounting firms and establishes, with limited exceptions; a process to issue limited permits to foreign credentialed accountants and temporary practice permits to CPAs licensed and in good standing in another state; and amends the process used to issue a license as a CPA to an individual licensed as a CPA in another state or a foreign country who substantially meets New York's licensure requirements.

3. PROFESSIONAL SERVICES:

The proposed regulation will not require any licensee or firm to hire any professional services to comply, including those that are considered ''Small Businesses''.

4. COMPLIANCE COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is (1) $50 for each office of the firm located in New York; and an additional; (2) $10 for the sole proprietor or each general partner of a partnership or limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is New York or who is otherwise authorized to practice in New York through a temporary practice permit. There is also a $250 fee for individuals applying for limited permits or a renewal of limited permits; $125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars ($50) to be collected from a licensee in addition to the triennial registration fee required by Education Law Section 7404.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed regulation will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and is economically feasible. See above ''Compliance Costs'' for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The Department believes that the requirements should apply to all firms, regardless of size, to ensure a uniformly high standard of professional practice in the practice of public accountancy. It is not unusual for small entities, including firms, not-for-profit organizations and local governments to contract with small accounting firms for audit services. Failure to apply the provisions of these regulations on a uniform basis could harm these small entities and the public by allowing small CPA firms to provide a lower standard of professional services than larger CPA firms.

7. SMALL BUSINESS PARTICIPATION:

The State Board for Public Accountancy, which includes members who have experience in a small business environment, assisted in the development of the proposed regulation. In addition, the State Education Department provided the New York State Society of Certified Public Accountants, which includes members who own and operate small businesses, with draft regulatory language concerning the proposed regulation and engaged in an ongoing conversation with this organization to ensure that their comments were addressed.

(b) Local Governments:

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experi-

ence requirements for licensure of certified public accountants and public accountants and add provisions relating to endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits, and to amend the definition of unprofessional conduct for certified public accountants and public accountants licensed in New York State. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis for local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect individuals who apply for licensure as certified public accountants (CPA), including those that are located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Each year about 1,750 individuals apply for licensure as a CPA. The Department estimates that about eight percent or about 140 of these individuals come from a rural county of New York State.

The proposed amendment also affects licensed CPAs and PAs who practice in a rural county in New York. As of January 13, 2009, the Department's records indicate that 2,206 licensed CPAs and 9 licensed PAs come from a rural county of New York State. In addition, the Department estimates that approximately 260 public accounting firms are located in a rural county in New York State.

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

The purpose of the proposed amendment is to establish in the definition of unprofessional conduct in the practice of public accountancy: (1) a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy pursuant to Education Law section 7401 or uses the title ''certified public accountant'' or the designation ''CPA'' or the title ''public accountant'' or the designation ''PA''; (2) any willful violation of any State, federal or local law by out-of-state licensed CPA performing non-attest services; and (3) a licensee's failure to meet certain competency requirements when a licensed CPA or PA supervises and signs or authorizes someone to sign the accountant's report on financial statements; and defines those instances when a licensed CPA or PA may accept a commission or referral fee and establishes disclosure requirements when such a fee is received.

The proposed amendment also amends the education, examination and experience requirements for licensure as a CPA in New York; the continuing education requirements for CPAs in New York; the registration process for public accounting firms and establishes, with limited exceptions; a process to issue limited permits to foreign credentialed accountants and temporary practice permits to CPAs licensed and in good standing in another state; and amends the process used to issue a license as a CPA to an individual licensed as a CPA in another state or a foreign country who substantially meets New York's licensure requirements.

The proposed amendment does not require any licensee or firm to hire any professional services to comply.

3. COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is (1) $50 for each office of the firm located in New York; and an additional; (2) $10 for the sole proprietor or each general partner of a partnership or limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is New York or who is otherwise authorized to practice in New York through a temporary practice permit. There is also a $250 fee for individuals applying for limited permits or a renewal of limited permits; a $125 fee for individuals applying for a temporary practice permit or a renewal of such permit. The proposed amendment also requires a mandatory continuing education fee of fifty dollars ($50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404.

4. MINIMIZING ADVERSE IMPACT:

The Department believes that these requirements should apply to all licensees and firms, regardless of whether or not they are located in a rural area, to ensure a uniform standard of professional practice in the practice of public accountancy. Failure to apply the provisions of these regulations on a uniform basis could harm the public by allowing certain CPA firms and licensees to provide a lower standard of professional services than other licensees or firms.

5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments from the State Board for Public Accountancy and the Society of Certified Public Accountants, which includes members located in all areas of New York State, including rural areas of the State.

Job Impact Statement

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants (CPAs) and public accountants (PAs) and add provisions relating to endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits, and to amend the definition of unprofessional conduct for CPAs and PAs licensed in New York State.

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

Department of Environmental Conservation

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Pesticide Applicator Certification and Direct Supervision Requirements

I.D. No. ENV-32-09-00002-P

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

Proposed Action: This is a consensus rule making to amend section 325.7 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, arts. 15, 33 and 71

Subject: Pesticide applicator certification and direct supervision requirements.

Purpose: To exempt persons authorized to apply 100% corn oil to bird eggs from pesticide applicator certification requirements.

Text of proposed rule: Add new paragraph 325.7 (a) (10) to read as follows:

(10) any person applying 100 percent corn oil to bird eggs as part of any wildlife control activity authorized by the department pursuant to Article 11 of the Environmental Conservation Law.

Text of proposed rule and any required statements and analyses may be obtained from: Bryan L. Swift, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8866, email: blswift@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.

Consensus Rule Making Determination

The purpose of this rule making is to exempt application of 100 percent corn oil to bird eggs from pesticide applicator certification and supervision requirements. The Department of Environmental Conservation does not anticipate any negative comments or objections from any party. Application of corn oil is an effective and humane way to prevent bird eggs from hatching, and is commonly used as part of wildlife control programs. Animal welfare organizations are among those who advocate egg-oiling as part of a humane population management program for overabundant Canada geese. Nuisance wildlife service providers should support this change since it reduces regulatory requirements for their services. Corn oil is a commonly used food product and is listed as a minimum risk pesticide by the Environmental Protection Agency, making it exempt from federal pesticide requirements. This rule making qualifies for consensus rule making since we do not anticipate receiving public comments in opposition to the proposal.

Job Impact Statement

The purpose of this rule making is to exempt application of 100 percent corn oil to bird eggs from pesticide applicator certification and supervision requirements. Application of corn oil is an effective way to prevent bird eggs from hatching, and is commonly used as part of wildlife control programs. However, many licensed wildlife control agents are not certified pesticide applicators, so they are unable to provide a full range of bird control services. Eliminating a regulatory requirement for authorized wildlife control purposes will allow more commercial wildlife control

agents to offer complete bird control services, which could have a positive impact on jobs. Therefore, the Department of Environmental Conservation has determined that this rule making will not have a substantial adverse impact on jobs or employment opportunities, and has concluded that a job impact statement is not required.

Department of Health

NOTICE OF ADOPTION

Physician Board Certification Entities

I.D. No. HLT-42-08-00017-A
Filing No. 865
Filing Date: 2009-07-23
Effective Date: 2009-08-12

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

Action taken: Amendment of section 1000.1(a) of Title 10 NYCRR.

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

Subject: Physician Board Certification Entities.

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

Text or summary was published in the October 15, 2008 issue of the Register, I.D. No. HLT-42-08-00017-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

Three sets of public comments were submitted to the New York State Department of Health (DOH) in response to this proposed regulation from the American Academy of Family Physicians (AAFP), American Board of Family Medicine, Inc. (ABFM) and The College of Family Physicians of Canada (CFPC).

Comment:

The AAFP stated that by eliminating the profile recognition of CFPC certification for family physicians the New York State Department of Health is indiscriminately denying deserved recognition for family physicians simply based upon the concern "that a physician could become board-certified in certain specialties by CFPC without sufficient rigorous training and experience."

Response:

DOH does not agree. First, DOH is proposing to eliminate the CFPC board certification from its regulatory definition of "board certification" for purposes of the NYS Physician Profile only, for all physicians and not just family physicians. Listing a physician on his/her profile as board-certified, when board-certified by CFPC, does not give the public a reasonable expectation that the physician has been both adequately trained and rigorously tested in the specialty area. DOH continues to believe that physicians can become board-certified in certain specialties by CFPC, without sufficient rigorous training and experience.

Comment:

The AAFP stated that a failure by New York State DOH to recognize board-certification by the CFPC would disenfranchise a substantial population of physicians practicing in New York and exacerbate the state's current shortages and mal-distributions of physicians. New York already suffers from difficulties in providing patient access to needed health care services, and would be severely impacted by an exodus of Canadian trained and certified physicians.

Response:

DOH disagrees. As proposed, this regulation only affects the NYS Physician Profile which provides additional on-line information intended to assist consumers in improving their healthcare decision-making. The DOH believes that the database should provide consumers with a reasonable expectation that a physician has been both adequately trained and vigorously tested in the specialty area. However, this is only one source of information available to the public and does not directly limit or expand a practitioner's scope or ability to practice.

Comment:

The CFPC and ABFM commented on an existing agreement, specifically: "Under a reciprocal agreement we have with the American Board, family physicians who hold our certification and immigrate to the U.S. may qualify to sit the ABFM exams if they are residency trained."

Response:

The DOH applauds the opportunity provided by ABFM because it recognizes that physicians need to be both vigorously tested and adequately trained to meet their board certification requirements. ABFM is included in the definition of "board certification" for purposes of physician profiling.

Insurance Department

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Valuation of Annuity, Single Premium Life Insurance, Guaranteed Interest Contract and Other Deposit Reserves

I.D. No. INS-32-09-00005-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 amend section 99.9 (Regulation 151) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 4217, 4240 and 4517

Subject: Valuation of Annuity, Single Premium Life Insurance, Guaranteed Interest Contract and Other Deposit Reserves.

Purpose: To adopt standards for the valuation of reserves for variable annuity and other contracts involving certain guaranteed benefits.

Text of proposed rule: Subdivisions (b) and (e) of section 99.9 are repealed and subdivisions (c) and (d) are relettered (b) and (c).

A new subsection 99.9(d) is added to read as follows:

(d) In the case of variable annuities and other contracts involving certain guaranteed benefits similar to those offered with variable annuities, standards for the valuation of reserves are governed by section 83.3 of this Title.

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

Data, views or arguments may be submitted to: Frederick Andersen, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-7929, email: fanderse@ins.state.ny.us

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

Consensus Rule Making Determination

Sections 201, 301, 1304, 4217, 4240, and 4517 of the Insurance Law establish the Superintendent's authority to issue guidelines for the application of the reserve valuation provisions to the policies and contracts that the Superintendent deems appropriate.

The Insurance Law, and the regulations promulgated thereunder, seek to maintain the solvency of insurers doing business in New York by, among other things, requiring all insurers and fraternal benefit societies authorized to do business in New York State, as well as all insurers holding a certificate from the Superintendent as being accredited for the reinsurance of insurance and annuities (collectively "insurers"), to hold adequate reserve funds in order to meet the obligations made to policyholders and contract holders. Insurance Law section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities for all outstanding insurance policies and contracts of every life insurance company doing business in this state. In turn, Insurance Law Section 4217(c)(6)(D) authorizes the Superintendent to issue guidelines for the application of the reserve valuation provisions of Section 4217 to the policies and contracts that the Superintendent deems appropriate.

Therefore, the Superintendent promulgated 1) New York Comp. Codes R. & Reg. ("NYCRR"), tit. 11, Section 99.9(b) of Part 99 ("Regulation 151"), which sets forth a methodology to calculate reserve liabilities for variable annuity contracts that provide minimum guaranteed death benefits that have the potential to exceed the account value, and 2) 11 NYCRR Section 99.9(e), which sets forth a methodology to calculate reserve liabilities for separate account contracts that provide guaranteed benefits, and for which the assets are valued at market, and that are not subject to the market value adjustment formulae set forth in 11 NYCRR Part 44.

In 2008, the National Association of Insurance Commissioners ("NAIC") adopted with considerable input from the Department a new reserve methodology that was incorporated into the 2009 NAIC Accounting Manual. Although 11 NYCRR Part 83 ("Regulation 172") adopted the 2009 NAIC Accounting Manual, it is subject to limitations elsewhere in the Insurance Law or the regulations promulgated thereunder, including Regulation 151. Because the new methodology addresses the same risks as the methodology currently contained in 11 NYCRR Sections 99.9(b) and (e), this amendment repeals 11 NYCRR Sections 99.9(b) and (e) so that the NAIC Accounting Manual will apply instead.

No person is likely to object to the rule. By adopting the reserve methodology contained in the NAIC Accounting Manual, the Department seeks to further a uniform national standard for valuing reserve liabilities for variable annuity contracts and other separate account contracts that contain certain guaranteed benefits, and ultimately create a level playing field for insurers. Furthermore, by adopting the national standard, an insurer need no longer prepare and file a separate New York actuarial certification and memorandum, which reflects the current reserve standards for variable annuities and other separate account contracts that contain certain guaranteed benefits.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. It changes the appropriate methodology to calculate and determine adequate reserves to help ensure the solvency of certain insurers doing business in New York by adopting the national standard for valuing reserve liabilities for variable annuity contracts and other separate account contracts that contain certain guaranteed benefits. The rule is likely to have no measurable impact on jobs and employment opportunities because existing personnel should be able to monitor the insurer's compliance with the revised reserve requirements. In addition, there should be no region in New York that would experience an adverse impact on jobs and employment opportunities. Finally, this rule would not have a measurable impact on self-employment opportunities.

Department of Labor

EMERGENCY RULE MAKING

Making Adjustments to the Regulations Dealing with the State Minimum Wage as Required by the Increase in the Federal Minimum Wage to Take Effect 7/24/09 and Adjusting Various Wage Allowances in the Same Proportion as this Minimum Wage Increase

I.D. No. LAB-32-09-00001-E

Filing No. 863

Filing Date: 2009-07-22

Effective Date: 2009-07-24

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

Action taken: Amendment of Parts 137, 138, 141, 142, 143 and 190 of Title 12 NYCRR.

Statutory authority: Labor Law, art. 19, sections 652(2) and 673(1)

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

Specific reasons underlying the finding of necessity: The federal minimum wage will increase to $7.25 per hour on July 24, 2009. Current State law (Labor Law Section 652(1)) provides that the State minimum wage shall be $7.15 ''or, if greater, such other wage as may be established by federal law pursuant to 29 U.S.C. section 206 or its successors.'' Labor Law Section 652(2) provides that all minimum wage orders shall be modified to increase all monetary amounts therein in the same proportion as the increase in the hourly minimum wage as provided in subdivision one of that section. Therefore, the July 24, 2009 increase in the federal minimum wage mandates both an increase in the State minimum wage and a corresponding modification of the minimum wage orders.

Subject: Making adjustments to the regulations dealing with the State Minimum Wage as required by the increase in the Federal Minimum Wage to take effect 7/24/09 and adjusting various wage allowances in the same proportion as this minimum wage increase.

Purpose: To bring the State Minimum Wage into compliance with the Federal Minimum Wage to take effect 7/24/2009.

Substance of emergency rule: In compliance with Labor Law Section 652(2), due to the increase in the federal minimum wage to $7.25 per hour, the following modifications are made to existing Wage Orders:

12 NYCRR Part 137 (Minimum Wage Order for the Restaurant Industry)- increase the basic hourly minimum wage to $7.25 (137-1.2) with corresponding increases to tip allowance for service employees (137-1.4(a)), tip allowance for food service workers (137-1.5), uniform allowance (137-1.8), meal and lodging allowances (137-1.9), classification of executive work (137-3.2(c)(1)(i)), classification of administrative work (137-3.2(c)(1)(ii)).

12 NYCRR Part 138 (Minimum Wage Order for the Hotel Industry)- increase the basic hourly minimum wage to $7.25 (138-2.1(a)) with corresponding increases to tip allowance for service employees (138-2.1(b)), tip allowance for food service workers (138-2.1(c)), tip allowance for chambermaids in resort hotels (138-2.1(d)), uniform allowance (138-2.5), meal and lodging allowances (138-2.7), classification of executive work (138-4.4(c)(1)(i)), classification of administrative work (138-4.4(c)(1)(ii)).

12 NYCRR Part 141 (Minimum Wage Order for the Building Service Industry)- increase the basic hourly minimum wage to $7.25 (141-1.3) with corresponding increases to unit rate for janitors in residential buildings (141-1.2), allowances for utilities (141-1.6), uniform allowance (141-1.8), unit rate limitations (141-2.8), classification of executive work (141-3.2(c)(1)(i)), classification of administrative work (137-3.2(c)(1)(ii)).

12 NYCRR Part 142-2 (Minimum Wage Order for Micellaneous Industries except nonprofitmaking institutions)- increase the basic hourly minimum wage to $7.25 (142-2.1) with corresponding increases to meal and lodging allowances (142-2.5)(a)), uniform allowance (142-2.5(c)), classification of executive work (142-2.14(c)(4)(i)), classification of administrative work (142-2.14(c)(4)(ii)).

12 NYCRR Part 142-3 (Minimum Wage Order for nonprofitmaking institutions that have not elected to be exempt from coverage under a minimum wage order)- increase the basic hourly minimum wage to $7.25 (142-3.1) with corresponding increases to meal and lodging allowances (142-3.5)(a)), uniform allowance (142-3.5(c)), classification of executive work (142-3.12(c)(2)(i)), classification of administrative work (142-3.12(c)(2)(ii)).

12 NYCRR Part 143 (Minimum Wage Order for nonprofitmaking institutions that certifies that it will pay the stautory minimum wage in lieu of being covered under a minimum wage order)- increase the basic hourly minimum wage to $7.25 (143.0) with corresponding increases to classification of executive work (143.1(b)(1)), classification of administrative work (142.1(b)(2)).

12 NYCRR Part 190 (Minimum Wage Order for Farm Workers)- revise the definition of ''basic minimum hourly wage'' (190-1.3(d)), increase the basic hourly minimum wage to $7.25 (190-2.1).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 19, 2009.

Text of rule and any required statements and analyses may be obtained from: Jeffrey G. Shapiro, Esq., New York State Department of Labor, Building 12, State Office Campus, Room 509, Albany, NY 12240, (518) 457-4380, email: bcejjs@labor.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Article 19 Sections 652 and 653, Article 2 Section 21 (11), and Article 19-A Sections 673 and 674 of the Labor Law require the Commissioner of Labor to issue regulations modifying wage orders to reflect increases in the minimum wage and related allowances. Article 19 Section 652 gives the Commissioner authority to modify the minimum wage orders in proportion to the increase in the minimum wage. Article 19 Section 653 gives the Commissioner authority to investigate the adequacy of wages. Article 2 Section 21(11) gives the Commissioner authority to issue such regulations governing any provision of the labor law as she finds necessary and proper. Article 19-A Section 673 requires the farm minimum hourly rate to increase whenever the general minimum hourly rate required by Section 652.1 increases. Article 19-A Section 674 authorizes the Commissioner to promulgate such regulations as she deems appropriate to carry out this article and to safeguard the minimum wage standards.

2. Legislative objectives: The legislature found it necessary to set a minimum hourly rate and authorized the Commissioner to promulgate regulations setting allowances for gratuities, meals, lodging, apparel and such other items, services and facilities, in order to remediate wages that are insufficient to provide adequate maintenance for employees and their families; to promote the health, efficiency and well-being of employees; to prevent unfair competition against other employers and their employees; to promote stability of industry; to maintain the purchasing power of employees; and to minimize the necessity to supplement wages with public money for relief or other public and private assistance.

The proposed regulations increase the allowances for gratuities, meals, lodging, and uniform maintenance, and the minimum salary for executive and administrative exemption, in proportion to the statutory increase in the hourly minimum wage rate, thus maintaining the existing proportionality among the elements of the wage orders.

3. Needs and benefits: The amendments to the wage orders are needed to conform the regulations to Section 652.2 of the Labor Law, which requires the Commissioner to modify the wage orders to increase all monetary amounts specified therein in the same proportion as the increase in the hourly minimum wage. The modified minimum wage orders are to be promulgated by the Commissioner without a public hearing, and without reference to a wage board, and to become effective on the effective date of an increase in the hourly minimum wage (July 24, 2009). Overall impact of these amendments is small and there is no significant benefit or harm to employees or employers.

4. Costs: There are no additional compliance costs associated with these regulations. The new wage order rates for uniform maintenance pay and the new minimum salary for executive and administrative exemption will constitute small additional payroll costs for some employers. On the other hand, the new wage order allowances for tips, meals and lodging have the opposite effect, thus mitigating the effect of the statutory increase in the minimum hourly wage rate on some employers' payroll costs. There are no added costs to the Department of Labor or to state and local governments. There is no study of the net cost effect on businesses.

5. Local government mandates: None. Federal, state and municipal governments and political subdivisions thereof are excluded from coverage under Parts 137, 138, 141, and 142 by Labor Law Section 651.5 (n) and 651.5 (last paragraph). They are not covered under Part 143 because it covers only certain non-profit organizations, in accordance with Section 652.3 of the Labor Law. They are excluded from coverage under Part 190 by Section 671.2 of the Labor Law.

6. Paperwork: There are no additional paperwork requirements in these amendments.

7. Duplication: None.

8. Alternatives: There are no alternatives, as the Commissioner has no discretion to amend the regulations other than as set forth in these amendments.

9. Federal standards: Generally, Parts 137, 138, 141, 142, 143 and 190 exceed the minimum standards found in the federal Fair Labor Standards Act with respect to minimum wage allowances and salary thresholds for exempt employees. The FLSA's tip allowance provisions after the minimum wage increase on July 24, 2009 will continue to permit employers to pay tipped employees as little as $2.13 per hour. In contrast, New York State's tip allowance provisions, as amended by these regulations, will require employers to pay tipped employees at least $4.35 per hour and in most cases at least $4.65 per hour. The FLSA's meal and lodging allowance provisions will continue to permit employers to claim the fair market value of these items as part of the minimum wages paid to employees. In contrast, New York State's wage orders do not allow fair market value credits and, under these amendments, will continue to set fixed limits on the value of these items as part of the minimum wages paid to employees. The FLSA's salary thresholds for exemption will continue to be far lower than New York State's. The uniform maintenance provisions of New York's existing and amended wage orders will continue to require, in most cases, payments to employees that the FLSA would not require. Wage Boards established these standards many years ago and the Labor Law requires that the wage allowances be modified in proportion to any increase in the hourly minimum wage.

10. Compliance schedule: Regulated entities should be able to achieve immediate compliance with the regulations. The Department of Labor will publicize the rates change, update our website to provide full details, and assist employers as needed.

Regulatory Flexibility Analysis

1. Effect of rule: All small businesses, but no local governments, are potentially affected by the changes in the regulations.

2. Compliance requirements: There are no changes in the reporting or record-keeping requirements. Businesses that employ tipped employees, provide meals or lodging to employees, or require employees to wear and maintain their own uniforms will have to check their payrolls to make sure they pay at least enough to comply with the statutory increase in the hourly minimum wage rate, as adjusted or mitigated by the small changes in the wage order allowances contained in the new regulations. Businesses in general will have to check the salaries of their lowest-paid executive and administrative exempt employees. Some, but not all, will have to make a small increase in these salaries.

3. Professional services: These regulations will not require small businesses to obtain additional professional services.

4. Compliance costs: There are no initial or continuing compliance costs as a result of these regulations.

5. Economic and technological feasibility: Compliance with these regulations will be economically and technologically feasible since wage order allowances and special rates have been in existence for a number of years and employers affected by these allowances and rates should already have payroll procedures set up.

6. Minimizing adverse impact: There will be no adverse impact on small businesses. In some cases, these regulations will mitigate the effect of the statutory increase in the minimum hourly rate by increasing the minimum wage allowances that businesses are currently permitted to take. The regulations do not impose any new paperwork or record-keeping requirements.

7. Small business and local government participation: Copies of the regulations will be furnished to the Business Council of New York, Inc., the New York State Department of Economic Development, the National Federation of Independent Business, the New York State Restaurant Association, and the New York State Hospitality and Tourism Association.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: These regulations apply to all private employers in rural areas of the state.

2. Reporting, recordkeeping and other compliance requirements; and professional services: There are no additional reporting, recordkeeping or compliance requirements for regulated employers and no need for additional professional services.

3. Costs: There are no significant additional compliance costs associated with these regulations. The new rates in these regulations in some cases add to, and in other cases mitigate, the effect of the statutory increase in the minimum hourly wage on employers' payroll costs, but these changes are small.

4. Minimizing adverse impact: There is no adverse impact to employers in rural areas.

5. Rural area participation: Copies of this regulation will be provided to the Business Council of New York, Inc., the New York State Department of Economic Development, the National Federation of Independent Business, the New York State Restaurant Association and the New York State Hospitality & Tourism Association.

Job Impact Statement

1. Nature of impact: These regulations will have no significant impact on jobs and employment opportunities. They conform the Wage Orders to the statutory increase in the New York State minimum hourly wage rate that is required by Labor Law Sections 652 and 673 when the federal minimum hourly wage rate increases to $7.25 per hour effective July 24, 2009.

2. Categories and numbers affected: These regulations will have no significant impact on employed persons or businesses.

3. Regions of adverse impact: There will be no adverse impact on employment opportunities in any region of the state as a result of these regulations.

4. Minimizing adverse impact: There will be no adverse impact on employment opportunities as a result of these regulations.

EMERGENCY RULE MAKING

Licensing of Blasters, Crane Operators, Laser Operators and Pyrotechnicans

I.D. No. LAB-32-09-00021-E

Filing No. 874

Filing Date: 2009-07-28

Effective Date: 2009-08-01 except section 61-6.1(b), (c), (d), (e), (f) and (g) effective 2009-10-04

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

Action taken: Addition of Part 61 to Title 12 NYCRR.

Statutory authority: General Business Law, section 483

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

Specific reasons underlying the finding of necessity: These regulations are needed to clarify and standardize the procedures for regulating various occupations which the legislature has found pose special risks to the safety and health of the citizens of New York as well as to their property. There have been several incidents where individuals have been or could have been seriously injured a pyrotechnic displays.

The licensing of pyrotechnicians is a new requirement enacted this year under Section 482 of the General Business Law, by Part CC of Chapter 57 of the Laws of 2009. Every pyrotechnic display conducted in New York on or after October 4, 2009 must have at least one lead pyrotechnician who possesses a certificate of competence issued by the Department of

Labor. These regulations set forth the procedure and requirements for obtaining the certificate.

Subject: Licensing of blasters, crane operators, laser operators and pyrotechnicians.

Purpose: To clarify and standardize the licensing of blasters, crane operators, laser operators and pyrotechnicians.

Substance of emergency rule: The proposed amendment will create a new part to Title 12 – Labor Law of the State Administrative Code. Under this amendment, Part 61 will be added to Subchapter A – Industrial Code. Part 61 provides for general licensing guidelines for crane operators, blasters, and laser operators as well as an entirely new subpart for the licensing of pyrotechnicians. It is the purpose and intent of Part 61, to provide consistent and uniform regulations for these dangerous occupations and to insure that only individuals with proper experience and ability engage in these activities in order to protect the lives, health, and safety of the citizens of the state.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 25, 2009.

Text of rule and any required statements and analyses may be obtained from: Nancy Pepe, Department of Labor, Harriman State Office Campus, Building 12, Room 509, Albany, New York 12240, (518) 457-0288, email: nancy.pepe@labor.state.ny.us

Additional matter required by statute: National Fire Protection Association, 1123 and 1126 Standards on Fireworks Displays and Use of Pyrotechnics Before a Proximate Audience.

Regulatory Impact Statement

1. Statutory Authority:

General Business Law Sections 482(1) and 483(1)(a) provide that the Commissioner of Labor is hereby authorized and directed to prescribe such rules and regulations with respect to lasers, crane operators, blasters and pyrotechnicians and that no individual shall operate lasers, cranes or act as a blaster or a pyrotechnician without holding a valid certificate of competence issued by the Commissioner or Labor.

2. Legislative Objectives:

General Business Law Section 480 states that the use of lasers, the operation of cranes, the detonation of explosives, and the preparation and firing of pyrotechnics involves such elements of potential danger to the lives, health and safety of the citizens of this state and to their property that special regulations are necessary to insure that only persons of proper ability and experience shall engage in such operations.

The general provision of this regulation does not supersede and incorporates by reference the current licensing criteria for each of the following occupations: crane operators, General Business Law Section 481.3, 12 NYCRR § 23-8.5; blasters, General Business Law Section 481.4, 12 NYCRR § 39.5; and laser operators, General Business Law Section 481.1., 12 NYCRR § 50.9.

The legislature specified that pyrotechnicians must be certified and directed the Commissioner of Labor to promulgate rules and regulations to administer and enforce the certification requirement.

3. Needs and Benefits:

The Commissioner of Labor recognizes the need for procedures to regulate various occupations which have been designated by the legislature as creating special risks to the safety and health of the citizens of New York as well as to their property. These regulations are needed to clarify and standardize the procedures for regulating the various occupations designated by the legislature as creating special risks to the safety and health of the citizens of New York as well as to their property. There have been several incidents where individuals have been or could have been seriously injured a pyrotechnic displays. The most recent incident occurred during the summer of 2008 when a member of the public was struck by a pyrotechnic shell in the Village of Ticonderoga during an aerial display. By requiring certification only individuals who have demonstrated that they have had training and experience in the field will be allowed to be in charge of these displays.

These emergency regulations clarify that firework displays subject to the permitting requirements of Penal Law Section 405.00 may be conducted by a single certified operator, who shall ensure that a sufficient number of authorized assistants are available for the safe conduct of the fireworks display. Penal Law Section 405.00(3) discusses two operators but makes no provision regarding certification of these individuals. These regulations clarify that at least one certified operator (as defined in the regulation) must conduct the fireworks display with the assistance of a sufficient number of authorized assistants (as defined in the regulation) to ensure the safe conduct of the fireworks display. Penal Law Section 405.00(2) provides that the permit application for a fireworks display must contain a verified statement from the applicant identifying the individuals who are authorized to fire the display, however firing the display is undefined in the statute. These regulations clarify that the firing of the display refers to the actions of the certified operator in issuing a signal to start, or halt, the ignition of fireworks, but does not include the actions of authorized assistants, including shooters, who ignite fireworks in response to such a signal.

4. Costs:

The cost to the certified party will be a one hundred and fifty dollar ($150) non refundable application fee which will entitle them to be certified for three years. They will also be required to submit to a criminal background check as part of the application process which will cost ninety four dollars and twenty five cents ($94.25). The total cost will be two hundred and forty four dollars and twenty five cents ($244.25) every three years.

Additionally, they will be required to demonstrate that they had training in safe handling and firing of pyrotechnic displays. Most employers currently provide this training to their staff on an annual basis.

The other requirement for certification is experience. Applicants will have to be able to demonstrate that they have practical experience by having worked on displays.

The final requirement will be that the applicant passes a written examination demonstrating that they do have the knowledge necessary to properly carry out their duties as a pyrotechnician.

5. Local Government Mandates:

This rule imposes no additional requirements on local governments; certification is the sole responsibility of the Department. Pyrotechnicians must still comply with local laws and obtain applicable permits and variances. For example, the City of New York requires Certificates of Fitness for firework displays (see 3 RCNY Section 113-01(e)(2)(B)).

6. Paperwork:

The paperwork requirements contained in the proposed rule are minimal. The Department will have to develop and complete new documents including application forms and letters to address certification determinations. The Department will also need to develop a data base to process the certificates of compliance.

7. Duplication:

No duplication of rules was identified. Rather, the general provision of this regulation does not supersede and incorporates by reference the current licensing criteria for crane operators, blasters and laser operators. As noted previously, applicants must still comply with local laws and obtain permits and variances in addition to obtaining a state issued license.

8. Alternatives:

The legislation requiring promulgation of the rule provided little room for any alternative to be considered. The amendment specifically requires pyrotechnicians to be certified. The alternatives provided by the Department involve different classifications depending on the applicants training and certification. The regulation requires basic requirements for certification recommended by various stakeholders.

9. Federal Standards:

There are no Federal Standards for pyrotechnic displays.

10. Compliance Schedule:

The statute becomes effective on October 4, 2009. The regulation contains provisions to allow individuals, who can otherwise demonstrate compliance with the requirements for certification, to be certified without having to sit for the exam. These individuals would have until April 1, 2010 to apply. Anyone applying after that date would be required to take a written exam.

These regulations become effective on August 1, 2009 and provide a procedure and requirements for obtaining a Pyrotechicians Certificate of Competence. The sections of the regulations requiring such certificate to conduct firework displays are not effective until October 4, 2009, the effective date for the statutory provisions requiring pyrotechnicians to be certified. However, these regulations provide the procedures and requirements for obtaining the Certificate of Competence prior to October 4, 2009.

Regulatory Flexibility Analysis

1. Effect of rule:

These regulations accomplish two purposes. One is to standardize the certification process for the various occupations that the Department is charged with regulating. The second is to adopt specific requirements that relate to the issuance of a Pyrotechnician's Certificate of Competence. The requirement for a Pyrotechnician's Certificate of Competence was enacted by Chapter 57 of the Laws of 2009. These regulations do not impose any new burdens on local governments. All of the requirements for review and issuance of certificates rests with the Department of Labor.

It is expected that the requirement to certify pyrotechnicians may have some economic impact on small businesses. The person in charge of each display will have to be certified by the Department. Currently there are approximately 79 businesses outside of New York City that are involved in pyrotechnic displays. Most of these would qualify as small businesses.

Chapter 57 amended the General Business Law, the Penal Law and the Labor Law. The amendments to the Penal Law now make it possible for pyrotechnic companies to put on ''private'' displays for things such as weddings etc. Prior to this change only public displays of fireworks were allowed. It is expected that this change will increase the number of shows being done on an annual basis thereby having a positive economic impact on these small businesses.

2. Compliance requirements:

There are no requirements for local governments associated with this rule. Small businesses will be required to hire at least one certified pyrotechnician to be in overall charge of each display.

3. Professional services:

The only required professional services associated with this regulation are those of the pyrotechnician created by the regulation.

4. Compliance costs:

The certifications issued under this regulation are individual occupational certifications. The cost of compliance is borne by the employee not the business or government. It is possible that there may be some positive impact on wages for these licensed individuals but that will remain to be determined by the marketplace.

5. Economic and technological feasibility:

There are no undue economic or technological requirements being imposed by this standard.

6. Minimizing adverse impact:

This rule will have no adverse impact on small businesses or local governments because it is an individual licensing requirement. These regulations provide a procedure for obtaining certification and the requirements for certification. The cost of the license is borne by the employee not the business or the government. The review and issuance of certificates for these individuals is the sole responsibility of the Department. Pyrotechnicians must still comply with local laws and obtain applicable permits and variances.

7. Small businesses and local government participation:

The Department has done extensive outreach with the industry while developing this regulation. It began two years ago with a public forum in Syracuse where members of the industry were invited to discuss reforms to the Departments existing regulations. At the conclusion of the meeting the Department requested that individuals be selected to act as industry representatives. These individuals worked with the Department in developing and revising the existing statutes and regulations. This is one of the changes developed by that workgroup.

Rural Area Flexibility Analysis

1. Types and Estimated Numbers:

It is expected that the requirement to certify pyrotechnicians may have some economic impact on rural areas. The person in charge of each display will have to be certified by the Department. Currently there are approximately 79 businesses outside of New York City that are involved in pyrotechnic displays. Most of these would qualify as small businesses.

2. Reporting, Recordkeeping and other Compliance Requirements; and Professional Services:

There are no requirements for local governments associated with this rule. Small businesses will be required to hire at least one certified pyrotechnician to be in charge of each display.

3. Costs:

The certifications issued under this regulation are individual occupational certifications. The cost of compliance is borne by the employee not the business or government. It is possible that there may be some positive impact on wages for these licensed individuals.

4. Minimize Adverse Impact:

This rule should have no adverse economic impact on rural areas.

5. Rural Area Participation:

In developing the proposed regulation, the Department sought assistance from the industry, which included rural areas. It began two years ago with a public forum in Syracuse where members of the industry were invited to discuss reforms to the Departments existing regulations. At the conclusion of the meeting the Department requested that individuals be selected to act as industry representatives. These individuals worked with the Department in developing and revising the existing statutes and regulations. This is one of the changes developed by that workgroup.

Job Impact Statement

1. Nature of impact:

The certifications issued under this regulation are individual occupational certificates. It is possible that there may be some positive impact on wages for these licensed individuals. The regulation requires that the person in charge of a pyrotechnic display be certified to ensure that they have the necessary training and experience to properly set up and carry out pyrotechnic displays. This certification requirement was enacted into law by Chapter 57 of the Laws of 2009 and is effective on October 4, 2009.

2. Categories and numbers of jobs or self-employment opportunities affected:

Currently, approximately 79 businesses in New York State are involved in pyrotechnic displays. Some are manufactures, some are display companies and some are a combination of both. These facilities are located across the state in rural areas as well as in proximity to urban area.

3. Regions of the state where there would be a disproportionate adverse impact:

There should be no adverse impact from these regulations; therefore, there will be no disproportionate impact.

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Trend Factors for 2009

I.D. No. MRD-03-09-00004-E

Filing No. 873

Filing Date: 2009-07-28

Effective Date: 2009-07-28

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

Action taken: Amendment of sections 81.10, 635-10.5, 671.7, 680.12, 681.14 and 690.7 of Title 14 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Emergency regulations are necessary to continue to reimburse providers and maintain the stability of the current service system, which ensures that individuals have access to necessary supports and services. The rapidly changing and deteriorating economy prevented the State from being able to determine an appropriate trend factor for the above facilities and services before 2009. This did not allow for proposal and promulgation of these amendments within the regular SAPA procedural time frames. The amendments continue the various reimbursement methodologies used to establish rates/fees for the above facilities and services, thereby maintaining current funding levels for these services and the stability of OMRDD's service system, which in turn ensures that New Yorkers with developmental disabilities continue to have access to necessary supports and services.

Subject: Trend Factors for 2009.

Purpose: To continue the methodologies used to calculate rates/fees for the rate/fee periods beginning with 1/1/09.

Text of emergency rule: Paragraph 81.10(b)(4) - Add new subparagraph (v):

(v) 0.00 percent for the 2009 fee period.

Paragraph 635-10.5(i)(1) - Add new subparagraph (xxvii):

(xxvii) 0.00 percent to trend 2008-2009 costs to 2009-2010.

Note: Rest of paragraph is renumbered accordingly.

Paragraph 635-10.5(i)(2) - Add new subparagraph (xxvii):

(xxvii) 0.00 percent to trend calendar 2008 costs to calendar year 2009.

Note: Rest of paragraph is renumbered accordingly.

Clause 671.7(a)(1)(vi)(a) - Add new subclause (17):

(17) For calendar year 2009:
NYC and Nassau, Rockland,
Suffolk, and Westchester Counties $ 31.97 per day
Rest of State $ 30.97 per day

Note: Rest of clause remains unchanged.

Clause 671.7(a)(1)(xvi)(a) - Add new subclause (15):

(15) 0.00 percent from January 1, 2009 through December 31, 2009.

Clause 671.7(a)(1)(xvi)(b) - Add new subclause (15):

(15) 0.00 percent from July 1, 2009 through June 30, 2010.

Paragraph 680.12(d)(3) - Add new subparagraph (xxii):

(xxii) 0.00 percent for 2009.

Add new subclause 681.14(c)(3)(ii)(b)(9):

(9) If a facility is subject to an expanded desk audit per subclause (2) of this clause, but the desk audit has not been completed by

January 1, 2009 or July 1, 2009, OMRDD shall continue the rate established according to the first sentence of subclause (3) of this clause and, if applicable, further trended to 2009 or 2009-2010 dollars until OMRDD completes the expanded desk audit. Upon OMRDD's completion of the expanded desk audit, for the base period and subsequent periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section will apply.

Subparagraphs 681.14(h)(1)(xviii)-(xix) are amended and a new subparagraph (xx) is added as follows:

(xviii) 2.97 percent for 2006-2007 to 2007-2008; [and]

(xix) 3.52 percent for 2007-2008 to 2008-2009 [.] *; and*

(xx) 0.00 percent for 2008-2009 to 2009-2010.

Subparagraphs 681.14(h)(2)(xviii)-(xix) are amended and a new subparagraph (xx) is added as follows:

(xviii) From February 1, 2007 to December 31, 2007, facilities will be reimbursed operating costs that result in a full annual trend factor of 2.97 percent for the rate period. On January 1, 2008, the trend factor for the previous rate period shall be deemed to be the 2.97 percent full annual trend; [and]

(xix) From February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend [.] *; and*

(xx) 0.00 percent for 2008 to 2009.

Subparagraphs 681.14(h)(3)(xxvi)-(xvii) are amended and subparagraph (xxviii) is added as follows:

(xxvi) 2.97 percent for 2006-2007 to 2007-2008; [and]

(xxvii) 3.52 percent for 2007-2008 to 2008-2009 [.] *; and*

(xxviii) 0.00 percent for 2008-2009 to 2009-2010.

Subparagraphs 681.14(h)(4)(xxvi)-(xxvii) are amended and subparagraph (xxviii) is added as follows:

(xxvi) From February 1, 2007 to December 31, 2007, facilities will be reimbursed operating costs that result in a full annual trend factor of 2.97 percent for the rate period. On January 1, 2008, the trend factor for the previous rate period shall be deemed to be the 2.97 percent full annual trend; [and]

(xxvii) From February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend [.] *; and*

(xxviii) 0.00 percent for 2008 to 2009.

Subparagraph 690.7(d)(6)(iii) is amended by adding new clause (g) to read as follows:

(g) From April 1, 2009 to March 31, 2010 the trend factor shall be 0.00 percent for all facilities.

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. MRD-03-09-00004-EP, Issue of January 21, 2009. The emergency rule will expire September 25, 2009.

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S is not needed.

Regulatory Impact Statement

1. Statutory authority:

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

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

2. Legislative objectives: These amendments further the legislative objectives embodied in sections 13.09(b) and 43.02 of the Mental Hygiene Law. The promulgation of these amendments concerns methodologies for rates or fees for voluntary agency providers of the following services:

a. Programs authorized by OMRDD to operate as integrated residential communities (amendments to section 81.10).

b. Individualized Residential Alternative (IRA) facilities and Home and Community-based (HCBS) Waiver services (amendments to section 635-10.5).

c. Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7).

d. Specialty Hospitals (amendments to section 680.12).

e. Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD) (amendments to section 681.14).

f. Day treatment facilities serving people with developmental disabilities (amendments to section 690.7).

3. Needs and benefits: OMRDD has historically increased operating revenues to providers on an annual basis through the implementation of trend factors. Their purpose has been to ensure that provider reimbursement stays abreast of inflation and to provide resources that enable providers to attract and appropriately compensate staff. The foremost goal to sustain operations was complemented by an eagerness to develop and expand programs. For the last nine years, relatively robust economies have dictated annual trend factors averaging 4.84 percent. Once applied, the trend factors accumulated and compounded.

The current economic landscape is vastly different from those that gave impetus to the previous trend factors. The recessionary nature and high unemployment that define the current economy suggest that inflation may be in check and that staff recruitment and retention achieved through additional monetary stimulus may not be required. The tentative economy suggests a conservative and limited approach to expansion with an aim to conserve resources and to promote efficiency and economy. In this vein, OMRDD will not, at this time, be implementing a positive trend factor for 2009 and 2009/2010. OMRDD views the economy as having slowed sufficiently so that existing reimbursement levels should be adequate.

The amendments continue the various reimbursement methodologies used to establish rates/fees for the above services, thereby maintaining current funding levels for these services and the stability of OMRDD's service system, which in turn ensures that New Yorkers with developmental disabilities continue to have access to necessary supports and services.

4. Costs:

a. Costs to the Agency and to the State and its local governments. Since the amendments establish trend factors of zero percent, there are no costs associated with the emergency amendments. They only continue the various reimbursement methodologies used to establish rates/fees for the referenced developmental disabilities facilities and services, thereby maintaining current funding levels.

There are no additional costs to local governments resulting from the emergency amendments.

The amendments to section 671.7 also update the SSI per diem allowances consistent with levels determined by the Federal Social Security Administration. There are no additional costs attributable to this conforming amendment, either to the State or to local governments.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs associated with implementation and continued compliance with the rule. The emergency amendments are necessary to continue funding of the affected facilities at levels of reimbursement that are currently in effect.

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

6. Paperwork: No additional paperwork will be required by the amendments.

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

8. Alternatives: The current course of action as embodied in these emergency amendments reflects what OMRDD believes to be a fiscally prudent, cost-effective reimbursement of the facilities and developmental disabilities services in question. No alternatives to these trend factors were considered. There is no alternative to emergency adoption that would allow for prompt, timely implementation of the trend factor provisions contained in the amendments.

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

10. Compliance schedule: The emergency rule is effective July 28, 2009. OMRDD has previously filed the rule as a Notice of Emergency Adoption and Proposed Rule Making that was published in the *State Register* January 21, 2009. This represents the third emergency readoption of these amendments. They do not impose any new requirements with which regulated parties are expected to comply.

Regulatory Flexibility Analysis

1. Effect on small business: These regulatory amendments will apply to voluntary not-for-profit corporations that operate the following facilities and/or provide the following services for persons with developmental disabilities in New York State:

- Programs certified by OMRDD as integrated residential communities (amendments to section 81.10). As of December 2008, there were only two such programs authorized by OMRDD to operate as integrated residential communities. They serve approximately 105 persons.
- Individualized Residential Alternative (IRA) facilities, and Home

and Community-based (HCBS) Waiver services (amendments to section 635-10.5). New York State currently funds IRA facilities and all authorized HCBS Waiver residential habilitation, day habilitation, supported employment, respite and prevocational services for the approximately 63,920 persons receiving such services as of December 2008.

- Home and Community-based (HCBS) Waiver Community Residential Habilitation Services (amendments to section 671.7). As of December 2008, OMRDD funds voluntary operated community residence facilities which serve approximately 400 persons.
- Intermediate Care Facilities for Persons with Developmental Disabilities (ICF/DD), (amendments to section 681.14). As of December 2008, there were approximately 5,530 people served in ICF/DD facilities in New York State.
- Day Treatment Facilities for Persons with Developmental Disabilities, (amendments to section 690.7). As of December 2008, there were approximately 2,260 people served in Day Treatment facilities in New York State.

While most of the above services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities operated by these agencies at discrete sites (e.g. IRAs or Day Habilitation programs) employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses.

There is only one Specialty Hospital (amendments to section 680.12) which serves approximately 50 people, certified to operate in New York State. It employs more than 100 persons and would therefore not be considered a small business as contemplated under the State Administrative Procedure Act (SAPA).

The emergency amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will continue to provide appropriate funding for small business providers of developmental disabilities services.

Since the amendments do not increase funding of the referenced services or programs, they will not result in any costs to local governments.

2. Compliance requirements: There are no additional compliance requirements for small businesses or local governments resulting from the implementation of these amendments.

3. Professional services: In accordance with existing practice, providers are required to submit annual cost reports by certified accountants. The amendments do not alter this requirement. Therefore, no additional professional services are required as a result of most of these amendments. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: There are no additional compliance costs to small business regulated parties or local governments associated with the implementation of, and continued compliance with, these amendments. OMRDD has considered the desirability of a small business regulation guide to assist provider agencies with this rule, as provided for by new section 102-a of the State Administrative Procedure Act. However, since the emergency rule requires no compliance effort on the part of the regulated service providers (most of which could be considered as small businesses under SAPA), OMRDD does not, at this time, contemplate the development of any such small business regulation guide.

5. Economic and technological feasibility: The emergency amendments are concerned with rate/fee setting in the affected facilities or services. The amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: The purpose of these emergency amendments is to continue to reimburse providers of the referenced services at current levels. The trend factor provisions do not increase or decrease funding of small business providers of services.

These amendments impose no adverse economic impact on regulated parties or local governments. Therefore, regulatory approaches for minimizing adverse economic impact suggested in section 202-b(1) of the State Administrative Procedure Act are not applicable.

7. Small business and local government participation: OMRDD has discussed the proposal for 0% trend factors with the provider associations. In addition, the proposal was a part of the 2009-10 Executive Budget which has been widely disseminated among local governments and the provider community.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. The amendments are concerned with the reimbursement methodologies which OMRDD uses in determining the reimbursement of the affected developmental disabilities services or facilities. Since the amendments do not decrease funding for the affected facilities or services, OMRDD expects that their adoption will not have adverse effects on regulated parties. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations (rural/urban), because the overall reimbursement methodologies are primarily based upon reported budgets and costs of individual facilities, or of similar facilities operated by the provider or similar providers in the same area. Thus, the reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. This finding is based on the fact that the amendments are concerned with the reimbursement methodologies which OMRDD uses in determining the appropriate reimbursement of the affected developmental disabilities services or facilities. The amendments continue to reimburse the various facilities or services at current levels of reimbursements for the rate/fee periods beginning January 1, 2009. As discussed in the Regulatory Impact Statement, the amendments are not expected to have any adverse impacts on jobs or employment opportunities in New York State.

Assessment of Public Comment

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

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Revision of the Reimbursement Methodologies for Various Facilities and Services Provided Under the Auspices of OMRDD

I.D. No. MRD-32-09-00020-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 635-10.5, 671.7, 679.6, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

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

Subject: Revision of the reimbursement methodologies for various facilities and services provided under the auspices of OMRDD.

Purpose: To implement Health Care Adjustments (HCA) IV and V.

Public hearing(s) will be held at: 3:00 p.m., Sept. 30, 2009 at Office of Mental Retardation and Developmental Disabilities, Basement Cafeteria, 44 Holland Ave., Albany NY; and 11:00 a.m., Oct. 2, 2009 at Bernard Fineson DDSO, Videoconf. Rm. 2, New Admin. Bldg., 80-45 Winchester Blvd., Queens Village, NY.

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

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

Substance of proposed rule (Full text is posted at the following State website:www.omr.state.ny.us): The proposed regulations for Health Care Adjustments (HCA) IV and V represent two sequels to previous health care initiatives. As such, HCA IV and V will continue the momentum to support and sustain provider agencies in addressing the health care needs of their staff. OMRDD recognizes the essential position of staff, especially direct support workers to develop and maintain a high quality service delivery system. These funding initiatives will enable providers to sponsor or continue to sponsor attractive employee health care related benefits and may simultaneously serve to facilitate recruitment and retention efforts.

Medicaid funded services covered by these initiatives at various funding levels include Residential Habilitation, Day Habilitation, Supported Employment, Prevocational Services, Respite, Community Residences, Article 16 Clinics, ICF/DDs, and Day Treatment. Plan of Care Support services and Family Education and Training will also benefit from this funding.

OMRDD has determined a benchmark of health care coverage and has identified provider agencies that meet or exceed the benchmark criteria. In recognition of health care costs being incurred and to serve as a model to-

ward which all providers should strive, providers which offer coverage at or above the benchmark will receive for each adjustment either a 3.0 percent increase to their allowable operating costs per trended program or a 1.0 percent increase to their allowable operating costs per all covered programs. Providers not in this category may apply to OMRDD to receive funding equivalent to 1.0 percent of their allowable operating costs per covered program for each adjustment. The application must specify the intended use of the funds from among the required and approved uses. Approved applicants shall be required to use these funds to offset health care premium increases. Remaining funds shall be used to establish health care related benefits or to reduce employee out-of-pocket health care related expenses. Providers must assure board authorization and agree to maintain records to substantiate distribution of these funds consistent with their applications.

Health Care Adjustment IV will be implemented to fund eligible providers as though the increase had become effective on, and continues from, April 1, 2008. Health Care Adjustment V will be implemented to fund eligible providers as though the increase had become effective on, and continues from, April 1, 2009.

In an effort toward simplification, the five sequential funding increments (Health Care Enhancements (HCE) I through III and Health Care Adjustments (HCA) IV and V) will be consolidated into one Health Care Adjustment beginning on January 1, 2010 and will either be incorporated into fees or be expressed as a single line item in the price or rate components.

In addition to the Health Care Adjustments, these regulations stipulate that providers delivering services which have received an appeal or price adjustment determination and thereafter resubmit their Consolidated Fiscal Reports for the same period will not be entitled to an increase in the award based on the resubmission.

These regulations also address the property component of Article 16 clinic fees for those clinics which were previously certified as Article 28 clinics. These clinics may be eligible to have their capital costs restored to the level previously funded by the Department of Health.

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

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

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

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory Authority:

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

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

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

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in the 2009-2010 New York State Budget and in sections 13.07, 13.09(b), and 43.02 of the Mental Hygiene Law by making revisions to the reimbursement methodologies for various Medicaid funded services including Residential Habilitation, Day Habilitation, Supported Employment, Prevocational Services, Respite, Community Residences, Article 16 Clinics, ICF/DDs, and Day Treatment. Plan of Care Support Services and Family Education and Training will also benefit from this funding initiative. The proposed amendments will increase reimbursement of providers of the referenced programs and services so as to enable them to enhance employee health care related benefits and/or to help their employees defray the ever increasing costs of health care.

3. Needs and Benefits:

Direct support staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands on, person to person needs of each individual requiring care. The direct support staff person may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct support staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

Health Care Adjustments (HCA) IV and V represent two sequels to previous health care initiatives. As such, HCA IV and V will continue the momentum to support and sustain provider agencies in addressing the health care needs of their employees.

OMRDD recognizes its dependence on direct support staff to deliver essential services to those individuals requiring care. It also recognizes how disproportionately workers with lower salaries may be impacted by rising health care related expenses. HCA IV and V funding is offered to help providers meet the challenges of sustaining and enhancing health care related benefits for their employees. While these funding initiatives will enable providers to sponsor or continue to sponsor attractive health care related benefits, they may simultaneously serve to facilitate staff recruitment and retention efforts.

Medicaid funded services covered by these initiatives at various funding levels include Residential Habilitation, Day Habilitation, Supported Employment, Prevocational Services, Respite, Community Residences, Article 16 Clinics, ICF/DDs, and Day Treatment. Plan of Care Support Services and Family Education and Training will also benefit from this funding.

OMRDD has determined a benchmark of health care coverage and has identified provider agencies that meet or exceed the benchmark criteria. In recognition of health care costs being incurred and to serve as a model toward which all providers should strive, providers which offer coverage at or above the benchmark will receive for each adjustment either a 3.0 percent increase to their allowable operating costs per trended program or a 1.0 percent increase to their allowable operating costs per all covered programs. Providers not in this category may apply to OMRDD to receive funding equivalent to 1.0 percent of their allowable operating costs per covered program for each adjustment. The application must specify the intended use of the funds from among the required and approved uses. Approved applicants shall be required to use these funds to offset health care premium increases. Remaining funds shall be used to establish health care related benefits or to reduce employee out-of-pocket health care related expenses. Providers must assure board authorization and agree to maintain records to substantiate distribution of these funds consistent with their applications. Funds are subject to audit to assure compliance with these regulations.

Health Care Adjustment IV will be implemented to fund eligible providers as though the increase had become effective on, and continues from, April 1, 2008. Health Care Adjustment V will be implemented to fund eligible providers as though the increase had become effective on, and continues from, April 1, 2009.

In an effort toward simplification, the five sequential Health Care funding increments will be consolidated into one Health Care Adjustment on January 1, 2010 and will either be incorporated into fees or be expressed as a single line item in the price or rate components.

In addition to the Health Care Adjustments, these regulations stipulate that providers delivering services which have received an appeal or price adjustment determination and thereafter resubmit their Consolidated Fiscal Reports for the same period will not be entitled to an increase in the award based on that resubmission.

4. Costs:

a. Costs to the Agency and to the State and its local governments: If there is full provider participation, the amendments will result in an annual aggregate increase of approximately $61.3 million in reimbursements to affected providers of developmental disabilities services. This approximate $61.3 million cost in Medicaid will be evenly shared by the State (approximately $30.65 million) and the federal (approximately $30.65 million) governments. For affected HCBS waiver services the estimated cost will be approximately $45 million; for community residence facilities, approximately $519,000; for Article 16 clinics, approximately $1.5 million; for intermediate care facilities, approximately $13.8 million; and for day treatment facilities, approximately $523,000. There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There may be some administrative costs associated with implementation and continued compliance with the amendments. However, overall, the change will have a positive fiscal impact on providers of services because the revisions are designed to provide them with additional funds to be utilized to enhance the health care benefits and reduce the health care expenditures of their employees.

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

6. Paperwork: For providers which are below the benchmark there will be some paperwork associated with the preparation and forwarding of ap-

plications and attestations and the associated governing body resolutions. They will also need to maintain records documenting the distribution of the health care initiative funds.

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

8. Alternatives: The proposed rule making represents what OMRDD believes to be the most effective way to provide funding increases designed to address health care related costs. The proposed amendments have been developed with the participation and input of the service provider community. The alternative would be to revise the current reimbursement methodologies by giving all providers a general increase in funding which would not necessarily address health care related benefits in agencies which are below the benchmark. Also, without the agency application and attestation procedure and associated governing body resolutions for providers which are below the benchmark, there would be no guarantee that the added funds would be applied to the intended purpose.

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

10. Compliance Schedule: OMRDD expects to adopt the proposed amendments as soon as possible within the time frames mandated by the State Administrative Procedure Act. As with similar targeted funding initiatives previously adopted by OMRDD, this agency will be available to provide guidance to providers with regard to their compliance activities.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies that are providers of Medicaid funded services covered by these initiatives at various funding levels including Residential Habilitation, Day Habilitation, Supported Employment, Prevocational Services, Respite, Community Residences, Article 16 Clinics, ICF/DDs, and Day Treatment. Plan of Care Support Services and Family Education and Training will also benefit from this funding.

While most services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities and services operated by these agencies at discrete sites employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses. OMRDD estimates that approximately 700 provider agencies are eligible for the funding.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not have any negative effects on these small business service providers. In fact, the proposed amendments to the various reimbursement methodologies have been developed to increase funding provided to these small business service providers in order to enhance their capacity to provide adequate health care related benefits for their employees.

Direct support staff are the backbone of the delivery of services for people with mental retardation and developmental disabilities. These vital staff meet the grassroots, hands on, person to person needs of each individual requiring care. The direct support staff person may provide assistance to individuals who need help with daily living skills such as getting ready for the day, preparing meals or eating. Other activities of direct support staff are aimed at building life skills such as job coaching, activity development and training in social interaction.

Health Care Adjustments (HCA) IV and V represent two sequels to previous health care initiatives. As such, HCA IV and V will continue the momentum to support and sustain provider agencies in addressing the health care needs of their employees.

OMRDD recognizes its dependence on direct support staff to deliver essential services to those individuals requiring care. It also recognizes how disproportionately workers with lower salaries may be impacted by rising health care related expenses. HCA IV and V funding is offered to help providers meet the challenges of sustaining and enhancing health care related benefits for their employees. While these funding initiatives will enable providers to sponsor or continue to sponsor attractive health care related benefits, they may simultaneously serve to facilitate staff recruitment and retention efforts.

OMRDD has determined a benchmark of health care coverage and has identified provider agencies that meet or exceed the benchmark criteria. In recognition of health care costs being incurred and to serve as a model toward which all providers should strive, providers which offer coverage at or above the benchmark will receive for each adjustment either a 3.0 percent increase to their allowable operating costs per trended program or a 1.0 percent increase to their allowable operating costs per all covered programs. Providers not in this category may apply to OMRDD to receive funding equivalent to 1.0 percent of their allowable operating costs per covered program for each adjustment. The application must specify the intended use of the funds from among the required and approved uses. Approved applicants shall be required to use these funds to offset health care premium increases. Remaining funds shall be used to establish health care related benefits or to reduce employee out-of-pocket health care related expenses. Providers must assure governing body authorization and agree to maintain records to substantiate distribution of these funds consistent with their applications. Funds are subject to audit to assure compliance with these regulations.

Health Care Adjustment IV will be implemented to fund eligible providers as though the increase had become effective on, and continues from, April 1, 2008. Health Care Adjustment V will be implemented to fund eligible providers as though the increase had become effective on, and continues from, April 1, 2009.

In an effort toward simplification, the five sequential Health Care funding increments will be consolidated into one Health Care Adjustment beginning on January 1, 2010 and will either be incorporated into fees or be expressed as a single line item in the price or rate components.

In addition to the Health Care Adjustments, these regulations stipulate that providers delivering services which have received an appeal or price adjustment determination and thereafter resubmit their Consolidated Fiscal Reports for the same period will not be entitled to an increase in the award based on that resubmission.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

2. Compliance requirements: For providers which are deemed by OMRDD to be below the benchmark, there will be some compliance activities associated with the submission of applications and attestations for the additional funds and the associated governing body resolution that will ensure their appropriate expenditure. The provider is also required to maintain records documenting the distribution of these funds.

3. Professional services: Depending on the labor situation of the individual provider, there may be some need for the advice of a labor relations professional to implement the benefit. The amendments will not add to the professional service needs of local governments.

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

5. Economic and technological feasibility: The proposed amendments are concerned with fiscal and administrative issues, and do not impose on regulated parties the use of any new technological processes.

6. Minimizing adverse economic impact: As discussed in the Regulatory Impact Statement, the amendments will have only positive economic impacts.

7. Small business and local government participation: The proposed amendments continue to address an area of concern for both the providers and OMRDD. During the initial phase of this funding initiative, OMRDD surveyed all voluntary provider agencies regarding their various health insurance benefit plans and worked closely with the provider community in the development of the regulations. The funding initiatives and the regulatory structures surrounding their implementation were discussed with provider associations, which represent provider agencies. OMRDD interfaces with them on a continuing basis to exchange information and gather input and feedback so that stakeholders' interests may be represented in all aspects of OMRDD's service delivery systems.

The first three phases of the funding initiative were well received by the provider community. HCA IV and V, as implemented by the proposed amendments, merely build upon the first three installments of the health care enhancement initiative. Therefore, providers will already be familiar with the basic concepts and requirements contained in these proposed regulations.

Rural Area Flexibility Analysis

A rural area flexibility analysis for these amendments is not being submitted because the proposed amendments will not impose any adverse economic impact on rural areas. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement the fourth and fifth phases of a Health Care Adjustment (HCA IV and V) initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care related costs of their employees. The amendments provide additional funding and will only have positive fiscal impacts for providers.

There will be no additional costs to local governments as a result of these particular amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

As discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments, there will be some compliance activities associated with submission of applications for the additional funds, the associated governing body or board resolution that will ensure their ap-

propriate expenditure, and record keeping relative to the distribution of these funds. OMRDD will provide any necessary guidance.

Finally, the amendments will have no adverse impact on providers as a result of the location of their operations (rural/urban) because OMRDD's reimbursement methodologies are primarily based upon costs or budgeted costs of services. Thus, OMRDD=s reimbursement methodologies have been developed to reflect variations in cost and reimbursement which could be attributable to urban/rural and other geographic and demographic factors.

Job Impact Statement

A Job Impact Statement for these amendments is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and employment opportunities. The proposed amendments will revise the reimbursement methodologies for the referenced facilities and services to implement the fourth and fifth phases of a Health Care Adjustment (HCA IV and V) initiative that will enable agencies which operate facilities and provide services under the auspices of OMRDD to address the health care related costs of their employees and enhance their ability to hire and retain indispensable direct support staff. While the amendments do provide additional funding for the stated purposes, they will not result in any changes to current staffing levels of the affected facilities and services. There will therefore be no effect on the numbers of jobs and employment opportunities in New York State.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Notification of Incidents and Access to Records

I.D. No. MRD-32-09-00007-P

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

Proposed Action: Addition of section 624.8 and amendment of sections 624.1, 624.2, 624.3, 624.4, 624.5, 624.6, 624.20 and 633.10 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07 and 13.09(b), 33.23 and 33.25 (L. 2007, ch. 24)

Subject: Notification of incidents and access to records.

Purpose: To conform regulations governing incidents to Jonathan's Law notification requirements and access to records provisions.

Substance of proposed rule (Full text is posted at the following State website:www.omr.state.ny.us): General:

- The regulations amend existing OMRDD regulations on incidents and abuse (Part 624).
- The regulations apply to all facilities and services operated, certified, authorized or funded through contract by OMRDD. This includes residential facilities, day programs, HCBS waiver services, and Medicaid Service Coordination.
- New notification and disclosure requirements do not apply to events or situations which are not under the auspices of the agency, such as allegations of abuse by family members in private residences. Requirements that agencies intervene and take appropriate action in these events or situations are unchanged.
- The OMR 147(I) and OMR 147(A) are removed from the regulation. OMRDD is replacing these forms with a single revised form.
- The OMR 147 must be used for all reportable incidents, serious reportable incidents and allegations of abuse.
- Full documentation of compliance is required.
- Existing requirements are unchanged for notification to CQCAPD, law enforcement officials, Statewide Central Register of Child Abuse and Maltreatment, etc.
- For the Willowbrook class, agencies must continue to comply with the incident reporting requirements of the Willowbrook Permanent Injunction.
- An old requirement for a "written preliminary finding" within 24 hours of the occurrence or discovery has been eliminated. The OMR 148 or equivalent report on actions taken takes the place of the written preliminary finding.
- The use of a diagnostic procedure (e.g. x-ray) when the results are negative (nothing broken) is no longer considered a reportable injury.
- Service coordinators must be notified of all reportable incidents, serious reportable incidents and allegations of abuse whether or not the event or situation is "under the auspices" of the agency or sponsoring agency.
- Paragraph 633.10(a)(4), which requires notification when a person has a health problem, is changed to add the receipt of services in an urgent care center and to clarify the language.

Regulations to implement Section 33.23 MHL:

- The regulations build on notification requirements in pre-existing OMRDD regulations, which required notification of serious reportable incidents and allegations of abuse to guardians, parents and advocates/correspondents.
- The following types of events/situations are subject to the new requirements:

-Reportable incidents in the categories of injury, medication error and death.

-Serious reportable incidents in the categories of injury, missing person, medication error and death.

-All allegations of abuse.

- Current notification requirements are maintained for serious reportable incidents which are in the other categories (restraint, possible criminal act, and sensitive situation). Notification must occur within 24 hours of completion of the OMR 147.
- Neither notification nor disclosure is required for reportable incidents in the category of sensitive situation or for events/situations which do not rise to the level of reportable incidents (e.g. "agency reportable incidents").
- The new requirements require notification to one of the following: guardian, parent, spouse or adult child.
- Exceptions:

-The guardian, parent, spouse or adult child objects to notification to himself or herself.

-The person receiving services is a capable adult who objects to the notification being made to someone else.

-The person who would otherwise be notified is the alleged abuser.

- If there is no guardian, parent, spouse or adult child (or they are unavailable), but the person has an advocate or correspondent, notification should be made to that individual in the same manner. Advocates/correspondents must also be offered a meeting and must be sent the report on actions taken. Upon request, advocates/correspondents must be sent the redacted OMR 147. (Note: the advocate or correspondent is not eligible to request disclosure of the investigation report and other investigation documents).
- If there is no guardian, parent, spouse or adult child (or they are unavailable), and the person receiving services is a "capable adult" as defined in the regulations, the person receiving services must be notified. In addition, the person receiving services must be offered a meeting and must receive the report on actions taken.
- The notification must be by telephone or in person, or by other methods at the request of the recipient of the notice.
- The notification must be made within 24 hours of the completion of the OMR 147.
- The notice must include:

-A description of the event or situation and a description of initial actions taken to address the incident or alleged abuse, if any,

-An offer to meet with the chief executive officer or designee, and

-For allegations of abuse, an offer to provide information on the status and resolution of the allegation (this is a pre-existing requirement).

- Upon request, a copy of the OMR 147 reporting form must be provided to the person receiving services, guardian, parent, spouse, adult child, or advocate/correspondent. Records must be redacted.
- The agency must provide a written report on actions taken to address the incident or alleged abuse for every incident and allegation subject to the new notification process.

-The report must be provided to the individual that was notified.

-The report must include: any immediate steps taken in response to the incident or alleged abuse to safeguard the health or safety of the person receiving services, and a general description of any initial medical or dental treatment or counseling provided to the person in response to the incident or alleged abuse.

-The report must be on a form developed by OMRDD or a similar agency form.

-The report must be provided within 10 days of the completion of the OMR 147.

-The report on actions taken cannot include names of others involved in the incident/allegation or investigation or information tending to identify them.

Regulations to implement Section 33.25 MHL:

- The regulations require the release of records and documents pertaining to allegations and investigations into abuse under the auspices of the agency.
- Only guardians, parents, spouses and adult children who are considered to be a "qualified person" according to the definition in the Mental Hygiene Law, are eligible to receive records.
- If the otherwise eligible requestor is the alleged abuser he or she is not eligible to receive records.
- If the consumer is a capable adult and objects to the release of records, the otherwise eligible requestor is not eligible to receive records.

• Requests must be in writing.

• Documents and records must be released 21 days after the closure of the alleged abuse case or 21 days after the request, if the request is made after closure.

For purposes of determining when the 21 day clock begins, closure is considered the time when the standing committee has ascertained that no further investigation is necessary and a conclusion is reach whether the allegation is substantiated, disconfirmed or inconclusive.

• Records must be redacted.

• Agencies are required to release records pertaining to allegations of abuse which occurred or were discovered on or after May 5, 2007.

• Agencies are also required to release records pertaining to allegations of abuse covering the period Jan. 1, 2003 to May 5, 2007. Qualified persons have until Dec. 31, 2010 to make these requests.

• Records may not be redisclosed by recipients.

• An administrative process is established to seek redress if records and documents are denied.

Redaction (applicable to the release of documents and records pursuant to Section 33.25 MHL and the OMR 147). The following should be redacted:

• Names or other information tending to identify people receiving services and employees. Redaction shall be waived if the employee or person receiving services authorizes disclosure (unless redaction is needed because the information would tend to identify a different person whose identity is shielded by the regulations). The definition of employee is very inclusive, but only for the purposes of redaction of these records in compliance with the new law and the implementing regulations. It includes consultants, contractors, volunteers, family care providers and family care respite/substitute providers, and individuals who live in home of the provider.

• Names or other information tending to identify anyone who made a report to the Statewide Central Register of Child Abuse and Maltreatment (SCR), contacted the SCR, or otherwise cooperated in a child abuse/maltreatment investigation.

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

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

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

Additional matter required by statute: Pursuant to the requirement of SEQRA and 14 NYCRR Part 602, OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory Authority:

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

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

c. Section 33.23 of the Mental Hygiene Law, which requires specific incident notifications and the release of specified reports.

d. Section 33.25 of the Mental Hygiene Law, which requires the release of records and documents pertaining to allegations and investigations of abuse.

2. Legislative Objectives: These amendments further the legislative objectives embodied in sections 13.07, 13.09(b), 33.23 and 33.25 of the Mental Hygiene Law. The promulgation of these amendments will provide a more extensive notification process for certain incidents and allegations of abuse. In addition, the amendments provide greater access by specified individuals to records and documents pertaining to allegations and investigations of abuse.

3. Needs and Benefits: Chapter 24 of the Laws of 2007 (MHL Sections 33.23 and 33.25), otherwise known as ''Jonathan's Law,'' was signed by the Governor on May 5, 2007 and was effective immediately.

The regulatory amendments are necessary to implement the new laws and to make longstanding OMRDD regulations related to incidents and abuse consistent with the statutory requirements. In addition, these amendments clarify ambiguities in the law, as well as provide more specific direction and guidance to providers so that implementation is more effective and consistent statewide. Further, the regulations build on the notification process requirements established by statute to extend certain provisions to advocates and correspondents who are not ''qualified persons'' and to require compliance by all providers in the OMRDD system, not just ''facilities'' as specified in the law.

The law and the associated regulations require providers to implement a more extensive notification process for certain incidents and all allegations of abuse. This notification process will provide timely information about incidents that affect the health or safety of a person receiving services to the following: a person's guardian, parent, spouse, adult child or advocate/correspondent. In addition to an initial telephone notification, the individual will have access to the initial incident/allegation of abuse report, will be provided a report on initial actions taken and will be offered the opportunity to meet with the agency Chief Executive Officer/DDSO Director (or a designee) to discuss the incident or allegation of abuse.

The law and implementing regulations also provide a qualified person with access to records and documents pertaining to allegations and investigations of abuse. For this purpose a qualified person is defined in Mental Hygiene Law 33.16 and may include: persons receiving services or who formerly received services; and guardians, parents, spouses and adult children of such persons. The regulations extend applicability of the new requirements from only events occurring ''at a facility'' as specified by statute to allegations of abuse occurring while individuals are receiving facility-based services at a location away from the facility. In addition, the regulations extend applicability to services in the OMRDD system which are not facility-based, such as at-home residential habilitation and supported employment. OMRDD considers that allegations of abuse by employees should be treated the same regardless of the type of service received or location of service delivery.

The proposed regulations contain two provisions which were not included in the emergency regulations promulgated by OMRDD to implement Jonathan's Law. The first provision adds an administrative process to appeal the denial of records and documents by an agency. This implements a recommendation of the Task Force on Mental Hygiene Records, which was convened by OMRDD in accordance with a requirement of Jonathan's Law. Without an administrative appeals process, individuals seeking redress of a denial would have to go to court, which can be an expensive and time-consuming process.

The second provision requires notification to parents, guardians, advocates or correspondents of suspected or diagnosed health problems which are served in an urgent care center. Current regulations only require notification when a person is served in an emergency room. The proposal recognizes that many problems that were formerly addressed in an emergency room setting are now addressed in an urgent care center. Families generally want to be notified of these types of visits, whether or not the visit is related to an incident or allegation of abuse.

4. Costs:

a. The amendments impose minor additional costs beyond the cost of complying with the new laws. Compliance with the new laws will likely require additional expenditures for personnel, paperwork, phone charges and postage. Although pre-existing OMRDD regulations already required notification of some types of incidents and allegations of abuse, the law requires notification (with its attendant costs) of additional incidents. In addition, the law requires that a report on actions taken be provided for each incident and allegation of abuse subject to the new notification requirements. Additional meetings may occur as a result of the mandated offer to hold a meeting. Lastly, documents and records must be provided upon request and must be redacted in accordance with the law.

While the statute limited the individuals being notified to ''qualified persons,'' the regulations extended the new notification process requirements to include advocates and correspondents. While advocates and correspondents were required to be notified of some incidents by the pre-existing OMRDD regulations, minor additional costs will be incurred through both notification of additional incidents and through the additional features of the notification process imposed by Jonathan's Law, such as the provision of the report on actions taken.

In addition, the statute only applied to allegations of abuse occurring at a facility. However, providers in the OMRDD system operate many services which are not ''facilities,'' such as service coordination, supported employment, and at-home residential habilitation. The OMRDD regulations extended the requirements of Jonathan's Law to include all services in the OMRDD system, as well as allegations of abuse when individuals are receiving facility-based services at a location away from the facility. This extension applies to both the notification process and the eligibility to request records and documents pertaining to allegations and investigations of abuse.

OMRDD is unable to quantify the modest additional costs that will be incurred by these extensions of the statutory requirements.

b. OMRDD will incur additional costs as a provider of state-operated services as noted above. These additional costs cannot be quantified.

OMRDD will use existing staff to administer this rule and does not anticipate any significant expenditure related to its administration. There are minimal additional expenditures related to informing and training providers of both Jonathan's Law and the implementing regulations.

c. There will be no additional costs to local governments.

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

6. Paperwork: Compliance with the new laws entails an increase in paperwork. The new law requires that a written report on actions taken be provided for every incident that is subject to the new requirements. OMRDD has developed a new form to assist agencies in providing this report. Agencies are also required to provide redacted incident reports upon request as a part of the notification process. Further, agencies are required to provide redacted records and documents pertaining to allegations and investigations into abuse. The regulations add minimal new paperwork requirements to the statutory requirements by extending provisions related to the notification process to include advocates and correspondents, and extending requirements to encompass all services in the OMRDD system and incidents related to facility-based programs which occur in community settings with staff.

7. Duplication: The regulatory amendment does not duplicate existing state or federal requirements.

8. Alternatives: The law only requires the notification requirements to be made to a qualified person as defined in MHL 33.16. ''Qualified persons'' include only guardians, parents, spouse or adult child. OMRDD had considered limiting the applicability of the notification requirements to ''qualified persons.'' However, OMRDD recognizes the valuable role played by siblings, family members, friends and others who are advocates and correspondents but who are not ''qualified persons.'' OMRDD considers that individuals without a ''qualified person'' who have an advocate or correspondent should also be able to benefit from the additional notification process requirements. OMRDD consequently extended the new notification process requirements to include advocates/correspondents.

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

10. Compliance Schedule: OMRDD filed similar emergency regulations first effective on October 1, 2007. The most recent emergency regulations were filed June 18, 2009.

OMRDD intends to finalize regulations within the time frames provided for by the State Administrative Procedure Act (SAPA).

Regulatory Flexibility Analysis

1. Effect on small business: These regulatory amendments will apply to providers of services that operate all programs certified, authorized or approved by OMRDD.

While most services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities and services operated by these agencies at discrete sites (e.g. small residences) employ fewer than 100 employees at each site and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees would themselves be classified as small businesses.

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that these amendments will not cause undue hardship to small business providers due to increased costs for additional services or increased compliance requirements.

2. Compliance requirements: The new law required a variety of compliance activities. These activities include: providing telephone notice to a qualified person for certain incidents and allegations of abuse, offering a meeting with the agency's Chief Executive Officer or DDSO Director or a designee, and offering to provide a written report on actions taken. In addition, upon the request of a qualified person, documents and records pertaining to allegations and investigations of abuse must be released. All the above referenced documents must have names and identifying information redacted. The implementing regulations extend the requirements to advocates and correspondents, to non-facility based services and to situations when facility-based services are delivered at a location away from the facility. Agencies will need to make the changes needed for implementation in these situations where the regulatory requirements exceed the statutory requirements.

OMRDD has carefully considered the desirability of a small business regulation guide to assist provider agencies with this rule, as provided for by new section 102-a of the State Administrative Procedure Act. However, OMRDD has already developed a regulatory handbook on the implementation of 14 NYCRR Part 624. This handbook will be updated to reflect the new requirements outlined in these amendments.

3. Professional services: Modest additional professional services are required as a result of these amendments, due to the need for the involvement of legal professionals in redaction and interpretation of the regulations, to the extent that the regulatory requirements exceed the statutory requirements. The amendments will have no effect on the professional service needs of local governments.

4. Compliance costs: There are no costs to local governments.

The amendments impose minor new compliance costs. There are minimal additional costs associated with implementation and compliance with the law. In the areas noted above where the regulatory requirements exceed the statutory requirements, these modest compliance costs will be increased as notification is required in new situations and in additional service types.

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

6. Minimizing adverse impact: As stated in the Regulatory Impact Statement, the proposed regulation will have no fiscal effect on State or local governments, and minimal fiscal impact on regulated parties (including the state as a provider). Modest additional costs are necessary to the extent regulatory requirements exceed statutory requirements. OMRDD has reviewed and considered the approaches for minimizing economic impact as suggested in section 202-b(1) of the State Administrative Procedure Act. In order to minimize adverse economic impact, OMRDD has developed a standardized form for the report on actions taken. The use of this form will minimize staff resources devoted to completing the form, instead of each agency developing its own form or not using a form for this purpose.

7. Small business and local government participation: OMRDD convened a Jonathan's Law implementation workgroup which included representatives from provider associations. The group met on June 1, June 20 and November 7, 2007. Presentations were made to various groups including committees of the Cerebral Palsy Associations of New York State and the New York State Association of Residential and Community Agencies (NYSACRA). OMRDD staff presented at training sessions with hundreds of provider representatives hosted by NYSACRA on June 28 and July 20, 2007. OMRDD staff also presented at a training session hosted by the Long Island Alliance on August 23, 2007. In addition, OMRDD staff made a presentation at a meeting of the Conference of Local Mental Hygiene Directors on August 17, 2007. OMRDD also conducted a series of internal training sessions on October 3, October 11, October 18 and October 29, 2007. Informational mailings were sent to affected providers regarding the implementation of the new law on May 11 and May 15, 2007. A detailed informational mailing specifically discussing the emergency regulations was sent to providers and other interested parties on August 31, 2007. OMRDD also solicited comments from the Self-Advocacy Association, the Statewide Family Support Services Committee and the NYSARC Adult Services Committee. OMRDD informed all provider agencies, provider associations, and other interested parties (including parents, family members and individuals receiving services) of similar emergency regulations by mail. The emergency regulations were first filed effective Oct. 1, 2007 and the most recent were filed June 18, 2009. In addition, numerous questions and comments were received from voluntary providers, local government representatives and others at the events noted above and through individual contact.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for these amendments is not submitted because the amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas because of the location of their operations (rural/urban). This finding is based on the fact that the proposed rule changes the way in which notifications are made regarding certain incidents and allegations of abuse. The proposed rule also provides greater access by qualified persons, including parents and legal guardians, to records and documents pertaining to allegations and investigations of abuse and mistreatment. OMRDD expects that adoption of the amendments will not have adverse effects on regulated parties because of the location of their operations. Further, the amendments will have no adverse fiscal impact on providers as a result of the location of their operations. Specific effects of the rule on providers of services have been discussed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

Job Impact Statement

A Job Impact Statement for these amendments is not submitted because it is apparent from the nature and purposes of the amendments that they will not have an adverse impact on jobs and/or employment opportunities and they may have a slightly positive impact on employment opportunities due to new features in the rule. This finding is based on the fact that the regulatory requirements exceed the statutory requirements of Jonathan's Law to require modest additional notifications and access to records as noted in the Regulatory Impact Statement. It is anticipated that providers will generally utilize existing staff to accomplish these tasks. In unusual circumstances, providers may find it necessary to hire or contract for additional staff.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Repeal of an Obsolete Rule (14 NYCRR Part 55)

I.D. No. MRD-32-09-00008-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 Part 55 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b) and 16.00

Subject: Repeal of an obsolete rule (14 NYCRR Part 55).

Purpose: To repeal antiquated regulations which do not reflect current practice or uses for specified facilities.

Text of proposed rule: Repeal 14 NYCRR Part 55

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

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

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

Additional matter required by statute: Pursuant to the requirement of SEQRA and 14 NYCRR Part 602, OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Consensus Rule Making Determination

This regulation is obsolete and does not reflect the current practice or use of these facilities. 14NYCRR Part 55 contains outdated terminology and cross references. In addition, Part 55 specifies that three facilities in the OMRDD system are established as psychiatric inpatient facilities. However, none of the three facilities listed in the regulation function as inpatient psychiatric facilities. OMRDD has determined that due to the nature and purpose of repealing this Part no person is likely to object to the rule as written.

Job Impact Statement

A JIS for this action was not submitted because it is apparent from the nature and purpose of the repeal that it will not have an impact on jobs and/or employment opportunities. The finding is based on the fact that the proposed rule making repeals an obsolete Part of the regulations which does not reflect the current practice or use of the three facilities listed. None of the three function as a psychiatric inpatient facility.

Office of Parks, Recreation and Historic Preservation

NOTICE OF ADOPTION

Environmental Protection Fund (EPF) Grants for Park, Historic Preservation and Heritage Area Projects

I.D. No. PKR-17-09-00004-A

Filing No. 871

Filing Date: 2009-07-27

Effective Date: 2009-08-12

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

Action taken: Amendment of Parts 439, 440, 441, 442 and 443; and repeal of section 439.4 of Title 9 NYCRR.

Statutory authority: Parks, Reacreation and Historic Preservation Law, section 3.09(8); Environmental Conservation Law, art. 54

Subject: Environmental Protection Fund (EPF) grants for park, historic preservation and heritage area projects.

Purpose: To conform the rule to statutory changes and clarify application requirements.

Substance of final rule: The proposed rule:

- Clarifies the authority and purpose of Title 9 of the Environmental Protection Act and clarifies that heritage area projects are also eligible for State assistance (Section 439.1);
- In accordance with the recent statutory changes, updates the definitions of "heritage area project," "historic preservation project" and" park project" to include costs of planning and structural assessment; clarifies the definition of "municipality;" and updates the definition of the "Secretary of the Interior's Standards." It also amends the definition of "cost" to include federal assistance in the approved project cost (Section 439.2);
- Clarifies that a State agency project must be recommended by the State agency's chief executive (Section 440.1);
- Requires the copy of the not-for-profit corporation's certificate from either the Department of State or Board of Regents and the IRS determination letter be included in the grant application, and requires verification of not-for-profit status for the project agreement (Section 440.2);
- Clarifies that the State may not guarantee a project or public benefit agreement for a project on State land (Section 440.3);
- Increases the State assistance up to 75% of approved cost for a project in an area with a 10% or more poverty rate (Section 440.4);
- Allows the fair market value of real property for the project sponsor's match to include only property acquired or converted within 1 year prior to the application deadline date (Section 440.5);
- Clarifies that an application may be obtained from OPRHP's website at www.nysparks.state.ny.us/grants or from OPRHP's Grants Management office in Albany or from OPRHP's 11 regional offices (Section 440.7);
- Clarifies that an application for a park, historic preservation or heritage area project located in the Catskill and Adirondack Parks should be submitted to OPRHP's Grants Management office in Albany. (Section 440.7);
- Clarifies that the project agreement will require a municipality's contracting to comply with General Municipal Law Sections 103 (competitive bidding) and 104-b (procurement policies and procedures), and will require that a not-for-profit corporation's procurement policies services ensure prudent and economical use of public money (Section 440.10);
- Clarifies that an "urban cultural park" is now called a "heritage area" (see, PRHPL § 31.01[2] and ECL § 54-0901[3]) (Sections 439.2[f], 440.11 and 443.1);
- Clarifies that eligible park, historic preservation and heritage area projects may include costs for planning and structural assessments and the value of acquisitions made within one year prior to the application deadline (Sections 441.1, 442.1 and 443.1);
- Clarifies that for park projects any required alienation legislation must be part of the application; clarifies the rating criteria for determining public benefit in a public-private partnership; and clarifies that the project agreement will also require commissioner approval and alienation legislation for any proposed subsequent lease, exchange or donation of the park property (Sections 441.2 and 441.4); and
- Repeals an outdated section pertaining to reporting requirements, a task force and public input that are not required by the controlling statute and repeals a SEQRA requirement that is redundant (Section 439.4).

Final rule as compared with last published rule: Nonsubstantive changes were made in section 439.2(q).

Text of rule and any required statements and analyses may be obtained from: Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, Agency Building 1, Empire State Plaza, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

Revised Job Impact Statement

The existing rule does not affect jobs or employment opportunities and its repeal would not affect jobs or employment opportunities.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

An Alternative Method of Recovering the Temporary State Assessment

I.D. No. PSC-32-09-00003-EP
Filing Date: 2009-07-24
Effective Date: 2009-07-24

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

Proposed Action: The Public Service Commission adopted an order approving, in part, on an emergency basis, the Verified Petition on behalf of Corning Natural Gas Corporation to implement, an alternative method of recovering the Temporary State Assessment pursuant to Public Service Law § 18-a(6).

Statutory authority: Public Service Law, section 18a

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

Specific reasons: Approval, in part, of the Verified Petition on behalf of Corning Natural Gas Corporation (Corning) to implement an alternative method of recovering the Temporary State Assessment pursuant to Public Service Law § 18-a(6), was necessary on an emergency basis to ensure Corning's short-term financial health and its ability to raise sufficient funds to make the system improvements necessary to assure safe and adequate service.

Subject: An alternative method of recovering the Temporary State Assessment.

Purpose: To grant in part on an emergency basis, an alternative method of recovering the Temporary State Assessment.

Substance of emergency/proposed rule (Full text is posted at the following State website:www.dps.state.ny.us): The Public Service Commission approved, in part, and denied, in part, on an emergency basis, the Verified Petition on behalf of Corning Natural Gas Corporation to collect the necessary revenues to pay the Temporary State Assessment (TSA) for State Fiscal Year 2009-2010. Specifically, the Commission allowed Corning to collect from all its customers the revenues necessary to pay State Fiscal Year 2009-2010 TSA surcharge on a July 2009 through March 2010 billing cycle. In order to get the Company back on the preferred July-June billing cycle, the Commission adopted for all customers, the Company's April 2010 through June 2011 collection period for State Fiscal Year 2010-2011. Thereafter, all customers will go back to the July-June billing cycle. Corning has demonstrated that an alternative schedule is necessary to meet its 2009-2010 TSA payment due September 10, 2009 because of its uncertain access to financing from external sources and to provide for the short-term financial health and the ability to raise sufficient funds to make the system improvements necessary to assure safe and adequate service, subject to the terms and conditions set forth in the order.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire October 21, 2009.

Text of rule may be obtained from: 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

A regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement 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-G-0546SA1)

NOTICE OF ADOPTION

American Recovery and Reinvestment Act of 2009

I.D. No. PSC-16-09-00019-A
Filing Date: 2009-07-27
Effective Date: 2009-07-27

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

Action taken: On 7/24/09, the PSC adopted an order approving certain utility stimulus project proposals, with conditions, and directing future filings.

Statutory authority: Public Service Law, sections 4, 5, 65 and 66

Subject: American Recovery and Reinvestment Act of 2009.

Purpose: To approve certain utility stimulus projects and recovery by utilities of eligible project cost through surcharges.

Substance of final rule: The Commission, on July 24, 2009, adopted an order approving certain utility stimulus project proposals, authorizing the recovery by utilities of eligible project costs through the imposition of a surcharge, directing utilities to file tariff leaves to conduct rate design trials and implement the surcharge, requiring utility submission of periodic project status reports and reserving the Commission's ability to judge prudence of final project expenditures, 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.

(09-E-0310SA1)

NOTICE OF ADOPTION

Specific Multifamily Residential Gas and Electric Energy Efficiency Programs

I.D. No. PSC-20-09-00009-A
Filing Date: 2009-07-27
Effective Date: 2009-07-27

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

Action taken: On July 24, 2009, the PSC adopted an order approving, with modifications, multifamily energy efficiency programs.

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

Subject: Specific multifamily residential gas and electric energy efficiency programs.

Purpose: To approve with modifications, selected gas & electric energy efficiency programs.

Substance of final rule: The Commission, on July 24, 2009, adopted an order approving, with modifications, selected gas and electric energy efficiency programs designed to serve the multifamily building customer market segment, 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.

(09-G-0363SA1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Cost Allocation for Consolidated Edison's East River Repowering Project

I.D. No. PSC-32-09-00009-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 analysis under Case 09-S-0029 related to allocation of costs of Consolidated Edison Company of New York, Inc.'s (Consolidated Edison) East River Repowering Project.

Statutory authority: Public Service Law, sections 65, 66, 79, 80 and 81

Subject: Cost allocation for Consolidated Edison's East River Repowering Project.

Purpose: To determine whether any changes are warranted in the cost allocation of Consolidated Edison's East River Repowering Project.

Public hearing(s) will be held at: 10:30 a.m., Sept. 23 and 24, 2009 at Boardroom, 90 Church St., New York, NY; There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS website (www.dps.state.ny.us) under Case No. 09-S-0029SP4.

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

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

Substance of proposed rule: The Commission has initiated a proceeding – Case 09-S-0029 -- to examine, among other things, the allocation of costs of Consolidated Edison Company of New York, Inc.'s (Consolidate Edison) East River Repowering Project, between electric revenue requirements and steam revenue requirements. On May 7, 2009, Consolidated Edison filed an East River Repowering Project Cost Allocation Study that recommends continuation of the "incremental method" of allocation that is currently in use. The Cost Allocation Study also presents a comparison of results using different fuel cost allocation methods. On June 20, 2009, parties submitted testimony that included additional alternative allocation methods. The proceeding will examine the Cost Allocation study, including the alternative allocation methods presented in the Study as well as other alternative methods presented by parties within the proceeding. Potential actions of the Commission are to continue the current allocation method, or to order the use of a different allocation method, effective not sooner than October 1, 2010. The Commission may also adopt rate mitigation options or other measures related to the issues presented by the Cost Allocation Study.

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.

(09-S-0029SP4)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates of Central Hudson Gas & Electric Corporation for Gas Service

I.D. No. PSC-32-09-00010-P

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

Proposed Action: The Commission is considering what action to take on a July 22, 2009 petition for rehearing filed by Central Hudson Gas & Electric Corporation.

Statutory authority: Public Service Law, sections 4(1), 22, 65(1), 66(1) and (12)

Subject: Rates of Central Hudson Gas & Electric Corporation for gas service.

Purpose: To resolve issues raised by Central Hudson Gas & Electric Corporation in a petition for rehearing.

Substance of proposed rule: On June 22, 2009, the Commission issued an Order Adopting Recommended Decision with Modifications establishing rates for electric and gas service for Central Hudson Gas & Electric Corporation (the Company). In a petition for rehearing filed July 22, 2009, the Company seeks rehearing of certain aspects of the order relating to the depreciation of gas mains and services; directors and officers insurance expense; environmental expense; storm restoration expense; rate of return on equity; and carrying charges for various deferral accounts.

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.

(08-G-0888SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates of Central Hudson Gas & Electric Corporation for Electric Service

I.D. No. PSC-32-09-00011-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 what action to take on a July 22, 2009 petition for rehearing filed by Central Hudson Gas & Electric Corporation.

Statutory authority: Public Service Law, sections 4(1), 22, 65(1), 66(1) and (12)

Subject: Rates of Central Hudson Gas & Electric Corporation for electric service.

Purpose: To resolve issues raised by Central Hudson Gas & Electric Corporation in a petition for rehearing.

Substance of proposed rule: On June 22, 2009, the Commission issued an Order Adopting Recommended Decision with Modifications establishing rates for electric and gas service for Central Hudson Gas & Electric Corporation (the Company). In a petition for rehearing filed July 22, 2009, the Company seeks rehearing of certain aspects of the order relating to the depreciation of electric services; directors and officers insurance expense; environmental expense; storm restoration expense; rate of return on equity; and carrying charges for various deferral accounts.

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.
(08-E-0887SP2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Specific Commercial and Industrial Electric and Gas Energy Efficiency Programs

I.D. No. PSC-32-09-00012-P

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

Proposed Action: The Commission is considering commercial and industrial electric and gas energy efficiency program proposals as a component of the Energy Efficiency Portfolio Standard.

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

Subject: Specific commercial and industrial electric and gas energy efficiency programs.

Purpose: To encourage electric and gas energy conservation in the State.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, (a) commercial and industrial electric energy efficiency program proposals made in response to an order in Case 07-M-0548 entitled ''Order Establishing Energy Efficiency Portfolio Standard and Approving Programs'' issued by the Public Service Commission on June 23, 2008 [see Ordering Clauses 8, 10 & 17]; and (b) commercial and industrial gas energy efficiency program proposals made in response to a notice in Case 07-M-0548 entitled ''Notice Requesting Proposals'' issued by the Secretary to the Public Service Commission on April 20, 2009. For potential independent program administrators that submitted updated proposals for programs in accordance with Ordering Clause 8 of the aforementioned June 23, 2008 Order, such submissions shall be considered as pre-filed comments responsive to this notice to the degree that they relate to the provision of energy efficiency programs for commercial and industrial customers. The program proposals under consideration for this rule include the following:

1. Cases 08-E-1127 and 09-G-0363 - Consolidated Edison Company of New York, Inc., ''Residential and Commercial Energy Efficiency Programs'' dated September 22, 2008 and ''Commercial Gas Efficiency Programs'' dated June 5, 2009: (a) Commercial and Industrial Equipment Rebate Program (electric), and (b) Commercial Gas Efficient Equipment Rebate Program (gas).
2. Case 08-E-1128 - Orange and Rockland Utilities, Inc., ''Residential and Commercial Energy Efficiency Portfolio Programs'' dated September 22, 2008: (a) Commercial and Industrial Existing Buildings Program (electric).
3. Case 08-E-1135 - Central Hudson Gas & Electric Corporation, Petition letter from Thompson Hine, Robert J. Glasser, Esq., dated September 22, 2008: (a) MidSize Commercial Business Program (electric).
4. Cases 08-E-1129/08-E-1130 and 09-G-0363 - New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation, ''Electric Program Plan of New York State Electric and Gas Corporation and Rochester Gas and Electric Corporation'' dated September 22, 2008, Updates dated April 30, 2009, and Updates dated May 15, 2009 (corrected June 11, 2009): (a) Non-residential Commercial & Industrial (C&I) Prescriptive Rebate Program (electric).
5. Cases 08-E-1132 and 09-G-0363 - New York State Research and Development Authority, ''Energy Efficiency Portfolio Program Administrator Proposal'' dated September 22, 2008, Updates dated November 21, 2008, Updates dated June 2, 2009, and Updates dated June 5, 2009: (a) Existing Facilities Program (electric and gas), and (b) FlexTech Program (gas).
6. Cases 08-E-1133 and 09-G-0363 - Niagara Mohawk Power Corporation d/b/a National Grid, ''Electric and Gas Energy Efficiency Program Proposals'' dated September 22, 2008 and ''Updated Gas Energy Efficiency Proposals for EnergyWise and Energy Initiative Programs'' dated May 28, 2009: (a) Energy Initiative Program (electric and gas).
7. Case 09-G-0363 - The Brooklyn Union Gas Company/KeySpan Gas East Corporation, ''Gas Energy Efficiency Program Proposals'' dated September 22, 2008, Updates dated September 26, 2008, and Updates dated June 5, 2009: (a) Commercial, Industrial and Multi Family Energy Efficiency Program (gas).

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.
(08-E-1127SP5)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-32-09-00013-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 grant, deny or modify, in whole or part, the petition filed by University Residence Inc., to submeter electricity at 1380 University Avenue, Bronx, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of University Residence, Inc., to submeter electricity at 1380 University Avenue, Bronx, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by University Residence Inc. to submeter electricity at 1380 University Avenue, Bronx, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.
(09-E-0453SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-32-09-00014-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 grant, deny or modify, in whole or part, the petition filed by 42nd and 10th Associates, to submeter electricity at 440 West 42nd Street, New York, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of 42nd and 10th Associates, to submeter electricity at 440 West 42nd Street, New York, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 42nd and 10th Associates to submeter electricity at 440 West 42nd Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.

(09-E-0492SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-32-09-00015-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 grant, deny or modify, in whole or part, the petition filed by FC 80 Dekalb Associates, to submeter electricity at 80 Dekalb Avenue, Brooklyn, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of FC 80 Dekalb Associates, to submeter electricity at 80 Dekalb Avenue, Brooklyn, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by FC 80 Dekalb Associates, to submeter electricity at 80 Dekalb Avenue, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.

(09-E-0519SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-32-09-00016-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 grant, deny or modify, in whole or part, the petition filed by 583 6th, LLC, to submeter electricity at 585 6th Avenue, Brooklyn, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of 583 6th, LLC, to submeter electricity at 585 6th Avenue, Brooklyn, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 583 6th, LLC, to submeter electricity at 585 6th Avenue, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.

(09-E-0526SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-32-09-00017-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 grant, deny or modify, in whole or part, the petition filed by 119 Third Avenue Associates, LLP, to submeter electricity at 181 East 119th Street, New York, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of 119 Third Avenue Associates, LLP, to submeter electricity at 181 E. 119th Street, New York, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 119 Third Avenue Associates, LLP, to submeter electricity at 181 East 119th Street, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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.

(09-E-0561SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Capacity Release Service

I.D. No. PSC-32-09-00018-P

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

Proposed Action: The Commission is considering a proposed filing by Orange and Rockland Utilities, Inc. (O&R) to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service - P.S.C. No. 4—Gas.

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

Subject: Capacity Release Service.

Purpose: To modify O&R's capacity release service available to Capacity Release Sellers serving firm transportation customers.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Orange and Rockland Utilities, Inc. (the company) to change the terms under which the company will release interstate pipeline capacity to Sellers and to revise its Capacity Release Service Adjustment (a mechanism currently used to credit or surcharge customers for the difference between the average cost of capacity release to Sellers and the company's weighted average cost of transportation). The proposed filing has an effective date of November 1, 2009.

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.

(09-G-0567SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Capacity Release Service

I.D. No. PSC-32-09-00019-P

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

Proposed Action: The Commission is considering a proposed filing by Consolidated Edison Company of New York, Inc. (Con Edison) to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service, P.S.C. No. 9—Gas.

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

Subject: Capacity Release Service.

Purpose: To modify Con Edison's capacity release service available to Capacity Release Sellers serving firm transportation customers.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Consolidated Edison Company of New York, Inc. (the company) to change the terms under which the company will release interstate pipeline capacity to Sellers and to revise its Capacity Release Service Adjustment (a mechanism currently used to credit or surcharge customers for the difference between the average cost of capacity release to Sellers and the company's weighted average cost of capacity). The proposed filing has an effective date of November 1, 2009.

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.

(09-G-0568SP1)