

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.

Office of Children and Family Services

EMERGENCY RULE MAKING

Mandatory Disqualification of Foster and Adoptive Parents Based on Criminal History

I.D. No. CFS-52-09-00003-E

Filing No. 1360

Filing Date: 2009-12-14

Effective Date: 2009-12-14

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

Action taken: Amendment of sections 421.27 and 443.8 of Title 18 NYCRR.

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

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

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

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

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

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

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

(i) a felony conviction at any time involving;

(a) child abuse or neglect;

(b) spousal abuse;

(c) a crime against a child, including child pornography;

(d) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery[, unless the prospective adoptive parent or approved adoptive parent demonstrates that:

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

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

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

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

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

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

Subdivision (k) of section 421.27 is repealed.

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

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

(1) a felony conviction at any time involving:

(a) child abuse or neglect;

(b) spousal abuse;

(c) a crime against a child, including child pornography; or

(d) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery; unless the applicant or approval or certification as a foster parent or the certified or approved foster parent demonstrates that;

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

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

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

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

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

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

Subdivision (k) of section 443.8 is repealed.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 13, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

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

2. Legislative objectives:

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

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

3. Needs and benefits:

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

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

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

4. Costs:

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

5. Local government mandates:

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

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

Investigation. The regulations do not expand who must have a criminal history record check in relation to foster care or adoption.

6. Paperwork:

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

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

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

2. Reporting, recordkeeping and compliance requirements:

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

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

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

3. Professional services:

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

4. Compliance costs:

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

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

7. Small business and local government participation:

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

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

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

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

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

3. Costs:

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

Job Impact Statement

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

EMERGENCY RULE MAKING

Child Care Market Rate and Stimulus Regulations

I.D. No. CFS-52-09-00004-E

Filing No. 1361

Filing Date: 2009-12-14

Effective Date: 2009-12-14

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

Action taken: Amendment of sections 404.5, 415.2 and 415.9 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f), 410 and title 5-C

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

Specific reasons underlying the finding of necessity:

The adoption of these regulations on an emergency basis is necessary to protect the health, safety and welfare of families and children receiving subsidized child care in New York State. First, these regulations address the expanded need for child care services by families affected by the extensive loss of jobs and employment opportunities as a result in the economic downturn of the State and national economy. With the simultaneous severe downturn of the credit, housing, job and stock markets and expected unusually slow recovery of each, OCFS expects the need for child care services for those battling the economic depression to only continue to grow for the foreseeable future. Further, without this action OCFS believes that the consequences for those battling the economic depression will only deepen, and only lead to an even slower recovery for the affected families and, as a result, the State economy.

OCFS also believes that by implementing these regulations, it will allow social services districts to meet some of the expanding need for child care services by families imperiled by the economic depression, which will hopefully allow those families to maintain or gain much needed services, training or employment. To be effective, and in order to best serve the families in the State that need child care services, OCFS must act quickly and without delay. Any delay in action may only exacerbate the financial crisis facing many families that need child care services in the State. Faced with this stark consequence, OCFS decided it had to act on an emergency basis, to get the needed child care services to those in the affected communities as soon as possible.

Second, it is also necessary to adopt these regulations on an emergency basis because Federal statute, section 658E(c)(4)(A) of the Social Security Act, and federal regulation, 45 CFR 98.43(a), require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure equal access for eligible children. The market rates that are being replaced are based on a survey conducted in 2007 and as a result,

continuing to maintain the existing rates could result in subsidized families losing equal access for eligible children to child care arrangements or being unable to find appropriate child care.

In addition, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The current State Plan in effect covers the period October 1, 2009 through September 30, 2011. The federal Administration for Children and Families has indicated that the New York State Child Care and Development Fund (CCDF) Plan would not have been approved unless the child care market rates were adjusted, based upon a market rate survey, and were effective on October 1, 2009. Unless new market rates become effective on that date, the State's ability to use federal funds under CCDF and to transfer Temporary Assistance to Needy Families funds into CCDF for child care subsidies would have been jeopardized.

Subject: Child Care Market Rate and Stimulus Regulations.

Purpose: To revise the market rates and address the expanded need for child care services caused by the economic downturn.

Text of emergency rule: Subparagraphs (xviii) and (xix) of subparagraph (6) of paragraph (b) of section 404.5 of Title 18 are amended, and a new subparagraph (xx) is added to such paragraph, to read as follows:

(xviii) veterans' assistance payments made to or on behalf of certain Vietnam veterans' natural adult or minor children for any disability resulting from spina bifida suffered by such children; [and]

(xix) veterans' assistance payments made for covered birth defects to or on behalf of the adult or minor children of women Vietnam veterans in service in the Republic of Vietnam during the period beginning on February 28, 1961 and ending on May 7, 1975. Covered birth defects means any birth defect identified by the Veterans' Administration as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period on February 28, 1961 and ending on May 7, 1975, and that has resulted or may result in permanent physical or mental disability[.]; and

(xx) one-time \$250 payments made under the American Recovery and Reinvestment Act of 2009 to Social Security, Supplemental Security Income (SSI), Railroad Retirement Benefits and Veterans Disability Compensation or Pension Benefits recipients for 10 months from the date the payment was received, including the month payment was received.

A new subparagraph (c) of subparagraph (vii) of subparagraph (3) of paragraph (a) of section 415.2 of Title 18 is added to read as follows:

(c) a program to train workers in an employment field that currently is or is likely to be in demand in the near future, if the caretaker documents that he or she is a dislocated worker and is currently registered in such a program, provided that child care services are only used for the portion of the day the caretaker is able to document is directly related to the caretaker engaging in such a program. For the purposes of this provision, a dislocated worker is any person who: has been terminated or laid off from employment; has received a notice of termination or layoff from employment that will occur within six months of such notice; or was self-employed but is unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters.

Subparagraph (1) of paragraph (j) of section 415.9 of Title 18 is amended and reads as follows:

(1) Effective [May 15, 2009] October 1, 2009, the following are the local market rates for each social services district set forth by the type of provider, the age of the child and the amount of time the child care services are provided per week.

Subparagraph (2) of paragraph (j) of section 415.9 of Title 18 is renumbered as subparagraph (3) and a new subparagraph (2) is added to read as follows:

(2) Upon the effective date of these regulations, there will be two market rates for the legally-exempt family child care and in-home child care categories, a standard market rate and an enhanced market rate. The standard market rate for legally-exempt family child care and in-home child care categories will be 65 percent of the applicable registered family day care market rate. The enhanced market rate for legally-exempt family child care and in-home child care categories will be 70 percent of the applicable registered family day care market rate. The enhanced market rate will apply to those caregivers of legally-exempt family child care and in-home child care who have provided notice to, and have been verified by, the applicable legally-exempt caregiver enrollment agency or by the district for those portions of the district that are not covered by a legally-exempt caregiver enrollment agency, as having completed ten or more hours of training annually in the areas set forth in section 390-a(3)(b) of the social services law. A social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child

care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement. The standard market rate will apply to all other caregivers of legally-exempt family child care and in-home child care.

Re-numbered subparagraph (3) of paragraph (j) of section 415.9 of Title 18 is amended and reads as follows:

[(2)] (3) The market rates are established in five groupings of social services districts. [Except for districts noted as an exception in the market rate schedule,] [t]he rates established for a group apply to all districts in the designated group. The district groupings are as follows:

CHILD CARE MARKET RATES

Market rates are established in five groupings of social services districts as follows:

Group 1: Nassau, Putnam, Rockland, Suffolk, Westchester
Group 2: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins, Warren

Group 3: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, Yates

Group 4: Albany, Dutchess, Orange, Ulster

Group 5: Bronx, Kings, New York, Queens, Richmond

GROUP 1 COUNTIES:

Nassau, Putnam, Rockland, Suffolk, and Westchester
DAY CARE CENTER

	Age of Child			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$330	\$304	\$265	\$265
DAILY	\$59	\$52	\$42	\$40
PART-DAY	\$39	\$35	\$28	\$27
HOURLY	\$9.32	\$9.00	\$8.56	\$9.16

REGISTERED FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$270	\$263	\$250	\$250
DAILY	\$48	\$41	\$40	\$37
PART-DAY	\$32	\$27	\$27	\$25
HOURLY	\$10.00	\$10.00	\$9.00	\$9.00

GROUP FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$275	\$275	\$265	\$257
DAILY	\$50	\$50	\$50	\$50
PART-DAY	\$33	\$33	\$33	\$33
HOURLY	\$9.88	\$9.13	\$9.13	\$8.00

(Group 1 Counties)

SCHOOL AGE CHILD CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$265
DAILY	\$0	\$0	\$0	\$40
PART-DAY	\$0	\$0	\$0	\$27
HOURLY	\$0	\$0	\$0	\$9.16

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE STANDARD RATE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$265
DAILY	\$0	\$0	\$0	\$40
PART-DAY	\$0	\$0	\$0	\$27
HOURLY	\$0	\$0	\$0	\$9.16

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$176	\$171	\$163	\$163
DAILY	\$31	\$27	\$26	\$24
PART-DAY	\$21	\$18	\$17	\$16
HOURLY	\$6.50	\$6.50	\$5.85	\$5.85

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$189	\$184	\$175	\$175
DAILY	\$34	\$29	\$28	\$26
PART-DAY	\$23	\$19	\$19	\$17
HOURLY	\$7.00	\$7.00	\$6.30	\$6.30

GROUP 2 COUNTIES: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins and Warren
DAY CARE CENTER
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$226	\$215	\$196	\$190
DAILY	\$48	\$45	\$40	\$35
PART-DAY	\$32	\$30	\$27	\$23
HOURLY	\$8.00	\$8.36	\$8.00	\$8.00

REGISTERED FAMILY DAY CARE
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$170	\$161	\$152	\$150
DAILY	\$35	\$32	\$30	\$30
PART-DAY	\$23	\$21	\$20	\$20
HOURLY	\$5.00	\$5.37	\$5.00	\$5.75

GROUP FAMILY DAY CARE
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$180	\$175	\$175	\$160
DAILY	\$36	\$35	\$35	\$34
PART-DAY	\$24	\$23	\$23	\$23
HOURLY	\$5.79	\$5.83	\$5.93	\$7.00

(Group 2 Counties)
SCHOOL AGE CHILD CARE
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$0	\$0	\$0	\$190
DAILY	\$0	\$0	\$0	\$35
PART-DAY	\$0	\$0	\$0	\$23
HOURLY	\$0	\$0	\$0	\$8.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$111	\$105	\$99	\$98
DAILY	\$23	\$21	\$20	\$20
PART-DAY	\$15	\$14	\$13	\$13

HOURLY \$3.25 \$3.49 \$3.25 \$3.74
LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$119	\$113	\$106	\$105
DAILY	\$25	\$22	\$21	\$21
PART-DAY	\$17	\$15	\$14	\$14
HOURLY	\$3.50	\$3.76	\$3.50	\$4.03

GROUP 3 COUNTIES: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, and Yates
DAY CARE CENTER
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$180	\$171	\$160	\$150
DAILY	\$40	\$37	\$34	\$31
PART-DAY	\$27	\$25	\$23	\$21
HOURLY	\$6.50	\$6.50	\$6.50	\$6.25

REGISTERED FAMILY DAY CARE
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$140	\$139	\$135	\$130
DAILY	\$30	\$30	\$30	\$30
PART-DAY	\$20	\$20	\$20	\$20
HOURLY	\$4.00	\$3.88	\$3.50	\$4.00

GROUP FAMILY DAY CARE
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$150	\$145	\$140	\$140
DAILY	\$33	\$31	\$30	\$30
PART-DAY	\$22	\$21	\$20	\$20
HOURLY	\$4.00	\$4.00	\$4.00	\$5.00

(Group 3 Counties)
SCHOOL AGE CHILD CARE
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$0	\$0	\$0	\$150
DAILY	\$0	\$0	\$0	\$31
PART-DAY	\$0	\$0	\$0	\$21
HOURLY	\$0	\$0	\$0	\$6.25

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*
AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	\$91	\$90	\$88	\$85
DAILY	\$20	\$20	\$20	\$20
PART-DAY	\$13	\$13	\$13	\$13
HOURLY	\$2.60	\$2.52	\$2.28	\$2.60

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$98	\$97	\$95	\$91
DAILY	\$21	\$21	\$21	\$21
PART-DAY	\$14	\$14	\$14	\$14
HOURLY	\$2.80	\$2.72	\$2.45	\$2.80

GROUP 4 COUNTIES:
Albany, Dutchess, Orange, and Ulster
DAY CARE CENTER

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$241	\$223	\$205	\$200
DAILY	\$50	\$48	\$43	\$37
PART-DAY	\$33	\$32	\$29	\$25
HOURLY	\$8.24	\$7.90	\$7.62	\$7.00

REGISTERED FAMILY DAY CARE
AGE OF CHILD

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$200	\$191	\$185	\$185
DAILY	\$44	\$40	\$38	\$38
PART-DAY	\$29	\$27	\$25	\$25
HOURLY	\$7.00	\$6.13	\$6.00	\$7.00

GROUP FAMILY DAY CARE
AGE OF CHILD

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$220	\$200	\$195	\$195
DAILY	\$45	\$45	\$40	\$40
PART-DAY	\$30	\$30	\$27	\$27
HOURLY	\$8.00	\$7.22	\$8.00	\$7.25

(Group 4 Counties)
SCHOOL AGE CHILD CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$200
DAILY	\$0	\$0	\$0	\$37
PART-DAY	\$0	\$0	\$0	\$25
HOURLY	\$0	\$0	\$0	\$7.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$130	\$124	\$120	\$120
DAILY	\$29	\$26	\$25	\$25
PART-DAY	\$19	\$17	\$17	\$17
HOURLY	\$4.55	\$3.98	\$3.90	\$4.55

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$112	\$105	\$105	\$105
DAILY	\$21	\$21	\$22	\$21
PART-DAY	\$14	\$14	\$15	\$14
HOURLY	\$11.20	\$7.78	\$9.24	\$9.14

WEEKLY	\$140	\$134	\$130	\$130
DAILY	\$31	\$28	\$27	\$27
PART-DAY	\$21	\$19	\$18	\$18
HOURLY	\$4.90	\$4.29	\$4.20	\$4.90

GROUP 5 COUNTIES:
Bronx, Kings, New York, Queens, and Richmond
DAY CARE CENTER

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$338	\$255	\$217	\$195
DAILY	\$53	\$47	\$40	\$35
PART-DAY	\$35	\$31	\$27	\$23
HOURLY	\$16.09	\$17.00	\$15.70	\$10.00

REGISTERED FAMILY DAY CARE
AGE OF CHILD

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$160	\$150	\$150	\$150
DAILY	\$30	\$30	\$32	\$30
PART-DAY	\$20	\$20	\$21	\$20
HOURLY	\$16.00	\$11.11	\$13.20	\$13.06

GROUP FAMILY DAY CARE
AGE OF CHILD

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$194	\$181	\$175	\$160
DAILY	\$35	\$33	\$31	\$32
PART-DAY	\$23	\$22	\$21	\$21
HOURLY	\$18.14	\$15.65	\$12.83	\$18.00

(Group 5 Counties)
SCHOOL AGE CHILD CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$195
DAILY	\$0	\$0	\$0	\$35
PART-DAY	\$0	\$0	\$0	\$23
HOURLY	\$0	\$0	\$0	\$10.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$104	\$98	\$98	\$98
DAILY	\$20	\$20	\$21	\$20
PART-DAY	\$13	\$13	\$14	\$13
HOURLY	\$10.40	\$7.22	\$8.58	\$8.49

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$112	\$105	\$105	\$105
DAILY	\$21	\$21	\$22	\$21
PART-DAY	\$14	\$14	\$15	\$14
HOURLY	\$11.20	\$7.78	\$9.24	\$9.14

SPECIAL NEEDS CHILD CARE

The rate of payment for child care services provided to a child determined to have special needs is the actual cost of care up to the statewide limit of the highest weekly, daily, part-day or hourly market rate for child care services in the State, as applicable, based on the amount of time the child care services are provided per week regardless of the type of child care provider used or the age of the child.

The highest full time market rate in the State is:

WEEKLY	\$338
DAILY	\$ 59
PART-DAY	\$ 39
HOURLY	\$ 18.14

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 March 13, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

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

Section 34(3)(f) of SSL authorizes the Commissioner to establish regulations for the administration of public assistance and care within the State.

Section 410 of the SSL authorizes a social services official of a county, city or town to provide day care for children at public expense and authorizes the Office to establish criteria for when such day care is to be provided.

Title 5-C (sections 410-u through 410-z) of the SSL governs the New York State Child Care Block Grant. It includes provisions regarding the use of funds by social services districts, the types of families eligible for services, the amount of local funds that must be spent on child care services, and reporting requirements. OCFS is required to specify certain NYSCCBG requirements in regulation.

Section 410-x(4) of the SSL requires the Office to establish, in regulation, the applicable market-related payment rates that will establish the ceilings for State and federal reimbursement for payments made under the New York Child Care Block Grant.

Federal statute, 42 USC 9858(c)(4)(A), and federal regulation, 45 CFR 98.43(a), also require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure equal access to care that is provided to children whose parents/caretakers are not eligible to receive assistance under federal or state programs. Additionally, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund.

2. Legislative objectives:

The legislative intent of the child care subsidy program is to assist low income families in meeting their child care costs in programs that provide for the health and safety of their children. The legislative intent is to have child care subsidy payment rates that reflect market conditions and that are adequate to enable subsidized families to access child care services comparable to other families not in receipt of a child care subsidy.

The regulations support the legislative objectives underlying Sections 332-a, 334, 335 and 410 and Title 5-C of the SSL to provide child care services to public assistance recipients and low income families when necessary to promote self-sufficiency and protect children. In addition, the regulations provide social services districts with greater local flexibility to provide child care services in the manner that best meets the needs of their local communities.

3. Needs and benefits:

The State is required under the Federal Child Care and Development Fund to adjust child care payment rates with each new State Plan based on a current survey of providers. The current State Plan covers the period October 1, 2007 through September 30, 2009 and the proposed State Plan for the period October 1, 2009 through September 30, 2011 has been submitted for approval by the federal government. A current survey of providers was conducted in April and May of 2009. These regulations are needed to adjust existing rates that were established based on a survey done in 2007. Adjustments to the child care market rates reflect both increases and decreases in the five groupings of counties.

Decreases in the child care market rates reflect the market place and

provide comparable access to those families in receipt of a child care subsidy as compared with families that do not receive a child care subsidy, which is required by federal and State laws.

In addition, this regulatory package includes the three provisions from the previous market rate stimulus regulatory package that was filed previously on an emergency basis on May 15, 2009 and was re-filed on August 13, 2009. The revised market rates that were in effect since August 13, 2009 are superseded by this filing.

The first provision is the exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 when determining the eligibility for social services programs. These regulations address the federal requirement that one time payments disbursed under the American Recovery and Reinvestment Act of 2009 to recipients of Social Security, Supplemental Security Income (SSI), Railroad Retirement Benefits and Veterans Disability Compensation or Pension Benefits be excluded as income for determining eligibility for any programs in receipt of federal funds.

Second, social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment.

Third, some districts have indicated that, in these difficult economic times, more families could be served without a negative impact on family access to child care if the enhanced child care market rate for legally-exempt family and in-home child care providers was lowered. Currently, there are two child care market rates established for legally-exempt family and in-home child care providers. One, the enhanced market rate, based on a 75 percent differential applied to the child care market rates established for registered family day care. The 75 percent reflects an incentive to legally exempt providers to pursue a minimum of ten hours of approved training. Two, the standard market rate, based on a 65 percent differential applied to the child care market rates established for registered family day care. The 65 percent applies to legally-exempt family and in-home child care providers that have not obtained ten hours of training annually. These regulations propose to establish the enhanced market rate for legally-exempt family and in-home providers at a 70 percent differential applied to the child care market rates established for registered family day care. Additionally, the regulation allows local social services districts, which so choose in their Child and Family Services Plans, to increase the enhanced market rate to up to 75 percent of the applicable registered family day care market rate. Further, a social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement.

4. Costs:

Under section 410-v(2) of the SSL, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; and, districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the New York State Child Care Block Grant, and is limited on an annual basis to each district's New York State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2009-2010, social services districts received their allocations of \$736,036,409 in federal and State funds under the New York State Child Care Block Grant. This funding represented an increase of \$11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the adjusted market rates. Further, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations. In addition, social services districts may use block grant funds to serve the optional category of eligible individuals set forth in these regulations. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

5. Local government mandates:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the applicable market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. Payment adjustments will have to be made, as appropriate.

Social services districts will also be required to amend their existing Child and Family Services Plan to select the expanded categories of eligible families to include the parent/caretaker that is a dislocated worker participating in a training program in an employment field that currently is or is likely to be in demand in the near future, if social services districts so desire. In addition, social services districts would also be required to amend their existing Child and Family Services Plans to increase the enhanced market rate for legally-exempt providers of family child care or in-home child care to 75 percent of the registered family child care rate, if social services districts so desire.

6. Paperwork:

Social services districts will need to process any required payment adjustments after conducting the necessary case reviews.

7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

8. Alternatives:

The adjustments in rates set forth in the regulations are required to implement the federal and State statutory and regulatory mandates; there are no other alternatives because every other alternative would violate federal and State statutory and regulatory mandates.

There are also no other viable alternatives to the child care stimulus provisions included in this regulatory filing. The only alternative to those provisions would be to not expand the delivery of child care services to needy families. This would adversely impact federal and State initiatives to support needy families affected by the recession and to stimulate the economy.

9. Federal standards:

The regulations are consistent with applicable federal regulations. 45 CFR 98.43(a) and (b)(2) and (3) require that the State establish payment rates that are sufficient to ensure equal access to comparable care received by unsubsidized families, based on a survey of providers and consistent with the parental choice provisions in 45 CFR 98.30.

10. Compliance schedule:

These provisions must be implemented effective on October 1, 2009.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments:

The adjustments to the child care market rates will affect the 58 social services districts. There is a potential effect on over 20,000 licensed and registered child care providers and an estimated 56,000 informal providers that may provide child care services to families receiving a child care subsidy.

2. Compliance requirements:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the applicable market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. Payment adjustments will have to be made, as appropriate.

Social services districts will also be required to amend their existing Child and Family Services Plans to select the expanded categories of eligible families to include the parent/caretaker that is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. In addition, social services districts would also be required to amend their existing Child and Family Services Plan to increase the enhanced market rate for legally-exempt providers of family child care or in-home child care to 75 percent of the registered family child care rate, if social services districts so desire.

3. Professional services:

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

4. Compliance costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2009-10, social services districts received their allocations of \$736,036,409 in federal and State funds under the New York State Child Care Block Grant, an increase of \$11.9 million from the base amount allocated to districts for SFY 2008-09. These

increases in funding are available to cover any increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

Social services districts will be required to provide the subsidies on behalf of the parent for subsidized child care services to legally-exempt family child care and in-home child providers who have completed ten hours of training annually, as approved by the legally-exempt caregiver enrollment agency, at the enhanced rate of seventy percent (70%) of the family child care rate. Districts do have the option to pay seventy five percent (75%) of the family child care rate for the enhanced market rate to legally-exempt family child care and in-home care approved by the legally-exempt caregiver enrollment agency, if the district selects this option in its Children and Family Services Plan. In addition, a social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

The exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 related to the determination of eligibility for social services programs, which receive federal funds, will not require any additional compliance costs to implement.

Social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment. Social services districts may use the already allocated block grant funds to serve this optional category of families, if social services districts so desire.

5. Economic and technological feasibility:

The child care providers and social services districts affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers and with standard statistical methodology to minimize adverse impact. The Office applied standard statistical methods to choose a sample of approximately 5,020 licensed and registered child care providers so that it was representative throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care that were reported in the survey within the counties. Adjustments to the child care market rates reflect the market place and provide access comparable to those families not receiving a child care subsidy.

The regulations recognize that there may be differences in the needs among districts. To the extent allowed by statute, the regulations provide districts with flexibility in designing their child care subsidy programs in a manner that will best meet the needs of their communities.

7. Small business and local government participation:

In accordance with federal regulatory requirements, OCFs conducted a telephone survey of a sample of regulated providers. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had the resources available to assist providers in other languages, if needed. Rate data was collected from almost 5,020 providers and that information formed the basis for the updated market rates.

The regulatory changes were discussed with a workgroup of local districts, including rural districts, for advice on potential impact.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect the 44 social services districts located in rural areas of the State and the child care providers located in those districts.

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

The regulations will not result in any new reporting or recordkeeping requirements for social services districts.

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine if the payments reflect the actual cost of care up to the appropriate market rate. Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

The exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 to the determination of eligibility for social services programs, which receive federal funds, will not place any additional compliance requirements on social services districts.

Social services districts that choose to serve the optional eligibility categories of families to serve families where the parent/caretaker is a dislocated worker participating in a program to train workers in an employment field that is currently or is likely to be in demand in the near future will be required to amend the district's current Child and Family Services Plan.

A district will be required to provide subsidies on behalf of the parents for subsidized child care services to legally-exempt family child care and in-home child providers who have completed ten hours of training annually, as long as such providers are approved by the appropriate legally-exempt caregiver enrollment agencies, for the enhanced rate; or by the district for those portions of the district that are not covered by a legally-exempt caregiver enrollment agency, at the rate of seventy percent (70%) of the family child care rate. A district has the option to pay seventy five percent (75%) of the family child care rate for the enhanced market rate to legally-exempt family child care and in-home care approved by an enrollment agency, if the district selects this option in its Child and Family Services Plan.

3. Costs:

Under the State Budget for SFY 2009-2010, social services districts received their allocations of \$736,036,409 in federal and State funds under the New York State Child Care Block Grant, an increase of \$11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

The exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 to the determination of eligibility for social services programs, which receive federal funds, will not require add any additional compliance costs to implement. In addition, social services districts may use block grant funds to serve the optional category of eligible individuals set forth in these regulations. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

4. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers and with standard statistical methodology to minimize adverse impact. The Office applied standard statistical methods to choose a sample of approximately 5,020 licensed and registered child care providers so that it was representative throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care that were reported in the survey within the counties. Adjustments to the child care market rates reflect the market place and provide access comparable to those families not receiving a child care subsidy.

Adjustments to the child care market rates reflect both increases and decreases in the five groupings of counties. Decreases in the child care market rates reflect the market place and provides access comparable to those families not receiving a child care subsidy to that received by fami-

lies that do not receive a child care subsidy as required by federal and State laws. The adjustments in the rates will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of temporary assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

The market rates for legally-exempt family child care and in-home child care were established based on a 65 percent differential applied to the market rates established for family day care. This differential reflects the higher costs associated with meeting the higher regulatory standards to become a registered family day care provider. The enhanced market rate for legally-exempt family and in-home child care providers is based on a 70 percent differential applied to the child care market rates established for registered family day care. The 70 percent reflects an incentive to legally exempt providers to pursue a minimum of ten hours of approved training. Additionally, the regulation allows local social services districts, which so choose in their Child and Family Services Plans, to increase the enhanced market rate to up to 75 percent of the applicable registered family day care market rate.

The regulations recognize that there may be differences in the needs among districts. To the extent allowed by statute, the regulations provide districts with flexibility in designing their child care subsidy programs in a manner that will best meet the needs of their communities. Social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment.

5. Rural area participation:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. In accordance with the federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. The sample drawn was representative of the regions across the State and, therefore, providers located in rural areas were appropriately represented in the survey. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had resources available to assist providers in other languages, if needed. Rate data was collected from almost 5,020 providers and that information formed the basis for the updated market rates.

The regulatory changes were also discussed with a workgroup of local districts, including rural districts, for advice on potential impact.

Job Impact Statement

Section 201-a of the State Administrative Procedures Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State.

Adjustments to the child care market rates reflect both increases and decreases. Decreases in the child care market rates reflect the market place and OCFS believes that they are not substantial enough to cause the loss of jobs in child care programs.

Department of Civil Service

NOTICE OF EXPIRATION

The following notices have expired and cannot be reconsidered unless the Department of Civil Service publishes new notices of proposed rule making in the *NYS Register*.

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
CVS-50-08-00004-P	December 10, 2008	December 10, 2009

Jurisdictional Classification

I.D. No.	Proposed	Expiration Date
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CVS-50-08-00005-P December 10, 2008 December 10, 2009

Crime Victims Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Loss of Earnings

I.D. No. CVB-52-09-00002-P

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

Proposed Action: Amendment of section 525.12 of Title 9 NYCRR.

Statutory authority: Executive Law, section 631

Subject: Loss of earnings.

Purpose: To establish the process through which claimants may be reimbursed by the Board for loss of earnings.

Text of proposed rule: A new paragraph (3) is added to section 525.12(i), to read as follows:

(3)(i) *Except as provided in subparagraph (ii) of this paragraph, and subject to applicable statutory limitations, any award for a victim's loss of earnings shall be limited to a period of disability resulting from crime-related injuries as established by the medical evidence obtained during the investigation of a claim.*

(ii) *If during the investigation of the claim such period of disability can not be established by medical evidence, there shall be a rebuttable presumption that such victim has suffered a period of disability of not longer than seven consecutive days beginning on the date of the crime. The Board may award loss of earnings for such period, or a portion thereof.*

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

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: Article 22 of the New York State Executive Law creates the Crime Victims Board (the Board) and section 623(3) grants the Board the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22. New York State Executive Law section 631(2) and (3) provide that the Board may make awards for loss of earnings (LOE) for the actual loss sustained, but not exceeding \$600/week for a maximum award amount of \$30,000. In instances where the medical evidence obtained during the investigation of a claim indicates a period of disability, the Board may make an award for actual LOE for that period. In instances where the evidence compiled during the investigation of a claim does not indicate a period of disability, the Board has consistently applied a presumptive, one-week period of disability measured as seven consecutive days from and including the date of the crime, in order to provide some assistance to innocent victims of crime while at the same time acting in a fiscally prudent manner. These changes are proposed in order for the Board to codify this longstanding practice, meet its statutory obligations and provide notice to claimants of what the Board considers acceptable documentation required to receive a loss of earnings (LOE) award in a reasonable, fiscally prudent and consistent manner.

2. Legislative objectives: By enacting the New York State Executive Law section 631(2) and (3), the Legislature sought to ensure that the Board could reimburse innocent victims of crime for their LOE which are the direct result of the injury upon which the claim is based. By enacting Executive Law, section 623(3), the Legislature sought to ensure the Board has the discretion to adopt suitable rules which establish a rational and consistent procedure for fulfilling its goals.

3. Needs and benefits: Currently, Article 22 of the New York State Executive Law provides that the Board may make awards for LOE. Regulations (9 NYCRR 525), however, do not explicitly provide guidance to claimants or the Board as to how such awards may be made. Provisions related to awards for LOE have been included in Article 22 since the creation of the Board in 1966. During the past forty-plus years, the Board has based its LOE award determinations on the period of disability established by the medical evidence obtained during the investigation of a claim.

There are instances, however, when the investigation of a claim does not produce sufficient evidence to establish a period of disability. This is most common with victims of assaults who require initial, emergency medical attention but do not seek follow-up medical care. When the Board examines a request for the reimbursement of LOE under such circumstances, the Board consistently applies a presumptive, one-week period of disability. This presumptive, one-week period takes into consideration the day of the crime itself and a reasonable but limited period of time during which the victim is presumed to have received emergency medical attention and recovered from physical injury sufficiently to resume working. If a person is granted this one-week LOE award and subsequently provides medical evidence substantiating a longer period, the Board will reassess the award accordingly. These proposed changes are necessary to make claimants or potential claimants aware of the need for medical evidence to establish a period of disability and the award the Board would consider reasonable if this period can not be clearly established. The proposal will assist the Board in making consistent award determinations, and codify the Board's longstanding practice.

4. Costs: a. Costs to the State. The proposed regulations would not impose any additional costs on the agency or State beyond those required by existing law. This is a codification of the Board's longstanding practice when making LOE award determinations. The proposed regulatory additions should, in fact, result in the efficient use of award dollars by (1) clearly defining the circumstances under which the Board would consider an award for LOE under its statutory authority, and (2) codifying the reasonable but limited period of time already used during which a victim is presumed to be disabled as the result of a crime, where medical evidence is lacking. Also, this provision may reduce administrative time spent reviewing and following up on claims filed with the Board because claimants or potential claimants would know to include medical evidence establishing a period of disability in support of their LOE request.

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

c. Costs to private regulated parties. The proposed regulation would not impose any additional costs on private regulated parties.

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

6. Paperwork: These proposed regulations do not create any more additional paperwork requirements for claimants than is currently required.

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

8. Alternatives: Since the creation of the Board in 1966, it has required the establishment of a period of disability, supported by medical evidence, when considering claims for LOE awards. This is relatively simple when the medical evidence compiled during the investigation of a claim clearly establishes the period. There are instances, however, where the claimant may not have sought follow-up medical attention for injuries and the investigation does not produce such information. From its years of its experience with such circumstances, the Board has and continues to believe a presumptive one-week period is the most reasonable under the circumstances where a victim's medical evidence does not exist or support a period of disability longer than one-week. This practice allows the Board to make limited, fiscally prudent determinations while at the same time fulfill its mission to provide assistance to innocent victims of crime.

Alternative methodologies considered were: (1) eliminating the presumptive period of disability altogether or (2) providing for a longer presumptive period of disability.

However, decades of balancing funding limitations against the number and varying circumstances surrounding individual crime victim claims for LOE have revealed that one-week is both sufficient and appropriate for the relatively minor physical injuries some victims may suffer which do not require any more medical attention than perhaps Emergency Room treatment and which do not have any long-lasting physical effects on victims. The Board's longstanding practice of providing a one-week LOE award under these narrow circumstance is therefore reasonable and the best alternative. Those victims with more serious injuries which may result in a period of disability beyond one-week are more likely to follow-up with a medical provider. Such provider would be able to furnish the Board with the information it needs to establish a longer period of disability.

9. Federal standards: These proposed regulations are not forbidden or duplicated by any federal requirements.

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

Regulatory Flexibility Analysis

The New York State Crime Victims Board (the Board) projects there will be no adverse economic impact on small businesses or local governments in the State of New York as a result of this proposed rule change. This

proposed rule change simply codifies the Board’s current and longstanding practice of determining loss of earnings awards for claimants. Since nothing in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

Rural Area Flexibility Analysis

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on public or private entities in rural areas in the State of New York as a result of this proposed rule change. This proposed rule change simply codifies the Board’s current and longstanding practice of determining loss of earnings awards for claimants. Since nothing in this proposed rule change will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

Job Impact Statement

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply codifies the Board’s current and longstanding practice of determining loss of earnings awards for claimants. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

The Regulations Are for the CWSRF Co-Administered by NYSDEC and the Environmental Facilities Corporation

I.D. No. ENV-43-09-00002-A
Filing No. 1364
Filing Date: 2009-12-15
Effective Date: 2009-12-30

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

Action taken: Amendment of Part 649 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 15-0101, 15-0105, 15-0109, 15-0315, 15-0317, 15-1303; L. 1989, ch. 565

Subject: The regulations are for the CWSRF co-administered by NYSDEC and the Environmental Facilities Corporation.

Purpose: To set forth rules implementing the statutory provisions of the American Recovery and Reinvestment Act of 2009 (“ARRA”).

Text or summary was published in the October 28, 2009 issue of the Register, I.D. No. ENV-43-09-00002-EP.

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

Text of rule and any required statements and analyses may be obtained from: Robert Simson, New York State Department of Environmental Conservation, Division of Water, 4th Floor, 625 Broadway, Albany, NY 12233, (518) 402-8271, email: rjsimson@gw.dec.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Environmental Facilities Corporation

NOTICE OF ADOPTION

The Proposed Regulations are for the DWSRF Co-Administered by EFC and the NYS Department of Health (DOH)

I.D. No. EFC-39-09-00002-A
Filing No. 1367
Filing Date: 2009-12-15
Effective Date: 2009-12-30

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

Action taken: Amendment of Part 2604 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1284(5) and 1285-m(4)

Subject: The proposed regulations are for the DWSRF co-administered by EFC and the NYS Department of Health (DOH).

Purpose: To set forth rules implementing the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111-5.

Text or summary was published in the September 30, 2009 issue of the Register, I.D. No. EFC-39-09-00002-EP.

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

Text of rule and any required statements and analyses may be obtained from: Judith A. Avent, Esq., Deputy General Counsel, New York State Environmental Facilities Corporation, 625 Broadway, 7th Floor, Albany, New York 12207-2997, (518) 402-6969, email: avent@nysefc.org

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

The Proposed Regulations Are for the CWSRF Co-Administered by EFC and the NYS Department of Environmental Conservation (DEC)

I.D. No. EFC-43-09-00003-A
Filing No. 1366
Filing Date: 2009-12-15
Effective Date: 2009-12-30

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

Action taken: Amendment of Part 2602 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1284(5) and 1285-j(4)

Subject: The proposed regulations are for the CWSRF co-administered by EFC and the NYS Department of Environmental Conservation (DEC).

Purpose: To set forth rules implementing the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111-5.

Text or summary was published in the October 28, 2009 issue of the Register, I.D. No. EFC-43-09-00003-EP.

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

Text of rule and any required statements and analyses may be obtained from: Judith A. Avent, Esq., Deputy General Counsel, New York State Environmental Facilities Corporation, 625 Broadway, 7th Floor, Albany, New York 12207-2997, (518) 402-6969, email: avent@nysefc.org

Assessment of Public Comment

The agency received no public comment.

Office of Homeland Security

NOTICE OF ADOPTION

Access by Data Subjects to Records Concerning the Data Subject and Maintained by the Office of Homeland Security

I.D. No. HLS-30-09-00005-A

Filing No. 1363

Filing Date: 2009-12-14

Effective Date: 2009-12-30

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

Action taken: Addition of Part 10030 to Title 9 NYCRR.

Statutory authority: Public Officers Law, section 94(2); and Executive Law, section 709(2)(n)

Subject: Access by data subjects to records concerning the data subject and maintained by the Office of Homeland Security.

Purpose: To provide procedures by which data subjects can seek to access their records maintained by the Office of Homeland Security.

Text or summary was published in the July 29, 2009 issue of the Register, I.D. No. HLS-30-09-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: James R. Clark, Deputy Counsel, NYS Office of Homeland Security, NYS Office of Homeland Security, Harriman State Office Camp, 1220 Washington Avenue, Bldg. 7A, 7th flr, Albany, NY 12226, (518) 402-2227, email: jclark@security.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Labor

EMERGENCY RULE MAKING

New York State Worker Adjustment and Retraining Notification Act (WARN)

I.D. No. LAB-07-09-00013-E

Filing No. 1372

Filing Date: 2009-12-15

Effective Date: 2009-12-15

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

Action taken: Addition of Part 921 to Title 12 NYCRR.

Statutory authority: Labor Law, section 860-f

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

Specific reasons underlying the finding of necessity: The effective date of the regulations coincides with the effective date of their authorizing legislation, the New York Worker Adjustment and Retraining Notification (WARN) Act, a new law that becomes effective February 1, 2009. The Act governs the provision of notice to certain employees who will lose employment through plant closings, mass layoffs, or reductions in work hours. The purpose of the authorizing statute is to ensure that the employees are aware of future actions that will affect their employment so that they can take steps to secure new employment, be retrained for more readily available work, and otherwise make arrangements to provide for their needs and those of their families when their employment ends. The law is also intended to ensure the ability of the Department of Labor and its partner, the Workforce Investment Board, to provide Rapid Response services to the affected employees prior to their employment loss. These services include providing employees with information regarding unemployment insurance, job training, and reemployment services. These regulations fill in gaps found in the law in order to more fully inform employees of their obligations and workers of their rights under the law.

The emergency promulgation of these regulations is necessitated by the dramatic job losses currently being suffered within the state, the need to ensure that the notice requirements detailed in the regulation are available to protect workers affected by such job losses, and the needs to provide reemployment services to these workers in order to return them quickly to work. After seasonal adjustment, New York State's private sector job count decreased by 12,700, or 0.2 percent, to 7,055,100 in October 2009. The statewide total nonfarm job count (private plus public sectors) decreased over the month by 15,300, or 0.2 percent, to 8,549,000 in October 2009. New York State's seasonally adjusted unemployment rate increased slightly from 8.9 percent in September to 9.0 percent in October 2009, its highest level since April 1983. New York City's rate held steady at 10.3 percent between September 2009 and October 2009, its highest level since May 1993. In October 2009, the number of unemployed in New York State increased to 872,000, its highest level on record (current data extend back to 1976).

The impact of these job losses on workers, their families, and their communities can be staggering, more so if workers are unaware that plant closings and layoffs are coming. The state WARN Act is designed to give workers time to avoid long periods of unemployment by affording them time to search for new work, retrain for more secure long-term employment, and take advantage of reemployment services which will ensure a quick return to work after their former employment ends. The proposed rules will ensure timely notice to the Department and early intervention of Rapid Response teams in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Such activities also avoid or shorten periods of unemployment, thereby reducing employer charges associated with the receipt of unemployment insurance by their former employees. On the other hand, employees need to know of the availability of unemployment insurance benefits following these employment losses since the program is designed to provide an economic safety net to the workers and their families. All efforts that will quickly transition workers into new employment when their former jobs end, or that ensure some continued income during unemployment, will allow workers to continue to make needed purchases such as housing, food, heat and other utilities and to maintain the payment of school and property taxes that support their local community.

Enacting emergency regulations, which will immediately clarify the scope, timing, and content of the notice requirements, supports the goals set forth above and protects the general welfare of the state.

Subject: New York State Worker Adjustment and Retraining Notification Act (WARN).

Purpose: To provide government enforcement and more advance notice to a larger number of workers than under the federal WARN law.

Substance of emergency rule: The proposed rule creates a new section of regulations designated as 12 NYCRR Part 921 entitled "New York State Worker Adjustment and Retraining Notification Act" created under Chapter 475 of the Laws of 2008. This Act requires employers of fifty (50) or more employees to provide at least ninety (90) days notice to affected employees and representatives of affected employees, the New York State Department of Labor, and local workforce partners before ordering a plant closing, mass layoff, or reduction in work hours that falls within the employment losses covered by the law. At least twenty-five (25) employees must be affected for the notice requirement to be triggered. The rule contains exceptions to the notice requirement for certain employers who are making good faith efforts to avoid employment losses and have reasonable expectation that these efforts will successfully forestall the plant closing, mass layoff, or reduction in work hours.

Many employers in the State are already subject to the federal WARN Act (29 USC §§ 2101 - 2109 and 20 CFR 639.3). The State WARN Act expands the notice requirements to a larger group of employers and, concomitantly, extends its protections to more employees. The State Act also gives the Commissioner of Labor the authority to enforce the law on behalf of affected employees who did not receive appropriate notice of a plant closing, mass layoff, or covered reduction in work hours from their employer in violation of the law. Labor Law § 860-f(1) states that the Commissioner of Labor "shall prescribe such rules as may be necessary to carry out this article."

Subpart 921-1, entitled "Purpose and Definitions" sets forth the purpose and defines the terms used in the part. Section 921-1.1(d) defines "employer" as "any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees within New York State, excluding part-time employees, or fifty (50) or more employees within the state that work in aggregate at least 2,000 hours per week." Section 921-1.1(a) defines "affected employee" as "an employee who may reasonably be expected to experience an employment loss as the result of a proposed plant closing, mass layoff, relocation, or covered reduction in hours by the employer."

Subpart 921-2, entitled "Notice," requires covered employers to provide notice to affected employees at least 90 calendar days prior to an event that triggers the notice requirement. This section enumerates the factors that trigger the notice requirement. It further spells out the contents of the notice, how notice is to be served and who must receive notice.

Subpart 921-3, entitled "Extension or Postponement of Mass Layoff Period" requires an employer to give additional notice if the triggering event is extended or postponed. Section 921-3.1 states that an "employer that previously announced and carried out a short-term layoff of six (6) months or less which is being extended beyond six (6) months due to business circumstances (e.g., unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff must give notice required under the Act and this Part as soon as it becomes reasonably foreseeable that an extension is required." Section 921-3.2 states that "if, after notice has been given, an employer decides to postpone a plant closing, mass layoff, or covered reduction in work hours for less than ninety (90) days, additional notice shall be given as soon as possible after the decision to postpone." This subpart also prohibits "rolling notice".

Subpart 921-4, entitled "Transfers," states that "notice is not required when an employer offers to transfer an employee to a different site of employment within a reasonable commuting distance with no more than a six (6)-month break in employment, regardless of whether the employee accepts such employment, or when an employer offers to transfer the employee to any other site of employment regardless of distance with no more than a six (6)-month break in employment and the employee accepts within thirty (30) days of the offer or of the closing or layoff, whichever is later."

Subpart 921-5, entitled "Temporary Employment," states that "notice is not required if the closing is of a temporary facility, or if the closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking." This subpart also makes clear that the burden of proof is on the employer to show that the job was understood to be temporary.

Subpart 921-6, entitled "Exceptions," provides exceptions to the 90-day notice period for which the employer bears the burden of proof. This subpart includes exceptions for faltering companies, unforeseeable business circumstances, natural disasters, strikes or lockouts, and economic strikers.

Subpart 921-7, entitled "Enforcement by the Commissioner of Labor," describes the administrative procedure followed by the Department when a WARN violation is suspected or alleged. Section 921-7.2 states that an employer who fails to give notice, as required, is subject to a civil penalty of \$500 for each day of the employer's violation. Section 921-7.3 states that an employer who fails to give notice is liable to each employee for back pay and the value of any benefits to which the employee would have been entitled. Further this subpart provides for an administrative appeal to the Commissioner and then an appeal under Article 79 of the CPLR.

Subpart 921-8, entitled "Confidentiality of Information Obtained by the Commissioner of Labor," requires that information obtained by the Commissioner through the administration of this Act be maintained as confidential and not be published or open to public inspection.

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. LAB-07-09-00013-EP, Issue of February 18, 2009. The emergency rule will expire February 12, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

Labor Law § 860 as added by Chapter 475 of the Laws of 2008 sets forth the requirements of the State Worker Adjustment and Retraining Notification Act. Section 860-f states that the Commissioner of Labor shall prescribe such rules as may be necessary to carry out Article 25-A of the Labor Law.

2. Legislative objectives:

Article 25-A establishes the New York State Worker Adjustment and Retraining Notification (WARN) Act which is intended to provide more advance notice to a larger number of workers who are laid off from their jobs than under the federal WARN law. Under the State WARN, companies with at least 50 employees must provide at least 90 days' notice to affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where at least 25 of the employees will suffer an employment loss as a result of a plant closing, mass layoff, or a covered reduction in work hours by their employer. These provisions will allow the Department of Labor's Rapid Response

Unit to provide workers with reemployment and retraining services well in advance of their loss of employment. This early intervention is designed to reduce or avoid periods of unemployment, ensure that workers are aware of job placement and retraining services, and, if attempts to transition workers into new employment are unsuccessful, make them aware of the availability of unemployment insurance benefits as an economic safety net for them and their families. Under the Act, the Commissioner of Labor is required to enforce the law by recovering back wages on behalf of workers whose employers failed to give timely notice and by imposing penalties against such employers.

3. Needs and benefits:

Workers whose employment is affected as a result of plant closings, mass layoffs, or significant reduction of hours require early and adequate notice to find new employment and prepare for their future. As the downturn in the economy increasingly impacts companies large and small, larger numbers of workers are impacted by such events. Over the past quarter, more than 100,000 private sector jobs have been lost in New York State. At the time of this writing, the State's seasonally-adjusted unemployment rate jumped from 6 percent in November to 7 percent in December, hitting a 14-year high and nearly equaling the nationwide 7.2 percent rate. The November-to-December unemployment rate spike was the biggest since the Department of Labor began tracking the state's rate in 1976. Unemployment insurance covers less than half of the unemployed and does not capture any of the long term unemployed, persons in non-covered employment who lost jobs, and others such as new entrants and those reentering the job market. Moreover, certain job sectors in the state, such as manufacturing, continue to decline, signaling a need to prepare workers exiting jobs in this sector with retraining to take other jobs in the economy. All in all, the current economic climate makes it essential to provide the Department with early access to workers who will be losing employment so that they can receive information and assistance that will return them to work as soon as possible following their job loss.

A federal WARN law has existed for a number of years; the law, however, does not apply to small and medium sized businesses; it only applies to firms with at least 100 employees where at least 50 workers have been affected by employment loss. As a result, large numbers of workers are not receiving the benefit of early warning of adverse employment events. If the State WARN law had been in effect in the 2007-2008 fiscal year, between 24,000 to 48,000 additional workers in at least 973 additional firms in New York would have been entitled to receive advance notice of layoffs. Fiscal Policy Institute, "The Role of Worker Notification in a New Economic Strategy for New York," May 19, 2008. At the same time, the federal law does not provide an enforcement mechanism for workers aggrieved by an employer's failure to comply. By contrast, the state statute allows the Commissioner of Labor to enforce the law against violating employers and to collect back wages and benefits and impose penalties as a deterrent to future violations.

Early intervention to assist workers with obtaining new jobs is key to avoiding the economic impact of large-scale employment losses on workers, their families, and their communities. Large-scale job losses addressed by the state law impact employee spending and lead to the general decline of the local economy. This affects businesses that serve the workforce, adversely impacts local sales and property taxes, housing values, and the like. The Department of Labor's Dislocated Worker Unit provides rapid response activities to workers to transition them into new employment as quickly as possible after a job loss. They do this by providing access to and information about dislocated worker re-employment assistance, unemployment insurance benefit information, job training, and other services. The state WARN Act increases the benefit to be derived from these services by giving workers more time to plan their reemployment strategy and more time to obtain retraining (if needed). Moreover, the notice provided to the Department under the state law and rule will include detail that will assist the Department in providing such services including the names of affected workers. Early intervention leading to reemployment also reduces dependence upon unemployment insurance benefits for laid off workers. Although such benefits are a critical economic safety net for workers and their families, reemployment is always preferable and provides greater income to workers. Reemployment reduces UI charges to individual employers and also UI benefit costs. Reduction of UI benefit costs is particularly beneficial to the state at this point in time since the State expects it will have to borrow from the federal government over the course of the upcoming year in order to support benefit payments.

The state Act and regulations also meet a significant need by providing workers with an effective mechanism to seek redress for employer violations of the notice requirements. Currently, the federal WARN law requires aggrieved employees to bring private lawsuits to sue for redress; neither the federal nor state departments of labor have the authority to enforce the federal WARN law. Private actions are a remedy that has been very seldom used over the years given that workers who fail to receive the required federal WARN notice typically lack the resources to sue their

employers. Instead, they must focus their efforts and savings on finding new employment to support their families. The State WARN Act and these emergency regulations, however, give the Commissioner of Labor the authority to recover back wages and benefits on behalf of such workers and to impose civil penalties against employers who fail to provide the required WARN notice.

4. Costs:

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. As noted elsewhere in this document, employers with 100 or more employees are already required to provide WARN notice for covered employment losses. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to employees. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve circumstances in which employees may be represented by different unions or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must also give notice of the extension or postponement as soon as possible. Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required notice, must still provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay, and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

5. Paperwork:

In addition to documentation discussed above, the proposal may result in increased paperwork for the Department. The Department's enforcement will require paperwork associated with investigations and, where necessary, hearings to determine violations and to impose appropriate penalties.

Employers charged with violating the law will have to document activities that would support their claim to exemptions from the notice provisions. In the event of appeals, there will be additional paperwork for the Department and employers to reproduce the hearing record and prepare necessary court filings.

6. Local government mandates:

The state WARN law does not apply to any units of local government so the regulations do not affect such entities. A local government may bring a civil action on behalf of any affected employee(s) and may recover attorney's fees from the court.

7. Duplication:

There is no duplication of existing state rules or regulations. There is some overlap of the proposed rules with federal rules governing the federal WARN; the Department has drafted state regulations to be consistent with federal rules to the extent possible, while still meeting the spirit and intent of the more stringent state law.

Rather than create new administrative rules to govern the WARN enforcement process, the Department's current procedural rules for Departmental hearings under 12 NYCRR Part 701 will be used for any administrative hearings conducted under the WARN Act, thereby avoiding duplication in this regard.

8. Alternatives:

The Department believes the promulgation of regulations will ensure that employers and employees impacted by the WARN Act are fully aware of their rights and responsibilities under law. Since the passage of the Act, regulated parties have been contacting the Department in large numbers requesting clarification of many provisions contained in statute, and requesting regulations to address these issues.

The Department has considered a number of other alternatives and, where possible, has selected those that will minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. Where federal WARN regulations did not address issues pertinent to the state Act, or were inconsistent with the legislative intent behind the state law, the Department adopted different requirements. Rather than requiring a separate state and federal notice for those employers who are subject to both state and federal notice requirements, the Department chose to allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. While the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, it chose to include in the rule the actual language that may be used by employers for this purpose. The Department also chose to allow delivery of the notice along with other routine contacts with employees such as with their paychecks or direct deposit slips should the employer choose to do so in order to avoid costs associated with separate delivery.

In considering whether an employer's out of state workers would count toward determining the size of the workforce needed to cover an employer under the state WARN Act, the Department noted that federal regulations count workers at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered. Since one of the main goals of the WARN Act is to require small and medium-sized businesses in the state to provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to companies' New York workforce.

The Department also considered alternatives regarding the scope of employee notice under the proposed rule. While the Department could have limited the information contained in the notice to that which is required by federal law, the Department believes it is critical that the notice contain information which employees can use to hasten their return to work following termination of employment. While the Federal WARN rules encourage, but do not require the inclusion of useful information on dislocated worker assistance programs, the Department chose to require the notices to contain information on the potential availability of unemployment insurance and reemployment services. By providing the actual language which employers can use to satisfy this requirement, the Department minimized the impact of the requirement on the regulated community.

The Department also considered the alternative of creating a separate enforcement procedure for the state WARN Act, but instead decided to utilize the administrative procedure currently in place for other administrative hearings conducted by the Department.

9. Federal standards:

Federal standards implementing the federal WARN law exist and are found at 29 USC §§ 2101 - 2109 and 20 CFR 639.3. However, consistent with a less stringent federal law, such regulations provide a shorter period of notice, cover fewer employers, and do not permit administrative enforcement of the law. Since the Commissioner of Labor is required to enforce the Act, additional provisions not contained in the federal WARN

regulations were included to ensure that information regarding notice requirements, investigations, and determinations in the state regulations sufficiently inform all affected parties of their rights and obligations and ensure a fair and thorough determination of violations based on the requirements of the Act.

10. Compliance schedule:

The Act takes effect February 1, 2009. Employers planning layoffs or other employment losses subject to the Act on or after February 1st must provide at least 90 days' notice prior to the planned termination date.

Regulatory Flexibility Analysis

1. Effect of rule:

The New York State Worker Adjustment and Retraining Notification (WARN) Act (Chapter of the Laws of 2008, effective February 1, 2009) requires businesses in New York with 50 or more employees to provide notice at least 90 days prior to a plant closing, mass layoff, or covered reduction in work hours where at least 25 of the employees will experience an employment loss from such event. Prior to the Act, only larger firms with at least 100 workers covered by the federal WARN law were required to provide 60 days notice of such events. The state WARN notice must be given to the affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where the employment losses occur. If the State WARN had been in effect during the 2007-2008 fiscal year, between 24,000 to 48,000 additional workers at 973 small and medium-sized firms in New York would have been entitled to receive such advance notice. Such notice would have allowed the Department to deploy Rapid Response staff to assist workers with reemployment and return them quickly to work after their employment loss. It is estimated that at least the same number of smaller and medium-sized businesses will be required to serve WARN notices in 2009, though the number may actually be larger given the current economic climate.

State, local, and tribal governments are not subject to the requirements of the rule.

The WARN notice will enable the Department of Labor to provide workers with access to and information concerning dislocated worker assistance, unemployment benefits, job training, and job opportunities. Most of the workers for these smaller-sized businesses are expected to remain with their employers until their last day of employment in order to continue to receive income.

2. Compliance requirements:

Employers of 50 or more employees, other than part-time employees, will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice. Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records allow employers to know the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Finally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open.

3. Professional services:

Employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice in the rule to minimize the impact of the requirement on the employers.

Employers who are cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

4. Compliance costs:

The adoption of the regulations is expected to result in minimal costs to employers. They will be required to file a WARN notice with the required parties; costs associated with providing the notice will depend upon the number of employees affected and the means of delivery selected by the employer. The rule permits delivery of the notice to be included with employee pay or direct deposit statements. Notice may also be personally delivered to individual employees at the workplace. Should employers choose to send the notice via first class mail, postage costs would still be minimal as the notice should be no more than a one or two page document. Apart from employee notice, which must be provided individually to all affected employees, notices to the Department of Labor, employee representatives, and local Workforce Investment Boards are required. Again, postage costs associated with such delivery should be nominal. In some circumstances, employees suffering an employment loss may be represented by different unions. In those cases, notices would be required to be sent to each of the different unions. In rare circumstances where places of employment are served by multiple Workforce Investment Boards, more than one notice may be required.

In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must give notice of the extension or postponement as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

5. Economic and technological feasibility:

The adoption of these emergency regulations is not expected to create an undue burden on employers. Larger employers that are required to file a WARN notice with the Department in compliance with the federal WARN law may file a single notice so long as it meets the notice requirements set forth in the regulations. Consistent with current federal WARN regulations, notice must be provided using a method that ensures the timely receipt of notice by the required parties, such as first class mail or personal delivery. While the rules do also permit notice to be provided along with paychecks or direct deposit receipts, they do not permit electronic service of notice as this means is not considered reliable and not all employees may have email accounts.

6. Minimizing adverse impact:

The proposed rule is being promulgated in response to dozens of requests received from employers, their attorneys, workers, and worker representatives seeking clarification and guidance on the scope and requirements of the state WARN statute. The Department has sought to minimize adverse impact upon the regulated community by including provisions in the rule that address the issues and concerns raised in these inquiries. These provisions allow employers to better understand their obligations under the law, and inform employees of their rights under the law. This proposal is intended to assist employers to avoid violations while ensuring that workers receive the notice that will provide them with an opportunity to plan for their futures and support their families following employment termination.

The Department has taken a number of steps to minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. For those employers who are subject to state and federal notice requirements, the Department will allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. Where the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, the rule contains the actual language

to be used by employers for this purpose. The rule allows delivery of the notice along with paychecks or direct deposit slips should the employer choose to do so, in order to avoid costs associated with separate delivery.

Another example of the Department's effort to minimize adverse impact involves the issue of whether an employer's out of state workers would count toward determining the size of the workforce needed to cover an employer under the state WARN Act. The federal regulations count workers at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered. Since one of the main goals of the WARN Act is to require small and medium-sized businesses in the state to provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to such companies' New York workforce.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

7. Small business and local government participation:

The state WARN Act and the proposed rule does not apply to state, local, or tribal governments.

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the Association of Corporate Counsel. Many individuals attending these meetings likely represent small businesses impacted by the rule. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. All of these activities prompted numerous contacts from businesses, corporate counsel, and worker representatives identifying areas of the statute which they felt required clarification in the regulations. The Department has attempted to address all these requests for clarification in the rule.

The Department also intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor for distribution to their constituency. These information activities will be in addition to the formal publication of the proposed rule in the State Register.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Employers of fifty (50) or more employees in the state who engage in plant closings, mass layoffs, or reductions in work hours covered under the Act and the rule must provide notice of such employment losses under both the statute and the emergency rule. Such employers are located throughout the state and, therefore, all the state's rural areas are affected by the rule.

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

Rural area employers of 50 or more employees, other than part-time employees, who have a plant closing, mass layoff, or reduction in work hours covered by the Act will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice. Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records allow employers to know the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff or covered reduction

in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Finally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open.

Rural area employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice in the rule to minimize the impact of the requirement on the employers.

Employers who are cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

3. Costs:

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. As noted elsewhere in this rulemaking, employers with 100 or more employees are already required to provide WARN notice for covered employment losses. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. Some of these employers will undoubtedly be located in rural areas. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those rural employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to employees. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve circumstances in which employees may be represented by different unions, or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones that action for which notice was given, that employer must also give notice of the extension or postponement as soon as possible. Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required 90-day notice, must provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence showing that they fit one or more of the various exception categories.

While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of a unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, and covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

To the extent that early intervention and reemployment services offered by the Department through its Rapid Response activities reduce the number of workers who will ultimately claim unemployment insurance benefits as a result of the adverse employment action, covered employers will see UI charges decrease as a result of the rule.

4. Minimizing adverse impact:

The proposed rule is being promulgated in response to dozens of requests received from employers and attorneys representing them seeking clarification and guidance on the scope and requirements of the statute creating the state WARN program. The Department has sought to minimize adverse impact upon the regulated community by including language in the rule that addresses the issues and concerns raised in these inquiries.

Wherever feasible and desirable, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. The Department will allow a single notice form to be used to satisfy both the state and federal notice requirements so long as the form contains all the information elements required under the state regulation. The Department has also drafted language to be included in the notice informing employees of the availability of Departmental programs and benefits as a service to employers. Service of notice is permitted along with paychecks or direct deposit slips should the employer choose to do so in order to avoid costs associated with separate delivery.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses in rural areas so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their rural area communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

5. Rural area participation:

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the State Association of Corporate Counsel. Individuals attending these events likely represent some clients located in rural areas. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. These efforts resulted in the Department receiving dozens of phone calls and written requests for clarification of various aspects of the law from all over the state. The Department has attempted to address all these requests for clarification in the emergency rule.

The Department intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor in all areas of the state, including rural areas, for their comment and distribution to their constituency, including those located in rural areas. These information activities will be in addition to the formal publication of the rule in the State Register.

Job Impact Statement

This rule requires notice to be provided to employees and other parties 90 days prior to covered plant closings, mass layoffs, relocations, and reductions in work hours at sites of employment subject to the rule. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

Assessment of Public Comment

The agency received no public comment.

Office of Mental Health

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Certificate of Relief from Disabilities Related to Firearms Possession

I.D. No. OMH-52-09-00005-EP

Filing No. 1362

Filing Date: 2009-12-14

Effective Date: 2009-12-14

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

Proposed Action: Addition of Part 543 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, section 7.09(b) and (j)

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

Specific reasons underlying the finding of necessity: The NICS Improvement Amendments Act of 2007 (Public Law 110-180, Section 105, enacted on January 8, 2008) requires that states have a relief from disabilities program that meets the requirements of the Act. In order to apply for the grant funding provided under the NICS Improvement Amendments Act of 2007, the U.S. Department of Justice required state applicants to certify by June 22, 2009 that they implemented a relief from disabilities program. This rulemaking is necessary to continue the emergency adoptions which were filed in June and September, 2009, until such time as the agency can adopt the rule as final through the Notice of Proposed Rulemaking process.

Subject: Certificate of Relief from Disabilities Related to Firearms Possession.

Purpose: To establish an administrative "certificate of relief from disabilities process" pursuant to Federal law.

Text of emergency/proposed rule: A new Part 543 is added to read as follows:

PART 543

CERTIFICATE OF RELIEF FROM DISABILITIES RELATED TO FIREARMS POSSESSION

(Statutory authority: Mental Hygiene Law § 7.09)

§ 543.1 Background and intent.

(a) *The federal Brady Handgun Violence Prevention Act of 1993 ("Brady Act") prohibits any person from selling or otherwise disposing of any firearm or ammunition to any person who has been involuntarily "committed to a mental institution" (18 U.S.C. Section 922 (d)(4)) and further prohibits any person who has been involuntarily "committed to a mental institution" from shipping or transporting in interstate or foreign commerce, or possessing in or affecting commerce, any firearm or ammunition; or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce (18 U.S.C. Section 922 (g)(4)).*

(b) *Under the federal NICS Improvement Amendments Act of 2007, Public Law 110-180, Section 105, the Brady Act was amended to establish the National Instant Criminal Background Check System (NICS). Upon being contacted by a federal firearm licensee prior to transferring a firearm to an unlicensed person, NICS will provide information on whether a person is prohibited from receiving or possessing a firearm under State or federal law. NICS contains records*

concerning certain events, such as criminal convictions and mental health adjudications and findings that may disqualify a person from purchasing a firearm. The 2007 amendments also require the establishment of a "certificate of relief from disabilities" process to permit a person who has been or may be disqualified from possessing a firearm pursuant to 18 U.S.C. Sections 922 (d)(4) and (g)(4) to petition for relief from that disability.

(c) Section 7.09 of the Mental Hygiene Law authorizes the Office of Mental Health to collect, retain, modify or transmit data or records for inclusion in the NICS system for the purpose of responding to NICS queries regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 U.S.C. 921(a)(3). The records which the Office of Mental Health is authorized by law to collect, retain, modify, or transmit are expressly limited to persons who have been involuntarily committed pursuant to Articles 9 or 10 of the Mental Hygiene Law, Article 730 or Section 330.20 of the Criminal Procedure Law, Sections 402 or 508 of the Correction Law or Sections 322.2 or 353.4 of the Family Court Act. Mental Hygiene Law Section 7.09 also requires the Office to promulgate regulations establishing a "certificate of relief from disabilities" process for those persons whose records were provided to the Division of Criminal Justice Services or the Federal Bureau of Investigation by the Office pursuant to Mental Hygiene Law Section 7.09, and who have been or may be disqualified from possessing a firearm pursuant to 18 U.S.C. Sections 922 (d)(4) and (g)(4).

(d) The purpose of these regulations is to establish the required administrative "certificate of relief from disabilities" process for persons whose records were submitted to the NICS system by the Office of Mental Health in accordance with Section 7.09 of the Mental Hygiene Law. (The Office of Mental Health has the authority under Section 7.09 of the Mental Hygiene Law to transmit the records either directly to the NICS system or through the Division of Criminal Justice Services). Such relief will be based on a determination of whether the person's record and reputation are such that he/she will not be likely to act in a manner dangerous to public safety and where granting the relief would not be contrary to the public interest.

§ 543.2 Legal Base.

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

(b) Section 7.09(j) of the Mental Hygiene Law gives the Commissioner of Mental Health the power and responsibility to establish within the Office of Mental Health an administrative process to permit a person who has been or may be disqualified pursuant to an adjudication under New York State law from possessing a firearm to petition for relief from that disability, and to promulgate regulations for this purpose.

§ 543.3 Applicability.

This Part applies to any person who has been or may be disqualified from possessing a firearm pursuant to 18 U.S.C. Sections 922 (d)(4) and (g)(4), due to being committed to a mental institution or adjudicated as having a mental disability, as such terms are defined in this Part and whose records were submitted to the NICS system by the Office of Mental Health in accordance with Section 7.09 of the Mental Hygiene Law.

§ 543.4 Definitions. For the purposes of only this Part:

(a) *Adjudicated as having a mental disability or adjudication as having a mental disability* means, and shall have the same meaning as the term "adjudicated as a mental defective" is defined in federal regulations at 27 C.F.R. 478.11, a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease is a danger to himself or to others or lacks the mental capacity to contract or manage his own affairs. Such term includes a finding of insanity by a court in a criminal case; and those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

(b) *Committed to a mental institution* means, as such term is defined

in federal regulations at 27 C.F.R. 478.11, a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. Such term includes a commitment to a mental institution involuntarily; commitment for mental defectiveness or mental illness; and commitments for other reasons, such as for drug use, provided, however, that such term does not include a person in a mental institution for observation or a voluntary admission to a mental institution. For purposes of this Part, committed to a mental institution shall include persons who have been involuntarily committed or confined pursuant to Articles 9 or 10 of the Mental Hygiene Law, Article 730 or Section 330.20 of the Criminal Procedure Law, Section 402 or 508 of the Correction Law, or Section 322.2 or 353.4 of the Family Court Act.

(c) *Mental Institution* means and includes hospitals, as defined in Section 1.03 of the Mental Hygiene Law, that are licensed or operated by the Office of Mental Health and secure treatment facilities operated by such Office.

(d) *Qualified psychiatrist* means, as that term is defined in Section 9.01 of the Mental Hygiene Law, a physician licensed to practice medicine in New York state who:

(1) is a diplomate of the American board of psychiatry and neurology or is eligible to be certified by that board; or

(2) is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.

§ 543.5 Process.

(a) *Request for relief.*

(1) An individual who has been or may be disqualified from attempting to purchase or otherwise possess a firearm in accordance with the provisions of subdivision (j) of Section 7.09 of the Mental Hygiene Law and whose records were submitted to the NICS system by the Office of Mental Health, may request administrative review by the Office to have his or her civil rights restored for such limited purpose.

(2) A request for relief shall be made on forms developed by the Office, which shall be available on the Office's public website. At a minimum, the forms shall require the applicant to answer all of the following questions under penalty of perjury:

(i) Is the applicant under indictment for, or has he/she been convicted of, a crime punishable by imprisonment for more than one year?

(ii) Is the applicant a fugitive from justice?

(iii) Is the applicant an unlawful user of, or is addicted to, any controlled substance?

(iv) Has the applicant been adjudicated as having a mental disability or committed to a mental institution?

(v) Is the applicant an illegal alien, or has he/she been admitted to the United States under a nonimmigrant visa?

(vi) Was the applicant discharged from the U.S. Armed Forces under dishonorable conditions?

(vii) Has the applicant renounced U.S. citizenship?

(viii) Is the applicant subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child?

(ix) Has the applicant been convicted in any court of a misdemeanor crime of domestic violence?

(3) In addition to the forms provided, the applicant shall be required to submit further information in support of the certificate of relief. The information must include, but is not limited to:

(i) true and certified copies of medical records detailing the applicant's psychiatric history, which shall include the records pertaining to the commitment to a mental health facility, or adjudication as having a mental disability (as defined in this Part), which is the subject of the request for relief;

(ii) true and certified copies of medical records from all of the applicant's current treatment providers, if the applicant is receiving treatment;

(iii) a true and certified copy of all criminal history informa-

tion maintained on file at the New York State Division of Criminal Justice Services and the Federal Bureau of Investigation pertaining to the applicant, or a copy of a response from such Division and Bureau indicating that there is no criminal history information on file;

(iv) evidence of the applicant's reputation, which may include notarized letters of reference from current and past employers, family members or personal friends, affidavits from the applicant or other character evidence;

(v) any further information specifically requested by the Office. Such documents requested by the Office shall be certified copies of original documents.

(4) The applicant may provide a psychiatric evaluation performed no earlier than 90 calendar days from the date the request for the certificate of relief was submitted to the Office, conducted by a qualified psychiatrist. The evaluation should include an opinion, and a basis for that opinion, as to whether or not the applicant's record and reputation are such that the applicant will or will not be likely to act in a manner dangerous to public safety and whether or not the granting of the relief would be contrary to the public interest.

(5) The Office reserves the right to request that the applicant undergo a clinical evaluation and risk assessment as determined by the Commissioner or his/her designee(s). The evaluation must be performed within 45 calendar days from the date the Office requests the evaluation, unless the Office allows an extension of time.

(6) The request for relief must include a valid authorization form permitting the Office to obtain and/or review health information from any health, mental health, or alcohol/substance abuse providers with respect to care provided prior to the date of the application, for the purposes of reviewing the application for relief. Such authorization must comply with applicable federal or state laws governing the privacy of health information, including but not limited to, as relevant, 45 CFR Parts 160 and 164, 42 CFR Part 2, Public Health Law Section 17 and Article 27-F, and Mental Hygiene Law Section 33.13.

(7) It is the responsibility of the applicant to ensure that all required information accompanies the request for relief at the time it is submitted to the Office. Unless specifically requested by the Office, information provided after receipt by the Office of the initial request for relief will not be considered. Information specifically requested by the Office must be received by the Office within 60 days of the date requested in order for it to be considered. Failure to meet this time frame will result in a denial of the certificate of relief.

(b) Scope of review.

(1) The Commissioner or his/her designee(s) shall perform an administrative review of the request for relief, which shall consist of a review of all information submitted by the applicant that was required or requested by the Office, in accordance with paragraph (a)(3) of this Section. The person(s) who conducts the review will not be the individual(s) who gathered the evidence for the administrative request for relief.

(2) Failure of the applicant to provide required or requested information may be the sole basis for denial of the certificate of relief.

(3) The scope of the review shall be to determine, from the materials submitted, whether the applicant will not be likely to act in a manner dangerous to public safety and granting the relief will not be contrary to the public interest.

(c) Decision.

(1) After review of the application in accordance with subdivision (b) of this Section, the Commissioner or his/her designee(s) shall prepare a written determination, which shall include:

(i) a summary of the information utilized in reaching the decision;

(ii) a summary of the applicant's criminal history (if any);

(iii) a summary of the psychiatric evaluation prepared to support the request for relief (if any);

(iv) a summary of the applicant's mental health history;

(v) a summary of the circumstances surrounding the firearms disability imposed by 18 U.S.C. Sections 922(d)(4) and (g)(4);

(vi) an opinion as to whether or not the applicant's record and

reputation are such that the applicant will or will not be likely to act in a manner dangerous to public safety and whether or not the granting of the relief would be contrary to the public interest; and

(vii) a determination as to whether or not the relief is granted.

(2) The Office shall provide a copy of the written determination to the applicant without undue delay. In addition to a copy of the written determination:

(i) if the relief is granted:

(A) the applicant must be provided with written notice that while the certificate of relief removes the disability from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. § 922(d)(4) and (g)(4), the determination does not otherwise qualify the applicant to purchase or possess a firearm, and does not fulfill the requirements of the background check pursuant to the Brady Act (Pub. L. 103-159); and

(B) the Office must notify the National Instant Criminal Background Check System (NICS) that the certificate of relief has been granted; or

(ii) if the relief is denied:

(A) the applicant must be notified of the right to have the decision reviewed in accordance with applicable State law; and

(B) the Office must further advise that the applicant cannot apply again for a request for relief until a year after the date of the written determination to deny the relief requested.

§ 543.6 Records.

The Office of Mental Health, on being made aware that the basis under which a record was made available by the Office to the National Instant Criminal Background Check System does not apply or no longer applies, shall, as soon as practicable:

(a) update, correct, modify or remove the record from any database that the Federal or State government maintains and makes available to the National Instant Criminal Background Check System, consistent with the rules pertaining to that database; and

(b) notify the United States Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.

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 March 13, 2010.

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

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: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction.

Subdivision (j) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the power to adopt regulations to establish the relief from disabilities program.

2. Legislative Objectives: Chapter 491 of the Laws of 2008 added a new Mental Hygiene Law Section 7.09(j) to give the Commissioner of the Office of Mental Health (OMH) broad authority to collect and transmit records to respond to queries to the NICS index. It also requires the Commissioner to establish a relief from disabilities program as mandated by the NICS Improvement Amendments Act of 2007.

The federal NICS Improvement Amendments Act of 2007 was passed and signed into law in response to recent tragedies involving weapons and persons with mental illness. This Act, which amends the Brady Handgun Violence Prevention Act of 1993, is designed to increase the number of records concerning disqualifying events that states transmit to the NICS directory, in order to prevent handgun purchases by persons who are prohibited from possessing such weapons under federal law.

Prior to Chapter 491 of the Laws of 2008, OMH had not routinely provided mental health records to the NICS index, even though it is unlawful for a person to possess a handgun if he or she has been “adjudicated as a mental defective” or “committed to a mental institution.” This was because Mental Hygiene Law Section 33.13 contains strong confidentiality protections for mental health records, and no provision of section 33.13 permits OMH to disclose mental health information to the Criminal Justice Information System (CJIS) for inclusion in NICS. Second, there are approximately 130 private or county-operated facilities in New York State that provide some form of inpatient mental health treatment. It was unclear whether OMH could access these records. Chapter 491 clarified that OMH does have access to records of these facilities that may disqualify a person from possessing a handgun.

By clarifying that OMH has the authority to obtain the relevant mental health records from private hospitals and by lifting confidentiality restrictions for the limited purpose of allowing transmission of the relevant records to CJIS, Chapter 491 of the Laws of 2007 was designed to help to prevent handgun purchases by persons who are disqualified from possessing such weapons due to their mental health histories.

Chapter 491 of the Laws of 2008 also requires the Commissioners of OMH and the Office of Mental Retardation and Developmental Disabilities to develop a relief from disabilities program by which a person who is disqualified from purchasing a firearm due to a mental health adjudication or commitment can seek to have that disqualification removed. This type of record-expungement program is mandated if the State is to be eligible for federal grant money to implement the NICS improvements.

The proposed regulations establish the required relief from disabilities program by which a person who is disqualified from purchasing a firearm due to a mental health adjudication or commitment can seek to have that disqualification removed. Again, this program is required by the federal government in order for New York State to be eligible for federal grant money to implement the NICS improvements.

3. Needs and Benefits: These regulations will establish within the Office of Mental Health a process whereby a person who has been or may be disqualified pursuant to adjudication under New York State law, as articulated in Mental Hygiene Law Section 7.09(j), from possessing a firearm to petition for relief from that disability. The implementation of this administrative “certificate of relief from disabilities” process is required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105. Upon being contacted by a federal firearm licensee prior to transferring a firearm to an unlicensed person, NICS will provide information on whether a person is prohibited from receiving or possessing a firearm under state or federal law. These regulations establish a process for individuals who have been or may be disqualified pursuant to New York law, as articulated in Mental Hygiene Law Section 7.09 (j), from possessing a firearm to petition for relief from disabilities to demonstrate that their gun ownership would not be dangerous to public safety or contrary to public interest. Failure to implement this administrative process could result in loss of future federal funds under the federal legislation.

The Commissioners of OMH and OMRDD are required in Mental Hygiene Law Section 7.09 to develop a relief from disabilities program by which a person who is disqualified from purchasing a firearm due to a mental health adjudication or commitment can seek to have that disqualification removed. However, New York State must also ensure that those law-abiding citizens wishing to purchase guns can do so. This rule is a careful balancing of an individual’s Constitutional rights to possess/own a firearm against the important public safety concern of gun violence. Furthermore, this type of record-expungement program is mandated if the State is to be eligible for federal grant money to implement the NICS improvements.

4. Costs:

(a) Cost to regulated persons: This regulation will impact members of the public who have been or may be disqualified pursuant to an adjudication under New York State law, as articulated in Mental Hygiene Law Section 7.09(j), from possessing a firearm and who

choose to petition for relief from that disability. To date, over 100,000 records have been submitted to the NICS system for this purpose, and record submission is ongoing. The Office has no experiential data from which to estimate the number of persons from the variable number of total records submitted who will voluntarily elect to petition for relief, nor is it known to what extent they will undergo costs in obtaining the documentation necessary for the regulatory process. Thus, although there may be some costs incurred by individuals who wish to avail themselves of the certificate of relief process in gathering the required materials, there are no mandatory fees required of applicants, except the cost of retrieving a certified copy of their criminal history information from the New York State Division of Criminal Justice Services and the Federal Bureau of Investigation. There will be no costs to providers regulated by the Office of Mental Health as a result of this regulatory amendment.

(b) Cost to State and local government: There will be no costs to local government. The 2009-2010 enacted State budget has included an appropriation of \$272,000 to off-set the costs to the Office associated with the hiring of new employees to implement the administrative program.

5. Paperwork: This rule should not substantially increase the paperwork requirements of regulated parties.

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

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

8. Alternative Approaches: The only alternative to this regulatory amendment would be inaction. The development of an administrative relief process is mandated by Section 7.09 of the Mental Hygiene Law. A failure to promulgate these regulations would be contrary to the legislation. Therefore, that alternative was necessarily rejected.

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

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

Regulatory Flexibility Analysis

The rulemaking serves to establish a “certificate of relief from disabilities” process as required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993. There will be no adverse economic impact on small businesses or local governments; therefore, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking, which serves to establish a “certificate of relief from disabilities” process, will not impose any adverse economic impact on rural areas. The implementation of this process is required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because there will be no adverse impact on jobs and employment opportunities. The rulemaking establishes a certificate of relief from disabilities process. Implementation of this administrative process is required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Restructuring of the Reimbursement Methodology for Community Residences

I.D. No. MRD-41-09-00016-A

Filing No. 1370

Filing Date: 2009-12-15

Effective Date: 2010-01-01

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

Action taken: Amendment of sections 635-10.5, 671.7 and 686.13 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 41.36(c) and 43.02

Subject: Restructuring of the reimbursement methodology for community residences.

Purpose: To achieve efficiencies by restructuring community residence reimbursement methodology to conform with IRA methodology.

Substance of final rule: Prior to January 1, 2010, OMRDD had two separate reimbursement methodologies for community residences and Individualized Residential Alternatives (IRAs).

The regulations change the reimbursement methodology for community residences to conform to the methodology currently used for IRAs. The IRA pricing mechanism utilizes a weighted average approach. It aggregates the allowable annual costs of all sites operated by one provider and then recognizes certified capacity and billing periods to render an individual monthly price. The pricing methodology differentiates between supervised sites and supportive sites establishing a singular price for each type of residential facility. These regulations promulgate the consolidation of aggregate costs of community residences with the aggregate costs of IRAs to determine a single agency-specific price for both supervised IRA and supervised community residence facilities and a single agency-specific price for both supportive IRA and supportive community residence facilities.

The proposed regulations are finalized effective January 1, 2010.

Final rule as compared with last published rule: Non-substantive changes were made in sections 635-10.5(b)(5), (8), (9), 671.7(a), 686.13(d)(2), (i)(1), (2), (k)(1).

Text of 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

Additional matter required by statute: Pursuant to the requirements of SEQRA 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.

Revised Regulatory Impact Statement

In preparing the final version of the regulations, non-substantive changes were made from the text that was originally proposed. This was done in recognition of regulations regarding food stamps benefits, liability for food costs and a provider reimbursement offset which also goes into effect on January 1, 2010. In the proposal phase, each of these regulations was constructed as a stand alone document without regard to the consequences one regulation would impose on the other. In order to synchronize the two, the CR regulations adjust cross references to accommodate renumbering due to insertions and deletions in the regulations addressing food stamp benefits; incorporate changes to the reimbursement methodology in the other regulation in explaining the price determination in this regulation; and modify terminology to employ the appropriate language as in changing from a "fee" to a "price." Minor non-substantive revisions unrelated to the food stamps regulations were also made and typographical errors were corrected.

None of these changes necessitate revisions to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

In preparing the final version of the regulations, non-substantive changes were made from the text that was originally proposed. This was done in recognition of regulations regarding food stamps benefits, liability

for food costs and a provider reimbursement offset which also goes into effect on January 1, 2010. In the proposal phase, each of these regulations was constructed as a stand alone document without regard to the consequences one regulation would impose on the other. In order to synchronize the two, the CR regulations adjust cross references to accommodate renumbering due to insertions and deletions in the regulations addressing food stamp benefits; incorporate changes to the reimbursement methodology in the other regulation in explaining the price determination in this regulation; and modify terminology to employ the appropriate language as in changing from a "fee" to a "price." Minor non-substantive revisions unrelated to the food stamps regulations were also made and typographical errors were corrected.

None of these changes necessitate revisions to the previously published Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

In preparing the final version of the regulations, non-substantive changes were made from the text that was originally proposed. This was done in recognition of regulations regarding food stamps benefits, liability for food costs and a provider reimbursement offset which also goes into effect on January 1, 2010. In the proposal phase, each of these regulations was constructed as a stand alone document without regard to the consequences one regulation would impose on the other. In order to synchronize the two, the CR regulations adjust cross references to accommodate renumbering due to insertions and deletions in the regulations addressing food stamp benefits; incorporate changes to the reimbursement methodology in the other regulation in explaining the price determination in this regulation; and modify terminology to employ the appropriate language as in changing from a "fee" to a "price." Minor non-substantive revisions unrelated to the food stamps regulations were also made and typographical errors were corrected.

None of these changes necessitate revisions to the previously published Rural Area Flexibility Analysis.

Revised Job Impact Statement

In preparing the final version of the regulations, non-substantive changes were made from the text that was originally proposed. This was done in recognition of regulations regarding food stamps benefits, liability for food costs and a provider reimbursement offset which also goes into effect on January 1, 2010. In the proposal phase, each of these regulations was constructed as a stand alone document without regard to the consequences one regulation would impose on the other. In order to synchronize the two, the CR regulations adjust cross references to accommodate renumbering due to insertions and deletions in the regulations addressing food stamp benefits; incorporate changes to the reimbursement methodology in the other regulation in explaining the price determination in this regulation; and modify terminology to employ the appropriate language as in changing from a "fee" to a "price." Minor non-substantive revisions unrelated to the food stamps regulations were also made and typographical errors were corrected.

None of these changes necessitate revisions to the previously published Job Impact Statement.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Food Stamp Benefits for Residents of OMRDD-Certified Facilities and Facility Reimbursement Offsets

I.D. No. MRD-41-09-00017-A

Filing No. 1371

Filing Date: 2009-12-15

Effective Date: 2010-01-01

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

Action taken: Amendment of Subpart 635-9, Parts 671 and 686 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 41.25, 41.36 and 43.02

Subject: Food stamp benefits for residents of OMRDD-certified facilities and facility reimbursement offsets.

Purpose: To establish requirements for obtaining food stamp benefits by or on behalf of persons receiving residential services.

Text of final rule: Amendments to Section 635-9.1 -- Requirements for residential facilities

- Paragraph (a)(1) and subparagraph (a)(1)(x) are amended as follows:
 - (1) Intermediate care facilities for persons with developmental dis-

abilities (ICF/DDs), community residences including *Individualized Residential Alternatives (IRAs)*, private schools, and specialty hospitals shall assume the cost of:

(x) Three well-balanced meals, or equivalent, and an appropriate number of snacks and any special foods required to meet the nutritional needs of persons in the facility. An exception to the meal/snack requirement is made where a person attends a day program which receives specific funds to cover the cost of a specified daily meal and/or snack. *An exception to the meal/snack requirement is also made where, and to the extent that, a person and the community residence or IRA in which the person lives agree that the person will pay for, obtain and prepare some or all of his or her own food.*

Amendments to Section 671.7 -- Reimbursement and fiscal reporting for providers of service

- Subparagraphs (a)(1)(vi) and (vii) are amended as follows:

(vi) The calculated fee, as computed in accordance with [subparagraphs (iii), (iv) and (v) of this paragraph] *this subdivision* shall be offset by [the appropriate] rent as *determined in accordance with* [allowed in] section 686.13[(d)](c) of this Title and adjusted for a utilization factor of [90 percent for the period March 1, 1993 to May 31, 1994 for community residences in Regions II and III and March 1, 1993 to June 30, 1994 for community residences in Region I. The utilization factor will be] 98.5 percent. [effective June 1, 1994, for community residences in Regions II and III, and effective July 1, 1994, for community residences in Region I.] The rent allowance shall be based on the following:

Note: Clauses (a)-(b) remain unchanged.

(vii) *Effective January 1, 2010, the calculated fee for a community residence of 16 or fewer beds shall be offset as follows:*

(a) *For supervised community residences the offset shall be \$1,404 (or a prorated portion thereof for facilities which opened after April, 2009) and beginning January 1, 2010, \$156 per month.*

(b) *For supportive community residences the offset shall be \$1,134 (or a prorated portion thereof for facilities which opened after April, 2009) and beginning January 1, 2010, \$126 per month.*

Note: Current subparagraphs (vii) - (xxix) are renumbered (viii) - (xxx) respectively.

- Clauses (a)(1)(ix)(b) is amended and (d) is deleted as follows:

(b) The community residential habilitation services fee shall be equal to the difference between the final net fee minus the room and board allocation in clause (a) of this subparagraph. [For the period March 1, 1993 through May 31, 1994 for Regions II and III community residences and for the period March 1, 1993 through June 30, 1994 for Region I community residences, an implementation adjustment of \$0.60 shall be added to the difference. The implementation adjustment addresses costs associated with the authorized provider's implementation of community residential habilitation services. Such costs may include, but are not limited to clinical personnel and/or administrative expenses.]

[(d)] [For the period March 1, 1993 through May 31, 1994 for Regions II and III community residences and for the period March 1, 1993 through June 30, 1994 for Region I community residences, based upon an analysis of each authorized provider's projected operating costs and revenues for the community residences, for the current fee period, the commissioner may allocate, with the approval of the Director of the Division of Budget, an amount up to \$ 4,100,000, to target additional implementation resources to providers transitioning to this new fee methodology. This provision shall expire December 31, 1993 for providers in Regions II and III, and June 30, 1994 for providers in Region I.]

Amendments to Part 686 – Operation of Community Residences

- Paragraph 686.13(a)(3) is amended as follows:

(3) Financial records shall be maintained for individuals [clients] and shall consist of [three] *four* separate accounts to record the revenue and expense as follows:

(i) an account to record the use of the total rent charged to [clients] *individuals* in accordance with subdivision (c) of this section. Such account shall record both the monthly amount collected by the provider as income and any direct payments by [clients] *individuals* for rent and utilities, as well as living expense allowances for such items as [food,] transportation, clothing, etc.;

(ii) an account to record [client] personal allowance, in cases where the [client] *individual* has chosen the option of management of such funds by the provider; and

(iii) an account to record the payments made to providers in the amount of \$250 per [client] *individual* per year, paid semiannually by OMRDD, whereby such payments are in addition to the [client] personal allowance. Such records shall document the use of the payments for the following needs of [clients] *individuals*:

- (a) replacement of necessary clothing;
- (b) personal requirements and incidental needs; and
- (c) recreational and cultural activities.

(iv) *an account of all food stamp benefits obtained and redeemed*

for individuals living in a residence with 16 or fewer beds, of all purchases and expenditures for food on behalf of such individuals, of all payments the provider receives from or for such individuals for food, and of all money given to such individuals for the purchase of food. The provider shall maintain such records for four years. Such records shall be subject to audit and review by OMRDD and any other federal or State agencies which regulate the provider or the food stamp benefit program.

- Clause 686.13(b)(1)(iv)(b) is amended as follows:

(b) monies received from persons in residence or on their behalf from third-party insurers or medical assistance programs [with the exception of personal care program monies received pursuant to Part 688 of this Title and/or comprehensive Medicaid case management payments].

- Subdivision 686.13(c) and paragraph (c)(1) are amended as follows:

(c) Rent charged to [clients] *individuals*.

(1) Rent shall mean the amount of the income and assets which may be used on a monthly basis in payment to the community residence for the goods and services the community residence is required to provide to *the individual*, or used by the [client] *individual* in direct payment to someone other than the community residence for maintenance costs such as [food,] housing, utilities and transportation. *Rent shall not include payment for food under section 686.17.*

• Subparagraph 686.13(i)(1)(vi) is amended and a new subparagraph (vii) is added as follows:

(vi) for any month during the fee period that a person is unable to pay an amount, whether from SSI, other benefits or earnings, equal to the rent charged each person and this affects the efficient and economical operation of the residence. An appeal pursuant to this section shall be a rent appeal [and shall only be considered for supervised community residences.] ; or

(vii) *for any month during the fee period that a person is unable to pay an amount, whether from benefits, earnings or other assets, equal to the amount charged each person for food under section 686.17 and this affects the efficient and economical operation of the residence.*

- Subparagraph 686.13(i)(2)(ii) is amended as follows:

(ii) In order to appeal a fee in accordance with subparagraphs (1)(i), (v), [and] (vi) *and (vii)* of this subdivision, the community residence must send to OMRDD within one year of the close of the fee period in question, a first level appeal application by certified mail, return receipt requested.

- Subparagraph 686.13(k)(1)(v) is amended as follows:

(v) Total allowable room, board and protective oversight costs shall be determined pursuant to subdivision (b) of this section. *Total reimbursable room, board and protective oversight costs shall be the allowable room, board and protective oversight costs net of rent determined pursuant to subdivision (c) of this section and net of the offset specified in subparagraph 671.7(a)(1)(vii) of this Title, both times the certified capacity minus temporary use beds (TUBS).* Room, board and protective oversight costs shall include, but not be limited to the following: capital and start-up costs, administrative personal service costs for protective oversight, building maintenance, cooking or housekeeping, where such functions cannot be integrated as part of the person's residential habilitation services portion of the ISP, as defined in Section 635-10.4(b)(1) of this Title and associated fringe benefits, food, repairs, utilities, equipment other than adaptive technologies, household supplies, linen, clothing and prorated administration and overhead costs.

- A new Section 686.17 is added to read as follows:

Section 686.17 Food stamp benefits.

(a) *Applicability. This section applies to non-profit organizations and governmental entities (other than OMRDD) with an OMRDD - issued operating certificate to operate an IRA or community residence of 16 or fewer beds, and to all individuals living in IRAs or community residences of 16 or fewer beds operated by non-profit organizations or governmental entities (other than OMRDD).*

(b) *Applying for food stamp benefits.*

(1) *The provider shall apply for food stamp benefits for each individual for whom an application for food stamp benefits has not already been made, unless:*

- (i) *the individual is capable of independently managing money and does not allow the provider to apply for food stamp benefits; or*
- (ii) *the individual and provider agree that the individual will pay for, obtain and prepare all of his or her own food; or*
- (iii) *the individual pays the provider \$200 per month for food.*

(2) *Each individual capable of independently managing money, and for whom an application for food stamp benefits has not already been made, shall apply for food stamp benefits unless:*

- (i) *the individual allows the provider to apply on his or her behalf;*
- or
- (ii) *the individual and provider agree that the individual will pay for, obtain and prepare all of his or her own food; or*
- (iii) *the individual pays the provider \$200 per month for food.*

(c) Maintaining eligibility for food stamp benefits.

(1) As used in this section "maintain eligibility for food stamp benefits" means recertifying eligibility for food stamp benefits, providing information for purposes of determining and verifying eligibility for food stamp benefits and otherwise cooperating with federal, State and local government agencies in the administration of the food stamp program. It does not mean refusing employment, public benefits, gifts or receipt of other income or assets which would make the individual ineligible for food stamp benefits.

(2) The provider shall maintain eligibility for food stamp benefits for each individual for whom the provider has applied for such benefits.

(3) Each individual for whom the provider has not applied for food stamp benefits must maintain his or her eligibility for food stamp benefits, or allow the provider to maintain eligibility and give the provider whatever information is needed to do so.

(d) Redeeming food stamp benefits or paying for food.

(1) The provider may obtain and redeem food stamp benefits for each individual for whom the provider applied for such benefits.

(2) Each individual for whom the provider has not applied for food stamp benefits must either:

(i) Allow the provider to obtain and redeem his or her food stamp benefits; or

(ii) If the provider agrees, pay for, obtain and prepare all of his or her own food; or

(iii) If the provider requests, pay the provider for food as follows:

(a) If the individual receives food stamp benefits, the individual must pay an amount equal to the food stamp benefits the individual receives.

(b) If the individual does not allow the provider to apply for food stamp benefits, does not make his or her own application or maintain his or her own eligibility for food stamp benefits, and does not present documentation of an inability to pay \$200 per month, the individual must pay \$200 per month for food.

(c) If the application for food stamp benefits for the individual was denied, or if the individual presents documentation that he or she cannot pay \$200 per month, the individual shall pay an amount he or she is able to pay.

(d) If the individual and the provider agree upon a reduced amount, the individual must pay the agreed-upon reduced amount for food and/or allow the provider to obtain and redeem the agreed-upon amount of the individual's food stamp benefits.

(e) The provider may not unreasonably withhold agreement to an arrangement whereby an individual pays for, obtains and prepares his or her own food. The provider shall base a decision on whether to agree to such an arrangement on the best interests and needs of the individual in accordance with his or her plan of services, and may not base such a decision on the provider's convenience or finances.

(f) The provider shall not decrease the amount of money it gives an individual for food purchases, whether from the individual's food stamp benefits or otherwise, or change any arrangement with the individual whereby the individual purchases or prepares some of his or her food or meals, unless such change is based on the individual's best interests and needs in accordance with his or her plan of services.

(g) A provider may not discharge an individual from a residence or deny an individual admission to a residence because of failure to pay for food or because of OMRDD's failure to grant an appeal pursuant to subparagraph 686.13(i)(1)(vii).

(h) A provider's obligation to provide for the nutritional needs of a person as set forth in paragraph 633.4(a)(4) and subparagraph 635-9.1(a)(1)(x) of this Title is not diminished or altered because of an individual's receipt or lack of receipt of food stamp benefits or because of fluctuations in the amount of food stamp benefits.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 686.13(i)(1).

Text of 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

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.

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

Although a minor nonsubstantive change was made in the proposed regulations to correct typographical errors at the end of clause 686.13(i)(1)(vi) this change does not necessitate revisions to the previously published RIS, RFA, RAFA, JIS.

Assessment of Public Comment

OMRDD received written comments and/or oral testimony from 4 different parties: one letter from a provider association, one from a Protection and Advocacy agency and two persons commenting on behalf of an advocacy organization for persons receiving services. One of the people presenting hearing testimony also identified herself as the parent of an individual receiving services. Seven individuals attended a public hearing and two presented comments. The comments on the proposed regulations and OMRDD's responses to those comments can be summarized as follows:

1. Comment:

The provider association was appreciative of the offsets established by OMRDD to recognize the administrative workload associated with management of food stamp benefits, but observed that providers who serve the most capable and independent people will be likely to have the more intense workload while being the least likely to benefit from the cushion provided in the offsets.

Response:

The regulations recognize and accommodate the fact that issues relating to the most capable and independent people may produce an increased workload for agency staff. Generally it is expected that these individuals reside in supportive residences. OMRDD has, therefore, reduced the per person per month offset by \$30 for individuals who reside in supportive residences.

2. Comment:

The provider association suggested removing the option for the individual to prevent the provider from applying for food stamp benefits on his or her behalf.

Response:

While OMRDD understands the commenter's concerns, these regulations strive to balance the practical and financial needs of providers with the need to recognize individuals' capabilities and to foster individuals' independence. In OMRDD's view, it is important to let individuals who can make their own financial decisions take responsibility and apply for food stamp benefits. However, the regulations also require these individuals to take responsibility. If the individual refuses to apply for the benefit or let the provider apply, he or she must pay for food.

3. Comment:

New subparagraph 686.13(a)(3)(iv) requires that the provider maintain an account of food stamp benefits obtained and all payments received as well as all purchases and expenditures for food on behalf of individuals, etc. The representative felt that "account" needed a regulatory definition and that further specificity might be provided in the form of an OMRDD administrative memorandum.

Response:

OMRDD believes the elements necessary to the accounting are sufficiently specified in the subparagraph and does not wish to be too restrictive by further defining the concept.

However, OMRDD is considering additional administrative guidance to providers with respect to the accounting, auditing and review of the benefits.

4. Comment:

The provider association expressed providers' concerns regarding various factors which could affect the amount of individuals' food stamp benefits and the regularity of their receipt which could cause a revenue deficit for a given residence or facility. The writer thought that new subparagraph 686.13(i)(1)(vii) should include language to express a commitment by OMRDD to a rapid response or contingency process to assist providers.

Response:

OMRDD does not agree with the concept of a "rapid appeal process" as a remedy for short term revenue deficits. In general, reimbursements follow the law of cost averages and fiscal viability is assessed by long term operational performance rather than by short term results. Revenues and expenses may fluctuate to produce losses in some months that are offset by surpluses in other months. OMRDD purposely calculated the offsets at amounts that would recognize factors contributing to the collection of less than the maximum food stamp benefit level. Consequently, OMRDD expects price adjustment requests to be almost non-occurring. On an exceptional basis, providers who experience losses due to revenue shortfalls related to food stamp benefit receipts will be afforded recourse as per subdivision 686.13(i). OMRDD does, however, remain sensitive to providers' hardships and will continue to address emergency situations on a case by case basis.

5. Comment:

The provider association questioned why the regulations did not use the term "authorized representative."

Response:

Providers acting on behalf of an individual will be authorized representatives as that term is used in the food stamp program. "Authorized repre-

sentative'' is not an OMRDD term, and OMRDD used other language to make the regulation more understandable to persons not versed in the food stamp program.

6. Comment:

A Protection and Advocacy agency applauded OMRDD for holding the individual harmless from the effects of fluctuations in food stamp benefits and for prohibiting providers from denying admission or continued stay in a residence because a person does not participate in the food stamp program. The agency also asked that the regulations require providers to give individuals formal written notice of the right to manage food stamp benefits, of the right to object to services or changes in services under 14 NYCRR Sec. 633.12, and of the basis for provider actions. The notice and right to object would cover the following provider actions: refusals to consent to the individual paying for, obtaining and preparing his or her own food; determinations that the individual is not capable of managing money; determinations that the individual is not permitted to manage his or her food stamps; reductions in the amount of money a person has for food, and changes in an arrangement for an individual to purchase or prepare his or her own food.

Response:

OMRDD is not making these changes to the regulations because they are unnecessary.

It is not necessary to require providers to give individuals separate formal written notice of their rights to manage their food stamp benefits. 14 NYCRR Section 633.12 already requires providers to give notice of the availability of the Section 633.12 objection process when a person enters a residence and when there are changes to a person's plan of services.

A person can already request that his or her plan of services state that he or she independently buys, prepares and eats his or her food. A provider's denial of a request to put a provision in a plan of services for independent food purchasing, preparation and eating, or a change to such a provision, would be subject to the Section 633.12 objection process. Similarly, if the person's plan of services states how much money he or she independently manages for food, the provider's reduction of that amount would be subject to the Section 633.12 process.

It is not necessary to require appeals of determinations that a person is not capable of managing money. Under 14 NYCRR Section 633.15, a person's expenditure planning team determines whether he or she is capable of independently managing money. This regulation requires the person and advocate to be part of the planning team. Finally, there is no provision in the regulations for a provider to determine that the individual is not permitted to manage his or her food stamp benefits. If the provider applied for the individual's benefits, the provider obtains and redeems the benefits. If the individual applied for the benefits, the individual can either obtain and redeem them or allow the provider to do so.

7. Comment:

The Protection and Advocacy agency also suggested that OMRDD change the format of the Individualized Service Plan (ISP) to ensure that issues relating to food stamp arrangements and the adequacy of resources available for food purchases are addressed during the ISP process.

Response:

This comment requests a change in policy, not in the regulation itself. However, OMRDD does not think it is necessary to change the ISP format for this point. It has always been the case that a person's ISP can include provisions for independent food purchasing, preparation and eating.

8. Comment:

Finally, the writer observed that OMRDD had done a great deal of work to educate providers as to the rules and procedures of the food stamp program and their assistance to individuals in the application process. The writer did, however, comment that more guidance to the field is necessary, in particular guidance materials directed to the individuals receiving services to inform them of their rights.

Response:

OMRDD plans to issue guidance materials for individuals receiving services.

9. Comment:

An advocacy organization gave both written comments and hearing testimony. The organization agreed with the comments of the Protection and Advocacy agency and made additional comments identified here and in comments 10-14.

The advocacy organization commented that the regulations are not specific enough concerning the situations of individuals who live independently in the community, and that greater guidance is necessary when people live in supportive Individualized Residential Alternatives (IRAs) or community residences and independently purchase and prepare their own food. They suggested separate regulations to address food stamp benefits for residents of supportive IRAs and community residences.

Response:

OMRDD does not believe that separate regulations for supportive IRAs

or community residences are advisable because the same opportunities for food purchases, preparation and eating should be afforded all individuals without regard for whether they reside in a supportive or supervised site. As previously stated, OMRDD plans to issue guidance materials for individuals receiving services.

10. Comment:

One commenter expressed, in testimony, appreciation for the choice afforded to residents who decline participation in the food stamp program. The comment stated that residents of supportive IRAs/community residences broadly fell into two categories: those that wished to make use of the food stamp benefit, and those who did not want to participate in the program. The commenter stated that both groups receive the same allowance from the provider for food and other needs, and that persons who decline to apply for food stamps will have difficulty meeting their needs on the same allowance persons with food stamps receive.

Response:

The purpose of the regulations is to promote utilization of a benefit for which residents are eligible. Individuals may indeed decline to participate, but if they elect to do so OMRDD will not subsidize this choice with 100% State funding.

11. Comment:

Advocates were concerned that individuals not be more restricted in their nutritional arrangements, or suffer a reduction in the amount of money they receive from the provider to meet their alimentary needs.

Response:

Paragraphs 686.17(e) and (f) specifically prohibit providers from engaging in the restrictions referred to above.

12. Comment:

The advocates said providers were giving residents an allowance which was expected to cover food and non-food expenses associated with living more independently in a supportive IRA or community residence. The commenter asked that the regulation cover non-food expenses.

Response:

OMRDD recognizes the complex issues of what supplies and services are, or are not, the agency's responsibility to provide, and has dealt with these topics in Subpart 635-9. The present regulations deal with the food stamp benefit and its use.

13. Comment:

The advocates asked that the regulation specify a fixed amount that a resident of a supportive residence should receive for food if he or she is responsible for purchasing his or her own food.

Response:

A single fixed dollar amount for an individual cannot be established due to the variation in circumstances encountered in the independent living arrangements. Individual preferences, dietary needs, household composition and geographical location are some of the factors that will determine the necessary dollar amount. Allowances and arrangements for food will need to be developed and modified on a case-by-case basis.

14. Comment:

The commenter asked that subdivision 686.17(f) be changed to state that the individual is the one to decide what is in his or her best interests.

Response:

This provision describes a decision made by a provider about how much money and autonomy to give the individual. The individual will presumably always decide that the amount of money and autonomy he or she requests is in his or her best interests. However, it is important to allow the provider to have a say in this matter to protect individuals from decisions that would be harmful to them.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Amendment of Liability for Services Regulations

I.D. No. MRD-52-09-00009-P

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

Proposed Action: Amendment of Subpart 635-12 and section 671.7(h) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 41.25, 43.02 and 43.03

Subject: Amendment of Liability for Services Regulations.

Purpose: To amend OMRDD's liability for services regulations to include a limited exception and a schedule of compliance activities.

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

- Subpart 635-12 was promulgated on Feb. 15, 2009 and establishes the

obligations of providers and individuals receiving or requesting services related to liability for services. Generally, the Subpart requires that individuals obtain and maintain Medicaid which would pay for the services, and, if necessary, apply for enrollment in OMRDD's Home and Community Based Services (HCBS) Waiver, or that the individuals (or other liable parties) pay for the services themselves.

- Related emergency regulations were also promulgated on Feb. 15, 2009. The emergency regulations, which have been maintained in force since that time, exempted certain services from compliance with Subpart 635-12.

SUMMARY OF PROPOSED REGULATIONS:

- Applies Subpart 635-12 to the services which were exempted by the emergency regulations. These services are: Medicaid Service Coordination; Day Treatment Services; At Home Residential Habilitation Services, Prevocational Services, Supported Employment Services, Respite Services; and Blended Services and Comprehensive Services (OPTS Services).

- Establishes a schedule of compliance activities for the exempted services listed above. The compliance activities are the same as those required for the original services, except that different dates are substituted. The schedule consists of the following:

Preexisting Compliance Date – March 15, 2010. This is the date which distinguishes between “preexisting services” and “other than preexisting services.”

Notice Date – May 15, 2010. Notices are required to be provided to individuals and liable parties by this date (for preexisting services).

Payment Start Date – June 15, 2010. Individuals and liable parties who are responsible for paying for services will receive bills for services delivered on or after this date (for preexisting services).

- Restores all provisions of the original regulation related to the exempted services that had been deleted by the emergency regulation, including a provision that OMRDD may approve a reduction or waiver of fees for Medicaid Service Coordination (MSC) for up to 3 months if an individual does not have Full Medicaid Coverage and MSC is necessary to assist the individual in obtaining Full Medicaid Coverage.

- Establishes a limited exception for some individuals receiving supported employment services or respite services. The exception applies to individuals who are receiving supported employment services but are not receiving any of the other services covered by Subpart 635-12. Similarly, the exception applies to individuals who are receiving respite services but are not receiving any of the other services covered by Subpart 635-12. This exception does not apply to individuals who have Full Medicaid Coverage and are enrolled in the HCBS waiver on or after the effective date of the amended regulation. Various notice requirements are established related to the limited exception.

- Requires providers of “other than preexisting services” to inquire whether an individual applying for services is already receiving or also applying for supported employment services or respite services. If the individual is receiving or also applying for either or both of those services and has (or is expected to have) the limited exception, the regulations impose notice requirements on these providers.

- Includes three technical corrections that were included in the emergency regulations.

The proposal clarifies that the provider's duty to gather information concerning liable parties and the ability to pay and qualify for Medicaid is limited to what is reasonably necessary to gather this information, not everything that is possible to gather the information.

The proposal includes a clarification that the add-on for educational services is to be excluded from the ICF/DD fee that can be charged to individuals and liable parties.

The proposal includes a conforming amendment to section 671.7(h), making that section consistent with the requirements of Subpart 635-12 for OMRDD payments.

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

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

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

Additional matter required by statute: Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has 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. New York State Mental Hygiene Law Section 13.07 establishes the New York State Office of Mental Retardation and Developmental Disabilities' (OMRDD) statutory responsibility for seeing that persons with

mental retardation and developmental disabilities are provided with services.

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

c. Section 41.25 of the Mental Hygiene Law requires that fees charged or payments requested take into account costs and ability to pay, considering resources available from private and public health insurance and medical aid programs.

d. Section 43.02 of the Mental Hygiene Law establishes OMRDD's responsibility for setting Medicaid rates and fees for services in facilities licensed or operated by OMRDD.

e. Section 43.03 of the Mental Hygiene Law establishes liability for fees for services. The individual, his/her estate, spouse, parents or guardian if the individual is under 21, and representative payee or fiduciary holding assets for the individual are jointly and severally liable for the fees. Parents or spouses of parents are not liable for fees for services rendered to a disabled child under 21 if the child does not reside in the common household.

2. Legislative Objectives: These proposed amendments further the legislative objectives embodied in sections 13.07, 13.09, 41.25, 43.02 and 43.03 of the Mental Hygiene Law by promoting personal responsibility to contribute to the cost of care and equity in the application of liability to individuals and other liable parties for developmental disabilities services provided by not-for-profit agencies operating under the auspices of OMRDD. The proposed amendments establish a compliance schedule for certain specified services which were excluded by emergency regulations and create a limited exception. OMRDD has determined that individuals in need of those services might be unable to access the services or might otherwise be adversely impacted if Subpart 635-12 were to remain unchanged.

3. Needs and Benefits: OMRDD filed a notice of adoption which added a new 14 NYCRR Subpart 635-12, Liability for Services, effective February 15, 2009. Subpart 635-12 established the obligations of providers and individuals receiving or requesting services related to liability for services. Generally, the regulations required that individuals obtain and maintain Medicaid which would pay for the services, and, if necessary, apply for enrollment in OMRDD's Home and Community Based Services (HCBS) Waiver, or that the individuals (or other liable parties) pay for the services themselves. The new requirements were applied to a list of specific service types included in the regulation.

A number of concerns were raised by regulated parties prior to the adoption of the permanent regulations. Providers were concerned that they would not be able to fulfill the mandatory requirements within the timeframes established for all services and requested a deferral of applicability for services which had not already been the subject of a similar administrative effort. Issues were identified concerning recipients of supported employment services, that some individuals transitioning from VESID services and other individuals who only received state-funded supported employment services could be adversely affected by applying the regulations in specific situations. In addition, concerns were voiced that some families accessing respite services would be deterred from accessing these essential services, and that it might actually be more costly to the state if the individuals complied with the new requirements.

In response to concerns raised by regulated parties, OMRDD adopted emergency regulations, effective February 15, 2009 to coincide with the effective date of the adoption of the new Subpart 635-12. The emergency regulations, which have been maintained in force since that time, exempted certain services from compliance with Subpart 635-12. The exempted services are: Medicaid Service Coordination; Day Treatment Services; the following HCBS Waiver Services: At Home Residential Habilitation Services, Prevocational Services, Supported Employment Services, and Respite Services; and Blended Services and Comprehensive Services.

The proposed regulations restore the applicability of the regulation to the services exempted by the emergency regulations, and schedule compliance activities for the exempted services in a manner similar to the original services. Without the promulgation of the proposed regulations, the exempted services would be restored with all compliance requirements being effective on the date the emergency regulations expire. The schedule of compliance activities includes a specific date that notices must be provided to individuals and liable parties and a date that billing will occur. The schedule of compliance activities gives individuals and liable parties time to be notified about the regulatory requirements and time to come into compliance by applying for Medicaid and HCBS waiver enrollment before being billed for services. It also gives providers time to evaluate requests for fees to be waived or reduced and to apply to OMRDD for approval of fee waivers or reductions, and gives OMRDD time to respond to these applications.

The proposed regulations will create a limited exception in some cases

of individuals receiving or applying for supported employment or respite services, but not for any of the other services in the regulation. The limited exception language preserves the definitions in Subpart 635-12 and the provisions concerning the effect of the regulation on liability and entitlements, and establishes special requirements that apply in limited exception cases. As long as all criteria for the limited exception continue to be met, providers, individuals and liable parties will not have to meet the general requirements of Subpart 635-12.

After extensive analysis and discussion, OMRDD determined that the applicability of the general requirements of Subpart 635-12 in the specified situations would in some cases be detrimental to individuals and families and/or would actually be more costly for the State. In some instances, individuals might forgo receipt of necessary supported employment services which could lead to the loss of the individual's employment. This is counter to the OMRDD's Employment First initiative and could lead to the individual's requiring more costly day program services. Similarly, caregivers might be deterred from receiving necessary respite services, and later the state could incur the much greater cost of out-of-home placement for the individual when the caregiver was unable to cope with the situation. In some cases, the state cost of the provision of service coordination (a requirement for HCBS waiver enrollees) could significantly offset or even exceed the state savings realized by the receipt of the federal portion of Medicaid for the respite or supported employment services. Without the promulgation of the proposed regulations, both supported employment services and respite services would be fully applicable without the limited exception, upon the expiration of the emergency regulations.

The proposed regulation also includes three technical corrections that had been incorporated into the emergency regulations. First, the proposal clarifies that the provider's duty to gather information concerning liable parties and the ability to pay and qualify for Medicaid is limited to what is reasonably necessary to gather this information, not everything that is possible to gather the information. Second, the proposal includes a clarification that the add-on for educational services is to be excluded from the ICF/DD fee that can be charged to individuals and liable parties. Finally, the proposal includes a conforming amendment to section 671.7(h), making that section consistent with the requirements of Subpart 635-12 for OMRDD payments.

4. Costs: It is difficult to quantify the fiscal impact of the proposed regulations.

As noted above, OMRDD promulgated emergency regulations to temporarily delay the applicability of the Subpart to the exempted services. The exempted services are: Medicaid Service Coordination; Day Treatment Services; the following HCBS Waiver Services: At Home Residential Habilitation Services, Prevocational Services, Supported Employment Services, and Respite Services; and Blended Services and Comprehensive Services.

Minor administrative and paperwork costs to providers and individuals will be incurred associated with the limited exception for respite services and supported employment services. However, these administrative costs are less than the administrative and paperwork costs that would be incurred by the imposition of the general requirements of Subpart 635-12 which would occur if the emergency regulations expired without the promulgation of these proposed regulations. For example, both the original and proposed regulations impose the requirement that providers give notices. However, the original regulation also requires additional compliance activities, such as requiring providers to request financial information and bill individuals and liable parties. These additional activities are not required in limited exception cases by the proposed regulations. Providers and individuals therefore will realize modest savings overall related to administrative costs by the promulgation of these proposed regulations.

Related to the effect on the state portion of Medicaid costs and other state costs, OMRDD has, after consideration of the variables involved, arrived at the conclusion that the limited exception will likely significantly reduce the savings projected in the original permanent regulations effective February 15, 2009. If the original permanent regulations were made effective to all individuals receiving supported employment services and respite, some services paid for by 100% state dollars would be funded by Medicaid with 50% state funding and 50% federal funding. In other cases, individuals would privately pay for services or would choose to stop receiving services. All of these scenarios would generate state savings. However, it is difficult to quantify the impact due to the potential impacts on service delivery and offsets due to the requirement for that enrollees in the HCBS waiver receive service coordination as noted above under "Needs and Benefits."

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

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: The proposed amendments will reduce paperwork by creation of the limited exception, so that individuals and liable parties will not be supplying financial and other information to providers, or applying for Medicaid or enrollment in the HCBS waiver when detrimental to the individual. Providers will avoid paperwork in billing costs and in applying to OMRDD for a waiver or reduction of the fees. Administrative paperwork requirements that providers give notice to individuals in these situations will be roughly similar to the notice requirements that would exist if the limited exception was not created.

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

8. Alternatives: The alternative would require that subpart 635-12 be applied, across the board, to all services as originally contemplated and adopted. After careful consideration of the concerns expressed by providers and advocates, OMRDD has determined that the proposed amendments creating a schedule of compliance activities and a limited exception for the specified services is the prudent course of action.

9. Federal Standards: The proposed regulations do not exceed any applicable federal standards.

10. Compliance Schedule: OMRDD delayed implementation of subpart 635-12 with respect to certain services while it considered whether uniformly applying the regulations to all services would be cost-effective and desirable, from a public policy perspective. This implementation delay was achieved by a series of emergency adoptions of amendments limiting the applicability of Subpart 635-12. From the adoption of Subpart 635-12 effective February 15, 2009, regulated parties have been involved in OMRDD's deliberations regarding the temporarily exempted services. The proposed amendments will permanently create a limited exception for the specified services, which will result in compliance activities related to giving notices to individuals and, occasionally, to other providers. These compliance activities are less extensive than the compliance activities that would be required without the limited exception.

OMRDD intends to adopt these regulations as soon as possible within the time constraints imposed by the State Administrative Procedure Act. The regulations contain specific dates by which certain compliance activities must take place, for services that had been exempted by the emergency regulations.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies which provide developmental disabilities services under the auspices of 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 employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses. As of December, 2008, OMRDD estimates that there are approximately 274 provider agencies that would be affected by the proposed amendments.

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that the proposed regulations would have a positive effect on affected providers. As discussed in the Regulatory Impact Statement, this proposed regulation amends the Liability for Services regulation to establish a schedule of compliance activities for services which had been exempted by emergency regulation and to establish a limited exemption for certain individuals receiving supported employment services or respite services.

The proposed amendments will have no effect on local governments.

2. Compliance requirements: The proposed regulations establish a schedule of compliance activities for services which had been exempted by the emergency regulations. The exempted services are: Medicaid Service Coordination; Day Treatment Services; the following HCBS Waiver Services: At Home Residential Habilitation Services, Prevocational Services, Supported Employment Services, and Respite Services; and Blended Services and Comprehensive Services. The compliance activities are the same as those originally required by the permanent regulations adopted February 15, 2009. However, the proposed regulations specify new dates by which these activities must occur.

The proposed regulations establish a limited exception for some individuals applying for or receiving supported employment services or respite services. New compliance activities are required in these situations, such as new notice requirements. However, as noted in the Regulatory Impact Statement, these compliance activities are substantially less than the activities that would be required without the creation of this limited exception.

3. Professional services: There are no additional professional services

required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There will be a minor savings in compliance costs for providers and no compliance costs for local governments as a result of the proposed amendments. The original permanent regulation included the services that were exempted by emergency regulations, so the compliance costs that may be associated with implementing the schedule of compliance activities for these services would be incurred without these proposed regulations. Compliance costs will be reduced for providers related to those individuals qualifying for the limited exception, as providers will be able to forgo activities such as billing and requesting financial information.

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

6. Minimizing adverse impact: The amendments will not result in any adverse economic impacts for small businesses, local governments and other regulated parties.

7. Small business and local government participation: OMRDD conducted extensive outreach to providers related to the regulations proposed in November 2008 which added the new Subpart 635-12, effective February 15, 2009. OMRDD facilitated discussions of the proposed regulations in numerous meetings including the provider associations, the Benefit Development Workgroup which includes regulated parties, and a subcommittee of the Commissioner's Advisory Council. Many of the features of the amendments that are now being proposed are an outgrowth of input received regarding the original regulations. OMRDD also informed all providers of the original regulations proposed in November 2008 as well as the final regulations and emergency regulations effective February 2009, and developed and distributed a variety of materials to assist providers in complying with the regulatory requirements (see www.omr.state.ny.us, News & Publications, Benefits Information). OMRDD continued its outreach efforts with regulated parties and other stakeholders during the development of the amendments that are now proposed. In particular, the Benefit Development Workgroup discussed the proposed amendments at several meetings.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this rule making 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. As discussed in the Regulatory Impact Statement, this proposed regulation amends the Liability for Services regulation to establish a schedule of compliance activities for services which had been exempted by emergency regulation and to establish a limited exception for certain individuals receiving supported employment services or respite services.

Job Impact Statement

A Job Impact Statement for this rule making 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. As discussed in the Regulatory Impact Statement, this proposed regulation amends the Liability for Services regulation to establish a schedule of compliance activities for services which had been exempted by emergency regulation and to establish a limited exemption for certain individuals receiving supported employment services or respite services.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

ACE's Petition for Rehearing for an Order Regarding Generator-Specific Energy Deliverability Study Methodology

I.D. No. PSC-52-09-00006-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 or deny (in whole or in part) a petition for rehearing by the Alliance for Clean Energy New York, Inc. (ACE) for an Order Prescribing Study Methodology issued October 20, 2009.

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

Subject: ACE's petition for rehearing for an order regarding generator-specific energy deliverability study methodology.

Purpose: To consider whether to change the Order Prescribing Study Methodology.

Substance of proposed rule: The Alliance for Clean Energy New York, Inc. (ACE) seeks rehearing of the Commission's Order Prescribing Study Methodology (issued October 20, 2009) in Case 09-E-0497, In the Matter of Generator-Specific Energy Deliverability Study Methodology. ACE claims that the Commission committed errors of law and fact in issuing such order.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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-0497SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges

I.D. No. PSC-52-09-00007-P

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

Proposed Action: The Public Service Commission is considering a filing by Southside Water Inc. requesting approval to increase its annual revenues by 90% or \$65,000.

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

Subject: Water rates and charges.

Purpose: To decide whether to approve the requested increase in annual revenues of \$65,000 or 90%.

Text of proposed rule: On November 5, 2009, Southside Water Inc. (Southside or the Company) filed tariff amendments (Rate Leaf No. 10 revision 1, and Leaf No 12 revision 2) to its electronic tariff schedule P.S.C. No. 1 – Water to become effective on May 1, 2010. The company has filed new rates to produce additional annual revenues of about \$65,000, or 90% over current annual revenues. The Company provides metered water service to approximately 104 customers in the Lettiere Development, Town of Watertown, Jefferson County.

In addition, the Company is requesting an increase in its restoration charge which is currently \$25.00 at all times to \$150.00 at all times and that it be allowed to charge \$150.00 to turn off service at a customer's request. The company is also requesting to be allowed to institute a fee of \$75.00 to take a final reading and a \$25.00 fee to set up a new account. The company's tariff, along with its proposed changes, is available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us) located under Commission Documents. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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-W-0792SP1)

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

Approval for the New York Independent System Operator, Inc. to Incur Indebtedness and Borrow Up to \$50,000,000

I.D. No. PSC-52-09-00008-P

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

Proposed Action: The Commission is considering whether to adopt, modify, or reject, in whole or in part, a petition by the New York Independent System Operator, Inc. for approval to borrow up to \$50,000,000 to finance the renovation and construction of facilities.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4), (5) and 69

Subject: Approval for the New York Independent System Operator, Inc. to incur indebtedness and borrow up to \$50,000,000.

Purpose: To finance the renovation and construction of the New York Independent System Operator, Inc.'s power control center facilities.

Substance of proposed rule: The Public Service Commission is considering whether to adopt, modify, or reject, in whole or in part, a petition by the New York Independent System Operator, Inc. (NYISO) for approval to incur indebtedness, for a term in excess of twelve months, by borrowing up to \$50,000,000 to finance the renovation and construction of the NYISO's alternate and primary power control center facilities, and to undertake other related improvements.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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-0857SP1)

Racing and Wagering Board

NOTICE OF ADOPTION

Out of Competition Drug Testing of Race Horses

I.D. No. RWB-43-09-00001-A

Filing No. 1369

Filing Date: 2009-12-15

Effective Date: 2010-01-01

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

Action taken: Amendment of sections 4043.1, 4120.1; and addition of sections 4043.12 and 4120.17 to Title 9 NYCRR.

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

Subject: Out of competition drug testing of race horses.

Purpose: To supplement existing equine drug testing requirements to include race horses that are not formally scheduled to race.

Text or summary was published in the October 28, 2009 issue of the Register, I.D. No. RWB-43-09-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of State

NOTICE OF ADOPTION

Uniform Standards of Professional Appraisal Practice

I.D. No. DOS-40-09-00014-A

Filing No. 1365

Filing Date: 2009-12-15

Effective Date: 2009-12-30

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

Action taken: Amendment of section 1106.1 of Title 19 NYCRR.

Statutory authority: Executive Law, section 160-d(1)(d)

Subject: Uniform Standards of Professional Appraisal Practice.

Purpose: To adopt the 2010-2011 edition of the Uniform Standards of Professional Appraisal Practice.

Text or summary was published in the October 7, 2009 issue of the Register, I.D. No. DOS-40-09-00014-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Taxation and Finance

NOTICE OF ADOPTION

Definition of Resident for Personal Income Tax

I.D. No. TAF-43-09-00023-A

Filing No. 1368

Filing Date: 2009-12-15

Effective Date: 2009-12-30

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

Action taken: Amendment of section 105.20(e)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First, 697(a) and 605(b)(1)

Subject: Definition of resident for personal income tax.

Purpose: To except dwellings maintained by full-time undergraduate students from the definition of permanent place of abode.

Text or summary was published in the October 28, 2009 issue of the Register, I.D. No. TAF-43-09-00023-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Workers' Compensation Board

EMERGENCY RULE MAKING

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-52-09-00001-E

Filing No. 1358

Filing Date: 2009-12-09

Effective Date: 2009-12-09

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. Memorandum of Decisions issued by Panels of three members of the Workers' Compensation Board (Board) have interpreted the current regulation as requiring reports of independent medical examinations to be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays to receive the report, and the U.S. Postal Service is not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is not accepted into evidence and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, the workers' compensation insurance carrier/self-insured employer, the claimant's treating provider, the claimant's representative and the claimant it is not possible to send the report by facsimile or electronic means. The Decisions have greatly, negatively impacted the professionals who conduct independent medical examinations and the entities that arrange and facilitate these exams, as well as the workers' compensation insurance carriers and self-insured employers. When untimely reports are not accepted into evidence, the insurance carriers and self-insured employers are prevented from adequately defending their position in a workers' compensation claim. Accordingly, emergency adoption of this rule is necessary.

Subject: Filing written reports of Independent Medical Examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the Board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 8, 2010.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation

Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will

be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. Any independent medical exams conducted at their request must be filed by the physician, chiropractor, psychologist or podiatrist conducting the exam or by an independent medical examination (IME) entity. Workers' Compensation Law § 137 (1)(a) does not permit self-insured employers or insurance carriers to file these reports, therefore there is no direct action a self-insured local government must or can take with respect to this rule. However, self-insured local governments are concerned about the timely filing of an IME report as one filed late will not be admissible as evidence in a workers' compensation proceeding. This rule makes it easier for a report to be timely filed as it expands the timeframe from 10 calendar days to 10 business days. Small businesses that are self-insured will also be affected by this rule in the same manner as self-insured local governments.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

This rule requires the filing of IME reports within 10 business days rather than 10 calendar days. Prior to this rule medical providers authorized to conduct IMEs and IME entities hired to perform administrative

functions for IME examiners, such as filing the report with the Board, had less time to file such reports. Self-insured local governments and small employers, who are not authorized or registered with the Chair to perform IMEs or related administrative services, are not required to take any action to comply with this rule. As noted above, WCL § 137(1)(a) does not permit self-insured employers or insurance carriers to file IME reports with the Board. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.