

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Ash Trees, Nursery Stock, Logs, Green Lumber, Firewood, Stumps, Roots, Branches and Debris of a Half Inch or More

I.D. No. AAM-49-09-00020-E

Filing No. 1332

Filing Date: 2009-11-24

Effective Date: 2009-11-24

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

Action taken: Addition of Part 141 to Title 1 NYCRR.

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

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

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

The Emerald Ash Borer can cause serious damage to healthy trees by boring through their bark, consuming cambium tissue, which

contains growth cells, and phloem tissue, which is responsible for carrying nutrients throughout the tree. This boring activity results in loss of bark, or girdling, and ultimately results in the death of the tree within two years.

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

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

Since the Emerald Ash Borer is not considered established in the State, moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State.

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

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

Based on the facts and circumstances set forth above the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately establish the quarantine in Cattaraugus and Chautauqua Counties could result in the spread of the Emerald Ash Borer beyond those areas and damage to the natural resources of the State. This could result in a federal quarantine and quarantines by other states and foreign countries af-

fecting the entire State. Such actions would cause economic hardship to the nursery and forest products industries of the State. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare. Given the potential for the spread of the Emerald Ash Borer beyond the areas currently infested and the detrimental consequences that would have, it appears that the rule establishing the quarantine should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more.

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

Text of emergency rule: Part 141

Control of the Emerald Ash Borer

Section 141.1. Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

Section 141.2. Quarantine area.

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

Section 141.3. Regulated articles.

(a) Prohibited movement.

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

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

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

(b) Regulated movement.

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

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

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

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

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

Section 141.4. Conditions governing the intrastate movement of regulated articles.

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

Section 141.5. Conditions governing the issuance of certificates and permits.

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

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

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

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

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

Section 141.6. Inspection and disposition of shipments.

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the quarantine area, which contains, or which the inspector has probable cause to believe may contain, infestations of the Emerald Ash Borer, or articles or things regulated under this quarantine, may be examined by an inspector at any time or place. When articles or things are found to be moving or to have been moved

intrastate in violation of these regulations, the inspector may take such action as he deems necessary to eliminate the danger of dissemination of the Emerald Ash Borer. If found to be infested, such articles or things must be free of infestation without cost to the State except that for inspection and supervision.

Section 141.7. Assembly of regulated articles for inspection.

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

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

Section 141.8. Marking requirements.

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

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

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

Section 141.9. Shipments for experimental and scientific purposes.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 21, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

The additions accord with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Emerald Ash Borer.

3. Needs and benefits:

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

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

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

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

Since the Emerald Ash Borer is not considered established in the State, moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State.

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

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

In the case of nursery stock, the regulations prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area.

In the case of all other regulated articles, the regulations prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area, except under

a limited permit or unless accompanied by a certificate of inspection indicating freedom of infestation.

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

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

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

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

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

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

4. Costs:

(a) Costs to the State government: None. Annual surveys will be required to monitor the natural spread of the beetle at a cost of \$200,000 to \$250,000. However, it is anticipated that this survey program will be funded by the United States Department of Agriculture (USDA) through a continuing cooperative agreement with the New York State Department of Environmental Conservation (DEC).

(b) Costs to local government: None.

(c) Costs to private regulated parties:

There are 51 nurseries in Cattaraugus County and 28 nurseries in Chautauqua County which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol for ash nursery stock. Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the regulations, other than pursuant to compliance agreement, will require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.00.

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

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

(d) Costs to the regulatory agency:

(i) The initial expenses the agency will incur in order to implement and administer the regulation: None.

(ii) It is anticipated that the Department will be able to administer the quarantine with existing staff.

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

The failure of the State to establish a quarantine in Cattaraugus and Chautauqua Counties in and near where the Emerald Ash Borer has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of Emerald Ash Borer that could result from the unrestricted movement of White Ash, Green Ash, Black Ash and Blue Ash from the quarantine areas. In light of these factors, there does not appear to be any viable alternative to the quarantine set forth in this rule.

9. Federal standards:

The regulations do not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business:

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

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

2. Compliance requirements:

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

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

3. Professional services:

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

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

4. Compliance costs:

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

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

There are 79 nurseries in Cattaraugus and Chautauqua Counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. Regulated parties exporting other types of host materials (e.g. firewood and forest products) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.00.

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

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

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

5. Minimizing adverse impact:

The Department has designed the rule to minimize adverse economic impact on small businesses and local governments. This is done by limiting the quarantine area to only those parts of New York State near or where the Emerald Ash Borer has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Emerald Ash Borer and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the regulations minimize adverse economic impact as much as is currently possible.

6. Small business and local government participation:

The Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of the Emerald Ash Borer quarantine.

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

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

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

Those in attendance at the meetings on July 9th and July 14th ap-

peared to understand the threat posed by the Emerald Ash Borer and expressed support for the regulations. Outreach efforts will continue.

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

The economic and technological feasibility of compliance with the rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping regulated articles (exclusive of nursery stock) from the quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a certificate of inspection. Most shipments, however, will be made pursuant to compliance agreements.

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

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

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

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

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

3. Costs:

There are 79 nurseries in Cattaraugus and Chautauqua Counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There are also approximately 600 firewood dealers and other forest products businesses in these counties. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.00.

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

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

4. Minimizing adverse impact:

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

shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact. Given all of the facts and circumstances, it is submitted that the regulations minimize adverse economic impact as much as is currently possible.

5. Rural area participation:

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

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

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

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

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

Job Impact Statement

The rule will not have a substantial adverse impact on jobs or employment opportunities and in fact, will likely aide in protecting jobs and employment opportunities for now and in the future. Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

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

By helping to prevent the spread of the Emerald Ash Borer, the rule will help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's nursery, forestry and wood-working industries.

Department of Correctional Services

NOTICE OF ADOPTION

Standards of Inmate Behavior, Inmate Correspondence Program and Privileged Correspondence

I.D. No. COR-30-09-00018-A

Filing No. 1328

Filing Date: 2009-11-23

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 sections 270.2, 720.3, 720.4, 721.2 and 721.3 of Title 7 NYCRR.

Statutory authority: Correction Law, sections 112, 137, 70 and 18

Subject: Standards of Inmate Behavior, Inmate Correspondence Program and Privileged Correspondence.

Purpose: To revise correspondence procedures and inmate rules with respect to the processing/possession of UCC related documents.

Text or summary was published in the July 29, 2009 issue of the Register, I.D. No. COR-30-09-00018-EP.

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

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

Assessment of Public Comment

One public comment was received from an inmate legal service group which believed the new rules defining any UCC document as contraband were overbroad and could prohibit any legal pursuit of UCC theories. It was suggested that the regulatory scheme be reconsidered to define and prohibit the actual abuse.

In addition, several inmates have sent letters to the Department's Counsel asserting that the rule restricting access to UCC materials violates their Constitutional rights. Although these letters were not submitted as comments in response to the Notice of Emergency Adoption and Proposed Rule Making, we nonetheless address the concerns below.

RESPONSE

DOCS had considered language making an exception for "legal materials which set forth the statute or law review and law journal articles analyzing legal issues in the context of the UCC." However, because there are numerous books and documents that give step-by-step instructions for the would-be UCC abuser that analyze legal issues in the context of the UCC, we determined that such an exception could not be made. It is noted that each part of the rule permits possession of UCC related materials with prior authorization.

The comment, while conceding DOCS' interest in staunching UCC abuse, suggest that the regulatory scheme should be re-considered to define and prohibit the actual abuse. It should not be so broad as to prohibit 'any document' concerning the UCC theories." Unfortunately, an inmate can easily take a number of preliminary steps under this scheme without his or her actions being detected until staff or other members of the public have already suffered significant harm. Therefore the prohibition of the instruments to engage in this conduct is necessary to protect staff and others.

Several inmates have asserted that the rule infringes upon their constitutional rights to possess UCC materials and petition the courts for redress of grievances, wherein they seek to use UCC filings to support their claims for habeas corpus relief. DOCS notes that shortly after the filing of its Notice of Emergency Adoption and Proposed Rule Making concerning parts 270, 720 and 721, a proceeding was filed challenging the new rules in the State of New York Supreme Court,

County of Onondaga (Hopkins v. Fischer, Index # 2009-5583). By Decision, Order and Judgment dated September 22, 2009, the court upheld the challenged rules finding that there is a rational relationship between the regulation and the legitimate government interests asserted to prevent harm to innocent victims of unauthorized UCC filings; the regulation is legitimate and neutral; the inmates have alternative means to exercise their rights in that the authorization process provides other avenues for the exercise of the asserted right; the misuse of UCC documents has had an adverse impact on the prison system; and no other reasonable alternatives exist which satisfy the government interest. The Court further found that access to UCC documents could properly be denied where they were sought in connection with a petition for habeas corpus relief and other matters referenced by the petitioner but unrelated to any commercial transaction.

Crime Victims Board

NOTICE OF ADOPTION

Reimbursement for Sexual Assault Forensic Examination

I.D. No. CVB-39-09-00005-A

Filing No. 1301

Filing Date: 2009-11-18

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 525.12(h) of Title 9 NYCRR.

Statutory authority: Executive Law, section 631(13)

Subject: Reimbursement for sexual assault forensic examination.

Purpose: To comply regulations with recent statutory amendments (L.2009, c. 56) as they relate to certain reimbursements by the Board.

Text or summary was published in the September 30, 2009 issue of the Register, I.D. No. CVB-39-09-00005-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Economic Development

EMERGENCY RULE MAKING

Empire Zones Reform

I.D. No. EDV-49-09-00003-E

Filing No. 1327

Filing Date: 2009-11-23

Effective Date: 2009-11-23

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

Action taken: Amendment of Parts 10 and 11; renumbering and amendment of Parts 12 through 14 to Parts 13, 15 and 16; and addition of new Parts 12 and 14 to Title 5 NYCRR.

Statutory authority: General Municipal Law, art. 18-B, section 959; L. 2000, ch. 63; L. 2005, ch. 63; L. 2009, ch. 57

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

Specific reasons underlying the finding of necessity: Regulatory action is needed immediately to implement the statutory changes contained in Chapter 57 of the Laws of 2009 and to realize \$90 million in savings to the General Fund in the current fiscal year. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State's taxpayers, particularly in light of New York's current fiscal climate. It bears noting that General Municipal Law section 959(a), as amended by Chapter 57 of the Laws of 2009, expressly authorizes the Commissioner of Economic Development to adopt emergency regulations to govern the program.

Subject: Empire Zones reform.

Purpose: Allow Dept to continue implementing Zones reforms and adopt changes that would enhance program's strategic focus.

Substance of emergency rule: The emergency rule is the result of changes to Article 18-B of the General Municipal Law pursuant to Chapter 63 of the Laws of 2000, Chapter 63 of the Laws of 2005, and Chapter 57 of the Laws of 2009. These laws, which authorize the empire zones program, were changed to make the program more effective and less costly through higher standards for entry into the program and for continued eligibility to remain in the program. Existing regulations fail to address these requirements and the existing regulations contain several outdated references. The emergency rule will correct these items.

The rule contained in 5 NYCRR Parts 10 through 14 (now Parts 10-16 as amended), which governs the empire zones program, is amended as follows:

1. The emergency rule, tracking the requirements of Chapter 63 of the Laws of 2005, requires placement of zone acreage into "distinct and separate contiguous areas."

2. The emergency rule updates several outdated references, including: the name change of the program from Economic Development Zones to Empire Zones, the replacement of Standard Industrial Codes with the North American Industrial Codes, the renaming of census-tract zones as investment zones, the renaming of county-created zones as development zones, and the replacement of the Job Training Partnership Act (and private industry councils) with the Workforce Investment Act (and local workforce investment boards).

3. The emergency rule adds the statutory definition of "cost-benefit analysis" and provides for its use and applicability.

4. The emergency rule also adds several other definitions (such as applicant municipality, chief executive, concurring municipality, empire zone capital tax credits or zone capital tax credits, clean energy research and development enterprise, change of ownership, benefit-cost ratio, capital investments, single business enterprise and regionally significant project) and conforms several existing regulatory definitions to statutory definitions, including zone equivalent areas, women-owned business enterprise, minority-owned business enterprise, qualified investment project, zone development plans, and significant capital investment projects. The emergency rule also clarifies regionally significant project eligibility. Additionally, the emergency rule makes reference to the following tax credits and exemptions: the Qualified Empire Zone Enterprise ("QEZE") Real Property Tax Credit, QEZE Tax Reduction Credit, and the QEZE Sales and Use Tax Exemption. The emergency rule also reflects the eligibility of agricultural cooperatives for Empire Zone tax credits and the QEZE Real Property Tax Credit.

5. The emergency rule requires additional statements to be included in an application for empire zone designation, including (i) a statement from the applicant and local economic development entities pertaining to the integration and cooperation of resources and services for the purpose of providing support for the zone administrator, and (ii) a statement from the applicant that there is no viable alternative area available that has existing public sewer or water infrastructure other than the proposed zone.

6. The emergency rule amends the existing rule in a manner that allows for the designation of nearby lands in investment zones to exceed 320 acres, upon the determination by the Department of Economic Development that certain conditions have been satisfied.

7. The emergency rule provides a description of the elements to be included in a zone development plan and requires that the plan be resubmitted by the local zone administrative board as economic conditions change within the zone. Changes to the zone development plan must be approved by the Commissioner of Economic Development

(“the Commissioner”). Also, the rule adds additional situations under which a business enterprise may be granted a shift resolution.

8. The emergency rule grants discretion to the Commissioner to determine the contents of an empire zone application form.

9. The emergency rule tracks the amended statute’s deletion of the category of contributions to a qualified Empire Zone Capital Corporation from those businesses eligible for the Zone Capital Credit.

10. The emergency rule reflects statutory changes to the process to revise a zone’s boundaries. The primary effect of this is to limit the number of boundary revisions to one per year.

11. The emergency rule describes the amended certification and decertification processes. The authority to certify and decertify now rests solely with the Commissioner with reduced roles for the Department of Labor and the local zone. Local zone boards must recommend projects to the State for approval. The labor commissioner must determine whether an applicant firm has been engaged in substantial violations, or pattern of violations of laws regulating unemployment insurance, workers’ compensation, public work, child labor, employment of minorities and women, safety and health, or other laws for the protection of workers as determined by final judgment of a judicial or administrative proceeding. If such applicant firm has been found in a criminal proceeding to have committed any such violations, the Commissioner may not certify that firm.

12. The emergency rule describes new eligibility standards for certification. The new factors which may be considered by the Commissioner when deciding whether to certify a firm is (i) whether a non-manufacturing applicant firm projects a benefit-cost ratio of at least 20:1 for the first three years of certification, (ii) whether a manufacturing applicant firm projects a benefit-cost ratio of at least 10:1 for the first three years of certification, and (iii) whether the business enterprise conforms with the zone development plan.

13. The emergency rule adds the following new justifications for decertification of firms: (a) the business enterprise, that has submitted at least three years of business annual reports, has failed to provide economic returns to the State in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value to the tax benefits the business enterprise used and had refunded to it; (b) the business enterprise, if first certified prior to August 1, 2002, caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York state to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization; (c) change of ownership or moving out of the Zone, (d) failure to pay wages and benefits or make capital investments as represented on the firm’s application, (e) the business enterprise makes a material misrepresentation of fact in any of its business annual reports, and (f) the business enterprise fails to invest in its facility substantially in accordance with the representations contained in its application. In addition, the regulations track the statute in permitting the decertification of a business enterprise if it failed to create new employment or prevent a loss of employment in the zone or zone equivalent area, and deletes the condition that such failure was not due to economic circumstances or conditions which such business could not anticipate and which were beyond its control. The emergency rule provides that the Commissioner shall revoke the certification of a firm if the firm fails the standard set forth in (a) above, or if the Commissioner makes the finding in (b) above, unless the Commissioner determines in his or her discretion, after consultation with the Director of the Budget, that other economic, social and environmental factors warrant continued certification of the firm. The emergency rule further provides for a process to appeal revocations of certifications based on (a) or (b) above to the Empire Zones Designation Board. The emergency rule also provides that the Commissioner may revoke the certification of a firm upon a finding of any one of the other criteria for revocation of certification set forth in the rule.

14. The emergency rule adds a new Part 12 implementing record-keeping requirements. Any firm choosing to participate in the empire zones program must maintain and have available, for a period of six

years, all information related to the application and business annual reports.

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

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

17. The emergency rule clarifies the statutory requirement that certain defined “regionally significant” projects can be located outside of the distinct and separate contiguous areas. There are four categories of projects: (i) a manufacturer projecting the creation of fifty or more net new jobs in the State of New York; (ii) an agribusiness or high tech or biotech business making a capital investment of ten million dollars and creating twenty or more net new jobs in the State of New York, (iii) a financial or insurance services or distribution center creating three hundred or more net new jobs in the State of New York, and (iv) a clean energy research and development enterprise. Other projects may be considered by the empire zone designation board. Only one category of projects, manufacturers projecting the creation of 50 or more net new jobs, are allowed to progress before the identification of the distinct and separate contiguous areas and/or the approval of certain regulations by the Empire Zones Designation Board. Regionally significant projects that fall within the four categories listed above must be projects that are exporting 60% of their goods or services outside the region and export a substantial amount of goods or services beyond the State.

18. The emergency rule clarifies the status of community development projects as a result of the statutory reconfiguration of the zones.

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 20, 2010.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Section 959(a) of the General Municipal Law authorizes the Commissioner of Economic Development to adopt on an emergency basis rules and regulations governing the criteria of eligibility for empire zone designation, the application process, the certification of a business enterprises as to eligibility of benefits under the program and the decertification of a business enterprise so as to revoke the certification of business enterprises for benefits under the program.

LEGISLATIVE OBJECTIVES:

The rulemaking accords with the public policy objectives the Legislature sought to advance because the majority of such revisions are in direct response to statutory amendments and the remaining revisions either conform the regulations to existing statute or clarify administrative procedures of the program. These amendments further the Legislative goals and objectives of the Empire Zones program, particularly as they relate to regionally significant projects, the cost-benefit analysis, and the process for certification and decertification of business enterprises. The proposed amendments to the rule will facilitate the administration of this program in a more efficient, effective, and accountable manner.

NEEDS AND BENEFITS:

The emergency rule is required in order to immediately implement the statutory changes contained in Chapter 57 of the Laws of 2009 and to realize \$90 million in savings to the General Fund in the current fiscal year. The emergency rule also clarifies the administrative procedures of the program, improves efficiency and helps make it more cost-effective and accountable to the State’s taxpayers, particularly in light of New York’s current fiscal climate.

COSTS:

A. Costs to private regulated parties: None. There are no regulated parties in the Empire Zones program, only voluntary participants.

B. Costs to the agency, the state, and local governments: There will be additional costs to the Department of Economic Development associated with the emergency rule making. These costs pertain to the addition of personnel that may need to be hired to implement the Empire Zones program reforms. There may be savings for the Department of Labor associated with the streamlining of the State’s administration and concentration of authority within the Department of Economic Development. There is no additional cost to local governments.

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

LOCAL GOVERNMENT MANDATES:

None. Local governments are not mandated to participate in the Empire Zones program. If a local government chooses to participate, there is a cost associated with local administration that local government officials agreed to bear at the time of application for designation as an Empire Zone. One of the requirements for designation was a commitment to local administration and an identification of local resources that would be dedicated to local administration.

This emergency rule does not impose any additional costs to the local governments for administration of the Empire Zones program.

PAPERWORK:

The emergency rule imposes new record-keeping requirements on businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years.

DUPLICATION:

The emergency rule conforms to provisions of Article 18-B of the General Municipal Law and does not otherwise duplicate any state or federal statutes or regulations.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions.

FEDERAL STANDARDS:

There are no federal standards in regard to the Empire Zones program. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

Regulatory Flexibility Analysis

1. Effect of rule

The emergency rule imposes new record-keeping requirements on small businesses and large businesses choosing to participate in the Empire Zones program. The emergency rule requires all businesses that participate in the program to establish and maintain complete and accurate books relating to their participation in the Empire Zones program for a period of six years. Local governments are unaffected by this rule.

2. Compliance requirements

Each small business and large business choosing to participate in the Empire Zones program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business’s application for entry into the Empire Zone program and relating to existing annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

No professional services are likely to be needed by small and large businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

No initial capital costs are likely to be incurred by small and large businesses choosing to participate in the Empire Zones program. Annual compliance costs are estimated to be negligible for both small and large businesses. Local governments are unaffected by this rule.

5. Economic and technological feasibility

The Department of Economic Development (“DED”) estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

7. Small business and local government participation

DED is in full compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small businesses and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

Rural Area Flexibility Analysis

The Empire Zones program is a statewide program. Although there are municipalities and businesses in rural areas of New York State that are eligible to participate in the program, participation by the municipalities and businesses is entirely at their discretion. The emergency rule imposes no additional reporting, record keeping or other compliance requirements on public or private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas or reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency rule relates to the Empire Zones program. The Empire Zones program itself is a job creation incentive, and will not have a substantial adverse impact on jobs and employment opportunities. In fact,

the emergency rule, which is being promulgated as a result of statutory reforms, will enable the program to continue to fulfill its mission of job creation and investment for economically distressed areas. Because it is evident from its nature that this emergency rule will have either no impact or a positive impact on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Education Department

EMERGENCY RULE MAKING

No Child Left Behind Act of 2001 (NCLB) - School Accountability

I.D. No. EDU-26-09-00004-E

Filing No. 1329

Filing Date: 2009-11-24

Effective Date: 2009-11-28

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

Action taken: Amendment of sections 100.2(p), 120.2, 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2) and (20), 309(not subdivided) and 3713(1) and (2)

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program, as granted by the United States Department of Education (USED) on January 8, 2009, in order to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. The State and local educational agencies, including school districts, BOCES and charter schools, are required to comply with NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

On January 8, 2009, former Education Secretary Spellings informed Commissioner Mills of New York's approval to participate in the United States Department of Education's (USED) Differentiated Accountability Pilot Program as a part of its system of interventions under section 1116 of the ESEA. The purpose of the proposed amendment is to conform the Commissioner's Regulations with the approved plan and to support the implementation of Differentiated Accountability. The proposed amendment will:

(1) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement, integrating federal and State accountability systems and collapsing identifications for improvement into three simplified phases, each of which provides schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(2) allow for differentiation in the improvement process, permitting schools and districts to prepare and implement school improvement plans that best match a school's designation;

(3) better align the SURR and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(4) maximize SED's limited resources and utilize the resources of USNY while implementing School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement;

(5) strengthen the capacity of districts to assist schools to improve; and

(6) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by offering SES in the first year of a school's identification for improvement and school choice only after an identified school has failed to make AYP.

The proposed amendment was adopted as an emergency rule at the May 2009 Regents meeting, effective July 1, 2009. A Notice of Proposed Rule Making was published in the State Register on July 1, 2009. The proposed

rule was subsequently revised in response to public comment and, as so revised, adopted as a second emergency action at the September 2009 Regents meeting.

The proposed amendment has been adopted as a permanent rule at the November 2009 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on December 9, 2009. However, the emergency rule which took effect on September 29, 2009 will expire on November 27, 2009. The expiration of the emergency rule could cause disruptions to the administration of the Differentiated Accountability Pilot Program for the 2009-2010 school year.

Therefore, a third second emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the September 2009 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule, in order to avoid disruption to the administration of the Differentiated Accountability Pilot Program for the 2009-2010 school year.

Subject: No Child Left Behind Act of 2001 (NCLB) - school accountability.

Purpose: To implement the NCLB Differentiated Accountability Pilot Program.

Substance of emergency rule: The Board of Regents has amended subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, subdivisions (g)-(i) of section 120.2; subdivisions (a) and (g) of section 120.3; and subdivisions (b) and (f) of section 120.4 of the Regulations of the Commissioner of Education, as an emergency action, effective November 28, 2009, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress (AYP) for two consecutive years and be returned to Good Standing.

The substantive amendments to the regulations are as follows:

Section 100.2(p)(2)(ii)(a) is amended to replace the term "identified" with "designated" and to replace the phrase "school requiring academic progress" with "school in Improvement, Corrective Action or Restructuring."

Section 100.2(p)(5)(vii) is amended to replace the term "identified" with "designated" and to replace the phrase "a school requiring academic progress" with "a school in Improvement (year 1)."

The current paragraph 100.2(p)(6), School Requiring Academic Progress, is repealed and a new paragraph 100.2(p)(6), Differentiated Accountability for Schools, is added, beginning with the 2009-2010 school year. More specifically, the new paragraph 100.2(p)(6) will:

(1) integrate federal and State accountability systems;

(2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;

(3) collapse identifications for improvement into three simplified accountability phases; Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress on an accountability performance criterion and/or accountability indicator;

(4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make adequate yearly progress in an accountability performance criterion and/or accountability indicator for which a school has been identified;

(5) determine a school's accountability designation for the 2009-2010 school year based upon the school's accountability status for the 2008-2009 school year and the school's AYP for the 2007-2008 and 2008-2009 school years;

(6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;

(7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement two-year school improvement/corrective action/restructuring plans that best match a school's designation;

(8) better align the School Under Registration Review (SURR) and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;

(9) maximize SED's limited resources and utilize the resources of the University of the State of New York (USNY) to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and

(10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by

providing for SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

Section 100.2p(9) is amended to reference subparagraph 100.2(p)(5)(vi) rather than 100.2(p)(5)(vii) due to general reorganization of the section.

Section 100.2p(10) is amended to set forth the action that is to be taken when a school has been designated as Improvement, Corrective Action, or Restructuring and has been placed on registration review. More specifically, under the amended regulations, a school designated as Improvement (year 1) or Corrective Action (year 1) shall modify its plan to meet the requirements of a restructuring plan for implementation no later than the beginning of the next school year following the year identified for registration review. The amended regulations also provide that a school designated as Restructuring (advanced) may be warned of revocation of registration unless an acceptable plan for closure or phase out has been submitted. In addition, a school identified for registration review may be identified for phase out or closure if after two full academic years of implementing a restructuring plan progress has not been demonstrated.

Section 100.2p(11) is amended to eliminate the provision allowing a board of education to replace a school under registration review with a redesigned school, and to provide for the phase out or closure of such.

Conforming amendments are also made to section 120.2(g), (h) and (i), section 120.3 (a) and (g) and section 120.4(b) and (f), for purposes of ensuring consistency with the above amendments to section 100.2(p).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-09-00004-P, Issue of July 1, 2009. The emergency rule will expire January 22, 2010.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner of Education as the Department's Chief Administrative Officer, which is charged with the general management and supervision of all public schools and the educational work of the State.

Education Law section 207 empowers the Regents and the Commissioner to adopt rules and regulations to carry out State education laws and the functions and duties conferred on the Department.

Education Law section 210 authorizes the Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in the State.

Education Law section 215 authorizes the Commissioner to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(20) provides the Commissioner shall have such further powers and duties as charged by the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3713(1) and (2) authorize the State and school districts to accept federal law making appropriations for educational purposes and authorize the Commissioner to cooperate with federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority and is necessary to establish criteria and procedures ensuring State and local educational agency (LEA) compliance with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program, as granted by the U.S. Department of Education (USDE).

NEEDS AND BENEFITS:

Section 100.2(p) is amended to establish criteria and procedures ensuring State and LEA compliance with the NCLB school accountability provisions. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

The Differentiated Accountability Pilot Program requires the State to implement a new method of categorizing schools identified for improve-

ment; to use differentiated diagnostic tools to assist schools and districts to develop and implement appropriate plans to address the needs of students; to vary the intensity and interventions to match the academic reasons that led to a school's identification; to compress the length of time a school is supported through improvement; to merge elements of the State and NCLB accountability systems; and to reverse the order of Supplemental Educational Services and Public School Choice.

On January 8, 2009, former USDE Secretary Margaret Spellings approved New York's request to participate in the Differentiated Accountability Pilot Program. The proposed rule will conform the Commissioner's Regulations with the approved Pilot Program to:

- (1) integrate federal and State accountability systems;
- (2) reduce the current number of school accountability categories by eliminating dual Title I and non-Title I streams of improvement;
- (3) collapse identifications for improvement into three simplified phases: Improvement, Corrective Action and Restructuring, based upon the number of years that a school failed to make adequate yearly progress (AYP) on an accountability performance criterion and/or accountability indicator for which it has been identified;
- (4) further differentiate each phase into three categories of intervention: Basic, Focused and Comprehensive, based upon the number of accountability groups that failed to make AYP;
- (5) determine a school's accountability designation for the 2009-2010 school year on the school's accountability status for the 2008-2009 school year and the school's AYP status for the 2007-2008 and 2008-2009 school years;
- (6) provide schools with diagnostic tools, planning strategies, and supports and interventions specific to that phase in the improvement process and the school's category of need;
- (7) allow for differentiation in the accountability process, permitting schools and districts to prepare and implement school improvement plans that best match a school's designation;
- (8) better align the SURR and NCLB processes and ensure that schools with systemic and persistent failure fundamentally restructure or close;
- (9) maximize SED's limited resources and utilize the resources of USNY to assign School Quality Review Teams, Joint Intervention Teams, and Distinguished Educators to schools in improvement; strengthen the capacity of districts to assist schools to improve; and
- (10) empower parents by increasing combined participation in Public School Choice (PSC) and Supplemental Educational Services (SES) by offering SES in the first year of a school's identification for improvement and PSC only after an identified school has failed to make AYP.

COSTS:

Cost to the State: None.

Costs to local government: The rule is necessary to conform the Commissioner's Regulations with the State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA.

The proposed amendment may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately \$900 to \$40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16(c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a

consultant, multiplied by consulting fees in the amount of \$57/hour, resulting in costs totaling \$912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$72/hour, resulting in costs totaling \$7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of \$102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of \$112/hour, resulting in costs totaling \$42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended. The rule will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

PAPERWORK:

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

DUPLICATION:

The rule does not duplicate, overlap or conflict with State and federal requirements, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

ALTERNATIVES:

There were no significant alternatives and none were considered. The rule is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

FEDERAL STANDARDS:

The rule does not exceed any minimum standards of the federal government for the same or similar subject areas, and is necessary to conform the Commissioner's Regulations to the Differentiated Accountability Pilot Program.

COMPLIANCE SCHEDULE:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA.

It is anticipated that regulated parties may achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. The proposed rule applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local government:

EFFECT OF RULE:

The proposed rule generally applies to school districts, boards of cooperative educational services and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended.

COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth [by] in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COMPLIANCE COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education, relating to school accountability. The State and LEAs, includ-

ing school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately \$900 to \$40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16(c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$57/hour, resulting in costs totaling \$912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$72/hour, resulting in costs totaling \$7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of \$102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of \$112/hour, resulting in costs totaling \$42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts, BOCES and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program as granted by the United States Department of Education, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts. In addition, copies of the proposed rule will be provided to each charter school to give them an opportunity to participate in this proposed rule making. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to school districts, boards of cooperative

educational services (BOCES) and charter schools that receive funding as local educational agencies (LEAs) pursuant to the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed rule is necessary to establish criteria and procedures, relating to school accountability, to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education, particularly in terms of revising school accountability to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. LEAs, including school districts, BOCES and charter schools, are required to comply with the NCLB as a condition to receipt of federal funding under Title I of the ESEA, as amended.

A public school or charter school subject to the provisions of 100.2(p)(6), beginning with the 2009-2010 school year, shall implement the requirements set forth in the Differentiated Accountability Pilot Program.

A public school or charter school subject to the provisions of 100.2(p)(6) that has been newly designated as Improvement shall participate in a school quality review. All Improvement schools shall develop an improvement plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Corrective Action shall participate in a curriculum audit. All Corrective Action schools shall develop a corrective action plan no later than three months following designation; implement the plan no later than the beginning of the next school year following designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school newly designated as Restructuring shall participate in an assessment of the educational program. All Restructuring schools shall develop a restructuring plan no later than three months following designation; implement the plan no later than the beginning of the next school year following its designation; and update the plan annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A school in receipt of Title I funds that has been designated as a school in the Improvement, Corrective Action, or Restructuring phase shall arrange for the provision of supplemental education services (SES) and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to SES.

A school in receipt of Title I funds that has been designated as a school in the Improvement (year 2), Corrective Action, or Restructuring phase shall provide public school choice to eligible students and shall, immediately upon receipt of such notice, provide written notification to parents of eligible students of the student's right to public school choice.

The proposed rule does not impose any additional professional services requirements on school districts, BOCES or charter schools.

COSTS:

The rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, as granted by the United States Department of Education, relating to school accountability. The State and LEAs, including school districts and charter schools, are required to comply with the NCLB as a condition for their receipt of federal funding under Title I of the ESEA, as amended.

The rule may impose costs on LEAs with schools that are in Improvement, Corrective Action, or Restructuring status. These costs would consist of the reasonable and necessary costs associated with the activities required under Differentiated Accountability of SQR teams and curriculum auditors, Joint Intervention Teams and Distinguished Educators. However, the State Education Department anticipates mitigating these costs to schools districts by using State Education Department staff or staff contracted by the Department to serve on SQR and Joint Intervention Teams or as Distinguished Educators. In addition, we anticipate that LEAs that receive Contract for Excellence funding will be able to consider the costs of SQR, curriculum auditors, Joint Intervention Teams and Distinguished Educators to be an allowable program and activity. No additional costs have been identified with respect to the implementation of improvement plans, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. In the event that persons serving as members of an SQR or Joint Intervention team or as a Distinguished Educator are not State Education Department staff or staff contracted for by the State Education Department, the estimated reasonable and necessary annual expenses will range from approximately \$900 to \$40,000 per school. These estimates are based on the number of anticipated hours that a school district will be required to engage the services of a consultant multiplied by the consulting fees that shall be paid in accordance with Commissioner's Regulations 100.16(c)(1). More specifically: For a school designated as Improvement/Basic, it is anticipated that two days (16 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$57/hour, resulting in costs totaling \$912. For a school designated as Corrective Action, it is anticipated that thirteen days (104 hours) will be required to engage the services of a consultant, multiplied by consulting fees in the amount of \$72/hour, resulting in costs totaling \$7,488. For a school designated as Restructuring/Advanced, it is anticipated that thirty days (240 hours) will be required to engage the services of a consultant multiplied by consulting fees in the amount of \$102, as well as 20 days (160 hours) will be required to engage the services of a Distinguished Educator, multiplied by consulting fees in the amount of \$112/hour, resulting in costs totaling \$42,400. These estimates presume, to the extent appropriate, that the Commissioner appoints qualified employees of the district of location to serve as consultants, that there will be no replacement costs incurred by the district for these employees, and that, in general, the consultants will incur no overnight and minimal travel expenses.

MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent approval granted by the U.S. Department of Education and is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the NCLB Differentiated Accountability Pilot Program, relating to school accountability. LEAs, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended. The proposed rule has been carefully drafted to meet specific federal and State requirements. Because these requirements are uniformly applicable State-wide to school districts, BOCES and charter schools, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed rule will be provided to each charter school. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed rule is necessary to conform the Commissioner's Regulations with New York State's approval to participate in the No Child Left Behind (NCLB) Differentiated Accountability Pilot Program as granted by the United States Department of Education. The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools, and implements the NCLB Differentiated Accountability Pilot Program in order to increase the percentage of schools designated for Improvement that are able to make adequate yearly progress for two consecutive years and be returned to Good Standing. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment

NOTICE OF ADOPTION

No Child Left Behind Act of 2001 (NCLB) - School Accountability

I.D. No. EDU-26-09-00004-A

Filing No. 1330

Filing Date: 2009-11-24

Effective Date: 2009-12-10

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

Action taken: Amendment of sections 100.2(p), 120.2, 120.3 and 120.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 210(not subdivided), 215(not subdivided), 305(1), (2) and (20), 309(not subdivided) and 3713(1) and (2)

Subject: No Child Left Behind Act of 2001 (NCLB) - school accountability.

Purpose: To implement the NCLB Differentiated Accountability Pilot Program.

Text or summary was published in the July 1, 2009 issue of the Register, I.D. No. EDU-26-09-00004-P.

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

Revised rule making(s) were previously published in the State Register on September 23, 2009.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Personnel Health Amendments and Medicare Conditions of Participation

I.D. No. HLT-49-09-00005-P

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

Proposed Action: Amendment of sections 405.3, 405.9, 405.10, 415.26, 751.6, 763.13, 766.11 and 793.5 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2800, 2803, 3612 and 4010

Subject: Personnel Health Amendments and Medicare Conditions of Participation.

Purpose: Allow but not require facilities to use FDA approved Blood Assay for TB testing in place of the tuberculin skin test, etc.

Text of proposed rule: Paragraph (10) of subdivision (b) of Section 405.3 of Part 405 is amended to read as follows:

(10) the provision for a physical examination and recorded medical history for all personnel including all employees, members of the medical staff, *contract staff*, students, and volunteers, whose activities are such that a health impairment would pose a potential risk to patients. The examination shall be of sufficient scope to ensure that no person shall assume his/her duties unless he/she is free from a health impairment which is of potential risk to the patient or which might interfere with the performance of his/her duties, including the habituation or addiction to depressants, stimulants, narcotics, alcohol or other drugs or substances which may alter the individual's behavior. The hospital is required to provide such examination without cost for all employees who are required to have such examination. For personnel whose activities are such that a health impairment would neither pose a risk to patients nor interfere with the performance of his/her duties,

the hospital shall conduct a health status assessment in order to determine that the health and well-being of patients are not jeopardized by the condition of such individuals. The hospital shall require the following of all personnel, *with the exception of those physicians who are practicing medicine from a remote location outside of New York State*, as a condition of employment or affiliation:

(i) a certificate of immunization against rubella which means:

(a) a document prepared by a physician, physician's assistant, specialist's assistant, nurse practitioner, licensed midwife or a laboratory possessing a laboratory permit issued pursuant to Part 58 of this Title, demonstrating serologic evidence of rubella antibodies; or

(b) a document indicating one dose of live virus rubella vaccine was administered on or after the age of 12 months, showing the product administered and the date of administration, and prepared by the health practitioner who administered the immunization; or

(c) a copy of a document described in clause (a) or (b) of this subparagraph which comes from a previous employer or the school which the employee attended as a student; and

(ii) a certificate of immunization against measles for all personnel born on or after January 1, 1957, which means:

(a) a document prepared by a physician, physician's assistant, specialist's assistant, nurse practitioner, licensed midwife or a laboratory possessing a laboratory permit issued pursuant to Part 58 of this Title, demonstrating serologic evidence of measles antibodies; or

(b) a document indicating two doses of live virus measles vaccine were administered on or after the age of 12 months and the second dose administered more than 30 days after the first dose but after 15 months of age showing the product administered and the date of administration, and prepared by the health practitioner who administered the immunization; or

(c) a document, indicating a diagnosis of the employee as having had measles disease prepared by the physician, physician's assistant/ specialist's assistant, licensed midwife or nurse practitioner who diagnosed the employee's measles; or

(d) a copy of a document described in clause (a), (b) or (c) of this subparagraph which comes from a previous employer or the school which the employee attended as a student;

(iii) if any licensed physician, physician's assistant, specialist's assistant, licensed midwife or nurse practitioner certifies that immunization with measles and/or rubella vaccine may be detrimental to the employee's health, the requirements of subparagraph (i) and/or (ii) of this paragraph relating to measles and/or rubella immunization shall be inapplicable until such immunization is found no longer to be detrimental to such employee's health. The nature and duration of the medical exemption must be stated in the employee's employment medical record and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the American Academy of Pediatrics and the Immunization Practices Advisory Committee of the U.S. Department of Health and Human Services); and

(iv) *for all personnel prior to employment or affiliation, except for personnel with no clinical or patient contact responsibilities who are located in a building or site with no patient care services*, [ppd (Mantoux)] *either tuberculin skin test or Food and Drug Administration (FDA) approved blood assay for the detection of latent tuberculosis infection*, prior to employment or affiliation and no less than every year thereafter for negative findings. Positive findings shall require appropriate clinical follow-up but no repeat *tuberculin skin test or blood assay*. The medical staff shall develop and implement policies regarding positive outcomes;

Paragraph (12) of subdivision (b) of Section 405.9 of Part 405 is amended to read as follows:

(12) Every patient shall have a complete history and physical examination performed by an appropriately credentialed practitioner within [seven] *thirty* days before or 24 hours after admission. If recorded in the patient's medical record by an individual other than the attending practitioner, the history and physical examination shall be reviewed and countersigned by the attending practitioner. *When the history and physical is completed within the thirty days prior to admis-*

sion, an examination, to update any changes in the patient's health status, must be completed and documented in the patient's medical record within 24 hours after admission.

Subparagraph (i) of paragraph (2) of subdivision (b) of Section 405.10 of Part 405 is amended to read as follows:

(i) evidence of a physical examination, including a health history, performed no more than [seven] *thirty* days prior to admission or within 24 hours after admission and a statement of the conclusion or impressions drawn;

Paragraph (8) of subdivision (c) of Section 405.10 of Part 405 is amended to read as follows:

(8) The hospital shall implement procedures regarding the use and authentication of *verbal orders, including* telephone orders. Such orders shall be used sparingly, shall be accepted, [and] recorded and *authenticated* only in accordance with applicable scope of practice provisions for licensed, certified or registered practitioners, consistent with Federal and State law, and with hospital policies and procedures and shall be authenticated by the prescribing practitioner *or, until January 26, 2012, by another practitioner responsible for the care of the patient and authorized to write such an order* [as soon as possible], *within 48 hours*, also in accordance with such policies and procedures and *Federal and State law*.

Subclause (1) of clause (a) of subparagraph (v) of paragraph (1) of subdivision (c) of Section 415.26 is amended to read as follows:

(1) [a ppd (Mantoux)] *either tuberculin skin test or Food and Drug Administration (FDA) approved blood assay for the detection of latent tuberculosis infection*, prior to employment or affiliation and no less than every year thereafter for negative findings. Positive findings shall require appropriate clinical follow-up but no repeat *tuberculin skin test or blood assay*. *The medical staff shall develop and implement policies regarding positive outcomes*; and

Paragraph (4) of subdivision (d) of Section 751.6 is amended to read as follows:

(4) *for all personnel prior to employment or affiliation, except for personnel with no clinical or patient contact responsibilities who are located in a building or site with no patient care services*, [a ppd (Mantoux)] *either tuberculin skin test or Food and Drug Administration (FDA) approved blood assay for the detection of latent tuberculosis infection*, prior to employment or affiliation and no less than every year thereafter for negative findings. Positive findings shall require appropriate clinical follow-up but no repeat *tuberculin skin test or blood assay*. *The medical staff shall develop and implement policies regarding positive outcomes*; and

Paragraph (4) of subdivision (c) of Section 763.13 is amended to read as follows:

(4) [ppd (Mantoux)] *either tuberculin skin test or Food and Drug Administration (FDA) approved blood assay for the detection of latent tuberculosis infection*, prior to assuming patient care duties and no less than every year thereafter for negative findings. Positive findings shall require appropriate clinical follow-up but no repeat *tuberculin skin test or blood assay*. The agency shall develop and implement policies regarding follow-up of positive test results;

Paragraph (4) of subdivision (d) of Section 766.11 is amended to read as follows:

(4) [ppd (Mantoux)] *either tuberculin skin test or Food and Drug Administration (FDA) approved blood assay for the detection of latent tuberculosis infection*, prior to assuming patient care duties and no less than every year thereafter for negative findings. Positive findings shall require appropriate clinical follow-up but no repeat *tuberculin skin test or blood assay*. The agency shall develop and implement policies regarding follow-up of positive test results; and

Paragraph (4) of subdivision (d) of Section 793.5 is amended to read as follows:

(4) [ppd (Mantoux)] *either tuberculin skin test or Food and Drug Administration (FDA) approved blood assay for the detection of latent tuberculosis infection*, prior to employment or voluntary service and no less than every year thereafter for negative findings. Positive findings shall require appropriate clinical follow-up but no repeat *tuberculin skin test or blood assay*. *The agency shall develop and implement policies regarding follow-up of positive test results*; and

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

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

Statutory Authority:

The authority for the promulgation of these regulations is contained in Sections 2800, 2830 (2), 3612 and 4010 (4) of the Public Health Law (PHL). Section 2800 of PHL Article 28 (Hospitals) specifies that "Hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state, pursuant to section three of article seventeen of the constitution, the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services, and all public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facilities for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition or for the rendering of health-related service shall be subject to the provisions of this article."

PHL Section 2803(2) authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities. PHL Article 36 (Home Care Services), Section 3612 authorizes the SHRPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to certified home health agencies, providers of long term home health care programs and providers of AIDS home care programs. PHL Article 40 (Hospice), Section 4010 (4) authorizes the SHRPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to hospices.

Legislative Objectives:

The legislative objective of PHL Article 28 includes the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services, of the highest quality at a reasonable cost. PHL Article 36 intends that there be a public commitment to the appropriate provision and expansion of services rendered to the residents of the State by certified home health agencies, to the maintenance of a consistently high level of services by all home care services agencies, to the central collection and public accessibility of information concerning all organized home care services, and to the adequate regulation and coordination of existing home care services. PHL Article 40 declares that hospice is a socially and financially beneficial alternative to conventional curative care for those afflicted by terminal illness. In recognition of the value of hospice and consistent with State policy to encourage the expansion of health care service options available to New York State residents, it is the intention of the Legislature that hospice be available to all who seek such care and that it become a permanent component of the State's health care system.

Needs and Benefits:

Personnel in hospitals, diagnostic and treatment centers, nursing homes, home care services agencies and hospices all must undergo tuberculosis (TB) testing requirements as condition of employment or affiliation. Currently a tuberculin skin test is required no less than every year thereafter for negative findings. Positive findings require appropriate clinical follow-up, but no repeat skin test. Medical staff are required to develop and implement policies regarding positive outcomes.

The Food and Drug Administration (FDA) has recently approved a whole blood assay to detect TB infection. This testing eliminates the variation of the skin test results associated with placement, reading and interpretation. It only requires a single patient visit to draw a blood sample and results can be available within 24 hours. It is also not af-

ected by prior BCG (bacille Calmette-Gueirn) vaccination. Disadvantages of the blood assay include test kit costs, limited laboratory availability, and the processing requirement that the blood reach the laboratory and be set up within 12-16 hours of obtaining the specimen. Either the skin test or the blood assay are acceptable methods for screening for tuberculosis infection. These regulations will be updated to permit, but not require, the use of the FDA-approved blood assays for the detection of latent TB infection, as an alternative to the skin test as a condition of employment or affiliation in New York State general hospitals, nursing homes, diagnostic and treatment centers, certified home health agencies, licensed home care service agencies and AIDS health care programs, licensed home care services agencies and hospice operations.

In general hospitals, the requirements for immunizations and TB testing will not be required from those physicians who are practicing medicine from a remote location outside of New York State.

The federal Medicare Conditions of Participation that hospitals must meet to participate in the Medicare and Medicaid programs, have been revised. Such revisions change: (1) the timeframe for the completion of the hospital admission history and physical (H&P) examinations, and (2) the time frame for authentication of verbal orders and persons who may authenticate verbal orders. (See the Code of Federal Regulations 42 CFR Sections 482.22 and 482.24) The proposed revisions to Title 10 of the New York Codes Rules and Regulations (NYCRR) Sections 405.9 and 405.10 are to make the Department's regulations consistent with those federal Conditions of Participation.

The timeframe for the requirement that every general hospital patient have a complete history and physical examination performed by an appropriately credentialed practitioner will be changed from within 7 days before or 24 hours after admission to 30 days before or within 24 hours after admission. When the H&P is completed within the 30 days prior to admission another examination or assessment to update any changes must be made within 24 hours of admission. This change, supported at both the federal and State levels, will reduce a regulatory burden on providers by allowing additional time prior to an admission to schedule an H&P and conduct any necessary and appropriate pre-admission testing. The flexibility in timing also recognizes that scheduled admissions can at times be delayed due to overcrowding or other emergency situations, and that in such circumstances elective admissions are often cancelled until resources and space become available. With the 30 day timeframe hospitals will not need to repeat the H&P or pre-admission testing, except for an exam to update any changes and testing as medically necessary. This flexibility will reduce the potential for duplicating pre-admission examinations and testing, thus reducing the burden on staff resources and facility costs.

Also to make the Department's regulations consistent with the federal Conditions of Participation, 10 NYCRR Section 405.10 will be revised so that verbal orders shall be authenticated within 48 hours, rather than as soon as possible. Department regulations have been revised consistent with federal Conditions of Participation to allow authentication by the prescribing practitioner, as is currently written, or in accordance with federal changes and this proposal, until January 26, 2012, by another practitioner responsible for the care of the patient when such practitioner is otherwise authorized to write and authenticate orders. Authentication by a practitioner, other than the prescribing practitioner, is limited to a practitioner who is responsible for the care of the patient and who is expected to have knowledge of the patient's hospital stay, medical plan of care, condition and current status. With this proposal, increased flexibility would be allowed for another practitioner in a group practice to authenticate the orders of a prescribing practitioner also in the group practice. The proposal, while continuing to assure the oversight and management of patient care by the patient's attending physician, allows, consistent with a facility's policies and procedures, up to 48 hours for the authentication of a verbal order by the prescribing practitioner or other practitioner responsible for the patient's care. Facilities may elect to implement practices that prescribe a time frame more stringent than 48 hours for authentication of verbal orders and hospitals have the flexibility to limit who may authenticate a verbal order and continue to require authentication by the prescribing practitioner. The provision allowing

the authentication of orders by another practitioner responsible for the care of the patient will sunset in the federal regulations and in the proposed Department regulations on January 26, 2012. At that time both the federal Centers for Medicare and Medicaid Services and the Department will re-evaluate the need for continuation of the rule. While it is intended that verbal orders will continue to be authorized past that date, it is expected that enhanced technology such as computerized physician order entry technologies and electronic medical records will minimize the need for verbal orders.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

The blood assay for detection of latent tuberculosis costs more than the tuberculin skin test. Medicaid reimbursement for the blood assay is \$50.00. The cost of the tuberculin skin test is \$5.00. The blood assay is not required. This regulation allows, but does not require that it be used. It does offer an alternative to the current method of skin testing. The blood assay eliminates the variation of the skin test results associated with placement, reading and interpretation. It only requires a single patient visit to draw a blood sample and is not affected by prior BCG vaccination. Cost savings can result with this more reliable 1-visit method of testing.

Cost to State and Local Government:

As stated above, the blood assay for detection of latent tuberculosis is more expensive, but is not required. It would impact any state or local health facilities that choose to use the blood assay rather than the tuberculin skin test. Currently the City of New York Department of Health and Mental Hygiene offers the blood assay to their patients at some of its chest centers and it is now the standard test for TB infection at these clinics.

Cost to the Department of Health:

None.

Local Government Mandates:

None. This is a permissive regulation that allows, but does not mandate that the blood assay be used. It does not add an additional burden.

Paperwork:

No additional paperwork would be required. Documentation of test administration in the medical record would still be required. Paperwork would be reduced because there would only be a single visit to draw the blood sample, rather than an initial visit to administer the test and a follow-up visit to evaluate the test results.

Duplication:

State Regulatory changes specific to the timing of the history and physical, Title 10 NYCRR, Section 405.9(b)(12), verbal orders and the authentication of verbal orders, Title 10 NYCRR, Section 405.10(c)(8), are written to be consistent with federal requirements, 42 CFR Sections 482.22(c)(5) and 482.24(c)(1), respectively.

Alternative Approaches:

There are no other viable alternative approaches. There are 2 methods of TB testing. Currently a tuberculin skin test is required. The FDA-approved blood assay offers an alternative choice for a facility to use when testing individuals for employment or affiliation.

Federal Requirements:

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

Compliance Schedule:

This proposal will go into effect upon a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

Any facility defined as a hospital pursuant to PHL Article 28, home care agency within PHL Article 36, or Hospice within PHL Article 40 will be required to comply. A small business (defined as 100 employees or less), independently owned and operated, affected by this rule will include: 3 hospitals, 237 diagnostic and treatment centers, 91 nursing homes, 90 certified home health care programs, 338 licensed home care services agencies and 84 long term home health care

programs. There are also 50 certified hospices in New York State. Most of them would fit into the category of a small business, but definitive data concerning their small business status was not available.

Compliance Requirements:

This proposal will allow affected facilities to choose to use either the current method of TB testing or use the new blood assay test. It does not mandate that the new blood assay be used. It also exempts physicians who are practicing medicine from a remote location outside of New York State from having to comply with the general hospital employee requirements for a physical examination, recorded medical history, immunizations and TB testing.

This proposal changes the history and physical exam requirements for every general hospital patient. Currently 10 NYCRR section 405.9(b)(12) requires a complete patient history and physical examination be performed 7 days before or 24 hours after admission to a general hospital. To make the Department's regulations consistent with changes in federal Medicare Conditions of Participation, the proposed revisions would allow for performance of such history and physical examinations 30 days before admission or within 24 hours after admission. Except, when the history and physical is completed within the 30 days prior to admission, another examination to update any changes is required to be completed and documented within 24 hours of admission. Also consistent with federal Medicare Conditions of Participation, this proposal specifies that in general hospitals, verbal orders shall be authenticated within 48 hours rather than as soon as possible.

In addition, and also to become consistent with the federal Conditions of Participation, this proposal would allow, until January 26, 2012, for authentication of a verbal order in a general hospital by a practitioner, other than the person who issued the verbal order, when such authenticating practitioner is responsible for the patient and is otherwise authorized to write and authenticate orders under hospital policies and procedures and federal and state law. That revision to 405.10(c)(8) will sunset when the corresponding federal Condition of Participation sunsets, on January 26, 2012, and will be re-evaluated at that time.

Professional Services:

If a facility uses a blood assay testing method, staff must be proficient in drawing blood samples and processing them according to the current protocols for this test. In general, nurses perform the administration of the tuberculin skin test and the reading of the test results. Laboratory services will be required to process the blood assay test.

Compliance Costs:

None.

Economic and Technological Feasibility:

This proposal is economically and technically feasible.

Minimizing Adverse Impact:

There will be no adverse impact to small businesses or local governments from these regulation revisions. The revisions allow, but do not require facilities to use the blood assay method for TB testing. A facility could continue to use tuberculin skin testing. The history and physical and telephone order authentication provisions will make it easier for general hospitals to comply rather than to create an adverse impact.

Small Business and Local Government Participation:

Outreach to the affected parties is being conducted. They include general hospitals, diagnostic and treatment centers, nursing homes, home care agencies and hospices. Organizations who represent the affected parties are given notice of this proposal by its inclusion on the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council (SHRPC). The public including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

Rural Area Flexibility Analysis

Pursuant to section 202-bb of the State Administrative Procedure Act (SAPA), a rural area flexibility analysis is not required. These provisions apply uniformly throughout New York State, including all rural areas.

The proposed rule will not impose an adverse economic impact on rural facilities defined within PHL Articles 28, 36, or 40, nor will it impose any additional reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not included in accordance with Section 201-a (2) of the State Administrative Procedure Act (SAPA), because it will not have a substantial adverse effect on jobs and employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Environmental Testing for Critical Agents Using Autonomous Detection Systems (ADS)

I.D. No. HLT-49-09-00006-P

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

Proposed Action: Amendment of Subpart 55-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 502

Subject: Environmental Testing for Critical Agents Using Autonomous Detection Systems (ADS).

Purpose: Establishes standards for certification of environmental labs using new technologies to analyze samples for critical agents.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): This amendment to Subpart 55-2, which revises Sections 55-2.10 and 55-2.13, as well as adds a new Section 55-2.14, establishes standards for the certification and operation of environmental laboratories that seek approval to engage in critical agent testing by means of new technologies, including polymerase chain reaction (PCR)-based methods and immune-based bioassays employed at a fixed-base facility, or by use of an autonomous detection system (ADS) deployed in the field. An ADS is, generally speaking, an automated, real-time, self-contained sampling and analytical system for detection of critical agents situated outside a fixed-base laboratory.

Section 55-2.10(d) is amended by replacing "section" with "Subpart" to clarify that the requirement to designate a temporary director in the extended absence of the technical director, with notice to the Department whenever the absence exceeds sixty-five days, applies to environmental laboratories whose technical directors qualify under Section 55-2.13 or 55-2.14.

Section 55-2.13(a) is amended by adding "component of an organism" to the definition of critical agent, and clarifying that select agents as designated by the federal Centers for Disease Control and Prevention are also included within that definition. The amendment also clarifies that the terms "chemical element" and "chemical compound" include radioactive substances.

Subdivisions (b) through (d) of Section 55-2.13 are amended to incorporate several references to ADSs in written policies and procedures already prescribed in Subpart 55-2, and to authorize the Department to consider, as part of the certification process, a laboratory's capacity to assume an appropriate role in the public health and safety emergency response to detection of critical agents. Air is added to the list of example sample matrices, as all ADSs now commercially available sample air. Time of specimen collection is added to requisite report content. The timeframe for reporting results is changed to "as soon as practicable, but no later than 24 hours," and a maximum of one hour is specified for the laboratory's notification following an ADS signal. Definitions are included for "supplemental testing" and "confirmatory testing," and laboratories conducting such testing in response to an ADS signal are required to make available their findings to the approved laboratory operating the ADS.

Personnel requirements in existing Section 55-2.13 (f) have been modified to include, as director-qualifying experience, work performed using technologies other than conventional microbiologic techniques, i.e., experience in analysis using the specific technology of the device, instrument or system for which the laboratory is seeking approval (e.g., nucleic acid detection by the PCR technique). "Conventional microbiologic techniques" are defined as culture, use of differential media, stains and/or biochemical reactions, and morphologic examination of colonies and/or organisms. Additional flexibility has been afforded to substitute coursework in the specific technology for one year's such experience.

A new Section 55-2.14 is added to establish certification and operational requirements for laboratories engaged in testing for critical agents in environmental samples using an ADS. An "autonomous detection system" is defined as a fixed or portable self-contained analytical system

that: automatically, continuously or periodically samples the environment; analyzes sample(s); and triggers an alert that a critical agent, as defined in Section 55-2.13, has been detected. "Deploy" is defined as engaging an ADS in real time collection and analysis of environmental samples for purposes of detecting incidental release of a critical agent. The section includes an express exception for six commonly used devices, and makes clear the authority of the Commissioner of Health to make determinations whether Department oversight is required for any environmental sampling and/or testing device that is or has been deployed for a purpose other than detecting incidental release of a critical agent.

Pursuant to subdivision (b) of new Section 55-2.14, a laboratory engaged in the analysis of environmental samples using an ADS must: ensure that the system is operated in a secure and safe manner to prevent accidental or deliberate tampering that could compromise the integrity of its operation; establish and validate the minimum concentration(s) of specified critical agent(s) that will trigger a signal; develop a laboratory response plan acceptable to the Department, to be immediately implemented whenever a signal is triggered; retain documentation that the response plan has been developed in collaboration with the client(s) on whose property an ADS is situated and with State and local public health and emergency preparedness authorities; and maintain a standard operating procedure manual (SOPM) containing specific protocols for ADS operation as detailed in subdivision (b). The requisite response plan must include procedures for: notification of a signal to the client(s) on whose property an ADS is situated; notification of a signal to State and local public health and emergency preparedness authorities; emergency shutdown of any ADS suspected to be malfunctioning; communication between the laboratory's technical director and authorities responding to a signal; timely verification that any signal triggered was neither a false positive nor false negative signal, including review of results of any supplemental tests; and remediation for any false signal. The new provisions require the SOPM to include, at a minimum: (i) the laboratory's process for selecting locations where each ADS would be situated, or, if a system is portable, a description of the types of locations where a system may be deployed; (ii) procedures to ensure adequate oversight by the technical director of each ADS deployed by the laboratory, including, but not limited to, review of quality assurance and quality control data, and, as available, the results of any post-signal confirmatory testing; (iii) protocols for monitoring multiple systems or monitoring from a remote location; (iv) protocols for timely communication between the system's operator and the technical director, and between the client and the laboratory; and (v) the laboratory's response plan. Subdivision (b) also stipulates that the laboratory must retain documentation of local government approval of the response plan, where appropriate, which may be a copy of the permit allowing deployment in the local authority's jurisdiction.

New subdivision (b) of Section 55-2.14 also stipulates that the laboratory's immediate response to an ADS signal must include: adherence to the Department-approved response plan; timely notification to the Department; and review of records of any supplemental testing conducted in response to the triggered signal. Should results of such supplemental testing be inconsistent with the expected reason for the signal, this amendment requires the laboratory to render inoperable the ADS that triggered the signal until the cause of the discrepancy is determined and remediated.

New subdivision (c) of Section 55-2.14 requires the laboratory to maintain a fixed-base location at which all records are retained for periods stipulated in the Subpart. Records include, but are not limited to, calibration, testing, quality assurance, quality control, operator training, client notification protocols, supplemental testing, and required registration of critical agent inventory.

New subdivision (d) of Section 55-2.14 allows a laboratory to operate more than one ADS under the direction of one technical director, provided procedures for direct oversight by the technical director of the systems and their operators shall be acceptable to the department.

New subdivision (e) of Section 55-2.14 requires the laboratory to engage the services of one or more persons as ADS operators to monitor the systems continuously, and allows the director to act as an operator. The subdivision also requires that the operator: receive adequate training specific to the operation of each specific make and model of ADS in use by the laboratory; provide written attestation to reading and understanding the general policies and procedures of the laboratory, and those specific to the autonomous detection system(s) in use, including the laboratory's response plan and the operator's responsibilities under that plan; and undergo a successful demonstration of capability.

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

Summary of Regulatory Impact Statement**Statutory Authority:**

Public Health Law Section 502 authorizes the Commissioner of Health to issue certificates of approval to environmental laboratories, and empowers him or her to adopt and amend regulations for implementing the provisions and intent of Section 502. Section 502 requires all laboratories performing environmental analysis on samples collected in New York State to hold certificates of approval and authorizes the Commissioner to establish standards, and technical and educational qualifications for staff, to ensure that tests are performed in an accurate and reliable manner.

Legislative Objectives:

This proposed amendment is consistent with the Commissioner's authority to amend regulations as necessary to carry out the intent of Public Health Law Section 502, which includes the protection of private and public health. The Legislature granted the Commissioner broad authority to certify environmental laboratories for the testing of materials, such materials encompass essentially any environmental matrix and material. It is consistent with the Legislature's objective to regulate emerging technologies used for environmental analyses to ensure that any testing performed is accurate and reliable.

Needs and Benefits:

Accurate and reliable identification of critical agents in environmental samples is crucial to appropriate and timely public health response to potential biological or chemical terrorism events, and/or other such incidents posing a significant public health threat. This amendment would add a new section to Subpart 55-2 that sets forth standards for certification of environmental laboratories that examine samples for critical agents using an autonomous detection system (ADS), an automated, real-time, self-contained sampling and analytical system for detection of critical agents, with the capability of issuing real-time alerts. The Department believes this amendment would clarify any ambiguity about the Department's intent to impose statutory certification requirements on entities seeking to deploy an ADS in the commercial marketplace. The newly proposed ADS standards build on Section 55-2.13 requirements in place for critical agent testing, as well as the general standards for environmental laboratory certification and operations stipulated in Subpart 55-2's preceding sections. In addition to establishing requirements for laboratories seeking to deploy an ADS, the proposal would modify certain provisions of existing Section 55-2.13 that now address only conventional microbiologic techniques, to provide alternative pathways for qualifying directors to oversee testing using new technologies in fixed-base laboratories, including polymerase chain reaction-based methods (PCR) and immune-based bioassays.

The need for timely and accurate response to adverse incidents (including terrorist events involving intentional airborne release of critical agents) has resulted in development of new approaches for sampling and analyzing indoor and outdoor ambient air. The Department believes that the use and range of application of ADS technology are likely to expand and must be addressed as part of the State's public health emergency preparedness. Results obtained from an ADS situated at the site of an incident or within the resulting plume's track will have significant impact on public health decision making; therefore, the accuracy and reliability of these devices is crucial. To deal with novel issues raised by real-time analysis, this amendment calls for: oversight by highly qualified personnel experienced in the technology; Department approval of a response plan to be implemented by the laboratory whenever an ADS signal is triggered; procedures for ongoing ADS monitoring, security and emergency shutdown; model-specific training of ADS operators; adequate protocols for director-level oversight of multiple and/or remote ADS stations, and documented collaboration among laboratories and the appropriate authorities. The regulation requires laboratories to notify the Department of any analytical finding indicating the presence of a critical agent to use the findings of confirmatory testing as an indicator of a system's functioning; to implement security systems and to notify appropriate parties within specified timeframes. The amendment's requirements promote clear communication of test results for various agents and permits the Department to determine the need for confirmatory testing. In addition, it facilitates an accurate assessment of each incident's public health threat potential and of the need for further governmental intervention. The amendment also establishes minimum qualifications for operators charged with monitoring critical agent testing using an ADS.

Costs:**Costs to Private Regulated Parties:**

Facilities already certified for anthrax testing by conventional microbiological methods would incur no costs related to structural or security-related modifications in order to qualify for certification in new methodologies for anthrax and/or toxin analysis. The Department expects that any previously unregulated business enterprises (i.e., commercial concerns) that voluntarily incur costs by electing to become certified as an environmental laboratory with critical agent testing capacity will be able to offset operational costs with income from charges on clients.

The costs of compliance for any laboratory proposing to bring new technology into the laboratory for the first time are relative to the technology. For PCR, a laboratory would incur start-up costs estimated to be in the range of \$50,000 - \$60,000, for instruments, reagents, consumables, training for existing personnel, and documentation of new procedures. Laboratories seeking initial approval for critical agent testing would incur costs to hire a qualified technical director. The Department estimates a hiring rate for scientists with a bachelor's degree and one to three years' experience to range from \$40,000 to \$60,000, depending on geographical location.

For laboratories seeking to engage in critical agent testing with an ADS, costs include purchase or lease of one or more ADS units. Costs following such purchase will be minimal; since each ADS is a self-contained discrete unit, a laboratory deploying an ADS would incur no renovation or construction costs. ADSs available for commercial (private) applications are priced from \$75,000 to \$500,000, with additional costs for reagents or reagent cartridges, and other consumables, installation and maintenance of the ADS unit, installation and maintenance of security systems and remote monitoring equipment, materials to conduct required quality control activities, and hiring technical directors and ADS operators. Costs related to security and remote monitoring systems vary greatly, depending on the components of the system (i.e., electronic or manual), and the costs of maintenance and service contracts. It is not possible to estimate total operating costs for an ADS.

Parties applying for approval under these amended regulations will also incur expenditures of \$3.00 to \$20.00 to submit to the Department all policies and procedures relevant to the operation of one or more ADSs for critical agent testing. Clinical laboratories and previously unregulated business enterprises (i.e., commercial concerns) seeking certification as environmental laboratories will need to pay an annual base fee of \$500 plus an annual fee calculation stipulated in Subpart 55-3, which considers, for each laboratory, the number of certified analytes and test volume for each.

Costs for Implementation and Administration of the Rule:**Costs to State Government:**

New York State would incur costs to the same extent as private regulated parties, should any State-operated environmental laboratory take on critical agent testing using any new technology, except approval fees would be less than those paid by private regulated parties. Pursuant to Public Health Law Section 502(6), the Department has waived the test volume component of the approval fee for government-operated laboratories.

Following the triggering of a signal, the Department may determine a need for supplemental testing of sample archived by an ADS system. Costs for transport of an archived sample to the Wadsworth Center or another designated facility for confirmatory testing would likely be incurred by such law enforcement agencies as the State Police. Law enforcement offices transporting a sample would incur an anticipated maximum cost of \$600, assuming an 800-mile round trip and a \$25 hourly wage.

Costs to the Department:

The Department would incur costs to the same extent as private regulated parties, should a Department-operated laboratory undertake critical agent monitoring using ADSs, except approval fees would be less than those paid by private regulated parties. Pursuant to Public Health Law Section 502(6), the Department has waived the test volume component of the approval fee for government-operated laboratories. The Department would incur costs for supplemental testing performed by the Wadsworth Center whenever such testing has been determined to be necessary following the triggering of an ADS signal. The scope, frequency or costs of supplemental testing cannot be estimated.

Costs to Local Government:

Should any local government-operated facilities opt to provide regulated services under this proposal, the operator would sustain the costs described above for private regulated parties, except approval fees would be less than those paid by private regulated parties. Pursuant to Public Health Law Section 502(6), the Department has waived the test volume component of the approval fee for government-operated laboratories.

Local governments in general would incur no to minimal new costs directly attributable to this amendment. While local governments likely would incur costs for responding to an ADS signal, such costs would not be directly related to this rulemaking. In fact, since this amendment calls for oversight of ADSs to ensure quality testing and appropriate protocols for prompt response, it is expected to greatly reduce costs associated with responding to false signals and reduce overall costs for incident remediation by allowing commercial access to real-time detection systems.

Local governments that operate laboratories certified to perform critical agent testing may incur costs for supplemental testing whenever such testing has been determined to be necessary following the triggering of an ADS signal, and the Department designates the local laboratory to conduct such testing. The scope, frequency or costs of supplemental testing cannot

be estimated. Local governments may incur costs for transport of an archived sample to the Wadsworth Center or another designated facility for confirmatory testing would likely be incurred by law enforcement agencies, and not the regulated laboratory. Law enforcement offices transporting a sample would incur an anticipated maximum cost of \$600, assuming an 800-mile round trip and a \$25 hourly wage.

Paperwork:

The only new paperwork requirements imposed by this regulation are: (1) documentation of ADS monitoring and security procedures; and (2) documentation of procedures to notify clients and appropriate State and local agencies that a signal has been triggered.

Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government; or school, fire or other special district. If such an entity chooses to operate an environmental laboratory, it would be subject to these regulations to the same extent as a private regulated party.

Duplication:

These rules do not duplicate any other law, rule or regulation. Federal emergency preparedness procedures and recommendations for security and public health and safety serve as the underpinnings of this rule, but are not duplicated by it. Furthermore, this proposal does not duplicate, but rather harmonizes with emergency preparedness protocols related to critical agent incidents and response to such incidents developed by responsible agencies throughout the State.

Alternative Approaches:

The alternative to adopting the proposed amendments is to apply existing minimal requirements for conventional microbiologic testing for anthrax to newer technologies used in complex assays to detect a broad scope of critical agents. Scientifically, this is unacceptable, if not impossible. Moreover, because of the special public health, safety and security issues raised by ADS deployment with real-time, well-publicized alerts, the Department finds it necessary to provide specific, explicit direction, with no room for ambiguity, to facilities that undertake such testing, especially in light of the minimal analytical experience held by commercial firms likely to seek certification for the first time.

Federal Standards:

Since there is no federal certification program in place for environmental laboratories, these regulations do not duplicate any federal standards. To the extent that the U.S. Centers for Disease Control and Prevention (CDC) or the U.S. Department of Homeland Security has promulgated standards affecting detection of and related to adverse public health events, these regulations are consistent with, and complement, such standards.

Compliance Schedule:

The Department expects to identify approved methods, develop and make available application forms, and be otherwise prepared to assess laboratories' compliance with all aspects of these regulations as of their effective date, upon publication of a Notice of Adoption in the New York State Register. Regulated parties adequately staffed with qualified personnel and otherwise prepared to adopt newer methods for critical agent testing in the laboratory or through deployment of an ADS should be able to apply for the Department's approval as of the amendment's effective date. Approval may be granted following the laboratory's participation in an on-site assessment and correction of all deficiencies cited; timeframes for compliance may vary, considering each laboratory's ability and willingness to come into full compliance.

Regulatory Flexibility Analysis

Effect of Rule:

The Department's Environmental Laboratory Approval Program (ELAP) now certifies 636 environmental laboratories. Of these, 204 are located out of State and do not qualify as small businesses. Of the remaining 432 laboratories, 193 are governmental laboratories, and 239 are commercial entities, of which 147 are estimated to be small businesses. For the most part, governmental laboratories, which are primarily drinking water and sewage treatment plant laboratories operated by counties, municipalities and townships, are not expected to apply for the environmental testing specialty of critical agents, for which this amendment sets new standards.

To date, seven laboratories have been granted certification in critical agent testing (i.e., for anthrax); of these, three are operated by local governments, and one is a small business.

Compliance Requirements:

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity of methods employed for critical agent testing and special public health welfare safety and security issues presented by testing using autonomous detection systems (ADSs), this regulation establishes new requirements in addition to expanding several minimum standards now in place. The decision to engage in critical agent testing in any capacity is strictly voluntary, and small businesses and local governments need to comply with the new and expanded requisites only if they operate environmental laboratories ap-

proved for the specialty, and propose to initiate testing using detection methods other-than-conventional culture techniques (e.g., polymerase chain reaction (PCR) methods or immune-based bioassays) and/or deploy one or more ADSs in the field.

Laboratories applying for approval in the specialty of critical agent testing for the first time will be required to submit their policies and procedures to the Department for review and approval to ensure adherence to approved methods and the requirements of this amendment. Since such information, often in the format of manuals, is a universal component of all laboratories' operations, this should not pose a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

Any costs of compliance incurred by small businesses and local governments that take on critical agent testing following the effective date of this amended rule will be same as the cost incurred by other regulated parties. With the possible exception of environmental testing conducted for public health purposes by county- or city-operated laboratories, the Department expects that costs could be offset by income from per-test or per-site charges imposed by a laboratory on its clients. Local governments that operate laboratories certified to perform critical agent testing may incur costs for supplemental testing whenever such testing has been determined to be necessary following the triggering of an ADS signal, and the Department designates the local government's laboratory to conduct such testing. The scope, frequency or costs of supplemental testing cannot be estimated. For ADS models that archive samples, the Department may determine a need for supplemental testing of archived samples that have triggered a signal. This amendment stipulates no requirement that certified laboratories arrange or pay for sample supplemental/confirmatory testing. Costs for transport of an archived sample to the Wadsworth Center or another designated facility for confirmatory testing would likely be incurred by law enforcement agencies such as the State Police. Law enforcement offices transporting a sample would incur an anticipated maximum cost of \$600, assuming an 800-mile round trip and a \$25 hourly wage.

The costs of compliance will vary significantly. A laboratory already meeting U.S. Centers for Disease Control and Prevention (CDC) safety and security standards is expected to incur no new costs in adopting new technologies for in-house testing. No additional structural or security-related modifications would be necessary for facilities already certified in anthrax testing by conventional microbiological methods so that they may qualify for approval to employ new methodologies for anthrax and/or toxins testing. On the other hand, an already-operating small business or government-operated facility minimally equipped for handling common infectious agents - because it limits microbiology testing to monitor drinking water, for instance - may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing for the first time.

The Department expects that previously unregulated small business enterprises (i.e., commercial concerns) will seek approval as environmental laboratories expressly to deploy ADSs in the commercial market. Assuming approval is granted, costs of doing business would include purchase or lease of one or more ADS units. Costs following such a purchase will be minimal; since each ADS is a self-contained discrete unit, laboratories deploying an ADS would incur no renovation or construction costs. Commercial concerns and government operated facilities would incur costs for lease of space for retention of laboratory records.

A laboratory that purchases an ADS would sustain significant costs; the ADSs now available for commercial (private) use are priced from \$75,000 to \$500,000. Manufacturers have projected costs for units expected to be available in the next year at \$40,000 to \$100,000. Additional costs would be incurred for: reagents or reagent cartridges and other consumables; installation and maintenance of the ADS unit; a power source and back-up system; installation and maintenance of security systems and remote monitoring equipment; materials to conduct required quality control activities; and salaries of technical directors and ADS operators. It is not possible to estimate total operating costs for ADSs in general terms.

Environmental laboratories certified for biological critical agent testing, specifically public health laboratories, would incur no costs related to hiring a qualified director, since they already employ technical directors who would also qualify under the proposed alternative educational and experiential criteria. Laboratories seeking initial approval for critical agent testing would incur costs to hire a qualified technical director. The Department estimates the hiring rate for scientists with a bachelor's degree and one to three years' experience at \$40,000 to \$60,000, depending on geographic location. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing critical agent testing using methods other-than-conventional microbiologic methods.

Costs related to security and remote monitoring systems vary greatly,

depending on the complexity of the system (i.e., electronic or manual), and costs of maintenance and service contracts. For example, security may be maintained through use of card-key devices and/or locks, or stringent administrative controls, including sign-in logs and identification badges, at lower costs than mechanical or electronic systems. Previously unregulated business enterprises (i.e., commercial concerns) seeking initial certification as environmental laboratories to engage in critical agent testing using an ADS will need to pay Environmental Laboratory Approval Program (ELAP) approval fees, estimated at \$500 base fee plus test volume and analyte fees calculated pursuant to Subpart 55-3. Entities applying for approval under these amended regulations will also incur costs of \$3.00 to \$20.00 to submit to the Department all policies and procedures relevant to operating one or more ADSs for critical agent testing.

Economic and Technological Feasibility:

The proposed regulation would present no additional economic or technological hardships to small businesses and local governments already undertaking critical agent testing in a safe and reliable manner. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are available, should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of ownership type, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation imposes requirements on only those laboratories that choose to undertake critical agent testing. Standards have been established at the absolute minimum level necessary for safe and reliable testing. The department did not consider different compliance requirements, or exceptions for small businesses or local governments because of the importance of this type of testing to public health, safety and welfare.

Small Business and Local Government Participation:

In the development of these regulations, the Department held informal discussions with the directors of government-operated environmental laboratories already certified to perform critical agent testing in order to assess their capabilities to meet the requirements set in this amendment. Preparedness officials from the City of New York participated in the workgroup assembled by the Department to solicit input for this rule. The New York State Association of County Healthcare Officials (NYSACHO), conveyed to the Department their concerns about a potential rise in local government expenditures due to an increased number of calls for local government services (i.e., first responders) linked to proliferation of ADSs in the commercial market. As this amendment calls for stringent oversight of ADSs, it should help prevent costs associated with responding to false signals and reduce overall costs for incident remediation by facilitating real-time detection.

While the Department cannot predict which commercial entities will seek approval to deploy an ADS, the intent of this rule was communicated to manufacturers of ADSs so that they could inform entities seeking to purchase such systems of the regulatory related requisites. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for more extensive solicitation of regulated party input at this time.

Rural Area Flexibility Analysis

Rural areas are defined as counties with a population under 200,000, and townships in counties with a population of more than 200,000 and a population density of 150 persons or fewer per square mile. Forty-two counties have a population under 200,000, and nine counties include townships with a population density of 150 persons or fewer per square mile.

The Department's Environmental Laboratory Approval Program (ELAP) certifies 432 environmental laboratories located in New York State; 217 of these are located in counties designated as rural. Of these 217 rural facilities, fewer than 60 hold certifications in bacteriology, and the vast majority only conducts procedures to monitor water treatment systems. Environmental laboratories in rural areas are not expected to apply for the environmental testing specialty of critical agents as a result of this amendment.

Of the approximately 232 facilities holding a New York State clinical laboratory permit that are located in areas designated as rural, only 90 hold permits in the bacteriology general or virology general categories, and would be potential candidates for testing microbiological critical agents. Of the 232 clinical laboratories designated as rural, approximately 100 hold permits in toxicology, and would be potential candidates for toxin critical agent testing. The vast majority of these restricts on-site toxicological analysis to screening for drugs of abuse in the emergency room setting, and would not likely be candidates testing for critical biological agents that are toxins.

Compliance Requirements:

The Department finds that this amendment will not result in adverse economic impact, nor impose record keeping, reporting, or other compliance requirements which would be uniquely burdensome to public or private parties in rural areas. The revision does not require any entity to take on critical agent testing of environmental samples, but merely recog-

nizes alternative technologies for environmental laboratories that choose to engage in testing for critical agents. The demand for the newer technologies recognized in this amendment, and specifically for continuous monitoring for critical agents using an ADS, is expected to be minimal in areas with low population densities. It is extremely unlikely that a previously unregulated business enterprise located in a rural area will apply for certification as an environmental laboratory as a result of this rulemaking.

This proposed rule establishes minimum standards necessary to protect the public and laboratory employees from the health and safety risks inherent in critical agent testing. Due to the increased complexity of methods employed for critical agent testing and special public health and safety issues presented by testing using autonomous detection systems (ADSs), this regulation establishes new requirements in addition to expanding several minimum standards now in place. The decision to engage in critical agent testing in any capacity is strictly voluntary; firms in rural areas need to comply with the new and expanded requisites only if they operate environmental laboratories that are approved for the specialty, and propose to take on testing using detection methods other-than-conventional culture techniques (e.g., polymerase chain reaction-based methods (PCR), or immune-based bioassays), and/or deploy one or more ADSs in the field.

Laboratories applying for approval in the specialty of critical agent testing for the first time, including previously unregulated business enterprises (i.e., commercial concerns), will be required to submit their policies and procedures to the Department for review and approval to ensure adherence to approved methods and the requirements of this amendment. Since such information, often in the format of manuals, is a universal component of all laboratories' operations, this should not pose a burdensome requirement to regulated parties.

Professional Services:

No need for additional professional services is anticipated.

Compliance Costs:

The demand for the technology, and specifically for continuous monitoring for critical agents using an ADS, is expected to be minimal in areas with low population densities. In the unlikely event that a laboratory or previously unregulated business enterprise located in a rural area were to apply for certification as an environmental laboratory as a result of this rulemaking, that laboratory's cost of compliance and cost offsets would be the same as the cost incurred by other regulated parties, regardless of location.

Those compliance costs will vary significantly. A laboratory already meeting U.S. Centers for Disease Control and Prevention (CDC) safety and security standards is expected to incur no new costs in adopting new technologies for in-house testing. No additional structural or security-related modifications would be necessary for facilities already certified for anthrax testing by conventional microbiological methods so that they could qualify for approval to employ new methodologies for anthrax and/or qualify for certification for toxins testing. On the other hand, regardless of location, a facility minimally equipped for handling infectious agents - because it limits testing to basic chemistry and microbiology analysis to monitor drinking water, for instance - may accrue extensive renovation and/or construction costs in the unlikely event it wished to take on critical agent testing for the first time. The Department anticipates that few if any previously unregulated business enterprises (i.e., commercial concerns) would choose to locate the requisite fixed site for ADS deployment in a rural area, since the technical director would be unable to oversee operations at ADS locations and have ready access to the rural fixed site records stored at which records are maintained, as required.

Assuming approval for the testing is granted, costs of doing business, regardless of location, would include purchase or lease of one or more ADS units. Costs following such a purchase will be minimal; since each ADS is a self-contained discrete unit, laboratories deploying an ADS would incur no renovation or construction costs. Previously unregulated business enterprises (i.e., commercial concerns) would incur costs for lease of space for retention of laboratory records. A laboratory that purchases an ADS would incur significant costs regardless of location; the ADSs now available for commercial (private) use are priced at \$75,000 to \$500,000. Manufacturers have projected costs for units expected to be available in the next year at \$40,000 to \$100,000. Additional costs would be sustained for: reagents or reagent cartridges and other consumables used during ongoing analyses; installation and maintenance of the ADS unit; a power source and back-up system; installation and maintenance of security systems and remote monitoring equipment; materials to conduct required quality control activities; and salaries of technical directors and ADS operators. It is not possible to estimate total operating costs for ADSs in general terms.

No environmental laboratories in areas designated as rural are currently certified for biological critical agent testing. Laboratories seeking initial approval for critical agent testing would incur costs to hire a qualified technical director. The Department estimates the hiring rate for scientists with a bachelor's degree and one to three years' experience at \$40,000 to

\$60,000, depending on geographic location. A person with these credentials would meet the proposal's minimum requirements for a technical director of a laboratory performing critical agent testing using methods other-than-conventional microbiologic methods.

Costs related to security and remote monitoring systems vary greatly, depending on the complexity of the system (i.e., electronic or manual), and costs of maintenance and service contracts. For example, security may be maintained through use of card-key devices and/or locks, or stringent administrative controls, including sign-in logs and identification badges, at lower costs than mechanical or electronic systems. Previously unregulated business enterprises (i.e., commercial concerns) seeking certification as environmental laboratories to engage in critical agent testing using an ADS will need to pay approval fees equivalent to first-year Environmental Laboratory Approval Program (ELAP) fees, estimated at \$500, and a fee of \$500 for each technology in each ADS deployed. Entities applying for approval under these amended regulations will also incur costs of \$3.00 to \$20.00 to submit to the Department all policies and procedures for operation of one or more ADSs for critical agent testing. For ADS models that archive samples, the Department may determine a need for supplemental testing of archived samples that have triggered a signal. This amendment stipulates no requirement that certified laboratories arrange or pay for sample supplemental/confirmatory testing. Costs for transport of an archived sample to the Wadsworth Center or another designated facility for confirmatory testing would likely be incurred by law enforcement agencies, the cost of which would vary depending on the location's distance from Albany rather than the rural or urban nature of the location. Law enforcement offices transporting a sample would incur an anticipated maximum cost of \$600, assuming an 800-mile round trip and a \$25 hourly wage.

Economic and Technological Feasibility:

The proposed regulation presents no unique economic or technological hardship to facilities located in rural areas. Appropriate equipment and supplies to perform critical agent testing in a safe and reliable manner are now available, should a laboratory choose to begin testing in this specialty. The regulation does not require any laboratory, regardless of location, to undertake testing for critical agents.

Minimizing Adverse Impact:

This regulation imposes requirements on only those laboratories choosing to undertake critical agent testing. Standards have been set at the absolute minimum level necessary for safe and reliable testing. The department did not consider different compliance requirements or exceptions for facilities located in rural areas because of the importance of this type of testing to public health, safety and welfare, and because most, if not all, of the costs are reasonably consistent between rural and urban areas.

Participation by Parties in Rural Areas:

In developing these regulations, the Department solicited input from preparedness officials responsible for protection of persons and property located across New York State, and received input from the New York State Association of County Healthcare Officials (NYSACHO). Preparedness officials would be responsible for incident response in rural areas, and the NYSACHO includes representatives from rural counties. NYSACHO did express concern, although not specific to rural counties, regarding potential increased costs for response to false ADS.

While the Department cannot predict which firms will seek approval to deploy an ADS, the intent of this rule was communicated to manufacturers of ADSs in so that they may inform parties seeking to purchase such systems of the regulatory requisites. The Department believes that the urgent need for public health and safety oversight in the area of critical agent testing obviates the need for more extensive solicitation of regulated party input at this time.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities in New York State. The revision proposes minimum standards for a recently developed technology, autonomous detection system (ADS), for critical agent testing expected to be available to environmental laboratories within the next several months. No requirement is imposed on approved laboratories to apply for certification in the use of any specific technology, including autonomous detection systems, for critical agent testing. The Department expects that a limited number of commercial enterprises will seek certification as environmental laboratories in order to deploy ADS units, which will likely be marketed as early warning devices to mitigate the concerns of the occupants of large, privately-owned buildings in major metropolitan areas. Each such commercial enterprise would need to hire a technical director from a small pool of candidates with specialized scientific qualifications, many of whom are expected to be recruited from a small pool of qualified persons in the laboratory industry. Other than this extremely limited number of new job opportunities, it is likely, in light of training-only

qualifications for ADS operators, few, if any, enterprises will need to take on additional capacity in the form of hiring new personnel. This amendment will have no adverse impact on job opportunities.

Higher Education Services Corporation

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Senator Patricia K. McGee Nursing Faculty Scholarship Program

I.D. No. ESC-49-09-00007-P

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

Proposed Action: This is a consensus rule making to amend section 2201.5(c)(4) of Title 8 NYCRR.

Statutory authority: Education Law, sections 653(9), 655(4) and 679-c

Subject: The Senator Patricia K. McGee Nursing Faculty Scholarship Program.

Purpose: To clarify "nursing faculty preparation program" requirements.

Text of proposed rule: Section 2201.5 of Title 8 of the NYCRR is amended to read as follows:

TITLE 8. EDUCATION DEPARTMENT

PART 2201. GENERAL ELIGIBILITY CRITERIA

Section 2201.5 Senator Patricia K. McGee Nursing Faculty Scholarship.

(a) Authority. The provisions contained within this regulation are made pursuant to authority granted to the Higher Education Services Corporation in sections 653, 655, and 679-c of the Education Law.

(b) Definitions. Faculty means a position that is primarily teaching, rather than administrative or research.

(c) Eligibility. In addition to those requirements already provided in sections 661 and 679-c of the Education Law, these additional requirements shall apply in the selection of the program recipients:

(1) applications for the Senator Patricia K. McGee Nursing Faculty Scholarship shall be postmarked or electronically transmitted no later than July 1st of each year, provided that this deadline may be extended at the discretion of the corporation;

(2) applications shall be filed annually on forms prescribed by the corporation;

(3) the pool of applicants shall be those who have successfully met the filing deadline;

(4) the applicant shall have been accepted into a master's level nursing faculty preparation program at an accredited nursing school, or in a doctoral program that will qualify the applicant as nursing faculty or adjunct clinical faculty, in the State of New York, at the time of application. The corporation will waive the requirement that the applicant be accepted into a "nursing faculty preparation program" until such time as the commissioner approves programs with curriculum that comprises a "nursing faculty preparation program";

(5) first priority shall be given to applicants who have received payment of an award pursuant to section 679-c of the Education Law in the prior academic year;

(6) the applicant shall have a grade point average of 3.0 or higher if the applicant has already completed a semester in either a master's degree program in nursing, or in a doctoral program that will qualify the applicant for nursing faculty or adjunct clinical faculty; and

(7) the following formula shall be used in determining award recipients:

(i) on a 4.0 scale, the applicant's final grade point average received from the undergraduate nursing program where the applicant received a diploma or degree in professional nursing;

(ii) on a 4.0 scale, the applicant's final grade point average received from the nursing program where the applicant received a master's degree in a nursing or nurse faculty curriculum;

(iii) on a 4.0 scale, the applicant's current grade point average, provided that the applicant has already completed a semester in a master's degree program in nursing, or a semester in a doctoral program that will qualify the applicant for nursing faculty or adjunct clinical faculty; and

(iv) on a scale of 0-10 for experience as a licensed registered professional nurse, where:

- (a) 0 equals less than one year experience;
 - (b) 2 equals one to three years of experience;
 - (c) 5 equals three to five years of experience;
 - (d) 8 equals five to seven years of experience; and
 - (e) 10 equals greater than seven years of experience.
- (v) the corporation shall add the points from subparagraphs (i), (ii), (iii), and (iv) of this paragraph and then rank the eligible candidates based upon highest scores;
- (vi) tie scores shall be decided by lottery, as determined by the corporation. The lottery shall be conducted by random selection.
- (8) successful applicants shall execute a service contract prescribed by the corporation.

(d) Disqualifications. The applicant shall be disqualified from receiving a scholarship award for any of the following conditions:

(1) the applicant has a service obligation to the State of New York or another entity; or

(2) the applicant is in default on a federally guaranteed student loan or State loan or has defaulted on any prior service obligation.

(e) Amounts.

(1) The amount of the scholarship award shall be determined in accordance with section 679-c of the Education Law.

(2) Disbursements shall be made each semester and pro-rated by credit hour.

(3) Scholarship awards shall be reduced by the value of other scholarships and grants.

(f) Penalty.

(1) The scholarship award monies received shall be converted to a 10-year student loan plus interest for recipients who fail to complete their education or who fail to complete their service in the allotted time.

(2) Interest for the life of the loan shall be fixed, and equal to that published annually by the U.S. Department of Education for Federal Family Education Loan Program PLUS loans at the time the service contract was signed.

(3) Interest shall begin to accrue on the day the award money was first disbursed to the school and/or recipient.

(4) Interest shall be capitalized on the day the scholarship award recipient violates the service contract or on the date the corporation deems the recipient was no longer able or willing to perform the terms of the service contract.

(5) The corporation may in its discretion waive a portion of the repayment of a scholarship award that is commensurate with service completed.

Text of proposed rule and any required statements and analyses may be obtained from: George M. Kazanjian, Senior Attorney, N.Y.S. Higher Education Services Corporation, 99 Washington Avenue, Room 1350, Albany, New York 1225, (518) 473-1581, email: regcomments@hesc.org

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

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

Consensus Rule Making Determination

This statement is being submitted pursuant to paragraph (b) of subdivision (1) of section 202 of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's ("HESC") "Notice of Proposed Rule Making" seeking to amend section 2201.5 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this proposed consensus rule that no person is likely to object to the adoption of the rule as written. The proposed rule would continue to waive the requirement that an applicant be accepted into a "nursing faculty preparation program" until such time as the Commissioner of the New York State Education Department ("SED") approves programs with curriculum that comprises a "nursing faculty preparation program." Currently, SED has indicated that there is no standardized curriculum comprising a "nursing faculty preparation program." By extending this waiver for the Senator Patricia K. McGee Nursing Faculty Scholarship Program, no scholarship applicant will be adversely impacted by this proposal.

Section 679-c of the Education Law sets forth the Senator Patricia K. McGee Nursing Faculty Scholarship by which licensed registered nurses may receive scholarships to obtain master's degrees that would qualify them to teach nursing at institutions of higher education, in return for a commitment to teach nursing for five years anywhere in New York State. To be eligible for a scholarship, an applicant must become accepted into a master's level nursing faculty preparation program in New York State. Initially, to provide schools with an opportunity to take advantage of the program, schools were given time to develop a "nursing faculty preparation program." To that end, 8 NYCRR § 2201.5(c)(4) was promulgated to waive the requirement that an applicant be accepted into a master's level nursing faculty preparation program for the first three academic years of the program. Currently, however, there is no standardized curriculum

comprising a "nursing faculty preparation program" and, as such, the regulation must be amended.

Since the proposed consensus rule merely waives a currently unattainable requirement, it will have no negative effects on past, present or future recipients, or upon nursing schools. Therefore, HESC has determined that there is no basis for any person to object to the proposed rule.

Job Impact Statement

This statement is being submitted pursuant to subdivision (2) of section 201-a of the State Administrative Procedure Act and in support of New York State Higher Education Services Corporation's Notice of Proposed Rule Making seeking to amend section 2201.5 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

It is apparent from the nature and purpose of this rule that it will not have any adverse impact on jobs or employment opportunities. The proposal is a technical amendment which waives a currently, unattainable requirement relating to a scholarship program administered by HESC.

Insurance Department

NOTICE OF ADOPTION

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

I.D. No. INS-32-09-00005-A

Filing No. 1331

Filing Date: 2009-11-25

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 Part 99 (Regulation 151) of Title 11 NYCRR.

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

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

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

Text or summary was published in the August 12, 2009 issue of the Register, I.D. No. INS-32-09-00005-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Minimum Standards for the Form, Content and Sale of Health Insurance, Including Standards of Full and Fair Disclosure

I.D. No. INS-36-09-00001-A

Filing No. 1299

Filing Date: 2009-11-19

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 Part 52 (Regulation 62) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1009 and 3234

Subject: Minimum Standards for the Form, Content and Sale of Health Insurance, Including Standards of Full and Fair Disclosure.

Purpose: Amend 11 NYCRR 52.70(e)(2) to comply with N.Y. Ins. Law 3234(b), pursuant to *Benesowitz v. Metropolitan Life Insurance Company*.

Text or summary was published in the September 9, 2009 issue of the Register, I.D. No. INS-36-09-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Office of Mental Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medical Assistance Payments for Community Rehabilitation Services Within Residential Programs for Adults, Children & Adolescents

I.D. No. OMH-49-09-00004-P

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

Proposed Action: This is a consensus rule making to amend Part 593 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 31.04; and Social Services Law, sections 364 and 364-a

Subject: Medical Assistance Payments for Community Rehabilitation Services within Residential Programs for Adults, Children & Adolescents.

Purpose: To clarify the intent of the regulation regarding service authorization and treatment planning and make technical corrections.

Text of proposed rule: 1. Subdivision (b) of Section 593.2 of Title 14 NYCRR is amended to read as follows:

(b) Sections 364 and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of [Social Services] *Health*.

2. Subdivision (a) of Section 593.3 of Title 14 NYCRR is amended to read as follows:

(a) This Part applies to any provider of service, licensed pursuant to [Part 586,] Part 594[,] or Part 595 of this Title, which proposes to operate a residential program for adults with mental illness and/or children or adolescents with serious emotional disturbance.

3. Subdivision (b) of Section 593.5 of Title 14 NYCRR is amended to read as follows:

(b) Reimbursement shall be made only for community rehabilitation services provided to individuals who have been authorized in writing [by a physician] *as set forth in section 593.6* to receive community rehabilitation services provided by a licensed residential program. Such individuals must have a severe and persistent mental illness or, for children and adolescents, serious emotional disturbance, as defined by the [commissioner] *Commissioner* in the Office of Mental Health's Annual Statewide Comprehensive Plan for Mental Health Services developed pursuant to Section 5.07 of the Mental Hygiene Law. Community rehabilitation services are delineated in section 593.4(b) and (c) of this Part.

4. Subdivisions (a), (b) and (d) of Section 593.6 of Title 14 NYCRR are amended to read as follows:

(a) In order to receive reimbursement for the provision of community rehabilitation services to an individual, the provider of service must ensure that the individual has been authorized in writing by a physician, prior to or upon admission, to receive services as provided by the program. The written authorization must be retained as a part of the individual's case record. [Individuals whom are residing in a program governed by this Part on April 1, 1992 and have been receiving such services in accordance with an approved service plan, must receive a physician's authorization by July 1, 1992, which shall be considered to be effective April 1, 1992.] The physician's authorization must:

(1) be based upon appropriate clinical information and assessment of the individual. The initial authorization must include a face-to-face assessment;

(2) delineate the maximum duration of the authorization to receive such services; and

(3) specify that the individual is in need of community rehabilitation services as defined in section 593.4(b) of this Part.

(b) *Service authorizations which are renewed must be signed by a physician, physician assistant, or nurse practitioner in psychiatry.* [Physician's] *Service authorizations must be renewed as follows:*

(1) every six months for individuals residing within congregate residences and residential programs for children and adolescents. The reauthorization for a child or adolescent must include a face-to-face contact with the physician, *physician assistant or nurse practitioner in psychiatry who signs and renews the service authorization;*

(2) every 12 months for individuals residing within an apartment program; and

(3) upon transfer to a different category of adult program (i.e., congregate to apartment or apartment to congregate). The authorization renewal must, in the case of a transfer from congregate to apartment, occur upon the expiration date of the current authorization or, in the case of a transfer from apartment to congregate, within six months of admission to the new program or the expiration of the current authorization, whichever comes first.

(d) Such plan shall be developed by the staff of the program, resident and any collateral identified for participation in planning, as appropriate. The service plan must be reviewed and signed by a qualified mental health staff person. The service plan must be a mutually agreed upon course of action which, at a minimum, identifies the following:

(1) statement of service goals and objectives;

(2) identification of the community restorative services to be provided;

(3) proposed time periods; [and]

(4) efforts to coordinate services with other providers[.], *as appropriate; and*

(5) *signature of the resident, documenting his or her participation, or any collateral, as appropriate, in planning and approval of the plan. Reasons for non-participation and/or non-approval by the resident shall be documented in the service plan.*

5. Subdivision (g) of Section 593.6 of Title 14 NYCRR is repealed.

6. Subdivisions (a) and (b) of Section 593.7 are amended to read as follows:

(a) In order to receive reimbursement for the provision of community rehabilitation services, each individual must have a service plan which documents the delivery of appropriate community rehabilitation services which have been authorized by a physician, *or reauthorized pursuant to subdivision (b) of section 593.6 of this Part.*

(b) Reimbursement will be based upon monthly and half-monthly rates. Such rates shall be paid based upon a minimum number of face-to-face contacts between an eligible resident or a program and a staff person of an approved provider of community rehabilitation services, subject to the following provisions:

(1) A full monthly rate will be paid for services provided to an eligible resident in residence for at least 21 days in a calendar month, who has received at least four contacts with a staff person of the program. For a family-based treatment program or a teaching family home program, a youth shall have received at least 11 contacts, at least three of which must be provided by authorized program staff other than the professional family or teaching parents. At least four different community rehabilitative services must have been provided.

(2) A half monthly rate will be paid for services provided to an eligible resident in residence for at least 11 days in a calendar month who has received at least two contacts with a staff person of the program. For a family-based treatment program or a teaching family home program, a youth shall have received at least six contacts, at least two of which must be provided by authorized program staff other than the professional family or teaching parents. At least two different community rehabilitation services must have been provided.

(3) Only one contact can be counted each day and each contact shall be at least 15 minutes in duration.

(4) For reimbursement purposes, a contact shall involve the performance of at least one of the services indicated in the resident's current service plan.

(5) A reimbursable contact may occur at or away from the program, except that a reimbursable contact may not occur at the site of a licensed mental health outpatient program as such programs are described in [Parts 585 and] *Part 587* of this Title, nor when the otherwise eligible resident is an inpatient of any hospital for any reason or temporarily residing in any other licensed residential facility.

(6) Reimbursement for contacts provided under this program shall not be limited in any way by reimbursement for visits under any outpatient program licensed by the Office of Mental Health on the same day or reimbursement for visits provided by any comprehensive Medicaid case management program approved by the Office of Mental Health.

7. Subdivision (g) of Section 593.8 of Title 14 NYCRR is amended to read as follows:

(g) Notwithstanding the provisions of this section, if a provider of service seeks reimbursement in excess of the limits imposed in section 593.7 of this Part, the provider shall be presumed to have violated the provisions of this Part, whereupon the Office of Mental Health shall notify the Depart-

ment of [Social Services] *Health* in order that the Department of [Social Services] *Health* may exercise its authority to recover such overpayment as may have occurred.

Text of proposed 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.

Consensus Rule Making Determination

This rulemaking is filed as a Consensus rule on the grounds that its purpose is to make technical corrections and is non-controversial. No person is likely to object to this rulemaking since it merely clarifies the intent of the regulation regarding service authorization and reauthorization, and treatment planning requirements. In addition, the rulemaking makes technical corrections regarding a State agency which is no longer in existence and removes references to Parts in Title 14 NYCRR that have been repealed.

The rulemaking provides flexibility by removing restrictive language regarding the need for a quarterly written summary for physician authorization. When the original regulations regarding service authorization were written, the intent was that there would be communication, collaboration and consistency with regard to the need for, and progress of, an individual's treatment. The physician's authorization prescribes the provision of community rehabilitation services for a set period of time. The initial and renewal authorizations are based on need, which is formulated and confirmed by the presentation of clinical information and assessment of the individual. The initial authorization includes a face-to-face assessment, and the renewal authorization is based on the summary of progress that a resident has achieved. The summary of progress can be obtained by a written document, face-to-face consultation, or case review that occurs prior to the authorization. The physician is required to sign and document his license number on the Physician Authorization Form, which acts as a prescription for service. The intent of the physician receiving a summary of information is to familiarize himself with the case and ongoing treatment as the treating physician. The physician also has the opportunity to obtain status information in his/her treatment/clinical sessions. This exceeds the minimum expectations of the regulation as the consumer is an active patient of the physician.

Since the time that this regulation was originally drafted, the use of physician assistants and nurse practitioners in psychiatry has greatly increased. In recognition of their scope of practice, the Office of Mental Health has determined that renewal authorizations can be prepared by a physician, a physician assistant and a nurse practitioner in psychiatry.

The rulemaking also corrects an inaccurate reference to the Department of Social Services, a State agency which is no longer in existence, and clarifies that the correct agency is the Department of Health. In addition, it removes references to Parts no longer in effect within Title 14 NYCRR.

As this rulemaking serves to only make technical corrections and clarify the agency's original intent regarding service authorizations, it is correctly filed as a consensus rulemaking.

Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant 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 jurisdiction. Sections 364 and 364-a of the Social Services Law give the Office of Mental Health the responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of Health.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because it merely clarifies the intent of the regulations regarding service authorization and treatment planning requirements, and makes technical corrections. There will be no adverse impact on jobs and employment opportunities as a result of this rulemaking.

Public Service Commission

NOTICE OF ADOPTION

Approval Amendments to PSC No. 220—Electricity, Effective December 1, 2009

I.D. No. PSC-31-09-00009-A

Filing Date: 2009-11-19

Effective Date: 2009-11-19

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

Action taken: On 11/12/09, the PSC adopted an order authorizing Niagara Mohawk Power Corporation d/b/a National Grid to implement amendments to Schedule P.S.C. No. 220—Electricity, effective December 1, 2009.

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

Subject: Approval amendments to PSC No. 220—Electricity, effective December 1, 2009.

Purpose: To approve amendments to PSC No. 220—Electricity, effective December 1, 2009.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's amendments to Schedule P.S.C. No. 220—Electricity, effective December 1, 2009, to recover municipal and village gross receipt taxes from customers purchasing electric supply from an energy marketer, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(09-E-0548SA1)

NOTICE OF ADOPTION

Approval of Amendments to PSC No. 219—Gas, Effective December 1, 2009

I.D. No. PSC-31-09-00011-A

Filing Date: 2009-11-19

Effective Date: 2009-11-19

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

Action taken: On 11/12/09, the PSC adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's amendments to Schedule P.S.C. No. 219—Gas, effective December 1, 2009.

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

Subject: Approval of amendments to PSC No. 219—Gas, effective December 1, 2009.

Purpose: To approve amendments to PSC No. 219—Gas, effective December 1, 2009.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's amendments to Schedule P.S.C. No. 219—Gas, effective December 1, 2009, to recover municipal and village gross receipt taxes from customers purchasing gas supply from an energy marketer, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents

per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-G-0549SA1)

NOTICE OF ADOPTION

Issuance and Sale of Securities and Other Forms of Indebtedness

I.D. No. PSC-35-09-00011-A

Filing Date: 2009-11-20

Effective Date: 2009-11-20

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

Action taken: On 11/12/09, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to issue and sell up to \$4.8 billion of New Debt and New Preferred for traditional utility purposes.

Statutory authority: Public Service Law, section 69

Subject: Issuance and sale of securities and other forms of indebtedness.

Purpose: To approve the issuance and sale of securities and other forms of indebtedness.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to issue and sell up to \$4.8 billion of New Debt and New Preferred for traditional utility purposes, of which up to \$550 million may be for the issuance and sale of New Preferred, through December 31, 2012, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-M-1244SA2)

**PROPOSED RULE MAKING
HEARING(S) SCHEDULED**

National Grid NY Proposes to Retain a Portion of the Property Tax Refund for its Shareholders

I.D. No. PSC-49-09-00019-P

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

Proposed Action: The Commission is considering the petition of The Brooklyn Union Gas Company d/b/a National Grid NY (National Grid NY) regarding the disposition of property tax refunds received from the City of New York.

Statutory authority: Public Service Law, section 113(2)

Subject: National Grid NY proposes to retain a portion of the property tax refund for its shareholders.

Purpose: To allow National Grid NY to retain a portion of the property tax refund for its shareholders.

Public hearing(s) will be held at: 10:30 a.m., Feb. 10, 2010 at 90 Church St., New York, NY.*

*There could be requests to reschedule the hearings. Notification of any subsequent scheduling changes will be available at the DPS Website (www.dps.state.ny.us) under Case No. 09-M-0818.

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

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

Substance of proposed rule: On September 18, 2009, The Brooklyn Union Gas Company d/b/a National Grid NY (National Grid NY) obtained a Real Property Tax refund of approximately \$5.1 million as a product of New York City's Industrial and Commercial Incentive Program (ICIP). When a public utility obtains a property tax refund, Public Service Law Section 113(2) provides that the Commission, after hearing, may determine the extent to which the refund will be passed on to the utility's customers. National Grid NY maintains that it undertook considerable effort, expense and risk in seeking the tax refunds, and should be allowed to retain a portion of the refunds for its shareholders. National Grid NY proposes to retain approximately \$2.94 million for its shareholders. The Commission will consider the petition of National Grid NY and may grant or modify the relief sought in the petition.

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-M-0818SP1)

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

Interconnection of the Networks between Time Warner ResCom and Berkshire Tele. for Local Exchange Service and Exchange Access

I.D. No. PSC-49-09-00012-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Time Warner ResCom of New York, LLC for approval of an Interconnection Agreement with Berkshire Telephone Corporation, executed on October 1, 2009.

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

Subject: Interconnection of the networks between Time Warner ResCom and Berkshire Tele. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Time Warner ResCom and Berkshire Tele.

Substance of proposed rule: Time Warner ResCom of New York, LLC and Berkshire Telephone Corporation have reached a negotiated agreement whereby Time Warner ResCom of New York, LLC and Berkshire Telephone Corporation will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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.

(09-02072SP1)

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

Interconnection of the Networks between Time Warner ResCom and Taconic Telephone for Local Exchange Service and Exchange Access

I.D. No. PSC-49-09-00013-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Time Warner ResCom of New York, LLC for approval of an Interconnection Agreement with Taconic Telephone Corporation, executed on October 1, 2009.

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

Subject: Interconnection of the networks between Time Warner ResCom and Taconic Telephone for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Time Warner ResCom and Taconic Telephone.

Substance of proposed rule: Time Warner ResCom of New York, LLC and Taconic Telephone Corporation have reached a negotiated agreement whereby Time Warner ResCom of New York, LLC and Taconic Telephone Corporation will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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.

(09-02073SP1)

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

Interconnection of the Networks between TW ResCom and Chautauqua and Erie for Local Exchange Service and Exchange Access

I.D. No. PSC-49-09-00014-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Time Warner ResCom of New York, LLC for approval of an Interconnection Agreement with Chautauqua and Erie Telephone Corporation, executed on October 1, 2009.

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

Subject: Interconnection of the networks between TW ResCom and Chautauqua and Erie for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between TW ResCom and Chautauqua and Erie.

Substance of proposed rule: Time Warner ResCom of New York, LLC and Chautauqua and Erie Telephone Corporation have reached a negotiated agreement whereby Time Warner ResCom of New York, LLC and Chautauqua and Erie Telephone Corporation will interconnect their networks at mutually agreed upon points of interconnection to provide

Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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.

(09-02074SP1)

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

Interconnection of the Networks between Windstream New York and TW ResCom for Local Exchange Service and Exchange Access

I.D. No. PSC-49-09-00015-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Windstream New York, Inc. for approval of an Interconnection Agreement with Time Warner ResCom of New York, LLC, executed on September 28, 2009.

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

Subject: Interconnection of the networks between Windstream New York and TW ResCom for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Windstream New York and TW ResCom.

Substance of proposed rule: Windstream New York, Inc. and Time Warner ResCom of New York, LLC have reached a negotiated agreement whereby Windstream New York, Inc. and Time Warner ResCom of New York, LLC will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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.

(09-02081SP1)

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

Net Metering for Micro-Combined Heat and Power Generating Systems

I.D. No. PSC-49-09-00016-P

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

Proposed Action: The Commission is considering a proposed filing by Niagara Mohawk Power Corporation d/b/a National Grid to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 220—Electricity.

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

Subject: Net Metering for Micro-Combined Heat and Power Generating Systems.

Purpose: To effectuate change to PSL Section 66-j in relation to net metering for micro-combined heat and power generating systems.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Niagara Mohawk Power Corporation d/b/a National Grid to effectuate the change to Public Service Law Section 66-j in relation to net metering for micro-combined heat and power generating systems. The proposed amendments have an effective date of February 26, 2010.

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-0819SP1)

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

Net Metering for Micro-Combined Heat and Power Generating Systems

I.D. No. PSC-49-09-00017-P

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

Proposed Action: The Commission is considering a proposed filing by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 9 — Electricity.

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

Subject: Net Metering for Micro-Combined Heat and Power Generating Systems.

Purpose: To effectuate change to PSL Section 66-j in relation to net metering for micro-combined heat and power generating systems.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposed filing by Consolidated Edison Company of New York, Inc. to effectuate the change to Public Service Law Section 66-j in relation to net metering for micro-combined heat and power generating systems. The proposed amendments have an effective date of February 26, 2010.

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-0820SP1)

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

Approval of GUSC's Proposed \$35 Million Generation Facility Financing

I.D. No. PSC-49-09-00018-P

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

Proposed Action: The Commission is considering a petition from Griffiss Utility Services Corporation (GUSC) requesting approval of a financing in the amount of \$35 million to fund construction of a 9.4 MW heat and power generation facility in Rome, NY.

Statutory authority: Public Service Law, sections 66-c, 69 and 83

Subject: Approval of GUSC's proposed \$35 million generation facility financing.

Purpose: Consideration of approval of GUSC's proposed \$35 million generation facility financing.

Substance of proposed rule: The Public Service Commission is considering a petition from Griffiss Utility Services Corporation (GUSC) requesting approval of a financing in the amount of \$35 million to fund construction of a 9.4 MW heat and power generation facility to be located at the Griffiss Business and Technology Park in Rome, NY. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: 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-M-0776SP1)

**Department of Taxation and
Finance**

NOTICE OF ADOPTION

Outdated List of Sales and Compensating Use Taxes

I.D. No. TAF-35-09-00003-A

Filing No. 1295

Filing Date: 2009-11-18

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 525.1 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 1142(1) and (8); and 1250 (not subdivided)

Subject: Outdated list of sales and compensating use taxes.

Purpose: To update and condense section 525.1 of the sales and compensating use tax regulations.

Text or summary was published in the September 2, 2009 issue of the Register, I.D. No. TAF-35-09-00003-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.

NOTICE OF ADOPTION

Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax Jointly Administered Therewith

I.D. No. TAF-35-09-00004-A

Filing No. 1296

Filing Date: 2009-11-18

Effective Date: 2009-11-18

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

Action taken: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon for the period October 1, 2009 through December 31, 2009.

Text or summary was published in the September 2, 2009 issue of the Register, I.D. No. TAF-35-09-00004-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

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

NOTICE OF ADOPTION

New York State and City of Yonkers Withholding Tables and Other Methods

I.D. No. TAF-39-09-00003-A

Filing No. 1294

Filing Date: 2009-11-18

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 sections 171.4(b)(1) and 251.1(b) and Appendixes 10 and 10-A of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 671(a)(1); 697(a); 1329(a); and 1332(a); Codes and Ordinances of the City of Yonkers, sections 15-105 and 15-108(a); L. 2009, ch.57, part Z-1, section 5

Subject: New York State and City of Yonkers withholding tables and other methods.

Purpose: To provide current New York State and City of Yonkers withholding tables and other methods.

Text or summary was published in the September 30, 2009 issue of the Register, I.D. No. TAF-39-09-00003-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.

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

Fuel Use Tax on Motor Fuel and Diesel Motor Fuel and the Art. 13-A Carrier Tax Jointly Administered Therewith

I.D. No. TAF-49-09-00001-P

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

Proposed Action: Amendment of section 492.1(b)(1) of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 301-h(c); 509(7); 523(b); and 528(a)

Subject: Fuel use tax on motor fuel and diesel motor fuel and the art. 13-A carrier tax jointly administered therewith.

Purpose: To set the sales tax component and the composite rate per gallon for the period January 1, 2010 through March 31, 2010.

Text of proposed rule: Section 1. Paragraph (1) of subdivision (b) of section 492.1 of such regulations is amended by adding a new subparagraph (lvii) to read as follows:

Motor Fuel			Diesel Motor Fuel		
Sales Tax Component	Composite Rate	Aggregate Rate	Sales Tax Component	Composite Rate	Aggregate Rate
(lvi) October - December 2009					
15.6	23.6	40.7	15.6	23.6	38.95
(lvii) January - March 2010					
15.0	23.0	39.3	15.5	23.5	38.05

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

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

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.

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

Informational Returns for Wholesale Dealers of Cigarettes and Tobacco Products

I.D. No. TAF-49-09-00002-P

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

Proposed Action: Amendment of sections 75.2 and 90.1 of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 475 (not subdivided); and 1142(12)

Subject: Informational returns for wholesale dealers of cigarettes and tobacco products.

Purpose: To require quarterly filing of informational returns for cigarette and tobacco products wholesale dealers.

Text of proposed rule: Section 1. Subdivision (a) of section 75.2 of such regulations is amended to read as follows:

(a)(1) Every licensed wholesale dealer of cigarettes, including a

wholesale dealer who is also an agent filing pursuant to section 75.1 of this Part, must file with the Department of Taxation and Finance [an annual] a quarterly informational return on a form prescribed by the department for such purpose. [Such]

(2) The informational return must be filed on or before the [fifteenth] twentieth day of March, June, September and December for the quarterly periods ending on the last day of February, May, August and November of each year, respectively, and must reflect the wholesale dealer's New York State activities for the preceding [12 months] quarter, or fraction thereof [, ending with the last day of February]. The return must show, in addition to any other information the department may require:

(i) [the name and address of every person from whom cigarettes have been purchased or otherwise acquired and the quantity of cigarettes purchased or acquired from each such person during the year;

(ii) the name, address and [sales] federal tax identification number of every person, other than consumers of the subject cigarettes, to whom cigarettes have been sold or otherwise [disposed of and] transferred during the quarter;

(iii) the quantity of cigarettes sold or [disposed of] transferred to each such person during the [year] quarter; [and]

(iv) [the location and number of cigarette vending machines in, at or upon premises owned or occupied by another person within the State.] the total sales price of cigarettes sold or transferred to each such person during the quarter; and

(v) the total sales price of sales or transfers (cigarette and non-cigarette) to each such person during the quarter.

(2) On or before the 15th day of June, September and December of each year, quarterly updates to the prior year's annual return must be filed with the department for the three-month periods ending with the last days of May, August and November, respectively. Such updates must be on forms prescribed by the department and must reflect any additions, deletions or other changes to the information as previously reported in the annual return. However, quantities of cigarettes purchased, sold or otherwise acquired or disposed of need not be updated quarterly. Such quantities must be reported in the annual return regardless of the fact that an account may have been added or deleted during the reporting period.]

Section 2. Subdivision (b) of section 75.2 of such regulations is amended to read as follows:

(b) The wholesale dealer's quarterly informational return [and quarterly updates] must be prepared in accordance with the instructions provided by the Department of Taxation and Finance and must be signed and filed in the same manner as an agent's cigarette tax return must be signed and filed pursuant to section 75.1(c) and (d) of this Part.

Section 3. Subdivision (a) of section 90.1 of such regulations is amended to read as follows:

(a)(1) Every licensed wholesale dealer of tobacco products must file with the Department of Taxation and Finance a [monthly] quarterly informational return on a form prescribed by the department for such purpose. Wholesale dealers that are also distributors of tobacco products will not be required to file separate informational returns. Information comparable to that required by this section will be included [in] on the returns required to be filed by distributors pursuant to section 473-a of the Tax Law.

(2) The informational return must be filed on or before the twentieth day of [each month] March, June, September and December for the quarterly periods ending on the last day of February, May, August and November of each year, respectively, and must reflect the wholesale dealer's activities for the preceding [month] quarter, or fraction thereof. Such return must show, in addition to any other information that the department may require:

(i) the quantity, by number of cigars and number of pounds of other tobacco products, on hand at the beginning of the preceding [month] quarter;

(ii) the name, address, and Federal employer identification number of every person from whom cigars and other tobacco products have been purchased or otherwise acquired and the quantity and purchase price of the cigars and other tobacco products purchased or acquired from each such person during the preceding [month] quarter;

(iii) the name, address, and Federal employer identification number of every person, other than consumers of the subject cigars and other tobacco products, to whom cigars and other tobacco products have been sold or transferred and the quantity and selling price of the cigars and other tobacco products sold or transferred to each such person during the preceding [month] quarter;

(iv) the quantity of cigars and other tobacco products otherwise disposed of, including, but not limited to, those that were not suitable for sale, destroyed, or stolen during the preceding [month] quarter; and

(v) the quantity of cigars and other tobacco products on hand at the end of the preceding [month] quarter.

Section 4. These amendments shall take effect on the date that the Notice of Adoption is published in the State Register and shall apply to quarterly reporting periods beginning more than 60 days after such date.

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

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, subdivision First; 475 (not subdivided), and 1142(12). Section 171, subdivision First of the Tax Law authorizes the Commissioner of Taxation and Finance to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and duties under the Tax Law. Section 475 provides the same authority as it relates specifically to the administration of the tax on cigarettes and tobacco products imposed under Article 20 of the Tax Law, and also provides that returns may be required to be filed at such times and containing such information as may be prescribed. Subdivision (12) of section 1142 provides for the adoption of rules and regulations that are appropriate to carry out and jointly administer the New York State and local sales and compensating use taxes and the taxes imposed by Article 20, including the joint reporting of such taxes and the information prescribed to be included on any return submitted to the commissioner.

2. Legislative objectives: The rule is being proposed pursuant to such authority and in accordance with the legislative objectives to help enable the Department to better ensure compliance with the provisions contained in Articles 20 and 28 of the Tax Law.

3. Needs and benefits: The rule seeks to address certain tax compliance issues concerning the excise tax on cigarettes, as well as the sales and use taxes on cigarettes and other products supplied to retail dealers by wholesale dealers of cigarettes. The excise tax on cigarettes and the prepaid sales tax on cigarettes are paid "upstream" by the stamping agent when the cigarette tax stamps are purchased, then added and collected as part of the selling price along the distribution chain to wholesale dealers, retail dealers and the ultimate customer. In addition to cigarettes, wholesale dealers may supply a variety of other products, such as candy, snacks, soft drinks and other sundries, to the retail dealer for resale. The Department has recently requested information from wholesale dealers regarding their sales of cigarettes and other products supplied to each retail dealer. While the Department has generally been able to obtain this type of information pursuant to its request, the Department currently does not receive reports containing the level of sales information described by this rule on an ongoing regular and systematic basis. The rule will require wholesale dealers of cigarettes, including wholesale dealers that are also stamping agents, to file quarterly informational returns with the Department detailing their sales of cigarettes and other products to retail dealers for the corresponding quarter. The returns will enable the Department to better track the distribution of cigarettes and other products in New York State. It will better enable the Department to reconcile information about products purchased and sold by retail dealers in an effort to ensure compliance, more complete reporting by the retail dealer, and the correct payment of the excise tax, as well as the sales and use taxes on cigarettes and other products. Cigarette vending machine information is not required on the wholesale dealer informational return as cigarettes sold through vending machines are dispensed to consumers and the main focus of the requested information is sales to retail dealers.

To ensure that the treatment of wholesale dealers of tobacco products is consistent with the treatment of wholesale dealers of cigarettes, the rule provides that wholesale dealers of tobacco products must file quarterly informational returns, rather than monthly informational returns, as currently required. The Department believes that quarterly filing is sufficient for its purposes and would be less burdensome to regulated parties.

4. Costs: (a) Costs to regulated parties. The regulated parties affected by this rule are approximately 280 licensed cigarette wholesale dealers, including wholesalers who are also stamping agents, and approximately 93 wholesale dealers of tobacco products that are not also licensed as distributors of tobacco products. There will be no tax liability costs to these regulated parties for the implementation of and continuing compliance with this rule. There will, however, be administrative costs associated with the requirements of the rule for the filing of the quarterly informational returns for wholesale dealers of cigarettes. It is estimated it will take a wholesale dealer of cigarettes one hour and thirty minutes to learn the new filing requirements, four hours to reprogram its computer system to capture the information needed to complete the informational returns, and one hour to complete the informational return, for a total of six hours and thirty minutes. Assuming an hourly rate of \$36 an hour (equivalent of a grade 23 New York State employee position) to do the reprogramming and complete the informational return, the average cost to a wholesale dealer of cigarettes to comply for the first quarterly reporting period will

be \$234. After the first quarterly reporting period, the cost of learning the new requirements and programming could be reduced to zero for these wholesale dealers, resulting in compliance costs to each of them of \$36 in the second quarterly reporting period and thereafter. Wholesale dealers of tobacco products will experience a reduction in administration costs based on the rule reducing their filing frequency from monthly to quarterly.

(b) Costs to the State and its local governments including this agency. This rule will have no cost in terms of revenue impact on New York State or its local governments. It is anticipated that it will assist in achieving compliance with the tax on cigarettes, tobacco products and other products sold by the retail dealer. There will be costs to this agency with regard to the implementation and continued administration of the rule. The rule will necessitate the development of quarterly informational returns for wholesale dealers of cigarettes. Minor revisions are also needed on four forms to accommodate the change in filing of the informational returns for wholesale dealers of tobacco products. In addition, a technical memorandum will be issued explaining these changes. The estimated cost of these revisions, including printing and mailing costs, is approximately \$5,500.

(c) Information and methodology. This analysis is based on discussions among personnel from the Department's Office of Tax Policy Analysis, Office of Tax Enforcement and the Office of Budget and Management Analysis, including the Management Analysis and Project Services Bureau.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: Additional reporting and paperwork requirements will be imposed on the wholesale dealer of cigarettes, who will be required to file a quarterly informational returns detailing their sales of cigarettes and other products to retail dealers for the corresponding quarter. The reporting requirements for wholesale dealers of tobacco products will be decreased, as the information for such wholesale dealers will be required quarterly rather than monthly. The informational returns for wholesale dealers of cigarettes and tobacco products must be filed on or before the twentieth day of the month following the end of the quarterly reporting period, which conforms to the sales tax quarter, and must reflect the wholesaler dealer's activities for the preceding quarter. Every return must contain a certification that the information reported is true, correct, and complete. Further, wholesale dealers must maintain complete and accurate records to substantiate the information reported on the returns.

7. Duplication: There are no relevant rules or other legal requirements of the Federal or State governments that duplicate, overlap, or conflict with this rule.

8. Alternatives: The rule could have required the filing of monthly informational returns for wholesalers of cigarettes, similar to the current requirement for wholesale dealers of tobacco products, but the Department deemed receiving the information quarterly to be sufficient. In addition, the rule could also have required information relating to purchases of cigarettes by cigarette wholesale dealers, but, instead, limits the required information to their sales and other transfers. Further, the Department is not requiring cigarette vending machine information as cigarettes sold through vending machines are dispensed to consumers and the main focus of the requested information is sales to retail dealers.

9. Federal standards: This rule does not exceed any minimum standards of the Federal government for the same or similar subject area.

10. Compliance schedule: The rule will take effect on the date that the Notice of Adoption is published in the State Register and will apply to quarterly reporting periods beginning more than 60 days after such date. The rule will require approximately 280 wholesale dealers of cigarettes to file quarterly informational returns with the Department. Approximately 93 wholesale dealers of tobacco products will be required to file quarterly informational returns rather than monthly informational returns. It is estimated that 60 days will be a sufficient amount of time to enable these regulated parties to achieve compliance with this requirement.

Regulatory Flexibility Analysis

1. Effect of rule: The rule will affect approximately 280 licensed cigarette wholesale dealers, including wholesalers who are also stamping agents, and approximately 93 wholesale dealers of tobacco products that are not also licensed as distributors of tobacco products, some of which may be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule does not distinguish between different business sizes. The rule affects all of these wholesale dealers in the same manner, regardless of the size of the business operation.

2. Compliance requirements: The rule will not impose any adverse economic impact or any additional reporting, recordkeeping, or compliance requirements on local governments. The rule will require wholesale dealers of cigarettes, including those that are small businesses, to file quarterly informational returns with the Department detailing their sales of cigarettes and other products to retail dealers for the corresponding quarter. In addition, wholesale dealers of tobacco products that are not also

distributors, including those that are small businesses, are required to file quarterly informational returns with the Department, rather than monthly informational returns. The informational returns for wholesale dealers of cigarettes and tobacco products must be filed on or before the twentieth day of the month following the end of the quarterly reporting period and must reflect the wholesale dealer's activities for the preceding quarter.

3. Professional services: The rule itself imposes no requirements for professional services upon small businesses or local governments. However, an affected wholesale dealer may decide that professional services, in addition to those it may already employ to prepare its tax returns, are needed in order for the wholesale dealer to comply with the additional reporting requirements of the rule.

4. Compliance costs: There are no compliance costs to local governments as a result of this rule. With regard to affected wholesale dealers of cigarettes during the first quarterly reporting period that the rule is in effect it is estimated that it will take a cigarette wholesale dealer one hour and thirty minutes to learn the new filing requirements, four hours to reprogram its computer system to capture the information needed to complete the informational returns, and one hour to complete the return, for a total of six hours and thirty minutes. Assuming an hourly rate of \$36 an hour (equivalent of a grade 23 New York State employee position) to do the reprogramming and complete the informational return, the average cost to a wholesale dealer of cigarettes to comply for the first quarterly reporting period will be \$234. After the first quarterly reporting period, the cost of learning the new requirements and programming could be reduced to zero for these cigarette wholesale dealers, resulting in compliance costs to each of them of \$36 in the second quarterly reporting period and thereafter. Wholesale dealers of tobacco products will experience a reduction in administration cost based on the rule reducing their filing frequency from monthly to quarterly. There are no variations in these costs for small businesses.

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

6. Minimizing adverse impact: This rule provides for filing of informational returns for wholesale dealers of cigarettes on a quarterly basis. The rule could have required informational returns to be filed monthly, to correspond with the current filing of informational returns for wholesale dealers of tobacco products, but the Department deemed quarterly filing to be sufficient. The rule does not require information relating to cigarettes purchased or acquired, but limits information requested to cigarettes sold or transferred during the quarter. The rule does not require information relating to cigarette vending machines as cigarettes sold through vending machines are dispensed to consumers and the main focus of the requested information is sales to retail dealers. In addition, the rule reduces filing requirements of the informational returns for wholesale dealers of tobacco products from monthly to quarterly. The quarterly reporting periods for these informational returns correspond to sales tax quarters for purposes of efficient recordkeeping.

7. Small business participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. The notified groups did not submit any comments concerning this rule.

In addition, it should be noted that the Audit Division of the Department recently requested wholesale dealers of cigarettes to provide information regarding their sales of cigarettes and other products to each customer. While the New York State Association of Wholesale Marketers and Distributors indicated some concerns about providing information requested by the Audit Division, the wholesale dealers have largely provided the information requested. Further, the Department provided the New York State Association of Wholesale Marketers and Distributors a draft of the proposed regulation for review. The association was asked to provide any concerns their members had regarding the proposed regulations. The Department did not receive any comments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The rule will affect approximately 280 licensed cigarette wholesale dealers, including wholesalers who are also stamping agents, and approximately 93 wholesale dealers of tobacco products that are not also licensed as distributors of tobacco products, some of which may be located in rural areas as defined by section 102(10) of the State Administrative Procedure Act. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with

population densities of 150 or fewer people per square mile). The rule affects all of these wholesale dealers in the same way; it does not distinguish between wholesale dealers located in rural, suburban, or metropolitan areas of this State.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The rule will require wholesale dealers of cigarettes, including those located in rural areas, to file quarterly informational returns with the Department detailing their sales of cigarettes and other products to retail dealers for the corresponding quarter. In addition, wholesale dealers of tobacco products that are not also distributors, including those located in rural areas, are required to file quarterly informational returns with the Department, rather than monthly informational returns. The informational returns for wholesale dealers of cigarettes and tobacco products must be filed on or before the twentieth day of the month following the end of the quarterly reporting period and must reflect the wholesale dealer's activities for the preceding quarter. The rule itself imposes no requirements for professional services. However, an affected wholesale dealer may decide that professional services, in addition to those it may already employ to prepare its tax returns, are needed in order for the wholesale dealer to comply with the additional reporting requirements of the rule.

3. Costs: There are no variations in costs for public or private concerns in rural areas. With regard to affected wholesale dealers of cigarettes located in rural areas or elsewhere, during the first quarterly reporting period that the rule is in effect it is estimated that it will take a cigarette wholesale dealer one hour and thirty minutes to learn the new filing requirements, four hours to reprogram its computer system to capture the information needed to complete the informational returns, and one hour to complete the return, for a total of six hours and thirty minutes. Assuming an hourly rate of \$36 an hour (equivalent of a grade 23 New York State employee position) to do the reprogramming and complete the informational return, the average cost to a wholesale dealer of cigarettes to comply for the first quarterly reporting period will be \$234. After the first quarterly reporting period, the cost of learning the new requirements and programming could be reduced to zero for these cigarette wholesale dealers, resulting in compliance costs to each of them of \$36 in the second quarterly reporting period and thereafter. Wholesale dealers of tobacco products will experience a reduction in administration costs based on the rule reducing their filing frequency from monthly to quarterly.

4. Minimizing adverse impact: The rule provides for filing of informational returns for wholesale dealers of cigarettes on a quarterly basis. The rule could have required informational returns to be filed monthly, to correspond with the current filing of informational returns for wholesale dealers of tobacco products, but the Department deemed quarterly filing to be sufficient. The rule does not require information relating to cigarettes purchased or acquired, but limits information requested to cigarettes sold or transferred during the quarter. The rule does not require information relating to cigarette vending machines as cigarettes sold through vending machines are dispensed to consumers and the main focus of the requested information is sales to retail dealers. In addition, the rule reduces the filing requirements of the informational return for wholesale dealers of tobacco products from monthly to quarterly. The quarterly reporting periods for these informational returns correspond to sales tax quarters for purposes of efficient recordkeeping.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given an opportunity to participate in its development: the Association of Towns of New York State; the Division of Local Government Services of New York State Department of State; the Division of Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. The notified groups did not submit any comments concerning this rule.

In addition, it should be noted that the Audit Division of the Department recently requested wholesale dealers of cigarettes to provide information regarding their sales of cigarettes and other products to each customer. While the New York State Association of Wholesale Marketers and Distributors indicated some concerns about providing information requested by the Audit Division, the wholesale dealers have largely provided the information requested. Further, the Department provided the New York State Association of Wholesale Marketers and Distributors a draft of the proposed regulation for review. The association was asked to provide any concerns their members had regarding the proposed regulations. The Department did not receive any comments.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities.

The purpose of this rule is to require licensed cigarette wholesale dealers, including wholesale dealers who are also cigarette agents, to file quarterly informational returns. The rule also requires additional information regarding total cigarette sales by customer and total cigarette and non-cigarette sales by customer. In addition, this rule requires licensed tobacco products wholesale dealers that are not also distributors of tobacco products to file quarterly instead of monthly informational returns.