

# 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.

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## Office of Alcoholism and Substance Abuse Services

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### NOTICE OF ADOPTION

#### Problem Gambling Treatment and Recovery

**I.D. No.** ASA-49-08-00004-A

**Filing No.** 110

**Filing Date:** 2009-02-02

**Effective Date:** 2009-02-18

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

**Action taken:** Addition of Part 857 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 32.02

**Subject:** Problem Gambling Treatment and Recovery.

**Purpose:** This regulation will provide guidance and standards for the continued provision of problem gambling services to New Yorkers.

**Text or summary was published** in the December 3, 2008 issue of the Register, I.D. No. ASA-49-08-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Patricia Flaherty, Associate Counsel, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Avenue, Albany NY 12203, (518) 485-2317, email: patriciaflaherty@oasas.state.ny.us

#### Assessment of Public Comment

Comments were received by New York Association of Alcoholism and Substance Abuse Providers, Inc., The Pederson Krag Center, NYS Council for Community Behavioral Healthcare, and the NYS Conference of Mental Hygiene Directors.

Comment:

“The point raised concerns a stand alone gambling treatment clinic staffed by a Licensed Social Worker (LSW). Apparently an LSW working in such a situation may not be able to either pursue, or hold a CASAC or CASAC with a Gambling credential or certification.”

Response:

Part 857.9(b) proposes,

The Clinician providing the problem gambling treatment services must hold a Gambling Counselor Certification or credential recognized by OASAS. (CASAC with a Gambling Specialty, Credentialed Problem Gambling Counselor) or any other professional credential related to this field and recognized by OASAS, New York Council on Problem Gambling Certificate, or National Council on Problem Gambling Certificate. If they do not hold such a certification, they must be able to document that they are pursuing certification and apply for their credential within one year of providing this service.

A LMSW who works in a stand alone gambling clinic would need to either hold or pursue a CASAC with the Gambling Specialty or the Credentialed Problem Gambling Counselor Certification (CPGC - which is currently being developed). If they are not currently credentialed with either credential, then they would need to provide documentation that they are actively pursuing one of the credentials and obtain that credential within a year.

For the CASAC-G, first and foremost the individual would need to become a CASAC, then they would need to meet the requirements for the CASAC-G (attached is the requirements for the CASAC-G).

Comment:

A provider commented that the staffing patterns are inadequate and that more staff is needed in order to properly administer the program. This provider also commented on the burden of administrative paperwork.

Response:

The Agency’s position is that these standards are minimum standards and the program is free to increase the staffing patterns according to perceived need. In regard to the comments about burdensome paperwork requirements, the Agency has created a regulatory relief paperwork reduction workgroup to try to reduce any unnecessary paperwork being required of all our programs.

Comment:

What will the “group” requirements or expectations be and will the regulation differ for “stand alone” facilities vs. existing Chemical Dependency clinics?

Response:

The group standards are the same whether or not the service is provided in a stand alone problem gambling clinic or one co-located within an outpatient chemical dependency clinic. These are minimum standards and the agency is encouraged to develop client centered treatment plans based on the client’s individual needs. The determination to put a client in a group should be a clinical judgment made by the primary clinical staff person and the clinical supervisor.

Comment:

Along with the preliminary gambling credentials listed, the director needs to hold an advanced credential in counseling such as the LCSW (Licensed Clinical Social Worker), CRC (Certified Rehab Counselor) or LMHC (License Mental Health Counselor) to ensure that a masters or doctoral degree in the counseling field is in place.

## Response:

The Clinical Supervision requirements are outlined in the new proposed Credentialing of Addictions Professional regulation which include minimum experience requirements in problem gambling treatment and supervision as outlined in Part 857.9b. That regulation is currently a "pre-proposed" regulation at GORR.

## Comment:

Clients in a gambling specific program often have jobs and mandating weekly attendance may place an undue hardship and lead to drop out. Having the option of bi weekly sessions under certain circumstances is important.

## Response:

All treatment planning and requirements should be developed based on the patient's individual treatment goals which includes determining the most appropriate time frame for treatment services.

## Comment:

Because some programs have limited staff and are way past the 25:1 ratio, it is impossible to fit all clients into the schedule within the specified time frame.

## Response:

25:1 staffing ratio was strongly recommended by the problem gambling treatment providers in 2006 when the Standards for Outpatient Problem Gambling Services were collaboratively developed.

**NOTICE OF ADOPTION****Individual Counseling, Physical Examination, Medical History, Quality Improvement and Utilization Review**

**I.D. No.** ASA-49-08-00005-A

**Filing No.** 108

**Filing Date:** 2009-01-30

**Effective Date:** 2009-02-18

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

**Action taken:** Amendment of sections 817.4(b)(1), (2), 818.4(b)(1), (2), 819.4(b)(1), (2), 822.6(c) and 822.2(c)(1), (2) of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(e), 19.09(b), 19.15(a), 19.40, 32.01 and 32.07(a)

**Subject:** Individual counseling, physical examination, medical history, quality improvement and utilization review.

**Purpose:** To deliver optimal patient care and treatment in a manner that is both cost effective and accountable.

**Text or summary was published** in the December 3, 2008 issue of the Register, I.D. No. ASA-49-08-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Sara E. Osborne, NYS Office of Alcoholism and Substance Abuse Services, 1450 Western Avenue, Albany, NY 12203, (518) 485-2317, email: SaraOsborne@oasas.state.ny.us

**Assessment of Public Comment**

OASAS received two comments on the above proposed rule making published in the NYS Register, December 3, 2008: one from the NY Association of Alcoholism and Substance Abuse Providers, Inc. and one from an individual.

AASAP endorses the changes in Parts 822, 817, 818, and 819 and encourages OASAS to continue to conform future Part 822 revisions to these changes. OASAS is currently engaged in such a process; comments have been forwarded to the appropriate OASAS staff for consideration in further amendments.

Comments from a former OASAS employee related to the proposed amendments and to other provisions affected by these changes. Those primarily concerned the commenter's preferred language usage and/or preferred location of the regulatory elements within the current Part. Comments did not suggest substantive alterations to the proposed rule changes; however, recommendations have been forwarded to the appropriate OASAS staff for consideration in further amendments. Likewise, recommendations to define terms for consistent regulatory

use are being addressed in the further amendment process. The commenter objected to the proposed repeal of utilization review (822.6(c)) requirements. OASAS has deemed the requirement in this Part to be redundant because review of admission appropriateness is achieved by other regulatory requirements; commenter would prefer repeal of the other requirements and retaining those in 822.6(c) but does provide a reason for such preference. OASAS proposes this change because its inclusion in Part 822.6(c) requires additional paperwork although appropriateness of admissions is continually addressed throughout admission, treatment and discharge; utilization review is more appropriate to address the matter of retention criteria being met.

**Department of Civil Service****NOTICE OF EXPIRATION**

The following notice has expired and cannot be reconsidered unless the Department of Civil Service publishes a new notice of proposed rule making in the NYS Register.

**Jurisdictional Classification**

| I.D. No.          | Proposed         | Expiration Date  |
|-------------------|------------------|------------------|
| CVS-05-08-00011-P | January 30, 2008 | January 29, 2009 |

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Supplemental Military Leave Benefits**

**I.D. No.** CVS-07-09-00001-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 sections 21.15 and 28-1.17 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Supplemental military leave benefits.

**Purpose:** To extend the availability of supplemental military leave benefits for certain New York State employees until December 31, 2009.

**Substance of proposed rule:** The proposed rule amends sections 21.15 and 28-1.17 of the Attendance Rules for Employees in New York State Departments and Institutions to continue the availability of the single grant of supplemental military leave with pay and further leave at reduced pay through December 31, 2009, and to provide for separate grants of the greater of 22 working days or 30 calendar days of training leave at reduced pay during calendar year 2009. Union represented employees already receive these benefits pursuant to memoranda of understanding (MOUs) negotiated with the Governor's Office of Employee Relations (GOER). The proposed rule merely amends section 21.15 of the Attendance Rules consistent with the current MOUs, and amends section 28-1.17 to extend equivalent benefits to employees serving in positions designated managerial or confidential (m/c).

Under current statute, section 242 of the New York State Military Law provides that public officers and employees who are members of the organized militia or any reserve force or reserve component of the armed forces of the United States may receive the greater of 22 working days or 30 calendar days of leave with pay to perform ordered military duty in the service of New York State or the United States during each calendar year or any continuous period of absence.

Following the events of September 11, 2001, certain State employees were ordered to extended active military duty, or frequent periods of intermittent active military duty. These employees faced the loss of State salary, with attendant loss of benefits for their dependents, upon exhaustion of the annual grant of Military Law paid leave. Accordingly, supplemental military leave, leave at reduced pay and training leave at reduced pay were made available to such employees pursuant to MOUs negotiated with the employee unions. Corresponding amendments to the Attendance Rules were adopted extending equivalent military leave benefits to employees in m/c designated positions. While these benefits are intended to expire upon a date certain, the benefits described herein have been repeatedly renewed in the wake of the continuing war on terror, including homeland security activities, and the armed conflicts in Afghanistan and Iraq.

With respect to supplemental military leave, eligible State employees (federally ordered, or ordered by the Governor, to active military duty (other than for training) in response to the war on terror receive a single, non-renewable grant of the greater of 22 working days or 30 calendar days of supplemental military leave with full pay.

With respect to military leave at reduced pay, upon exhaustion of the military leave benefit conferred by the Military Law, and the single grant of supplemental military leave with pay, and any available accruals (other than sick leave) which an employee elects to use, employees who continue to perform qualifying military duty are eligible to receive military leave at reduced pay. Compensation for such leave is based upon the employee's regular State salary as of his/her last day in full pay status (defined as base pay, plus location pay, plus geographic differential) reduced by military pay (defined as base pay, plus food and housing allowances) received from the United States or New York State for military service, if the former exceeded the latter. While in leave at reduced pay status, employees are eligible to receive leave days due upon his/her personal leave anniversary if such anniversary date falls during a period of military leave at reduced pay, and can accumulate biweekly vacation and sick leave credits for any pay period in which they remain in full pay status for at least seven out of ten days (or a proportionate number of days for employees with work weeks of less than 10 days per bi-weekly pay period.) These leave benefits are available even for employees who do not receive supplemental pay because their military salaries (as defined) exceed their regular State pay.

With respect to training leave at reduced pay, many employees ordered to military duty in response to the war on terror also continue to perform other required military service unrelated to the war on terror. To support employees performing other military duty, including mandatory summer and weekend training and other activation, a new category of leave was established, entitled "training leave at reduced pay." Eligible employees receive the greater of 22 work days or 30 calendar days of training leave at reduced pay following qualifying military duty in response to the war on terror, and after depleting the annual Military Law grant of leave with pay and any leave credits (other than sick leave) that they elect to use. Training leave at reduced pay may then be used for any ordered military duty during the calendar year that is not related to the war on terror. Employees who have already utilized leave at reduced pay receive the same compensation for any periods of training leave at reduced pay. Employees who have not used leave at reduced pay prior to their initial use of training leave at reduced pay are paid according to the employee's regular State salary as of his or her last day in full pay status reduced by military pay received from the United States or New York State for military service, if the former exceeds the latter. Employees on training leave at reduced pay retain the same leave accrual benefits as apply to leave at reduced pay.

The proposed rule extends the availability of supplemental military leave with pay, leave at reduced pay and training leave at reduced pay through December 31, 2009. Employees must establish eligibility for supplemental military leave (provided they have not already depleted the single grant of such leave), leave at reduced pay and training leave at reduced pay during 2009 by performing qualifying military service.

Employees on leave at reduced pay or training leave at reduced pay on January 1, 2009, have their rate of pay calculated from their base State pay as of January 1, 2009, reduced by the military pay rate applied to their most recent period in either reduced pay category prior to 2009. For employees who have used leave at reduced pay or training leave at reduced pay prior to year 2009, their pay for either type of reduced pay leave at point between January 1, 2009 and December 31, 2009, will be calculated from their base State pay as of their last day in full pay status after January 1, 2009, prior to their initial use of leave of reduced pay or training leave at reduced pay, offset by the rate of military pay from their most recent period of reduced pay leave, prior to 2009. Employees whose initial use of either reduced pay leave category occurs during 2009 will have their pay rate determined by their base State pay on their last day of full pay status, minus military pay. For all employees receiving leave at reduced pay or training leave at reduced pay in 2009, the initial pay calculation will apply to all subsequent periods of reduced pay leave.

The proposed amendment provides that in no event shall supplemental military leave, leave at reduced pay or training leave at reduced pay be granted for military service performed after December 31, 2009, nor shall such leaves be available to employees who have voluntarily separated from State service or who are terminated for cause.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

### **Consensus Rule Making Determination**

Section 6(1) of the Civil Service Law authorizes the State Civil Service Commission to prescribe and amend suitable rules and regulations concerning leaves of absence for employees in the Classified Service of the State.

Following September 11, 2001, certain State employees were federally ordered, or ordered by the Governor, to active military duty. The New York State Military Law provides for the greater of 22 working days or 30 calendar days of military leave at full (State) pay for ordered service during each calendar year or continuous period of absence. Employees ordered to prolonged active duty, or repeatedly ordered to intermittent periods of active duty, faced exhaustion of the Military Law leave with pay benefit. Further periods of military service would then subject these employees to economic hardship from the loss of their regular State salaries and deprive their dependents of needed benefits derived from State employment.

To support State employees called to military duty after September 11, 2001, the Governor's Office of Employee Relations (GOER) executed memoranda of understanding (MOUs) with the employee unions to provide for a supplemental grant of military leave with pay and leave at reduced pay. Subsequent MOUs established a new benefit entitled training leave at reduced pay. These military leave benefits have been repeatedly renewed in the wake of the ongoing war on terrorism, including homeland security activities and military actions in Afghanistan and Iraq.

Upon depletion of the Military Law paid leave benefit, employees federally ordered, or ordered by the Governor, to active military duty in response to the war on terror receive a single grant of the greater of 22 work days or 30 calendar days of military leave with pay. Employees who continue to perform active duty in response to the war on terror and have exhausted their paid Military Law leave and supplemental military leave with pay, and any available leave credits (other than sick leave), which they elect to use, become eligible for leave at reduced pay. Leave at reduced pay provides eligible employees with the difference between their regular State salaries (defined as base pay, plus location pay, plus geographic differential) and their pay for military service (defined as base pay plus food and housing allowances), if the former exceeds the latter. Individuals in leave at reduced pay status also retain certain other leave benefits, even if they do not receive additional salary.

Members of the Reserves and National Guard may also continue to perform duty unrelated to the war on terror, including mandatory weekend and summer training or other activation. Following any military service related to the war on terror, and exhaustion of the annual Military Law paid leave benefit, plus any available leave credits (other than sick leave) that an employee elects to use, eligible employees can use up to 22 work days or 30 calendar days of training leave at reduced pay for any ordered military service that is not in response to the war on terror. Salary computations for training leave at reduced pay are substantially derived from the calculations for leave at reduced pay.

The Governor's Office of Employee Relations has executed new MOUs with the Classified Service employee unions extending the availability of the single grant of supplemental military leave with pay and leave at reduced pay, and training leave at reduced pay through December 31, 2009. The State Civil Service Commission shall amend the Attendance Rules in accordance with the MOUs and extend equivalent benefits to employees serving in m/c designated positions.

No person or entity is likely to object to the rule as written, because it conforms the Attendance Rules to the current, approved MOUs negotiated with the employee unions and provides equivalent benefits to employees serving in m/c positions. Cost estimates are expected to remain consistent with the \$2-5 million per annum cost estimates prepared before prior adoptions of the military leave benefits described herein. These cost projections include both the anticipated full and partial State salary payments for employees on all categories of additional military leave and the cost of any replacement staffing for mission-critical State positions. Most eligible employees are expected to have already utilized the sole grant of supplemental military leave at full pay, so direct leave costs for calendar year 2009 may be slightly lower than projected. Estimates cannot anticipate sudden changes in global conditions or homeland security needs. No new compliance costs or implementation difficulties are associated with the extension of the subject benefits.

The Civil Service Commission received no public comments after publication of the amendments to the Attendance Rules establishing or re-authorizing the benefits now put forward for renewal. Previous re-adoptions of the proposed amendments have been proposed and adopted as consensus rules. As no person is likely to object to the rule as written, the proposed rule is advanced as a consensus rule pursuant to State Administrative Procedure Act (SAPA) § 202(1)(b)(i).

### **Job Impact Statement**

By modifying Title 4 of the NYCRR to extend the availability of supplemental military leave, leave at reduced pay and training leave at

reduced pay for eligible employees subject to the Attendance Rules for Employees in New York State Departments and Institutions, these rules will positively impact jobs or employment opportunities for eligible employees, as set forth in section 201-a(2)(a) of the State Administrative Procedure Act (SAPA). Therefore, a Job Impact Statement (JIS) is not required by section 201-a of such Act.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-09-00002-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Family Assistance under the subheading "Office of Children and Family Services," by adding thereto the position of Confidential Aide.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-09-00003-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Alcoholic Beverage Control," by deleting therefrom the position of Beverage Control Investigator (1) (Until first vacated after March 4, 1986); and, in the Department of Family Assistance under the subheading "Office of Temporary and

Disability Assistance," by deleting therefrom the position of Child Abuse Specialist 2 (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-09-00004-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete positions from and classify positions in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Law, by deleting therefrom the positions of Confidential Systems Analyst (3); and, in the Department of Law under the subheading "Medicaid Fraud Control Unit," by adding thereto the positions of Confidential Systems Analyst (3) and by increasing the number of positions of Investigator from 9 to 25.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was

previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-09-00005-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Agriculture and Markets, by adding thereto the position of Assistant Public Information Officer.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-09-00006-P

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

**Proposed Action:** Amendment of Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the non-competitive class.

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in Westchester County under the subheading "Office of the District Attorney," by adding thereto the position of Director-County Wide Intelligence Center (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-09-00007-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Health, by increasing the number of positions of Research Associate from 8 to 9.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously

printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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

**Jurisdictional Classification**

**I.D. No.** CVS-07-09-00008-P

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

**Proposed Action:** Amendment of Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)

**Subject:** Jurisdictional Classification.

**Purpose:** To delete a position from and classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Environmental Conservation, by decreasing the number of positions of Special Assistant from 16 to 15 and by increasing the number of positions of Assistant Commissioner from 5 to 6.

**Text of proposed rule and any required statements and analyses may be obtained from:** Shirley LaPlante, NYS Department of Civil Service, AES-SOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

**Data, views or arguments may be submitted to:** Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, AES-SOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-01-09-00010-P, Issue of January 7, 2009.

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## Division of Criminal Justice Services

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### NOTICE OF ADOPTION

**Personal Privacy Protection Law**

**I.D. No.** CJS-49-08-00008-A

**Filing No.** 106

**Filing Date:** 2009-02-02

**Effective Date:** 2009-02-18

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

**Action taken:** Amendment of sections 6151.2(b), 6151.4, 6151.8(c) and 6151.9 of Title 9 NYCRR.

**Statutory authority:** Public Officers Law, section 94(2); and Executive Law, section 837(13)

**Subject:** Personal Privacy Protection Law.

**Purpose:** To update the Division's address and contact person for requests regarding the Personal Privacy Protection Law.

**Text or summary was published** in the December 3, 2008 issue of the Register, I.D. No. CJS-49-08-00008-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Environmental Conservation

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### AMENDED NOTICE OF ADOPTION

**Requirements for Proposed New Major Facilities and Major Modifications to Existing Facilities**

**I.D. No.** ENV-39-07-00006-AA

**Filing No.** 112

**Filing Date:** 2009-02-03

**Effective Date:** 2009-03-05

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

**Action taken:** Amendment of Parts 200, 201 and 231 of Title 6 NYCRR.

**Amended action:** This action amends the rule that was filed with the Secretary of State on January 20, 2009, to be effective February 19, 2009, File No. 00074. The notice of adoption, I.D. No. ENV-39-07-00006-A, was published in the February 4, 2009 issue of the *State Register*.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305; and Federal Clean Air Act, sections 160-169, 171-193 (42 U.S.C. 7470-7479; 7501-7515)

**Subject:** Requirements for proposed new major facilities and major modifications to existing facilities.

**Purpose:** The Department is undertaking this rulemaking to comply with the 2002 Federal New Source Review Rule as amended on 12/21/07.

**Substance of amended rule:** The Department of Environmental Conservation (Department) is proposing revisions to its rulemaking proposal published in the State Register on September 26, 2007 for Parts 200, 201 and 231 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, entitled "General Provisions," "Permits and Registrations" and "New Source Review in Nonattainment Areas and Ozone Transport Regions" respectively.

The Part 200 amendments will add a definition for Routine Maintenance, Repair, or Replacement (RMRR), codifying current Department practice of reviewing RMRR activities on a case by case basis, taking into account the nature and extent of the activity and its frequency and cost. In addition, the Department is revising Part 200 (Sections 200.9 and 200.10). Section 200.9 is being amended to include all federal materials referenced in the proposed amendments to Part 231. Section 200.10(a) is being amended to reflect that the Department is no longer delegated responsibility for implementation of the Federal Prevention of Significant Deterioration (PSD) Program.

The proposed amendments to Part 201 revise the definition for "major stationary source or major source" at 6 NYCRR 201-2.1(b)(21). The definition will now encompass the term "major facility" and incorporate major facility and significant project thresholds for facilities emitting particulate matter or particles with an aerodynamic diameter less than or equal to a nominal 2.5 micro-meters (PM-2.5). EPA designated the New York City metropolitan area as nonattainment for the PM 2.5 standard (70 Fed. Reg. 944). Nonattainment new source review (NNSR) is now required for new major facilities and major modifications to existing facilities that emit PM 2.5 in significant amounts in the PM2.5 nonattainment area.

The existing nonattainment New Source Review program at Part 231 will be re-titled "New Source Review for New and Modified Facilities"

and will include new Subparts 231-3 through 231-13. The new subparts will implement nonattainment New Source Review (NNSR) and attainment New Source Review (PSD). The NNSR requirements are based on New York's existing NNSR program Subpart 231-2, with revisions to include selected provisions from the December 31, 2002 Federal NSR reform rule and EPA's December 21, 2007 Reasonable Possibility in Recordkeeping Rule. The PSD requirements are also based largely on the December 31, 2002 Federal NSR reform rule as codified at 40 CFR 52.21.

The proposed revisions to Part 231 will change the basis of applicability for modifications and emission reduction credits (ERCs) from an "Emission Unit" basis to an "Emission Source" basis, incorporate various federal requirements, provide clarification of existing requirements, and require comprehensive reporting, monitoring, and recordkeeping that will conform to the requirements of Title V. Through this rulemaking, the Department will also establish a new method for determining baseline actual emissions. Baseline actual emissions will be determined by using any 24 consecutive month period of emissions in the previous five years. All facilities (no separate baseline period for electric utility steam generating units) will be required to determine their baseline actual emissions using this method.

The Department will retain existing Subpart 231-1 "Requirements for emission sources subject to the regulation prior to November 15, 1992" and Subpart 231-2, "Requirements for emission units subject to the regulation on or after November 15, 1992". These regulations are currently cited in many air permits issued throughout the State and retaining them will facilitate implementation and enforcement of the NSR program. Existing Subpart 231-2 will be revised only to indicate that the Subpart will not apply after the date the proposed revisions to Part 231 become effective. Thus, permit applications received on or after the effective date of revised Part 231 will be processed according to the provisions of Subparts 231-3 through 231-13, as applicable.

New Subparts 231-3 through 231-13 have been added to include provisions from the EPA December 31, 2002 NSR Rule, and incorporate the Federal PSD program. The NNSR provisions currently specified in Subpart 231-2 are being updated and incorporated into these new subparts. The Department is also adopting a State PSD program which is based largely on the Federal PSD rule and included in Subparts 231-7, 231-8, and 231-12. The subparts of the proposed regulation are being organized to ease determinations of applicability, to collect common requirements into groups, and to streamline the regulation. The organization of the new regulation strives to make a more coherent series of requirements and obligations.

Subpart 231-3 General Provisions specifies provisions which apply generally such as a transition plan, exemptions, general prohibitions, source obligation, general permit requirements, facility shakedown periods, and circumvention. Proposed Section 231-3.4 (Exemptions) has been revised to remove the Clean Coal technology exemptions. The Department has determined that these exemptions are out of date and no longer necessary for implementing the NSR program. The Source Obligation section (231-3.6) includes a requirement that any owner or operator of a facility that proposes a project that involves a physical change or change in the method of operation that the owner or operator determines would be followed by a facility emissions increase that equals or exceeds any of the significant project thresholds in Subpart 231-13, Tables 3, 4 or 6, must notify the Department in writing of the proposed project prior to implementing the change if the owner or operator determines that the project does not constitute a modification because all the emission increases are attributable to independent factors in accordance with Clause 231-4.1(b)(40)(i)(c). The notification must include (1) a description of the change, (2) the calculation of the projected emissions increase, (3) the proposed date of the change, and (4) an explanation of the factual basis for the conclusion that none of the projected emission increases are attributable to the proposed project.

Subpart 231-4 defines the terms used throughout Part 231 and incorporates terms from both the existing Subpart 231-2 and the Federal PSD rule, 40 CFR 52.21. The Department has made minor revisions to terms used in existing Subpart 231-2 and 40 CFR 52.21 so that definitions are consistent for both nonattainment and attainment NSR and with New York's regulations. The Department has also removed the previously proposed Clean Coal technology definitions to be consistent with the removal of the Clean Coal technology exemptions in Subpart 231-3.

To facilitate the implementation and administration of Part 231, the Department has included the requirements for new and modified facilities in four main Subparts (231-5 to 231-8) depending on the facility's location in an attainment or nonattainment area.

Subpart 231-5 is applicable to new facilities and to modifications at existing non-major facilities in nonattainment areas. Proposed new major facilities will continue to be subject to the requirements to install Lowest Achievable Emission Rate (LAER) and obtain emission offsets as they are under existing Subpart 231-2. The subpart also specifies that non-major

facilities undertaking projects which are major by themselves, or increase the emissions of the facility above major thresholds must obtain permits which limit emissions.

Subpart 231-6 applies to modifications at existing major facilities in nonattainment areas. The subpart continues the requirements for LAER technology and emission offsets that exist in the Department's current nonattainment NSR program. The subpart also specifies that facilities can perform a netting exercise to determine whether the modification, when considering other contemporaneous activities at the facility, would exceed applicable emissions thresholds.

Subpart 231-7 applies to new facilities and to modifications at existing non-major facilities in attainment areas. The subpart implements the requirements for determination of air quality impacts through modeling, and the application of Best Available Control Technology (BACT). The subpart also specifies that non-major facilities undertaking projects which are major by themselves, or increase the emissions of the facility above major thresholds must obtain permits which limit emissions.

Subpart 231-8 applies to modifications at existing major facilities in attainment areas of the State. The subpart implements the requirements for determination of air quality impacts through modeling and the application of BACT in the case of facilities which undertake a NSR major modification. These requirements address Federal PSD requirements. The subpart also specifies that facilities can perform a netting exercise to determine whether the modification, when combined with other contemporaneous activities at the facility, would exceed emissions thresholds.

The remaining five subparts include general provisions that apply to both new and modified subject facilities.

Subpart 231-9 sets forth the requirements for establishing Plantwide Applicability Limitations (PAL) at Title V facilities. A PAL allows a facility to undertake modifications without being subject to NSR review as long as the facility does not exceed its PAL emission limit. Subpart 231-9 is based on the PAL provisions from the December 31, 2002 Federal NSR rule (67 Fed Reg at 80278), which specify PAL creation, duration, and expiration. The Department has made a few revisions to the Federal regulatory language to take into account Subpart 201-6, New York's approved Title V regulation and to ensure that reduced emissions and improved air quality will result. PALs are established in Title V permits and are subject to Title V permit application and processing procedures for creation, modification, or renewal. PALs are created for an initial period of 10 years, less if established during the middle of a Title V permit term, and can be renewed for 10 years, subject to certain restrictions. The proposed regulation requires that the PAL shall be reduced to 75 percent of the initial PAL, commencing with the first day of the sixth year of the PAL, unless the owner or operator demonstrates that a lesser level of reduction is justified. The owner or operator may seek an alternative reduced PAL by demonstrating that the application of BACT and/or LAER, as applicable, on all major PAL emission sources at the facility would not result in a 25 percent reduction in the initial PAL. The Department may authorize a reduction in the PAL to a level that would reflect the emissions from the facility if all major PAL emission sources are operated at full capacity after complying with BACT and/or LAER, as applicable.

Subpart 231-10 defines emission offset and Emission Reduction Credit (ERC) creation and use. The provisions for ERC creation and use are substantially the same as existing Subpart 231-2 except for the determination of ERC enforceability. Under proposed Subpart 231-10 the Department has clarified how ERCs are made enforceable.

Subpart 231-11 sets forth permit requirements for new major facilities, NSR major modifications, and netting. This Subpart also establishes reasonable possibility requirements for insignificant modifications. These requirements are in addition to any Part 201 requirements that may apply. The Federal Reasonable Possibility Rule only requires post-change monitoring for insignificant modifications if the projected actual emissions increase (Part 231 project emission potential) is by itself greater than or equal to 50 percent of the applicable significance threshold. Proposed Part 231 extends the post-change monitoring requirement to also include any modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added. For such modifications, facilities will be required to keep records of their calculation of emission increases from independent and unrelated factors such as demand growth, monitor post-modification emissions, and submit annual reports to verify the accuracy of their calculations. Additionally, the Federal Reasonable Possibility Rule only requires EUSGUs to notify the Department, prior to beginning actual construction, for any modification with a project emission potential which equals or exceeds 50 percent of the applicable significant project threshold. Proposed Part 231 extends the pre-construction notification requirement to any facility that proposes a modification with a project emission

potential which equals or exceeds 50 percent of the applicable significant project threshold or proposes a modification with a project emission potential which is less than 50 percent of the applicable significant project threshold in Table 3, Table 4 or Table 6 of Subpart 231-13, but equals or exceeds 50 percent of the applicable significant project threshold when emissions excluded in accordance with Clause 231-4.1(b)(42)(i)(c) (emissions from independent and unrelated factors) are added.

Subpart 231-12 specifies the ambient air quality impact analysis requirements for facilities in attainment areas. These requirements emanate from the Federal PSD rule which is codified at 40 CFR 52.21.

Subpart 231-13 includes several tables which list applicable emission thresholds for proposed new and modified facilities, emission offset ratios, Federal Class I variance maximum allowable increase concentrations, and maximum allowable increase in SO<sub>2</sub> concentrations for gubernatorial variances. Table 9 – Source Category List includes the new chemical process plant exclusion for ethanol production facilities that produce ethanol by natural fermentation (included in NAICS codes 325193 or 312140). This exclusion was promulgated in the EPA May 1st, 2007 Final Rule for 40 CFR Parts 51, 52, 70, and 71 Prevention of Significant Deterioration, Nonattainment New Source Review, and Title V: Treatment of Certain Ethanol Production Facilities Under the “Major Emitting Facility” definition.

**Amended rule as compared with adopted rule:** Nonsubstantive revisions were made in sections: 200.1(c), 201-2.1(b)(21), 231-3.6(a), 231-4.1(b)(29)(iii), 231-5.1(a)(1), (2), (b), 231-5.2(d)(1), (e)(1), 231-6.3(d)(1), (e)(1), 231-7.1(a)(1), (2), (b), 231-10.1(h), (i), 231-10.2(c) and 231-10.7.

**Text of amended rule and any required statements and analyses may be obtained from:** Rick Leone, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 231nsr@gw.dec.state.ny.us

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file. This rule has been approved by the Environmental Board.

#### Revised Regulatory Impact Statement

There were no changes to the previously published Revised Regulatory Impact Statement.

#### Revised Regulatory Flexibility Analysis

There were no changes to the previously published Revised Regulatory Flexibility Analysis for small business and local governments.

#### Revised Rural Area Flexibility Analysis

There were no changes to the previously published Revised Rural Area Flexibility Analysis.

#### Revised Job Impact Statement

There were no changes to the previously published Revised Job Impact Statement.

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## Department of Labor

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

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

**I.D. No.** LAB-07-09-00013-EP

**Filing No.** 109

**Filing Date:** 2009-01-30

**Effective Date:** 2009-01-30

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

**Proposed Action:** Addition of Part 921 to Title 12 NYCRR.

**Statutory authority:** Labor Law, section 860-f

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

**The specific reasons underlying the finding of necessity, above, are as follows:** The effective date of the regulations coincides with the effective date of their authorizing legislation, the New York Worker Adjustment

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

The emergency promulgation of these regulations is necessitated by the dramatic job losses currently being suffered within the state, the need to ensure that the notice requirements detailed in the regulation are available to protect workers affected by such job losses, and the needs to provide reemployment services to these workers in order to return them quickly to work. In the last quarter of 2008, New York State lost 102,900 private sector jobs, including 49,300 in December alone. This is the steepest one-month drop since October 2001 in the aftermath of the World Trade Center attacks. Since the beginning of the national recession in December 2007, the number of unemployed in the state has increased by more than 50% and is at its highest level since October 1993. New York State's unemployment rate, after seasonal adjustment, increased from 6.0 percent in November 2008 to 7.0 percent in December 2008 -- its highest level since June 1994.

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

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

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

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

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

Many employers in the State are already subject to the federal WARN Act (29 USC §§ 2101 - 2109 and 20 CFR 639.3). The State WARN Act expands the notice requirements to a larger group of employers and, concomitantly, extends its protections to more employees. The State Act also gives the Commissioner of Labor the authority to enforce the law on

behalf of affected employees who did not receive appropriate notice of a plant closing, mass layoff, or covered reduction in work hours from their employer in violation of the law. Labor Law § 860-f(1) states that the Commissioner of Labor “shall prescribe such rules as may be necessary to carry out this article.”

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

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

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

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

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

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

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

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

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire April 29, 2009.

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

**Data, views or arguments may be submitted to:** Kevin E. Jones, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 508, Albany, New York 12240, (518) 457-4380, email: nysdol@labor.state.ny.us

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

### Regulatory Impact Statement

#### 1. Statutory authority:

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

#### 2. Legislative objectives:

Article 25-A establishes the New York State Worker Adjustment and Retraining Notification (WARN) Act which is intended to provide more advance notice to a larger number of workers who are laid off from their jobs than under the federal WARN law. Under the State WARN, companies with at least 50 employees must provide at least 90 days’ notice to affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where at least 25 of the employees will suffer an employment loss as a result of a plant closing, mass layoff, or a covered reduction in work hours by their employer. These provisions will allow the Department of Labor’s Rapid Response Unit to provide workers with reemployment and retraining services well in advance of their loss of employment. This early intervention is designed to reduce or avoid periods of unemployment, ensure that workers are aware of job placement and retraining services, and, if attempts to transition workers into new employment are unsuccessful, make them aware of the availability of unemployment insurance benefits as an economic safety net for them and their families. Under the Act, the Commissioner of Labor is required to enforce the law by recovering back wages on behalf of workers whose employers failed to give timely notice and by imposing penalties against such employers.

#### 3. Needs and benefits:

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

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

Early intervention to assist workers with obtaining new jobs is key to avoiding the economic impact of large-scale employment losses on workers, their families, and their communities. Large-scale job losses addressed by the state law impact employee spending and lead to the general decline of the local economy. This affects businesses that serve the workforce, adversely impacts local sales and property taxes, housing values, and the like. The Department of Labor’s Dislocated Worker Unit provides rapid response activities to workers to transition them into new employment as quickly as possible after a job loss. They do this by providing access to and information about dislocated worker re-employment assistance,

unemployment insurance benefit information, job training, and other services. The state WARN Act increases the benefit to be derived from these services by giving workers more time to plan their reemployment strategy and more time to obtain retraining (if needed). Moreover, the notice provided to the Department under the state law and rule will include detail that will assist the Department in providing such services including the names of affected workers. Early intervention leading to reemployment also reduces dependence upon unemployment insurance benefits for laid off workers. Although such benefits are a critical economic safety net for workers and their families, reemployment is always preferable and provides greater income to workers. Reemployment reduces UI charges to individual employers and also UI benefit costs. Reduction of UI benefit costs is particularly beneficial to the state at this point in time since the State expects it will have to borrow from the federal government over the course of the upcoming year in order to support benefit payments.

The state Act and regulations also meet a significant need by providing workers with an effective mechanism to seek redress for employer violations of the notice requirements. Currently, the federal WARN law requires aggrieved employees to bring private lawsuits to sue for redress; neither the federal nor state departments of labor have the authority to enforce the federal WARN law. Private actions are a remedy that has been very seldom used over the years given that workers who fail to receive the required federal WARN notice typically lack the resources to sue their employers. Instead, they must focus their efforts and savings on finding new employment to support their families. The State WARN Act and these emergency regulations, however, give the Commissioner of Labor the authority to recover back wages and benefits on behalf of such workers and to impose civil penalties against employers who fail to provide the required WARN notice.

#### 4. Costs:

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

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

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

with the final paycheck or through a separate notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

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

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

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

#### 5. Paperwork:

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

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

#### 6. Local government mandates:

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

#### 7. Duplication:

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

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

#### 8. Alternatives:

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

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

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

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

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

#### 9. Federal standards:

Federal standards implementing the federal WARN law exist and are found at 29 USC §§ 2101 - 2109 and 20 CFR 639.3. However, consistent with a less stringent federal law, such regulations provide a shorter period of notice, cover fewer employers, and do not permit administrative enforcement of the law. Since the Commissioner of Labor is required to enforce the Act, additional provisions not contained in the federal WARN regulations were included to ensure that information regarding notice requirements, investigations, and determinations in the state regulations sufficiently inform all affected parties of their rights and obligations and ensure a fair and thorough determination of violations based on the requirements of the Act.

#### 10. Compliance schedule:

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

#### **Regulatory Flexibility Analysis**

##### 1. Effect of rule:

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

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

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

##### 2. Compliance requirements:

Employers of 50 or more employees, other than part-time employees, will be required to provide a WARN notice to the required parties under

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

##### 3. Professional services:

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

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

##### 4. Compliance costs:

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

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

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

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with

their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination.

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

#### 5. Economic and technological feasibility:

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

#### 6. Minimizing adverse impact:

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

The Department has taken a number of steps to minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. For those employers who are subject to state and federal notice requirements, the Department will allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. Where the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, the rule contains the actual language to be used by employers for this purpose. The rule allows delivery of the notice along with paychecks or direct deposit slips should the employer choose to do so, in order to avoid costs associated with separate delivery.

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

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

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their communities.

Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

#### 7. Small business and local government participation:

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

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

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

#### *Rural Area Flexibility Analysis*

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

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

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

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

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

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

### 3. Costs:

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

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

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

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

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

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

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

### 4. Minimizing adverse impact:

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

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

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

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

### 5. Rural area participation:

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

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

### *Job Impact Statement*

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

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## Office of Mental Health

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

#### Rights of Patients

**I.D. No.** OMH-07-09-00009-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 527 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 33.02

**Subject:** Rights of Patients.

**Purpose:** To correct outdated references and utilize “person-first” language.

**Text of proposed rule:** 1. Subdivisions (a), (e) and (f) of Section 527.2 of Title 14 NYCRR are amended to read as follows:

(a) Section 7.07 of the Mental Hygiene Law gives the Office of Mental Health responsibility for seeing that the personal and civil rights of [mentally ill] persons *with mental illness* receiving care and treatment are adequately protected.

(e) Section 33.02 of the Mental Hygiene Law establishes statutory rights of [mentally disabled] persons *with mental disabilities* and requires the Commissioner to publish regulations informing residents of facilities or programs operated or licensed by the Office of Mental Health of their rights under law.

(f) Section 33.05 of the Mental Hygiene Law provides that each patient *or resident* in a facility shall have the right to communicate freely and privately with persons outside the facility as frequently as he *or she* wishes, subject to regulations of the Commissioner designed to assure the safety and welfare of patients and to avoid serious harassment to others.

2. Paragraphs (5) and (6) of subdivision (c) of Section 527.4 are amended to read as follows:

(c) In addressing the communication needs of persons who are non-English-speaking, deaf or hard-of-hearing in accordance with subdivisions (a)-(b) of this section, each facility shall take reasonable steps to ensure that:

(5) effective communication with non-English-speaking persons is provided in accordance with title VI of the Civil Rights Act of 1964 (42 USC 2000d). Said law is published by the West Publishing Company, St. Paul, MN and is available for review at the Department of State, [Office of Information Services, 41 State Street] *Division of Administrative Rules, One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231, and the Office of Mental Health, Counsel’s Office, 44 Holland Avenue, Albany, NY 12229; and

(6) effective communication with persons who are deaf or hard-of-hearing is provided in accordance with the Americans with Disabilities Act (Public Law 101-336). Said law is published by the West Publishing Company, St. Paul, MN and is available for review at the Department of State, [Office of Information Services, 41 State Street] *Division of Administrative Rules, One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231, and the Office of Mental Health, Counsel’s Office, 44 Holland Avenue, Albany, NY 12229.

3. Paragraph (12) of subdivision (b), and subdivision (f) of Section 527.5 are amended to read as follows:

(b) Each person residing in a hospital or community-based residential program, unless otherwise indicated, has the right to:

(12) bring any questions or complaints, including complaints regarding any orders limiting such persons’ rights, to the facility director, the Mental Hygiene Legal Service, the board of visitors if applicable, and the Commission on Quality of Care [for the Mentally Disabled] *and Advocacy for Persons with Disabilities*.

(f) Notices provided pursuant to subdivisions (d) and (e) of this section shall include the address and telephone numbers of the office of the facility director, or such person’s designee responsible for receiving questions or complaints, the board of visitors if applicable, the Mental Hygiene Legal Service, and the Commission on Quality of Care [for the Mentally Disabled] *and Advocacy for Persons with Disabilities*.

**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 utilizes a “person first” approach to language and updates an incorrect title of a State agency as well as an inaccurate address for another State agency.

No longer is the terminology “mentally ill” used when referencing persons with mental illness. A person-first approach to language is much more respectful and courteous to others.

Pursuant to Chapter 58 of the Laws of 2005, two State agencies (the former Commission on Quality of Care for the Mentally Disabled and the former New York State Office of Advocate for Persons with Disabilities) merged on April 1, 2005, and the new name of the combined agency is Commission on Quality of Care and Advocacy for Persons with Disabilities.

The address currently listed in regulation for the Department of State is no longer correct, as that agency moved to a new location in February, 2008.

Statutory Authority: Section 7.09 of the Mental Hygiene Law authorizes the Commissioner of the Office of Mental Health to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 33.02 of the Mental Hygiene Law establishes statutory rights of persons with mental disabilities and requires the Commissioner to publish regulations informing residents of facilities or programs operated or licensed by the Office of Mental Health of their rights under law.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this notice because it merely corrects two outdated references in the regulation and utilizes “person-first” language. There will be no impact on jobs and employment opportunities as a result of this rulemaking.

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## Public Service Commission

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

#### **Transfer Certain Utility Assets Located in the Town of Montgomery from Plant Held for Future Use to Non-Utility Property**

**I.D. No.** PSC-07-09-00015-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, the petition filed by Central Hudson Gas & Electric Corporation for approval to transfer certain utility assets to non-utility assets.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer certain utility assets located in the Town of Montgomery from plant held for future use to non-utility property.

**Purpose:** To consider the request to transfer certain utility assets located in the Town of Montgomery to non-utility assets.

**Substance of proposed rule:** Central Hudson Gas & Electric Corporation (company) requests authorization to transfer approximately 3.64 acres of vacant land located in the Town of Montgomery, Orange County, New York from Account 105 Plant Held for Future use to Account 121 Non-Utility Property. The company proposes to defer the appraised value less original book cost and appraisal fees as well as the associated deferred income taxes as a regulatory liability in Account 254.xx. The company has proposed the deferred amount be added to the balance sheet offset list in the current rate proceeding.

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

New York 12223-1350, (518) 486-2655, email: leann\_ayer@dps.state.ny.us

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

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

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

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

(08-M-1495SA1)

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

**Transfer of Property**

**I.D. No.** PSC-07-09-00016-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by Niagara Mohawk Power Corporation requesting authorization for the transfer of ownership of certain utility real estate property.

**Statutory authority:** Public Service Law, section 70

**Subject:** Transfer of Property.

**Purpose:** To allow Niagara Mohawk Power Corporation to transfer ownership of certain utility property.

**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 for approval under Section 70 of the Public Service Law for the sale of two parcels of real property comprising a total of approximately 53 acres in the city of North Tonawanda, New York to the City of North Tonawanda, New York. The Commission may approve, reject or modify, in whole or in part, Niagara Mohawk Power Corporation's request.

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

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

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

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

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

(08-E-1390SA1)

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

**Request for Authorization to Defer the Incremental Costs Incurred in the Restoration Work Resulting from the Ice Storm**

**I.D. No.** PSC-07-09-00017-P

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

**Proposed Action:** The PSC is considering whether to approve or reject, in whole or in part, the petition of Central Hudson Gas & Electric Corporation (company) for authority to defer incremental costs incurred related to the December 11, 2008 ice storm.

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

**Subject:** Request for authorization to defer the incremental costs incurred in the restoration work resulting from the ice storm.

**Purpose:** To allow the company to defer the incremental costs incurred in the restoration work resulting from the ice storm.

**Substance of proposed rule:** Central Hudson Gas & Electric Corporation (company) has requested permission to defer the incremental costs incurred in the restoration work resulting from the December 11, 2008 ice storm. The company proposes to defer such costs and associated deferred income taxes as a regulatory asset in Account 186.xx (Miscellaneous Debits). The company requests future rate recovery for these costs. If the Commission approves this deferral, there is a reasonable assurance the company will be allowed to recover these costs.

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

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

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

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

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

(09-M-0004SA1)

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

**Whether to Permit the Submetering of Natural Gas Service to an Industrial and Commercial Customer at Cooper Union, New York, NY**

**I.D. No.** PSC-07-09-00018-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, a petition filed by Cooper Union, for permission to submeter a gas customer at 41 Cooper Square, New York, New York.

**Statutory authority:** Public Service Law, sections 65(1), 66(2), (3), (4), (5), (8), (9), (10), (12) and (14)

**Subject:** Whether to permit the submetering of natural gas service to an industrial and commercial customer at Cooper Union, New York, NY.

**Purpose:** To consider the request of Cooper Union, to submeter natural gas at 41 Cooper Square, New York, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Cooper Union, to submeter natural gas to a commercial customer located at 41 Cooper Square, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(09-G-0069SA1)

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## State University of New York

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

#### Proposed Amendment to the Regulations of the Board of Trustees Relating to the Rules for the Maintenance of Public Order

**I.D. No.** SUN-07-09-00019-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 535(a) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 355(2)(b), (p) and 356(3)(g)

**Subject:** Proposed amendment to the regulations of the Board of Trustees relating to the Rules for the Maintenance of Public Order.

**Purpose:** Amend 8 NYCRR 535.3(a) to broaden a category of prohibited conduct relating to actions that cause physical injury or threats.

**Text of proposed rule:** Amendments to Section 535.3(a) of Title 8 NYCRR.

No person, either singly or in concert with others, shall: (a) willfully cause physical injury to any other person, nor threaten to do so [for the purpose of compelling or inducing such other person to refrain from any act which he has a lawful right to do or to do any act which he has a lawful right not to do];

**Text of proposed rule and any required statements and analyses may be obtained from:** Penelope D. Ploughman, Esq., State University of New York, State University Plaza, S-323, Albany, New York 12246, (518) 443-5400, email: Penelope.Ploughman@SUNY.edu

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

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

#### Consensus Rule Making Determination

The proposed rule will amend provisions of the Policies of the Board of Trustees of State University of New York to broaden a category of prohibited conduct relating to actions that cause physical injury or threats. No person is likely to object to the adoption of the rule as written because the proposed amendment clarifies that willfully causing physical injury or threatening to cause physical injury for any reason is conduct prohibited by the SUNY Board of Trustees Rules for the Maintenance of Public Order. The amendment is also needed to reflect the SUNY-wide adoption of policies prohibiting violence in the workplace as mandated by State law.

#### Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment.

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## Department of Taxation and Finance

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

#### Communications of the Division of Taxation of the Department of Taxation and Finance

**I.D. No.** TAF-07-09-00010-P

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

**Proposed Action:** Amendment of Parts 2375, 2376 and section 536.2 of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subs. First and Twenty-fourth; 1142(1); and 1250 (not subdivided)

**Subject:** Communications of the Division of Taxation of the Department of Taxation and Finance.

**Purpose:** To update the regulations in conjunction with the implementation of recent changes in policy concerning communications.

**Substance of proposed rule (Full text is posted at the following State website: [www.nystax.gov](http://www.nystax.gov)):** The rule amends the Communications of the Division of Taxation of the Department of Taxation and Finance Regulations, as published in Chapter VI, and the Sales and Use Taxes Regulations, as published in Subchapter A of Chapter IV of Title 20 NYCRR, in conjunction with the implementation of recent changes in policy concerning communications of the Division of Taxation of the Department of Taxation and Finance ("department"). It recognizes alternative methods of disseminating communications of the division, repeals outdated information, provides new rules relating to advisory opinions, and makes other clarifying and technical amendments.

Section 1 makes technical updates to the sales and use taxes regulations, regarding department communications.

Sections 2 and 3 amend section 2375.1 to reference the department's Web site as a method of communicating tax policy and delete obsolete statutory references.

Sections 4 and 5 amend section 2375.3. Section 4 deletes a reference to opinions of counsel. Section 5 clarifies that the conclusions of a declaratory ruling could be affected by the Tax Appeals Tribunal but not by a nonprecedential determination by an Administrative Law Judge in the Division of Tax Appeals.

Section 6 repeals section 2375.4, Opinions of counsel. The Division of Taxation provides numerous forms of advice. Opinions of counsel are discretionary and intended to interpret and apply the Tax Law to situations of wide applicability. They are similar in many respects to technical memoranda (TSB-Ms), and have ordinarily been issued as TSB-Ms. Discontinuing formal Opinions of Counsel will avoid unnecessary duplication.

Section 7 amends section 2375.5 to clarify that advisory opinions are based on the law and regulations as they apply to specific sets of facts as of the date the opinion is issued or for the specific time period at issue in the opinion.

Sections 8, 10, 11, 12, and 13 amend sections 2375.6, 2375.8, 2375.9, 2375.10 and 2375.11, respectively, to eliminate references to the division disseminating technical memoranda, forms and instructions, and publications and notices by mail. The division may disseminate the documents by alternative methods, such as the Internet and electronic mail. In addition, section 8 deletes reference to opinions of counsel and clarifies the force and effect of technical memoranda. Section 11 provides for online tax information and section 13 adds reference to communication by electronic mail. These sections also make other clarifying and technical amendments.

Section 9 repeals section 2375.7, Tribunal and judicial decision reprints (TSB-D's), because the department no longer reprints the full text of Tax Appeals Tribunal decisions and significant court decisions. However, these decisions are available on the New York State Division of Tax Appeals Web site. Section 9 also adds a new section 2375.7 to provide for a new document the division is publishing, New York tax guidances (NYT-G's). Tax guidances consist of redacted versions of selected letters and memoranda and responses to withdrawn petitions for advisory opinion.

Section 14 amends section 2376.1 regarding advisory opinions. It provides that advisory opinions will not be issued to anyone on behalf of an unidentified or hypothetical person or entity. In addition, advisory opinions will not be issued if a statutory notice has been issued about the matter. An advisory opinion may be issued when the question relates to a matter pending before the Bureau of Conciliation and Mediation Services, but only when all parties to the conciliation conference consent. This section deletes an obsolete reference to the Director of the Taxpayer Services Division and provides that advisory opinions are issued by a person to whom such authority is delegated by the commissioner. It deletes reference to an opinion of counsel, eliminates reference to obsolete taxes, and adds reference to new programs administered by the commissioner. Section 2376.1 is amended regarding the publication of certain petitions that have been withdrawn. Finally, a new paragraph is added to allow a petitioner to reserve the right to apply for the department's Voluntary Disclosure and Compliance program when submitting a petition, with respect to the subject of the advisory opinion.

Sections 15, 16 and 17 amend section 2376.2. Section 15 allows the petition for advisory opinion to be submitted electronically. Sections 15 and 17 delete references to an opinion of counsel. Section 16 broadens who may file a petition on behalf of another and also deletes an obsolete address.

Section 18 amends section 2376.3 to provide a definitive time frame for a petitioner to provide requested information. It also clarifies that Audit Division's initial review of the petitioner's request for advisory opinion relates only to the facts contained in the request, which reflects current

policy. The time frame has been extended for a petitioner's response to a notice from the Audit Division stating its disagreement to any facts specified in the petition.

Section 19 amends section 2376.4 to clarify that an advisory opinion is limited to the precedential material in effect as of the date the opinion is issued and may be affected by subsequent changes. It also deletes an obsolete reference.

Section 20 amends section 2376.5. Section 20 eliminates mailing requirements, and allows the department to use alternative methods to issue advisory opinions and/or contact the petitioner. It provides that all identifying information will be redacted when an advisory opinion is published and that published advisory opinions are available from the department upon request. They are also posted on the department's Web site.

Finally, section 21 repeals subdivision (d) of section 2376.5, as these documents are available to the public and do not need to be requested through the records access officer.

**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, subdivisions First and Twenty-fourth; 1142(1); and 1250 (not subdivided). Section 171, subdivision First of the Tax Law provides for the Commissioner of Taxation and Finance to make reasonable rules and regulations, which are consistent with the law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law, including regulations which shall advise the public of (i) the various methods by which the department communicates tax policy and interpretations to taxpayers, tax practitioners, personnel of the department and the general public and (ii) the legal force and effect, precedential value and binding nature of each such method of communication. Section 171, subdivision Twenty-Fourth of the Tax Law provides that the Commissioner of Taxation and Finance may promulgate rules and regulations with respect to the procedures for submitting a petition for an advisory opinion. Subdivision (1) of section 1142 of Article 28 and section 1250 of Article 29 of the Tax Law provide 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 imposed by and pursuant to the authority of such Articles.

2. Legislative objectives: This rule is being proposed pursuant to the above authority to update the regulations advising the public of (i) the various methods by which the Division of Taxation of the Department of Taxation and Finance ("department") communicates tax policy and interpretations and (ii) the legal force and effect, precedential value and binding nature of each method of communication.

3. Needs and benefits: This rule updates Parts 2375 and 2376 in conjunction with the implementation of recent changes in policy concerning communications of the department. It recognizes alternative methods of disseminating communications of the department, including use of the department's Web site and online tax information, as well as electronic mail. In addition, the procedures for review and issuance of advisory opinions have been streamlined to improve timeliness. The new procedures help protect taxpayer confidentiality. Opinions of Counsel, which were discretionary and similar in many respects to technical memoranda (TSBMs), are being discontinued to avoid unnecessary duplication.

#### 4. Costs:

(a) Costs to regulated persons: There is no cost to regulated parties for the implementation of and continuing compliance with the rule. The rule merely serves to inform regulated persons as to the nature of the department's communications.

(b) Costs to the State and its local governments including this agency: This rule will not impose any costs on New York State or its local governments. The implementation and continued administration of this rule will not impose costs on the Department of Taxation and Finance. The rule also eliminates references to the department disseminating documents by mail; the department is moving toward disseminating more documents by alternative methods, such as the Internet and electronic mail, resulting in cost savings.

(c) Information and methodology: The conclusions reached above were based on an analysis of the rule, which merely updates the department's rules on communications and their force and effect, from the department's Taxpayer Guidance Division, Office of Tax Policy Analysis, Office of Counsel, Audit Division, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

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

6. Paperwork: This rule does not impose any reporting requirement upon regulated parties nor does it require any forms or other paperwork.

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: This rule is being proposed in conjunction with recent changes in policy concerning communications of the department in order to improve efficiency in this area. The alternative would be to continue with the former policy and forego projected improvement in communications.

9. Federal standards: The amendments do 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. Regulated parties and the department will not require any period of time to achieve compliance with the rule.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because this rule will not impose any adverse economic impact or reporting, recordkeeping, or other compliance requirements on small businesses or local governments.

The purpose of this rule is to update Parts 2375 and 2376 of the regulations in conjunction with the implementation of recent changes in policy concerning communications of the Division of Taxation of the Department of Taxation and Finance (department). It recognizes alternative methods of disseminating communications of the department including use of the department's Web site and electronic mail. The rule also repeals section 2375.4 regarding Opinions of Counsel as this form of communication is being discontinued. In addition, the rule makes other clarifying and technical amendments and provides new rules relating to advisory opinions.

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

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas.

The purpose of this rule is to update Parts 2375 and 2376 of the regulations in conjunction with the implementation of recent changes in policy concerning communications of the Division of Taxation of the Department of Taxation and Finance (department). It recognizes alternative methods of disseminating communications of the department including use of the department's Web site and electronic mail. The rule also repeals section 2375.4 regarding Opinions of Counsel as this form of communication is being discontinued. In addition, the rule makes other clarifying and technical amendments and provides new rules relating to advisory opinions.

#### **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 or employment opportunities. The purpose of this rule is to update Parts 2375 and 2376 of the regulations in conjunction with the implementation of recent changes in policy concerning communications of the Division of Taxation of the Department of Taxation and Finance (department). It recognizes alternative methods of disseminating communications of the department including use of the department's Web site and electronic mail. The rule also repeals section 2375.4 regarding Opinions of Counsel as this form of communication is being discontinued. In addition, the rule makes other clarifying and technical amendments and provides new rules relating to advisory opinions.

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

### **Consumer Bill of Rights Regarding Tax Preparers**

**I.D. No.** TAF-07-09-00011-P

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

**Proposed Action:** Addition of Part 2398 to Title 20 NYCRR.

**Statutory authority:** General Business Law, section 372

**Subject:** Consumer Bill of Rights Regarding Tax Preparers.

**Purpose:** To comply with statutory requirement to create and disseminate a Consumer Bill of Rights Regarding Tax Preparers.

**Text of proposed rule:** Section 1. A new Part 2398 is added to read as follows:

PART 2398

CONSUMER BILL OF RIGHTS REGARDING TAX PREPARERS

(Statutory Authority: General Business Law, Section 372(b))

Section 2398.1 Definitions and Applicability.

(a) Definitions. (1) "Tax preparer" or "preparer" means a person, partnership, corporation, or other business entity that, in exchange for consideration, advises or assists or offers to advise or assist in the preparation of income tax returns for another.

(2) "Department" means the Department of Taxation and Finance.

(b) Applicability. The provisions of this Part do not apply to:

(1) An officer or employee of a corporation or business enterprise who, in his or her capacity as such, advises or assists in the preparation of income tax returns relating to such corporation or business enterprise;

(2) An attorney at law who advises or assists in the preparation of income tax returns in the practice of law, and the employees thereof;

(3) A fiduciary who advises or assists in the preparation of income tax returns on behalf of the fiduciary estate, testator, trustee, grantor, or beneficiaries thereof, and the employees thereof;

(4) A certified public accountant licensed pursuant to the Education Law or licensed by one or more of the states or jurisdictions of the United States, and the employees thereof;

(5) A public accountant licensed pursuant to the Education Law, and the employees thereof;

(6) An employee of a governmental unit, agency, or instrumentality who advises or assists in the preparation of income tax returns in the performance of his or her official duties;

(7) An agent enrolled to practice before the Internal Revenue Service pursuant to section 10.4 of subpart A of part ten of title thirty-one of the Code of Federal Regulations; or

(8) A tax preparer operating within New York City.

Section 2398.2 Consumer Bill of Rights.

(a) The Department shall produce and make available to taxpayers and tax preparers an informational publication regarding consumer's rights and laws concerning tax preparers, to be called a "Consumer Bill of Rights Regarding Tax Preparers" (hereinafter, "Consumer Bill of Rights"). This publication shall be easily reproducible by photocopy machines.

(b) The publication shall be available on the Department's internet website, and shall contain information including, but not limited to, the following:

(1) Postings required by state and federal laws, such as price posting and posting of qualifications;

(2) Explanations of some common services and terminology, such as preparation of short and long federal forms, electronic filing, express mail, direct deposit, refund anticipation loan, quick, instant, rapid, fast, fee, and interest;

(3) Basic information on what a tax preparer is and is not required to do for a consumer, such as the preparer's responsibility to sign a return, that a tax preparer may not be required to accompany a consumer to an audit but may have a voluntary policy to accompany consumers to audits;

(4) Information a tax preparer is legally required to provide to consumers;

(5) Practices in which a tax preparer is legally prohibited from engaging;

(6) Information regarding the requirements of section 372 of the General Business Law relating to refund anticipation loans;

(7) The telephone numbers of the Department for information and complaints;

(8) Any additional information the Department deems appropriate regarding consumers' rights and laws concerning tax preparers.

Section 2398.3 Dissemination.

(a) A copy of the Consumer Bill of Rights shall be provided to individuals or businesses upon request to the Department, and shall be sent by the Department no later than October fifteenth of each year to each tax preparer who, to the Department's knowledge, has been found to be in violation of section 372 of the General Business Law within the previous calendar year.

(b) Each tax preparer subject to this Part shall obtain a current Consumer Bill of Rights from the Department and shall reproduce it so that it is clear and legible. As of January first of each year, each tax preparer shall give to each customer, free of charge, a current, legible copy of the Consumer Bill of Rights prior to discussion with the customer. Each such tax preparer shall also verbally direct the consumer to review

the Consumer Bill of Rights and shall answer any questions the consumer may have about its contents.

**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: General Business Law, section 372, Subdivision (b). Section 372 of the General Business Law, added by Chapter 432 of the Laws of 2008, requires the Department of Taxation and Finance ("the Department") to produce and make available a Consumer Bill of Rights Regarding Tax Preparers, in accordance with regulations promulgated by the Commissioner.

2. Legislative objectives: This rule is being proposed pursuant to this authority to comply with the directive of section 372 of the General Business Law relating to the production and dissemination of a Consumer Bill of Rights Regarding Tax Preparers.

3. Needs and benefits: These amendments comply with the directive of section 372 of the General Business Law, which requires the Department to produce and make available an informational flier called a Consumer Bill of Rights Regarding Tax Preparers, in accordance with regulations promulgated by the Commissioner. This rule reflects the provisions of section 372 in requiring that the flier is to contain basic information including, but not limited to, postings required by state or federal law, definitions of common services and terminology, basic information regarding tax preparers' obligations to consumers, and contact information for the Department. The Department is required to make the publication available on its website and upon request, and to send a copy of the Consumer Bill of Rights Regarding Tax Preparers on or before October 15th of each year to any tax preparer who, to the Department's knowledge, has been found to be in violation of section 372 within the previous calendar year.

This rule parallels section 372 in defining certain terms and requiring tax preparers to provide a complimentary copy of the flier to each customer. In accordance with section 372, the rule also enumerates those entities to which these requirements do not apply.

4. Costs:

(a) Costs to regulated persons: It is estimated that there would be no costs to regulated parties associated with implementation of this rule. There will, however, be minimal costs to regulated parties attributable to the requirements imposed by section 372 of the General Business Law: tax preparers will be required to make copies of the Consumer Bill of Rights Regarding Tax Preparers and provide a copy to each customer.

(b) Costs to the agency and to the State and local governments including this agency: It is estimated that the implementation and continued administration of this rule will not impose any costs upon this agency, New York State, or its local governments.

(c) Information and methodology: This analysis is based on a review of the rule, which describes the information to be included in the Consumer Bill of Rights Regarding Tax Preparers, which is directed by statute, and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Counsel, Office of Tax Policy Analysis, and Office of Budget and Management Analysis.

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

6. Paperwork: While this rule imposes no new reporting requirements, forms, or other paperwork upon regulated parties, section 372 of the General Business Law requires tax preparers to make copies of the Consumer Bill of Rights Regarding Tax Preparers and provide a copy to each customer.

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

8. Alternatives: There were no significant alternatives to this proposal considered by this agency.

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

10. Compliance schedule: The amendment will take effect when the Notice of Adoption is published in the State Register. No time is needed in order for regulated parties to comply with this rule, as no requirements are imposed on regulated parties.

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

A Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis, and Job Impact Statement

are not being submitted with this rule because this rule will not impose any adverse economic impact on small businesses or local governments, or on public or private entities in rural areas, nor any additional reporting, recordkeeping, or other compliance requirements on these entities. Section 372 of the General Business Law, however, does impose minimal requirements on tax preparers that may be small businesses or located in rural areas, in that it requires tax preparers to make copies of the Consumer Bill of Rights Regarding Tax Preparers and provide a copy to each customer. It is evident from the subject matter of the rule that it will have no adverse impact on jobs and employment opportunities.

This rule merely complies with section 372 of the General Business Law, added by Chapter 432 of the Laws of 2008, which requires that the Department produce and disseminate a Consumer Bill of Rights Regarding Tax Preparers, pursuant to regulations promulgated by the Commissioner of Taxation and Finance. This rule adds a new Part 2398 to Chapter IX of the Procedural Regulations. The provisions of Part 2398 set forth information to be included in the Consumer Bill of Rights Regarding Tax Preparers, the manner in which it is to be disseminated, define certain terms, and establish to whom the provisions apply.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Filing Requirements for Certain Wine Distributors Registered Under Article 18 of the Tax Law

I.D. No. TAF-07-09-00012-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 60.1 of Title 20 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. TAF-43-07-00002-P.

**Statutory authority:** Tax Law, sections 171, subdivision First; 429(1); and 436 (not subdivided)

**Subject:** Filing requirements for certain wine distributors registered under Article 18 of the Tax Law.

**Purpose:** To allow certain wine distributors to file annual rather than monthly alcoholic beverage tax returns.

**Text of proposed rule:** Section 1. Paragraph 1 of subdivision (a) of section 60.1 of such regulations is amended to read as follows:

(a)(1) Except as provided in paragraphs (2) [and], (3), and (4) of this subdivision, every distributor must, on or before the 20th day of each month, file with the Department of Taxation and Finance a monthly tax return, for the preceding month, on a form or forms prescribed by the department for such purpose, even though no tax may be payable. [In] Except for a distributor as defined in clause (“a”) of subparagraph (i) of paragraph (4) of this subdivision, in addition to any other required information, such return must show, the number of gallons of beers or wines (or fractional part thereof) or liters of liquors (or fractional part thereof) that are:

- (i) on hand at the beginning of the preceding month;
- (ii) manufactured or purchased during the preceding month;
- (iii) on hand at the end of the preceding month; and
- (iv) sold or used in this State during the preceding month.

Such return must also include the number of gallons of beers or wines or liters of liquors in transit during the return period and the extent of the distributor’s other receipts and distributions of alcoholic beverages in New York State during the return period. *For a distributor as defined in clause (“a”) of subparagraph (i) of paragraph (4) of this subdivision, in addition to any other required information, such return must show the total number of gallons of wines (or fractional part thereof) that are sold directly to New York State residents for such residents’ personal use during the preceding month.* The return must be prepared in accordance with the instructions provided by the department and must be accompanied by all supporting schedules.

Section 2. A new paragraph 4 is added to subdivision (a) of section 60.1 of such regulations to read as follows:

(4)(i) A distributor that:

(“a”) (“1”) is an out-of-state winery and is required to register as a distributor solely because such person ships its wine directly to any New York State resident for such resident’s personal use; and

(“2”) is licensed by the State Liquor Authority of New York State as a direct shipper, pursuant to section 79-c of the Alcoholic Beverage Control Law; or

(“b”) is licensed by the State Liquor Authority of New York State as a farm winery, pursuant to section 76-a of the Alcoholic Beverage Control Law, as a special farm winery pursuant to section 76-d of the

*Alcoholic Beverage Control Law, or as a micro-winery pursuant to section 76-f of the Alcoholic Beverage Control Law;*

may apply to the department to file an annual tax return in lieu of the monthly returns required by paragraph (1) of this subdivision. Such annual return shall relate to the distributor’s activities during the calendar year and shall be due on or before January 20th of the succeeding calendar year. Such return must show the information required in paragraph (1) of this subdivision, except that “month” shall be read as “year,” and must be accompanied by proof of such distributor’s continuing license as a direct shipper, farm winery, special farm winery or micro-winery.

(ii) (“a”) If a distributor meeting the requirements of subparagraph (i) of this paragraph (a “qualifying distributor”) at any time during the period to be covered by an annual return ceases to be licensed by the State Liquor Authority, such distributor must file a return reflecting the distributor’s activities from January 1st of such annual period through the end of the month during which the distributor ceased to meet the qualifications of subparagraph (i) of this paragraph. Such return must be filed on or before the 20th day of the month following the month during which the distributor ceased to meet the requirements of subparagraph (i) of this paragraph, and any tax due must be paid with filing of such return.

(“b”) If a distributor meeting the requirements of clause (“b”) of subparagraph (i) of this paragraph at any time during the period to be covered by an annual return becomes reclassified with the State Liquor Authority as a winery other than a farm winery, a special farm winery, or a micro-winery, such distributor must immediately begin filing monthly tax returns, as described in paragraph (1) of this subdivision.

(iii) If it becomes necessary for a qualifying distributor to begin filing monthly returns during an annual period, pursuant to the provisions of clause (“b”) of subparagraph (ii) of this paragraph, such distributor must also file a return reflecting the distributor’s activities from January 1st of such annual period through the end of the month during which the distributor ceased to meet the qualifications of subparagraph (i) of this paragraph. Such return must be filed on or before the 20th day of the month following the month during which the distributor ceased to meet the requirements of such subparagraph (i) of this paragraph, and any tax due must be paid with filing of such return.

(iv) If it becomes necessary for a qualifying distributor to begin filing monthly returns during an annual period, pursuant to the provisions of clause (“b”) of subparagraph (ii) of this paragraph, such distributor may apply to the department to file on an annual basis for the next or any subsequent calendar year if such distributor anticipates that it will again meet the requirements of clause (“b”) of subparagraph (i) of this paragraph. Such application must include an explanation of why the distributor was required to begin filing monthly returns during the previous annual period and why the distributor does not expect such circumstances to re-occur in the upcoming annual period.

**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.

#### Consensus Withdrawal Objection

This rule was previously proposed as a consensus rule and published in the *State Register* on October 24, 2007, and identified as TAF-43-07-00002-P. However, a Notice of Withdrawal was published in the *State Register* on April 2, 2008, because an objection was received from Southern Wine and Spirits (Southern).

Southern expressed concern that the rule allowing certain farm wineries, micro-wineries, and out-of-state direct wine shippers to file tax returns annually rather than monthly would diminish the state’s ability to collect taxes, resulting in a potential loss of tax revenue. Southern indicated its belief that the rule would result in “[f]urther erosion of regulations that ensure tight controls of this industry” and that the low volume of wine shipped into New York State reported by out-of-state direct wine shippers is due to under reporting. In Southern’s view, the rule provided an “[u]nfair competitive advantage to one sector in the industry at the expense of larger distributors.”

The Department disagrees with these objections. This rule change was originally prompted by correspondence received from a small out-of-state winery that was filing monthly alcoholic beverage tax returns to pay a minimal amount of tax. Representatives from Wine America, The Wine

Institute, and the New York State Wine and Grape Foundation reviewed and fully support the draft proposal. In addition, the amount of tax owed by most of the New York State farm and micro wineries as well as the out-of-state direct wine shippers is minimal. Accordingly, there is no need to continue to require monthly filing for these small wineries. It should also be noted that similar amendments were made in 2000 to allow distributors whose activities relate to the production of beer and are registered with the State Liquor Authority as micro-brewers or restaurant breweries to file annual alcoholic beverage tax returns.

#### **Regulatory Impact Statement**

1. Statutory authority: Tax Law, section 171, subdivision First, and sections 429(1) and 436 (not subdivided). Section 171, subdivision First of the Tax Law provides for the Commissioner of Taxation and Finance to make reasonable rules and regulations, which are consistent with the law, that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. Section 436 of the Tax Law provides for the authority provided by section 171 to be exercisable specifically with respect to the alcoholic beverage tax imposed by Article 18 of the Tax Law. Section 429(1) of the Tax Law, while providing generally for monthly alcoholic beverage tax returns, provides that the Commissioner may require tax returns to be made at such times and covering such periods as is deemed necessary in order to insure the payment of the tax.

2. Legislative objectives: The rule is being proposed pursuant to this authority to allow returns to be filed by certain filers for periods and upon such dates other than those prescribed in the Tax Law.

3. Needs and benefits: The rule amends section 60.1(a) of the Alcoholic Beverage Tax Regulations to allow certain New York State farm wineries, micro-wineries, and out-of-state direct wine shippers to apply to file annual alcoholic beverage tax returns rather than monthly returns as currently required. In addition, the rule reflects that out-of-state direct wine shippers are not required to report certain inventory information on their alcoholic beverage tax returns, which conforms to current department policy. Records show that the tax liability of these wine distributors is minimal; annual filing would reduce the burden placed upon these filers.

#### 4. Costs:

(a) Costs to regulated persons: The regulated parties affected by this rule are approximately 750 out-of-state direct wine shippers and 185 licensed New York State farm wineries who are currently filing Form MT-40, "Return of Tax on Wines, Liquors, Alcohol, and Distilled or Rectified Spirits," each month. The regulated parties may elect to file an annual wine tax return. Form MT-40 will be modified to accommodate both monthly and annual filing. The administrative cost and burden of tax return filing will be reduced. However, to make the election to file an annual return, the regulated party will need to file Form MT-38, "Application For Annual Beer Tax Return Filing Status." Form MT-38 is a half-page form, currently used by certain beer distributors to elect to file annual beer tax returns. Form MT-38 will be modified to accommodate certain farm wineries, micro-wineries, and out-of-state direct wine shippers. The cost to the regulated parties choosing to file annually to fill out this application form is minuscule. Overall, there is no measurable cost impact resulting from adopting this rule, which will benefit the regulated parties.

(b) Costs to the State and its local governments including this agency: It is estimated that implementation of this regulation will cause an estimated minimal State revenue loss, based on a one time spin-down in revenues, of approximately \$45,000 in State fiscal year 2009-2010. It is further estimated that the implementation of this regulation will cause an estimated minimal State revenue loss of less than \$3,500 annually. It is estimated that annual, rather than monthly, processing of these returns should result in a slight reduction of this agency's administrative costs. This rule will have no cost in terms of revenue impact on local governments.

(c) Information and methodology: The estimated State fiscal year 2009-2010 State revenue loss is attributable to a one time spin-down in revenues as collections associated with alcoholic beverage tax (ABT) liabilities for certain New York State farm wineries, micro-wineries, and out-of-state direct wine shippers for the January and February 2009 monthly liability periods will be shifted from State fiscal year 2009-2010 under current regulations to State fiscal year 2010-2011 under the proposed regulations. The assumption for this estimate is that all eligible licensed New York State farm wineries, micro-wineries, and out-of-state direct wine shippers will choose the annual filing option. This is a one time spin-down as each subsequent fiscal year will receive a full 12 months of collections.

In addition, the estimated \$3,500 annual State revenue loss is attributable to a minimal "cash flow" loss (i.e. interest) as ABT revenues which would have come in monthly under current rules will be delayed until January of the subsequent year under the rule. The estimate uses average quarterly collections for the 2007 calendar year for New York State farm wineries, micro-wineries, and out-of-state direct wine shippers and estimates the State revenue foregone in delaying the tax receipts. A two-

month Jumbo CD with an annualized interest rate of 1.5% was used to project the estimated investment revenue lost to the State due to the delay in access to the tax receipts. It is projected that similar minimal "cash flow" losses (i.e. interest) will continue in subsequent years as ABT revenues are received on an annual basis rather than on a monthly basis. Estimates of forgone future interest will be based on market interest rates at the time.

These conclusions are based upon the information and methodology discussed above and an analysis of the rule from the Department's Taxpayer Guidance Division, Office of Tax Policy Analysis, Transaction and Transfer Tax Audit Bureau, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

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

6. Paperwork: The rule imposes no reporting requirements, forms or other paperwork upon regulated parties beyond those required by statute. The instructions for Form MT-40, "Return of Tax on Wines, Liquors, Alcohol, and Distilled or Rectified Spirits," currently provide special instructions for out-of-state direct wine shippers. It is noted that this rule will reduce the number of returns required to be filed by the affected parties who apply and are allowed to file annual returns and, in turn, processed by the Department.

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 intention of the Department is to allow the option of annual filing for affected parties which will benefit both the affected parties and the Department. An alternative would be to offer quarterly filing, which would not be as beneficial to the affected parties or the Department.

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

10. Compliance schedule: No time is needed in order for regulated parties to comply with this rule nor does the rule impose any new compliance requirements. The rule will take effect on the date that the Notice of Adoption is published in the *State Register* and affected parties will be allowed to make the election to file annual ABT returns for tax years beginning on or after January 1, 2009. Once the rule has been adopted, the department intends to issue a technical memorandum explaining the changes to affected parties, along with the revised application for annual filing, Form MT-38.

#### **Regulatory Flexibility Analysis**

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not being submitted with this rule because the rule will not impose any adverse economic impact or any reporting, recordkeeping, or other compliance requirements on small businesses or local governments beyond those required by statute.

The rule allows certain New York State farm wineries, micro-wineries, and out-of-state direct wine shippers to file annual alcoholic beverage tax returns rather than monthly returns as currently required. In addition, the rule reflects that out-of-state direct wine shippers are not required to report certain inventory information on their alcoholic beverage tax returns, which conforms to current department policy.

Representatives from Wine America, The Wine Institute, and the New York State Wine and Grape Foundation reviewed and support the draft proposal. In addition, 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 Small Business Council of the New York State Business Council, the Division for Small Business of Empire State Development, the National Federation of Independent Businesses, the Retail Council of New York State, the New York State Association of Counties, the Association of Towns of New York State, the New York Conference of Mayors and Municipal Officials, and the Office of Local Government and Community Services of the New York State Department of State. The notified groups did not submit any comments concerning the rule.

Once the rule has been adopted, the department intends to issue a technical memorandum explaining the changes to affected parties, along with the revised application for annual filing, Form MT-38.

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

A Rural Area Flexibility Analysis is not being submitted with this rule because it will not impose any adverse impact on rural areas or any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The rule allows certain New York State farm wineries, micro-wineries, and out-of-state direct wine shippers to file annual alcoholic beverage tax returns rather than monthly returns as currently required. In addition, the rule reflects that out-of-state direct wine shippers are not required to report certain inventory information on their alcoholic beverage tax returns, which conforms to current department policy.

Representatives from Wine America, The Wine Institute, and the New York State Wine and Grape Foundation reviewed and support the draft proposal. In addition, 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 Small Business Council of the New York State Business Council, the Division for Small Business of Empire State Development, the National Federation of Independent Businesses, the Retail Council of New York State, the New York State Association of Counties, the Association of Towns of New York State, the New York Conference of Mayors and Municipal Officials, and the Office of Local Government and Community Services of the New York State Department of State. The notified groups did not submit any comments concerning the rule.

Once the rule has been adopted, the department intends to issue a technical memorandum explaining the changes to affected parties, along with the revised application for annual filing, Form MT-38.

**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 impact on jobs and employment opportunities. The rule allows certain New York State farm wineries, micro-wineries, and out-of-state direct wine shippers to file annual alcoholic beverage tax returns rather than monthly returns as currently required. In addition, the rule reflects that out-of-state direct wine shippers are not required to report certain inventory information on their alcoholic beverage tax returns, which conforms to current department policy.

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## Office of Temporary and Disability Assistance

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

**Utility Service**

**I.D. No.** TDA-07-09-00014-EP

**Filing No.** 111

**Filing Date:** 2009-02-02

**Effective Date:** 2009-02-02

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

**Proposed Action:** Amendment of section 352.5(e) of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 131(1) and 131-s

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

**Specific reasons underlying the finding of necessity:** This rule is being proposed on an emergency basis because of the threat to the health and safety of households if they suffer utility shutoffs in the cold weather period as a result of high energy costs. It is crucial that the rule remain in place as the heating season continues.

**Subject:** Utility Service.

**Purpose:** To permit social services districts to suspend the enforcement of utility repayment agreements during periods of cold weather in order to provide districts with the flexibility to assist households during the current period of historically high energy costs.

**Text of emergency/proposed rule:** Subdivision (e) of section 352.5 is amended to read as follows:

(e) Payment essential to continue or restore utility service for an applicant for family assistance, safety net assistance, veteran assistance or emergency public assistance. A payment must be made for utilities previously provided to an applicant for family assistance, safety net assistance, veteran assistance or emergency public assistance if such payment is essential to continue or restore utility service. Payment essential to continue or restore utility service may be provided to an applicant whose utility bill includes costs for service for the applicant's own residential unit and for space outside that unit. Payment may only be made when it is documented that the applicant is the tenant of record and the customer of record, as defined in subdivision (a) of this section, and alternative payment or hous-

ing accommodations cannot be made and the applicant is without liquid resources to continue or restore utility service. Payment must not exceed the cost of utilities provided to the applicant during the four most recently completed monthly billing periods or two most recently completed bi-monthly billing periods for which a bill has been issued immediately preceding the date of application for such assistance. Payment is limited to the applicant's proportionate share of the cost of service for the most recently completed four monthly or two most recently completed bi-monthly billing periods for which a bill has been issued immediately preceding the date of application for such assistance when the applicant's utility bill includes costs for service for the applicant's own residential unit and for space outside that unit. Payment must not exceed the balance due on the account. In a shared meter situation subject to the provisions of section 52 of the Public Service Law, the proportionate share is to be determined by the utility company's apportionment of retroactive charges upon completion of a shared meter investigation and determination. As a condition of receiving such assistance, an applicant not in receipt of recurring public assistance or supplemental security income whose gross monthly household income on the date of application exceeds the public assistance standard of need for the same size household must sign an agreement to repay the assistance within one year of the date of the payment. A household consists of all persons who occupy a housing unit. A house, an apartment or other group of rooms, or a single room is regarded as a housing unit when it is occupied or intended for occupancy as separate living quarters. A household includes related family members and all unrelated persons, if any, such as lodgers, foster children, wards, or employees who share the housing unit. A person living alone, or a group of unrelated persons sharing a housing unit as partners, also constitutes a household. The public assistance standard of need is determined by applying the following statewide standards of need in accordance with office regulations: the pre-add allowance as set forth in Schedule SA-2a of section 352.3 of this Part; the shelter allowance as paid, but not to exceed the maximum allowance set forth in section 352.3 of this Part; the fuel allowance set forth in Schedule SA-6a, SA-6b or SA-6c of section 352.5 of this Part, if the applicant is the tenant of record and customer of record for the residential heating bill; the home energy and supplemental home energy payments (HEA and SHEA) as set forth in schedule SA-2b or SA-2c of section 352.1 of this Part; and, if applicable, the additional cost of meals for persons unable to prepare meals at home as set forth in schedule SA-5 of section 352.7 of this Part. The repayment agreement must set forth a schedule of payments that will assure repayment within one year of the date of payment. Subsequent assistance to continue or restore utility service must not be provided unless any prior utility arrearage payments have been repaid or are being repaid in accordance with the schedule of payments contained in each prior repayment agreement as of the date of application for such subsequent assistance, *or unless the enforcement of such prior repayment agreement(s) is suspended by the local social services district during a period of cold weather, defined as the time period from November 1st of each year and ending April 15th of the following year.* Repayment agreements under this subdivision may be enforced in any manner available to a creditor, in addition to any other remedy the district may have pursuant to the Social Services Law.

**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire April 2, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.state.ny.us

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

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

**Regulatory Impact Statement**

1. Statutory authority:

Section 20(3)(d) of the Social Services Law (SSL) authorizes the Department of Social Services to promulgate regulations to carry out its powers and duties. Section 122 of Part B of Chapter 436 of the Laws of 1997 reorganized the Department of Social Services into the Department of Family Assistance with two distinct offices, the Office of Children and Family Services and the Office of Temporary and Disability Assistance (OTDA). The functions of the former Department of Social Services concerning the public assistance programs were transferred by Chapter 436 to OTDA.

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

122 of Part B of Chapter 436 of the Laws of 1997 provides that the Commissioner of the Department of Social Services will serve as the Commissioner of OTDA.

Section 131(1) of the SSL requires social services districts, insofar as funds are available, to provide adequately for those unable to maintain themselves, in accordance with the provisions of the SSL.

Section 131-s of the SSL governs payments made for utility services for applicants and recipients of public assistance benefits, supplemental security income benefits or additional State payments. Subdivision (1) of the section requires applicants whose gross household income exceeds the public assistance standard of need for the same size household to sign a repayment agreement to repay the assistance within one year of the date of payment as a condition of receiving assistance in accordance with regulations established by OTDA.

#### 2. Legislative objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules, regulations and policies so that adequate provision is made for those persons unable to provide for themselves so that whenever possible, such persons can be restored to a condition of self-support and self-care.

#### 3. Needs and benefits:

Section 131-s of the Social Services Law and the current regulation, 18 NYCRR § 352.5(e), permit social services districts to make payments to continue utility service or to restore such service. Certain households, whose gross income exceeds the public assistance standard of need, must sign a repayment agreement in order to have their utility arrears paid. Pursuant to 18 NYCRR § 352.5(e), households who have not or are not repaying their repayment agreements are not eligible to sign a new repayment agreement and receive new utility arrears payments.

This proposed amendment to 18 NYCRR § 352.5(e) would permit districts to suspend the enforcement of repayment agreements during a period of cold weather, defined as the time period from November 1st of each year and ending April 15th of the following year. The goal of the amendment is to provide social services districts with the flexibility to assist households during the current period of historically high energy costs. Districts would have the flexibility to provide utility arrears and to enter into new repayment agreements even though a prior such agreement has not been repaid or is not being repaid. The suspension of enforcement of the agreement during the period of cold weather would not end the obligation to repay but simply permit the district to meet a current utility emergency.

The regulation is being proposed on an emergency basis because of the threat to the health and safety of households if they suffer utility shutoffs in the cold weather period as a result of high energy costs. It is crucial that the regulation remain in place throughout the heating season.

The proposed regulation defines the period of cold weather as the time period from November 1st of each year and ending April 15th of the following year. This definition is the same time period that is referenced in the Public Service Regulations at 16 NYCRR § 11.5(c)(2), which is part of the Home Energy Fair Practices Act and Energy Consumer Protection Act.

#### 4 Costs:

The proposed amendment simply would provide the social services districts the option of suspending enforcement of prior repayment agreements during the period of cold weather. The amendment would not negate the obligation to repay. Due to this option, it is anticipated that there will be an increase in the number of utility assistance payments provided to certain households, whose gross income exceeds the public assistance standard of need. However, this additional fiscal impact would be remedied, in part, by the reinstatement of repayment agreements once the designated period of cold weather ends. Pursuant to regulatory requirements, a person who has a suspended repayment agreement during the period of cold weather would still be required to repay the full amount of the assistance owed once this period ends.

In addition, costs incurred due to the payment of additional utility assistance would be offset to the extent that temporary housing assis-

tance is not needed for households that would otherwise experience heat or utility shut-offs during cold weather. It is anticipated that fewer persons will need to be re-housed due to heat and utility emergencies.

As a result of these considerations, the fiscal impact of this regulatory change is expected to be minimal, since repayment of assistance could merely be delayed and there is offsetting cost-avoidance.

#### 5. Local government mandates:

Districts would be permitted to suspend the enforcement of prior repayment agreements during the defined period of cold weather. The amendment would not impose any other programs, services, duties or responsibilities upon the social districts. Districts are now required to review a household's current gross income prior to issuing a denial of the current applications for public assistance.

#### 6. Paperwork:

There would be no additional forms required to support this process.

#### 7. Duplication:

The proposed amendment would not duplicate, overlap or conflict with any existing State or Federal regulations.

#### 8. Alternatives:

The alternative is to amend section 131-s of the SSL altering the repayment agreement requirement. However, this proposed regulatory amendment is a better option because it would be more timely. The proposed regulatory amendment would allow the social services districts to meet the immediate energy needs of applicants this winter.

#### 9. Federal standards:

The proposed amendment would not conflict with federal standards for public assistance.

#### 10. Compliance schedule:

Districts would be able to implement the proposed amendment when it becomes effective.

#### *Regulatory Flexibility Analysis*

##### 1. Effect of rule:

This proposed amendment would impact local governments, specifically social services districts, but not small businesses.

##### 2. Compliance requirements:

This proposed amendment to 18 NYCRR § 352.5(e) would permit social services districts to suspend the enforcement of repayment agreements during a period of cold weather, defined as the time period from November 1st of each year and ending April 15th of the following year. The goal of the amendment is to provide social services districts with the flexibility to assist households during the current period of historically high energy costs. Districts would have the flexibility to provide utility arrears and to enter into new repayment agreements even though a prior such agreement has not been repaid or is not being repaid. The suspension of enforcement of the agreement during the period of cold weather would not end the obligation to repay but simply permit the district to meet a current utility emergency. The proposed amendment would better enable the districts to help protect the health and safety of households if they suffer utility shutoffs in the cold weather period as a result of high energy costs. The proposed regulations define the period of cold weather using the same time period as the Public Service Regulations at 16 NYCRR § 11.5(c)(2), which is part of the Home Energy Fair Practices Act and Energy Consumer Protection Act.

##### 3. Professional services:

The proposed amendment would not require small businesses or local governments to hire additional professional services.

##### 4. Compliance costs:

The fiscal impact of this regulatory change upon the social services districts which utilize this option is expected to be minimal. Pursuant to this amendment, the repayment of utility assistance could merely be delayed, and it is anticipated that payments of temporary housing assistance would decrease.

The proposed amendment would not require additional compliance costs for small businesses.

##### 5. Economic and technological feasibility:

All small businesses and local governments have the economic and technological ability to comply with this proposed rule.

6. Minimizing adverse impact:

It is anticipated that the fiscal impact of this regulatory change would be minimal. This proposed amendment would allow the districts to meet the immediate energy needs of applicants this winter, during the period of cold weather from November 1st through April 15th.

There would be no adverse economic impact on small businesses.

7. Small business and local government participation:

Several local districts, Orange, Onondaga, Oneida, Suffolk, Schenectady, Cortland, Clinton, Essex, Hamilton, Montgomery, Saratoga, Warren, Washington, Delaware, Columbia, Ulster, Madison, Otsego, Seneca, Oswego, Jefferson and Wayne, were informed of the proposal, and no objections to the proposal were expressed.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

The proposed amendment would positively impact the 44 rural social services districts in the State.

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

No additional recordkeeping is required.

3. Costs:

The fiscal impact of this regulatory change upon the rural districts which utilize this option is expected to be minimal. Pursuant to this amendment, the repayment of utility assistance could merely be delayed, and it is anticipated that payments of temporary housing assistance would decrease.

4. Minimizing adverse impact:

The proposed amendment would be beneficial to social services districts in rural areas. This proposed amendment would allow the districts to meet the immediate energy needs of applicants this winter during the period of cold weather, defined as beginning November 1st of each year and ending April 15th of the following year.

5. Rural area participation:

This proposal was discussed at a meeting with Clinton, Essex, Hamilton, Montgomery, Saratoga, Warren and Washington counties with no objections noted. Additionally, this proposal was presented during a telephone conference with commissioners or their appointed representatives from Delaware, Columbia, Ulster, Madison, Otsego, Seneca, Oswego, Jefferson and Wayne with no comment offered in support or in opposition. In 2006, OTDA offered a similar emergency waiver option in response to rising natural gas prices. Twelve local social services districts elected to implement this waiver option. We believe that no comments were offered on this proposed regulatory change during the telephone conference because the local districts were familiar and comfortable with the proposal from this past offering. Additionally, local districts often ask NYS OTDA for greater flexibility in dealing with emergent needs and being more responsive to changing economic stresses on income. This change will give these districts another tool to help families in cold weather months.

**Job Impact Statement**

A Job Impact Statement is not required for the proposed amendment. It is apparent from the nature and the purpose of the proposed amendment that it would not have an adverse impact on jobs and employment opportunities. The proposed amendment would not affect in any real way the jobs of the workers in the social services districts.