

# 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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## Department of Civil Service

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### ERRATUM

A Notice of Proposed Rule Making, I.D. No. CVS-45-08-00030-P, pertaining to Jurisdictional Classification was inadvertently left out of the November 5, 2008 issue of the State Register. Following is the notice:

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

##### Jurisdictional Classification

**I.D. No.** CVS-45-08-00030-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 and classify positions 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 the New York State Thruway Authority by deleting therefrom the positions of Transportation Construction Inspector 2 (2) and Transportation Construction Inspector 3 (2) and by adding thereto the positions of Transportation Construction Inspector 1, Transportation Construction Inspector 2 and Transportation Construction Inspector 3.

**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.

##### **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-05-08-00003-P, Issue of January 30, 2008.

##### **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-05-08-00003-P, Issue of January 30, 2008.

##### **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-05-08-00003-P, Issue of January 30, 2008.

##### **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-05-08-00003-P, Issue of January 30, 2008.

The Department of State apologizes for any inconvenience this may have caused.

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## Crime Victims Board

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### EMERGENCY RULE MAKING

##### Loss of Earnings

**I.D. No.** CVB-50-08-00002-E

**Filing No.** 50

**Filing Date:** 2009-01-14

**Effective Date:** 2009-01-14

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

**Action taken:** Addition of sections 525.1(p), 525.2(e) and 525.12(i) to Title 9 NYCRR.

**Statutory authority:** Executive Law, section 631

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

**Specific reasons underlying the finding of necessity:** The proposed regulations are necessary for the proper implementation of chapter 162 of the Laws of 2008, which takes effect on September 1, 2008.

**Subject:** Loss of earnings.

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

**Text of emergency rule:** A new subdivision (p) is added to section 525.1 to read as follows:

(p) "Hospitalization" shall mean the period during which a person is a patient in or resident of a licensed facility for (1) emergency care or

ambulatory surgery, or (2) in-patient treatment at: a general hospital, a psychiatric center, a physical rehabilitation facility or a residential health care facility.

A new subdivision (e) is added to section 525.2 to read as follows:

(e) If a person is eligible to file a claim for loss of earnings as a parent or guardian during the period of hospitalization of a child victim under the age of eighteen for injuries sustained as a direct result of a crime, all other requests for the reimbursement of related, out-of-pocket expenses must be submitted together under the name of one, eligible parent or guardian. Should more than one parent or guardian be responsible for the child victim, the Board shall determine all other requests for reimbursement of such expenses under the first, eligible claim accepted by the Board. All claims received for loss of earnings as a parent or guardian during the period of hospitalization of the same child victim under the age of eighteen for injuries sustained as a direct result of a crime shall be cross-referenced to ensure no duplicate awards are made.

A new subdivision (i) is added to section 525.12 to read as follows:

(i) (1) Any award for loss of earnings shall include time which an employee: (i) was absent from work and not paid for the day or time off; (ii) was absent from work and utilized accumulated paid leave available to him or her by the employer; or (iii) had taken leave of employment without pay.

(2) An award for loss of earnings by a parent or guardian as a result of the hospitalization of a child victim under the age of eighteen for injuries sustained as a direct result of a crime, shall further be limited by the following: (i) the victim's full loss of earnings shall take priority over any other eligible claim for loss of earnings by a parent or guardian based on the victim's hospitalization; (ii) should more than one parent or guardian be eligible for an award for loss of earnings, the board shall only award the first eligible claim received, in addition to the victim's claim, per hospitalization period or portion of such period; (iii) the total weekly award for an eligible claimant or claimants shall not exceed six hundred dollars. See Executive Law section 631 (3); and (iv) the total loss of earnings award for an eligible claimant or claimants shall not exceed thirty thousand dollars. See Executive Law section 631 (2).

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. CVB-50-08-00002-EP, Issue of December 10, 2008. The emergency rule will expire March 14, 2009.

**Text of rule and any required statements and analyses may be obtained from:** John Watson, General Counsel, New York State Crime Victims Board, 1 Columbia Circle, Suite 200, Albany, New York 12203, (518) 457-8066, email: johnwatson@cvb.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory authority: The New York State Executive Law, section 623 creates the Crime Victims Board (the Board) and grants the Board the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. New York State Executive Law, section 631 provides that the Board may make awards for out-of-pocket losses which include loss of earnings. Chapter 162 of the Laws of 2008 added an award for loss of earnings to include earnings lost by a parent or guardian as a result of the hospitalization of a child victim under age eighteen for injuries sustained as a direct result of a crime.

2. Legislative objectives: By enacting the New York State Executive Law, section 631 and the subsequent amendment in Chapter 162 of the Laws of 2008, the Legislature sought to ensure that the Board could reimburse out-of-pocket losses for loss of earnings, including earnings lost by a parent or guardian as a result of the hospitalization of a child victim under age eighteen for injuries sustained as a direct result of a crime.

3. Needs and benefits: Currently, in New York State Executive Law, article 22, and 9 NYCRR 525, hospitalization is not explicitly defined, nor are the circumstances enumerated under which the Board would consider loss of earnings generally, or specifically those of a parent or guardian during the period of hospitalization of a child victim under the age of eighteen for injuries sustained as a direct result of a crime. From recent history to date, the Board has consistently interpreted the statute to mean it should base determinations for loss of earnings on time which an employee was not paid due to absence from work or in instances where they utilized accumulated, paid leave, as such leave is something which an employee earns. With the amendments contained in Chapter 162 of the Laws of 2007, it was deemed necessary to codify this current practice and make additional clarifications related specifically to how the Board would define hospitalization, and make determinations for earnings lost by a parent or guardian as a result of the hospitalization of a child victim under age eighteen for injuries sustained as a direct result of a crime, with priority given to the victim's loss of earnings, all in order for claimants or potential claimants to be aware of what the Board would consider eligible for an award under its statutory authority.

4. Costs: a. Costs to regulated parties. These proposed regulations would be codifying the Board's current interpretation of its statutory authority, and establishing a procedure for determining a newly created, statutory award, therefore it is not expected that the proposed regulations would impose any additional costs to the agency or State which would not be created by the adoption of this new law. The proposed regulatory changes may, in fact, result in saving the agency and State money when the volume of otherwise ineligible claims filed with the Board decreases because claimants or potential claimants would be made aware of what the Board would consider eligible for an award under its statutory authority.

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

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

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

6. Paperwork: These proposed regulations do not require any additional paperwork requirements.

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

8. Alternatives: Although the current Board has consistently applied its interpretation of Executive Law, section 631 as it relates to determining loss of earnings, not implementing these proposed regulatory changes could result in inconsistent claimant award decisions in the future. Alternatives to the computation of loss of earnings based on whether or not a claimant utilized their accumulated leave were examined, but the Board determined it should continue its current methodology, as enumerated in the proposed 525.12(i)(1). Another alternative to these proposed regulatory changes would be for the Board to apply the more comprehensive definition of hospitalization as provided in current New York State Public Health Law, section 2961(11). Such an application is, however, impractical as this definition is excessively broad in scope and the Board is not limited to in-state medical providers, it also provides awards to claimants in other states and countries, which necessitates a more concise and easily applicable definition.

9. Federal standards: Permissible under 42 USC 10602(b)(1)(B).

10. Compliance schedule: The regulations will be effective on the effective date of Chapter 162 of the Laws of 2008 (September 1, 2008).

#### **Regulatory Flexibility Analysis**

The New York State Crime Victims Board (the Board) projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of this proposed rule change. This proposed rule change simply defines hospitalization and enumerates the circumstances under which the Board would consider loss of earnings generally, and specifically those of a parent or guardian during the period of hospitalization of a child victim under the age of eighteen for injuries sustained as a direct result of a crime. Since nothing in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

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

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in the State of New York as a result of this proposed rule change. This proposed rule change simply defines hospitalization and enumerates the circumstances under which the Board would consider loss of earnings generally, and specifically those of a parent or guardian during the period of hospitalization of a child victim under the age of eighteen for injuries sustained as a direct result of a crime. Since nothing in this proposed rule change will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

#### **Job Impact Statement**

The New York State Crime Victims Board (the Board) projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply defines hospitalization and enumerates the circumstances under which the Board would consider loss of earnings generally, and

specifically those of a parent or guardian during the period of hospitalization of a child victim under the age of eighteen for injuries sustained as a direct result of a crime. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.

#### Assessment of Public Comment

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

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## Department of Health

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### NOTICE OF ADOPTION

#### Approval of Nonclinical Projects

**I.D. No.** HLT-34-08-00006-A

**Filing No.** 51

**Filing Date:** 2009-01-13

**Effective Date:** 2009-01-28

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

**Action taken:** Amendment of section 710.1(c)(6) of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2802

**Subject:** Approval of Nonclinical Projects.

**Purpose:** Substitute prior limited review for administrative CON review of construction projects with costs between \$3 million and \$10 million.

**Text or summary was published** in the August 20, 2008 issue of the Register, I.D. No. HLT-34-08-00006-P.

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

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

#### Assessment of Public Comment

The Department received comments from three sources, the Greater New York Hospital Association (GNYHA), the Healthcare Association of New York State (HANYs), and Memorial Hospital for Cancer and Allied Diseases (Memorial Sloan-Kettering Cancer Center). All comments were in support of the proposed rule. Although all three organizations used the occasion to reiterate their support for further changes in the CON process currently being considered by the Department, these additional comments in no way qualified or diminished the organizations' support of the proposed rule itself.

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

#### Fingerprinting and Criminal Background Check Requirements (CBCR) for Unescorted Access to Radioactive Materials

**I.D. No.** HLT-04-09-00002-P

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

**Proposed Action:** Addition of section 16.112 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 225(5)(p) and (q) and 201(1)(r)

**Subject:** Fingerprinting and Criminal Background Check Requirements (CBCR) for Unescorted Access to Radioactive Materials.

**Purpose:** US NRC requirements-fingerprint and CBCRs for individuals allowed unescorted access to large quantities of radioactive materials.

**Text of proposed rule:** Pursuant to the authority vested in the Public Health Council by sections 225(5)(p) and 225(5)(q) of the Public Health Law and in the Commissioner of Health by section 201(1)(r), of the Public Health Law, Part 16 of the State Sanitary Code, contained in Chapter I of Title 10 (Health) of the Official Compilation of Codes, Rules and Regula-

tions of the State of New York, is amended by adding a new section 16.112, to be effective upon publication of the Notice of Adoption in the New York State Register, to read as follows:

*Section 16.112 Fingerprinting and criminal background check requirements*

(a) *Applicability.*

*This section applies to any licensee who possesses, or is authorized to possess, radioactive material that is: (1) listed in Table 1 ("Radionuclides of Concern") of this Section and (2) in a quantity equal to or exceeding that listed in Table 1.*

(b) *Definitions.*

(1) *Trustworthiness and Reliability (T&R) Official means an individual appointed by the licensee who is responsible for determining the trustworthiness and reliability of another individual requiring unescorted access to one or more radioactive materials identified in Table 1 of this section.*

(2) *"Affected individual" means an individual who has or is seeking unescorted access to radioactive material identified in Table 1 of this section in a quantity equal to or exceeding that listed in Table 1.*

(3) *"Unescorted access" means access without an escort to radioactive material identified in Table 1 of this section which is in a quantity equal to or exceeding that listed in Table 1.*

(c) *The T&R Official, if he/she does not require unescorted access, must be deemed trustworthy and reliable by the Licensee in accordance with its Increased Controls license conditions before making a determination regarding the trustworthiness and reliability of another individual. If the T&R Official requires unescorted access, the Licensee must consider the results of the Federal Bureau of Investigation (FBI) identification and criminal history records check before approving a T&R Official.*

(d) *Prior to requesting fingerprints from any individual, the Licensee shall provide a copy of this section to that person.*

(e) *Upon receipt of the results of FBI identification and criminal history records checks, the Licensee shall control such information as specified in subdivision (i) of this section and its Increased Controls license conditions.*

(f) *Specific Requirements Pertaining to Fingerprinting and Criminal History Records Checks.*

(1) *Each Licensee subject to the provisions of this section shall fingerprint each affected individual.*

(2) *For affected individuals employed by the Licensee for three years or less, and for affected individuals who are nonlicensee personnel, such as physicians, physicists, house-keeping personnel, and security personnel under contract, trustworthiness and reliability shall be determined, at a minimum, by verifying employment history, education, personal references, and fingerprinting and the review of an FBI identification and criminal history records check.*

(3) *The Licensee shall also obtain independent information to corroborate that provided by the employee (e.g. seeking references not supplied by the individual). For an affected individual employed by the Licensee for longer than three years, trustworthiness and reliability shall be determined, at a minimum, by a review of the employee's employment history with the Licensee and fingerprinting and an FBI identification and criminal history records check.*

(4) *Service provider Licensee employees who are affected individuals shall be escorted unless they are determined to be trustworthy and reliable by a NRC-required background investigation. Written verification attesting to or certifying the person's trustworthiness and reliability shall be obtained by the Licensee from the Licensee providing the service.*

(5) *The Licensee must submit one completed, legible standard FBI fingerprint card (Form FD-258, ORIMDNRCOOOZ)' for each affected individual, to the NRC's Division of Facilities and Security. The name and address of the individual (T&R Official) to whom the criminal history records should be returned must be included with the submission.*

(6) *The Licensee shall review and use the information received from the FBI identification and criminal history records check as part of its trustworthiness and reliability determination required by its Increased Controls license conditions.*

(7) *The Licensee shall notify each affected individual that his/her fingerprints will be used to secure a review of his/her criminal history record and inform the affected individual of the procedures for revising the record or including an explanation in the record, as specified in subdivision (h) of this section.*

(8) *Fingerprints for unescorted access need not be taken if an employed individual (e.g., a Licensee employee, contractor, manufacturer, or supplier) is:*

(i) *An employee of the United States (U.S.) Nuclear Regulatory Commission (NRC) or of the Executive Branch of the U.S. Government who has undergone fingerprinting for a prior U.S. Government criminal history check;*

(ii) *A Member of Congress;*

(iii) *An employee of a member of Congress or Congressional com-*

mittee who has undergone fingerprinting for a prior U.S. Government criminal history check;

(iv) The Governor or his or her designated State employee representative;

(v) Federal, State, or local law enforcement personnel;

(vi) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;

(vii) Representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC; or

(viii) documentation is provided which demonstrates that the employed individual has been favorably-decided by a U.S. Government program involving fingerprinting and an FBI identification and criminal history records check within the last five calendar years of the effective date of this regulation, or documentation is provided which demonstrates that any person has an active federal security clearance. Written confirmation from the agency/employer which granted the federal security clearance or reviewed the FBI criminal history records results based upon a fingerprint identification check must be provided. The Licensee must retain this documentation for a period of three (3) years from the date the employed individual no longer requires unescorted access associated with the Licensee's activities.

(9) All fingerprints obtained by the Licensee pursuant to this section must be submitted to the NRC. Additionally, the Licensee shall submit a certification of the trustworthiness and reliability of the T&R Official as determined in accordance with 16.112(c) to the NRC with each submission of fingerprints.

(10) The Licensee shall review and use the information received from the FBI identification and criminal history records check and consider it as part of its trustworthiness and reliability determination, in conjunction with the trustworthiness and reliability requirements set forth in its Increased Controls license conditions, in making a determination whether to grant an affected individual unescorted access. The Licensee shall use any information obtained from a criminal history records check solely for the purpose of determining an affected individual's suitability for unescorted access.

(11) The Licensee shall document the basis for its determination whether to grant, or continue to allow, an affected individual unescorted access.

(12) Licensees shall notify the Department and the U.S. NRC Headquarters Operations Office by telephone within 24 hours if the results from a FBI identification and criminal history records check indicate an individual is listed on the FBI Terrorist Screening Data Base.

(g) Prohibitions.

(1) A Licensee shall not base a final determination to deny an affected individual unescorted access solely on the basis of information received from the FBI involving:

(i) an arrest more than one (1) year old for which there is no information regarding the disposition of the case, or

(ii) an arrest that resulted in dismissal of the charge or an acquittal.

(2) A Licensee shall not use information received from a criminal history records check obtained pursuant to this section in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States or Article 1 of the New York State Constitution, nor shall the Licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

(h) Right to Correct and Complete Information.

Prior to any final adverse determination, the Licensee shall make available to the affected individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification. If, after reviewing the record, an affected individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either a direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the FBI Identification Division.<sup>2</sup> The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI criminal history records check after the record is made available for his/her review. The Licensee may make a final unescorted access determination based upon an individual's criminal history record only upon receipt of the FBI's confirmation or correction of the record. Upon a final adverse determination on unescorted access the Licensee

shall provide the individual its documented basis for denial. Unescorted access shall not be granted to an individual during the review process.

(i) Protection of Information.

(1) Each Licensee who obtains a criminal history record on an affected individual pursuant to this section shall establish and maintain a system of files and procedures for protecting the record and the personal information in the record from unauthorized disclosure.

(2) The Licensee may not disclose the record or personal information collected and maintained to persons other than the affected individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining unescorted access. No individual authorized to have access to the information may disseminate the information to any other individual whose job duties do not require such information.

(3) The personal information obtained on an affected individual from a criminal history record check may be transferred to another Licensee if the Licensee holding the criminal history record check receives the affected individual's written request to provide the information contained in his/her file, and the receiving Licensee verifies information such as the affected individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

(4) The Licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the Department to determine compliance with this section.

(5) The Licensee shall retain all fingerprint and criminal history records from the FBI, or a copy if the affected individual's file has been transferred, for three (3) years after termination of employment or determination of unescorted access (whether unescorted access was approved or denied). After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

Table 1: Radionuclides of Concern

| Radionuclide  | Quantity of Concern <sup>1</sup> (TBq) | Quantity of Concern <sup>2</sup> (Ci) |
|---|--|---------------------------------------|
| Am-241  | 0.6                                    | 16                                    |
| Am-241/Be   | 0.6                                    | 16                                    |
| Cf-252  | 0.2                                    | 5.4                                   |
| Cm-244  | 0.5                                    | 14                                    |
| Co-60   | 0.3                                    | 8.1                                   |
| Cs-137  | 1                                      | 27                                    |
| Gd-153  | 10                                     | 270                                   |
| Ir-192  | 0.8                                    | 22                                    |
| Pm-147  | 400                                    | 11,000                                |
| Pu-238  | 0.6                                    | 16                                    |
| Pu-239/Be   | 0.6                                    | 16                                    |
| Ra-226  | 0.4                                    | 11                                    |
| Se-75   | 2                                      | 54                                    |
| Sr-90 (Y-90)  | 10                                     | 270                                   |
| Tm-170  | 200                                    | 5,400                                 |
| Yb-169  | 3                                      | 81                                    |
| Combinations of radionuclides listed above <sup>3</sup> | See Footnote Below <sup>4</sup>        |                                       |

<sup>1</sup> The aggregate activity of multiple, collocated sources of the same radionuclide should be included when the total activity equals or exceeds the quantity of concern.

<sup>2</sup> The primary values used for compliance with this Order are tera becquerel (TBq).

<sup>3</sup> Radioactive materials are to be considered aggregated or co-located if breaching a common physical security barrier (e.g., a locked door at the entrance to a storage room) would allow access to the radioactive material or devices containing the radioactive material.

<sup>4</sup> If several radionuclides are aggregated, the sum of the ratios of the activity of each source, i of radionuclide, n, A(i,n), to the quantity of concern for radionuclide n, Q(n), listed for that radionuclide equals or exceeds one. That is:

$$\sum_n \left\{ \sum_i \frac{A_{i,n}}{Q_n} \right\} \geq 1$$

<sup>1</sup> Copies of these forms may be obtained from NRC. The Licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards. Licensees must have fingerprints taken by local law enforcement (or a private entity authorized to take fingerprints) because an authorized official must certify the identity of the person being fingerprinted. If the FBI advises the fingerprints are unclassifiable based on conditions other than poor quality, the Licensee must submit a request to NRC for alternatives. When those search results are received from the FBI, no further search is necessary. The NRC will receive and forward to the submitting Licensee all data from the FBI as a result of the Licensee's application(s) for criminal history records checks, including the FBI fingerprint record(s).

<sup>2</sup> In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency (see 28 CFR Part 16.30 through 16.34).

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

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

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

**Regulatory Impact Statement**

**Statutory Authority:**

The Public Health Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. PHL Sections 225(5)(p) & (q) and 201(1)(r) authorize SSC regulation of the public health aspects of ionizing radiation. These provisions authorize the regulation of radioactive materials.

The Atomic Energy Act (see 42 USC §§ 2021(j)(1), 2021(o), and 2022) requires Agreement States such as New York to comply with and adopt federal standards or risk jeopardizing their authority to regulate certain radioactive material. The proposed regulatory changes to institute fingerprinting and criminal history records check requirements incorporate these federal standards.

**Legislative Objectives:**

The legislative objectives of PHL Sections 225(5) and 201(1)(p) and (q) are to protect public health and safety. The proposed regulations enhance the security of radioactive material and are consistent with these purposes.

**Needs and Benefits:**

The possession and use of radioactive material is regulated by the United States Nuclear Regulatory Commission (NRC). The NRC has relinquished that authority to states that have entered into agreements with NRC whereby the "Agreement State" takes over the authority for regulation of radioactive material. New York became the fourth Agreement State in 1962. Currently, 35 Agreement States exist.

The Department of Health (DOH) regulates the use of radioactive material at approximately 1,100 facilities in order to protect people and the environment. DOH radioactive material licensees have the primary responsibility of maintaining the security and accountability of the radioactive material in their possession. The events of 9/11 put new emphasis on security to prevent the malicious use of radioactive material, such as in dirty bombs. In 2002, the New York State Office of Public Security commissioned a study of radioactive material security in the State. A task force comprised of state and federal radiation and security experts evaluated the current security posture. This evaluation included reviewing existing regulatory structures, policies and procedures and making site visits to several different types of facilities that possess and use radioactive materials. The task force developed several recommendations to improve radioactive material security. One of those recommendations was to explore using background investigations for assessing employees who have access to certain quantities of radioactive materials.

In 2005, DOH implemented new security requirements called Increased Controls (ICs) on radioactive material licensees that possess certain quantities of radioactive materials. The NRC imposed ICs on their licensees as well. The ICs included requirements for enhancing physical security of radioactive materials, coordination of security plans with local law enforcement and procedures for limiting unescorted access to radioactive materials to only those who have been determined to be trustworthy and reliable (T&R). The T&R determination is based on an evaluation of the individual's work history, employment records and personal references but does not include fingerprinting and Federal Bureau of Investigation (FBI) criminal background checks.

On August 8, 2005, section 652 of the federal Energy Policy Act of 2005 (EPAc) was enacted. This provision amended the fingerprinting requirements of the Atomic Energy Act (AEA). Specifically, the EPAc amended Section 149 of the AEA (see 42 USC § 2169) to require fingerprinting and an FBI identification and criminal history records check for "any individual who is permitted unescorted access to radioactive materials or other property subject to regulation by the Commission [NRC] that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks." Therefore, in accordance with Section 149 of the AEA, as amended by the EPAc, on December 2, 2007, NRC imposed fingerprinting and FBI identification and criminal history records check requirements on all NRC IC licensees with an effective date of June 2, 2008 (NRC Order EA-07-305). Also, NRC directed the Agreement States to implement the fingerprinting requirements established in EA-07-305 on their licensees by the June 2, 2008 deadline. DOH has determined that such requirements must be established in regulation. Since DOH must establish these requirements in regulation, New York is the only state not to have implemented the fingerprinting requirements on its radioactive material licensees by the June 2, 2008 deadline. The NRC and all other Agreement States were able to impose the fingerprinting requirements immediately via department orders or license conditions.

**Costs:**

The cost impact of these regulations is a total of \$50 for each affected individual: \$36 for the FBI identification and criminal history records check and \$10-15 for fingerprint impressions by a law enforcement agency. The latter cost varies with jurisdiction. This cost will apply to several New York State government entities including DOH, Roswell Park Cancer Center, State Emergency Management Office, and the State University of New York.

**Local Government Mandates:**

No local governments, county, city, town, village, school district, fire department or any other district possess the type or quantity of radioactive materials that would subject them to fingerprinting requirements.

**Paperwork:**

Licensees will need to obtain fingerprint cards from the NRC. Also, licensees will need to maintain records of fingerprinting, criminal history and identification checks and trustworthiness and reliability determinations for review by DOH.

**Duplication:**

There is no duplication of this requirement by any federal, state or local agency. New York State entered into an agreement with the federal government on October 15, 1962 by which the federal government discontinued its regulatory authority and New York assumed such authority.

**Alternatives:**

Taking no action was rejected as being inconsistent with State policies on public security. No other alternative exists for obtaining a FBI criminal background check.

**Federal Standards:**

These proposed fingerprinting and criminal background and identification checks are NRC standards based on the EPAc.

**Compliance Schedule:**

The proposed rule was implemented as an emergency rule on November 18, 2008. It is expected that all affected licensees will have already implemented the requirements in the emergency rule before the adoption of the proposed rule. Applicants for a new radioactive materials license that authorizes the possession of radioactive material in quantities greater than those listed in Table 1 must comply with the requirements in section 16.112 prior to receiving such license.

**Regulatory Flexibility Analysis**

**Effect of rule:**

No local governments possess the quantity and type of radioactive material that would subject them to the proposed rule. There are 10 small

businesses affected by this regulation. Prior to the implementation of the emergency rule, program staff contacted these facilities and three had already implemented the requirements since they have offices in other states and must comply with the NRC fingerprinting requirements in those states. At that time all of the facilities contacted were aware of the regulations and while some facilities had questions on implementation and timing no one expressed opposition to the fingerprinting requirements.

#### Compliance requirements:

All affected facilities are required to establish policies and procedures for implementing the fingerprinting requirements, including designating a Trustworthy and Reliable (T&R) Official, obtaining fingerprint cards from the Nuclear Regulatory Commission (NRC), having the fingerprints taken by local law enforcement, and submitting the cards to the NRC. The T&R Official will receive and review the results of the criminal history records check and then make a determination on unescorted access for each affected individual. Also the T&R Official must notify the Department of Health (DOH) if any individual is identified on the Federal Bureau of Investigation (FBI) error watchlist. Records of approvals for unescorted access must be maintained for inspection by DOH.

The proposed regulations do not impose significant new requirements since affected facilities are already implementing procedures for determining the trustworthiness and reliability of these individuals. The proposed regulations will require that they take fingerprints and use the criminal history records check as part of their T&R determination.

#### Professional services:

Licensees will need the services of the FBI to perform the criminal history records check. Services of a law enforcement agency or other authorized party will be needed to verify identification and collect fingerprints.

#### Compliance costs:

The FBI criminal history records check cost is \$36 per individual, and the fee for taking fingerprinting is estimated to be \$10-\$15 per individual. These are one-time costs per individual, not recurring or annual costs. Approximately four to six persons from each small business will be subject to fingerprinting. Indirect costs are estimated to be one hour of work time for fingerprinting for each individual.

#### Economic and technological feasibility:

There are no capital costs or new technology required to comply with the proposed rule.

#### Minimizing adverse impacts:

The proposed rule establishes requirements for obtaining and using information on an individual's criminal history for allowing access to radioactive material. However the proposed rule does not set criteria for making this determination. It is up to the licensee to set the criteria and make a determination on each affected individual. Since affected licensees already make T&R determinations using other criteria, DOH does not foresee significant adverse impacts as result of the proposed rule. Further, since there are a limited number of affected facilities, DOH intends to conduct workshops to assist licensees with any questions related to implementing the fingerprinting requirements.

#### Participation:

DOH issued a notice to all affected licensees in June 2007 informing them that the NRC was considering requirements requiring criminal history record checks as part of the T&R determination and that such requirements may be implemented in New York State (NYS). In October 2007, DOH initiated a series of statewide workshops on security of radioactive materials for NRC licensees that have received the Increased Controls (IC) requirements. At the three most recent workshops conducted in Long Island, Buffalo and Rochester, the new fingerprinting requirements were discussed. In June 2008, another notice was sent to affected licensees informing them that DOH is moving forward with developing regulations requiring fingerprinting and FBI criminal background checks. Further the NRC has developed a web page for commonly asked questions. Since the proposed rule is essentially the same as the NRC requirements (NRC Order EA-07-305), NYS facilities are encouraged to use the NRC web page.

#### Rural Area Flexibility Analysis

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

There are 55 facilities outside of New York City (NYC) that are affected by this regulation. The NYC Department of Health and Mental Hygiene will impose the same requirements on 24 facilities it regulates. The State Department of Health (DOH) facilities are generally located in larger cities. A few licensees (industrial radiographers) are in commercially zoned facilities near metropolitan areas.

Reporting, recordkeeping and other compliance requirements and professional services:

Licensees will be required to obtain, process and mail fingerprint cards

to the Nuclear Regulatory Commission (NRC). Licensees will maintain records of fingerprinting activities including determinations of trustworthiness and reliability for review by DOH. Licensees must notify the department if any individual is identified on the Federal Bureau of Investigation (FBI) error watchlist. The need for professional services will be limited to use of the applicable local law enforcement for fingerprint impressions.

#### Costs:

The cost estimate for regulated parties is approximately \$50 for each applicable individual. This includes \$36 for the NRC to process the FBI identification and criminal history records check and approximately \$10-15 for taking fingerprint impressions by a law enforcement agency. The latter varies with jurisdiction.

#### Minimizing adverse impact:

There are no alternatives with respect to rural areas. All affected licensees will need to use the services of an approved entity to take fingerprints.

#### Rural area participation:

The Department issued a notice to all affected licensees in June 2007 informing them that the NRC was considering requirements requiring criminal history record checks as part of the T&R determination and that such requirements may be implemented in New York State (NYS). In October 2007, the Department initiated a series of statewide workshops on security of radioactive materials for DOH Increased Controls licensees. At the three most recent workshops conducted in Long Island, Buffalo and Rochester the new fingerprinting requirements were discussed. In June 2008, another notice was sent to affected licensees informing them that DOH was moving forward with developing regulations requiring fingerprinting and FBI criminal background checks. Further the NRC has developed a web page for commonly asked questions. Since the proposed rule is essentially the same as the NRC requirements (NRC Order EA-07-305), NYS facilities are encouraged to use the NRC web page.

#### Job Impact Statement

##### Nature of impact:

It is anticipated that few, if any, persons will be adversely affected. The fingerprinting and criminal background check is an additional element or enhancement to the existing trustworthy and reliability (T&R) determination requirement. Department of Health (DOH) inspections of these facilities during 2007 indicated that all persons were deemed to be trustworthy and reliable. No person was adversely affected by that evaluation. A history of criminal activity is not automatically disqualifying. The T&R Official will review an individual's record of criminal activity and determine if that individual will be granted unescorted access to the applicable radioactive materials. If the determination indicates that an individual should not have unescorted access to radioactive materials, the person may be permitted to have escorted access. However, a situation where the licensee has no means to provide an escort, or has limited availability of an escort (e.g., shift work), could result in an affected individual not being able to perform tasks and duties that require access to applicable radioactive sources. In such situations the licensee may need to reassign the individual to tasks that do not require unescorted access, or reschedule tasks based on an escort's schedule.

##### Categories and numbers affected:

DOH inspections indicate that approximately 500 persons will be subject to fingerprinting, including physicians and medical staff, researchers/scientists, laboratory workers, and industrial radiographers.

##### Regions of adverse impact:

No region will be disproportionately affected. The affected facilities are larger hospitals, universities, blood banks, research institutions and industrial radiographers. The affected parties are not rural entities.

##### Minimizing adverse impact:

The intent of a fingerprint check is to provide additional information on an employee's personal history. The licensee's T&R official will make a determination of an employee's trustworthiness and reliability based on various factors (employment history, education, etc.) and the results of the criminal activity report. A history of criminal activity is not automatically disqualifying. The licensee, not DOH, will establish disqualifying criteria.

Not all individuals who use radioactive sources will require a criminal background check. If the radioactive material is used in the presence of more than one individual only one of those individuals must be determined to be trustworthy and reliable and may escort other individuals. During inspections of the affected licensees, DOH inspectors determine if the applicable radioactive sources are generally used in the presence of several persons.

The use of radiation therapy units in hospitals involves a team of individuals including physicians, medical therapy physicists, nurses, and

radiation therapy technologists. Use of industrial radiography sources is subject to two-person rule, meaning that two qualified individuals must be present. Blood banks/services are typically operated continuously (24/7) with several persons present.

## Department of Labor

### EMERGENCY RULE MAKING

#### Enhanced Administration of the State's Apprenticeship Training Program and Enhanced Program Sponsor Accountability

**I.D. No.** LAB-04-09-00003-E

**Filing No.** 48

**Filing Date:** 2009-01-12

**Effective Date:** 2009-01-12

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

**Action taken:** Addition of sections 601.4 and 601.5 to Title 12 NYCRR.

**Statutory authority:** Labor Law, section 811; Federal regulations found at 29 CFR 29

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

**Specific reasons underlying the finding of necessity:** The Rule enhances consistency in administration of the State's Apprenticeship Training Program, stakeholder participation in program approval, and program sponsor accountability that will ensure a well-trained workforce for the state's future.

**Subject:** Enhanced administration of the state's apprenticeship training program and enhanced program sponsor accountability.

**Purpose:** To strengthen the Apprenticeship Training Program in New York and ensure a well-trained, skilled workforce for the future.

**Text of emergency rule:** Section 601.4 of the regulations of the Commissioner of Labor is amended by adding a new sub-section (i) as follows:

(i) A written public comment period is required for all new trades and apprenticeship program applications. A list of all new trades and new apprenticeship program applications will be placed on the New York State Department of Labor website for a minimum period of ten business days to solicit public comments. Those individuals who submit comments will be asked to provide their name, title, organizational name and their comments via mail or e-mail. Comments received will be reviewed by the Apprenticeship Training Program Director, and action will be taken, as deemed appropriate.

Section 601.5 of the regulations of the Commissioner of Labor is amended by adding new sub-sections (d), (e), (f), and (g), as follows:

(d) All sponsors of apprenticeship training programs, and their signatories - if any, are required to ensure that their apprentices maintain records that document job rotation and the skills acquired. The apprentice must maintain this record in a format approved by the New York State Department of Labor. The apprentice's immediate supervisor is required to sign off on this record at least monthly.

(e) Newly approved sponsors seeking registration of new apprenticeship programs must undergo a two year probationary period. Newly approved sponsors will be advised that their programs will be approved contingent upon successful completion of the probationary period.

(1) Factors considered during the probationary period include, but are not limited to:

- (i) Payment of wages as specified in the apprenticeship agreement;
- (ii) documentation of job rotation;
- (iii) documentation of participation in related instruction;
- (iv) provision of proper supervision;
- (v) provision of a safe work environment; and
- (vi) compliance with the provisions of Labor Law, Article 23 and 12 NYCRR Parts 600 and 601.

(2) After a review of the new sponsor's performance during the probationary period, the sponsor will be notified whether they:

- (i) passed probation; or
  - (ii) will be placed on an extended probation for a period of no more than one year, informed of the reasons why this decision was made, and issued a corrective action plan; or
  - (iii) failed probation and the reasons why.
- (f) New sponsors who fail probation will not be permitted to reapply for

registration of an apprenticeship program for a period of one year. This prohibition additionally applies to any successor or substantially owned-affiliated entity, as those terms are defined in Labor Law, Section 220, of the new sponsor. The new sponsor may file a written appeal to the decision by sending a letter to the Commissioner of Labor putting forth its arguments why the sponsor candidate should not have failed probation.

(g) All Apprentice Training Program sponsors will undergo a recertification process for each program at three year intervals. Commencing with enactment of these regulations, for the first three years, these recertifications shall be performed on a basis of older programs, by region, being recertified first.

(1) Each sponsor shall complete a new Apprenticeship Training Program Registration Agreement for each of their programs.

(i) Simultaneously, any sponsors of Group Joint or Group Non-Joint programs must submit a current list of program signatories' names, addresses, Federal Employer Identification Numbers, and Unemployment Insurance Employer Numbers in an electronic format as specified by the Department of Labor.

(ii) The Sponsor shall also collect completed and signed Due Diligence forms from each signatory, provide any such forms with affirmative answers to the Department of Labor with its new Apprenticeship Training Program Registration Agreement, and maintain the rest of the applications in its office for ongoing review and inspection by the Department.

(iii) The program sponsor must provide assurances in writing to the New York State Department of Labor that the sponsor will hold all signatories to the standards of their Apprentice Training Program Registration Agreement with the New York State Department of Labor.

(2) After a review of the sponsor's performance during the period prior to recertification, the sponsor will receive notification that:

- (i) Its Apprenticeship Training Program has been renewed; or
- (ii) It was found to have committed the violations specified, and is to be issued a corrective action plan; formal deregistration will be pursued only if NO corrective action has been taken by the sponsor within a reasonable period of time to resolve all issues; or
- (iii) Its Training Program has been recommended for deregistration and deregistration proceedings will be initiated.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 11, 2009.

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

#### Regulatory Impact Statement

##### 1. Statutory authority:

Labor Law § 811.1 (j) states that the Commissioner of Labor shall have the power to adopt such rules and regulations as may be necessary for the effective administration of the purposes and provisions of Article 23. In addition, the emergency regulations are promulgated under authority granted to the Department under federal regulations found at 29 CFR 29.

##### 2. Legislative objectives:

Labor Law Article 23, § 810 makes it the public policy of the State of New York to develop sound apprenticeship training standards and to encourage industry and labor to institute apprenticeship programs as a preferred method of training and preparing workers in New York. These amendments fulfill these legislative objectives and strengthen the Apprenticeship Training program in New York by increasing public participation in the apprenticeship process, reinforcing the need to memorialize skill attainment by apprentices, and reaffirming the accountability of program sponsors for their signatories and apprentices.

##### 3. Needs and benefits:

During the past year, the Commissioner of Labor placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the State's Apprenticeship Training Program was conducted. Two independent reviews were conducted, an internal review - the Process Mapping Report - and an External Review conducted by Coffey Consultant's. These reviews sought input from various stakeholders and partners as well as Apprenticeship Training Program staff. Both the internal and external reviews echoed common themes and consistent recommendations to ensure the development of a world class workforce. Those themes included the need for greater stakeholder involvement in the registration process, increased consistency in program implementation, and increased accountability by program sponsors in ensuring the quality and effectiveness of apprenticeship programs. A number of significant recommendations which surfaced from the internal and external reviews are reflected in these regulatory amendments.

The public comment period for all new program applications affords an opportunity for stakeholders to provide comments on all new programs

and new trades initiated in New York State. The requirement for use of Blue Books or other form of documentation of job rotation ensures that apprentices are being rotated to all aspects of their work process resulting in a skilled workforce with portable credentials. Sponsor responsibility for monitoring program signatories and their compliance with apprenticeship training requirements shores up program oversight and accountability. Finally, the program recertification process allows sponsors an opportunity to ensure the Department has current and accurate information on their programs and signatories and ensures periodic monitoring of all apprenticeship programs on a regular basis.

#### 4. Costs:

The implementation of these regulations will result in the need for the apprentice's on-the-job supervisor to sign the apprentice's Blue Book, or other form of documentation of job rotation approved by the Department. It will also require that new sponsors go through a two-year probation period before being certified. Further, the rules call for triennial sponsor recertification, the reporting and monitoring of employer-members and employer-signatories by program sponsors, and, if needed, the preparation and implementation of corrective action plans for sponsors who fail to measure up to program standards. The amount of time and resources needed will be contingent upon the size of the program and the complexity of the corrective action issues.

It is anticipated that the implementation of the regulations will impact Apprenticeship Training Office staff. The caseloads for field staff will be adjusted accordingly to accommodate for these needs; however, additional staff will be required in central office to process the documents for program probation and recertification, for tracking of signatory information, as well as handling the correspondence regarding public comments on new trades and program applications.

#### 5. Local government mandates:

Municipalities, school districts, fire districts and others who currently, or plan to, serve as program sponsors for apprenticeship training programs will have to comply with the new requirements that will apply to any new programs proposed by them including public notice of program applications. All apprenticeship programs in which these entities participate will be subject to ensuring that current and accurate information is held on program signatories. The Department will be responsible for monitoring the signatories on a random sample basis. However, these requirements apply only to local governments that choose to serve as program sponsors for apprenticeship programs. Moreover, the amendments will benefit such local governments by ensuring consistency and accountability among program sponsors and will assist local governments that have enacted local laws requiring public work contractors to participate in state registered apprenticeship training programs by helping to ensure the quality of such programs.

Apprenticeship Training Program staff will be available to provide technical assistance to program sponsors - including local governments choosing to undertake this role - to assist them in complying with the rule.

#### 6. Paperwork:

Apprenticeship programs traditionally require apprentices and their supervisors to track apprentices' progress through various job rotations included in their overall training program. While "blue books" have traditionally been used for this purpose, the proposed rule allows for flexibility in this regard by providing for skills attainment to be tracked in some other format approved by the Department.

Additional paperwork that will be required from regulated parties as a result of these rule changes include corrective action plans for program sponsors who fail to comply with program requirements and triennial recertification applications.

At the same time, the Department will have to develop and complete a number of new documents including form letters to address probationary and recertification determinations, form letters to acknowledge receipt of public written comments, as well as revisions to the Apprentice Training Program Registration Agreement.

The database currently used by the Apprenticeship Training Program will also need to be revised to track probationary and recertification periods and program signatories' information.

#### 7. Duplication:

No duplication of rules were identified. Rather, these regulations are intended to clarify existing regulations found in 12 NYCRR § 601.4 Standards for Apprenticeship Programs and 12 NYCRR § 601.5 Standards for Apprenticeship Agreements.

#### 8. Alternatives:

Overall there are no viable alternatives to the requirements set forth in the proposed rule. The rule reinforces basic requirements for program registration, monitoring, and accountability recommended by consultants and various stakeholders folding a long and detailed review of the state's administration of its apprenticeship training program.

#### 9. Federal standards:

United States Department of Labor's proposed rule changes to 29 CFR

29 published in the Federal Register on December 13, 2007, contains a requirement for provisional registration, including a one year provisional approval of newly registered programs after which program approval may be permanent, continued as provisional, or rescinded following a review by the registration agency. New York State's proposed emergency regulation for a probationary period for all new programs mirrors the proposed federal requirement except that the probation period extends for two years. It is believed that this enhanced requirement will result in higher standards for New York's Apprenticeship Training program by offering sponsors additional time to fully develop quality programs, while at the same time, affording the Department an opportunity to assess the success of the program based upon a more representative operating history.

#### 10. Compliance schedule:

The two-year probationary requirement will become effective for new sponsor program applications approved on or after the effective date of these regulations.

The three-year recertification period will be implemented in each geographic region of the state on an incremental scale determined by the age of the program so that one third of the programs within a region - starting with the oldest programs - will be due for recertification each year, commencing on or after the effective date of these regulations.

The establishment of a written public comment period for new trades and program applications will be implemented on or after the effective date of these regulations.

New sponsor mandates with regard to ensuring that current and accurate information is held on their employer signatories will be implemented on or after the effective date of these regulations.

Provisions set forth in the rule clarifying job rotation requirements and acceptable documentation will be effective on or after the effective date of these regulations.

#### *Regulatory Flexibility Analysis*

##### 1. Effect of rule:

Apprenticeship Training Programs include building and construction trades, manufacturing trades, state governments (Division of Correctional Services), local governments (such as villages, school districts, and fire districts), as well as other non-traditional trades (such as chef).

There are four types of Apprenticeship Training programs in the state, as follows:

- Individual Non-Joint: --- Involves a non-union employer and one or more apprentices or an employer with a union that does not wish to participate in the apprenticeship program. (584 Programs)

- Individual Joint: --- Involves a single employer and the union representing the employer's apprentices. (70 Programs)

- Group Joint: --- Involves a group of employers and one union, which represents the workers of the trade. (194 Programs)

- Group Non-Joint: --- Involves a group of non-union employers or an employer trade association whose members agree to apprenticeship standards among themselves or which contracts with a service provider to administer the apprenticeship program and to provide related instruction classes for the apprentices. (27 Programs)

Please note the data listed above reflects the number of programs in each category, not individual sponsors. One sponsor may operate multiple programs.

##### 2. Compliance requirements:

Participation in apprenticeship training programs is completely voluntary. Small businesses and local government sponsors who choose to participate in such programs may be required to undertake additional record keeping activities associated with tracking the apprentice's progress through various job rotations, if they were not complying with this requirement previous to the implementation of this rule. Such record keeping may be accomplished through use of a "Blue Book" or, under the proposed rule, some other format approved by the Commissioner. Small businesses and local governments sponsoring apprenticeship training programs will also be responsible for the preparation and implementation of a corrective action plan, if needed, to bring their program into compliance with statutory and regulatory requirements governing apprenticeship programs; completion of paperwork for triennial recertification; and obtaining and tracking of signatory information. The amount of time needed for all these activities is contingent upon the size of the program and the degree to which these programs are already in compliance with requirements of the current regulations governing the program.

##### 3. Professional services:

The adoption of these emergency regulations is not expected to place an undo burden on program sponsors that would require them to retain professional services.

##### 4. Compliance costs:

The adoption of these emergency regulations is not expected to place an undo burden on program sponsors with regard to cost. For example, the completion of blue books or an alternative method of documentation of job rotation is done by the apprentice's supervisor. All Apprentice Train-

ing Program Registration Agreements provide for a specified ratio of apprentices to journey workers (supervisors). Therefore, a supervisor will be responsible for a limited number of apprentices and their Blue Books.

The implementation of these regulations will result in the need for program sponsors to sign the apprentice's Blue Book, or other form of documentation of job rotation, and the preparation and implementation of the completion of a corrective action plan, if needed, completion of paperwork for recertification, and the tracking of signatory information. The amount of time needed is contingent upon the size of the program and the complexity of the corrective action issues.

#### 5. Economic and technological feasibility:

The adoption of these emergency regulations is not expected to place an undue burden on program sponsors. Wherever possible, the Department will utilize technology to make filing of documents with the Department easier. For example, the department encourages sponsors to submit lists of apprenticeship program signatories in an electronic format. Also, public comments on new program applications and new trades will be accepted via an electronic format.

#### 6. Minimizing adverse impact:

For the new regulation regarding sponsors' responsibilities to monitor employer signatories it is presumed that sponsors who conduct Group Joint or Group Non-Joint programs currently maintain a list of program signatories in their normal course of business.

For the new regulation regarding job rotation requirements and acceptable documentation, this change will allow a stricter enforcement of current procedures. Program sponsors should be tracking job rotation at the present time, however, this regulation will provide a more consistent application of this requirement.

While the Department believes that the possibility of adverse impact of the emergency rule should be minimal, the Department will provide apprenticeship program sponsors with reasonable periods of time in which to bring non-compliant programs into compliance with all regulatory requirements, will provide technical assistance to program sponsors, and will provide adjudicatory hearings to program sponsors to challenge any proposed adverse action by the Department. These activities all serve to minimize any adverse impact from the rule.

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

During the past year, New York State placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the program was conducted. Two independent reviews were conducted which seeking input from various stakeholders and partners as well as Apprenticeship Training Program staff. Small businesses and local governments were given an opportunity to participate in these reviews by responding to questions asked by parties conducting the reviews. The final written Reports authored by Coffey Consulting, LLC., and NYSDOL were posted for public review on NYSDOL's website and seven public forums were held throughout the state in August and September 2008, offering the public, including small businesses and local governments, an opportunity to provide their comments on the reports. All feedback received as a result of these activities was reviewed and considered and a number of recommendations received from stakeholders, interested parties, and the consultants are reflected in this rulemaking.

### **Rural Area Flexibility Analysis**

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

Apprenticeship training programs may be sponsored by a single employer, a group of employers, or a joint apprenticeship committee representing both employers and a union. These sponsors may be located throughout New York State, including all rural areas of the State.

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

All Apprenticeship Training Program Sponsors in rural areas who conduct Group Joint or Group Non-Joint programs must provide a list of all employer signatories to NYSDOL and will be required to hold all signatories to the standards of their Apprentice Training Program Registration Agreement with NYSDOL.

All program sponsors in rural areas will be required to ensure their apprentices are regularly keeping "Blue Books" or a comparable record to ensure documentation of job rotation and the attainment of skills.

All program sponsors in rural areas will be required to apply for recertification of programs every three years and to undergo a program review at that time. Deficiencies in program administration or operation identified during the review will have to be corrected.

All applications for new apprenticeship training programs by sponsors in rural areas will be subject to publication and public comments. Sponsors may be required to respond to inquiries from Apprenticeship Training Program staff in response to comments received from the public.

#### 3. Costs:

The adoption of these emergency regulations is not expected to place an undue burden on program sponsors located in rural areas as opposed to program sponsors in other geographic areas of the state. The implementa-

tion of these regulations will result in the need for the apprentice's on-the-job supervisor to sign the apprentice's Blue Book or other form of documentation of job rotation approved by the Department. It will also require that new sponsors go through a two-year probation period before being certified. Further, the rules call for triennial sponsor recertification, that sponsors insure current and accurate information is held on program signatories, and, if needed, the preparation and implementation of corrective action plans for sponsors who fail to measure up to program standards. The amount of time and resources needed will be contingent upon the size of the program and the complexity of the corrective action issues. New York State Department of Labor Staff is available to assist in addressing any corrective action issues. It is not anticipated that the rule would require the programs to hire professional staff or consultants to undertake any of these tasks.

#### 4. Minimizing adverse impact:

It is presumed that sponsors located in rural areas who conduct Group Joint or Group Non-Joint programs currently maintain a list of program signatories in their normal course of business. Therefore, the emergency rule should not have an adverse impact from any sponsors in this regard.

The documentation of job rotation requirements for sponsors is currently enacted by procedure. Program sponsors located in rural areas should be tracking job rotation at the present time and the impact from the emergency rule should be minimal.

The Department's Apprenticeship Training Program staff is available to provide technical assistance to program sponsors located in rural areas as well as other areas of the state. Moreover, the Department will provide apprenticeship program sponsors with reasonable periods of time in which to bring non-compliant programs into compliance with all regulatory requirements and will provide adjudicatory hearings to program sponsors to challenge any proposed adverse action by the Department. These activities all serve to minimize any adverse impact from the rule.

#### 5. Rural area participation:

During the past year, New York State placed a moratorium on the approval of apprenticeship training programs in all trades while a thorough review of the program was conducted. Two independent reviews were conducted seeking input from various stakeholders and partners as well as Apprenticeship Training Program staff. Sponsors in rural areas were given an opportunity to participate in these reviews by responding to questions asked by parties conducting the reviews. The final written Reports authored by Coffey Consulting, LLC. and NYSDOL were posted for public review on NYSDOL's website and seven public forums were held throughout the state in August and September 2008, offering the public, including sponsors in rural areas, an opportunity to provide their comments on the reports. All feedback received as a result of these activities was reviewed and considered and a number of recommendations received from stakeholders, interested parties, and the consultants are reflected in this rulemaking.

### **Job Impact Statement**

#### 1. Nature of impact:

If a sponsor fails to comply with the requirements of the emergency regulations and a program is ultimately deregistered or not recertified, this would have an impact on an apprentice's status as a registered apprentice and thus affect his or her ability to obtain a portable nationally recognized credential of skills standards. The loss of this credential may have a long term impact on the apprentice's earning potential.

The Department does not anticipate that the proposed rule will impact many jobs as we do not believe it will be necessary to either deregister or refuse to recertify a large number of programs. It is expected that the vast majority of programs would comply with all requirements of the rule. Moreover, except under extreme circumstances, non-compliant program sponsors will be given opportunities to come into compliance before any steps would be taken to terminate a program.

#### 2. Categories and numbers affected:

The Apprenticeship Training Program currently contains 521 construction trades programs and 354 non-construction trades programs, with over 20,000 registered apprentices.

#### 3. Regions of adverse impact:

These emergency regulations impact all program sponsors in New York State regardless of the geographic location of the apprenticeship program.

#### 4. Minimizing adverse impact:

While the Department believes that the possibility of adverse impact of the emergency rule on job holders is going to be negligible, the Department will provide apprenticeship program sponsors with reasonable periods of time in which to bring non-compliant programs into compliance with all regulatory requirements, will provide technical assistance to program sponsors, and will provide adjudicatory hearings to program sponsors to challenge any proposed adverse action by the Department. These activities all serve to minimize any adverse impact from the rule.

#### 5. (IF APPLICABLE) Self-employment opportunities:

N/A

## Office of Mental Retardation and Developmental Disabilities

### NOTICE OF ADOPTION

#### At Home Residential Habilitation (AHRH)

**I.D. No.** MRD-47-08-00008-A

**Filing No.** 52

**Filing Date:** 2009-01-13

**Effective Date:** 2009-02-01

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

**Action taken:** Amendment of sections 635-10.5 and 635-99.1 of Title 14 NYCRR.

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

**Subject:** At Home Residential Habilitation (AHRH).

**Purpose:** To change the unit of service, establish requirements, and establish standards for self and family direction for AHRH.

**Substance of final rule:** General:

- Establishes a regulatory framework for the delivery of At Home Residential Habilitation (AHRH) services. Home and Community Based Waiver AHRH services allow individuals to receive needed residential habilitation services in a private home.

- Changes the unit of service. Currently, the unit of service is a day, with the length of the day varying for each person. The regulations change the unit of service to an hour, billed in 15 minute increments.

- Requires that services be delivered in accordance with the person's Individualized Service Plan (ISP) and At Home Residential Habilitation Plan.

- Requires that services must start at the home, stop at the home, or be delivered entirely at the person's home.

- Requires that the time counted toward billing requires face-to-face, staff-to-individual service delivery.

- Specifies the limited circumstances when AHRH services can be billed at the same time that other types of services are provided (hospice, Medicaid Service Coordination, personal care/home health aide, nursing, physician and other clinical services).

- Effective February 1, 2009.

Self-directed or family-directed AHRH:

- Establishes self-direction or family direction to permit greater flexibility and freedom of choice in obtaining AHRH services.

- Requires a co-management agreement between the individual receiving services, the provider, and, if one exists, an identified adult (e.g. family member), which would specify the management responsibilities of the parties to the agreement.

- Requires that the individual receiving services (or the identified adult) be willing and able to co-manage the services.

- Establishes a mechanism for the individual or identified adult to assume key responsibilities, including recruiting staff, making recommendations for staff selection and discharge, and managing the staff schedule.

- Establishes core provider responsibilities, including service monitoring, documentation monitoring and collection, billing, payroll, regulatory compliance, and staff training.

- Requires periodic review of AHRH, and service providers' participation in ISP reviews.

- Establishes that all providers can provide self-direction and family direction as an option.

Fee setting:

- Bases the hourly fees on three regions in the State.

- Bases the hourly fees on the number of individuals being served simultaneously - Individual(1) or Group serving (2), (3), or (4) or more.

- Establishes transitional hourly fees for 2009 and 2010 for some providers based on their historical costs, and a mechanism for transitional fees to be reduced where they were based on incorrect information.

- Allows the fee to be trended and states that the fees are not appealable.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in section 635.10.5(b)(19).

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

**Additional matter required by statute:** Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has on file a Negative Declaration with respect to this action. OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### **Revised Regulatory Impact Statement**

A revised Regulatory Impact Statement is not submitted because the change to paragraph 635-10.5(b)(19) only corrects a mistake in citation (i.e., "subdivision" instead of "section"). This correction does not materially alter the purpose, meaning, or effect of the text and it does not necessitate a revision to the previously published Regulatory Impact Statement.

#### **Revised Regulatory Flexibility Analysis**

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted because the change to paragraph 635-10.5(b)(19) only corrects a mistake in citation (i.e., "subdivision" instead of "section".) This correction does not materially alter the purpose, meaning, or effect of the text and it does not necessitate a revision to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Governments.

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

A revised Rural Area Flexibility Analysis is not submitted because the change to paragraph 635-10.5(b)(19) only corrects a mistake in citation (i.e., "subdivision" instead of "section".) This correction does not materially alter the purpose, meaning, or effect of the text and it does not necessitate a revision to the previously published Regulatory Area Flexibility Analysis.

#### **Revised Job Impact Statement**

A revised Job Impact Statement is not submitted because the change to paragraph 635-10.5(b)(19) only corrects a mistake in citation (i.e., "subdivision" instead of "section".) This correction does not materially alter the purpose, meaning, or effect of the text and it does not necessitate a revision to the previously published Job Impact Statement.

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

OMRDD received comments from 6 different parties: one self-advocate, two provider associations, one advocacy group, a member of the public and the Developmental Disabilities Planning Council. The comments to the proposed regulations and OMRDD's responses to those comments can be found below.

Comment:

OMRDD received a comment from a member of the public about the fiscal aspects of the proposed regulations for At Home Residential Habilitation. He contested the soundness of eliminating the appeals process particularly when implementing an untested methodology. He asked that OMRDD expound on the process for authorizing units of service and the process for changing a provider's initial determination of eligibility for a transitional fee level. He claimed that some providers may lose almost 50% of their revenue in two years.

Response:

OMRDD's responses to the comment contesting eliminating appeals for At Home Residential Habilitation are as follows: The movement to a regional fee is designed to eliminate appeals. Because fee appeals will no longer be available to providers, OMRDD has built in transitional fee schedules to provide a two year safety net to allow a provider with costs that significantly exceed the norm time to re-tool to bring its costs in line with the majority of its counterparts.

Although the current At Home Residential Habilitation fee methodology was designed to individually address each provider's costs and to ensure adequate reimbursement to providers, it has proven in some instances to reward inefficiency rather than effective management. The reality is that providers are reporting widely disparate costs to deliver similar services. While some of the variances are attributable to regional cost differentials and some are the result of agency size and the ability to exercise economies of scale, a significant portion of the variances cannot be explained by geography and agency size. OMRDD's goal in developing the regional fees was to determine what appropriate fees are for At Home Residential Habilitation. OMRDD analyzed data obtained directly from providers. Because the change in methodology replaces a per diem price with an hourly fee, in order to analyze providers' costs for hours of service delivered, OMRDD asked each provider to translate per diem times into hourly measures for a discrete period. OMRDD then examined costs in terms of hours of service delivered. Despite removing extreme outliers, hourly low to high cost deviations approached 500%.

Standardization that accommodates regional differences levels the playing field for all providers.

One of OMRDD's primary objectives in developing new regional fees for At Home Residential Habilitation is to broaden access to this vital service. OMRDD analyzed data, provider business practices and revenue implications in order to support more access, rather than less.

The regulation will not contain more detail on the process of authorizing units of service because each Developmental Disabilities Services Office (DDSO) will have the authority to allocate units of service according to the needs of the individuals served in its region.

OMRDD disagrees with the comment that the regulation should contain more detail on the process for changing a provider's initial determination of eligibility for a transitional fee. The initial determination of eligibility is predicated on providers' cost information from prior years relative to the new fees. OMRDD has sent a letter to each provider indicating the applicable fee schedule. If more recent financial information puts the provider outside the parameters for eligibility and invalidates its need to receive the transitional fee, reimbursement will revert to the appropriate fee schedule. Conversely, OMRDD will entertain a provider's request for the transition fee if more recent information substantiates eligibility. As is the case with other financial regulations, OMRDD will monitor and evaluate the financial effects of these regulations with consideration for future modifications as deemed necessary.

The writer expresses a concern about the possibility of an agency losing 50% of its revenue after two years. OMRDD's projections do not support this conclusion. As stated above, OMRDD will monitor the actual impact which providers experience.

Comment:

Comments received from a provider association praised the collaborative efforts that produced the regulations and described the new rate structure as a "sound fiscal foundation" for the services. The writer suggested that the regulation language allow for modification of the fee structure if it appeared warranted after implementation, particularly with regard to lengthening the transition period should it be found to be insufficient.

Response:

OMRDD is instituting the transition fee to give providers time to review their operations and to make the modifications necessary to operate within the AHRH regional fee levels. OMRDD will monitor and evaluate the financial effects of these regulations.

Comment:

OMRDD received comments from a second provider association. They were also supportive, complimenting OMRDD on its outreach and responsiveness to stakeholders' concerns. Echoing other comments, the representative hypothesized that some providers may not be able to bring their costs in line with the fees within the transition time period. He pointed particularly to those that serve sparsely populated, wide geographic areas that must absorb relatively high costs of transportation. To ascertain the potential magnitude of this outcome, he inquired about the number of individuals and the corresponding units of service for which transition fees might apply.

Response:

Again, OMRDD is instituting the transition fee to give providers time to review their operations and to make the modifications necessary to operate within the AHRH regional fee levels and will monitor and evaluate the financial effects of these regulations.

Comment:

The New York State Developmental Disabilities Planning Council advised that the regulatory language stress coordinating the AHRH services with other services.

Response:

Coordination of all supports and services, including At Home Residential Habilitation, is the responsibility of the Medicaid Service Coordinator (MSC) and all providers serving an individual are expected to coordinate services. It is not necessary to require coordination in this particular regulation.

Comment:

OMRDD received a comment from a self-advocate about the self-directed and family-directed option for At Home Residential Habilitation. She suggested that the regulation language be clearer in the fact that termination of a staff person and day-to-day supervision of staff are the responsibility of the individual and/or family.

Response:

OMRDD is committed to the self-directed and family-directed option for At Home Residential Habilitation. It is believed that this option will allow individuals to have more flexibility and control over their services. OMRDD worked extensively with stakeholders on developing an option that balances the concerns of individuals, families and providers. OMRDD recognizes that in self-directed services, an individual has the right to select staff who will work with him or her and, vice versa, to choose to no longer work with a specific staff person. Providers have the responsibility to respect those choices. However, the provider is still the employer of the staff person, and the authority to hire and fire staff from the provider agency (as opposed to assigning the staff to work with a particular individual) rests with the provider.

OMRDD also added the requirement of a co-management agreement

between the provider, the individual, and if appropriate, the identified adult, in which the terms of each party's responsibilities regarding staff are specified. In the end, however, the individual and his or her family are the decision makers on which agency they want to have deliver their At Home Residential Habilitation supports and services.

Comment:

OMRDD received comments from an analyst of an advocacy coalition. The correspondence covered the following:

1. The writer regards as a "major deficit" the fact that "regulations do not require provider agencies to offer self direction or family directed AHRH services."

2. She states that authorized units of service that go unused should not be reassigned by non-governmental agencies but a determination of reassignment should be the purview of the authorizing source.

3. She contends that OMRDD should not bar payments to parents who provide services defined in the individual's Habilitation Plan and Individualized Service Plan and cites a recent CMS regulation for another program that approves recognizing and reimbursing parents as service providers.

4. She faults OMRDD for the failure of regulations to address language barriers. She states that service providers need to supply interpreters or be allowed to avail themselves of OMRDD's interpreting services. Further, she recommends that all media be available in appropriate languages.

5. She opposes the arbitrary placement of individuals in group settings according to their disabilities as a condition for receiving support services. She objects to segregated group settings and sees a bias against those who need individualized services.

6. She criticizes regional fees as promoting a "one size fits all" mentality. She claims that regional fees contribute to low salaries and the recruitment of the least skilled workers, and that they produce a bias against serving individuals with more intensive needs. Further, she finds that this approach does not lead to incentives for workers to improve their skills.

7. She opines that the regulation has inadequate provisions for working with individuals with medical needs.

8. She disagrees with the limitations which the regulations set on the number of times that will be reimbursed when a worker accompanies an individual while being transported to a therapy.

9. She questions the adequacy of oversight in the self-directed and family-directed options that might put individuals in "emergency conditions or conditions presenting clear and present danger" and feels that monthly MSC visits and semi-annual evaluations are insufficient.

10. She asserts that individuals and their families should govern the training and education requirements for staff employed in their service and that agencies should follow their dictates.

11. She faults the regulations in that they do not accommodate demand for service when there are staff shortages or plan for back-ups in instances when the usual service worker is unavailable. She suggests that parents who serve as back-ups should be compensated for lost wages and benefits; that OMRDD impose penalties on agencies who fail to meet service demands and that OMRDD should monitor and make public agency performance measures to meet demand reliably.

12. She suggests that waiting lists for services demonstrate inadequate oversight of the application process and creation of self-directed services. She favors OMRDD monitoring wait times and service fulfillment practices and sanctioning agencies with poor records.

13. She recommends that services for employed individuals be coordinated so that they do not interfere with their employment and that a mechanism be established to accept service payment through an employee's benefits package.

Response:

The responses below correlate by number with the numbered comments specified above.

1. At this time OMRDD believes that forcing voluntary providers to provide the self-directed or family-directed options within At Home Residential Habilitation could potentially deter providers from offering to provide any At Home Residential Habilitation Services. The self and family directed models are considered options and like all other services are not imposed on agencies. OMRDD believes it is more prudent for individuals and their families to work with agencies that choose to offer a service rather than ones that are forced to do so.

2. As explained in the first response above, the regulation will not contain more detail on the process of authorizing units of service because each Developmental Disabilities Services Office (DDSO) will have the authority to allocate units of service according to the needs of the individuals served in its region.

3. This is not a comment on the regulations. However, OMRDD is reviewing a policy on family as paid staff.

4. The proposed regulations do not address the issue of meeting the needs of non-English speaking persons because existing OMRDD regula-

tions at 14 NYCRR section 633.4(a)(15) address this issue for all programs.

5. The proposed regulations do not dictate either group or individual service arrangements. OMRDD's experience with providers is that they typically deliver At Home Residential Habilitation services in a one-to-one setting. However, the proposed regulations do recognize that individuals may receive At Home Residential Habilitation Services in a group or individual setting.

6. As explained in the first response above, these regional fees were designed to represent an adequate reimbursement that would stimulate access to the service. While the fee may be fixed for all within a region, there are no constraints on the provider's flexibility to construct a compensation framework that accommodates a variety of skill levels and educational backgrounds.

7. AHRH is not intended to be a medical service.

8. OMRDD worked with various groups on developing the exceptions for when At Home Residential Habilitation services are billable. OMRDD recognizes that At Home Residential Habilitation staff help individuals live independently and also help to advocate for the individuals they serve. In addition, OMRDD is in no way limiting the number of clinical appointments that an individual may attend. OMRDD has limited the number of clinical appointments which an At Home Residential Habilitation staff may count as billable time. OMRDD is committed to At Home Residential Habilitation staff assisting individuals with implementing treatments or therapies in the home and therefore, built in the ability for At Home Residential Habilitation staff to periodically attend clinical appointments.

9. First, At Home Residential Habilitation is not an emergency service, and OMRDD does not certify and regulate private homes. Second, OMRDD worked with various stakeholders on developing oversight that would evaluate an individual's appropriateness and safety in the self-directed and family directed options. For all individuals receiving Medicaid Service Coordination (MSC), OMRDD requires the MSC Service Coordinator to have monthly face-to-face visits and quarterly visits to the home with an individual.

10. Regarding the writer's concern of training and education, the proposed At Home Residential Habilitation regulations do not address training because existing OMRDD regulations at 14 NYCRR section 633.8 describe training requirements for all programs.

11. Providers currently have the flexibility to develop policies that meet the needs of the individuals that they serve. Providers do not get reimbursed when staff does not provide At Home Residential Habilitation services as scheduled. On the writer's suggestion that parents be compensated when agency staff does not provide services as scheduled, parents are not authorized At Home Residential Habilitation providers and therefore cannot be paid.

12. Although this is not a comment on the regulations, it is an idea that OMRDD will consider in developing performance measurement standards.

13. The writer expressed a concern for the coordination and delivery of At Home Residential Habilitation services being delivered to individuals who are employed. Agencies are not prohibited from providing At Home Residential Habilitation services to individuals who are employed, and individuals can work with an agency on scheduling At Home Residential Habilitation services around work schedules. The writer makes a second point that providers should accept private payment for services, and that employee benefits should also be allowed for payment. Currently, providers are not prohibited from accepting private payment for At Home Residential Habilitation services. In addition, OMRDD cannot regulate employee benefit programs.

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## Committee on Open Government

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

#### Fees for Copies of Records, Subject Matter List Updates, Update Committee on Open Government's Address

I.D. No. COG-04-09-00010-P

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

**Proposed Action:** This is a consensus rule making to repeal section 1401.8, add sections 1401.6(d) and 1401.8, and amend sections 1401.6(c) and 1401.7(g) of Title 21 NYCRR.

**Statutory authority:** Public Officers Law, section 89(1)(b)(iii); L. 2008, ch. 223; L. 2008, ch. 499

**Subject:** Fees for copies of records, subject matter list updates, update Committee on Open Government's address.

**Purpose:** To conform with recent statutory amendments.

**Text of proposed rule:** Repeal section 1401.8 and add a new section 1401.8 to read as follows:

*1401.8 Fees. Except when a different fee is otherwise prescribed by statute:*

(a) An agency shall not charge a fee for the following:

(1) inspection of records for which no redaction is permitted;

(2) search for, administrative costs of, or employee time to prepare photocopies of records;

(3) review of the content of requested records to determine the extent to which records must be disclosed or may be withheld; or

(4) any certification required pursuant to this Part.

(b) An agency may charge a fee for photocopies of records, provided that:

(1) the fee shall not exceed 25 cents per page for photocopies not exceeding 9 by 14 inches. This section shall not be construed to mandate the raising of fees when an agency in the past has charged less than 25 cents for such copies;

(2) the fee for photocopies of records in excess of 9 x 14 inches shall not exceed the actual cost of reproduction; or

(3) an agency has the authority to redact portions of a paper record and does so prior to disclosure of the record by making a photocopy from which the proper redactions are made.

(c) The fee an agency may charge for a copy of any other record is based on the actual cost of reproduction and may include only the following:

(i) an amount equal to the hourly salary attributed to the lowest paid employee who has the necessary skill required to prepare a copy of the requested record, but only when more than two hours of the employee's time is necessary to do so; and

(ii) the actual cost of the storage devices or media provided to the person making the request in complying with such request; or

(iii) the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, and if such service is used to prepare the copy.

(d) When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, or when doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically. In such case, the agency may charge a fee in accordance with paragraph (c)(i) and (ii) above.

(e) An agency shall inform a person requesting a record of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if it is necessary to retain an outside professional service to prepare a copy of the record.

(f) An agency may require that the fee for copying or reproducing a record be paid in advance of the preparation of such copy.

(g) An agency may waive a fee in whole or in part when making copies of records available.

Amend subdivision (c) of section 1401.6 to read as follows:

(c) [The subject matter list shall be updated] *Each agency shall update its subject matter list annually, and the date of the most recent update shall [appear on the first page of the subject matter] be conspicuously indicated on the list.*

Amend subdivision (d) of section 1401.6 to read as follows:

(d) *Each state agency that maintains a website shall post its current list on its website and such posting shall be linked to the website of the Committee on Open Government. Any state agency that does not maintain a website shall arrange to have its list posted on the website of the Committee on Open Government.*

Amend subdivision (g) of section 1401.7 to read as follows:

(g) The agency shall transmit to the Committee on Open Government copies of all appeals upon receipt of an appeal. Such copies shall be addressed to: the Committee on Open Government, Department of State, [41 State Street] One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, NY 12231.

**Text of proposed rule and any required statements and analyses may be obtained from:** Janet Mercer, NYS Department of State, Committee on Open Government, One Commerce Plaza, 99 Washington Avenue, Suite 650, Albany, NY 12231, (518) 474-2518, email: janet.mercer@dos.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.

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

**Consensus Rule Making Determination**

The primary purpose of the rule is to implement the provisions of Public Officers Law § 87(1)(b) concerning fees that may be charged in response to requests. In particular, the rule would provide guidance to state and local agencies concerning fees for preparing copies of electronic records pursuant to the Freedom of Information Law. No person is likely to object to the adoption of the proposed rule because it implements statutory provisions which must be complied with by all state and local agencies and is otherwise non-controversial.

An additional purpose of the rule is to implement the provisions of Public Officers Law § 87(3)(c) concerning subject matter lists. In particular, the rule would provide guidance to state and local agencies concerning the frequency for updated subject matter lists and the requirement that state agencies make them available online. No person is likely to object to the adoption of the proposed rule because it implements statutory provisions which must be complied with by all state and local agencies and is otherwise non-controversial.

The final purpose of the rule is to update the mailing address for the Committee on Open Government.

**Job Impact Statement**

The primary purpose of the rule is to implement the provisions of Public Officers Law § 87(1)(b) concerning fees that may be charged in response to requests. In particular, the rule would provide guidance to state and local agencies concerning fees for preparing copies of electronic records pursuant to the Freedom of Information Law.

An additional purpose of the rule is to implement the provisions of Public Officers Law § 87(3)(c) concerning subject matter lists. In particular, the rule would provide guidance to state and local agencies concerning the frequency for updated subject matter lists and the requirement that state agencies make them available online.

The final purpose of the rule is to update the mailing address for the Committee on Open Government.

It is therefore apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities.

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## Public Service Commission

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

**Interconnection of the Networks between Verizon New York Inc. and Solarity Comm. for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-04-09-00004-P

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

**Proposed Action:** The PSC is considering whether to approve or reject a proposal filed by Verizon New York Inc. for approval of an Interconnection Agreement with Solarity Communications LLC executed on October 7, 2008.

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

**Subject:** Interconnection of the networks between Verizon New York Inc. and Solarity Comm. for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Verizon New York and Solarity Comm.

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

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

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

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

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

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

(08-C-1375SA1)

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

**Petition for the Submetering of Electricity**

**I.D. No.** PSC-04-09-00005-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Wheaton/TMZ 4th Ave. L.P., to submeter electricity at 251 7th Street, in Brooklyn, New York.

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

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider the request of Wheaton/TMZ 4th Ave. L.P., to submeter electricity at 251 7th Street, in Brooklyn, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Wheaton/TMZ Fourth Avenue Limited Partnership, to submeter electricity at 251 7th Street, in Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(08-E-1405SA1)

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

**Interconnection of the Networks between Verizon New York Inc. and Flint Comm. for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-04-09-00006-P

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

**Proposed Action:** The PSC is considering whether to approve or reject a proposal filed by Verizon New York, Inc. for approval of an Interconnec-

tion Agreement with Flint Communications Inc. executed on October 30, 2008.

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

**Subject:** Interconnection of the networks between Verizon New York Inc. and Flint Comm. for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Verizon New York and Flint Comm.

**Substance of proposed rule:** Verizon New York Inc. (Verizon) and Flint Communications Inc. have reached a negotiated agreement whereby Verizon and Flint Communications Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their network lasting until October 29, 2010, or as extended.

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

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

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

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

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

(08-C-1393SA1)

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

**Deferred Accounting Treatment and Rate Recovery of Unrecovered Property Tax Expenses**

**I.D. No.** PSC-04-09-00007-P

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

**Proposed Action:** The Commission is considering a petition filed by Consolidated Edison Company of New York, Inc. to defer and recover extraordinary property tax expenses.

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

**Subject:** Deferred accounting treatment and rate recovery of unrecovered property tax expenses.

**Purpose:** To defer and recover previously unrecovered extraordinary property tax expenses.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition by Consolidated Edison Company of New York, Inc., to defer and recover \$14.558 million of extraordinary property tax expenses related to the January 1, 2009 tax rate increase by the City of New York. The Commission shall consider all other related matters.

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

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

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

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

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

(08-M-0901SA2)

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

**Approval of a Financing and a Transfer of Ownership Interests in Generation and Steam Facilities**

**I.D. No.** PSC-04-09-00008-P

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

**Proposed Action:** The Public Service Commission is considering a petition from Alliance Energy, New York LLC and Fourth Coast LLC requesting approval of a financing and approval of a transfer of ownership interests in generation and steam facilities.

**Statutory authority:** Public Service Law, sections 69, 70, 82 and 83

**Subject:** Approval of a financing and a transfer of ownership interests in generation and steam facilities.

**Purpose:** Consideration of approval of a financing and a transfer of ownership interests in generation and steam facilities.

**Substance of proposed rule:** The Public Service Commission is considering a petition from Alliance Energy, New York LLC (Alliance) and Fourth Coast LLC (Fourth Coast) requesting approval of a transfer of ownership interests, from Alliance to Fourth Coast, in generation and steam facilities located in Ogdensburg, New York. Fourth Coast also requests approval of a secured note that would fund its purchase. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

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

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

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

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

(08-M-1488SA1)

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

**Dissolution of a Utility Corporation and Filing of Certificate of Dissolution with the Department of State**

**I.D. No.** PSC-04-09-00009-P

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

**Proposed Action:** The PSC is considering a petition filed by Davenport Water Company seeking approval for the dissolution of the company and authorization to file a Certificate of Dissolution with the New York Department of State.

**Statutory authority:** Public Service Law, section 108

**Subject:** Dissolution of a utility corporation and filing of Certificate of Dissolution with the Department of State.

**Purpose:** To determine if the company should be dissolved and if the filing of a Certificate of Dissolution should be approved.

**Substance of proposed rule:** By petition dated December 29, 2008, Davenport Water Company seeks approval of the dissolution of the corporation and the filing of a Certificate of Dissolution with the New York Department of State. The Commission is considering whether to grant or deny, in whole or in part, the requested relief.

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

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-W-0317SA2)

## Racing and Wagering Board

### ERRATUM

A Proposed Rule Making, No hearing(s) Scheduled, I.D. No. RWB-34-08-00003-P, pertaining to Bonus Ball Bingo, published in the August 20, 2008 issue of the *State Register* failed to include the full text of rule 5820.57. The following includes the full text of the rule.

New section 5820.57 is added to 9NYCRR to read as follows:  
5820.57 Bonus Ball.

*Bonus ball is a special bingo game played in conjunction with one or more regular and/or special bingo games that have been designated by the licensed authorized organization on its application for bingo license and on the bingo program required by Section 5820.39 of this subtitle as "Bonus Ball Games" and in which a "Bonus Ball Prize" is awarded to the player acquiring the designated winning bingo pattern when the last number called and marked by that player is identical to the "Bonus Ball Number".*

1. a. *Bonus ball may be conducted during single occasions, and during each occasion of multiple occasion bingo sessions known as Double Headers and Triple Headers, as described in subdivision 2 of this section, provided the licensed authorized organization adheres to all of the provisions of this Subtitle related to the determination of the Bonus Ball Number, the sale of opportunities to enroll in bonus ball, and the establishment, awarding, or carrying-over of the bonus ball prize.*

b. *The "Bonus Ball Number" is determined for each occasion by the bingo caller's drawing of a bingo ball from the receptacle, the caller's announcement that the ball drawn is the Bonus Ball Number for that occasion only, the prominent posting of the Bonus Ball Number in an area of the bingo premises visible to the majority of players, and the immediate return of that ball to the receptacle. The Bonus Ball Number must be determined, announced and prominently posted prior to the start of the first bingo game in each occasion.*

c. *To be eligible to participate in bonus ball, each player must pay a fee for that opportunity prior to the start of the first bingo game in an occasion wherein bonus ball will be played. To verify payment, the player shall be issued a bonus ball receipt unique to that occasion, or some similar method of verifying payment must be used, such as stamping the player's hand with ink, or indelibly marking their bingo cards to reflect payment.*

d. *The fee for a single opportunity to participate in bonus ball, which cannot exceed one dollar, entitles each participating player to compete in all bingo games conducted during an occasion that are specified as bonus ball games in the authorized organization's application for bingo license, and on the bingo program required by Section 5820.39 of this subtitle.*

e. *All sales of opportunities to play bonus ball must cease prior to the caller's announcement of the total amount collected from the sale of opportunities to participate in bonus ball and the amount of the bonus ball prize.*

f. *The total amount collected from the sale of opportunities to participate in bonus ball and the amount of the bonus ball prize must be announced by the caller at least fifteen minutes prior to the start of the first bingo game designated as a bonus ball game in each occasion.*

g. *If a winner of a designated bonus ball game is verified, a bonus ball prize consistent with subdivision h. below shall be awarded to the winning player, and the caller shall declare the bonus ball game closed for the remainder of that bingo occasion.*

h. *Each winner of a bonus ball game shall be awarded a cash prize equal to a percentage of the proceeds collected from the sale of opportunities to participate in bonus ball, which cannot exceed seventy-five percent of the proceeds derived from such sales. The remaining percentage of the proceeds from those sales, which cannot be less than twenty-five percent, is retained by the licensed authorized organization as profit. The percentage of sales used to calculate bonus ball prizes must be consistently applied at all occasions, as specified in the licensed authorized organization's application for bingo license, on the license, and on the bingo program required by Section 5820.39 of this Subtitle.*

i. *If there is no winner during a bingo occasion in which opportunities to play bonus ball are sold, the bonus ball prize money is carried-over and added to the specified percentage of the proceeds derived from the sale of bonus ball opportunities during each subsequent bingo occasion, until a winner is determined and the bonus ball prize is awarded, provided, however, pursuant to Subsection 11-b of Section 1 of Section 476 of the General Municipal Law, that no bonus ball prize can exceed the sum of \$6,000. When a bonus ball prize reaches \$6,000, that prize must remain at \$6,000 until a winner is determined. All proceeds from the sale of opportunities collected after a bonus ball prize has reached \$6,000 shall be retained by the licensed authorized organization as profit until the \$6,000 bonus ball prize is awarded, at which time the caller shall declare the bonus ball game closed for the remainder of that bingo occasion.*

j. *Bonus ball prizes are exempt from the single game prize limitation of \$1,000 and the \$3,000 limit on the series of prizes imposed by Subdivisions 5 and 6 of Section 479, paragraph (a) of Subdivision 1 of Section 481 of the General Municipal Law, and Section 5820.25 of this Title. However, as detailed in Subsection i. above, no bonus ball prize can exceed the sum of \$6,000, pursuant to Subsection 11-b of Section 1 of Section 476 of the General Municipal Law.*

k. *Although the prizes awarded in Bonus Ball games are comprised of a predetermined percentage of the proceeds collected from the sale of opportunities identical to the prizes awarded in Early Bird bingo games defined in 5800.1 (h) and conducted pursuant to Section 5820.50 of this Subtitle, Early Bird and Bonus Ball are two distinctly separate bingo games. Authorized organizations may be licensed to conduct two Early Bird games per occasion, and can also designate any or all of the regular and/or special bingo games conducted during that occasion to be Bonus Ball games.*

2. *Opportunities to participate in both occasions of a double-header or all three occasions of a triple header session may be sold prior to the first occasion in such sessions, provided;*

a. *The proceeds from the total sales of bonus ball opportunities are, prior to the start of the first occasion, divided into two equal parts for a double header, and three equal parts for a triple header, and that those parts shall be subdivided according to the percentages specified on the application for the bingo license to form the percentage of such funds to be retained by the licensee as the profit for each occasion, and the percentage of the proceeds to be available as separate prizes in each of the occasions in the session, and*

b. *The bonus ball number must be determined by a drawing of a bingo ball from the bingo receptacle, and it must be announced; prominently posted in the area of the bingo premises occupied by the majority of players; and shall be returned to the receptacle prior to the start of the first bingo game in each occasion in which bonus ball is conducted, unless the application for bingo license specifies that the bonus ball number drawn prior to the first game in the first occasion of a double header or triple header session shall be designated the bonus ball number for all of the occasions conducted during that session.*

Text of proposed rule and any required statements and analyses may be obtained from: Gail Pronti, Secretary to the Board, NYS Racing and Wagering Board, One Broadway Center, Suite 600, Schenectady, NY 12305, (518) 395-5400, email: info@racing.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 the notice.

## Department of State

### EMERGENCY RULE MAKING

#### Temporary Swimming Pool Enclosures

I.D. No. DOS-44-08-00005-E

Filing No. 45

Filing Date: 2009-01-09

Effective Date: 2009-01-09

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

**Action taken:** Addition of section 1228.4 to Title 19 NYCRR.

**Statutory authority:** Executive Law, sections 377 and 378; and L. 2007, ch. 234, section 3

**Finding of necessity for emergency rule:** Preservation of public safety.

**Specific reasons underlying the finding of necessity:** This rule is adopted on an emergency basis to preserve public safety and because time is of the essence. Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007, provide that the State Uniform Fire Prevention and Building Code (the Uniform Code) must (1) include standards for temporary swimming pool enclosures used during the construction or installation of swimming pools requiring that any such enclosure shall sufficiently prevent any access to such swimming pool by any person not engaged in the installation or construction of such swimming pool and shall sufficiently provide for the safety of any such person, and (2) require that any temporary swimming pool enclosure be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in ground swimming pool, whichever is later. Section 3 of Chapter 234 of the Laws of 2007 provides that the regulations necessary to implement the new requirements must be adopted prior to the effective date of Chapter 234. The effective date of Chapter 234 was January 14, 2008. A prior emergency rule similar to this rule was filed on January 14, 2008 and became effective on that date. The prior emergency rule has expired. A second emergency rule similar to this rule was filed on April 11, 2008 and became effective on that date. That rule has also expired. A third emergency rule similar to this rule was filed on July 10, 2008 and became effective on that date. That rule has also expired. Adoption of this rule on an emergency basis is necessary to reduce the number of accidental drownings in swimming pools, and to continue to satisfy the mandate of section 3 of Chapter 234 of the Laws of 2007.

**Subject:** Temporary swimming pool enclosures.

**Purpose:** Implement Executive Law section 378(14)(c) and (16), as added by chapter 234 of the Laws of 2007.

**Text of emergency rule:** Part 1228 of Title 19 NYCRR is amended by adding a new section 1228.4 to read as follows:

*Section 1228.4. Temporary swimming pool enclosures.*

(a) *Purpose.* This section is intended to implement the provisions of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007. (The provisions of Executive Law section 378(14)(c), as added by Chapter 75 of the Laws of 2007, as well as the provisions of Executive Law section 378(14)(b), are implemented by section 1228.2 (Pool alarms) of this Part.)

(b) *Definitions.* For the purposes of this section, the following words and terms shall have the following meanings:

(1) The word "approved" means approved by the code enforcement official responsible for enforcement and administration of the Uniform Code as complying with and satisfying the purposes of this section.

(2) The term "complying permanent enclosure" means an enclosure which surrounds a swimming pool and which complies with (i) all provisions of the Uniform Code (other than the provisions of subdivision (c) of this section) applicable to swimming pool enclosures, (ii) the provisions of any and all other New York State codes or regulations applicable to swimming pool enclosures, and (iii) any and all local laws applicable to swimming pool enclosures and in effect in the location where the swimming pool shall have been installed or constructed.

(3) The term "swimming pool" means any structure, basin, chamber or tank which is intended for swimming, diving, recreational bathing or wading and which contains, is designed to contain, or is capable of

containing water more than 24 inches (610 mm) deep at any point. This includes in-ground, above-ground and on-ground pools; indoor pools; hot tubs; spas; and fixed-in-place wading pools.

(c) *Temporary enclosures.* During the installation or construction of a swimming pool, such swimming pool shall be enclosed by a temporary enclosure which shall sufficiently prevent any access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and sufficiently provide for the safety of any such person. Such temporary enclosure may consist of a temporary fence, a permanent fence, the wall of a permanent structure, any other structure, or any combination of the foregoing, provided all portions of the temporary enclosure shall be not less than four (4) feet high, and provided further that all components of the temporary enclosure shall have been approved as sufficiently preventing access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and as sufficiently providing for the safety of all such persons. Such temporary enclosure shall remain in place throughout the period of installation or construction of the swimming pool, and thereafter until the installation or construction of a complying permanent enclosure shall have been completed.

(d) *Permanent enclosures.* A temporary swimming pool enclosure described in subdivision (c) of this section shall be replaced by a complying permanent enclosure. The installation or construction of the complying permanent enclosure must be completed within ninety days after the later of

(1) the date of issuance of the building permit for the installation or construction of the swimming pool or

(2) the date of commencement of the installation or construction of the swimming pool; provided, however, that if swimming pool is installed or constructed without the issuance of a building permit, the installation or construction of the complying permanent enclosure must be completed within ninety days after the date of commencement of the installation or construction of the swimming pool. Nothing in this subdivision shall be construed as permitting the installation or construction of a swimming pool without the issuance of a building permit if such a building permit is required by any statute, rule, regulation, local law or ordinance relating to the administration and enforcement of the Uniform Code with respect to such swimming pool.

(e) *Extensions.* Upon application of the owner of a swimming pool, the governmental entity responsible for administration and enforcement of the Uniform Code with respect to such swimming pool may extend the time period provided in subdivision (d) of this section for completion of the installation or construction of the complying permanent enclosure for good cause, including, but not limited to, adverse weather conditions delaying construction.

(f) *Exceptions.* An above-ground hot tub or spa equipped with a safety cover classified by Underwriters Laboratory, Inc. (or other approved independent testing laboratory) to reference standard ASTM F1346 (2003), entitled "Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs," published by ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428, shall be exempt from the requirements of subdivisions (c) and (d) of this section, provided that such safety cover is in place during the period of installation or construction of such hot tub or spa. The temporary removal of a safety cover as required to facilitate the installation or construction of a hot tub or spa during periods when at least one person engaged in the installation or construction of the hot tub or spa is present shall not invalidate the exception provided in this subdivision.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. DOS-44-08-00005-EP, Issue of October 29, 2008. The emergency rule will expire April 8, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Raymond Andrews, Department of State, 99 Washington Ave., Albany, New York 12231-0001, (518) 474-4073, email: Raymond.Andrews@dos.state.ny.us

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

Executive Law section 377(1) authorizes the State Fire Prevention and Building Code Council to periodically amend the provisions of the New York State Uniform Fire Prevention and Building Code ("Uniform Code"). Executive Law section 378(1) directs that the Uniform Code shall address standards for safety and sanitary conditions. Executive Law section 378(16), as added by Chapter 234 of the Laws of 2007, requires that the Uniform Code include standards for temporary swimming pool enclosures used during the installation or construction of swimming pools requiring that any such enclosure shall sufficiently prevent any access to

such swimming pool by any person not engaged in the installation or construction of such swimming pool and shall sufficiently provide for the safety of any such person. Executive Law section 378(14)(c), as added by Chapter 234 of the Laws of 2007, requires that the Uniform Code provide that any temporary swimming pool enclosure be replaced by a permanent enclosure which is in compliance with New York state codes, regulations or local laws within ninety days from the issuance of a local building permit or the commencement of the installation of an in-ground swimming pool, whichever is later. Executive Law section 378(14)(c), as added by Chapter 234 of the Laws of 2007, also provides that a local building department may issue a waiver to allow an extension of such ninety day time period for good cause, including but not limited to adverse weather conditions delaying construction.

## 2. LEGISLATIVE OBJECTIVES:

The Legislative objective sought to be achieved by this rule is a reduction in the number of accidental drownings in swimming pools in this State.

## 3. NEEDS AND BENEFITS:

In the memorandum accompanying the bill which became Chapter 234 of the Laws of 2007, the Legislature stated as justification for the bill:

“According to a 2004 study by the National SAFE KIDS Campaign, drowning is the second leading cause of injury-related death among children ages 1 to 14. In 2001, 859 children under age 14 died from drowning, and in 2002, an estimated 2,700 children under age 14 were treated in hospital emergency rooms for near-drowning. Drowning can occur in only one inch of water. A child loses consciousness after two minutes of being submerged, and permanent brain damage occurs after only four to six minutes.

“The health effects of near-drowning can also be severe, including permanent neurological disability, and psychological and emotional impacts. The financial impacts on the child’s family are also significant, with costs of \$75,000 for initial treatment, \$180,000 per year for long-term care, and a lifetime cost of over \$4.5 million per child. Of all drownings reviewed by SAFE KIDS, 39 percent occurred in pools.

“Studies have shown that proper fencing could reduce the number of deaths caused by drowning and near-drownings that involve children by 50 to 90 percent.

“In one tragic incident on May 1, 2005, Matthew Lenz, age 2 1/2 of Craryville in Columbia County, lost his life after wandering onto a neighbor’s property with an in-ground swimming pool that had no fence. Had the pool been properly secured by fencing, as required by the State Residential Code section AG 105, Matthew’s life may have been spared.

“At present, New York’s residential codes pertaining to pool enclosures comply and surpass federal code. On occasion however, fencing is not erected at all, or some pool owners rely on temporary fencing for an inordinate amount of time. While municipal building departments are charged with the responsibility of inspecting pool enclosures, they are reliant on pool owners to seek building permits and, at times, never notified that a pool has been installed.

“Neither current statute nor rules and regulations pertaining to swimming pool enclosures address the length of time a temporary fence may be in place.”

This rule making amends the Uniform Code by adding a new provision (19 NYCRR section 1228.4) which requires that a swimming pool be enclosed by a temporary enclosure during the installation or construction of the pool; requires that such temporary enclosure sufficiently prevent access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and sufficiently provide for the safety of any such person; and requires that such temporary enclosure be replaced by a permanent enclosure that complies with the requirements of existing laws and regulations within 90 days of issuance of the building permit or commencement of installation or construction of the pool. By requiring the use of such temporary enclosures during installation / construction, and by requiring the replacement of such temporary enclosures with permanent enclosures within the stated time period, this rule should provide the benefit intended by the Legislature: a reduction in the number of accidental drownings.

## 4. COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing and installing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the

plastic orange type with wood or metal stakes or the green wire “yard guard fence” type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows: orange fence material, approximately \$225 to \$275; green wire “yard guard” fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation.

Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool construction or installation activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction/installation period.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

There are no costs to the Department of State for the implementation of the rule. The Department of State is not required to develop any additional regulations or develop any programs to implement the rule.

There are no costs to New York State or local governments for the implementation of the rule; provided, however, that if the State or any local government installs or constructs a swimming pool, it will be required to install the temporary enclosure as required by this rule, and to replace such temporary enclosure with a permanent enclosure within the time period specified by this rule. In addition, since this rule adds provisions to the Uniform Code, in a situation where the State or a local government is responsible for administration and enforcement of the Uniform Code with respect to the installation or construction of a swimming pool, the State or such local government will be required to consider the requirements added by this rule in reviewing plans and performing inspections; however, it is anticipated that this will not have a significant impact on the review and/or inspection process.

## 5. PAPERWORK:

This rule imposes no new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

## 6. LOCAL GOVERNMENT MANDATES:

This rule does not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows: First, any county, city, town, village, school district, fire district or other special district that installs or constructs a swimming pool will be required to comply with this rule. Second, cities, towns and villages (and sometimes counties) are charged by Executive Law section 381 with the responsibility of administering and enforcing the Uniform Code; since this rule adds provisions to the Uniform Code, the aforementioned local governments will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code.

## 7. DUPLICATION:

The rule does not duplicate any existing Federal or State requirement.

## 8. ALTERNATIVES:

This rule provides an exemption from the temporary enclosure requirement for above-ground spas and hot tubs equipped with a safety cover. The alternative of not providing such an exemption was considered, but rejected, because hot tubs and spas equipped with a safety cover are exempt from the permanent enclosure requirements, and it would be illogical to require such hot tubs and spas to be enclosed with a temporary enclosure during the installation / construction period when they are not required to be enclosed with a permanent enclosure after installation / construction is complete. The alternative of providing an exemption for in-ground hot tubs and spas was considered and rejected, since there would be an unprotected and uncovered hole in the ground during the installation / construction of such a hot tub or spa, and a temporary enclosure would provide a measure of protection against children and others falling into the hole during the installation / construction period. No other significant alternatives to this rule were considered, since other alternatives would not provide the safety protections contemplated by Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007.

## 9. FEDERAL STANDARDS:

There are no standards of the Federal Government which address the subject matter of the rule

#### 10. COMPLIANCE SCHEDULE:

Regulated persons will be able to achieve compliance with the rule in the normal course of the installation or construction of a swimming pool.

#### *Regulatory Flexibility Analysis*

##### 1. EFFECT OF RULE:

This rule will apply to any small business and any local government that installs or constructs a swimming pool. The State Fire Prevention and Building Code Council (the Code Council) and the Department of State are unable to estimate the number of small businesses and local governments that own or operate swimming pools; however, it is believed that a majority of the non-residential swimming pools in this State are owned or operated by small businesses or local governments.

Small businesses that install or construct swimming pools for others will also be affected by this rule.

Since this rule adds a provisions to the Uniform Fire Prevention and Building Code (the Uniform Code), each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The State Fire Prevention and Building Code Council (the Code Council) and the Department of State estimate that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

##### 2. COMPLIANCE REQUIREMENTS:

No reporting or record keeping requirements are imposed upon regulated parties by the rule.

Small businesses and local governments that install or construct swimming pools will be required to erect a temporary enclosure around the pool during the installation / construction period, and to replace the temporary enclosure with a permanent enclosure (as required by existing laws and regulations) within 90 days after issuance of the building permit or commencement of installation or construction. Local governments that enforce the Uniform Code will be required to consider the requirements of this rule when reviewing plans for installation or construction of a pool by any person or entity, public or private, and when inspecting work.

##### 3. PROFESSIONAL SERVICES:

No professional services will be required to comply with the rule.

##### 4. COMPLIANCE COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing and installing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows: orange fence material, approximately \$225 to \$275; green wire "yard guard" fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation. Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting pool installation / construction activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction / installation period.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days after issuance of the building permit or commencement of installation of the pool, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

##### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

It is economically and technologically feasible for regulated parties to comply with the rule. No substantial capital expenditures are imposed and no new technology need be developed for compliance.

##### 6. MINIMIZING ADVERSE IMPACT:

The rule minimizes any potential adverse economic impact on regulated

parties (including small businesses or local governments) by allowing use of any type of temporary enclosure, provided that it is (1) at least 4 feet high and (2) approved by the code enforcement official as sufficiently preventing access to the swimming pool by any person not engaged in the installation or construction of the swimming pool, and as sufficiently providing for the safety of any such person; by permitting all or any part of the permanent enclosure (as required by existing laws and regulations) to be used as all or part of the temporary enclosure, thereby permitting regulated parties to minimize the amount of temporary enclosure components required during construction; and by providing an exemption from the temporary enclosure requirements for above-ground hot tubs and spas equipped with a safety cover.

This rule implements Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007. Those statutes do not authorize the establishment of differing compliance requirements or timetables with respect to swimming pools owned or operated by small businesses or local governments.

Except for the exemption for above-ground hot tubs and spas equipped with a safety cover, providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

On December 6, 2007, the Department of State notified code enforcement officials throughout the State and other interested parties of the new requirements to be imposed by this rule by means of a notice in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and currently distributed to approximately 7,000 subscribers representing all aspects of the construction industry. The notice was also posted on the Department of State's website. The notice invited interested parties to provide comments.

#### *Rural Area Flexibility Analysis*

##### 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule implements the provisions of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007, by adding a provision to the Uniform Fire Prevention and Building Code ("Uniform Code") requiring that swimming pools be enclosed by a temporary enclosure during the period of installation or construction of the pool, and requiring that such temporary enclosure be replaced with a permanent enclosure within 90 days. Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

##### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements. The rule will impose the following compliance requirements: swimming pools will be required to be enclosed by temporary enclosures during the period of installation or construction of the pool, and such temporary enclosures will be required to be replaced with a permanent enclosure as required by existing laws and regulations within 90 days after issuance of the building permit or commencement of installation or construction. No professional services are likely to be needed in a rural area in order to comply with such requirements.

##### 3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the temporary enclosure. The cost of complying with this rule in connection with the construction or installation of any particular pool will depend on the size of the temporary enclosure that must be used to enclose such pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows: orange fence material, approximately \$225 to \$275; green wire "yard guard" fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation. Regulated parties will be able to minimize the cost of complying with this rule by constructing as much of the permanent enclosure as can be installed without restricting

pool installation / construction activities, and by using temporary enclosure components to enclose only the remainder of the pool area during the construction / installation period. Any variation in such costs for different types of public and private entities in rural areas will be attributable to the size and configuration of the swimming pools owned or operated by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

Since this rule requires the temporary enclosure to be replaced with a permanent enclosure within 90 days, and since the permanent enclosure mentioned in this rule is required by existing laws and rules, and not by this rule, there should be no recurring annual costs of complying with this rule.

#### 4. MINIMIZING ADVERSE IMPACT.

Executive Law sections 378(14)(c) and 378(16) make no distinction between swimming pools located in rural areas and swimming pools located in non-rural areas. However, the economic impact of this rule in rural areas will be no greater than the economic impact of this rule in non-rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas.

Executive Law sections 378(14)(c) and 378(16) do not authorize the establishment of differing compliance requirements or timetables in rural areas.

The rule provides exemptions from the temporary enclosure requirements for above-ground hot tubs and spas equipped with safety covers because such hot tubs and spas are exempt from permanent enclosure requirements. Providing additional exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

#### 5. RURAL AREA PARTICIPATION.

On December 6, 2007, the Department of State notified code enforcement officials throughout the State, including those in rural areas, and other interested parties of the new requirements to be imposed by this rule by means of a notice in Building New York, a monthly electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and currently distributed to approximately 7,000 subscribers representing all aspects of the construction industry. The notice was also posted on the Department of State's website. The notice invited interested parties to provide comments.

##### **Job Impact Statement**

The Department of State and the State Fire Prevention and Building Code Council have concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

The rule adds a requirement to the Uniform Fire Prevention and Building Code ("Uniform Code") that swimming pools be enclosed by a temporary enclosure during the period of installation or construction of the pool, and that such temporary enclosure be replaced with a permanent enclosure (as required by existing laws and regulations) within 90 days. This provision is added to the Uniform Code pursuant to the requirements of Executive Law sections 378(14)(c) and 378(16), as added by Chapter 234 of the Laws of 2007.

Regulated parties may comply with this rule by installing a temporary enclosure during installation or construction of the pool. Temporary fences that would satisfy the requirements of this rule are relatively inexpensive, and are available at most lumber and hardware type stores. The fencing can include the plastic orange type with wood or metal stakes or the green wire "yard guard fence" type. Wooden snow fencing can also be used. The Department of State estimates that the cost of enclosing an average residential pool (16 foot by 32 foot), including the cost of the fencing material, the stakes, and the labor, will be as follows: orange fence material, approximately \$225 to \$275; green wire "yard guard" fence, approximately \$600 to \$650; and wooden snow fencing, approximately \$400 to \$450. The Department of State estimates that between 25% and 50% of the material used to construct a temporary pool enclosure can be reused. A business that installs pools on a regular basis would presumably reuse temporary fence materials to the maximum extent possible, which should reduce the average cost of per pool installation. Regulated parties will be permitted to use components of the permanent enclosure that will be required by existing laws and regulations after installation or construction is complete as all or part of the temporary enclosure during the installation / construction period. This would permit regulated parties to minimize the cost of the temporary enclosure by constructing as much of the permanent enclosure as can be installed without restricting pool installation /

construction activities, and enclosing only the remaining portion of the pool area with a temporary enclosure.

It is anticipated that the cost of providing the temporary enclosures required by this rule will be insignificant when compared to the overall cost constructing or installing a swimming pool. Accordingly, it is anticipated that this rule will have no significant impact on the number of pools installed or constructed in this State, and that this rule will not have a "substantial adverse impact on jobs and employment opportunities."

## EMERGENCY RULE MAKING

### Administration and Enforcement of the Uniform Code by the Department of State

**I.D. No.** DOS-04-09-00001-E

**Filing No.** 47

**Filing Date:** 2009-01-09

**Effective Date:** 2009-01-09

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

**Action taken:** Repeal of sections 1202.1-1202.6; renumbering of section 1202.7 to 1202.12; amendment of section 1202.12; and addition of sections 1202.1-1202.11 to Title 19 NYCRR.

**Statutory authority:** Executive Law, section 381(1) and (2)

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

**Specific reasons underlying the finding of necessity:** Part 1202 of Title 19 NYCRR ("Part 1202") establishes the procedures applicable in circumstance in which the Department of State ("DOS") must administer and enforce the Uniform Fire Prevention and Building Code (the "Uniform Code"). For many years prior to 2009, DOS administered and enforced the Uniform Code only with respect to buildings and structures in the custody of 15 counties (the "opted-out counties"). On January 1, 2009, DOS became responsible for administering and enforcing the Uniform Code with respect to all buildings and structures, public and private, in a town located in one of the opted-out counties. However, DOS's code enforcement program (Part 1202) does not now include all of the features which must be included in a code enforcement program adopted by a local government that administers and enforces the Uniform Code (those features being described in 19 NYCRR Part 1203). This rule will amend Part 1202 to make the features of DOS's code enforcement program (Part 1202) substantially similar to the features that local governments must include in the code enforcement programs they are required to adopt under the current version of Part 1203. Adopting this rule on an emergency basis is required to preserve public safety and the general welfare by ensuring that administration and enforcement of the Uniform Code by DOS in the town mentioned above will be conducted in a manner that satisfies the minimum standards established by the rules and regulations promulgated by the Secretary of State pursuant to Executive Law section 381(1).

**Subject:** Administration and enforcement of the Uniform Code by the Department of State.

**Purpose:** To ensure that administration and enforcement of the Uniform Code will be conducted in a manner that satisfies the minimum standards established by Executive Law section 381(1).

**Substance of emergency rule:** Subdivision 1 of Executive Law section 381 authorizes the Secretary of State to promulgate rules and regulations prescribing minimum standards for administration and enforcement of the State Uniform Fire Prevention and Building Code (the Uniform Code). Subdivision 2 of Executive Law section 381 provides that in the event that a local government elects not to administer and enforce the Uniform Code within such local government, and the county in which such local government is located elects not to administer and enforce the Uniform Code in such county, the Secretary of State shall administer and enforce the Uniform Code in the place and stead of such local government. Part 1202 of Title 19 NYCRR establishes the procedures applicable in circumstance in which the Secretary of State must administer and enforce the Uniform Code. This rule amends Part 1202.

This rule renumbers current Section 1202.7 (Fees) of Title 19 NYCRR as section 1202.12.

This rule repeals current Sections 1202.1 to 1202.6 of Title 19 NYCRR and adds new Sections 1202.1 to 1202.11.

New Section 1202.1 specifies the purpose of Part 1202 and defines certain terms used in Part 1202.

New Section 1202.2 provides that building permits and demolition permits are required for any work which must comply with the Uniform

Code or Energy Code. Section 1202.2 also specifies certain exceptions, where a permit is not required; specifies requirements applicable to permit applications; specifies requirements applicable when a permit applicant is not the owner of the subject property; specifies requirements applicable to the construction documents that must be submitted with a permit application; specifies requirements applicable to the issuance and display of permits; specifies when permits may be suspended or revoked; and specifies the duration of permits and the procedures applicable to renewal of permits.

New Section 1202.3 provides that construction inspections will be performed at appropriate stages during the performance of work for which a building permit has been issued. Section 1202.2 also includes provisions relating to scheduling inspections, and includes provisions relating to the results of the inspections.

New Section 1202.4 provides that a certificate of occupancy or certificate of completion must be obtained upon completion of any work for which a permit has been issued. Section 1202.4 also prohibits the use or occupancy of buildings or structures without an appropriate certificate of occupancy or certificate of completion; prohibits any change in the nature of the occupancy of an existing building or structure, or any portion thereof, unless a certificate of occupancy authorizing the change has been issued; includes provisions relating to temporary certificates of occupancy; includes provisions relating to the issuance of certificates and the suspension or revocation of certificates.

New Section 1202.5 provides for periodic inspections of buildings for compliance with applicable fire safety and property maintenance provisions of the Uniform Code. In general, buildings which contain an area of public assembly, buildings under the jurisdiction of a college, and dormitories shall be subject to inspection at least once every twelve (12) months; normally unoccupied buildings shall be subject to inspection at least once every sixty (60) months; and all other buildings shall be subject to inspection at least once every thirty-six (36) months. However, Section 1202.5 provides that in most cases, regular, periodic inspections of agricultural buildings used directly and solely for agricultural purposes, one-family dwellings, two-family dwellings, townhouses, or occupied dwelling units in multiple dwellings shall not be required. Section 1202.5 also includes provisions relating to inspections that are in addition to the regular, periodic inspections previously described.

New Section 1202.6 includes provisions relating to operating permits. Section 1202.6 prohibits certain activities and certain uses of buildings without an appropriate operating permit. Section 1202.6 also includes provisions relating to applications for operating permits; tests that may be required prior to the issuance of an operating permit; inspections to be performed prior to the issuance of an operating permit; the duration of an operating permit; keeping operating permits at the subject premises and making operation permits available for inspection; posting operation permits in a conspicuous place at the subject premises; and revocation or suspension of operating permits.

New Section 1202.7 includes provisions relating to violations and remedies. Section 1202.7 authorizes the Department of State and its employees and agents to issue stop work orders, not to be occupied orders, compliance orders, notices of violation, and appearance tickets, and includes provisions relating to the content, service, and effect of stop work orders, not to be occupied orders and compliance orders. Section 1202.7 also includes provisions relating to applications by the Department of State for injunctive relief. The remedies and penalties specified in section 1202.7 are not exclusive, and shall be in addition to, and not in substitution for or limitation of, the other remedies or penalties specified in any other applicable law.

New Section 1202.8 includes provisions relating to the review and investigation of complaints which allege or assert the existence of conditions or activities that fail to comply with the Uniform Code, the Energy Code, or Part 1202.

New Section 1202.9 provides that the chief of any fire department providing fire fighting services for any building subject to this Part shall promptly notify the Department of any fire or explosion in any building subject to this Part involving any structural damage, fuel burning appliance, chimney or gas vent.

New Section 1202.10 includes provisions relating to unsafe building and structures.

New Section 1202.11 includes provisions relating to performance of reviews of permit applications by third party reviewers, and performance of construction inspections, periodic inspections and operating permit inspections by third party inspectors. Such reviews would be performed at the cost and expense of the owner or occupant or proposed owner or occupant of the subject premises by a competent reviewer or inspector acceptable to the Department of State.

Former section 1202.7 of Title 19 NYCRR, renumbered as section 1202.12 by this rule, is amended by this rule. In general, existing fees are not changed, although some provisions relating to existing fees are

clarified. Section 1202.12 also adds provisions relating to reduced fees payable to the Department of State when a third party reviewer, a third party inspector, or both a third party reviewer and a third party inspector are used. Section 1202.12 also establishes fees for items for which no fee was previously established, such as fees for operating permits.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 8, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Steven Rocklin, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Steven.Rocklin@dos.state.ny.us

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY.**

Subdivision 1 of Executive Law section 381 authorizes the Secretary of State to promulgate rules and regulations prescribing minimum standards for administration and enforcement of the State Uniform Fire Prevention and Building Code (the Uniform Code).

Subdivision 2 of Executive Law section 381 provides that in the event that a local government elects not to administer and enforce the Uniform Code within such local government, and the county in which such local government is located elects not to administer and enforce the Uniform Code in such county, the Secretary of State shall administer and enforce the Uniform Code in the place and stead of such local government.

Part 1202 of Title 19 NYCRR establishes the procedures applicable in circumstance in which the Secretary of State must administer and enforce the Uniform Code. This rule amends Part 1202.

##### **2. LEGISLATIVE OBJECTIVES.**

This rule will further the legislative objective of ensuring that administration and enforcement of the Uniform Code be conducted in a manner that satisfies the minimum standards established by the rules and regulations promulgated by the Secretary of State pursuant to Executive Law section 381(1).

Part 1203 of Title 19 NYCRR was promulgated pursuant to Executive Law section 381(1). Part 1203 establishes the minimum standards for administration and enforcement of the Uniform Code by local governments.

Part 1203 was amended in 2005, with an effective date of January 1, 2007. At the time of the amendment of Part 1203, the Department of State (DOS) was not responsible for administration and enforcement of the Uniform Code in any local government. However, one local government has recently enacted a local law providing that it (the local government) will not enforce the Uniform Code within such local government on or after January 1, 2009. This particular local government is located in a county that has also elected not to enforce the Uniform Code. As a result, DOS will become responsible for administration and enforcement of the Uniform Code within that local government, starting on January 1, 2009.

Part 1202 of Title 19 NYCRR establishes the procedures applicable in circumstances in which DOS must administer and enforce the Uniform Code. As of January 1, 2009, Part 1202 will be, in effect, the code enforcement program in the local government mentioned above. Thereafter, Part 1202 will become the code enforcement program in any other local government in which DOS may become responsible for enforcing the code. This rule will amend Part 1202 to make the features of DOS's code enforcement program (Part 1202) substantially similar to the features that local governments must include in the code enforcement programs they are required to adopt under the current version of Part 1203.

##### **3. NEEDS AND BENEFITS.**

The purpose of this rule is to cause the features included in DOS's program for enforcing the Uniform Code (Part 1202) to be substantially similar to the features which are required (under Part 1203) to be included in a code enforcement program adopted by any local government that enforces the Uniform Code. This is necessary because certain features (e.g., operating permit requirements) now required by Part 1203 are not now included in Part 1202. The benefits to be derived from this rule include insuring that enforcement of the Uniform Code by DOS in those local governments where DOS has that responsibility complies with the minimum standards set forth in the current version of Part 1203.

##### **4. COSTS.**

###### **Costs to Regulated Parties.**

Regulated parties that build, alter, or demolish buildings or structures located in a local government in which DOS enforces the Uniform Code will be required to obtain building permits, demolition permits, and certificates of occupancy or completion. The initial costs of obtaining a building or demolition permit will include the costs of obtaining the construc-

tion documents and other documents needed to include in or with the application for the required permits, and the fees payable to obtain such permits.

The cost of the required construction documents (plans, specifications and drawings) will depend on the nature and scope of the project. DOS estimates that the cost of construction documents for a typical 1,500 square foot one-family dwelling will be approximately \$10,000 to \$18,000 (\$7.00 to \$12.00 per square foot). The cost of construction documents for commercial buildings will vary significantly, depending upon the use, size and complexity of the building. However, the requirement that construction documents be provided as part of a permit application is not a new requirement added by this rule. Part 1202 currently requires the submission of "three sets of plans and specifications for the proposed work." This rule would amend this requirement by providing that only two sets of construction documents need be submitted; this may reduce the cost of applying for a building or demolition permit in certain cases.

The fees to be paid to DOS for building permits or demolition permits are set forth in the current version of Part 1202, and will be set forth in section 1202.12 of the new version of Part 1202 to be added by this rule. This rule does not change those fees. Typical fees are as follows: \$200 for a building permit for a 1,500 square foot one-family dwelling; \$300 for a building permit for a 2,500 square foot one-family dwelling; \$200 per 1,000 square feet for a building permit for a multiple dwelling or other general construction; and \$50 for a demolition permit. This rule continues provisions which are found in the current version of Part 1202 and which allow DOS to require the use of a third-party inspector to perform required inspections. This rule also adds provisions which allow DOS to require the use of a third-party reviewer to review permit applications. Permit applicants will be required to pay the fees and expenses charged by any third-party inspector or third-party reviewer; however, in either such case, the fee payable to DOS for the permit will be reduced.

The fee for renewing a building permit or demolition permit will be one-half of the original permit fee.

Regulated parties that manufacture, store or handle hazardous materials; conduct hazardous processes and activities; use pyrotechnic devices in any assembly occupancies; own buildings containing one or more areas of assembly with an occupant load of 100 persons or more; or own buildings whose use or occupancy classification may pose a substantial potential hazard to public safety, will be required to obtain an operating permit. The initial costs of obtaining an operating permit will include a permit fee of \$100.00 per building affected by the permit, plus an inspection fee of \$100.00 per building affected by the permit. DOS may require that a third-party inspector perform the required inspection; in such a case, the applicant will be required to pay the fees and expenses charged by the third-party inspector, but will not be required to pay the \$100 per building inspection fee that would otherwise be payable to DOS. The applicant will also be required to pay for any tests or reports that DOS may determine to be necessary to verify that the proposed activity or use complies with the applicable provisions of the Uniform Code.

The fee for renewing an operating permit will be one-half of the initial fee, and will be payable annually in the case of an operating permit issued for an area of public assembly and once every three years in any other case.

Costs to the Department of State, the State, and Local Governments.

DOS will be required to provide the staff necessary to administer and enforce the Uniform Code in the local government(s) where the Department has that responsibility, and DOS will be required to develop permit application forms, permit forms, and other aspects of programs for enforcing the Uniform Code in such local government(s). However, these obligations are imposed upon the Department by statute, as a consequence of local governments and counties opting out of their code enforcement responsibilities, and not by reason of this rule or implementation of this rule. Further, it is anticipated that these costs will be offset, in part, by the fees to be charged.

The State of New York will be required to pay the costs incurred by DOS in providing code enforcement services in the affected local governments and in developing and implementing the code enforcement programs. However, these obligations arise by operation of the statute, as a consequence of local governments and counties opting out of their code enforcement responsibilities, and not by reason of this rule or implementation of this rule.

There will be no cost to local governments for the implementation of this rule, except as follows: DOS currently enforces the Uniform Code with respect to buildings and structures controlled by counties that have elected not to enforce the Uniform Code (the "opted-out counties"). Enforcement of the code against those buildings and structures is

performed under the current version of Part 1202. This rule will amend Part 1202 by, *inter alia*, adding provisions requiring the issuance of operating permits in certain cases and adding provisions permitting DOS to require the use of third-party reviewers to review permit applications. Opted-out counties will incur the cost of applying for, obtaining, and maintaining any required operating permits. Further, if DOS requires the use of a third-party reviewer to review any building permit, demolition permit or operating permit application filed by an opted-out county, such county will be required to pay the fees and expenses charged by such third-party reviewer; however, in a case where a third-party reviewer is used, the permit fee that would otherwise be paid to DOS will be reduced.

#### 5. PAPERWORK.

This rule will not impose any new reporting requirements.

This rule will require regulated parties to file permit application forms and to obtain permits. However, regulated parties (other than opted-out counties) should now be subject to similar requirements under code enforcement programs that local governments are required to adopt under Part 1203. Further, except for the new provisions relating to operating permits to be added to Part 1202 by this rule, opted-out counties are now subject to similar paperwork requirements under the current version of Part 1202.

#### 6. LOCAL GOVERNMENT MANDATES.

This rule will not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows: Opted-out counties, which are not subject to operating permit requirements under the current version of Part 1202, will be subject to the operating permit requirements to be added to Part 1202 by this rule.

#### 7. DUPLICATION.

The rule does not duplicate any existing Federal or State requirement.

#### 8. ALTERNATIVES.

The alternative of making no change to Part 1202 was considered. However, it was determined that the existing provisions of Part 1202 do not include certain features (e.g., operating permit requirements) which are required by Part 1203 to be included in code enforcement programs adopted by local governments that enforce the Uniform Code, and it was determined that the differences between the features included in Part 1202 and the features required by Part 1203 should be minimized before the Department assumes responsibility for enforcing the code in a local government. Therefore, this alternative was rejected.

#### 9. FEDERAL STANDARDS.

There are no standards of the Federal Government which address the subject matter of the rule.

#### 10. COMPLIANCE SCHEDULE.

It is anticipated that regulated persons will be able to achieve compliance with this rule immediately.

#### *Regulatory Flexibility Analysis*

##### 1. EFFECT OF RULE.

This rule amends 19 NYCRR Part 1202 ("Part 1202"), which sets forth the procedures applicable in circumstances in which the Department of State ("DOS") must administer and enforce the Uniform Fire Prevention and Building Code ("Uniform Code"). Currently, DOS administers and enforces the Uniform Code with respect to buildings and structures in the custody of the following fifteen counties (the "opted-out counties"): Allegany County, Cattaraugus County, Chautauga County, Clinton County, Essex County, Greene County, Hamilton County, Herkimer County, Madison County, Oneida County, Oswego County, Saratoga County, Schoharie County, St. Lawrence County, and Wayne County. Effective January 1, 2009, DOS will also be responsible for administering and enforcing the Uniform Code with respect to all buildings and structures, public and private, in the Town of Conewango in Cattaraugus County.

This rule will apply to (1) the opted-out counties, (2) the Town of Conewango, and (3) all individuals and businesses (including all small businesses) in the Town of Conewango. This rule will also apply to any county that elects to opt out in the future, and to all individuals and businesses (including all small businesses) in any city, town or village in which DOS becomes responsible for administering and enforcing the Uniform Code in the future.

##### 2. COMPLIANCE REQUIREMENTS.

This rule will require regulated parties to file permit application forms and to obtain permits. However, regulated parties (other than opted-out counties) should now be subject to similar requirements under code enforcement programs that local governments are required to adopt under 19 NYCRR Part 1203. Further, except for the new provisions relating to operating permits to be added to Part 1202 by this rule, opted-out counties

are now subject to similar paperwork requirements under the current version of Part 1202.

### 3. PROFESSIONAL SERVICES.

Regulated parties will be required to provide construction documents (plans, drawings and specifications) when they apply for a building or demolition permit. In most cases, construction documents must be stamped and signed by a registered architect or professional engineer. However, the requirement that permit applicants submit construction documents is not a new requirement added by this rule; it is a requirement which is established by statute (Executive Law section 7303(1)), which is reflected in the current version of Part 1202, and which should be reflected in code enforcement programs enacted by local governments that enforce the Uniform Code.

### 4. COMPLIANCE COSTS.

An opted-out county that builds, alters, or demolishes a building or structure will be required to obtain a building permit, demolition permit, or certificate of occupancy or completion. Regulated parties that build, alter, or demolish buildings or structures located in a local government in which DOS enforces the Uniform Code will be required to obtain building permits, demolition permits, and certificates of occupancy or completion. The initial costs of obtaining a building or demolition permit will include the costs of obtaining the construction documents and other documents needed to include in or with the application for the required permits, and the fees payable to obtain such permits.

The cost of the required construction documents (plans, specifications and drawings) will depend on the nature and scope of the project. DOS estimates that the cost of construction documents for a typical 1,500 square foot one-family dwelling will be approximately \$10,000 to \$18,000 (\$7.00 to \$12.00 per square foot). The cost of construction documents for commercial buildings will vary significantly, depending upon the use, size and complexity of the building. However, the requirement that construction documents be provided as part of a permit application is not a new requirement added by this rule. Part 1202 currently requires the submission of "three sets of plans and specifications for the proposed work." This rule would amend this requirement by providing that only two sets of construction documents need be submitted; this may reduce the cost of applying for a building or demolition permit in certain cases.

The fees to be paid to DOS for building permits or demolition permits are set forth in the current version of Part 1202, and will be set forth in section 1202.12 of the new version of Part 1202 to be added by this rule. This rule does not change those fees. Typical fees are as follows: \$200 for a building permit for a 1,500 square foot one-family dwelling; \$300 for a building permit for a 2,500 square foot one-family dwelling; \$200 per 1,000 square feet for a building permit for a multiple dwelling or other general construction; and \$50 for a demolition permit. This rule continues provisions which are found in the current version of Part 1202 and which allow DOS to require the use of a third-party inspector to perform required inspections. This rule also adds provisions which allow DOS to require the use of a third-party reviewer to review permit applications. Permit applicants will be required to pay the fees and expenses charged by any third-party inspector or third-party reviewer; however, in either such case, the fee payable to DOS for the permit will be reduced.

The fee for renewing a building permit or demolition permit will be one-half of the original permit fee.

Regulated parties that manufacture, store or handle hazardous materials; conduct hazardous processes and activities; use pyrotechnic devices in any assembly occupancies; own buildings containing one or more areas of assembly areas with an occupant load of 100 persons or more; or own buildings whose use or occupancy classification may pose a substantial potential hazard to public safety, will be required to obtain an operating permit. The initial costs of obtaining an operating permit will include a permit fee of \$100.00 per building affected by the permit, plus an inspection fee of \$100.00 per building affected by the permit. DOS may require that a third-party inspector perform the required inspection; in such a case, the applicant will be required to pay the fees and expenses charged by the third-party inspector, but will not be required to pay the \$100 per building inspection fee that would otherwise be payable to DOS. The applicant will also be required to pay for any tests or reports that DOS may determine to be necessary to verify that the proposed activity or use complies with the applicable provisions of the Uniform Code.

The fee for renewing an operating permit will be one-half of the initial fee, and will be payable annually in the case of an operating permit issued for an area of public assembly and once every three years in any other case.

Any variation in the foregoing compliance costs for small businesses or

local governments of different types and of differing sizes would be a factor of the types of buildings and structures typically owned by such small businesses or local governments. For example, a small business or local government that typically owns complex commercial buildings will incur higher costs for the construction documents that must accompany an application for a building permit than would a small business or local government that typically owns less complex commercial buildings or residential buildings. The compliance costs associated with the construction, alteration or demolition of any particular building is not likely to vary significantly by reason of the type or size of the small business or local government that constructs, alters or demolishes the building.

### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

It is economically and technologically feasible for small businesses and local governments to comply with the rule. This rule imposes no substantial new compliance costs. No new technology need be developed for compliance with this rule.

### 6. MINIMIZING ADVERSE IMPACT.

This rule is intended to further the legislative objective of ensuring that administration and enforcement of the Uniform Code be conducted in a manner that satisfies the minimum standards established by the rules and regulations promulgated by the Secretary of State pursuant to Executive Law section 381(1); it does so by amending Part 1202 to make the features of the DOS's code enforcement program (Part 1202) substantially similar to the features that local governments must include in the code enforcement programs they are required to adopt under the current version of 19 NYCRR Part 1203.

In the opinion of DOS, establishing differing compliance or reporting requirements or timetables for small businesses and local governments or providing exemptions from coverage by the rule for small businesses and local governments would be detrimental to the foregoing objective and would endanger public health, safety or general welfare by reducing code enforcement standards with respect to buildings and structures owned by small businesses and local governments.

### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

In December of 2008, the Department of State sent a copy of the proposed rule to the chief executive officer of each of the fifteen opted-out counties, the Town of Conewango and several small businesses in the Town of Conewango by e-mail and/or by regular mail, and invited the opted-out counties, the Town of Conewango and those small businesses to contact the Department of State if they had any questions or comments. To date, no substantive comments have been received.

#### *Rural Area Flexibility Analysis*

#### 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule amends 19 NYCRR Part 1202 ("Part 1202"), which sets forth the procedures applicable in circumstances in which the Department of State ("DOS") must administer and enforce the Uniform Fire Prevention and Building Code ("Uniform Code"). Currently, DOS administers and enforces the Uniform Code with respect to buildings and structures in the custody of the following fifteen counties (the "opted-out counties"): Allegany County, Cattaraugus County, Chautauqua County, Clinton County, Essex County, Greene County, Hamilton County, Herkimer County, Madison County, Oneida County, Oswego County, Saratoga County, Schoharie County, St. Lawrence County, and Wayne County. Effective January 1, 2009, DOS will also be responsible for administering and enforcing the Uniform Code with respect to all buildings and structures, public and private, in the Town of Conewango in Cattaraugus County.

This rule will apply in the opted-out counties (as to buildings and structures in the custody of the opted-out counties) and in the Town of Conewango. This rule will also apply in any county that elects to opt out in the future (as to buildings and structures in the custody of such county), and in any city, town or village in which DOS becomes responsible for administering and enforcing the Uniform Code in the future.

#### 2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

This rule will require regulated parties to file permit application forms and to obtain permits. However, regulated parties (other than opted-out counties) should now be subject to similar requirements under code enforcement programs that local governments are required to adopt under 19 NYCRR Part 1203. Further, except for the new provisions relating to operating permits to be added to Part 1202 by this rule, opted-out counties are now subject to similar paperwork requirements under the current version of Part 1202.

#### 3. PROFESSIONAL SERVICES.

Regulated parties will be required to provide construction documents

(plans, drawings and specifications) when they apply for a building or demolition permit. In most cases, construction documents must be stamped and signed by a registered architect or professional engineer. However, the requirement that permit applicants submit construction documents is not a new requirement added by this rule; it is a requirement which is established by statute (Executive Law section 7303(1)), which is reflected in the current version of Part 1202, and which should be reflected in code enforcement programs enacted by local governments that enforce the Uniform Code.

#### 4. COMPLIANCE COSTS.

An opted-out county that builds, alters, or demolishes a building or structure will be required to obtain a building permit, demolition permit, or certificate of occupancy or completion. Regulated parties that build, alter, or demolish buildings or structures located in a local government in which DOS enforces the Uniform Code will be required to obtain building permits, demolition permits, and certificates of occupancy or completion. The initial costs of obtaining a building or demolition permit will include the costs of obtaining the construction documents and other documents needed to include in or with the application for the required permits, and the fees payable to obtain such permits.

The cost of the required construction documents (plans, specifications and drawings) will depend on the nature and scope of the project. DOS estimates that the cost of construction documents for a typical 1,500 square foot one-family dwelling will be approximately \$10,000 to \$18,000 (\$7.00 to \$12.00 per square foot). The cost of construction documents for commercial buildings will vary significantly, depending upon the use, size and complexity of the building. However, the requirement that construction documents be provided as part of a permit application is not a new requirement added by this rule. Part 1202 currently requires the submission of "three sets of plans and specifications for the proposed work." This rule would amend this requirement by providing that only two sets of construction documents need be submitted; this may reduce the cost of applying for a building or demolition permit in certain cases.

The fees to be paid to DOS for building permits or demolition permits are set forth in the current version of Part 1202, and will be set forth in section 1202.12 of the new version of Part 1202 to be added by this rule. This rule does not change those fees. Typical fees are as follows: \$200 for a building permit for a 1,500 square foot one-family dwelling; \$300 for a building permit for a 2,500 square foot one-family dwelling; \$200 per 1,000 square feet for a building permit for a multiple dwelling or other general construction; and \$50 for a demolition permit. This rule continues provisions which are found in the current version of Part 1202 and which allow DOS to require the use of a third-party inspector to perform required inspections. This rule also adds provisions which allow DOS to require the use of a third-party reviewer to review permit applications. Permit applicants will be required to pay the fees and expenses charged by any third-party inspector or third-party reviewer; however, in either such case, the fee payable to DOS for the permit will be reduced.

The fee for renewing a building permit or demolition permit will be one-half of the original permit fee.

Regulated parties that manufacture, store or handle hazardous materials; conduct hazardous processes and activities; use pyrotechnic devices in any assembly occupancies; own buildings containing one or more areas of assembly with an occupant load of 100 persons or more; or own buildings whose use or occupancy classification may pose a substantial potential hazard to public safety, will be required to obtain an operating permit. The initial costs of obtaining an operating permit will include a permit fee of \$100.00 per building affected by the permit, plus an inspection fee of \$100.00 per building affected by the permit. DOS may require that a third-party inspector perform the required inspection; in such a case, the applicant will be required to pay the fees and expenses charged by the third-party inspector, but will not be required to pay the \$100 per building inspection fee that would otherwise be payable to DOS. The applicant will also be required to pay for any tests or reports that DOS may determine to be necessary to verify that the proposed activity or use complies with the applicable provisions of the Uniform Code.

The fee for renewing an operating permit will be one-half of the initial fee, and will be payable annually in the case of an operating permit issued for an area of public assembly and once every three years in any other case.

Any variation in the foregoing compliance costs for different types of public and private entities in rural areas would be a factor of the types of buildings and structures typically owned by such entities. For example, a public or private entity that typically owns complex commercial buildings will incur higher costs for the construction documents that must ac-

company an application for a building permit than would a public or private entity that typically owns less complex commercial buildings or residential buildings. The compliance costs associated with the construction, alteration or demolition of any particular building is not likely to vary significantly by reason of the type of entity that constructs, alters or demolishes the building.

#### 5. MINIMIZING ADVERSE IMPACT.

This rule is intended to further the legislative objective of ensuring that administration and enforcement of the Uniform Code be conducted in a manner that satisfies the minimum standards established by the rules and regulations promulgated by the Secretary of State pursuant to Executive Law section 381(1); it does so by amending Part 1202 to make the features of the DOS's code enforcement program (Part 1202) substantially similar to the features that local governments must include in the code enforcement programs they are required to adopt under the current version of 19 NYCRR Part 1203.

In the opinion of DOS, establishing differing compliance or reporting requirements or timetables for rural areas or providing exemptions from coverage by the rule in rural areas would be detrimental to the foregoing objective and would endanger public health, safety or general welfare by reducing code enforcement standards in rural areas.

#### 6. RURAL AREA PARTICIPATION.

In December of 2008, the Department of State sent a copy of the proposed rule to the chief executive officer of each of the fifteen opted-out counties, the Town of Conewango and several small businesses in the Town of Conewango by e-mail and/or by regular mail, and invited the opted-out counties, the Town of Conewango and those small businesses to contact the Department of State if they had any questions or comments. To date, no substantive comments have been received.

#### Job Impact Statement

The Department of State has concluded, after reviewing the nature and purpose of the rule, that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

Part 1202 of Title 19 NYCRR establishes the procedures applicable in circumstances in which the Department of State must administer and enforce the State Uniform Fire Prevention and Building Code (the Uniform Code) in the place and stead of a local government or county. This rule amends Part 1202.

Regulated parties that build, alter or demolish buildings in local governments in which the Department of State enforces the Uniform Code will be required to apply for and obtain building or demolition permits and certificates of occupancy or completion. However, regulated parties currently are, or should be, subject to substantially similar obligations under code enforcement programs adopted by local governments pursuant to the mandate of Part 1203 of Title 19 NYCRR or under the current version of Part 1202.

Regulated parties that manufacture, store or handle hazardous materials; conduct hazardous processes and activities; use pyrotechnic devices in any assembly occupancies; own buildings containing one or more areas of assembly with an occupant load of 100 persons or more; or own buildings whose use or occupancy classification may pose a substantial potential hazard to public safety, will be required to apply for, obtain and maintain an operating permit. Counties that have elected not to enforce the Uniform Code (the "opted-out counties") and that engage in such activities or uses are not currently subject to operating permit requirements. This rule will extend those requirements to the opted-out counties. However, all other regulated parties currently are, or should be, subject to substantially similar operating permit requirements under code enforcement programs adopted by local governments pursuant to the mandate of Part 1203 of Title 19 NYCRR.

Based on the foregoing, it is anticipated that this rule will have no significant adverse impact on jobs or employment opportunities in the building industry, or in any related businesses or industry.

### NOTICE OF ADOPTION

#### Temporary Swimming Pool Enclosures

**I.D. No.** DOS-44-08-00005-A

**Filing No.** 46

**Filing Date:** 2009-01-09

**Effective Date:** 2009-01-28

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

**Action taken:** Addition of section 1228.4 to Title 19 NYCRR.

**Statutory authority:** Executive Law, sections 377 and 378; and L. 2007, ch. 234, section 3

**Subject:** Temporary swimming pool enclosures.

**Purpose:** Implement Executive Law section 378(14)(c) and (16), as added by chapter 234 of the Laws of 2007.

**Text or summary was published in** the October 29, 2008 issue of the Register, I.D. No. DOS-44-08-00005-EP.

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

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

Raymond Andrews, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Raymond.Andrews@dos.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## Office of Temporary and Disability Assistance

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

#### Educational Activities

**I.D. No.** TDA-04-09-00011-P

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

**Proposed Action:** Amendment of sections 385.6(a) and (b), 385.7(a) and (b), and 385.9(c) of Title 18 NYCRR.

**Statutory authority:** 42 United States Code sections 601(a) and 607; and Social Services Law, article 5, title 9-B

**Subject:** Educational Activities.

**Purpose:** To increase the skills of individuals receiving public assistance through the provision of additional opportunities to participate in education and other skill development activities.

**Text of proposed rule:** Subparagraph (ii) of paragraph (1) of subdivision (a) of section 385.6 is amended to read as follows:

(ii) [is] 16 or 17 years of age and not attending secondary school and has not completed high school or an equivalency program.

Subparagraphs (v) and (vi) of paragraph (2) of subdivision (a) of section 385.6 are renumbered subparagraphs (vi) and (vii).

A new subparagraph (v) is added to paragraph (2) of subdivision (a) of section 385.6 to read as follows:

(v) *prior participation in education and training;*

Paragraph (4) of subdivision (a) of section 385.6 is amended to read as follows:

(4) The social services official shall encourage and may require a *nonexempt* recipient who has not attained a basic literacy level and who is not subject to the educational requirements of section 385.9 of this Part to enroll in a basic literacy program, high school equivalency program or other educational program in combination with other work activities. Any such assignment shall be consistent with the employability plan prepared pursuant to subdivision (b) of this section.

Subparagraphs (i) and (ii) are added to paragraph (4) of subdivision (a) of section 385.6 to read as follows:

(i) *Basic literacy level for purposes of paragraph (4) of this subdivision is defined as a literacy level equivalent to the ninth grade.*

(ii) *Such basic literacy level for nonexempt recipients of public assistance who have not obtained a high school diploma or the equivalent shall be established based on a test for basic literacy level as determined appropriate by the State Education Department.*

Paragraphs (5) and (6) of subdivision (a) of section 385.6 are renumbered paragraphs (6) and (7).

A new paragraph (5) is added to subdivision (a) of section 385.6 to read as follows:

(5) *The social services official shall offer the option and may require a nonexempt recipient who has achieved a basic literacy level as defined in subparagraph (i) of paragraph (4) of this subdivision, but has not attained a high school diploma or the equivalent and who is not subject to the educational requirements of section 385.9 of this Part to enroll in an educational program designed to improve the individual's literacy level and/or prepare the individual for attainment of a high school diploma or*

*the equivalent in combination with other work activities as appropriate. Any such assignment shall be consistent with the employability plan prepared pursuant to subdivision (b) of this section.*

Clauses (c) and (d) of subparagraph (ii) of paragraph (1) of subdivision (b) of section 385.6 are amended to read as follows:

(c) the local employment opportunities; [and]

(d) if the recipient is assigned to an education program, *the appropriateness of the educational activity based on the assessment completed pursuant to subdivision (a) of this section and the recipient's liability for student loans, grants and scholarship awards[.]; and*

A new clause (e) is added to subparagraph (ii) of paragraph (1) of subdivision (b) of section 385.6 to read as follows:

(e) *the recipient's participation in prior education and training activities.*

Subparagraphs (v) and (vi) of paragraph (3) of subdivision (a) of section 385.7 are renumbered as subparagraphs (vi) and (vii).

A new subparagraph (v) is added to paragraph (3) of subdivision (a) of section 385.7 to read as follows:

(v) *prior participation in education and training;*

Paragraph (4) of subdivision (a) of section 385.7 is amended to read as follows:

(4) The social services official shall encourage and may require a *nonexempt* recipient who has not attained a basic literacy level and who is not subject to the educational requirements of section 385.9 of this Part to enroll in a basic literacy program, high school equivalency program or other educational program in combination with other work activities. Any such assignment shall be consistent with the employability plan prepared pursuant to subdivision (b) of this section.

Subparagraphs (i) and (ii) are added to paragraph (4) of subdivision (a) of section 385.7 to read as follows:

(i) *Basic literacy level for purposes of paragraph (4) of this subdivision is defined as a literacy level equivalent to the ninth grade.*

(ii) *Such basic literacy level for nonexempt recipients of public assistance who have not obtained a high school diploma or the equivalent shall be established based on a test for basic literacy level as determined appropriate by the State Education Department.*

Paragraphs (5) and (6) of subdivision (a) of section 385.7 are renumbered paragraphs (6) and (7).

A new paragraph (5) is added to subdivision (a) of section 385.7 to read as follows:

(5) *The social services official shall offer the option and may require a nonexempt recipient who has achieved a basic literacy level as defined in subparagraph (i) of paragraph (4) of this subdivision, but has not attained a high school diploma or the equivalent and who is not subject to the educational requirements of section 385.9 of this Part to enroll in an educational program designed to improve the individual's literacy level and/or prepare the individual for attainment of a high school diploma or its equivalent in combination with other work activities as appropriate. Any such assignment shall be consistent with the employability plan prepared pursuant to subdivision (b) of this section.*

Subparagraphs (iii) and (iv) of paragraph (2) of subdivision (b) of section 385.7 are amended to read as follows:

(iii) local employment opportunities; [and]

(iv) if the recipient is assigned to an education program, *the appropriateness of the educational activity based on the assessment completed pursuant to subdivision (a) of this section and the recipient's liability for student loans, grants and scholarship awards [if the recipient is assigned to an education program.]; and,*

A new subparagraph (v) is added to paragraph (2) of subdivision (b) of section 385.7 to read as follows:

(v) *the recipient's participation in prior education and training activities.*

Paragraphs (6) and (7) of subdivision (c) of section 385.9 are renumbered as paragraphs (7) and (8).

A new paragraph (6) is added to subdivision (c) of section 385.9 to read as follows:

(6) *For individuals assigned by the district to participate in educational activities pursuant to this section and consistent with the individual's assessment and employability plan, the district may report supervised homework time and up to one hour of unsupervised homework time for each hour of class time, provided that the total homework time reported for participation does not exceed the hours required or advised by the respective educational program.*

**Text of proposed 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:

The New York State Office of Temporary and Disability Assistance (Office) supervises public assistance employment programs authorized by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, in accordance with Section 103 of the PRWORA (42 U.S.C. § 607) and Title 9-B of Article 5 of the New York State Social Services Law (SSL). Title 9-B establishes that the Office shall supervise the administration of employment programs created under title 9-B of Article 5 of the SSL, including those authorized by federal statute. Section 337 of the SSL vests responsibility for the administration of the work, employment and training programs in the Office. PRWORA established that a primary purpose of the Temporary Assistance for Needy Families (TANF) program is to provide employment services to reduce dependency on government benefits (42 U.S.C. § 601[a]).

Section 103 of PRWORA (42 U.S.C. § 607) requires the State to meet federal work participation rates and section 335-b of the SSL requires each social services district (district) to meet federal and State work participation rates by placing recipients of public assistance in employment activities. Section 103 of PRWORA (42 U.S.C. § 607) and SSL § 335 and § 335-a require that an assessment be completed for adults and certain minors not in school to identify elements that affect an individual's employability including education level, skills, prior work experience, training, vocational interest and support services needs. Assessment requirements governing members of households with dependent children are included in section 335 of the SSL and requirements governing members of households without dependent children are included in section 335-a of the SSL. Sections 335 and 335-a also establish that the district will develop an employability plan for each individual assessed that establishes the services to be provided by the social services official, including the activities in which the participant will take part, and that establishes an employment goal for the individual. Sections 335 and 335-a further establish that when the individual assessment indicates that a participant has not attained a basic literacy level, the social services official shall encourage and may require the individual to participate in educational programs.

In 2006, Congress passed the Deficit Reduction Act of 2005 which, among other things, gave the United States Department of Health and Human Services (HHS) the ability to define work activities countable towards meeting the federal work participation rates. The final TANF rule (45 CFR § 261.60) permits States to count supervised homework time and up to one hour of unsupervised homework time for each hour of class time that the individual is participating in a countable educational activity towards the federal participation rate provided that the total homework time counted for participation does not exceed the hours required or expected by the respective educational program.

Social Services Law (§ 335 and § 335-a) establishes that social services districts shall encourage and may require an adult recipient of public assistance who has not attained a basic literacy level to participate in an educational program to achieve basic literacy or a high school diploma or the equivalent. Social Services Law does not define basic literacy and current regulations do not establish a standard that all social services districts must apply when determining whether or not educational activities must be considered when determining an individual's employment assignment. The proposed rule would require all districts to use the Office established basic literacy level standard when determining which nonexempt public assistance recipients must be encouraged to participate in educational activities to improve basic literacy as part of the individual's work requirement. The proposed rule would also establish standards to require social services districts to offer nonexempt public assistance recipients who have attained basic literacy but not obtained a high school diploma or the equivalent the option to participate in educational activities designed to prepare the individual for the attainment of a high school diploma or the equivalent. Additionally, the proposed rule would add a provision to 18 NYCRR § 385.9 to give districts the option to count homework time, consistent with the extent that such time is permitted under federal rules, towards the respective participation rate. This provision will provide each social services district the flexibility recently afforded states through federal regulation.

Individuals who do not have a high school diploma are, on average, expected to have lower earnings, higher rates of unemployment and reduced job training opportunities as compared to those with a high school diploma. Therefore, when developing an individual's employment plan in accordance with SSL § 335 and § 335-a for an individual without a high school diploma or the equivalent, districts shall offer and may require enrollment in educational activities designed to prepare the individual to attain a high school diploma or the equivalent. These services, provided with other work activity participation as deemed appropriate by the

district, are important in enhancing employment opportunities for public assistance recipients so they may end dependence on government benefits and achieve economic independence consistent with the purposes of SSL Title 9-B.

The proposed rule retains the district's authority governing individual enrollments in work activities, including the authority to:

- assign individuals to a work activity or a combination of work activities which the district has determined as appropriate to enhance the individual's work skills and that are consistent with the individual's assessment and employability plan (§ 335 and § 335-a of the SSL);
- re-assess participation in work activities to determine if work assignments remain appropriate and discuss any changes with the recipient (§ 335 and § 335-a of the SSL);
- assign individuals to work activities in a manner consistent with the district's need to meet federal and State work participation requirements (§ 335, § 335-a and § 335-b of the SSL);
- consider the availability of program resources and local employment opportunities when developing an individual's employability plan (§ 335 and § 335-a);
- approve enrollments by public assistance applicants/recipients in those programs offered by providers that meet minimum standards necessary for local approval in accordance with the district's biennial employment plan (§ 331 and § 333 of the SSL);
- require individuals applying for or receiving public assistance to accept suitable employment (§ 332 and § 336-d of the SSL); and,
- issue a notice of denial, conciliation and/or notice of intent to discontinue or reduce the amount of public assistance provided in those instances when an individual willfully and without good cause fails to comply with a work activity as assigned (§ 341 and § 342 of the SSL).

##### 2. Legislative objectives:

The proposed rule will further the legislative objective of the Welfare Reform Act of 1997 with regard to the stated purpose of SSL Title 9-B of providing work activities and employment opportunities necessary for applicants for and recipients of public assistance to secure and retain unsubsidized employment as well as improve the likelihood of achieving earnings gains over time that provide economic independence.

##### 3. Needs and benefits:

The Office seeks to increase the skills of individuals receiving public assistance through the provision of additional opportunities to participate in education and other skill development activities. Educational attainment is a key predictor of employment earnings. On average, individuals with a high school diploma have higher earnings, are less likely to be unemployed and have enhanced opportunities for additional job training as compared to individuals without a high school diploma. Given that the majority of adult recipients of public assistance do not have a high school diploma, effort is needed to ensure these adults have the opportunity to obtain educational gains. Some adults receiving public assistance would benefit from the opportunity to participate in educational services designed to enhance their literacy level or to attain a high school diploma or the equivalent as improved educational outcomes will enable recipients to not only enter employment, but improve the ability to retain jobs and experience earnings gains over time. Currently, about 24% of adults receiving public assistance are working but not earning sufficient wages to eliminate the need for cash assistance.

Individuals who have not attained basic literacy would benefit from achieving increased literacy levels. Benefits associated with increased literacy levels include the ability to understand more complicated written instructions in daily life activities and at work, improved ability to learn on-the-job, attainment of the minimum standards required for entry into certain job skills training programs, preparation for attainment of a high school diploma and an improved ability to support the educational efforts of children. Improved basic literacy will also support employers' workforce needs. One example of how improved literacy levels benefit employers and job seekers is seen in the fact that a large manufacturing firm in New York has experienced an inability to fill certain job openings due to the fact that few job applicants were able to demonstrate reading and math skills of at least the 9th grade level, as needed by the employer. Improved basic literacy levels for these applicants would increase employment opportunities.

Individuals that do not have a high school diploma but who have attained basic literacy are best prepared to attain a high school equivalency diploma. Obtaining a high school diploma increases the likelihood of consistent employment, significantly increases earnings potential and the likelihood of escaping poverty, and provides individuals with the credentials necessary for a range of higher learning opportunities including college.

The proposed rule would establish a standard for requiring districts to permit certain public assistance recipients without a high school diploma or the equivalent to participate in adult basic education and in services that prepare individuals for the General Educational Development examina-

tion to earn a high school equivalency diploma. Additionally, the proposed rule would require district to encourage nonexempt public assistance recipients who have not attained a literacy level equivalent to at least the ninth grade level to participate in educational instruction to improve their literacy level. Assigned work activities, including adult basic education, literacy training and educational activities designed to prepare the individual for the attainment of a high school diploma or the equivalent, must still be based on the individual's employment assessment and identified in the employability plan. The employability plan is developed based on several factors, including consideration of the availability of program resources in the district. Districts are expected to consult with local education providers to identify available programs and to collaborate with State and local agencies and program providers in an attempt to secure appropriate educational opportunities for nonexempt public assistance recipients. Districts are encouraged to combine such educational services with at least 20 hours weekly of work-based activities, such as employment, work experience, and internships both for purposes of meeting work participation requirements and to improve employment outcomes. To the extent that vocational training combined with literacy instruction is available, districts are encouraged to consider such placements when developing employment plans for individuals in receipt of public assistance.

The Office estimates that up to 5,000 additional individuals receiving public assistance statewide may participate in educational programs designed to improve the individual's basic skills proficiency as part of the individual's work requirement following this regulation change and once offered the opportunity to participate in educational programs.

#### 4. Costs:

The proposed rule is not expected to result in significant new costs. The individuals receiving public assistance who would benefit from additional opportunities to participate in education activities are likely participating in another work activity assignment and the rule is expected to primarily result in a new mix of work activity assignments rather than a large number of new enrollments. Furthermore, the proposed rule is consistent with the enrollment policies of several districts.

Individuals receiving public assistance may generally be referred to participate in educational activities at little or no cost to the social services district. Furthermore, districts are already required to encourage certain individuals to participate in education programs and therefore should have referral arrangements in place to serve clients. Many districts already routinely test an individual's literacy level. Districts may choose to test literacy levels for those without a high school diploma after the individual has expressed an interest in participating in an education program, thereby reducing the number of individuals for whom a test of literacy levels must be performed. Typically the education provider would perform a test of literacy upon referral.

In most areas of the State, the new enrollments are expected to be accommodated by existing adult education programs. In some instances, districts may choose to shift resources over time to support additional enrollments in education. Additionally, the Office directly funds a number of providers throughout the State that offer adult basic education and General Education Development examination preparation instruction. The Office will through its contracting procedures and through ongoing technical assistance make services to public assistance recipients a priority target population to accommodate increased referrals from social services districts.

The Office acknowledges that there may be additional costs related to transportation or other supportive services necessary to support an individual's participation in educational activities, but does not anticipate that these costs will be significant.

Some costs savings may accrue from the provision that provides districts the option of counting some unsupervised homework time toward an individual's required hours of work activity participation. Limited hours of homework time that are approved by the district as part of an individual's work requirement likely will not require any district expenditure as such hours of participation should not require expenditures associated with transportation or child care. Absent this flexibility, district would continue to be required to ensure that all hours of participation, including study time, are supervised.

#### 5. Local government mandates:

These regulations would require all districts to follow the Office established standard for basic literacy level when determining which nonexempt public assistance recipients must be offered the opportunity to participate in educational activities designed to improve the individual's basic skills proficiency as part of the individual's work requirement.

#### 6. Paperwork:

The proposed amendments may require districts to include a discussion about enrollment in education services as part of the employment assessment process to a greater extent than currently addressed through local procedures. Following adoption of this regulation, the Office will amend the Client Rights and Responsibilities Booklets (LDSS-4148A and LDSS-

4148B) to notify individuals of the option for those without a high school diploma to participate in educational activities. The Office may also produce other informational material to inform clients of the opportunity to participate in education programs.

#### 7. Duplication:

The proposed rule does not duplicate any State regulatory provisions and is consistent with federal requirements.

#### 8. Alternatives:

The alternative considered was to continue current regulatory authority and procedures. However, the proposed regulatory changes are needed to improve the extent to which public assistance recipients are offered the opportunity to participate in educational activities designed to improve the individual's basic skills proficiency or educational programs which prepare the individual for a high school diploma or the equivalent. These educational services are necessary to help individuals develop the skills needed to obtain employment.

#### 9. Federal standards:

Federal regulations require that all adult individuals age eighteen and older (including 16 and 17 year old individuals who have not attained a high school diploma or the equivalent and are not attending secondary school) be assessed within 90 days of eligibility. Federal regulations also require the State, and therefore social services districts, to engage a minimum percentage of its total caseload receiving assistance supported by federal or State or local funds used towards the maintenance of effort requirement in certain work activities. State statute also requires each social services district to engage a minimum percentage of individuals in households receiving non-federally funded assistance, which includes all households without dependent children.

#### 10. Compliance schedule:

The effective date of the proposed rule will be no earlier than May 1, 2009. This is expected to permit social services districts sufficient time to implement the changes necessary to comply.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

The proposed action does not directly affect small businesses. To the extent the proposed rule improves the skill level of adults entering the workforce, small businesses would benefit from a more highly skilled workforce. The proposed amendments may require social services districts (districts) to include a discussion about enrollments in education services as part of the employment assessment process to a greater extent than currently addressed through local procedures. Social Services Law (§ 335 and § 335-a) establishes that social services districts shall encourage and may require an adult recipient of public assistance who has not attained a basic literacy level to participate in an educational program to achieve basic literacy or a high school diploma or the equivalent. Social Services Law does not define basic literacy and current regulations do not establish a standard that all social services districts must apply when determining whether or not educational activities must be considered when determining an individual's employment assignment. The proposed rule would require all districts to follow the Office established basic literacy level standard when determining which nonexempt public assistance recipients must be encouraged to participate in educational activities to improve basic literacy as part of the individual's work requirement. The proposed rule would also establish standards to require social services districts to offer nonexempt public assistance recipients who have attained basic literacy but not obtained a high school diploma or the equivalent the option to participate in educational activities designed to prepare the individual for the attainment of a high school diploma or the equivalent. The proposed amendments would retain the district's authority governing the individual's enrollment in work activities in accordance with Title 9-B of the Social Services Law. Additionally, the proposed rule would provide districts additional flexibility by providing the option for districts to count homework time, as recently afforded states through federal regulations.

#### 2. Compliance requirements:

The proposed rule has no direct effect on small businesses. Districts are currently required to encourage certain public assistance recipients to participate in educational activities. However, the proposed rule may require districts to provide information during the assessment process to nonexempt public assistance recipients who do not have a high school diploma or the equivalent about the availability of educational activities designed to help the individual improve his/her basic literacy level or help prepare the individual for the General Educational Development examination to earn a high school equivalency diploma. Districts would also be required to follow the Office established basic literacy standard for nonexempt public assistance recipients without a high school diploma or the equivalent. Additionally, districts would be required to offer nonexempt public assistance recipients who have attained basic literacy but not obtained a high school diploma or the equivalent the option to participate in educational activities designed to prepare the individual for the attainment of a high school diploma or the equivalent.

### 3. Professional services:

The proposed rule has no direct effect on small businesses. Districts should require no additional professional services to comply with the proposed rule.

### 4. Compliance costs:

The proposed rule has no direct effect on small businesses. Districts may experience some additional costs depending on the basic literacy level previously used by the district to determine when individuals should be provided the option to participate in an education program. There may be some additional costs related to transportation or other supportive services which are necessary to support the individual's participation in education activities. However, based on the number of individuals estimated to participate in educational activities as result of the proposed rule, the Office does not anticipate that these costs will be significant.

Some costs savings may accrue from the provision that provides districts the option of counting some unsupervised homework time toward an individual's required hours of work activity participation. Limited hours of homework time that are approved by the district as part of an individual's work requirement likely will not require any district expenditure as such hours of participation should not require expenditures associated with transportation or child care. Absent this flexibility, district would continue to be required to ensure that all hours of participation, including study time, are supervised.

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

The proposed rule has no direct effect on small businesses. Compliance with the proposed rule will be technologically feasible for social services districts.

### 6. Minimizing adverse impact:

The proposed rule has no direct effect on small businesses. Districts should not experience any significant economic impact as a result of compliance with the proposed rule. Many districts already routinely test an individual's literacy level. Districts may choose to test literacy levels for those without a high school diploma after the individual has expressed an interest in participating in an education program, thereby reducing the number of individuals for whom a test of literacy levels must be performed. Typically the education provider would perform a test of literacy upon referral.

Districts are already required to encourage and may require certain public assistance recipients to participate in educational programs and therefore should have referral arrangements in place to serve nonexempt public assistance recipients. Furthermore, individuals receiving public assistance may generally be referred to participate in educational activities at little or no cost to the social services district.

In most areas of the State, the new enrollments are expected to be accommodated by existing adult education programs. In some instances, districts may choose to shift resources over time to support additional enrollments in education. Additionally, the Office directly funds a number of providers throughout the State that offer adult basic education and General Education Development examination preparation instruction. The Office will through its contracting procedures and through ongoing technical assistance make services to public assistance recipients a priority target population to accommodate increased referrals from districts.

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

The proposed rule has no direct effect on small businesses. The Office has discussed the proposed amendments with a workgroup consisting of representatives from the Office, the New York Public Welfare Association and a group of social services districts.

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

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

The proposed regulations will affect the 44 rural social services districts in the State.

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

The proposed rule may require social services districts (districts) to include a discussion about enrollment in education services as part of the employment assessment process to a greater extent than currently addressed through local procedures.

Social Services Law (§ 335 and § 335-a) establishes that social services districts shall encourage and may require an adult recipient of public assistance who has not attained a basic literacy level to participate in an educational program to achieve basic literacy or a high school diploma or the equivalent. Social Services Law does not define basic literacy and current regulations do not establish a standard that all social services districts must apply when determining whether or not educational activities must be considered when determining an individual's employment assignment. The proposed rule would require all districts to follow the Office established standard for basic literacy level when determining which non-exempt public assistance recipients should be offered the opportunity to participate in basic education activities or educational activities designed to prepare the individual for the attainment of a high school diploma or the

equivalent as part of the individual's work requirement. Districts will need to keep records to identify the basic literacy level for nonexempt public assistance recipients who have not attained a high school diploma or the equivalent.

Additionally, the proposed rule would add a provision to 18 NYCRR § 385.9 to give districts the option to count homework time, consistent with the extent that such time is permitted under federal rules, towards the respective participation rate. This provision will provide each social services district the flexibility recently afforded states through federal regulation.

There are no additional needs for professional services due to these regulations.

### 3. Costs:

The proposed rule is not expected to result in significant new costs. The individuals receiving public assistance who would benefit from additional opportunities to participate in education activities are likely participating in another work activity assignment, and the rule is expected to primarily result in a new mix of work activity assignments rather than a large number of new enrollments. Furthermore, the proposed rule is consistent with the enrollment policies of several districts.

Depending on the basic literacy level currently used by the district, districts may incur some additional costs as a result of the proposed regulatory change. Based on the number of individuals in rural areas estimated to participate in basic education or GED preparation, the Office does not anticipate that costs, including costs related to transportation or other supportive services, will be significant.

Some costs savings may accrue from the provision that provides districts the option of counting some unsupervised homework time toward an individual's required hours of work activity participation. Limited hours of homework time that are approved by the district as part of an individual's work requirement likely will not require any district expenditure as such hours of participation should not require expenditures associated with transportation or child care. Absent this flexibility, district would continue to be required to ensure that all hours of participation, including study time, are supervised.

### 4. Minimizing adverse impact:

The proposed amendments are expected to have minimal economic impact on social services districts that serve rural areas.

Districts may choose to test literacy levels for those without a high school diploma after the individual has expressed an interest in participating in an education program, thereby reducing the number of individuals for whom a test of literacy levels must be performed. Typically the education provider would perform a test of literacy upon referral.

Districts are already required to encourage and may require certain public assistance recipients to participate in educational programs and therefore should have referral arrangements in place to serve clients. Furthermore, individuals receiving public assistance may generally be referred to participate in educational activities at little or no cost to the district.

In most areas of the State, the new enrollments are expected to be accommodated by existing adult education programs. In some instances, districts may choose to shift resources over time to support additional enrollments in education. Additionally, the Office directly funds a number of providers throughout the State that offer adult basic education and General Education Development examination preparation instruction. The Office will through its contracting procedures and through ongoing technical assistance make services to public assistance recipients a priority target population to accommodate increased referrals from districts.

### 5. Rural area participation:

The Office has discussed the proposed amendments with a workgroup consisting of representatives from the Office, the New York Public Welfare Association and a group of social services districts.

#### **Job Impact Statement**

#### 1. Nature of impact:

These proposed regulations should not have any adverse effect on jobs and employment opportunities in New York. The proposed rule is expected to improve employment options and outcomes for individuals who improve their skill level through educational advancement, and improve the quality of New York's workforce. The regulations provide flexibility to social services districts (districts) to assign individuals applying for or receiving public assistance to work activities, consistent with the individual's assessment and employability plan, which are intended to help the individual develop the skills necessary to obtain employment.

The Office anticipates that districts will use existing staff or resources to conduct assessments. The proposed rule may require districts to include a discussion about enrollment in education services as part of the employment assessment process to a greater extent than currently addressed through local procedures and will likely require additional coordination and monitoring by districts of participation in concurrent work activities.

Districts will need to keep records to identify the basic literacy level for

nonexempt public assistance recipients who have not attained a high school diploma or the equivalent.

Additionally, the proposed rule would give districts the option to count homework time, consistent with the extent that such time is permitted under federal rules, towards the respective participation rate. This provision will provide each social services district the flexibility recently afforded states through federal regulation.

2. Categories and numbers affected:

These regulations should have no adverse effect on jobs or employment opportunities in New York State. Districts will likely use existing staff or resources to implement these changes. Furthermore, it is anticipated that in most areas of the State, the new enrollments are expected to be accommodated by existing adult education programs. In some instances, districts may choose to shift resources over time to support additional enrollments in education.

3. Regions of adverse impact:

The Office does not anticipate any adverse effect on jobs or employment opportunities as a result of these regulations in any region of the State.

4. Minimizing adverse impact:

The Office does not anticipate any adverse effect on employment opportunities as a result of these regulations.