

RULE MAKING ACTIVITIES

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

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

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

Office of Alcoholism and Substance Abuse Services

EMERGENCY RULE MAKING

Administration of “Other Approved Agents” Such As Buprenorphine to Treat Opioid Addictions

I.D. No. ASA-49-08-00007-E

Filing No. 493

Filing Date: 2009-05-05

Effective Date: 2009-05-05

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

Action taken: Amendment of Part 828 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(b), (e), 19.21(b), 19.40, 32.01, 32.05(b), 32.07(a), (b)

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

Specific reasons underlying the finding of necessity: The proper administration and availability of buprenorphine and other approved agents to treat opioid addiction are necessary to ensure that those persons suffering from addiction can get the most advanced and most appropriate treatment for their disease.

Subject: Administration of “other approved agents” such as buprenorphine to treat opioid addictions.

Purpose: To ensure that all persons will have equal access to the appropriate “approved agent” to treat their opioid addiction.

Text of emergency rule: PART 828

AMENDMENT TO: REQUIRMENTS FOR THE OPERATION OF CHEMOTHERAPY SUBSTANCE ABUSE PROGRAMS.

§ 828.1 Definitions.

(a) Methadone program means a substance abuse program using methadone *or other approved agents*, and offering a range of treatment procedures and services for the rehabilitation of persons dependent on opium, morphine, heroin or any derivative or synthetic drug of that group.

(1) Methadone maintenance means a treatment procedure using methadone or any of its derivatives, *or other approved agents*, administered over a period of time to relieve withdrawal symptoms, reduce craving and permit normal functioning so that, in combination with rehabilitative services, patients can develop productive life styles.

(i) Methadone to abstinence means a treatment procedure using methadone, *or other approved agents*, administered for a period exceeding 21 days, as part of a planned course of treatment involving reduction in dosage to the point of abstinence followed by drug-free treatment.

(ii) Methadone maintenance aftercare means a planned course of treatment for methadone, *or other approved agents* maintenance patients, directed toward the achievement of abstinence and, through the aid of supportive counseling, the continuance of a drug-free life style.

(2) Methadone detoxification means a treatment procedure using methadone, or any of its derivatives, *or other approved agents*, administered in decreasing doses over a limited period of time for the purpose of detoxification from opiates.

(b) Methadone clinic means a single location at which a methadone program provides methadone, *or other approved agent* and rehabilitative services to patients.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. ASA-49-08-00007-P, Issue of December 3, 2008. The emergency rule will expire July 3, 2009.

Text of rule and any required statements and analyses may be obtained from: Deborah Egel, OASAS, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: DeborahEgel@oasas.state.ny.us

Regulatory Impact Statement

1. Statutory Authority

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services (“the Commissioner”) to ensure that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment which is effective and of high quality.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.15(a) of the Mental Hygiene Law bestows upon the Commissioner the responsibility of promoting, establishing, coordinating, and conducting programs for the prevention, diagnosis, treatment, aftercare, rehabilitation, and control in the field of chemical abuse or dependence.

Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue a single operating certificate for the provision of chemical dependence services.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

Section 32.09 of the Mental Hygiene Law gives the Commissioner the authority to issue operating certificates to providers of chemical dependence services.

2. Legislative Objectives

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and ensure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk of becoming chemical abusers. The amendment of Part 828 will allow methadone clinics to dispense buprenorphine to clients of the service as an alternative to methadone and thereby reducing the number of persons dependent on street drugs or illegally obtained prescription opioids.

3. Needs and Benefits

The use of additional agents to treat opioid addiction will decrease the number of addicted persons using street drugs such as heroine or illegally obtained prescription opioids. The need for additional and varied treatment methodology's to treat opioid addiction is apparent, and the benefit to the service to be able to offer choices to their patients is that they may be able to keep more people on a "maintenance" program then if they have only one option.

4. Costs:

a. Costs to regulated parties.

There may be a change in the reporting requirements or the documentation requirements which may have a fiscal impact on regulated parties.

b. Costs to the agency, state and local governments.

The state and local impact of the amendment of 828 will be minimal if at all. There is a difference between the reimbursement rates between methadone and buprenorphine. The weekly rates for buprenorphine are between \$170.78 and 259.78, depending on the dose, and for methadone the weekly reimbursement rates are \$136.05. Therefore it may cost the state, federal or local governments more money to provide buprenorphine. However, the number of persons receiving buprenorphine may not rise because the dispensing of this approved agent is completely voluntary.

5. Local Government Mandates

The proposed rule does not impose any new local government mandates.

6. Paperwork

The proposed rule does not impose additional paperwork requirements.

7. Duplication

The proposed rule does not duplicate of other state or federal regulations.

8. Alternatives

The only alternative to the proposed regulation is to continue to use only methadone in clinics regulated under 828.

9. Federal Standards

The CSAT Federal regulations preserve States' authority to regulate OTPs. The Federal regulations are considered minimal and the States are authorized to determine appropriate additional regulations. Federal regulations for dispensing Buprenorphine in opioid treatment programs are more restrictive than minimal Federal regulations for dispensing in physicians. In support of reducing opioid dependence it is demonstrated that there are numerous benefits which include improved retention in treatment for patients, making OTP's more attractive to new patients, and giving patients more control over their treatment experience. In addition, patient quality of life may be improved through the reduction in daily attendance at an OTP clinic.

10. Compliance Schedule

It is expected that full implementation of these Part 828 amendments shall become effective immediately.

Regulatory Flexibility Analysis

Effect of the Rule: The proposed emergency revision to Part 828 will impact certified and/or funded providers. It is expected that the emergency revision will require providers to amend some of their policies and procedures in their treatment modality. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking medication assisted treatment for opioid addiction due to more treatment options. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts may see a nominal increase in cost due to the weekly Buprenorphine rate but this should be offset by better patient outcomes.

Compliance Requirements: It is expected that there will be no significant changes in compliance requirements. Since providers are already required to provide utilization review, it is not expected that this regulation, will have additional costs.

Professional Services: While it is expected that programs may require additional professional services the impact is nominal because induction of Buprenorphine lasts only a few days.

Compliance Costs: Some programs may need to formally train staff to understand the pharmacology of Buprenorphine.

Economic and Technological Feasibility: Compliance with the recordkeeping and reporting requirements of the emergency revision to Part 828 is not expected to have an economic impact or require any changes to technology for small businesses and government.

Minimizing Adverse Impact: This is an emergency adoption, no public comment is required, however, the subject matter experts within our agency, including the Medical Director have concluded that, in line with the Federal Standards, the addition of buprenorphine through emergency regulation is necessary for the health, safety and welfare of the public. Any impact this rule may have on small businesses and the administration of State or local governments and agencies will either be a positive impact or the nominal costs and compliance are small and will be absorbed into the already existing economic structure. The positive impact for our patients and our health care system, out weigh any potential minimal costs.

Small Business and Local Government Participation: This is an emergency adoption, therefore even though there have been informal conversations with persons affected by this regulation and the subject matter experts within the agency have decided that this emergency is necessary to protect the health, safety and welfare of the public, a formal outreach to the business community was not performed. Small businesses should not be affected by this change, and local governments running methadone clinics are not required to provide buprenorphine.

Rural Area Flexibility Analysis

A rural flexibility analysis is not provided since these proposed regulations would have no adverse impact on public or private entities in rural areas. The majority of Methadone providers are located in NYC. There are a few others upstate, but they are in cities, of various sizes. There are only three providers located in Ulster, Broome and Montgomery which may be considered a rural area however they are in towns where the density is greater than 150 people per square mile. The compliance, recordkeeping and paperwork requirements are the minimum needed to insure compliance with state and federal requirements and quality patient care.

Job Impact Statement

The implementation of emergency regulation Part 828 will have a minimal impact on jobs in that it may require some additional staffing during the induction phase of Buprenorphine. This regulation will not adversely impact jobs outside of the agency.

Assessment of Public Comment

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

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

Detoxification of Substances and Stabilization Services

I.D. No. ASA-49-08-00009-RP

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

Proposed Action: Amendment of Part 816 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.09, 19.15, 19.40, 21.09 and 23.02

Subject: Detoxification of substances and stabilization services.

Purpose: To amend the emergency promulgation of Part 816 which is currently in effect.

Substance of revised rule: The proposed regulations would revise Section 816 of the Mental Hygiene law (Requirements for the detoxification and stabilization Chemical Dependence Crisis Services) of patients who have substance abuse addictions to allow for statutory implementation of language in Article 7 of the Executive budget in 2008 added under § 6808 C 14-b which added language to Section 2807-c of the public health law changing rates from a DRG system to a per diem system.

The proposed regulation would add the following definitions in Part 816.4 Detoxification, Medically Managed Withdrawal Services, Medically Supervised Withdrawal services-Inpatient, Medically Supervised Withdrawal Services-Outpatient, Medically Monitored, Observation Bed, Prescribing Professional, Recovery Care Plan, and update Qualified Health Professionals to include Licensed Mental Health Counselors, Discrete unit, in order to effectively integrate operation of the proposed regulation.

The proposed regulations updates the following section 816.5 Standards applicable to medically managed withdrawal and stabilization services and in order to define inpatient services that can be offered in this service. The proposed regulation would establish that medically managed services could also provide medically supervised services within the same setting with no change to their OASAS certification. The proposed regulation also defines the differences in the two services.

The proposed regulation was developed by OASAS staff and providers of withdrawal and stabilization services to allow for greater clinical flexibility; reduced paperwork requirement; increased patient-centered focus and a more targeted focus on withdrawal and stabilization services followed by linkage to support ongoing recovery for patients. Recommendations from the Detoxification Task Force convened by the Commissioner in the summer of 2007 included revising Part 816 regulations and "identify and modify, where appropriate the regulatory requirements that currently impede development of community-based medically supervised withdrawal programs". The proposed regulations have been revised to protect patient safety and quality of care while providing greater flexibility to the role of medical and clinical staff to exercise clinical judgment. These changes should allow communities to develop increased community-based withdrawal and stabilization programs to meet the overall goal of the Detoxification Task Force to reduce unnecessary hospital detoxifications and increase access to community based care where safe and appropriate.

The proposed regulation also updates 816.6 Standards applicable to inpatient medically supervised withdrawal and stabilization services. The regulation changes the type of paperwork required and staffing configuration for outpatient setting. The proposed regulation provides a separate section for 816.8 medically supervised outpatient withdrawal and stabilization services. Changes to the outpatient regulation allows for a face to face visit with a medical professional including a registered nurse and allows for the physician to schedule visits less than daily if deemed safe and appropriate. This change addresses the biggest previous barrier to the provision of outpatient services; the need for daily physician contact.

The proposed regulation would reduce the amount of paperwork in both the inpatient and outpatient medically managed and medically supervised setting. The proposed regulation no longer requires vocational and education assessments, changes the language from biopsychosocial assessment to an assessment targeting only the information necessary to safely stabilize the patient, engage them in a change process and link them to appropriate treatment services. The proposed regulation requires targeted assessments aimed at withdrawal and stabilization and linkages, thereby allowing more time for counseling services and providing more time to engage the client in the recovery process.

The proposed regulation expands clinical flexibility by providing individualized treatment when a patient is interested in withdrawal and stabilization services. By triaging the patient a more efficient and cost effective level of care determination can be made allowing for more individualized withdrawal assessment and stabilization.

The proposed Part 816 regulation supports implementation of the enacted 2008-2009 Health and Mental Hygiene Budget and the related 2008-2009 Article 7 bill. The 2008-09 Health and Mental Hygiene Article 7 bill amended section 2807-c of the Public Health law to: reconfigure reimbursement for hospital based medically managed withdrawal / detoxification; and, authorize the reimbursement methodology for a 48 hour detoxification observation period.

The section entitled 816.8 medically monitored withdrawal and stabilization services recognizes the need for flexibility in order to maintain the highest quality in patient care. Each medically monitored withdrawal and stabilization center will be required to submit a staffing protocol that is compliant with clients needs, federal, state and local laws and suitable for their situation. These protocols will be reviewed by the Medical Director for approval and must be submitted at all future recertifications.

Revised rule compared with proposed rule: Substantial revisions were made in sections 816.4, 816.5, 816.6, 816.7, 816.9 and 816.12.

Text of revised proposed rule and any required statements and analyses may be obtained from Deborah Egel, 1450 Western Ave., Albany, NY 12203, (518) 485-2317, email: DeborahEgel@OASAS.state.ny.us

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

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

The proposed Chemical Dependence Withdrawal and Stabilization Services regulation is being re-submitted for public review and comment. Proposed 816 was produced as a result of a task force convened by the Commissioner to make recommendations to detoxification services in the State of New York. As a result not a lot of comments were received by the agency. However, all comments that were received were reviewed and considered. In addition, the proposed Part 816 Chemical Dependence Withdrawal and Stabilization Services must be amended in order for OASAS to be in alignment with New York State statutory language of the enacted 2008-2009 Health and Mental Hygiene Budgets, and the related 2008-2009 Article 7 bill. The 2008-09 Health and Mental Hygiene Article 7 bill amended Section 2807-c of the Public Health Law to: reconfigure reimbursement for hospital based medically managed withdrawal / detoxification; and, authorizes the reimbursement methodology for a 48 hour detoxification observation period and had an effective date of December 1, 2008.

Chemical dependence is a chronic illness which can be treated effectively when medications are administered under conditions consistent with their pharmacological efficacy, and when withdrawal and stabilization services include necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, and medical services as needed. Chemical dependence withdrawal and stabilization is the first step in facilitating recovery from addiction for many patients. The proposed regulation sets forth standards to guide withdrawal and stabilization services.

1. Statutory Authority:

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner ("the Commissioner") of the Office of Alcohol and Substance Abuse Services (OASAS) to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

Section 19.21 (b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

Section 19.21(d) of the Mental Hygiene Law requires the Commissioner to promulgate regulations which establish criteria to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.05 of the Mental Hygiene Law requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

The relevant sections of the Mental Hygiene Law cited above allow the Commissioner to regulate how chemical dependency services are administered. This regulation will alter the way those services are administered, providing greater flexibility within state regulations and

aligning the regulation with NYS statutory language. (2008- 2009 Article 7 bill which amended Public Health law section § 2087-c (4)(1)). The objective is in line with the legislative intent behind the enactment of Sections 19, 22 and 32 of the Mental Hygiene Law, allowing the Commissioner to certify, inspect, license and establish treatment standards for all facilities that treat chemical dependency. Revising this regulation will establish a new standard for all facilities, which will assist withdrawal programs to provide better health care services and withdrawal from chemical dependence.

2. Legislative Objectives:

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the State to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. The Legislature enacted Section 19 of the Mental Hygiene law, enabling the Commissioner to establish best practices for treating chemical dependency.

Needs and Benefits:

Detoxification is a medical intervention that manages an individual safely through the process of withdrawal (McCorry et. al. 2000). Three components of successful detoxification have been identified in the Treatment Improvement Protocol (TIP) #45: evaluation, stabilization and linkage to treatment (CSAT, 2006). The American Society of Addiction Medicine (ASAM) recognizes five levels of care for detoxification services and recognizes that patients should be placed in the least restrictive setting.

In 2007 alone 72,099 patients, who represent 24% of all patients being admitted in addiction treatment, entered hospital and community based withdrawal and stabilization services in New York State. Among the 2007 admissions to Medically Managed Detox the number of patients, 10,029 representing 19%, arrived at another level of care within 14 days of discharge. Among the 2007 admissions to Medically Supervised Withdrawal the number of patients, 8,265 representing 40%, arrived at another level of care within 14 days of discharge. Finally the median numbers are:

Within Medically Managed Detox, 32,983 clients (i.e., UNIQUE PEOPLE) were admitted in 2007, for a total of 51,747 admissions.

73% of clients were admitted once.

15% were admitted twice

10% were admitted 3 to 6 times.

The remaining 1.5% (n=504) of the clients were admitted 7 or more times, (n=5,185) account for 10% of the 51,747 admissions.

Within Medically Supervised Withdrawal 15,034 clients (i.e., UNIQUE PEOPLE) were admitted in 2007 for a total of 20,352 admissions.

79% of clients were admitted once.

13% were admitted twice

7% were admitted 3 to 6 times.

The remaining 0.5% (n=72) of the clients admitted 7 or more times, (n=604) account for 3% of the 20,352 admissions.

The purpose of this regulatory change is to capitalize on better linkage and engagement to prevent multiple admissions without sustained recovery. Patients are more likely to enter and remain in subsequent substance abuse treatment if they believe that the services will help them with life problems (Fiorentine et. al. 1999). Better linkages to inpatient or outpatient rehabilitation have been found when case managers are able to directly link patients through a warm-hand-off or provide incentives. (Chutuape, et.al. 2001; CSAT 2006).

Furthermore, information disseminated in the process of rewriting, reorganizing, and promulgating the Part 816 regulation will provide both patients and withdrawal and stabilization services clear understanding of the intent of the regulation. This will result in better implementation and homogeneous services, improving patient care and more efficient use of staff resources.

Here are the significant comments that were received and addressed in the following manner for the Proposed Part 816.

ISSUE	OASAS RESPONSE
The current proposed renumbering of sections of the Part 816 regulation would result in significant database and certification issues.	Section entitled Incorporation by Reference moved to the end of the regulation to prevent a major overhaul of the specific modalities being renumbered.
Use of inconsistent language (examples such as crisis services and recovery plan)	All references to crisis services or detoxification services were removed and changed to withdrawal and stabilization services. Substance abuse changed to chemical dependence

Add savings clause language

Each level of care or service category needs to be defined by its purpose, its target population. The specific provisions necessary to provide the level of medical needs also should be included in each section to ensure that they are followed.

“Background and Intent” section should help users to understand the place of the regulated services in the system and explain the inter-relationships of the regulated categories as necessary

You use and define the term “pharmacological services” in a very impractical and unusual way.

The proposed definition of “recovery care plan” is inadequate to properly reflect its significance and importance to the State goals of maximizing the “successful linkage” and minimizing repeated hospital detoxifications.

Staffing patterns rewritten and being interpreted to reduce staffing

Sentence structure

Add definition for discrete unit

Medically monitored withdrawal and stabilization services will recognize the need for flexibility.

Consistent language use of recovery care plan which is now better defined.

OASAS added language to help with the administrative tasks involved in issuing new operating certificates due to change in renumbering of services.

This is the way the regulations were previously written. More latitude is now being given to providers in the way of clinical judgment and there is an accompanying document that defines clinical criteria for admission at each level.

In addition, OASAS has posted this on their website and held trainings throughout NYS for providers.

This comment did not come from a provider currently rendering services therefore they may not have known/and or participated in the above.

In this case it should explain the need and intent behind the changes in the names of categories particularly the deletion of the category of “crisis services” and the addition of “stabilization” to the names of the new categories.

Definition changed

Definition changed

Staffing pattern changed to previous regulation language.

Some sentences changed to better clarify the intent.

Language was proposed in the 30 day amendment for discrete units. This language was added to the regulation pending budget approval in 2009.

Each medically monitored withdrawal and stabilization center will be required to submit a staffing protocol that is compliant with clients’ needs, federal, state and local laws and suitable for their situation. These protocols will be reviewed by the Medical Director for approval and must be submitted at all future re-certifications.

4. Costs:

Additional costs are expected to be minimal. Any costs incurred by providers or the State will be offset by better treatment outcomes and healthier patients, which will result in lower costs for medical and other services.

a. Costs to regulated parties:

There should be no additional costs to regulated parties as a result of this regulation. The regulation changes the focus of withdrawal and stabilization services from treatment to stabilization and discharge planning.

b. Costs to the agency, state and local governments:

OASAS is not expected to see increased cost related to administering the rule. OASAS will need to modify the program review instrument cur-

rently used to certify chemical dependence withdrawal services along with providing technical assistance; however this is not expected to result in any undue hardship for OASAS.

Additionally, there is an anticipated cost saving with the regulation changing from a DRG to a per diem rate. Also, patients will be moved from a more intensive service to a lower level of care more effectively thereby reducing costs to the federal, state and local government.

There will be no additional costs to counties, cities, towns or local districts.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

6. Paperwork:

Updated Part 816 regulations decrease the amount of individual patient assessments and treatment plans saving providers considerable time and effort. Assessments are now targeted for this distinct population. Time previously spent on vocation and educational assessments is now eliminated. Services are now focused on withdrawal and stabilization and discharge planning. On average, 60% of counselors' time is spent filling in required paperwork which could now be dedicated to serving the patient population.

The proposed regulation provides more clinical expertise in the management of patients. The previous regulations provided for inpatient treatment in an abbreviated amount of time that was not conducive to recovery. The proposed regulations will encourage the appropriate use of a broader array of withdrawal and stabilization services. Hospitals will be required to more thoroughly assess patients for appropriate level of care and community providers have been provided more flexibility in providing community-based care. This approach to detoxification has been supported by consensus opinion (CSAT, 2006).

The proposed regulation also includes changes to allow more flexibility by reducing paperwork, targeting interventions to withdrawal and stabilization and linkages which in fact allow clinicians more time for individual contact.

7. Duplications:

There is no duplication of other state or federal requirements.

8. Alternatives:

The only other alternative is to keep the existing regulation in place. This would place OASAS in violation of New York State statutory language. In an effort to elicit comments on the proposed regulations and possible alternatives, these amendments were shared with New York's treatment provider community, representing a cross-section of upstate and downstate, as well as urban and rural programs. OASAS used a statewide coalition of representatives of both hospital and community based organizations that provide withdrawal and stabilization services. The regulation was published in the NYS Register and more comments were received, reviewed and more changes were made. Additionally, these regulations were also shared with the New York State's Council of Local Mental Hygiene Directors, New York State's Advisory Council, Alcoholism and Substance Abuse Providers of NYS., Inc., and New York State chemical dependency providers.

9. Federal Standards:

Federal standards governing Medicaid requirements for these services are currently incorporated into Part 816.

10. Compliance Schedule:

Part 816 was promulgated by emergency on December 1, 2008 in order to be compliant with statutory language. Part 816 also appeared in the NYS Register in December for comment and review. Providers were informed that they will be reviewed on the new regulation as of one year after promulgation.

References

Center for Substance Abuse Treatment. Detoxification and Substance Abuse Treatment. Treatment Improvement Protocol (TIP) Series 45. DHHS Publication no. (SMA) 06-4131. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2006.

Chutuape, M.A., Jasinski, D.R., Fingerhood, M.I., and Stitzer, M.I. One- Three- and Six- Month Outcomes After Brief Inpatient Opiate Detoxification. *American Journal of Drug and Alcohol Abuse* 27(1): 19-44, 2001

Fiorentine, R., Nakashima, J., and Anglin, M.D. Client Engagement in Drug Treatment. *Journal of Substance Abuse Treatment* 17(3): 199-206, 1999.

McCorry, F., Garnick, D.W., Bartlett, J., Cotter, F., and Chalk, M> Developing Performance Measures for Alcohol and Other Drug Services in Managed Care Plans. Washington Circle Group. Joint Commission Journal on Quality Improvement 26(11): 633-643, 2000.

Revised Regulatory Flexibility Analysis

Effect of the Rule: The proposed Part 816 will impact certified and/or funded providers. It is expected that the development of Withdrawal and Stabilization services will require providers to amend some of their poli-

cies and procedures. The new service will result in greater clinical flexibility; reduced paperwork requirements; increased patient-centered focus and a more targeted focus on withdrawal and stabilization and linkage to support ongoing patient recovery. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking crisis withdrawal and stabilization services due to less restrictive procedures. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts will not be affected because any nominal increase in cost will be offset by better patient outcomes.

Compliance Requirements: It is expected that there will be some changes in compliance requirements and the development of protocols. Providers will be expected to assess patients within the hospital and determine the appropriate level of care with a focus on linking patients as they progress and move through the continuum of care. The proposed changes affect internal policies however, it is not expected that the Proposed regulation, will have additional costs.

Professional Services: Additional professional services are not expected.

Compliance Costs: Some programs may need additional formally trained staff to meet the proposed requirements.

Economic and Technological Feasibility: Compliance with the record-keeping and reporting requirements of the proposed Part 816 is expected to have a nominal economic impact on small businesses and government.

Minimizing Adverse Impact: Part 816 has been carefully reviewed to ensure minimum adverse impact to providers by NYS Alcoholism and Substance Abuse Providers of NYS, Inc., New York State's Council of Local Mental Hygiene Directors and New York State's Advisory Council, Greater New York Hospital Association, Healthcare of New York, and a statewide representative coalition from hospital and community based organizations that provide withdrawal and stabilization services. All comments received were reviewed and numerous changes were made. Any impact this rule may have on small businesses and the administration of State or local governments and agencies will either be a positive impact or have nominal costs. Compliance requirements are small and will be absorbed into the already existing economic structure. The positive impact for patients and the NYS health care system, out- weigh any potential minimal costs.

Small Business and Local Government Participation: The proposed regulations were shared with New York's treatment provider community including, NYS Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare of New York, the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services and a statewide representative coalition from hospital and community based organizations that provide withdrawal and stabilization services.

Revised Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: There are six (6) certified providers of medically managed detoxification services that are located in rural areas of the State five of which are public.

2. Reporting: There will be new documenting requirements to maintain clients in the higher level of care that will have some impact on providers.

3. Costs: There will be minimum impact for rural providers to implement Part 816.

4. Minimizing adverse impact: Regulatory reform of detoxification rates was driven by language in the Article 7 bill from the Executive. In order to achieve optimal results, OASAS solicited input from over 40 providers of service representing each modality statewide. This group met for a period of six months and the hospitals agreed that it was important to align detoxification care with detoxification rates. Hospitals also realized this could increase opportunities for Outpatient detoxification units with increased income.

5. Rural area participation: These amendments were shared with New York's treatment provider community and included a cross-section of upstate and downstate, as well as urban and rural programs.

Revised Job Impact Statement

The implementation of Part 816 may have minor impact on staffing at hospital based detoxification units. Hospital based units under the current Part 816 solely operate as Medically managed units which requires more staffing than any other withdrawal service. Under the Proposed 816 hospital based units can now operate two levels of care simultaneously; medically managed and medically supervised. Staffing for medically supervised services may require less staffing.

In addition, the regulation allows for flexibility within the Medically monitored withdrawal and stabilization programs. This could potentially change the staffing within the medical complement and may adversely impact some LPN's.

Assessment of Public Comment

The Proposed 816 was created as a result of a task force convened by the Commissioner to make recommendations to Detoxification services in

the State of New York. As a result not a lot of comments were received by the agency. However, all comments that were received were reviewed and listed below are the issues that were raised and addressed in the following manner:

ISSUE	OASAS RESPONSE
The current proposed renumbering of sections of the Part 816 regulation would result in significant database and certification issues.	Section entitled Incorporation by reference moved to the end of the regulation to prevent a major overhaul of the specific modalities being renumbered.
Use of inconsistent language (i.e. crisis svcs and recovery plan)	All references to crisis services or detoxification services were removed and changed to withdrawal and stabilization services. Substance abuse changed to chemical dependence
Add savings clause language	Consistent language use of recovery care plan which is now better defined.
Each level of care or service category needs to be defined by its purpose, its target population. The specific provisions necessary to provide the level of medical-ness also need to be included in each section to ensure that they are followed.	OASAS added language to help with the administrative tasks involved in issuing new operating certificates due to change in renumbering of services. This is the way regulations were previously written. More latitude is now being given to providers in the way of clinical judgment and there is an accompanying document that defines clinical criteria for admission at each level.
Background and Intent'' section should help users to understand the place of the regulated services in the system and explain the inter-relationships of the regulated categories as necessary	In addition, OASAS has posted this on their website and held trainings throughout NYS for providers. This comment did not come from a provider currently rendering services therefore they may not have known/and or participated in the above.
You use and define the term ''pharmacological services'' in a very impractical and unusual way. The proposed definition of ''recovery care plan'' is inadequate to properly reflect its significance and importance to the State goals of maximizing the ''successful linkage'' and minimizing repeated hospital detoxifications.	In this case it should explain the need and intent behind the changes in the names of categories particularly the deletion of the category of ''crisis services'' and the addition of ''stabilization'' to the names of the new categories. Definition changed
Staffing patterns rewritten and being interpreted to reduce staffing Sentence structure	Definition changed
Add definition for discrete unit	Staffing pattern changed to previous regulation language. Some sentences changed to better clarify the intent. Language was proposed in the 30 day amendment for discrete units. This language was added to the regulation pending budget approval in 2009.

Department of Civil Service

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-20-09-00002-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To classify a position in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Health, by increasing the number of positions of Assistant Counsel from 18 to 19.

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-20-09-00003-P

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

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

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

Subject: Jurisdictional Classification.

Purpose: To classify positions in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Labor under the subheading ''State Insurance Fund,'' by increasing the number of positions of Special Investment Officer from 4 to 10.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy

Commissioner and Counsel, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-20-09-00004-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Correctional Services, by adding thereto the position of Deputy Superintendent of Correctional Mental Health Care Facility (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-20-09-00005-P

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

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

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

Subject: Jurisdictional Classification.

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

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the State University of New York under the subheading "SUNY at Buffalo," by deleting therefrom the positions of Senior Laboratory Technician (Nucleonics) (1) and Supervisor of Audio Visual Equipment Services (1).

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

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

Jurisdictional Classification

I.D. No. CVS-20-09-00006-P

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

Proposed Action: Amendment of Appendixes 1 and 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete and classify a position in the exempt class and to delete and classify positions in the non-competitive class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Labor under the subheading "Workers' Compensation Board," by deleting therefrom the position of Assistant Secretary to Workers' Compensation Board and by increasing the number of positions of Secretary from 2 to 3; and

Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office for Technology," by deleting therefrom the positions of Assistant Director Computer System Programming (3) and by adding thereto the positions of Assistant Director Informa-

tion Technology Technical Services 1 (3); in the Department of Labor under the subheading "State Insurance Fund," by deleting therefrom the position of Assistant Administrative Officer 1 (1) and by adding thereto the position of Administrative Officer 3 (1); and, in the Department of Mental Hygiene under the subheading "Office of Alcoholism and Substance Abuse Services," by deleting therefrom the positions of Addiction Treatment Center Director and Director, Addiction Treatment Center and by adding thereto the positions of Director, Addiction Treatment Center 1 and Director, Addiction Treatment Center 2.

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

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

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

Regulatory Impact Statement

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

Regulatory Flexibility Analysis

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

Rural Area Flexibility Analysis

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

Job Impact Statement

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

Department of Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Contraband Drugs

I.D. No. COR-20-09-00020-P

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

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

Statutory authority: Correction Law, section 112

Subject: Contraband Drugs.

Purpose: Provide clarity for staff and ensure consistency between departmental internal policy and the corresponding section of 7 NYCRR.

Text of proposed rule: Amend Section 1010.3, as follows:

The possession by [inmates or visitors] *anyone* of contraband drugs presents a serious threat to the safety and security of a correctional facility. The [attendant] importation of and trafficking in contraband drugs provides an opportunity for the demoralization of inmates and the corruption of correctional staff. The accurate identification of suspected contraband drugs and the use of appropriate disciplinary sanctions for the possession of contraband drugs can assist facility administrators in detecting and suppressing this threat.

Amend sections 1010.4(b), 1010.4(c), 1010.4(e) and 1010.4(f), as indicated below:

When a substance is found which is suspected of being a contraband drug, the following steps shall be taken.

(a) Place the substance in a sealed container and label it with the following information:

(1) date and time found;

(2) place where found; and

(3) name and badge number of the officer, security supervisor, executive team member with peace officer status or name and title of the employee (if civilian) finding the substance.

(b) Initiate a request for test of suspected contraband drugs (see [subdivision [h]] *section 1010.8(a)* of this part [section]) to include details of circumstances leading to request. Each person handling the suspected substance shall make an appropriate notation on the form to document the action taken as well as the chain of custody of the substance until it is identified or, if applicable, placed in control of the Inspector General's Narcotics staff or a police agency or [forwarded to] the State Police laboratory.

(c) If the substance is not to be identified immediately, it shall be secured in a locked contraband locker or other appropriate secure place with limited *documented* access.

(d) If the substance is in tablet or capsule form, it shall be inspected at the facility pharmacy for possible identification.

(e) If the substance has not been conclusively identified at the facility pharmacy, it shall be tested by the use of the narcotics identification kit (NIK®) manufactured by Public Safety, Inc. *Always begin Polytesting with Test A and continue from test to test until a positive or negative result is obtained. Tests E, L, M, N, P, Q and R are exceptions to this rule and are designed as stand alone tests (see section 1010.8(c) of this part, NIK® Tests list.*

(f) The individual performing the test shall have been appropriately trained in the use of the testing materials and shall follow the procedures recommended by the manufacturer. The testing sequence followed and the results obtained shall be noted on the contraband test procedure form (see [subdivision [i]] *section 1010.8(b)* of this part [section]).

(g) Any substance remaining after testing at the facility may, but need not, be forwarded to a State Police laboratory for further testing.

Repeal sections 1010.4(h) Form 2080 and 1010.4(i) Form 2081.

Amend section 1010.5 and add new section 1010.5(e) as indicated below:

In a subsequent disciplinary hearing, the positive result of a test of suspected contraband drugs may be used as evidence that the suspected substance is what the test result indicates. In addition to the misbehavior report, the inmate shall be served with the following documents and the record of the hearing must include:

(a) the request for test of suspected contraband drugs form, *see section 1010.8(a) of this part;*

(b) the contraband test procedure form, *see section 1010.8(b) of this part;*

(c) the test report prepared by an outside agency subsequent to testing of the substance; if any;

(d) a statement of the scientific principals and validity of the testing materials and procedures used (for the Public Safety, Inc. NIK® system, see [below] *section 1010.8(c) of this part.*

(e) a photocopy of the individual test instructions for each test used.

Repeal the remaining text in current section 1010.5(d).

Create a new section 1010.6 as follows:

§ 1010.6 **LEFTOVER DRUG SUBSTANCES.** *Substances remaining after testing and/or disciplinary proceedings should be disposed of in accordance with NYSDOCS Departmental Directive #4910, "Control of and Search for Contraband."*

Create a new section 1010.7 as follows:

§ 1010.7 **POSITIVE TEST REPORTING.** *A positive test for suspected contraband drugs must be reported as an Unusual Incident in accordance with Directive #4004, when any one of the following conditions apply:*

- *A positive test result for cocaine, heroin, or marijuana, even if no perpetrator is identified.*

- *Any positive test result in which an inmate has been identified as a perpetrator of the incident.*

- *Any positive test result which results in the arrest of any individual, i.e., visitor, volunteer, contractor, employee, etc., by the Department's Inspector General's Office or any outside police agency.*

Create a new Section 1010.8 as indicated below:

1010.8 Forms.

(a) *Form 2080, Request for Test Of Suspected Contraband Drugs.* See Appendix (page 109) in this issue of the Register.

(b) *Form 2081, Contraband Test Procedure.* See Appendix (page 110) in this issue of the Register.

(c) *NIK® System, statement of principals, procedures and tests* NIK® Public Safety developed the NIK® System of Narcotics Identification as a means of rapidly screening and presumptively identifying sub-

stances suspected of being abused drugs, narcotics and hallucinogens. Designed to be a completely self-contained system, the kit in its several configurations, provides all necessary elements to perform chemical color tests for the commonly known and most frequently abused narcotics and dangerous drugs.

Each test pack contains the chemical required to perform the desired test in pre-filled, hermetically sealed glass ampoules. This eliminates the need for measuring, mixing and dispensing of reagents while affording a maximum of protection to the investigator. Reagent shelf life is also substantially prolonged by this method of packaging. Chemicals used are ACS grade or better, providing the highest rate of accuracy.

The NIK® System is designed to function as a transportable-minor narcotics identification laboratory. It may be carried with you and is, therefore, available for use wherever and whenever the need may arise.

"COLORIMETRIC CHEMICAL TESTING"

The NIK® System employs chemical colorimetric comparison as the means by which narcotics and other controlled substances are screened and presumptively identified. Each test pack contains one or more chemical reagents which will predictably develop a color or a series of colors in the presence of the most commonly known narcotics and dangerous drugs. When the predicted color reaction occurs while following the recommended test sequence, a positive identification is presumed. A positive identification is considered a component of probable cause and generally recognized within our legal system as being presumptive in nature.

"NIK® POLYTESTING SYSTEM"

The NIK® System of Narcotics Identification is based upon a poly testing procedure whereby a suspect material is subjected to a series of progressively discriminating screening tests. The results of a single test may or may not yield a valid result. However, the sequential results of several tests, if they all indicate a positive reaction for a particular substance, provides a high degree of certainty that the suspect material is in fact what the NIK® Poly testing System indicates it to be.

Experiments have been and continue to be conducted with hundreds of licit and illicit chemical compounds in a continuing effort to eliminate false positive results. No chemical reagent system, adaptable to field use exists, that will completely eliminate the occurrence of an occasional invalid test result. A complete forensic laboratory would be required to qualitatively identify an unknown suspect substance. In absence of such a laboratory facility, the NIK® System, utilizing the recommended Poly testing procedure, is your best assurance that the presumptive results of a positive identification are what they appear to be.

"NIK® TESTING CAPABILITY"

The NIK® System will presumptively identify most substances which fall within the following general groups of abused drugs:

- A. Cannabis sativa L. B. Depressants C. Hallucinogens
D. Narcotics E. Stimulants

NIK® NARCOTICS IDENTIFICATION SYSTEM - NIK® TESTS

- Test A Marquis Reagent - for the presumptive identification of Opiates (Morphine, Codeine or Heroin), Demerol, Black Tar, Amphetamine-type compound, including Methamphetamine & Methylenedioxyamphetamine (MDMA or Ecstasy), Amphetamines and as a general screening agent for other drugs
- Test B Nitric Acid Reagent - always used with test A for the confirmation of Opiates (Morphine, Codeine or Heroin) and Amphetamine-type compound as well as well as a general screening test for other drugs
- Test C Modified Dille-Koppanyl Reagent - for the presumptive identification of Barbiturates
- Test D Modified Ehrlich's Reagent - for the presumptive identification of LSD (Lysergic Acid Diethylamide)
- Test E Duquenois-Levine Reagent - for the presumptive identification of Marijuana, Hashish and "Hash Oil"
- Test G Modified Scott Reagent - for the presumptive identification of Cocaine, Crack or Free Base
- Test H Proprietary formula - for the presumptive identification of Methadone
- Test I Proprietary formula - for the general screening to presumptively identify PMA, Ketamine, Barbiturates and Methadone
- Test J Proprietary formula - for the presumptive identification of PCP (Phencyclidine)
- Test K Proprietary formula - for the presumptive identification of Heroin, Black Tar, Codeine and Morphine, (easier to distinguish between the four Opiates, than using test B) -test screens out Methapyrilene and Propoxyphene
- Test L Modified Mecke's Reagent - for the presumptive identification of all forms of Heroin, including White, Brown and Black Tar, and Ecstasy (MDMA), as well as detecting the presence of

certain dye combinations designed to give false positives with the Marquis Test (Test A)

- Test M Proprietary formula - for the presumptive identification of Methaqualone (Quaaludes, Sopor, Somnafac, Opitimll and Parest are the trade names)
- Test N Proprietary formula - for the presumptive identification of Pentazocine, commonly known under the trade name Talwin Nx or Talacen
- Test O Proprietary formula - for the presumptive identification of GHB (gammahydroxybutyrate)
- Test P Proprietary formula - for the presumptive identification of Propoxyphene
- Test Q Proprietary formula - for the presumptive identification of Ephedrine and Pseudoephedrine
- Test R Proprietary formula - for the presumptive identification of Valium (Daizepam), Rohpnol (Flunitrazepam) and Methathione
- Test T Proprietary Formula - for the presumptive identification of Ketamine.
- Test U Proprietary formula - for the presumptive identification of secondary amines, such as Methamphetamine and MDMA (Ecstasy)
- Test W Proprietary formula - for the presumptive identification of amphetamines and Methadone, as well as screening for PMA and Ketamine with Test I

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

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

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

Regulatory Impact Statement

1. Statutory Authority

Section 112 of Correction Law grants the Commissioner of DOCS the superintendence, management and control of the correctional facilities and inmates confined therein and to promulgate rules and regulations for this purpose.

2. Legislative Objective

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner to promulgate such rules, regulations and disciplinary standards so as to provide for the safe, secure and orderly operation of correctional facilities for both staff and inmates and to help ensure public safety.

3. Needs and Benefits

The possession of contraband drugs by anyone presents a serious threat to the safety and security of a correctional facility. Therefore, the accurate identification of suspected contraband drugs and the use of appropriate disciplinary sanctions can assist facility administrators in detecting and suppressing this threat. Due to the potential for disciplinary sanctions and the paramount safety and security concerns associated with contraband drug testing, DOCS considers it prudent to ensure that its internal policy mirrors the corresponding part of 7NYCRR Part 1010.

4. Costs

a. To agency, state and local government: No discernable costs are anticipated.

b. Cost to private regulated parties: None. The proposed rule changes do not apply to private parties.

c. This cost analysis is based upon the fact that the rule changes merely clarify and expand upon previously established rules regarding internal management and Standards of Inmate Behavior. No additional procedures or new staff are necessary to implement the proposed changes.

5. Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

6. Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

7. Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

8. Alternatives

DOCS considered the alternative of not promulgating this rule. However, DOCS decided that this rule making was important to ensure that departmental policy (Directive #4938) mirrors Part 1010, 7 NYCRR. To this purpose departmental policy (Directive #4938) is also undergoing minor revisions accordingly.

9. Federal Standards

There are no minimum standards of the Federal government for this or a similar subject area.

10. Compliance Schedule

The Department of Correctional Services will achieve compliance with the proposed rules immediately.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This proposal seeks to provide consistency between departmental internal policy and the corresponding section of 7NYCRR, as well as to provide clarity with regard to the affected procedures.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal seeks to provide consistency between departmental internal policy and the corresponding section of 7NYCRR, as well as to provide clarity with regard to the affected procedures.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal seeks to provide consistency between departmental internal policy and the corresponding section of 7NYCRR, as well as to provide clarity with regard to the affected procedures.

Education Department

EMERGENCY RULE MAKING

Administration of Immunization Agents by Certified Pharmacists

I.D. No. EDU-47-08-00007-E

Filing No. 449

Filing Date: 2009-05-01

Effective Date: 2009-05-01

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

Action taken: Addition of section 63.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6527(7), 6801(1), (2) and (3), 6802(22), and 6828(1) and (2), and 6909(7); and L. 2008, ch. 563

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

Specific reasons underlying the finding of necessity: The proposed amendment implements the requirements of Chapter 563 of the Laws of 2008, which authorizes licensed pharmacists with a certification of administration issued by the Department to administer immunizations for influenza and pneumococcal disease and medications for the emergency treatment of anaphylaxis to adults. The statute became effective on December 3, 2008.

Effective December 3, 2008, the proposed amendment authorizes licensed pharmacists to administer immunizations to prevent influenza and pneumococcal disease to patients 18 or older and medications for the emergency treatment of anaphylaxis. Since that date, the Department sought extensive comment from the field on the proposed amendment. In response to the comments, the regulations were revised by emergency action, effective March 2, 2009.

A Notice of Proposed Rule Making was published in the State Register on November 19, 2008. The proposed rule was substantially revised in response to public comment and a Notice of Revised Rule Making was published in the State Register on February 4, 2009. The proposed amendment was adopted as a permanent rule at the April 20-21, 2009 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on May 14, 2009. However, the second emergency rule which took effect on March 2, 2009 will expire on April 30, 2009.

Therefore, emergency action is necessary now for the preservation of

the general welfare in order to ensure that the emergency rule remains continuously in effect until the effective date of the rule's permanent adoption, and thereby avoid any risk of potential disruptions to the administration of such immunizations.

Subject: Administration of immunization agents by certified pharmacists.

Purpose: Establish criteria for the certification of licensed pharmacists and requirements for the administration of immunizations.

Substance of emergency rule: The Board of Regents proposes to amend the Regulations of the Commissioner of Education by adding a new section 63.9, effective December 3, 2008. Section 63.9 of the Regulations of the Commissioner of Education is added to establish requirements relating to the administration of immunizations for the prevention of influenza and pneumococcal disease and medications for the emergency treatment of anaphylaxis by certified pharmacists.

Section 63.9(a) defines the applicability of the provision, authorizing certified pharmacists to administer certain immunization agents and medications for the emergency treatment of anaphylaxis only to the extent that the applicable provisions in Education Law sections 6527, 6801, 6802, 6828 and 6909 have not expired or been repealed.

Sections 63.9(b)(1) and (b)(2) provide that a pharmacist with a certificate of administration issued by the Department is authorized to administer immunization agents to prevent influenza or pneumococcal disease to patients over the age of 18, pursuant to either a patient specific order or non-patient specific order and protocol ordered by a licensed physician or certified nurse practitioner with a practice site in the county in which the immunization is administered. If the immunization is administered in a county with a population of 75,000 or less, the immunization shall be prescribed or ordered by a licensed physician or certified nurse practitioner with a practice site in the county in which the immunization is administered or in an adjoining county.

Section 63.9(b)(3) establishes the requirements that a licensed pharmacist must meet in order to obtain a certificate to administer immunizations from the Department. The licensed pharmacist shall submit an application with the required fee and present satisfactory evidence of completion of one of the following: (1) a training course in the administration of immunizations acceptable to the Commissioner and the Commissioner of Health; (2) a training course associated with a Doctor of Pharmacy degree; or (3) possession of a current certificate of administration issued by another jurisdiction and continuous practice in the administration of immunizing agents since the pharmacist received such training or completion of a retraining program in the administration of immunization agents.

Section 63.9(b)(4) establishes the standards, procedures and reporting requirements for the administration of immunizing agents.

Section 63.9(b)(5)(i) provides that certified pharmacists shall maintain or ensure the maintenance of a copy of the patient specific order or the non-patient specific order and protocol prescribed by a licensed physician or a certified nurse practitioner which authorizes the certified pharmacist to administer immunization agents. This section prescribes the information required to be included in patient specific orders and non-patient specific orders and protocol. Such orders and protocol shall be considered a record of the patient. The pharmacist shall maintain a record of the patient in either: (a) a patient medication profile, or (b) in instances where a patient medication profile is not required, on a separate form that is retained by the pharmacist who administered the immunization.

Section 63.9(b)(5)(ii) establishes the contents of patient specific orders and non-patient specific orders.

Section 63.9(b)(5)(iii) specifies additional provisions required to be included in non-patient specific orders, including the incorporation of a protocol.

Section 63.9(b)(5)(iv) requires the protocol, incorporated into the non-patient specific order, to include the standards, procedures and reporting requirements set forth in section 63.9(b)(4).

Section 63.9(c)(1) authorizes certified pharmacists to administer medications for the emergency treatment of anaphylaxis.

Section 63.9(c)(2) establishes the standards, procedures and reporting requirements for the administration of anaphylaxis treatment agents by certified pharmacists.

Section 63.9(c)(3)(i) requires a certified pharmacist to maintain or ensure the maintenance of a copy of the non-patient specific order and protocol prescribed by a licensed physician or a certified nurse practitioner that authorizes such pharmacist to administer medications for the emergency treatment of anaphylaxis. This section requires a record of each patient to be maintained in either a patient medication profile, or in instances where a patient medication profile does not exist, on a separate form that is retained by the pharmacist who has administered the immunization.

Section 63.9(c)(3)(ii) provides that the non-patient specific order shall authorize one or more named pharmacists, or certified pharmacists who are not individually named but are identified as employed or under contract

with an entity that is legally authorized to employ or contract with pharmacists to provide pharmaceutical services, to administer specified anaphylaxis treatment agents in specified circumstances for a prescribed period of time. This subparagraph also prescribes the content for such non-patient specific orders.

Section 63.9(c)(3)(iii) requires that the protocol to be incorporated into the non-patient specific order include the requirements set forth in section 63.9(c)(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. EDU-47-08-00007-P, Issue of November 19, 2008. The emergency rule will expire June 29, 2009.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

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

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

Subdivision (1) of section 6508 of the Education Law provides that state boards for the professions shall assist the Board of Regents and Department on matters of professional licensing.

Subdivision 7 of section 6527 of the Education Law authorizes physicians to order non-patient specific regimens for the administration of immunizing agents by pharmacists.

Section 6801 of the Education Law authorizes certified pharmacists to administer immunizing agents and authorizes the Commissioner of Education to promulgate regulations regarding training and reporting requirements.

Subdivision 7 of section 6909 of the Education Law authorizes nurse practitioners to order non-patient specific regimens for the administration of immunizing agents by pharmacists.

Section 6828 of the Education Law authorizes the Commissioner to promulgate regulations relating to the issuance of a certificate of administration to a qualifying pharmacist.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the aforementioned statutes by expanding access to immunizations to residents of the State of New York. The proposed amendment establishes procedures for the Department to certify licensed pharmacists to administer immunizing agents and anaphylactic treatments; prescribes standards, procedures, reporting and record keeping requirements for the administration of immunizations and anaphylactic treatments and sets forth the requirements for orders and protocols for the administration of immunizations and anaphylactic treatments.

3. NEEDS AND BENEFITS:

Chapter 563 of the Laws of 2008, effective December 3, 2008, authorizes licensed pharmacists that are certified by the State Education Department to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. Section 6801(2) of the Education Law, as added by Chapter 563 of the Laws of 2008, directs the Commissioner of Education to promulgate regulations concerning a licensed pharmacist's execution of non-patient specific orders prescribed or ordered by a licensed physician or certified nurse practitioner. Section 6801(3) prohibits a pharmacist from administering immunizing agents without receiving training satisfactory to the Commissioner and the Commissioner of Health.

In order to timely implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes procedures for the certification of licensed pharmacists to administer immunizations. Specifically, the proposed amendment requires a licensed pharmacist to submit an application, with the required fee, to the Department and present satisfactory evidence of one of the following: (1) completion of a training course in the administration of immunizations acceptable to the Commissioner and the Commissioner of Health, within the three years immediately preceding application for a certificate of administration; (2) a Doctor in Pharmacy Degree and completion of training in the administration of immunization agents received as part of his/her pharmacy degree that is satisfactory to the Department; or (3) possession of a current certificate of administration issued by another jurisdiction and continuous practice in the administration of immunizing agents since the pharmacist received

such training or completion of a retraining program in the administration of immunization agents.

The proposed amendment also establishes uniform requirements for certified pharmacists to meet when executing orders to administer immunizations and medications for the emergency treatment of anaphylaxis. For instance, the proposed amendment defines what information should be included in the non-patient specific order and the requirements that must be set forth in the protocol, for a certified pharmacist to follow when administering immunizations through a non-patient specific order. The proposed amendment also establishes uniform reporting requirements. Specifically, the proposed amendment requires a certified pharmacist (1) to inform the recipient, in writing, of potential side effects and adverse reactions prior to the administration of an immunization; (2) to provide written instructions to the recipient regarding the appropriate course of action in the event of contraindications or adverse reactions; and (3) to provide a signed certificate of immunization to the recipient containing certain prescribed information.

With the enactment of Chapter 563 of the Laws of 2008, New York State joins 48 other states and the District of Columbia in authorizing pharmacists to administer immunizations. The proposed amendment is needed to expand access to immunizations, which is expected to reduce morbidity and mortality caused by influenza and pneumococcal disease and any related complications. At the present time, there are approximately 20,000 pharmacists licensed to practice in New York State. Consequently, a significant number of individuals will be affected by the proposed amendment.

The proposed amendment is not expected to cause regulated parties to have to hire additional professional services in order to comply.

4. COSTS:

(a) There are no additional costs to state government beyond those imposed by statute.

(b) There are no additional costs to local government beyond those imposed by statute.

(c) Cost to private regulated parties: The amendment is likely to result in only nominal costs to entities that employ certified pharmacists to execute the non-patient specific orders to administer immunizations. These entities will likely have to bear a small additional cost to provide prescribed written information and issue a certificate of immunization to each recipient who requests such a certificate. The State Education Department estimates that the nominal cost of providing this information and issuing the certificate will be approximately \$.75 per recipient. The other paperwork requirements relate to maintenance of patient records, which are already subject to the requirements of section 29.2(a)(3) of the Regents Rules, and consequently will not result in additional costs.

(d) Cost to the regulatory agency. As stated above in "Costs to State Government", the proposed amendment does not impose additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendment defines what information should be included in the orders and the requirements that must be set forth in the protocol, for a certified pharmacist to follow when administering immunizations through a non-patient specific order. The proposed amendment also establishes uniform reporting requirements. Specifically, the proposed amendment requires a certified pharmacist (1) to inform the recipient, in writing, of potential side effects and adverse reactions prior to administration of the immunization; (2) to provide written instructions to the recipient regarding the appropriate course of action in the event of contraindications or adverse reactions; and (3) to provide a signed certificate of immunization to the recipient containing certain prescribed information.

7. DUPLICATION:

The proposed amendment does not duplicate other existing state or federal requirements.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendment and none were considered because of the nature of the amendment, which implements statutory requirements.

9. FEDERAL STANDARDS:

There are no Federal standards that establish requirements that certified professional nurses must meet to administer immunizations, pursuant to non-patient specific orders and protocol.

10. COMPLIANCE SCHEDULE:

The proposed amendment implements and clarifies statutory requirements. Regulated parties must comply with the proposed amendment on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

In order to implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes requirements for the certifica-

tion of pharmacists to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. The proposed amendment also establishes requirements relating to the execution of patient specific and non-patient specific orders prescribed by licensed physicians or certified nurse practitioners for the administration of such immunizations. The proposed amendment does not regulate small businesses or local governments. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. At the present time, there are approximately 20,303 licensed pharmacists that will be subject to the requirements of the proposed amendment. Of these licensed pharmacists, approximately 2,613 licensed pharmacists report their permanent address of record in a rural county of New York State.

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

Chapter 563 of the Laws of 2008, effective December 3, 2008, authorizes licensed pharmacists that are certified by the State Education Department to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. Section 6801(2) of the Education Law, as added by Chapter 563 of the Laws of 2008, directs the Commissioner of Education to promulgate regulations concerning a licensed pharmacist's execution of non-patient specific orders prescribed or ordered by a licensed physician or certified nurse practitioner. Section 6801(3) prohibits a pharmacist from administering immunizing agents without receiving training satisfactory to the Commissioner and the Commissioner of Health.

In order to timely implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes procedures for the certification of licensed pharmacists to administer immunizations. Specifically, the proposed amendment requires a licensed pharmacist to submit an application, with the required fee, to the Department and present satisfactory evidence of one of the following: (1) completion of a training course in the administration of immunizations acceptable to the Commissioner and the Commissioner of Health, within the three years immediately preceding application for a certificate of administration; (2) a Doctor in Pharmacy Degree and completion of training in the administration of immunization agents received as part of his/her pharmacy degree that is satisfactory to the Department; or (3) possession of a current certificate of administration issued by another jurisdiction and continuous practice in the administration of immunizing agents since the pharmacist received such training or completion of a retraining program in the administration of immunizing agents.

The proposed amendment also establishes uniform requirements for certified pharmacists to meet when executing orders to administer immunizations and medications for the emergency treatment of anaphylaxis. For instance, the proposed amendment defines what information should be included in the non-patient specific order and the requirements that must be set forth in the protocol, for a certified pharmacist to follow when administering immunizations through a non-patient specific order. The proposed amendment also establishes uniform reporting requirements. Specifically, the proposed amendment requires a certified pharmacist: (1) to inform the recipient, in writing, of potential side effects and adverse reactions prior to the administration of an immunization; (2) to provide written instructions to the recipient regarding the appropriate course of action in the event of contraindications or adverse reactions; and (3) to provide a signed certificate of immunization to the recipient containing certain prescribed information.

With the enactment of Chapter 563 of the Laws of 2008, New York State joins 48 other states and the District of Columbia in authorizing pharmacists to administer immunizations. The proposed amendment is needed to expand access to immunizations, which is expected to reduce morbidity and mortality caused by influenza and pneumococcal disease and any related complications. At the present time, there are approximately 20,000 pharmacists licensed to practice in New York State. Consequently, a significant number of individuals will be affected by the proposed amendment.

The proposed amendment is not expected to cause regulated parties to have to hire additional professional services in order to comply.

3. COSTS:

The proposed amendment is likely to result in only nominal costs to entities that employ certified pharmacists to execute orders to administer

immunizations, including those that are located in rural areas of the State. These entities will likely have to bear a small additional cost to provide prescribed written information and issue a certificate of immunization to each recipient. The State Education Department estimates that the nominal cost of providing this information and issuing the certificate will be approximately \$.75 per recipient. The other paperwork requirements relate to maintenance of patient records, that are already subject to the requirements of section 29.2(a)(3) of the Regents Rules, and consequently will not result in additional costs.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment implements statutory directives to establish requirements for certified pharmacists to execute orders prescribed by licensed physicians or certified nurse practitioners for the administration of immunizations and makes no exception for licensed registered professional nurses who live or work in rural areas. In any event, consistent practice requirements should apply no matter the geographic origin of the licensee to ensure a uniform high standard of competency across the State and that the administration of immunizations is performed safely in all areas of the State. Because of the nature of the proposed amendment, establishing different standards for licensed registered professional nurses in rural areas of New York State is inappropriate.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in promoting expanded access to important immunizations. Included in this group were members of the State Board of Pharmacy; educational institutions which currently offer professional pharmacy programs; professional associations representing the pharmacy profession, such as the Pharmacists Society of the State of New York, the New York State Council of Health System Pharmacists and the New York State Chain Drug Association; the State Board for Nursing; the New York State Department of Health; the New York City Department of Health and Mental Hygiene; and many other interested parties. These groups, which have representation in rural areas, have been provided notice of the proposed rule making and an opportunity to comment on the proposed amendment.

Job Impact Statement

In order to implement the requirements of Chapter 563 of the Laws of 2008, the proposed amendment establishes requirements for the certification of pharmacists to administer immunizations to prevent influenza or pneumococcal disease and medications required for emergency treatment of anaphylaxis. The proposed amendment also establishes requirements relating to the execution of patient specific and non-patient specific orders prescribed by licensed physicians or certified nurse practitioners for the administration of such immunizations. The amendment will not have a substantial adverse impact on jobs and employment opportunities, beyond those imposed by statute. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

A Notice of Proposed Rule Making was published in the State Register on November 19, 2008. Below is a summary of written comments received by the State Education Department (SED) and SED's assessment of issues raised.

1. COMMENT: Section 63.9(b)(4)(x) of the proposed amendment relates to the reporting requirements for both the New York State Department of Health and the New York City Department of Health and Mental Hygiene. However, this section only refers to the Commissioner of Health, which could be interpreted to mean only the Commissioner of Health of the State of New York and not the New York City Commissioner of Health, as was originally intended.

DEPARTMENT RESPONSE: SED agrees with this comment and has revised the proposed rule to refer to the "Commissioner of Health of the State of New York or of New York City, as applicable."

2. COMMENT: One commenter indicated that the proposed amendment is inconsistent because it refers to the individuals receiving immunizations as both "patients" and "recipients".

DEPARTMENT RESPONSE: SED agrees that both terms are used interchangeably throughout the proposed amendment. However, SED believes the terms are used appropriately and will not result in confusion to the regulated parties.

**EMERGENCY
RULE MAKING**

Computation of Nonresident Pupil Tuition Rate

I.D. No. EDU-18-09-00007-E

Filing No. 450

Filing Date: 2009-05-01

Effective Date: 2009-05-01

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

Action taken: Amendment of section 174.2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 3202(4)(d) and 3206

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amendment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

State Administrative Procedure Act (SAPA) section 202 generally provides that a rule may not be adopted until at least 45 days after publication of a Notice of Proposed Rule Making in the *State Register*. Because the Board of Regents meets at fixed intervals, the earliest the proposed rule could be presented for adoption by the Board of Regents, after expiration of the 45-day public comment period prescribed by SAPA, is the July 27-28, 2009 Regents meeting. However, affected school districts need to know now the allowable tuition rates for nonresident pupils for public reporting by school districts, so that they may timely prepare their contracts for the 2009-2010 school year pursuant to statutory requirements.

Emergency action to adopt the proposed rule is necessary for the preservation of the general welfare in order to immediately establish the methodology for computing allowable tuition rates for public reporting by school districts, so that affected school districts may timely prepare contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year, pursuant to statutory requirements.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the July 2009 meeting of the Board of Regents, which is the first scheduled Regents meeting after expiration of the 45-day public comment period prescribed by the State Administrative Procedure Act.

Subject: Computation of nonresident pupil tuition rate.

Purpose: To conform section 174.2 to the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and other statutory changes.

Text of emergency rule: Section 174.2 of the Regulations of the Commissioner of Education is amended, effective May 1, 2009, as follows:

§ 174.2 Computation of tuition charges for nonresident pupils.

The provisions of this section shall apply to all contracts entered into after January 1, 1975, for the reimbursement of a school district which provides instruction to a nonresident pupil. The charge for the instruction of each nonresident pupil shall not exceed the actual net cost of educating such pupil. If the accounting records of the school district providing such instruction are not maintained in a manner which would indicate the net cost of educating such pupil, a board of education, board of trustees or sole trustee of each school district shall compute the tuition to be charged for the instruction of each nonresident pupil admitted to the schools of such district, or for the education of whom such district contracts with a board of cooperative educational services, in accordance with the following formulae:

(a) The tuition to be charged by a school district which provides full-day instruction for each nonresident pupil shall be computed as follows:

(1) . . .

(2) . . .

(3) The net amount of State aid received by the school district, as defined in this paragraph, shall be distributed among the categories set forth in paragraph (2) of this subdivision in the same proportion that the

aidable pupil units in each of such categories bears to the [total aidable pupil units] *average daily membership* for the school district. Such [aidable pupil units] *average daily membership* shall be computed in accordance with the provisions of *paragraph 1 of subdivision [8] 1 of section 3602 of the Education Law*, except that for the purpose of this computation the [additional aidable pupil units for] *enrollment of pupils enrolled in special schools, the enrollment of pupils attending under the provisions of paragraph c of subdivision 2 of section 4401 of the Education Law, the equivalent attendance of the school district, as computed pursuant to paragraph d of subdivision 1 of section 3602 of the Education Law and the average daily attendance included in the daily membership of the school district pursuant to subdivision 8 of section 3602-c of the Education Law* shall not be included in such computation. For the purposes of this section, net State aid shall include aid received in the general fund for operating expenses, textbooks, experimental programs, educational television, county vocational boards and boards of cooperative educational services, building aid, and other forms of State aid as approved by the department for inclusion herein, but shall not include transportation aid or aid attributable to pupils attending special schools. Net State aid shall also include the sum which is withheld from the school district for payment to the teacher's retirement fund.

(4) . . .

(5) The maximum nonresident pupil tuition which may be charged shall be determined by dividing the net cost of instruction of pupils in each category by the estimated average daily [attendance] *membership* of pupils in each category.

(6) Refunds or additional charges shall be made at the conclusion of the school year based upon actual revenues, expenditures and average daily [attendance] *membership*.

(b) . . .

(c) . . .

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-18-09-00007-P, Issue of May 6, 2009. The emergency rule will expire July 29, 2009.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 207 authorizes the Board of Regents and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 3202(4)(d) authorizes each school district: that is serving children who do not reside within the district to fix a tuition amount which represents the additional operating cost to the school district resulting from the attendance of such child. It also requires the Commissioner to establish a formula for such purpose.

Education Law section 3602 provides for the apportionment of State monies to school districts, and the process therefore. Chapter 57 of the Laws of 2007 amended section 3602 to change the school funding system by replacing approximately 30 State aid items with a single Foundation Aid.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statute and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes.

NEEDS AND BENEFITS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amendment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional program, service, duty or responsibility upon local governments beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

PAPERWORK:

The proposed amendment conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional reporting or other paperwork requirements on school districts.

DUPLICATION:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other State statutory changes, and to eliminate obsolete provisions, and does not duplicate, overlap or conflict with State and federal legal requirements.

ALTERNATIVES:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment relates to the computation of nonresident tuition by school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other State statutory changes. There are no related federal standards.

COMPLIANCE SCHEDULE:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts beyond those inherent in Chapter 57 and other applicable statutes. It is anticipated that regulated parties can achieve compliance with the proposed rule making upon its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to the computation of nonresident tuition by school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule making that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed amendment applies to each of the 698 public school districts in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts. Chapter 57 of the Laws of

2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements.

COMPLIANCE COSTS:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 and other applicable statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional costs or new technological requirements on school districts.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to reflect the fact that the existing statutory reference is now incorrect and that aid is now computed based on an enrollment-based pupil count rather than the previous, attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to reflect the fact that the existing statutory reference is now incorrect and that aid is now computed based on an enrollment-based pupil count rather than the previous, attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils. The proposed amendment will impose no additional professional services requirements on rural school districts.

COMPLIANCE COSTS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs on rural school districts beyond those inherent in Chapter 57 and other applicable statutes.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, local government mandates or costs on school districts in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

RURAL AREA PARTICIPATION:

Comments on the proposed rule making were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment relates to the payment of State aid to school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes to the law. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts, and will not have an adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

EMERGENCY RULE MAKING

Teachers Performing Instructional Support Services

I.D. No. EDU-20-09-00007-E

Filing No. 452

Filing Date: 2009-05-01

Effective Date: 2009-05-01

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

Action taken: Amendment of sections 30-1.1, 30-1.2, 30-1.9 and 80-1.1; and addition of section 80-5.21 to Title 8 NYCRR.

Statutory authority: Education Law, section 207

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to establish qualifications for teachers performing duties in instructional support services and to authorize teachers performing such functions to accrue tenure and seniority rights in a tenure area for which they are properly certified.

The recommended action is proposed as an emergency measure because such action is necessary to preserve the general welfare in order to allow a teacher employed by a school district or BOCES to accrue tenure and seniority rights for the performance of instructional support services.

These positions have never been formally recognized under Education Law and Regents Rules and, therefore, no tenure area exists for them. Therefore, by default under Civil Service Law, these positions are considered classified Civil Service positions that are not instructionally related and, therefore, teachers serving in these positions would not be eligible to accrue tenure and seniority rights.

To address this issue, the Commissioner has certified to the New York State Civil Service Commission that teachers providing instructional support services to classroom teachers and other school personnel for the purpose of enhancing instruction and improving student performance are part of the teaching staff of a public school. Accordingly, these positions are now in the unclassified service, require an appropriate teaching certificate, and are subject to certain provisions in Education Law in regard to appointment, tenure, and seniority rights.

As a result of this action, it is now necessary to authorize teachers performing such services to accrue tenure and seniority rights and to establish qualifications for appointment to positions covered by this tenure area. This will enable teachers who are already serving in instructional support positions to be appointed to an appropriate tenure area. Given the current budget difficulties faced by schools and BOCES in New York State and the possibility of impending lay-offs, it is critical that teachers currently serving in instructional support positions have appropriate tenure protection and that their accrued seniority rights be protected.

Subject: Teachers performing instructional support services.

Purpose: Establish qualifications and tenure and/or seniority rights for teachers performing instructional support services.

Text of emergency rule: 1. A new subdivision (j) shall be added to section 30-1.1 of the Rules of the Board of Regents, effective May 1, 2009, to read as follows:

(j) Instructional support services shall mean professional development, pedagogical support, technical assistance, consultation, and/or program coordination offered by teachers to other school personnel including, but not limited to: conducting workshops, study groups, and demonstration lessons; modeling instruction; providing feedback, coaching, mentoring and other professional support for instructional staff; providing training in best instructional practices in specific content areas; assisting instructional staff in analyzing student performance data and differentiating instruction to meet the needs of all students; coordinating the provision of special education services; developing and promoting a culture of reflective instructional practice; providing curriculum and assessment resources to instructional staff; providing information and support on technology tools to extend and support student learning; assessing curriculum development or professional development needs; and such similarly related work.

2. Subdivisions (b) and (c) of section 30-1.2 of the Rules of the Board of Regents shall be renumbered to subdivisions (c) and (d) of section 30-1.2 of the Rules of the Board of Regents, effective May 1, 2009.

3. A new subdivision (b) shall be added to section 30-1.2 of the Rules of the Board of Regents, effective May 1, 2009, to read as follows:

(b) The provisions of this Subpart shall apply to a professional educator appointed by a board of education or board of cooperative educational services for the performance of duties in instructional support services, as defined in subdivision (j) of section 30-1.1 of this Subpart, on or after August 1, 1975 as follows:

(1) A professional educator employed by a board of education or board of cooperative educational services on May 1, 2009 that was appointed to tenure or a probationary period in a tenure area identified in this Subpart for the performance of duties in instructional support services and who did not provide knowing consent to an assignment outside of his previous tenure area pursuant to section 30-1.9 of this Subpart when he was assigned by such board of education or board of cooperative educational services prior to May 1, 2009 to the performance of duties in instructional support services shall receive credit toward tenure and/or accrue tenure and seniority rights in his previous tenure area from the initial date of his assignment to the performance of such duties and shall continue to receive tenure and/or seniority rights in his previous tenure area while assigned to perform duties in instructional support services.

(2) A professional educator employed by a board of education or board of cooperative educational services on May 1, 2009 who was appointed by such board of education or board of cooperative educational services prior to May 1, 2009 for the performance of duties in instructional support services, and who was appointed to tenure or a probationary period in an improper tenure area or a tenure area not authorized under this Subpart based upon the performance of such duties, shall be deemed to have been appointed or assigned by such board of education or board of cooperative educational services to serve in a tenure area for which he holds the proper certification as described in subdivision (b) of section 30-1.9 of this Subpart as it exists on May 1, 2009, from the initial date of his assign-

ment and shall continue to receive credit toward tenure and/or accrue tenure and seniority rights in such tenure area while assigned to perform duties in instructional support services provided that he holds the proper certification for such tenure area.

(3) Any board of education or board of cooperative educational services that employs a professional educator on May 1, 2009 who has not been appointed to tenure or a probationary period in a tenure area and is performing duties in instructional support services, shall make a probationary appointment in accordance with the provisions of subdivision (b) of section 30-1.9 of this Subpart by July 1, 2009 if the board desires to continue to employ such professional educator for instructional support services, provided that the professional educator meets the requirements of section 80-5.21 of the Regulations of the Commissioner of Education. Thereafter, appointments on tenure shall be made in accordance with the provisions of this Subpart.

(4) Any board of education or board of cooperative educational services that assigns a professional educator to the performance of instructional support services on or after May 1, 2009 who has previously been appointed to tenure or a probationary period by such board in a tenure area identified in this Subpart shall credit the professional educator with tenure and seniority rights in their existing tenure area while assigned to perform duties in instructional support services.

(5) Any board of education or board of cooperative educational services that appoints a professional educator on or after May 1, 2009 for the performance of duties in instructional support services shall make probationary appointments and appointments on tenure in accordance with subdivision (b) of section 30-1.9 of this Subpart.

4. Renumbered subdivision (d) of section 30-1.2 of the Rules of the Board of Regents shall be amended, effective May 1, 2009, to read as follows:

(d) Except as otherwise provided in subdivision (b) of this section, each board of education or board of cooperative educational services shall on and after the effective date of this Subpart make probationary appointments and appointments on tenure in accordance with the provisions of this Subpart.

5. Subdivision (a) of section 30-1.9 of the Rules of the Board of Regents shall be amended, effective May 1, 2009, to read as follows:

(a) [A] Except as otherwise provided in subdivision (b) of this section, a board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time throughout the probationary period in at least one designated tenure area except that a professional educator who teaches in an experimental program as defined in [subdivision (i) of] section 30-1.1 of this Subpart and who does not devote 40 percent or more of his time to service in any one tenure area may be appointed to a tenure area for which he holds the proper certification.

6. Subdivisions (b) through (e) of section 30-1.9 of the Rules of the Board of Regents shall be renumbered to subdivisions (c) through (f) of section 30-1.9 of the Rules of the Board of Regents, effective May 1, 2009.

7. A new subdivision (b) shall be added to section 30-1.9 of the Rules of the Board of Regents, effective May 1, 2009, to read as follows:

(b) Except as otherwise provided in subdivision (b) of section 30-1.2 of this Subpart, a board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time in at least one designated tenure area except that a professional educator appointed or assigned on or after May 1, 2009 to duties described in either paragraph (1) or (2) of this subdivision, shall be appointed to a tenure area for which he holds the proper certification.

(1) A professional educator appointed or assigned to devote a substantial portion of his time to the performance of duties in instructional support services; or

(2) A professional educator appointed or assigned to devote a substantial portion of his time to a combination of duties in instructional support services and time in at least one designated tenure area identified in this Subpart.

8. Paragraphs (23) through (46) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education shall be renumbered to paragraphs (24) through (47) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education, effective May 1, 2009.

9. A new paragraph (23) shall be added to subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education, effective May 1, 2009, to read as follows:

(23) Instructional support services, for purposes of section 80-5.21 of the Regulations of the Commissioner of Education, shall mean professional development, pedagogical support, technical assistance, consultation, and/or program coordination offered by teachers to other school personnel including, but not limited to: conducting workshops, study groups, and demonstration lessons; modeling instruction; providing feedback, coaching, mentoring and other professional support for instructional staff; providing training in best instructional practices in specific content areas; assisting instructional staff in analyzing student performance data and differentiating instruction to meet the needs of all students; coordinating the provision of special education services; developing and promoting a culture of reflective instructional practice; providing curriculum and assessment resources to instructional staff; providing information and support on technology tools to extend and support student learning; assessing curriculum development or professional development needs; and such similarly related work.

10. A new section 80-5.21 of the Regulations of the Commissioner of Education shall be added, effective May 1, 2009, to read as follows:

§ 80-5.21 Authorization for appointment or assignment of a teacher to provide instructional support services.

(a) Purpose. The purpose of this section is to authorize a board of education or board of cooperative educational services to appoint or assign an experienced and qualified teacher to provide instructional support services to other school personnel.

(b) Requirements for authorization to provide instructional support services. To be eligible to provide instructional support services to other school personnel, a candidate shall meet the requirements in either paragraph (1) or (2) of this subdivision.

(1) (i) Certification. The candidate shall hold a valid permanent or professional certificate in the teaching service identified in Subpart 80-2 or 80-3 of the Regulations of the Commissioner of Education and be competent and qualified to perform instructional support services by meeting the education and experience qualifications set by the employing school district or board of cooperative educational services, including holding any appropriate certificate(s) in the teaching service required by the school district or board of cooperative educational services for such position; and

(ii) Experience. The candidate shall have at least three years of satisfactory experience as a teacher as defined in section 80-1.1 of the Regulations of the Commissioner of Education, as determined by the department.

(2) (i) Certification. The candidate shall hold a valid initial, provisional, permanent or professional certificate in the teaching service identified in Subpart 80-2 or 80-3 of the Regulations of the Commissioner of Education and be competent and qualified to perform instructional support services by meeting the education and experience qualifications set by the employing school district or board of cooperative educational services, including holding any appropriate certificate(s) in the teaching service required by the school district or board of cooperative educational services for such position; and

(ii) Education. The candidate shall hold an educational degree(s) beyond the baccalaureate level for which the superintendent of school or district superintendent finds sufficiently qualifies such person to be competent and qualified to provide instructional support services.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires July 29, 2009.

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

Regulatory Impact Statement**1. STATUTORY AUTHORITY:**

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

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above-referenced statute by establishing qualifications for teachers appointed by a school district or BOCES to serve in a position in instructional support services and authorizes teachers serving in such positions to accrue tenure and seniority rights for the performance of such duties.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to permit teachers employed in instructional support service positions in school districts and BOCES to accrue tenure and seniority rights in a tenure area for which they are properly certified. (The regulations do not impact teachers serving in the New York City School District.) The proposed amendment is necessary because the number of individuals serving in these types of positions has grown considerably in the past three decades and these positions have never been formally recognized as being educational in nature under section 35-g of the Civil Service Law. The effect is that teachers serving in these positions currently are not eligible to accrue tenure and seniority rights in any tenure area.

Despite the fact that instructional support service positions have grown in number and variety, these positions were never certified to the State Civil Service Commission pursuant to the provisions of 35-g of the Civil Service Law as educational in nature and therefore individuals appointed to such positions were not required to have a teaching certificate and teachers in such positions were not able to acquire tenure and/or seniority rights for the performance of such duties.

To address this issue, the Commissioner will certify to the New York State Civil Service Commission that positions providing direct instructional support to other educators for the purpose of enhancing instruction and improving student performance are part of the teaching staff of a public school. Accordingly, these positions will become part of the unclassified service, require an appropriate teaching certificate, and be subject to the Education Law in regard to appointment and tenure.

The proposed amendment authorizes a teacher who is performing instructional support services in a school district or BOCES to accrue tenure and/or seniority rights in a tenure area for which they are properly certified. It also permits teachers who did not provide knowing consent to an assignment outside of their previous tenure to receive retroactive credit for their prior service in an instructional support position and continue to receive credit in their previous tenure area while assigned to perform instructional support services and authorizes teachers who were appointed to an improper tenure area or a tenure area not authorized by Part 30 of the Rules of the Board of Regents to receive retroactive credit for their prior service in instructional support services in a tenure area for which they are properly certified and to continue to receive such credit while assigned to perform instructional support services.

The proposed amendment also requires that by July 1, 2009, any school district or BOCES which currently employs a certified individual who is not appointed to tenure or a probationary period and who is working in an instructional support service position make a probationary appointment for such individual in a tenure area in which they are properly certified if the district/BOCES intends to continue to employ such individual.

In addition, the proposed amendment provides for an exception to the general rule that, to accrue tenure and seniority rights in a tenure area, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area. The proposed amendment authorizes teachers to accrue tenure and seniority rights for the performance of duties in instructional support services in any tenure area for which they are properly certified.

The proposed amendment also adds a new Section 80-5.21 to the

Commissioner's Regulations to establish qualifications for an appointment of a teacher to a position in instructional support services. The proposed amendment requires that an individual performing instructional support services: (1) hold a valid Permanent or Professional teaching certificate and have at least three years of satisfactory teaching experience, or (2) hold a valid Initial, Provisional, Permanent or Professional certificate and hold an educational degree(s) beyond the baccalaureate level that qualifies such person to be competent and qualified to provide instructional support services.

4. COSTS:

(a) Costs to State government: The proposed amendment will not impose any additional costs on State government, including the State Education Department.

(b) Costs to local governments: The proposed amendment will not impose any additional costs on local governments, including school districts and BOCES.

(c) Costs to private regulated parties: The proposed amendment will not impose any additional costs on private regulated parties.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Government," the amendment will not impose any additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to both school districts and boards of cooperative educational services. Therefore, the mandates in Section 3 apply to BOCES as well. The State Education Department has determined that uniform requirements are necessary to ensure the quality of the State's teaching workforce and consistency in tenure and seniority rights for teachers performing duties in instructional support services across the State.

6. PAPERWORK:

In general, the amendment does not impose additional paperwork requirements upon school districts or BOCES.

7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements.

8. ALTERNATIVES:

One alternative that was explored was to create a new tenure area in instructional support services for teachers in all school districts and BOCES across the State (with the exception of New York City). However, this alternative was rejected because many teachers are selected for an assignment in instructional support services based on expertise gained from years of quality service to the district and possibly additional education or training attained. These teachers literally "bubble up" from the ranks of the various teaching areas as a result of exemplary service. It made more sense to treat these additional responsibilities as an extension of their teaching duties and permit them to remain in their tenure area and continue to accrue seniority while performing instructional support services. The State Education Department rejected the alternative to create a new instructional support services tenure area because this approach could serve as a deterrent for the recruitment of tenured, experienced teachers to these positions. Most tenured teachers would not want to leave their tenure area to serve in these positions. The proposed amendment provides for an exception to the general rule that, to earn seniority credit, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area and permits teachers to accrue tenure and seniority rights for the performance of instructional support duties in any tenure area where they are properly certified.

Another alternative was a "blended approach", to establish a new tenure area in instructional support services for teachers serving in these positions in a BOCES and for teachers performing these duties in a school district, they would receive tenure and seniority rights in a tenure area for which they were properly certified. This alternative was also rejected because the State Education Department determined that tenure and seniority rights for individuals performing duties in instructional support services should apply uniformly across the State.

9. FEDERAL STANDARDS:

There are no Federal standards that establish qualifications and/or tenure and seniority rights for teachers performing instructional support services.

10. COMPLIANCE SCHEDULE:

School districts and BOCES will be required to comply with the proposed amendment on its stated effective date.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment applies to school districts and boards of cooperative educational services (BOCES) and relates to qualifications for teachers performing instructional support services and tenure and seniority rights for teachers performing such duties. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local Governments:

The proposed amendment relates to the qualifications of teachers performing instructional support services and tenure and seniority rights for teachers performing such duties in school districts and BOCES throughout the State.

1. EFFECT OF RULE:

The proposed amendment applies to the 698 school districts and seven BOCES located in New York State and relates to the qualifications of teachers appointed to positions in instructional support services and authorizes teachers to accrue tenure and seniority rights for the performance of such duties.

2. COMPLIANCE REQUIREMENTS:

The purpose of the proposed amendment is to permit teachers employed in instructional support service positions in BOCES and school districts to receive tenure and seniority rights in a tenure area for which they are properly certified. (The regulations do not impact teachers serving in the New York City School District.) The proposed amendment is necessary because the number of individuals serving in these types of positions has grown considerably in the past three decades and these positions have never been formally recognized as being educational in nature under section 35-g of the Civil Service Law. The effect is that teachers serving in these positions currently are not eligible to accrue tenure and seniority rights in any tenure area.

Despite the fact that instructional support service positions have grown in number and variety, these positions were never certified to the State Civil Service Commission pursuant to the provisions of 35-g of the Civil Service Law as educational in nature and therefore individuals appointed to such positions were not required to have a teaching certificate and teachers in such positions were not able to acquire tenure and/or seniority rights for the performance of such duties.

To address this issue, the Commissioner will certify to the New York State Civil Service Commission that positions providing direct instructional support to other educators for the purpose of enhancing instruction and improving student performance are part of the teaching staff of a public school. Accordingly, these positions will become part of the unclassified service, require an appropriate teaching certificate, and be subject to Education Law in regard to appointment and tenure.

The proposed amendment authorizes a teacher who is performing instructional support services in a school district or BOCES to accrue tenure and/or seniority rights in a tenure area for which they are properly. It also permits teachers who did not provide knowing consent to an assignment outside of their previous tenure to receive retroactive credit for their prior service in an instructional support position and continue to receive credit in their previous tenure area while assigned to perform instructional support services and authorizes teachers who were appointed to an improper tenure area or a tenure area not authorized by Part 30 of the Rules of the Board of Regents to receive retroactive credit for their prior service in instructional sup-

port services in a tenure area for which they are properly certified and to continue to receive such credit while assigned to perform instructional support services.

In addition, the proposed amendment requires that by July 1, 2009, any school district or BOCES which currently employs a certified individual who is not appointed to tenure or a probationary period and who is working in an instructional support service position make a probationary appointment for such individual in a tenure area in which they are properly certified if the district/BOCES intends to continue to employ such individual.

For individuals employed by a school district or BOCES after May 1, 2009, the proposed amendment provides an exception to the general rule that, to accrue tenure and seniority credit, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area and will now permit teachers to accrue tenure and seniority rights for the performance of instructional support duties in any tenure area for which they are properly certified.

The proposed amendment also adds a new Section 80-5.21 to the Commissioner's Regulations to establish qualifications for an appointment of a teacher to a position in instructional support services. The proposed amendment requires that an individual performing instructional support services: (1) hold a valid Permanent or Professional teaching certificate and have at least three years of satisfactory teaching experience, or (2) hold a valid Initial, Provisional, Permanent or Professional certificate and hold an educational degree(s) beyond the baccalaureate level that qualifies such person to be competent and qualified to provide instructional support services.

3. PROFESSIONAL SERVICES:

The proposed amendment does not mandate that school districts or BOCES contract for additional professional services to comply.

4. COMPLIANCE COSTS:

In general, the proposed amendment does not impose any additional compliance costs on school districts and BOCES.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional technological requirements. Economic feasibility is addressed under the Compliance Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment applies to school districts and BOCES and relates to qualifications for teachers performing instructional support services and tenure and seniority rights for teachers performing such duties. The State Education Department has determined that uniform qualifications are necessary to ensure the quality of the State's teaching workforce and a uniform tenure system across the State for individuals performing such duties.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES across the State. Comments on the proposed rule were also solicited from the BOCES District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect teachers in the 698 school districts and seven boards of cooperative services in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The purpose of the proposed amendment is to permit teachers employed in instructional support service positions in school districts

and BOCES to accrue tenure and seniority rights in a tenure area for which they are properly certified. (The regulations do not impact teachers serving in the New York City School District.) The proposed amendment is necessary because the number of individuals serving in these types of positions has grown considerably in the past three decades and these positions have never been formally recognized as being educational in nature under section 35-g of the Civil Service Law. The effect is that teachers serving in these positions currently are not eligible to accrue tenure and seniority rights in any tenure area.

Despite the fact that instructional support service positions have grown in number and variety, these positions were never certified to the State Civil Service Commission pursuant to the provisions of 35-g of the Civil Service Law as educational in nature and therefore individuals appointed to such positions were not required to have a teaching certificate and teachers in such positions were not able to acquire tenure and/or seniority rights for the performance of such duties.

To address this issue, the Commissioner will certify to the New York State Civil Service Commission that positions providing direct instructional support to other educators for the purpose of enhancing instruction and improving student performance are part of the teaching staff of a public school. Accordingly, these positions will become part of the unclassified service, require an appropriate teaching certificate, and be subject to the Education Law in regard to appointment and tenure.

The proposed amendment authorizes a teacher who is performing instructional support services in a school district or BOCES to accrue tenure and/or seniority rights in a tenure area for which they are properly. It also permits teachers who did not provide knowing consent to an assignment outside of their previous tenure to receive retroactive credit for their prior service in an instructional support position and continue to receive credit in their previous tenure area while assigned to perform instructional support services and authorizes teachers who were appointed to an improper tenure area or a tenure area not authorized by Part 30 of the Rules of the Board of Regents to receive retroactive credit for their prior service in instructional support services in a tenure area for which they are properly certified and to continue to receive such credit while assigned to perform instructional support services.

The proposed amendment also requires that by July 1, 2009, any school district or BOCES which currently employs a certified individual who is not appointed to tenure or a probationary period and who is working in an instructional support service position make a probationary appointment for such individual in a tenure area in which they are properly certified if the district/BOCES intends to continue to employ such individual.

In addition, the proposed amendment provides for an exception to the general rule that, to accrue tenure and seniority rights in a tenure area, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area. The proposed amendment authorizes teachers to accrue tenure and seniority rights for the performance of duties in instructional support services in any tenure area for which they are properly certified.

The proposed amendment also adds a new Section 80-5.21 to the Commissioner's Regulations to establish qualifications for an appointment of a teacher to a position in instructional support services. The proposed amendment requires that an individual performing instructional support services: (1) hold a valid Permanent or Professional teaching certificate and have at least three years of satisfactory teaching experience, or (2) hold a valid Initial, Provisional, Permanent or Professional certificate and hold an educational degree(s) beyond the baccalaureate level that qualifies such person to be competent and qualified to provide instructional support services.

3. COSTS:

The proposed amendment will not impose any additional costs on private regulated parties.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes the qualifications for teachers employed in instructional support service positions in school districts and BOCES and authorizes these teachers to accrue tenure and senior-

ity rights in a tenure area for which they are properly certified. Because these requirements apply to teachers, school districts and BOCES located in all areas of the State, including rural areas, it is not possible to exempt those from rural areas from the proposed amendment or impose a lesser standard. Moreover, the State Education Department has determined that uniform qualifications for appointment to these positions and accrual of tenure and seniority rights in such positions are necessary to ensure the quality of the State's teaching workforce and consistency in the application of tenure and seniority rights for such positions.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES located in rural areas of New York State. Comments on the proposed rule were also solicited from the District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators, the constituencies of which include those from rural areas.

Job Impact Statement

The purpose of the proposed amendment is to establish qualifications for teachers serving in instructional support service positions and to authorize teachers employed in instructional support service positions in school districts and boards of cooperative educational services to accrue tenure and seniority rights in a tenure area for which they are properly certified.

Because it is evident from the nature of this regulation that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Changes Dam Safety and Permit Requirements to be Consistent with ECL

I.D. No. ENV-07-08-00011-RP

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

Proposed Action: Amendment of sections 608.1, 608.3, 608.6, 621.4 and Part 673 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, art. 3, title 3 and art. 15, title 5

Subject: Changes dam safety and permit requirements to be consistent with ECL.

Purpose: Amend 6 NYCRR Parts 608, 621 and 673 to comply with Chapter 364 (1999) and amend Part 673 to comply with Chapter 178 (2006).

Substance of revised rule: 608.1 Definitions have been added and revised to be consistent with revisions to Part 673.

608.3 The size thresholds for dams which require construction permits have been revised to be consistent with the ECL 15-0503.

608.6 Permit application procedures have been revised to better reflect the elements of a dam safety construction permit application.

608.6 has been revised to state that the department may accept a certification by a professional engineer, in lieu of a permit application, at its discretion.

Part 621.4 has been revised to state that all dam projects are major,

except projects at existing dams for which an engineering assessment pursuant to Part 673 is on file with the department.

All of Part 673 is repealed. The Revised Part 673 incorporates Chapter 364 of the laws of 1999 and Chapter 178 of the laws of 2006 amendments to statute. The Revised Part 673 contains revised definitions, revised requirements for inspection and maintenance; emergency action planning; recordkeeping and reporting and notifications; revised language regarding the department's inspection, investigation, and enforcement process. Sections are renumbered and renamed.

673.1 Purpose; applicability; severability

This section revises language related to applicability of the regulation. This section references applicability based on dam size. The size thresholds match those of permit requirements (Part 608) except as otherwise noted. Some provisions of Part 673 apply to dams above these size thresholds.

Part 673 also applies to owners of all dams the failure of which poses a threat to public health, safety, property or natural resources.

Part 673 also applies to illegal dams.

Revised language regarding purpose and severability of the regulation.

673.2 Definitions

This section was expanded for clarification to include definitions not previously included and modifies some existing definitions.

673.3 General Provisions

Incorporates the statutory dam safety authority.

Requires all dams to be operated and maintained in safe condition.

Specifies that the department may consider any information on a dam that may be available.

Provides that the department may, at its discretion, accept equivalent reports from or to federal agencies in lieu, in whole or in part, of the reports of inspections and assessments required in this Part.

673.4 Permit Requirements for Dams

Advises the reader to consult Part 608 for permit requirements, and that the department's permits do not relieve the applicant from any requirements for other permits and approvals, such as federal permits.

673.5 Hazard Classifications

Revises language related to the hazard classifications that may be assigned to a dam, and the factors that the department may consider in assigning a hazard classification, for clarity.

Requires that the department must notify a dam owner when it changes the hazard classification, and that the department will make available a list of dams and the hazard classifications assigned to them.

Provides a process for appealing a hazard classification.

Part 673.6 Inspection, Operation and Maintenance

Owners of Intermediate Hazard and High Hazard dams, and dams above applicability size thresholds, must prepare and implement an inspection and maintenance plan.

Describes the elements of an inspection and maintenance plan.

Requires that the inspection and maintenance plan must be provided to the department upon request.

673.7 Emergency Action

Requires that Emergency Action Plans (EAP's) for Intermediate Hazard and High Hazard dams must be submitted to the department.

Provides a schedule for submitting the EAP's after the effective date of this regulation.

Requires that High Hazard dam owners must have the EAP prepared by an engineer unless the department agrees otherwise.

Requires that Intermediate Hazard dam owners must have the EAP prepared by an engineer if requested by the department.

Describes the elements of an EAP, that it must be provided to certain recipients, and that it must be updated annually.

673.8 Annual Certification

Intermediate Hazard and High Hazard dam owners must provide an annual certification on a form prescribed by the department.

673.9 Notification of Auxiliary Spillway Flow

Intermediate Hazard and High Hazard dam owners must notify the department of flow in a dam's erodible spillway.

673.10 Recordkeeping; Response to Request for Records

All records on a dam must be kept in good order.

Records must be provided to the department upon request.

673.11 Notices of Property Transfer

The records required to be maintained related to a dam must be provided to the new owner upon transfer of the property where a dam is located.

Notice must be provided to the department and the municipality in which the dam is located, of the new owner's information, upon transfer of property where a dam is located.

673.12 Safety Inspections

Intermediate Hazard and High Hazard dam owners must conduct a safety inspection as provided for in their inspection and maintenance plan.

The department may require Safety Inspections on a more frequent schedule, if the dam is rated "unsafe" or "unsound."

The Safety Inspection must be conducted by an engineer.

The department may require changes if the report is not acceptable.

673.13 Engineering Assessments

Engineering Assessments (EA's) for Intermediate Hazard and High Hazard dams must be submitted to the department.

Provides a schedule for submitting the EA's after the effective date of this regulation.

All EA's must be prepared by an engineer.

The department may require EA's on a more frequent schedule if the dam is rated Unsafe or Unsound.

The department may require changes if the EA report is not acceptable.

673.14 Inspection of a Dam by the Department

Describes the department's authority to conduct inspections, and the requirement for the department to provide inspection reports in accordance with ECL 15-0516.

673.15 Investigation of a Dam by the Department or Owner

Describes the department's authority to conduct investigations, or order investigations by the dam owner, when the public safety requires.

673.16 Condition Ratings

Describes the department's condition rating system, and its authority to require an Enhanced Safety Program for dams rated Deficiently Maintained, Unsound, or Unsafe.

Requires the department to notify the dam owner if a dam has been rated Unsafe, Unsound, or Deficiently Maintained.

Describes the process for disputing the department's assignment of a condition rating.

673.17 Orders of the Department

Describes the department's authority to issue orders and act upon noncompliance with orders, including the department's authority to alleviate safety problems at a dam when the owner fails to do so, and the department's authority to try to collect costs associated with its work in alleviating a safety problem at a dam.

Revised rule compared with proposed rule: Substantial revisions were made in Part 673 and sections 621.4, 608.1, 608.3 and 608.6.

Text of revised proposed rule and any required statements and analyses may be obtained from Ms. Jamie Woodall, NYSDEC, Bureau of Flood Protection and Dam Safety, 625 Broadway, 4th Floor, Albany, NY 12233-3504, (518) 402-8151, email: jvwoodal@gw.dec.state.ny.us

Data, views or arguments may be submitted to: Alon Dominitz, c/o Jamie Woodall, NYSDEC, Bureau of Flood Protection and Dam Safety, 625 Broadway, 4th Floor, Albany, NY 12233-3504, (518) 402-8151, email: jvwoodal@gw.dec.state.ny.us

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

1. Statutory Authority: Part 673: Environmental Conservation Law, Article 1, Title 3, 3-0301[2][aa] and [m]; Article 15, Title 5, 15-0503, 15-0507, 15-0511, and 15-0516

Part 608: Environmental Conservation Law, §§ 3-0301[2][m], 15-0501, 15-0503, 15-0505, 17-0303[3]

Part 621: Environmental Conservation Law, §§ 3-0301[2][m], 3-0306[4], 8-0113[2], 15-1501, 15-1503, 15-1505, 17-0303, 19-0103, 70-0107, 70-0117[5], Article 70; State Administrative Procedure Act, § 301[3]

Chapter 364, Laws of 1999 amended ECL Sections 15-0503, 15-0507 and 15-0511 to expressly require all dam owners - whether or not subject to a DEC permit under ECL § 15-0503 - to operate and maintain such structures in a safe condition. The statutory amendments explicitly authorize DEC to adopt regulations requiring dam owners to prepare safety programs including inspections, monitoring, maintenance and operation, and emergency plans, where failure of the dam could cause personal injury, substantial property damage or substantial natural resource damage. This safety program was defined by the 2008 proposed modifications, and these 2009 revised modifications, to Part 673. The Chapter 364 statutory amendments also increased thresholds for dam construction permits issued by the department. This change is reflected in the 2008 proposed and in these 2009 revised modifications to Part 608.

Chapter 17, Laws of 2006 amended the ECL by adding a new Section 15-0516 regarding distribution of department inspection reports of dam safety for intermediate and high hazard dams. This is reflected in the 2008 proposed and 2009 revised language in Part 673.

ECL § 3-0301(2)(m) authorizes the DEC commissioner to adopt such rules, regulations and procedures as may be necessary, convenient or desirable to effectuate the purposes of this chapter: to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.

2. Legislative Objectives: To require a safety program and describe how dam owners will prepare and implement the program. To place focus on dams which pose a greater potential risk to public safety, and ease regulatory requirements on small dams which pose less public safety and environmental damage risks.

The objectives of the Chapter 364 amendments are fulfilled by this revised rule making through modifications to New York Codes, Rules and Regulations Title 6 (6 NYCRR) Part 673, Dam Safety Regulations; Part 608, Use and Protection of Waters; and Part 621, Uniform Procedures, by requiring dam owners to prepare and implement safety programs, providing specific elements of such programs, and updating dam construction permit thresholds and procedures.

In accordance with public policy objectives the legislature sought to advance, the revised regulation modifications provide relief from permitting requirements for construction or repair of small dams, the vast majority of which are presumed to pose a negligible safety threat, while updating, clarifying and strengthening requirements for dams which pose a greater threat to public safety. Dams which pose a significant safety threat, even if exempt from construction permit requirements, are subject to the safety program.

Revised 6 NYCRR Part 673 also includes the requirement found in ECL § 15-0516 for department inspection reports of dam safety for intermediate and high hazard dams to be provided to officials of the municipality in which the dam is located within thirty days of creating such reports.

3. Needs and Benefits: ECL § 15-0507 states that regulations governing the dam safety program may include requirements for a safety program by dam owners. Current dam safety regulations in 6 NYCRR Part 673 do not contain such safety program requirements. Accordingly, the revised 6 NYCRR Part 673 promulgate such a program.

There is a need to ensure the safety of dams. The revised regulations promulgate dam owner safety program requirements commensurate with a dam's hazard classification, and better align regulations describing the department's authority, with statutes. Compared with the 2008 proposed regulations, this revised 2009 rule making has removed certain requirements for low hazard dams.

The 2009 revised regulations require owners of deficient dams to demonstrate sufficient financial assurance. This will help assure that funds will be available to reimburse the department if it is necessary for the department to either breach or remove the dam to protect public safety. Compared to the 2008 proposed regulations, the 2009 revised regulation narrows the applicability and more clearly articulates this provision.

In developing the 2008 proposed and 2009 revised rule making, the department drew heavily from the following documents:

“Model State Dam Safety Program” Federal Emergency Management Office, 1998

“Summary of State Laws and Regulations on Dam Safety”, Association of State Dam Safety Officials, 2000

“Owner-Responsible Periodic Inspection Guidance” Association of State Dam Safety Officials, 2005

In developing the 2009 revised regulations, the department also reviewed “Model State Dam Safety Program” Federal Emergency Management Office, July 2007, which was an update of the 1998 document.

Modifications to 6 NYCRR Part 608, Use and Protection of Waters, in the revised rule making, address two needs. First, the dam construction permit thresholds and definitions need to be consistent with the 1999 amendments and associated Part 673 modifications. Second, to facilitate department review and approval of permit applications, Part 608 is modified to more clearly articulate existing permit application submission requirements.

6 NYCRR Part 621, Uniform Procedures, also is modified for consistent use of terms and to narrow the minor project category for dam permits.

4. Costs:

a) Costs to dam owners for initially complying and continuing to comply with the revised regulations will vary depending upon the dam's size and hazard classification. The revised regulations require that most dam owners have a written operation and maintenance plan. Owners of Class B and Class C must retain an engineer for inspections and assessments, and to create an Emergency Action Plan. Cost estimates for these activities were obtained from a 2007 survey of consulting engineers. The cost estimates are summarized in Table 1. Costs for maintenance, repairs or other activities are considered normal costs associated with owning a dam, and were not considered as a regulatory requirement generated by the proposed regulations. This is consistent with tradition and common law. In response to public comments to the 2008 proposal, some compliance elements in the regulations were revised in the 2009 rule making, to reduce the cost of compliance. This is further detailed in the Frequent Responses to Public Comments.

The statute and revised regulations require that owners of deficient dams demonstrate financial assurance. Generally the cost for obtaining financial security is dependent upon a dam owner's credit rating and liquidity of collateral. As of February 2008 the department's research indicated that surety bonds could generally be obtained for about 1 to 15% of the reconstruction or removal amount. A letter of credit could cost approximately 1 to 2% of the credit amount. A certificate of deposit could

generally be issued for as low as \$100, but would require a given sum to be set aside.

It is anticipated that routine enforcement actions for Class A dams will likely be handled by regional staff. Large or complex enforcement actions for all dams will be handled by central office staff. Therefore, a small fraction of dam owners negotiating consent orders may incur travel costs to Albany.

b) Costs to the department, the state, and local governments for the implementation and continued compliance with the rule: The greatest direct cost to the department will occur in the dam safety section, and to a lesser extent, other units needed to support the program's work. The department may conduct outreach and training, develop additional guidance documents, notifications, develop a compliance database to track receipt of required reports, prepare case referrals to the attorneys for enforcement, and face an increase dam construction permit applications.

There are no significant costs anticipated for state or local governments except with respect to their roles as dam owners. Local government tax assessors may receive some requests for determining ownership of land parcels containing a dam. There is a possibility that some private landowners could abandon properties containing dams rather than comply with regulations or undertake maintenance or repairs to dams, and local governments would potentially become the owners of these “orphan” dams. By providing copies of inspection reports and requiring notifications of dam property transfers, the department intends to make local government better aware of dams in their area, so that abandonment of dams can be prevented.

Various state agencies are dam owners. The regulations and the enacting statute specifically exempt the state from the regulations. However, ECL 3-0311 directs 51 state agencies, public authorities, and public benefit corporations to conduct an annual report on environmental compliance status. Therefore, the state may incur costs as a result of complying with the proposed regulations.

5. Local Government Mandates: There are no programs, services, duties, or responsibilities imposed by the rule upon any county, city, town, village, school district, fire district or other special district except with respect to their roles as dam owners and as noted above.

6. Paperwork: The proposed and revised regulations require that the dam owner prepare and/or maintain documents about the dam for the life of the dam, and that owners of all dams exceeding the permitting size threshold transfer the documents to the new dam owner. Intermediate and high hazard dam owners would be required to submit an annual certification to the department, as well as other periodic submissions such as emergency action plans and dam safety inspections and engineering assessments.

7. Duplication: For most dam owners, there are no relevant rules or other legal requirements of the state and federal governments that duplicate, overlap or conflict with the rule. However, hydroelectric dams which are also regulated by the Federal Energy Regulatory Commission (FERC) are required to conduct inspections which may be similar to the inspections and/or assessments required in the proposed regulations. In an effort to eliminate a duplication of efforts, the proposed regulations provide that the department may accept reports from federal entities or reports submitted to other regulatory agencies.

The Phase II Stormwater program requires the construction of stormwater treatment and retention facilities. Some stormwater facilities include dams that are required to meet permitting and/or general dam safety regulatory requirements.

8. Alternatives: Two alternative proposals were considered in the development of the proposed regulations. First was developing a permit system, where dam owners would be required to have a permit, issued by the department to own and operate a dam. The permit would have an annual fee associated with it. Review of the Summary of State Laws and Regulations on Dam Safety, published by the Association of State Dam Safety Officials, revealed that several states operate a dam permit system. Money received from the permit fees is used for general state program operations, or for an emergency dam safety fund. The department determined it was too onerous on dam owners to require fees. The second alternative evaluated regulating small dams below the permitting threshold. The 1999 statute provides that all dam owners are responsible for operating and maintaining their dam in a safe condition. However, most dams below the construction permit size thresholds pose a minimal threat of impact if they were to fail. The department therefore minimized requirements for owners of small dams.

9. Federal Standards: Although the state's dam safety program does not derive its authority from any federal laws or regulations, the department reviewed the documents listed in the Needs and Benefits section above, which are guidance documents published by FEMA, a federal agency. The revised regulations also contain provisions for accepting submissions that are prepared for compliance with various federal requirements, such as Federal Energy Regulatory Commission licenses.

10. Compliance Schedule: The proposed regulations have a phased approach for initial submittal of certain deliverables, including Emergency Action Plans and dam assessments.

Dam owners, working with their engineers, will be expected to propose a reasonable schedule for any necessary maintenance or remedial work at a dam.

Table 1. Cost Estimates for Proposed Engineering Services

	Class A Dam	Class B Dam	Class C Dam
Hazard Class Verification	\$1,300 - \$8,000	N/A	N/A
Dam Safety Inspection	N/A	\$2,500 - \$12,000	\$4,000 - \$80,000
Engineering Assessment	N/A	\$6,000 - \$20,000	\$8,000 - \$50,000
Breach, 60 ft. earthen dam*	N/A	N/A	\$12,000 - \$1.5 MM

* This range of costs represents an approximate amount of financial security Class C dam owners could be expected to demonstrate.

Revised Regulatory Flexibility Analysis

1. Effect of Rule: The statute and revised proposed regulations require that dam owners operate and maintain a dam in a safe condition. Many local governments own dams for flood control, stormwater management and control, fire protection, drinking water supply, recreation, or aesthetic appeal in parks. Many local governments have acquired dams when owners have failed to pay property taxes. Small businesses may own dams if the dams are located on the property.

The dam inventory database contains approximately 902 dams owned by local governments. Of these, 395 are low (A) hazard dams, 191 are intermediate (B) hazard dams, 201 are high (C) hazard dams, 87 are either failed or were never constructed and pose negligible hazard dams (D), and 28 are not classified.

There are 4850 dams in the database which are listed as privately owned. Privately-owned dams include dams owned by businesses, private individuals and non-profit organizations. There is no further breakdown on dams owned by small businesses.

2. Compliance Requirements: The proposed regulations are the same for dams owned by small businesses or local governments; there are no special exemptions or allowances.

3. Professional Services: The proposed regulations are the same for dams owned by small businesses or local governments. Small business owners and local governments that own dams are subject to the same requirements as other dam owners, and must retain the same level of professional services to comply with the regulations as other dam owners. The requirements are described in the section, "Costs to Dam Owners" in the Regulatory Impact Statement.

4. Compliance Costs: The proposed regulations are the same for dams owned by small businesses or local governments. Small business owners and local governments that own dams are subject to the same requirements as other dam owners, and will likely incur similar costs as other dam owners. The requirements are described in the section, "Costs to Dam Owners" in the Regulatory Impact Statement. Small businesses or local governments who have an engineer on staff may use their engineer to produce the documents required in the proposed regulations, provided the engineer meets the qualifications as described in the definition of engineer in Part 673.1. In response to public comments, revisions designed to reduce the costs of compliance were made to the proposed regulations.

5. Economic and Technological Feasibility: It is anticipated that small businesses and local governments may struggle to meet the requirements of the proposed regulations, particularly if they own intermediate or high hazard dams. The economic burden of the proposed regulations is likely to be greater if the dam requires extensive maintenance, repairs, or reconstruction to meet current dam safety stability criteria or spillway capacity. However, the goal of the proposed regulation is to protect public safety. If the dam poses a threat to public safety and the municipality is unable to secure financing to bring the dam into compliance with current safety criteria, the department can pursue enforcement, and if the owner fails to bring the dam into compliance, the department will recommend that the dam be breached or removed, and will take actions necessary to protect public safety. It is not acceptable to the department or lawmakers (as evidenced by the 1999 amendment to the statute) that dams not be maintained, because of the risk to public safety. Funding was recently available to municipalities, primarily through the Clean Water/Clean Air Bond Act of 1996 Title 3 - Section 56-0311, but funding availability fell short of meeting the needs of the municipalities, as expressed in unfunded applications. The department is unaware of funding opportunities for small business

owners who are seeking to repair or reconstruct their dams, although it may be possible to secure funding from environmental groups for removal of the dam. Non-profit organizations and homeowners' associations are also likely to be financially challenged.

6. Minimizing Adverse Impacts: The proposed regulations are the same for dams owned by small businesses or local governments. Small business owners and local governments that own dams are subject to the same requirements as other dam owners, and will likely incur similar costs as other dam owners. The requirements are described in the section, "Costs to Dam Owners" in the Regulatory Impact Statement. It is not acceptable to the department that dams not be maintained, or that dam owners not comply with the proposed regulations because they claim economic hardship, since dams that are not maintained or do not meet dam safety design criteria pose a risk to public safety.

7. Small Business and Local Government Participation: The department has sought input from stakeholders in the development of the proposed regulations. The department has conducted mailings containing the web link to the proposed regulations and invited all dam owners to public outreach sessions. Information was sent to all dam owners listed in the department's dam inventory database, as well as organizations, such as the Federation of Lakes, which include many dam owners. The department held preliminary stakeholder outreach meetings in Poughkeepsie, Rochester, and Albany to gather input from all dam owners, including local governments and small business owners.

Revised Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas: The 1999 statute and proposed regulations require that all dam owners operate and maintain a dam in a safe condition. Dams are located in all areas of the state, including rural areas. Therefore, all rural areas may be impacted by the proposed regulation.

2. Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services: The proposed regulations are the same for dams located in rural areas. The proposed regulations are not applicable to dams below the permitting thresholds including many farm pond dams. Most rural dams are low hazard dams subject only to maintenance and record-keeping requirements, with minimal costs involved.

3. Costs: The cost to comply with the proposed regulation will depend upon the dam's hazard classification, as well as the size and condition of the dam. Other than the factors mentioned above, it is not expected that there will be any variation in the cost to comply with the regulation based upon rural area status.

4. Minimizing Adverse Impacts: The proposed regulations have been developed to protect public safety. As stated above, dams are located across the state, and many are located in rural areas. A dam's hazard classification is based upon the potential impacts within the inundation area if the dam were to fail. Dams in rural areas with little or no development in the downstream inundation area, would have a lower hazard classification than a dam located in a more developed, heavily populated area. Dams with lower hazard classifications have lesser regulatory requirements. Therefore, the proposed regulations have incorporated a mechanism for minimizing the impacts on dam owners located in rural areas.

5. Rural Area Participation: The department has sought input from stakeholders in the development of the proposed regulations. The department has conducted mailings containing the web link to the proposed regulations and invited all dam owners to public outreach sessions. Information was sent to all dam owners listed in the department's dam inventory database, as well as organizations, such as the Federation of Lakes and Association of Conservation Districts which are in contact with many dam owners. The department held stakeholder outreach meetings in Poughkeepsie, Rochester, and Albany to gather input from all dam owners, including those located in rural areas. Revised proposed regulations and written responses to comments received during the three stakeholder outreach meetings and the public comment period have been prepared. The revised regulations and responses to comments from the public comment period will be made available to the public. An additional public comment period will be held for the revised rulemaking. The additional public comment period will be announced to dam owners via a press release, published in the Environmental Notice Bulletin and the State Register, and will be announced on the NYSDEC website. Notice will also be given to groups which have expressed interest in the regulations.

Revised Job Impact Statement

1. Nature of Impact: The revised proposed regulations are likely to create good, high paying technical jobs in engineering and training, as well as construction jobs.

2. Categories and Numbers Affected: The proposed regulations require dam owners to retain professional engineers to create emergency action plans, verify hazard classification, conduct safety inspections, and conduct engineering assessments. Furthermore, these inspections and assessments may identify deficiencies, which dam owners will be required to correct.

The dam safety projects generated as a result of the engineering inspections could involve engineering and construction jobs. As a result, it is expected that the proposed regulation will generate high paying engineering jobs, as well as construction jobs. The field of dam safety includes two highly specialized areas: civil/structural engineering and hydrologic/hydraulic analysis utilizing computer modeling. There will clearly be a need for civil engineers to have additional training in dam safety. Therefore, there will be an opportunity for companies and colleges to develop training programs and offer specialized training in New York. This would create job opportunities for trainers as well as support staff opportunities. The department has no way of determining the number of engineering or construction jobs or training opportunities. During one of the stakeholder meetings, a manager for a large consulting engineering firm stated that his firm planned on hiring one or two engineers in response to the proposed regulations.

3. Regions of Adverse Impact: There are no adverse job impacts expected.

4. Minimizing Adverse Impacts: There are no adverse job impacts expected.

5. Self-Employment Opportunities: The proposed regulations will create an environment favorable for experienced civil engineers, licensed surveyors, and computer modelers specializing in hydrology and hydraulic analysis to start their own businesses. Self-employment opportunities also will likely exist for experienced engineers to conduct training, dam safety inspections and dam safety engineering assessments. Additionally, self employment opportunities also will likely exist for experienced individuals in the construction trades for the erection, reconstruction, repair, breach or removal of dams.

Assessment of Public Comment

On February 13, 2008, the New York State Department of Environmental Conservation (NYSDEC) issued a Notice of Proposed Rule Making to amend the dam safety regulations at 6 NYCRR Parts 608, 621.4 and 673. The regulatory amendments were proposed in order to comply with Chapter 364 of the Laws of 1999 and with Chapter 178 of the Laws of 2006. Three public hearings were held on April 15 and 18, and on May 2, 2008, in Poughkeepsie, Rochester and Albany, respectively. The public comment period for the proposed rule making closed 15 days after May 2, 2008, the date of the last public hearing.

A large volume of comments were received. The Assessment of Public Comment (APC) summarizes, condenses, and codifies all of the comments. Complete copies of all written submissions are also included.

As a result of the public comments that were received, and upon further analysis and review, NYSDEC has extensively revised the proposed regulations. Many of NYSDEC's responses in the APC refer the reader to the text of NYSDEC's revised rule making - meaning, the text of the revised regulations. The public is invited to refer to the full text of the revised dam safety regulations, which will themselves be the subject of a separate public comment period.

This Summary of the APC provides an overview of the comments most frequently received and the responses of NYSDEC.

Frequent Comment #1: The additional engineering assessments, safety inspections, and financial security requirements impose high costs. This may mean bankruptcy for some or may cause individuals to breach their small dams rather than comply. The breaching of dams may harm the ecosystems supported by those dams and the overall aesthetics of the lands affected, which may lead to decreased property values and a diminished tax-base. Financial assistance including an insurance or grant program should be provided. NYSDEC is responsible for undertaking the engineering assessments, inspections, plans, and functions for all dams. The proposed regulations impermissibly shifted responsibility to dam owners.

Response: The proposed dam safety regulations generally reflect the state of the practice in dam safety. The costs of concern are primarily those of operating and maintaining a dam in a safe condition, as widely understood in the industry, which is a now longstanding statutory obligation of dam owners which pre-dates this rule making by almost a decade. Compliance with a strong regulatory framework may help to contain or even lower insurance costs. Dam owners have long been responsible for their dams as a matter of law, through statute, and by tradition. Nevertheless, in response to these comments, the revised rule making proposal includes several changes designed to address the cost of compliance. By way of example, the revised regulations:

Extends the date by which the first Engineering Assessments and Emergency Action Plans are due, thus offering owners more time to make arrangements for the associated costs.

Require Safety Inspections at a frequency that shall appear in a schedule that is part of an Inspection and Maintenance Plan, not on a schedule that is explicitly stated in the regulations in order to allow greater flexibility to determine the appropriate schedule for a specific dam.

Require an Enhanced Safety Program only for dams that have been assigned a particular Condition Rating. This approach addresses public

safety, allows NYSDEC to focus on deficient dams, and rewards responsible owners of well-maintained dams.

Clarify that financial assurance is to cover only the costs of breach or removal, and only if required by NYSDEC.

Creation of a funding mechanism to help dam owners rehabilitate their dams must be addressed through the legislative amendment and budget processes, and is beyond the scope of this rule making.

Frequent Comment #2: Opposing views were expressed over the use of dams. Owners of farm pond dams should be exempt from any obligation beyond operating farm pond dams in a safe and cautious manner. Dams should be regulated based on downstream hazard potential, rather than use. Response: Under the revised dam safety regulations, Class A (Low Hazard) dams only have to comply with the requirement to operate a dam in a safe condition, and with recordkeeping requirements (including having an inspection and maintenance plan). The reference to "farm pond dams" has been removed, and all Class A dams (Low hazard), regardless of use or purpose, are treated the same.

Frequent Comment #3: How will NYSDEC assign or change the Hazard Classification of a dam? Do not include downstream development as a criterion in assigning a hazard classifications to a dam because doing so forces upstream dam owners to bear the costs of poor development choices, many of which are made after the dam is constructed and without input from the upstream dam owners. The regulations lack any mode of appeal. Response: The proposed regulations do not significantly change the Hazard Classifications, but a dam's classification now carries more significance as a result of the safety requirements that are associated with each particular hazard classification. The Hazard Classification of a dam must reflect changes to potential impacts from a dam failure, including those due to increases in development downstream of the dam.

The regulations must allow for the array of specific characteristics of each dam and its locale. Hazard Classification determinations remain subject to the dam safety engineering discretion of NYSDEC staff. This issue may be further tackled in technical guidance documents. The language providing dam owners the right to appeal NYSDEC's Hazard Classification, which exists in the currently effective regulation, has been added to the revised rule making.

Frequent Comment #4: The requirement to retain a professional engineer. The State should maintain a list of approved engineers. The requirement that engineers have ten years of specific experience is arbitrary and unreasonable. NYSDEC may not be able to comply. Response: NYSDEC may not recommend engineers. The requirement for an engineer to have 10 years of experience has been removed from the revised rule making. State Education Law already bars engineers from practicing outside their area of expertise, and this principal has been clarified with a revised definition of "engineer." The revised rule making clarifies the components of a dam safety program that require the services of an engineer.

Frequent Comment #5: The definition of "dam owner" is over-broad and will create problems with enforcement, as many "dam owners" will be difficult if not impossible to identify and locate. Other interested parties have no influence in NYSDEC's decisions about a dam. How will transfers of ownership affect liability? Response: The definition of "owner" is not new. It simply adopts the long-existing statutory definition of dam owner. A new property transfer provision in the revised rule should help clarify the transition of statutory and regulatory dam safety liability upon the transfer of property, or rights in property, where a dam is located.

Where there are numerous direct users or beneficiaries of a dam (i.e., a lake association or other group), NYSDEC has the statutory authority to pursue enforcement against any one of these statutory "owners", who would then need to pursue contribution from the other owners. It may be in the best interests of groups of owners to work together cooperatively and designate a primary contact with NYSDEC for the purposes of dam safety compliance. Further, the respective owners of several dams on a single water body or of dams that are in close proximity to each other, may choose to work together to explore whether, for example, periodic engineering services may be retained by the owners for multiple sites at more economical rates.

A new provision reflects that any individual or entity may submit information to NYSDEC that is relevant to the existence, location, condition and safety of any dam.

Frequent Comment #6: It is burdensome to require dams to conform to new standards, when these dams were properly designed and constructed to the applicable design standards at the time they were built, and have since been inspected annually and properly maintained in excellent condition. Response: The rule making does not promulgate new engineering safety standards for dams. However, as with any technical guidance, NYSDEC expects to regularly review its "Guidelines for Design of Dams" for consistency with the state of science, engineering, and practice and issue updates as needed. Periodic review of downstream conditions

and dam design standards in light of current information is a well-recognized component of a dam safety program. It is appropriate and necessary to carry this concept into the regulations in order to protect public safety and the environment.

Frequent Comment #7: Numerous comments indicated concern that a dam owner must provide specific information or reports in a form “acceptable to NYSDEC,” but the regulations do not specify what would be acceptable. These comments recommend that NYSDEC should make standards and forms available to eliminate this confusion.

Response: NYSDEC intends to make guidance documents -- including some forms - available, as appropriate, after the content of the regulations has been finalized.

Frequent Comment #8: NYSDEC dam safety regulations may be preempted by FERC with respect to dams that generate hydroelectric power. If the NYSDEC regulations are not preempted, NYSDEC should to adopt regulations that more closely coincide with the regulations already used for FERC. Response: The regulatory authority of NYSDEC and FERC are each governed by their respective statutes and case law. The proposed and revised dam safety regulations do not change these authorities. In drafting the proposed dam safety regulations, NYSDEC provided compliance flexibility for dams regulated by government agencies. As part of the revised rule making, NYSDEC reviewed and has further clarified this language.

Frequent Comment #9: NYSDEC should conduct an Environmental Impact Study before these regulations go into effect. Response: Agency rule making is generally subject to the State Environmental Quality Review Act (SEQRA) pursuant to 6 NYCRR Part 617. NYSDEC prepared an Environmental Assessment Form, Coastal Assessment Form, and Negative Declaration concerning the proposed dam safety rule making. The regulations enhance the protection of the environment and public safety by more explicitly implementing the statutory obligation of dam owners to operate and maintain their dams in a safe condition. As the regulations do not themselves do not impose adverse environmental impacts, an Environmental Impact Study is not required.

Frequent Comment #10: Some form of review or appeal should be available to dam owners concerning NYSDEC determinations as to dam safety and the associated dam safety deliverables submitted by owners. Response: NYSDEC staff work cooperatively with dam owners. Technical submissions by owners are often the subject of dialogue between NYSDEC staff and the dam owner prior to finalization. However, the revised rule provides formal opportunities for the review of NYSDEC determinations as Hazard Classifications and Condition Ratings. In addition, orders issued by NYSDEC are subject to appeal through hearing provisions, and to Article 78 of the New York Civil Practice Law and Rules.

Frequent Comment #11: Part 608 (dam construction permit requirements) uses the term “ordinary maintenance.” Since all dams are unique in construction, the maintenance that can be completed without a permit should also be unique. Response: NYSDEC has attempted to define the term “ordinary maintenance” as precisely as possible, but because dam designs and the specific characteristics of individual dams vary widely, a more precise definition cannot be uniformly applied to all dams in an appropriate manner. In the revised rule making, NYSDEC has provided a definition for “repair” to provide a contrast to “ordinary maintenance.” In addition, NYSDEC has an existing mechanism through which a dam owner may request a determination as to whether proposed work would require permits.

Frequent Comment #12: NYSDEC does not provide enough information to the public about dams. NYSDEC should not make security-sensitive information available to the public. Response: This issue is beyond the scope of the dam safety rule making. NYSDEC is subject to New York State Public Officers Law and, within it, to the Freedom of Information Law (FOIL). The Public Officers Law defines the types of information that must be released and identifies which information may be withheld from disclosure. Regulations and case law interpret this law. NYSDEC handles requests for information about dams in accordance with this law. Requirements for the distribution of inspection reports by NYSDEC are in ECL § 15-0516.

Department of Health

NOTICE OF ADOPTION

Service Intensity Weights (SIW) and Average Lengths of Stay

I.D. No. HLT-53-08-00007-A

Filing No. 494

Filing Date: 2009-05-05

Effective Date: 2009-05-20

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

Action taken: Amendment of section 86-1.62 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(3)

Subject: Service Intensity Weights (SIW) and Average Lengths of Stay.

Purpose: Modifies the Service Intensity Weights (SIW) for DRGs.

Text or summary was published in the December 31, 2008 issue of the Register, I.D. No. HLT-53-08-00007-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: regsqa@health.state.ny.us

Assessment of Public Comment

The agency received no public comment.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Poison Control Distributions - Rollover of Unexpended Funds

I.D. No. HLT-20-09-00001-P

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

Proposed Action: This is a consensus rule making to repeal section 68.6(e) of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2500-d, 2807-j and 2807-l

Subject: Poison Control Distributions - Rollover of Unexpended Funds.

Purpose: Eliminates the rollover to the subsequent calendar year of unexpended HCRA Resources funds allocated for a given calendar year.

Text of proposed rule: Subdivision (e) of Section 68.6 is repealed.

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

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

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

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

Consensus Rule Making Determination

Statutory Authority:

The statutory authority for the regulation is contained in sections 2500-d(7), 2807-j, and 2807-l of the Public Health Law (PHL) which authorizes the commissioner to make distributions from the Health Care Initiative (HCI) Pool to the Poison Control Centers. The proposed amendment repeals a provision that is no longer permitted due to a revision to State Finance Law (SFL) that became effective April 1, 2005.

Basis:

The proposed regulation repeals an obsolete provision of the Department's poison control center HCI Pool distribution regulation set forth in section 68.6 of Title 10 NYCRR. The repealed provision is obsolete due to a change in SFL enacted under Chapter 58 of the Laws of 2005 that requires disbursements to HCRA programs to be made in accordance with state fiscal year appropriations as enacted by the legislature.

PHL section 2807-j(9)(b) created the Health Care Initiatives (HCI) Pool to help fund special initiatives including support to the statewide network of regional poison control centers. Under PHL section 2500-d(7), the com-

missioner is authorized to make grants to the regional poison control centers to assist them with meeting operational costs related to providing poison control consultation to health care professionals and the public. Pursuant to the PHL section 2807-l(1)(c)(iv), the commissioner is further authorized to make distributions from the HCI pool to the poison control centers up to the amounts specified for the given calendar year. Under the current regulation set forth in 68.6(e), any funds allocated to the regional poison control centers for a given calendar year that remain unexpended are to be rolled over to next subsequent calendar year to be made available for distribution in accordance with the methodology defined in subdivision (a) of section 68.6.

However, Chapter 58 of the Laws of 2005 amended SFL by adding a new section 92-dd to Article 6 that established a fund in the joint custody of the comptroller and the Department known as the Health Care Reform Act (HCRA) Resources Fund. This HCRA Resources Fund is composed of, in part, the HCRA program account which includes the HCI Pool. Effective on and after April 1, 2005, section 92-dd requires that disbursements from the HCRA Resources Fund to any HCRA program must be made in accordance with appropriations enacted by the legislature. Accordingly, the HCI Pool grant distributions to the poison control centers must be made in accordance with SFL section 40(2)(a), which outlines the period for which appropriations are to be made, and section 40(3)(b), which provides a lapse date for use of all aid to localities appropriations including special revenue funds such as the HCRA Resources Fund.

Accordingly, the rollover of unexpended HCRA funds allocated to the poison control centers for a given calendar year to the next subsequent calendar year, as currently provided for in 68.6(e), is no longer permitted. Such unused funds must lapse at the end of each fiscal year as provided for in SFL section 40(2)(a) and section 40(3)(b).

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedures act since it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulation serves only to eliminate the rollover of poison control center HCRA program funds allocated for a given calendar year to the funds available for disbursement for the subsequent calendar year. State Finance Law as amended by Chapter 58 of the Laws of 2005 requires such unexpended funds to lapse at the end of each fiscal year.

Insurance Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Workplace Safety and Loss Prevention Incentive Program

I.D. No. INS-20-09-00011-P

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

Proposed Action: Amendment of Subpart 151-3 (Regulation 119) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 308; and L. 2007, ch. 6

Subject: Workplace Safety and Loss Prevention Incentive Program.

Purpose: To establish Workers' Compensation premium credits for certain employers that implement safety and loss prevention programs.

Text of proposed rule: A new subpart 151-3 is added to read as follows:

Section 151-3.1 Preamble.

(a) In March 2007, the Legislature enacted Chapter 6 of the Laws of 2007, which reformed New York's workers' compensation system. Chapter 6 amended Workers Compensation Law § 134(6), to state that employers insured through the state insurance fund (except those who are current policy holders in a recognized safety group) or any other insurer that issues policies of workers' compensation insurance, shall be eligible for a credit in workers' compensation insurance premiums if the employer implements any of the following:

- (1) a safety incentive program that conforms to regulations promulgated by the Commissioner of Labor;
- (2) a drug and alcohol prevention program that conforms to regulations issued by the Commissioner of Labor, in consultation with the office of alcoholism and substance abuse services; or
- (3) a return to work program that conforms to regulations issued by the Commissioner of Labor.

(b) Pursuant to the statute, the Commissioner of Labor promulgated 12 NYCRR 60 ("Industrial Code Rule 60"). Industrial Code Rule 60 sets forth the minimum requirements for an acceptable safety incentive program, drug and alcohol prevention program, and a return to work program. Workers Compensation Law § 134(6)(c) requires the superintendent to promulgate regulations establishing the premium credit for those programs, and include provisions for recertification on an annual basis.

(c) The superintendent will review the information submitted by insurers pursuant to this Part to evaluate whether the credit amounts specified in this Part continue to be appropriate and reflective of actual loss and experience and expenses.

Section 151-3.2 Definitions.

In this Part:

(a) Credit means credit in workers' compensation insurance premium provided to an insured employer that implements an approved WSLPIP.

(b) Industrial Code Rule 60 means the rule promulgated by the Commissioner of Labor as 12 NYCRR 60.

(c) Renewal year means the year in which an insured employer renews the credit pursuant to 12 NYCRR 60-1.7.

(d) Workplace safety and loss prevention incentive program or WSLPIP means, pursuant to 12 NYCRR 60, a qualifying:

- (1) safety incentive program;
- (2) drug and alcohol prevention program; or
- (3) return to work program.

Section 151-3.3 Employer safety incentive program credit for first three consecutive years.

For each policy of workers' compensation insurance issued or renewed in the state, an insurer shall provide credit to an insured employer that implements and maintains a safety incentive program, which meets the requirements of Industrial Code Rule 60. The credit shall be:

- (a) four percent in the first full year in which the insured is entitled to a credit;
- (b) two percent in the second consecutive full year for which the insured is entitled to a credit; and
- (c) one percent in the third consecutive full year for which the insured is entitled to a credit.

Section 151-3.4 Employer drug and alcohol prevention program credit for first three consecutive years.

For each policy of workers' compensation insurance issued or renewed in the state, an insurer shall provide credit to an insured employer that implements and maintains a drug and alcohol prevention program, which meets the requirements of Industrial Code Rule 60. The credit shall be:

- (a) two percent in the first full year for which the insured is entitled to a credit;
- (b) one and one-half percent in the second consecutive full year for which the insured is entitled to a credit; and
- (c) one percent in the third consecutive full year for which the insured is entitled to a credit.

Section 151-3.5 Employer return to work program credit for first three consecutive years.

For each policy of workers' compensation insurance issued or renewed in the state, an insurer shall provide credit to an insured employer that implements and maintains a return to work program, which meets the requirements of Industrial Code Rule 60:

- (a) four percent in the first full year for which the insured is entitled to a credit;
- (b) two percent in the second consecutive full year for which the insured is entitled to a credit; and
- (c) one percent in the third consecutive full year for which the insured is entitled to a credit.

Section 151-3.6 WSLPIP credit in a renewal year.

For each policy of workers' compensation insurance issued or renewed in the state, an insurer shall provide a two-percent credit in each renewal year for any WSLPIP approval that an insured has obtained pursuant to 12 NYCRR 60-1.7.

Section 151-3.7 Credit for years other than the first, second, and third consecutive years, or renewal year.

For each policy of workers' compensation insurance issued or renewed in the state, an insurer shall provide a one-percent credit in any year other than the first, second, or third consecutive years or a renewal year in which the insured employer is entitled to a credit.

Section 151-3.8 Deviation from premium credit amount.

An insurer, upon written application to the superintendent, may deviate from the credit, provided that the superintendent approves the deviation in accordance with, and pursuant to, the standards set forth in Insurance Law Article 23.

Section 151-3.9 Credit for Employers with more than one WSLPIP.

For each insured with more than one WSLPIP, an insurer shall add all credits to which the insured is entitled for a total combined credit amount.

Section 151-3.10 Amount of credit for a WSLPIP when not implemented for consecutive years.

(a) *An insured that ceases to maintain a previously approved WSLPIP for less than four years shall, upon application pursuant to 12 NYCRR 60-1.6, be eligible for a credit in an amount equal to the amount that the insured would have been entitled to as if the insured had continuously maintained the WSLPIP.*

(b) *An insured that ceases to maintain a previously approved WSLPIP for four or more years shall, upon application pursuant to 12 NYCRR 60-1.6, be eligible for a credit in an amount equal to the amount that the insured would have been entitled to as if the insured were a new entrant into the WSLPIP.*

Section 151-3.11 Provision of Initial Approval Certificate and Annual Credit Recertification

(a) *An insurer shall require an insured that receives a credit pursuant to Industrial Code Rule 60 and this Part to provide the insurer with the certificate of approval issued pursuant to 12 60-1.6(e) of Industrial Code Rule 60.*

(b) *An insurer shall require an insured that receives a credit pursuant to Industrial Code Rule 60 and this Part to recertify the credit by annually submitting to the insurer the verification submitted to the Department of Labor pursuant to 12 NYCRR 60-1.8.*

Section 151-3.12 Reporting Requirements

An insurer providing a credit pursuant to this Part shall report annually to the superintendent and the Commissioner of Labor, in a form prescribed by the superintendent, the total number of employers insured during the prior year that received a premium credit for each WSLPIP program, and the total amount of the credit provided by the insurer.

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

Data, views or arguments may be submitted to: Michael Rasnick, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-7474, email: mrasnick@ins.state.ny.us

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.

Summary of Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of Part 151-3 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Second Amendment to Regulation No. 119) derives from Sections 201 and 301 of the Insurance Law, and Chapter 6 of the Laws of 2007. These provisions establish the Superintendent's authority to regulate workers' compensation premium rates.

Workers' Compensation Law § 134(6) directs the Superintendent to establish premium credits for certain employers insured through the State Insurance Fund (SIF) or any other insurer that issues policies of workers' compensation insurance if the employers implement a safety incentive plan, drug and alcohol prevention program, or a return to work program.

2. Legislative objectives: In March 2007, the Legislature enacted Chapter 6 of the Laws of 2007, which reformed the New York workers' compensation system. Chapter 6 amended Workers Compensation Law § 134(6), to state that employers insured through SIF (except those who are current policy holders in a recognized safety group) or any other insurer that issues policies of workers' compensation insurance, shall be eligible for a credit in workers' compensation insurance premiums if the employer implements any of the following: (1) a safety incentive plan, that has been recommended by a safety and loss management specialist after such specialist has been certified by the Commissioner of Labor, or if such plan otherwise conforms to regulations promulgated by the Commissioner of Labor; (2) a drug and alcohol prevention program that conforms to regulations issued by the commissioner of labor, in consultation with the office of alcoholism and substance abuse services; and (3) a return to work program that conforms to regulations issued by the commissioner of labor.

Pursuant to Workers Compensation Law § 134(6), the Commissioner of Labor promulgated 12 NYCRR 60 ("Industrial Code Rule 60"). Industrial Code Rule 60 sets forth the minimum requirements for an acceptable Safety Incentive Program, Drug and Alcohol Prevention Program, and a Return to Work Program. In conjunction therewith, Workers Compensation Law § 134(6)(c) requires the Superintendent to promulgate regulations establishing the premium credit for those programs, and include provisions for recertification on an annual basis.

3. Needs and benefits: Workers Compensation Law § 134(6)(c) requires the Superintendent to promulgate regulations establishing the premium credits for a safety incentive program, drug and alcohol prevention program, and a return to work program, and to include provision for

recertification on an annual basis. This regulation is necessary to establish the premium credit amount, and to require insureds to recertify their eligibility under the programs.

4. Costs: To insurers: Workers Compensation Law § 134(6)(c) requires the Superintendent to promulgate regulations establishing the premium credits for a safety incentive program, drug and alcohol prevention program, and a return to work program. The cost to insurers is determined by the size of the credits, the level of participation by policy holders in the workplace programs, and the effectiveness of the individual programs at reducing eliminating and mitigating workplace injuries and the cost of workplace injuries. If an employer's program or programs lead to a lower number of injuries or a reduction in the severity of injuries, the credit or credits provided by the insurer will be offset by a reduction in workers' compensation costs. On the other hand, if an employer's program or programs fail to result in a lower number of injuries or a reduction in the severity of injuries, the credit or credits provided by the insurer will not be offset by any savings in workers' compensation costs. The Department exercised its judgment to arrive at a credit amount that was both conservative yet meaningful enough to provide employers an incentive to implement the voluntary programs.

The regulation requires workers' compensation insurers to file reports with both the Superintendent of Insurance and the Commissioner of Labor, setting forth the number of employers insured in the previous year that received a credit, and the total credit amount the insurer granted. The costs to most insurers to make such a filing will be minimal, since they must report the same information to the DOL. The DOL and the Department each needs to collect the data so that each agency can assess the efficacy of the programs in terms of level of participation in the programs, as well as in reducing worker's compensation costs, respectively. Furthermore, the Workers' Compensation Rating Board will file the credit with the Insurance Department on behalf of all workers' compensation insurers. Therefore, the cost to each insurer will be minimal.

To employers: The program is a voluntary program; therefore, an employer's costs associated with implementing the program, and any fees that an employer must pay to the Department of Labor ("DOL") in order to receive certification, are discretionary. However, because the regulation mandates all workers' compensation insurers to require insureds to submit to the insurer documents for certification and re-certification, an employer may incur minimal filing costs, though the savings received through the premium credits would more than offset such minimal costs.

There are a variety of ways an employer may choose to implement any of the programs in this legislation. The employer has the option to: 1) use its own resources to establish a WSLPIP; 2) establish a program with the assistance of its insurer; 3) adopt a model program deemed by the DOL to comply with this Industrial Code Rule 60; or 4) use a specialist or the DOL's trained personnel to assist in establishing a WSLPIP. Unionized employers may operate a WSLPIP in conjunction with the union that represents their employees. Preexisting programs that meet the criteria established in Industrial Code Rule 60 are eligible for the incentive.

An employer must implement a program, and the program must undergo a consultation and evaluation by a specialist or DOL staff, before the employer applies to the DOL for approval. Employers have several options for conducting the consultation and evaluation, including: 1) seeking their own DOL certification to implement and verify the appropriate program, 2) contracting with a specialist in the appropriate safety or loss prevention field, 3) consulting with a specialist employed by the employer's insurance carrier or a representative of the bargaining unit who can evaluate the program, or 4) requesting DOL staff to conduct an evaluation. In most cases, the cost of the consultation and evaluation will be determined by supply and demand.

The DOL proposes to charge \$100 per hour for consultation and evaluation services for each of the three WSLPIPs. The DOL estimates that the review of the safety incentive programs will require several hours of staff time. Consultation and evaluation costs of the drug and alcohol abuse program and return to work programs and the credits given for such programs are expected to be lower and, therefore, the DOL capped those charges at \$300 for employers with less than \$50,000 in annual premiums. The DOL believes that its fee schedule is lower than what is charged by specialists/consultants in the private sector.

As an additional incentive for employers to apply for these credits, the DOL proposed an application fee of \$100, which is discounted to \$50 for employers with annual policy premiums of \$10,000.00 or less. The discount particularly will help small businesses, as defined by the New York State Administrative Procedure Act (SAPA). The fee is waived if the employer chooses to use DOL staff for the consultation and evaluation. The renewal application fee is set at \$100, and small employers are charged a discounted fee of \$50 for renewals. These application fees are below the expected cost of administering this program. These fees, are not imposed pursuant to this regulation but are established under Industrial Code Rule 60.

5. Local government mandates: This regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district. However, local governments that are not self-insured may elect to participate in the program to reduce their workers' compensation premiums.

6. Paperwork: This regulation requires workers' compensation insurers to file reports with both the Superintendent of Insurance and the Commissioner of Labor, setting forth the number of employers insured in the previous year that received a credit, and the total credit amount the insurer granted. In addition, the regulation mandates all workers' compensation insurers to require insureds to submit to the insurer documents for certification and re-certification.

7. Duplication: This regulation does not duplicate any existing law or regulations but complements DOL's Industrial Code Rule 60 (11 NYCRR 60).

8. Alternatives: The Department does not have any statistical data to determine the credit percentages. However, because the Workers' Compensation Law mandates the Superintendent to grant a credit, the Department exercised its judgment to arrive at a credit amount that was both conservative yet meaningful enough to provide employers an incentive to implement the voluntary programs. When employers implement effective loss control programs--such as the safety incentive plan, drug and alcohol prevention program, or the return to work program--the programs may result in lower loss experience, and thereby lower workers' compensation insurance premiums for employers. If an employer implements the three programs together, then the employer will receive a combined premium credit of 10% in the first year—a significant reduction in workers' compensation premiums.

The Department believes that the safety incentive and return to work programs have a greater possibility of reducing workers' compensation costs than drug and alcohol prevention program. Therefore, the up-front premium credits for these two programs are greater than the up-front premium credit for the drug and alcohol prevention program. In addition, some insurers are already authorized to offer a five percent premium credit under their drug free workplace rating plans.

The credits for the safety incentive program, the drug and alcohol prevention program, and the return to work program decrease over the first three consecutive years of a program's existence because the experience rating plan will incorporate the employer's actual loss experience into the premium separate and apart from the credits authorized by this regulation. Indeed, the experience rating plan provides a powerful economic incentive for employers for reduce the number and severity of workplace injuries.

The Department considered phasing the credits down to zero by the fourth consecutive year of a program's existence because of the experience rating plan but concluded that the programs, if implemented correctly, could continue to drive down worker's compensation costs beyond three years so that a smaller credit or credits should continue so long as the programs remain in effect. The Department also recognizes the possibility that an employer's program, although implemented correctly and followed in the outmost good faith, may not prevent that employer from experiencing higher than expected workers compensation injuries.

The Department also exercised its judgment to provide an additional 1% credit in the renewal year as a further incentive to employers to continue participating in one or more of the programs and to help offset any additional costs associated with renewing the program or programs with the Department of Labor.

The Workers' Compensation Rating Board will be collecting the data on the WSLPIP to facilitate the analysis of the credit experience. The Superintendent also will review the information submitted by insurers pursuant to the regulation in order to evaluate the appropriateness of the credits and make any necessary modifications.

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

10. Compliance schedule: WSLPIP is a voluntary program. Employers that choose to participate can be expected to act in an expeditious manner to qualify for premium discounts. However, insurer participation is not voluntary. Therefore, the Workers' Compensation Rating Board must file the credit with the Insurance Department on behalf of all workers compensation insurers recognizing the credits for the programs. Because the Workers' Compensation Rating Board files on behalf of all insurers doing a workers compensation business in this state, compliance will be expeditious. Nevertheless, an insurer voluntarily may file deviations from the filed rates.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

The rule is directed at workers' compensation insurers authorized to do

business in New York State, none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of workers' compensation insurers, and believes that none of them falls within the definition of "small business", because there are none that are both independently owned and have less than one hundred employees. Nor does the New York Compensation Insurance Rating Board ("CIRB"), which is also affected by the regulation, come within the definition of "small business" found in section 102(8) of the State Administrative Procedure Act.

The rule requires a mandatory credit in workers' compensation premiums for those employers insured through the State Insurance Fund (except for those who are current policyholders in a recognized safety group), or any other insurer, if they voluntarily implement any of the following: a safety incentive plan, drug and alcohol prevention program, and a return to work program. Some of the employers are small businesses.

The program is a voluntary program; therefore, a small business employer's costs associated with implementing the program, and any fees that an employer must pay to the Department of Labor ("DOL") in order to receive certification, are discretionary. However, because the regulation mandates all workers' compensation insurers to require insureds to submit to the insurer documents for certification and re-certification, an employer may incur minimal filing costs, though the savings received through the premium credits would more than offset such minimal costs.

If the employer uses an independent specialist for consultation and evaluation, the cost will be determined by supply and demand. Nevertheless, the DOL will: 1) lower its fees for consultation and evaluation services, 2) waive its application fees for employers who use the DOL for consultation and evaluation, and 3) set DOL application fees below its administrative costs in order to make WSLPIP a cost effective alternative for employers. To lower the cost for small employers, the cost of the consultation and evaluation services provided by the DOL for the return to work program and the drug and alcohol prevention program will be no more than \$300 for employers with annual premium payments of less than \$50,000. The DOL anticipates that consultation and evaluation for the safety incentive program requires additional hours of work by the DOL staff, and, therefore, the DOL did not cap the evaluation and consultation fees for that program. An employer that seeks an incentive for more than one program can lower costs by implementing all three programs together and thereby save on consultation and evaluation fees. Application fees per program are only \$100 with a discount of \$50 for employers with annual premiums of less than \$10,000. The discount particularly will help small businesses, as defined by the State Administrative Procedure Act. These fees are not imposed pursuant to this regulation but are established under Industrial Code Rule 60.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments. However, local governments that are not self-insured may elect to participate in the program to reduce their workers' compensation premiums.

Rural Area Flexibility Analysis

The entities covered by this regulation - workers' compensation insurers authorized to do business in New York State - do business in every county in this state, including rural areas as defined under SAPA 102(10). This regulation requires a credit in workers' compensation premiums for those employers insured through the State Insurance Fund (except for those who are current policyholders in a recognized safety group), or any other insurer, if the employer voluntarily implements any of the following: a safety incentive plan, drug and alcohol prevention program, and a return to work program. Workers Compensation Law § 134(6)(c) requires the Superintendent to promulgate regulations establishing the premium credit for those programs, and include provisions for recertification on an annual basis.

The regulation effects all employers required to maintain workers' compensation insurance in the state, including those doing business in rural areas.

The program is a voluntary program; therefore, a small business employer's costs associated with implementing the program, and any fees that an employer must pay to the Department of Labor ("DOL") in order to receive certification, are discretionary. However, because the regulation mandates all workers' compensation insurers to require insureds to submit to the insurer documents for certification and re-certification, an employer may incur minimal filing costs, though the savings received through the premium credits would more than offset such minimal costs. If the employer uses a specialist for consultation and evaluation, the cost will be determined by supply and demand. Nevertheless, the DOL will: 1) lower its fees for consultation and evaluation services, 2) waive its application fees for employers who use the DOL for consultation and evaluation, and 3) set DOL application fees below its administrative costs in order to make

WSLP a cost effective alternative for employers. To lower the cost for small employers, the cost of the consultation and evaluation services provided by the DOL for the return to work program and the drug and alcohol prevention program is limited to \$300 for employers with annual premium payments of less than \$50,000. The DOL anticipates that consultation and evaluation for the safety incentive program requires additional hours of work by the DOL staff, and, therefore, the DOL did not cap the evaluation and consultation fees for that program. An employer that seeks an incentive for more than one program can lower costs by implementing all three programs together and thereby save on consultation and evaluation fees. Application fees per program are only \$100 with a discount of \$50 for employers with annual premiums of less than \$10,000. The discount particularly will help small businesses, as defined by the State Administrative Procedure Act. These fees, are not imposed pursuant to this regulation but are established under 12 NYCRR Pt. 60 ("Industrial Code Rule 60").

The regulation contains no provisions that create impacts unique to rural areas of the state.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. It requires a mandatory credit in workers' compensation premiums for those employers insured through the State Insurance Fund (except for those who are current policyholders in a recognized safety group), or any other insurer, if the employers, among other things, implement a safety incentive plan, drug and alcohol prevention program, and a return to work program.

If there is any impact on jobs and employment opportunities in this state, it should be a positive one, since it enhances the health and safety of workers in the State of New York and provides lower workers' compensation insurance premiums for employers who qualify for a premium credit or credits.

Department of Labor

EMERGENCY RULE MAKING

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

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

Filing No. 446

Filing Date: 2009-04-29

Effective Date: 2009-04-29

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

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

Statutory authority: Labor Law, section 860-f

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

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

The emergency promulgation of these regulations is necessitated by the dramatic job losses currently being suffered within the state, the need to ensure that the notice requirements detailed in the regulation are available to protect workers affected by such job losses, and the needs to provide reemployment services to these workers in order to return them quickly to

work. In the last quarter of 2008, New York State lost 102,900 private sector jobs, including 49,300 in December alone. This is the steepest one-month drop since October 2001 in the aftermath of the World Trade Center attacks. Since the beginning of the national recession in December 2007, the number of unemployed in the state has increased by more than 50% and is at its highest level since October 1993. New York State's unemployment rate, after seasonal adjustment, increased from 6.0 percent in November 2008 to 7.0 percent in December 2008 -- its highest level since June 1994.

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

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

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

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

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

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

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

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

Subpart 921-3, entitled "Extension or Postponement of Mass Layoff Period" requires an employer to give additional notice if the triggering

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. LAB-07-09-00013-EP, Issue of February 18, 2009. The emergency rule will expire June 27, 2009.

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

Regulatory Impact Statement

1. Statutory authority:

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

2. Legislative objectives:

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

is required to enforce the law by recovering back wages on behalf of workers whose employers failed to give timely notice and by imposing penalties against such employers.

3. Needs and benefits:

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

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

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

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

4. Costs:

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

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

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

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

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

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

5. Paperwork:

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

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

6. Local government mandates:

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

7. Duplication:

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

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

8. Alternatives:

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

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

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

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

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

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

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

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

2. Compliance requirements:

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

3. Professional services:

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

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

4. Compliance costs:

The adoption of the regulations is expected to result in minimal costs to employers. They will be required to file a WARN notice with the required parties; costs associated with providing the notice will depend upon the number of employees affected and the means of delivery selected by the

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

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

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

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

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

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

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

Another example of the Department's effort to minimize adverse impact involves the issue of whether an employer's out of state workers would

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

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

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

7. Small business and local government participation:

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

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

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

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

Rural area employers of 50 or more employees, other than part-time employees, who have a plant closing, mass layoff, or reduction in work hours covered by the Act will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice. Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records allow employers to know the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's

collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Finally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open.

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

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

3. Costs:

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

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

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

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

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

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

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

4. Minimizing adverse impact:

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

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

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

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

5. Rural area participation:

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

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

Job Impact Statement

This rule requires notice to be provided to employees and other parties 90 days prior to covered plant closings, mass layoffs, relocations, and reductions in work hours at sites of employment subject to the rule. It is appar-

ent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Workplace Safety and Loss Prevention

I.D. No. LAB-20-09-00010-P

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

Proposed Action: Addition of Part 60 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, section 134

Subject: Workplace Safety and Loss Prevention.

Purpose: Provide incentives to employers who institute a safety procedure program, drug and alcohol prevention program, return to work program.

Public hearing(s) will be held at: 9:00 a.m., July 13, 2009 at State Office Campus, Bldg. 12, Rm. 544, Albany, NY.

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

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

Substance of proposed rule (Full text is posted at the following State website: <http://labor.ny.gov>): Section 60-1.2 defines: (a) Accommodate; (b) Attorney General; (c) Board; (d) Certification; (e) Certified; (f) Chair; (g) Commissioner; (h) Consultation; (i) Department; (j) Drug and Alcohol Prevention Program; (k) Evaluation; (l) Incentive; (m) Monitoring; (n) Qualified Organization; (o) Return to Work Program; (p) Review; (q) Safety Incentive Program; (r) Specialist; (s) Superintendent; (t) Verification; (u) Workplace Safety and Loss Prevention Incentive Program (WSLPIP).

Section 60-1.3 describes:

(a) the intent of this Rule to: (1) reduce occupational injuries and illnesses in the workplace; (2) return injured or ill employees to work; (3) reduce workers' compensation costs for employers; and (4) reward employers that have implemented a quality WSLPIP;

(b) the purpose of this Rule to set forth: (1) the procedures that must be followed in order for an employer to apply for and receive approval of a WSLPIP; (2) the minimum requirements for each WSLPIP; (3) the basic education or experience required of an individual to be Certified as a Specialist;

Section 60-1.4 (a) describes the eligibility requirements for an employer insured by the New York State Insurance Fund or any other authorized insurer that issues policies of workers' compensation insurance; (b) describes the eligibility requirements of an individually self-insured employer; (c) requires compliance with the procedures set forth in this Part and with New York State Labor Law and Workers' Compensation Law; (d) excludes employers required to implement a mandatory safety and loss prevention program from WSLPIP eligibility; (e) includes employers that have a preexisting program that complies with this Part in eligibility; and (f) subjects a group member's eligibility to the authorization of and limitations set by the Chair in addition to the requirements set forth in this Part.

Section 60-1.5 (a) describes the resources available to employers in establishing a compliant WSLPIP; (b) requires an implemented WSLPIP to undergo a Consultation and Evaluation by a Certified Specialist and describes the employer's options for obtaining those services; (c) allows for the eligibility of previously implemented programs that meet the requirements of this Part; (d) describes the fees for Consultations and Evaluations conducted by Department staff; (e) requires the Consultation and Evaluation be conducted according to the criteria set forth by this Part; and (f) allows an employer implementing more than one WSLPIP to undergo a single Consultation and Evaluation for all of its programs.

Section 60-1.6 (a) requires that an employer apply for WSLPIP approval using Department forms no later than 120 calendar days prior to the employer's annual policy renewal date, or the end of the calendar year for individually self-insured employers, and to provide a copy of the application to the employer's insurer or to the Board; (b) requires that the employer use a Specialist to perform the Consultation and Evaluation prior to application; (c) describes the application fees; (d) describes the information required on the application; (e) describes notification of approval, approval duration, and Incentive effective date; (f) describes the employer's responsibility for notification; (g) provides that the Depart-

ment will notify the employer's insurer, the Superintendent, and the Board of the approval; and (h) requires employer record-keeping and continued compliance.

Section 60-1.7 (a) requires that Incentive renewal be sought by the employer no later than 90 days prior to the end of the initial three year approval period using Department forms; (b) describes the renewal application fees; (c) describes the information required on the renewal application; (d) requires that the WSLPIP report and Verification comply with the procedures in Section 60-1.8; (e) describes notification of approval and Incentive effective date; (f) describes the employer's responsibility for notification; (g) provides that the Department will notify the employer's insurer, the Superintendent, and the Board of the approval; and (h) requires employer record-keeping and continued compliance.

Section 60-1.8 (a) requires approved employers to submit an annual report in order to receive the Incentive in the second and third year of initial and renewal approval periods; (b) describes the information to be included on the annual report; (c) describes notification of approval; (d) describes the employer's responsibility for notification; (e) provides that the Department will notify the employer's insurer, the Superintendent, and the Board of the Review and approval; and (f) requires the employer to notify the Department and its insurer or the Board if it discontinues a WSLPIP during an approval period.

Section 60-1.9 provides that: (a) the Incentive provided to insured employers for implementation and renewal of each WSLPIP shall be in accordance with Section 134 (6) of the Workers' Compensation Law; and (b) the reduction in the security deposit provided to individually self-insured employers for implementation and renewal of each WSLPIP shall be pursuant to Section 134 (7) of the Workers' Compensation Law.

Section 60-1.10 (a) describes the reasons why and method by which the Department may deny, revoke, or suspend Incentives and the procedure the employer may follow to correct their deficiencies; (b) subjects any approved WSLPIP to Monitoring by the Department and describes potential Monitoring activities; and (c) describes an employer's appeal rights should their application for Incentive be denied, revoked, or suspended.

Section 60-1.11 requires the employer to: (a) post the certificate of approval issued by the Department for each WSLPIP prominently in all work locations; (b) provide access to personnel, facilities, records, and documents required to carry out this Part to the Department and various parties identified by the Department and describes the penalty for failure to do so; (c) notify the Department about changes that relate to the WSLPIP; and (d) represent the status of a WSLPIP truthfully to the Department and describes the penalties for misrepresentation.

Section 60-1.12 (a) requires the insurer to apply each Incentive granted by the Department and the Superintendent to the employer's policy renewal period following the date of the Department's approval certificate; (b) requires an insurer to continue to apply an approved Incentive to a new policy that was originally provided by a prior insurer; (c) requires the insurer to report annually to the Commissioner and the Superintendent and describes the information to be reported; and (d) provides that the Chair of the Board shall maintain the information required by this Part and provide it to the Commissioner and the Superintendent on behalf of individually self-insured employers.

Section 60-1.13 describes: (a) the purpose and methods of a Safety Incentive Program; (b) the parties who may provide the services related to a Safety Incentive Program; (c) the documentation of a Safety Incentive Program required to qualify for an Incentive; (d) the elements required to be included in an acceptable Safety Incentive Program; and (e) the required dissemination and availability of the approved Safety Incentive Program plan to employees.

Section 60-1.14 describes: (a) the purpose and methods of a Drug and Alcohol Prevention Program; (b) the parties who may provide the services related to a Drug and Alcohol Prevention Program; (c) the documentation of a Drug and Alcohol Prevention Program required to qualify for an Incentive; (d) the elements required to be included in an acceptable Drug and Alcohol Prevention Program; and (e) the required dissemination and availability of the approved Drug and Alcohol Prevention Program plan to employees.

Section 60-1.15 describes: (a) the purpose and methods of a Return to Work Program; (b) the parties who may provide the services related to a Return to Work Program; (c) the documentation of a Return to Work Program required to qualify for an Incentive; (d) the elements required to be included in an acceptable Return to Work Program; and (e) the required dissemination and availability of the approved Return to Work Program plan to employees.

Section 60-1.16 describes: (a) the process a Safety and Loss Management Specialist must follow when conducting a WSLPIP Consultation and Evaluation, including communication with stakeholders, collection of information, analysis of historical loss and claim information, and industrial hygiene sampling procedures; and (b) the information required on the Evaluation Report.

Section 60-1.17 (a) requires a Specialist performing services identified in this Part to be Certified by the Department; (b) provides for designated Department employees to be automatically Certified and exempt from application requirements; (c) describes the qualifications required for Certification to conduct a Consultation and Evaluation of a Safety Incentive Program; (d) describes the qualifications required for Certification to conduct a Consultation and Evaluation of a Drug and Alcohol Prevention Program and provides for collaboration between the Department and the Office of Alcoholism and Substance Abuse Services in developing evaluation criteria to determine the acceptability of an applicant's experience; (e) describes the qualifications required for Certification to conduct a Consultation and Evaluation of a Return to Work Program; (f) describes the requirements for Certification as a Specialist in multiple Incentive Programs; (g) defines "professional experience;" (h) limits Specialists' activities to their area(s) of expertise as Certified by the Department; (i) describes the Specialist application and Recertification processes and their associated fees; (j) requires a Specialist applying for Recertification to advise the Department of any circumstance which would disqualify the Specialist from Recertification; (k) describes the circumstances under which the Department may deny, suspend, or revoke a Specialist's Certification; (l) requires an investigation, formal hearing, and written notification to revoke or suspend a Specialist's Certification; (m) describes the circumstances under which a Specialist's Certification may be reinstated; and (n) subjects a Specialist applying for reinstatement of Certification to those procedures pertaining to application for an original Certification.

Section 60-1.18 indicates that variances from the provisions of this Part may be granted in accordance with Article 2, Section 30 of the Labor Law.

Section 60-1.19 declares the provisions of this Part to be severable.

Section 60-1.20 declares that nothing contained in this Part shall abrogate or otherwise limit the responsibility of an employer to comply with all requirements set forth in State and Federal safety and health standards to which the employer would otherwise be subject, nor abrogate or otherwise limit the liability of such employer to fines or other penalties to which it would otherwise be subject for failure to comply with such Rules and Regulations.

Text of proposed rule and any required statements and analyses may be obtained from: Benjamin Garry, Senior Attorney, NYS Department of Labor, State Office Campus, Bldg. 12; Rm. 509, Albany, NY 12240, (518) 485-6205, email: benjamin.garry@labor.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority: Chapter 6, Section 33 of the Laws of 2007, titled the 2007 New York Workers' Compensation Law Reform, amended Article 7, Section 134(6-10) of the Workers' Compensation Law and directed the Commissioner of Labor to develop a Workplace Safety and Loss Prevention Incentive Program (WSLPIP) which encourages employers to voluntarily implement a Safety Incentive Program, a Drug and Alcohol Prevention Program, and/or a Return to Work Program by providing participating employers with a credit in workers' compensation premiums, or a reduction in the security deposit in the case of self-insured employers. The Commissioner of Labor was given the responsibility for monitoring all incentive plans implemented by the employer and for establishing rules for the certification of Safety and Loss Management Specialists who perform such services. The State Insurance Department was given the authority to determine the size of the credit in workers' compensation premiums, and the Workers' Compensation Board was given the authority to determine the reduction in the security deposit required by self-insured employers for each of the three incentive programs implemented.

Furthermore, the Commissioner of Labor was given statutory authority to make recommendations on how to help injured workers return to work under Chapter 6, Section 5 of the Laws of 2007, which established new Safety Net provisions in Section 35 of the Workers' Compensation Law. The Commissioner also has statutory authority under New York State Labor Law to monitor and enforce various workplace safety and health laws.

Legislative Objectives: The new legislation that amended Article 7, Section 134(6-10) was intended to (1) reduce occupational injuries and illnesses in the workplace; (2) return injured or ill employees to work; (3) reduce workers' compensation costs for employers; and (4) encourage and reward employers that have implemented or plan to implement quality, cost-effective safety incentive, drug and alcohol prevention, and return to work programs.

Article 7, Section 134 originally went into effect on January 8, 1997, and established both a mandatory safety and loss prevention program for insured employers with high experience ratings and a voluntary safety incentive program for those employers with low experience ratings. Sec-

tion 134 originally did not include an incentive for the implementation of a drug and alcohol prevention program or a return to work program. The Department of Labor was responsible for administering the mandatory safety and loss program and for certifying consultants who provide the required services. Under the 1997 law, a safety panel was created to approve incentives for the voluntary program, and the Workers' Compensation Board was given responsibility for monitoring the safety incentive program, but these provisions were not implemented.

During the legislative negotiations for the 2007 Workers' Compensation Reform, the stakeholders sought to improve workplace safety and encourage the reemployment of injured workers by creating additional opportunities for employers to receive incentives for implementing safety and health, drug and alcohol prevention, and return to work programs. It was recognized that such efforts would result in cost savings and provide real value to employers, workers, and the workers' compensation system. The stakeholders also transferred the responsibility for overseeing the voluntary program to the Department because of its proven track record in administering the compulsory safety and loss prevention program as well as its expertise in safety incentive programs.

The thresholds established by law for participation in the voluntary and mandatory programs overlap. The mandatory safety and loss prevention program, established by regulation as Industrial Code Rule 59, covers employers with both an experience rating that exceeds 1.20 and an annual payroll exceeding \$800,000. Section 134(6-10) of the WCL specifies that the voluntary safety and loss prevention program covers those employers who maintain an experience rating of "under 1.30 for the year preceding and the years in which the credit has been applied for." This section also states that employers who are required to participate in the compulsory program are not eligible for the voluntary program. The Legislature gave the Department the responsibility and authority to draft clarifying language and regulations. The Department, in consultation with the Workers' Compensation Board, set the eligibility threshold for the voluntary program to be those insured employers whose experience modification for the previous year was under 1.30. This decision opens the program up to more employers including smaller employers whose experience rating is above 1.20 but below 1.3 and who are not subject to the mandatory program. This threshold will avoid confusion and clarify the parameters of the program.

The Legislature sought to encourage employers to establish these voluntary programs. According to the State Insurance Department, approximately 77,000 employers have an experience modification factor at or below 1.2 and pay annual workers' compensation premiums of \$5,000 or more. Currently, 150 employers actively self-insure and these employers along with their 285 subsidiary companies would be eligible to apply for a reduction in their security deposit. Employers with experience ratings greater than 1.20 represent only 1.7% of the total number of employers in New York State. The pool of eligible employers will be slightly larger than the figures indicate, as the Department decided to make smaller employers that have annual payrolls of less than \$800,000 and experience ratings between 1.2 and 1.3 eligible for the incentive in order to maximize the number of employers that could choose to have a WSLPIP approved.

The purpose of this Rule is to: outline the procedures, including the application process, that must be followed in order for an employer to receive the Department's approval of a WSLPIP; establish the minimum requirements for an acceptable Safety Incentive Program, Drug and Alcohol Prevention Program and Return to Work Program; and describe the basic educational and/or professional work experience required of an individual to be Certified as a Specialist.

Needs and Benefits: This legislation addresses the needs of employers and employees in reducing the incidence and severity of occupational accidents and illnesses and promotes positive solutions that are universally recognized in safety and loss prevention. Numerous studies have documented how these programs reduce the incidence and cost of workplace accidents or illnesses and help injured workers return to work.

Each day, on average, 9,000 U.S. workers sustain disabling injuries on the job, sixteen workers die from an injury suffered at work, and one-hundred thirty-seven workers die from work-related diseases. The average cost per disabling injury is approximately \$34,000. Disabling workplace injuries are estimated to cost employers over \$50 billion in direct wage replacement and medical payments annually and generate between \$80 billion and \$200 billion in indirect costs per year for replacement labor, overtime, lost production and decreased productivity.

According to a report issued by the Superintendent of Insurance in March 2008, while the overall number of claims in New York is decreasing, indemnity and medical costs per claim continue to rise. Overall, indemnity costs comprise 62% of the total workers' compensation claim costs in New York, which is higher than the national average of 55% of total system costs related to indemnity. Programs which focus on ways to reduce the number and severity of workplace injuries and time lost on the job, and which result in safer workplaces, benefit all stakeholders in the system: workers, employers and the State.

There is much data to support the cost-effectiveness of implementing an occupational safety and health program. Safety and health programs help prevent workplace accidents and illnesses and provide direct cost-savings to businesses including lower workers' compensation insurance costs; reduced medical expenditures; less disruption to the normal course of workplace activity; lower costs for job accommodations for injured workers; and less money spent for overtime payments. Safety and health programs also reduce indirect costs because they result in increased productivity, improved morale, better labor-management relations, reduced turnover, and better use of human resources. Employees and their families benefit from workplace safety and health programs because their incomes are protected.

The cost of implementing an accident prevention program is far lower than the cost of accidents. It is estimated that workplaces that establish safety and health management systems can reduce their injury and illness costs by 20 to 40 percent. Studies from the Occupational Safety and Health Administration (OSHA) confirm that incentives for implementing effective worker safety and health programs result in lowered incidents of injury. Employers participating in OSHA's Voluntary Protection Program (VPP) report 51% fewer injury incidences than their respective industry averages.

The economic and human costs of drug and alcohol use are staggering. The National Institutes of Health estimated that alcohol and drug abuse cost the U.S. economy \$351 billion in 2006 dollars. Numerous studies, reports and surveys indicate that substance abuse has a profoundly negative effect on the workplace in terms of decreased productivity and increased accidents, absenteeism, turnover, and medical costs. National statistics show that one-third of all workplace deaths have some link to drug or alcohol use. A study published in Occupational Medicine indicated that as many as 40% of fatal workplace accidents and 47% of serious workplace accidents involve alcohol and/or drug use. Drug and alcohol users are three to four times more likely to be involved in workplace accidents, and five times more likely to file a workers' compensation claim.

Workplace substance use and abuse can be prevented. Taking steps to raise awareness among employees about the impact of drug and alcohol abuse on workplace performance, and offering the appropriate assistance to employees in need will improve worker safety and health, lower workers' compensation costs, and increase workplace productivity and market competitiveness. According to the U.S. Department of Labor, for every dollar invested in drug and alcohol prevention programs, often referred to as employee assistance programs (EAPs), employers generally save anywhere from \$5 to \$16. A study showed that when EAP services were provided work loss was avoided in 60% of cases.

Research has documented the psychological, medical, social and economic effects caused by unnecessarily prolonged work disability and loss of employability. Return to work programs have been shown to reduce the frequency and duration of lost time, workers' compensation costs, medical and indemnity costs, litigation, wage replacement costs, utilization of short term and long term disability benefits, utilization of leave benefits, and worker replacement and productivity costs.

Return to work programs facilitate recovery and lead to less time off work for the worker. A 1995 study demonstrated that employees recover from their injuries three times faster when they are on the job. Furthermore, this data indicated that an employer's return to work efforts can save up to 70 percent in claims costs. Return to work programs also help injured employees maintain their earnings and benefits, such as sick leave and health insurance, and they improve labor relations and employee and supervisor satisfaction.

There are many sources that have documented the key components of these three programs. The Department will provide model programs for an employer's consideration. The Department also will partner with the New York State Office on Alcoholism and Substance Abuse Services to develop sample drug and alcohol prevention programs. Each program implemented will be evaluated to ensure that it contains the proven elements and strategies that will lower workers' compensation and related costs, and justifies approval for the incentive.

Costs: Implementation costs of each WSLPIP option are employer specific and based upon the size and location of the employer. It is anticipated that the cost of implementing any of the options of this legislation will be significantly lower than the cost that employers would incur for employee injuries and illnesses if they did not implement a program.

The cost of the program to employers will be offset by the premium credit or reduction in the security deposit required. The incentives are available to employers on an annual basis as long as an acceptable program is implemented. These programs will also lower the costs to employers of workers' compensation, replacing employees, overtime, and employee turnover.

Local governments that are not self-insured may elect to participate in the program to reduce their workers' compensation premiums. The Department encourages them to consider sharing resources with other

nearby local governments in the development and implementation of their programs, thereby reducing the costs of participating in a program.

There are a variety of ways an employer may choose to implement any of the programs in this legislation. The employer has the option to use its own resources to establish a WSLPIP that complies with this Rule, establish a program with the assistance of its insurer, adopt a model program deemed by the Department to comply with this Rule, or use a Specialist or the Department's trained personnel to assist in establishing a WSLPIP that complies with this Rule. Unionized employers may operate a WSLPIP in conjunction with the union that represents their employees. Preexisting programs that meet the criteria established in this Rule are eligible for the Incentive.

An employer must implement a program and the program must undergo a consultation and evaluation by a Specialist or Department staff before the employer applies to the Department for approval. Employers have several options for conducting the consultation and evaluation. This includes seeking the certification of a qualified employee to implement and verify the appropriate program, contracting with a Specialist in the appropriate safety or loss prevention field, consulting with a Specialist employed by the employer's insurance carrier or a representative of the bargaining unit who can evaluate the program, or having a Department staff conduct an evaluation. In most cases, the cost of the consultation and evaluation will be determined by supply and demand.

The New York State Department of Labor's fee for consultation and evaluation services is below statewide rates already in place under the mandatory safety and loss prevention program. The Department proposes to charge \$100.00 per hour for consultation and evaluation services for each of the three WSLPIPs. It is anticipated that the review of the Safety Incentive Programs will require several hours of staff time. Consultation and evaluation costs of the Drug and Alcohol Abuse Programs and the Return to Work Programs, as well as the credits given for such programs, are expected to be lower than those of the Safety Incentive Programs; therefore, the Department capped those charges at \$300.00 for employers with less than \$50,000 in annual premiums. The Department believes that its fees are less than those charged by Specialists/Consultants in the private sector. The Department considered requiring programs to undergo a Consultation and Evaluation either annually or every three years upon renewal, but the Department wanted to lower the cost of the program and determined that it would have enough information from the annual reports and renewal applications to make an accurate assessment as to the worthiness of each program.

As an additional incentive for employers to apply for these credits, the Department proposed an application fee of \$100.00, which is discounted to \$50.00 for small employers with annual policy premiums of \$10,000.00 or less. The fee is waived if the employer chooses to use DOL staff for the consultation and evaluation. The renewal application fee is set at \$100.00 and employers with annual policy premiums of \$10,000.00 or less are charged a discounted fee of \$50 for renewals. The discounts will help small employers in particular. These application fees are below the expected cost of administering this program.

It is imperative that Specialists and Department employees engaged in the consultation and evaluation process have the qualifications necessary to advise employers on their programs. In determining criteria for Specialist certification, the Department considered various education and professional requirements. The Department chose those criteria determined to be the least onerous, while still maintaining the integrity of the program.

In an effort to ensure that there would be an adequate supply of Specialists available to employers, the Department proposed application fees for Specialists that are below DOL's administrative costs. Individuals who wish to be certified as a Specialist in one program area must submit a \$100.00 non-refundable application fee, which will be applied to the certification fee of \$800.00 if the applicant is approved. Individuals seeking certification in more than one program area would pay a discounted certification fee of \$200 for each additional incentive program certification. In order to expand the number of Certified Specialists, Specialists certified for three years in one specialty will receive experience credit toward certification in the second and third specialty.

Fees for members of qualified organizations are discounted to \$600 for the first certification. The Department encourages business, labor, insurance and industry groups to serve as qualified organizations. Renewal fees are minimal and scaled to the number of Specialists recertifying. Those currently certified by the Department as Safety and Loss Prevention Consultants under Code Rule 59 will incur no additional costs for certification as a Specialist for the Safety Incentive Program and will incur the same renewal fees as Specialists.

The Department had multiple alternative fee structures for certifying Specialists and opted for a lower fee schedule to minimize costs to those seeking certification, while providing some funds to cover the cost of the program. Costs of certification as a Safety and Loss Management Specialist will be incurred by those wishing to provide the appropriate services as described in this legislation.

The increased administrative costs related to the paperwork for certifying Specialists and collecting fees will require additional resources and staff for the Department's Licensing and Certification Units. In addition, the Department will incur increased costs for sending staff out to provide consultation and evaluation services. The Department foresees that it will need at least 13 additional staff to administer this program.

The Department set fees below its anticipated costs. The Department considered trying to recoup its administrative costs through increased fees, but was concerned that the number of employers who will implement these programs would be reduced.

Local Government Mandate: This regulation relates to a voluntary program and applies to county and local governments who are not self-insured or are members of a self insurance workers' compensation program that requires a security deposit and is monitored under the rules and regulations of the New York State Workers' Compensation Board. Municipal corporations that are exempt from posting a security deposit for their self insurance plans are not affected by this legislation. Approximately 1,500 local governments, such as counties, cities, towns, villages, school districts, fire districts and other special districts and public authorities, do not self-insure and would be eligible to voluntarily participate in this program if their annual premium costs are above \$5,000.

Paperwork: This Rule creates reasonable paperwork requirements to ensure compliance and measure quality. The proposed Rule would require that employers develop a written program for any of the options available in the WSLPIP. An evaluation report and written WSLPIP plan must accompany initial applications so that the Department has adequate data to assess whether the WSLPIP approval should be granted. The renewal application and annual reports provide sufficient information for the Department to determine whether the employer's incentive should continue. The employer also must simultaneously send a copy of the application to the employer's workers' compensation insurer, or to the Board if it is self-insured.

Application materials developed by the Department will seek to minimize necessary paperwork. The Department will provide samples of model programs and make them accessible to employers.

Once the WSLPIP is approved, the employer must notify the insurer, or the Workers' Compensation Board if self-insured, and post the certificate of approval at the worksite. Employers must also inform workers of the program and provide program documents to employee representatives, including the recognized collective bargaining representatives where applicable. These provisions involve stakeholders in the program implementation and oversight. The Department also will send copies of the approval notice to the insurer, the Board and the Superintendent of Insurance, but the primary responsibility for notification rests with the employer.

The annual WSLPIP report and reports by insurers will provide data for evaluating and determining compliance by individual programs as well as for measuring the effectiveness of the overall program. The Department will develop report forms that are streamlined to capture relevant data necessary to evaluate the program.

The Department proposes sensible recordkeeping requirements and monitoring procedures. Monitoring is an opportunity for the Department to take a first-hand look at a program and for an employer to receive valuable feedback on its operations. The Department's onsite review is more accurate with the full cooperation of the employer. The Department will conduct the monitoring process in a reasonable manner to ensure that it does not cause undue hardship. However, employers are expected to fully comply with the recordkeeping and reporting requirements of the regulations and to respond cooperatively to the Department's request for information. The Department will look for evidence of compliance, not just the written program or record-keeping sheets.

The law states that employee representatives must be involved in the programs. The Department believes that the participation of employee representatives in each program is necessary and will ensure that the programs are in compliance with this Rule. The Department requires employers to verify that they have complied with all requirements of these regulations concerning the participation of employee representatives, including the designated employee representatives and the recognized representative of each collective bargaining unit, where applicable.

Insurers are also asked to report annually to the Department and the State Insurance Department concerning the number of employers and the total amount of credits they issue. This data will enable the state to evaluate the program.

Applications to become a Specialist will require the necessary information for determining whether the applicant's qualifications meet the criteria for certification. Applicants will be able to attach pertinent information if necessary. The Department will ensure that the application process is not burdensome.

Duplication: This Rule does not duplicate any current state or federal laws. This Rule revises and expands an existing Rule that was not

implemented previously, and seeks to encourage maximum participation by employers.

Alternatives: This Rule provides employers with several alternatives for receiving an incentive. Participation is voluntary. The Safety Incentive Program option addresses key components of a written safety and loss prevention program that are nationally recognized as the basis of an employer's efforts in providing a workplace free from recognized hazards. Option two, the Drug and Alcohol Prevention Program provides for the voluntary implementation of a variety of specifically designed, proven programs used to minimize the incidence and impact of drug and alcohol abuse in the workplace. Option three, the Return to Work Program, provides employers with an effective way to reduce the cost of a workers' compensation injury or illness claim by encouraging safe and timely return to work and by providing alternate forms of transitional employment.

The Department considered a number of alternatives in developing these regulations and carefully weighed the need to use incentives to motivate employers to voluntarily participate in the program with the need to ensure that employers who receive the incentives fully implement an effective program. This balance is attained by requiring employers to have their programs undergo a consultation and evaluation by a Specialist or Department staff prior to initial application, submit an outline of the program and an evaluation report with their application for the incentive, and implement any one or more of the programs prior to receiving an incentive. The components of each of the programs are spelled out in the regulations, but employers are given sufficient latitude to tailor each of the program requirements to their specific needs.

The Department will approve each program for three years; however, employers must submit a short yearly report so that the Department is assured that the program continues to be implemented and can measure the overall effectiveness of the programs. The Department originally considered requiring employers' programs to undergo an annual evaluation by a Specialist or a Department employee but concluded that such an evaluation would be too burdensome and costly. Requiring programs to undergo a consultation and review for the renewal application was considered as well, but the Department concluded that it should receive sufficient information from annual reports and the renewal application to make an informed judgment about the worthiness of the program. The Department also contemplated giving insurers the responsibility for verifying that employer programs continue to be in effect after the first year, but the Department rejected that proposal. Insurers objected to taking on that responsibility since they did not have input during the initial granting of the incentive, and employers were concerned that insurers would deny incentives unreasonably because the insurer had a vested interest in not granting credits.

The Department also took into account the cost and paperwork implications of annual reporting. The Department has determined that in order to ensure that the employer continues to maintain the program and to measure the overall effectiveness of this program that certain basic information should be provided by the employer to the Department. The Department considered simply having employers attest that they continue to implement the approved program, but, given the Department's limited resources to monitor the program, the Department did not believe that employer self-reporting was an effective way to ensure compliance. The Department considered requiring information from both employers and insurance carriers regarding the implementation of each specific WSLPIP, but opted to require reporting from the employer only, so as not to duplicate effort and because the employer could provide a more accurate description of the program's operation.

The Department was required to set fees below its anticipated costs. The Department considered trying to recoup its administrative costs through increased fees, but was concerned that the number of employers who will implement these programs would be reduced.

The Department weighed charging the same certification fees for Specialists as for the Consultants under the mandatory Safety and Loss Prevention Program. The Department lowered the cost of certification of Specialists to ensure that an adequate number of Specialists are available and to encourage employers, unions, and insurers to have their members seek this certification. The Department also considered having only one certification which would have allowed the Specialist to provide consultation and evaluation services for all of the three options, but the Department determined that each WSLPIP option requires distinct expertise and qualifications. The Department lowered the cost and streamlined the application procedures for Specialists who seek certification in more than one specialty.

Federal Standards: There are no federal standards which cover workplace safety incentives under a state-run workers' compensation system.

Compliance Schedule: Employers may implement any of the WSLPIP options immediately and may apply for the incentive upon adoption of these regulations, provided that the application is received by the Department no later than 120 days prior to the end of the employer's policy year,

or 120 days prior to the end of the calendar year for self-insured employers. Employers that have implemented any of the three programs prior to this Rule may apply to receive the incentive. The application and renewal procedures provide sufficient time for an employer to implement, arrange for a consultation and evaluation, apply, and receive the credit by the next policy period. Employers will be granted the incentive approval for three years.

To receive the incentive in the second and third year of the approval period, employers must submit required reports at least 90 days before the start of the annual policy date in the second and third year. An employer may seek a renewal of the incentive for another three years, and the renewal application and subsequent reports must be submitted to the Department no later than 90 days before the annual policy renewal date in the third year.

The Department requires insurers to apply each incentive that is granted by the Department and the Superintendent to the employer's next policy renewal period following the date of the Department's approval certificate. Failure to apply the approved incentive within thirty calendar days of the employer's notification to the insurer may subject the insurer to penalties issued by the Superintendent. The Department believes that insurers will have sufficient time to meet this deadline.

Individuals seeking certification as Specialists may apply immediately to the Department upon adoption of these regulations. Applications for certification will be accepted throughout the year and are approved for three years. An individual, who has received certification under the mandatory safety and loss prevention program, Section 59-1.12 of the Labor Law, and has maintained the certification required by the Department, will be deemed qualified to provide the required consultation and evaluation of Safety Incentive Programs under this Rule provided that the individual notifies the Department of his or her intent to perform Specialist services under this Rule.

Regulatory Flexibility Analysis

Effect of Rule: Section 134(6-10) of the Workers' Compensation Law (WCL) was amended in 2007 to restructure the process for providing incentives to employers that implement one or more voluntary safety and loss prevention programs. This Workplace Safety and Loss Prevention Incentive Program (WSLPIP) authorizes premium credits for participating employers whose experience modification rating is under 1.30 and who pay workers' compensation insurance premiums of at least five thousand dollars annually, and authorizes reductions in the required security deposit for participating self-insured employers who pay a security deposit. Section 134(1-5) of the WCL was amended as well. Section 134(1-5) established the mandatory safety and loss prevention program for employers with annual payrolls above \$800,000 whose most recent experience rating exceeds the level of 1.20; this program has been overseen by the Department of Labor for over ten years in accordance with Industrial Code Rule 59.

The experience rating thresholds for participation in both the voluntary and mandatory programs overlap; however, the Legislature gave the Department the responsibility and authority to draft clarifying language and regulations. There may be small employers and local governments with an experience rating between 1.20 and 1.30 who are not required to participate in the compulsory program and could be eligible for a WSLPIP credit. In order to maximize the number of eligible small employers, the Department revised its initial proposal and set the threshold for eligibility as those employers with an experience rating of under 1.3 and who are not mandated to have a safety and loss prevention program under Section 134 (1).

Approximately 77,000 employers have premiums of at least \$5,000 and experience modification factors at or below 1.20. Currently, 150 employers actively self-insure and these employers along with their 285 subsidiary companies would be eligible to apply for a reduction in their security deposit. Employers with experience ratings greater than 1.20 represent 1.7% of the total number of employers in New York State. Employers with experience ratings above 1.2 and an annual payroll above \$800,000 will not qualify for the voluntary safety and loss prevention incentive program because they would be subject to the mandatory program. Employers subject to the mandatory safety and loss program represent a small percentage of employers in New York State. The Department decided to make smaller employers that have annual payrolls of less than \$800,000 and experience ratings between 1.2 and 1.3 eligible for the incentive in order to maximize the number employers that could choose to have a WSLPIP approved.

Compliance Requirements: Employers, including small businesses and local governments, may voluntarily implement any one or more of the three options in the WSLPIP. To receive approval for the incentive, the eligible employer must develop and implement a written program that complies with the regulations promulgated by the Commissioner of Labor. The regulations provide guidance and flexibility to enable an employer to adopt a program tailored to its needs. Employers who have existing safety,

alcohol and drug prevention, and/or return to work programs that meet the standards set in this Rule may apply immediately for the incentive.

There are many models that meet the standards set forth in the regulations. These models may be easily adapted to the needs of small businesses and local governments.

The Department has developed several model safety programs that have been provided to New York employers through its On-Site Consultation Program and for those employers required to have a safety program under Section 134(1-5). Model drug and alcohol prevention programs that conform to this Rule are being developed in consultation with the New York State Office of Alcoholism and Substance Abuse. A variety of specifically designed, nationally recognized programs used to address the incidence of drug and alcohol abuse in the workplace are available through this New York State agency as well as most federal agencies promoting safety, health or drug prevention programs. There are also many model programs that provide direction for employers who implement a return to work program. They include the necessary changes in company policy, employee notification and forms. Many insurers, including the New York State Insurance Fund, have model return to work programs available for employers. The Department has identified additional return to work programs through its research related to the Department's "Return to Work" report, as issued in March 2008.

An employer must implement the program at each work location prior to applying to the Department of Labor for a WSLPIP credit. Since the employer's incentive will be based on the entire premium paid, the Department requires employers to ensure that the approved program covers each employee.

In addition, prior to applying to the Labor Department for approval for the WSLPIP, the employer's program must undergo a consultation and evaluation by a Certified Specialist or a Department of Labor employee. The evaluation report issued by the Specialist or Department employee verifying that a WSLPIP has been implemented must accompany the application to the Department of Labor. The employer has several options for choosing who will conduct the consultation and evaluation. Employers, including small businesses and local governments, may have the consultation and evaluation conducted by one of their qualified employees who has been certified as a Specialist, or make arrangements with a private sector Specialist, a Specialist representing their insurance carrier or union, or the Department of Labor. This step ensures that the employer will receive an objective assessment of its WSLPIP plan as well as input on improving the program. The evaluation report will enable the Department to make a more accurate and timely decision on granting approval for the WSLPIP incentive.

An employer who chooses to participate in the voluntary program must have its WSLPIP undergo a consultation and evaluation prior to the initial application, and apply to the Department for one or more incentives. Thereafter, an employer must submit an annual WSLPIP report and verification that the program still complies with the regulations in order to receive the incentive for each year of the three year approval period. They must reapply for the incentive after the expiration of each three year approval period. The Department's application and reporting process will be as streamlined as possible, but an employer will be asked to provide sufficient information so that the Department can determine whether the program complies with the regulations and analyze the effectiveness of the program. Insurers and the Workers' Compensation Board are also asked to provide data that the State can use to evaluate the program and to ensure that the appropriate credits are being issued.

An employer must send copies of its application to the Department as well as its insurer or the Board. Furthermore, employers, including small businesses and local governments, must include relevant employee representatives in the consultation and evaluation discussions with the Department or a Specialist. The employer must share their plan documents and certificates of approval issued by the Department with the insurer or the Board, and with employee representatives. This is to ensure that all relevant parties are part of the process and included in the program.

New Certification requirements are outlined for Specialists for each of the three voluntary programs. The Department determined that each specialty required different qualifications, but lowered the cost and simplified the certification process for those seeking more than one Certification. The Department provided an opportunity for the Consultants certified under the mandatory safety and loss prevention program established by WCL Section 134(1-5) to serve as Specialists under the voluntary safety and loss prevention program. The criteria for Certification as Specialists were developed to encourage representatives of employers and organizations such as insurers and unions to seek Certification.

Professional Services: Most employers, including small businesses and local governments, have access to a variety of professional services that address cost containment under the workers' compensation system. The amended Section 134(6-10) of the WCL creates additional options that an employer may choose from to lower costs when implementing an

incentive. The employer may seek the certification of a qualified employee to implement and evaluate the appropriate program, contract with a Specialist in the appropriate safety or loss prevention field, have a representative of the employer's insurance carrier provide consultation and evaluation services, or have a Department of Labor employee conduct the consultation and evaluation. In addition, employer groups and employee organizations may have qualified members certified by the Department to perform the required evaluation. To reduce costs to taxpayers, the Department encourages local governments and small employers to consider cooperative arrangements for securing the services of a Specialist who can assist them in developing and implementing their programs. Members of professional organizations are given a discount for certification and re-certification.

Compliance Costs: If the employer uses a Specialist for consultation and evaluation, the cost will be determined by supply and demand. The Department anticipates that most insurers will seek Specialist Certification for staff and such Specialist will provide these services to their customers at little or no cost. The Department decided to lower its fees for consultation and evaluation services, to waive its application fees for employers who use the Department for consultation and evaluation, and to set its application fees below its administrative costs in order to make this program more cost effective for employers. To lower the cost for small employers, the cost of the consultation and evaluation services provided by the Department for the Return to Work Program and the Drug and Alcohol Prevention Program is limited to \$300 for employers with annual premium payments of less than \$50,000. The consultation and evaluation for the Safety Incentive Program is anticipated to require more hours of work by the Department staff, and, therefore, the Department did not cap that fee. An employer seeking an incentive for more than one program can lower costs by having all programs undergo the consultation and evaluation at the same time. Application fees per program are only \$100 with a discount of \$50 for employers with annual premiums between \$5,000 and \$10,000.

Employers will receive a premium credit or a reduction in their security deposit as determined by the Superintendent of Insurance and the Board respectively. These incentives are expected to offset the compliance costs of the programs. Employers with less than five thousand dollars in annual premium and self-insured employers who are not required to submit a security deposit do not qualify for the WSLPIP and will not incur any cost because of this legislation. Employers who do not choose to voluntarily participate in the incentive program will not incur any costs.

Economic and Technological Feasibility: The regulation does not require any use of technology to implement a WSLPIP. The Department will offer, but not mandate, on-line application and reporting. The Department will make every effort to assist small businesses and local governments in their effort to implement and maintain a successful WSLPIP.

Minimizing Adverse Impact: The Department does not anticipate any adverse impact on small businesses created by the implementation of a WSLPIP. To the contrary, the impact of implementing any of the options of this regulation will have a significantly positive effect on small businesses in New York. The Department is working with several agencies such as the New York State Insurance Fund, the Workers' Compensation Board, the Office of Alcoholism and Substance Abuse Services (OASAS) and the Insurance Department to minimize duplication.

The Department sought to increase the attractiveness of the program in several ways. It considered requiring that each WSLPIP receive an annual consultation and evaluation by a Specialist or Department employee, but determined that such a requirement would make the cost of the program prohibitive, especially for small employers and local governments. The Department structured its three year approval process to lower costs for employers while ensuring that approved WSLPIPs continue to comply with the regulations. The Department initially proposed requiring each program to undergo a consultation and evaluation upon renewal every three years, but determined that sufficient information was available through the employer's annual reports and renewal application to enable the Department to render an opinion regarding the employer's continued compliance, thereby minimizing the renewal application costs to employers. Paperwork requirements have been minimized to capture essential data to analyze the effectiveness and maintain the integrity of the program.

The Department lowered the cost of using the Department as a Specialist from the costs charged for the compulsory program. Discounts were established for Specialists seeking Certification in more than one specialty and for members of qualified organizations such as employers, insurers, and unions.

Small Business and Local Government Participation: The Department will seek feedback from small businesses and local governments during the rule making process. Notice of the rulemaking process will be distributed to business organizations and to government entities eligible for the WSLPIP. The Department has posted a notice on the website for

employers to make comment. The proposed rule will be posted on the Department website with a reference to the rulemaking provisions in the State Register.

Rural Area Flexibility Analysis

Effect of rule: The Article 7, Section 134(6-10) legislation established a voluntary program that applies to all employers whose experience modification rating is at or below 1.20 and either pay workers' compensation insurance premiums of at least five thousand dollars or are self-insured and required to pay a security deposit. This program allows employers to voluntarily implement a safety incentive program, a drug and alcohol prevention program and/or a return to work program to be eligible for a credit in their workers' compensation premiums or a reduction in their security deposit. The program is voluntary in nature, and employers in rural areas may choose to participate. Over 77,000 employers across the state are eligible to apply for the incentive although the number of employers in rural areas is unknown.

Reporting, recordkeeping and other compliance requirements; and professional services: The compliance requirements for rural employers are the same as for all employers. All employers who choose to implement a Workplace Safety and Loss Prevention Incentive Program (WSLPIP) must first file an application with the Department of Labor to be approved for an incentive. Prior to application, the employer's program shall undergo a Consultation and Evaluation by a Specialist or a Department employee. An Evaluation Report and a copy of the written program must be sent to the Department as part of the initial application and renewal applications. This information will provide the Department with adequate data in order to assess whether the WSLPIP approval should be granted. Application materials developed by the Department will seek to minimize necessary paperwork. The Department will provide samples of model programs and make them accessible to employers.

Once the WSLPIP is approved, the employer must notify the insurer, or the Workers' Compensation Board if self-insured, and post the certificate of approval at the worksite. Employers must also inform workers of the program and provide program documents to employee representatives, including the recognized collective bargaining representatives where applicable. These provisions involve stakeholders in the implementation and oversight of the program.

Approval for each implemented program shall be extended for three years. In order for the employer to receive an incentive in the second and third year of the approval period, the employer shall submit a basic report to the Department so that the Department can ascertain whether the employer is continuing to implement the program and that the program has had an impact.

The annual WSLPIP report and reports by insurers will provide data for evaluating and determining compliance by individual programs as well as for measuring the effectiveness of the overall program. The Department will develop report forms that are streamlined and capture relevant data necessary to evaluate the program.

Applications to become a Specialist will require the necessary information for determining whether the applicant's qualifications meet the criteria for certification. Applicants will be able to attach pertinent information if necessary. The Department will design the application form so that it is not burdensome.

Costs: There should be no difference between the initial start-up cost of any of the WSLPIPs for an employer in a rural area or for one in a non-rural area. Implementation of the incentive programs are expected to lower the costs of employee injuries and illnesses that employers incur. Savings will be generated by reducing the cost of additional labor, overtime and employee turnover; savings will be generated on an annual basis as long as an incentive is implemented. To reduce costs to taxpayers, the Department encourages local governments in rural areas to consider cooperative arrangements for securing the services of a Specialist who can assist them in developing and implementing their plans. Likewise, private sector employers are encouraged to have an employee certified as a Specialist or to enter into cooperative arrangements through employer associations or their insurers to secure the services of a Specialist.

There are a variety of ways an employer may choose to implement any of the programs in this legislation. This includes seeking the certification of a qualified employee to implement and verify the appropriate program, contracting with a Specialist in the appropriate safety or loss prevention field, consulting a Specialist employed by the employer's insurance carrier who can evaluate the program, or having a Department staff conduct an evaluation. In most cases, cost will be determined by supply and demand.

Implementation costs of each WSLPIP option are employer specific and based upon the size and location of the employer. It is anticipated that the cost of implementing any of the options of this legislation will be significantly lower than the cost that employers incur related to employee injuries and illnesses. Application fees and costs are discounted for smaller employers.

The New York State Department of Labor's fees for consultation and evaluation services are below statewide rates and usage already in place under the mandatory safety and loss prevention program. The Department proposes to charge \$100.00 per hour for consultation and evaluation services for each of the three WSLPIPs. It is anticipated that the review of the Safety Incentive programs will require several hours of staff time. Consultation and evaluation costs of the drug and alcohol abuse program and return to work programs and the credits given for such programs are expected to be lower and, therefore, the Department capped those charges at \$300.00 so that employers are given an idea of the maximum cost for those programs. The agency believes that its fees are less than those charged by Specialists/Consultants in the private sector.

As an additional incentive for employers to apply for these credits, the Department proposed an application fee of \$100.00, which is discounted to \$50.00 for small employers with annual policy premiums of \$10,000.00 or less. The fee is waived if the employer chooses to use DOL staff for the consultation and evaluation. The renewal application fee is set at \$75.00 and small employers are charged a discounted fee of \$50 for renewals. These application fees are below the expected cost of administering this program.

The Department proposed application fees for Specialists that are below DOL's administrative costs in an effort to ensure that there would be an adequate supply of Specialists available to employers. Individuals who wish to be certified as a Specialist in one program area must submit a \$100.00 non refundable application fee, which will be applied to the certification fee of \$800.00 if the applicant is approved. Individuals seeking certification in more than one program area would pay a discounted certification fee of \$200 for each additional incentive program certification.

Costs of certification as a Safety and Loss Management Specialist will be incurred by those wishing to provide the appropriate services as described in this legislation. Renewals fees are minimal and scaled to the number of Specialists recertifying. Those currently certified by the Department as Safety and Loss Prevention Consultants under Code Rule 59 will incur no additional costs for certification as a Specialist for the Safety Incentive Program and will incur the same renewal fees as Specialists. The Department had multiple alternative fee structures for certifying Specialists and opted for a lower fee schedule to minimize costs to those seeking certification, while providing some funds to cover the cost of the program.

The increased administrative costs related to the paper work of certifying Specialists and collecting fees will strain DOL's Licensing and Certification Units resources as well as the one program manager assigned to the unit without additional state funding. The Department determined that if it tried to recoup its administrative costs through increased fees the number of employers who will implement these programs would be reduced.

Economic and technological feasibility: The legislation does not require any use of technology to implement a WSLPIP. Applications, report forms and model programs will be available on the Department's website, but on-line submission of paperwork will not be required. The Department will make every effort to assist rural and small employers in their efforts to implement and maintain a successful WSLPIP.

Minimizing adverse impact: There should be no adverse impact on rural areas. It is anticipated that the impact of implementing any of the options of this regulation will have a significant positive effect on rural businesses in New York. The Department is working with several agencies such as the New York State Insurance Fund, the Workers' Compensation Board, the Office of Alcoholism and Substance Abuse Services (OASAS) and the Insurance Department to minimize duplication.

The Department sought to minimize the adverse impact of the program in several ways. It considered requiring that each WSLPIP receive an annual Consultation and Evaluation by a Specialist or Department employee, but determined that would make the cost of the program prohibitive for employers. The Department structured its three year approval process to lower costs for employers while ensuring that approved WSLPIPs continue to comply with the regulations. Paperwork requirements have been minimized to capture essential data to analyze the effectiveness and maintain the integrity of the program. The Department lowered the cost of using the Department as a Specialist from the costs charged for the compulsory program. Discounts were established for Specialists seeking Certification in more than one specialty and for members of qualified organizations such as employers, insurers, and unions.

Rural area participation: Public and private interests in rural areas will have the opportunity to participate in the rule making process, public and/or direct notice, public hearings and/or meetings, and adoption or modification of procedural rules to minimize cost or complexity of this regulation. A period of comment will be offered where the Department will solicit comments on this regulation. The Department will reach out to entities in rural areas during the public comment period.

Job Impact Statement

Nature of impact: This Rule, pursuant to Article 7, Section 134(6-10) legislation, will have a positive effect by retaining and increasing job

opportunities. This Workplace Safety and Loss Prevention Incentive Program (WSLPIP) was intended to help New York's businesses reduce costs and maintain a stable workforce, thereby keeping and growing jobs in the state. This Rule will help employers minimize the cost of workers' compensation in New York by providing an annual insurance credit or reduction in the employer's security deposit with the Workers' Compensation Board for the implementation of a WSLPIP. The savings to an employer are expected to be greater than the costs of implementation. These programs will increase productivity and improve the competitiveness of participating employers.

Article 7, Section 134(6-10) will expand the number of individuals seeking certification as Safety and Loss Prevention Specialists, creating more opportunity and jobs. Members of qualified organizations representing employers, labor organizations and insurers may seek certification as Specialists, thus enhancing their qualifications. This legislation creates employment opportunities for safety, health, environmental, drug and alcohol prevention and return to work professionals with qualified experience or professional designations. The legislation will also support the expansion of small businesses that will provide consultative and evaluative services to new and existing clients seeking help with the implementation of a WSLPIP.

Office of Mental Health

NOTICE OF ADOPTION

Operation of Residential Programs for Adults

I.D. No. OMH-09-09-00002-A

Filing No. 495

Filing Date: 2009-05-05

Effective Date: 2009-05-20

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

Action taken: Amendment of Part 595 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 31.04

Subject: Operation of Residential Programs for Adults.

Purpose: To amend Part 595 to include a new class of community residences for treatment of eating disorders.

Substance of final rule: Summary

This rule will amend 14 NYCRR Part 595, Operation of Residential Programs for Adults, by establishing a new sub-class of community residence for individuals over the age of 18 who have been diagnosed as having an eating disorder such as anorexia nervosa, bulimia, binge eating disorder, or other eating disorder identified as such in generally accepted medical or mental health diagnostic references.

Overview

The new category of community residences will be known as Community Residences for Eating Disorder Integrated Treatment (CREDIT), and will address the needs of adults who have been referred by a provider who is a participant in a Comprehensive Care Center for Eating Disorders (CCCED) designated by the State Department of Health or by the individual's primary care physician or mental health provider, and whose individual treatment issues preclude being served in a family setting or other less restrictive residential alternative.

Requirements

CREDIT programs will be required to have written affiliation agreements with CCCED providers, which must include referral and admission procedures, as well as procedures for crisis clinical back-up. The agreements will be subject to approval by the Office of Mental Health, and will be required to assure continuity and integration of care with the CCCED. The agreements will provide, at a minimum, for the following:

- The performance of a psychiatric assessment;
- The development of an integrated service plan;
- The performance of a medical examination;
- The supervision of meal, bathroom and exercise time;
- Family participation, as appropriate.

CREDIT programs will be required to have sufficient staff to meet the special needs of individuals residing in a community residence who have been diagnosed with an eating disorder. Services will be required to be provided pursuant to an initial service plan developed by program staff with the resident and family and/or any collateral identified for participation within three days of admission, and a more extensive plan to be

developed within four weeks of admission. The CREDIT program will be required to complete progress notes weekly.

Non-substantive changes to previous rulemaking

The non-substantive changes in the final version of the rulemaking serve to specify the appropriate chapter of the Life Safety Code (LSC) for new and existing residences. The changes clarify that newly constructed residences shall be governed by the LSC chapter on new construction and that existing buildings which are converted to use as residential programs shall be governed by the chapter on the LSC on existing construction.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 595.15(a)(2).

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

Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the non-substantive changes in the final version of the rulemaking merely serve to specify the appropriate chapter of the Life Safety Code (LSC) for new and existing residences. The changes clarify that newly constructed residences shall be governed by the LSC chapter on new construction and that existing buildings which are converted to use as residential programs shall be governed by the chapter of the LSC on existing construction.

Revised Regulatory Flexibility Analysis

Because it is evident from the nature of the non-substantive changes in the final version of the rulemaking that there will be no adverse economic impact on small businesses or local governments, a regulatory flexibility analysis is not submitted with this notice. The changes merely serve to specify the appropriate chapter of the Life Safety Code (LSC) for new and existing residences. The changes clarify that newly constructed residences shall be governed by the LSC chapter on new construction and that existing buildings which are converted to use as residential programs shall be governed by the chapter of the LSC on existing construction.

Revised Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the non-substantive changes in the final version of the rulemaking merely serve to specify the appropriate chapter of the Life Safety Code (LSC) for new and existing residences. The changes clarify that newly constructed residences shall be governed by the LSC chapter on new construction and that existing buildings which are converted to use as residential programs shall be governed by the chapter of the LSC on existing construction. There is no adverse economic impact on rural areas.

Revised Job Impact Statement

A Job Impact Statement is not submitted with this notice because the non-substantive changes in the final version of the rulemaking merely serve to specify the appropriate chapter of the Life Safety Code (LSC) for new and existing residences. The changes clarify that newly constructed residences shall be governed by the LSC chapter on new construction and that existing buildings which are converted to use as residential programs shall be governed by the chapter of the LSC on existing construction.

Assessment of Public Comment

The agency received two letters in support of the adoption of Part 595 of Title 14 NYCRR. The letters indicated that the rate of eating disorders among all age groups continues to rise both in New York State and throughout the country. In addition, eating disorders can have severe effects on a patient's physical and mental health, and effective treatment requires an integrated team approach involving a physician, mental health provider, dietitian and supportive therapies. There are patients who require more than outpatient services to manage their eating disorder, and a structured treatment program offered in a residential setting may be needed to facilitate recovery. Since a residential component for the treatment of eating disorders has not previously been available in New York State, many patients are forced to go out of state to access this level of care. The CREDIT program will help to alleviate this problem and allow therapeutic work to be done with the patient and his/her family.

NOTICE OF ADOPTION

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

I.D. No. OMH-09-09-00003-A

Filing No. 496

Filing Date: 2009-05-05

Effective Date: 2009-05-20

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

Action taken: Amendment of Part 593 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09, 31.04 and 43.02

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

Purpose: To clarify that services provided by CREDIT programs do not qualify as rehabilitative and are not eligible for Medicaid payments.

Text or summary was published in the March 4, 2009 issue of the Register, I.D. No. OMH-09-09-00003-P.

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

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

Assessment of Public Comment

Issue: Community Residences for Eating Disorder Integrated Treatment (CREDIT) programs should not be ineligible for Medicaid reimbursement. Excluding CREDIT from Medicaid could be medically and financially devastating for individuals who lack sufficient income to pay for care.

Response: Housing for individuals with mental illness is not covered by Medicaid. While there are some rehabilitative services covered by Medicaid for individuals living in community residences with up to 16 beds, such services are not covered anywhere else for the agency's population. The CREDIT program is a new model of service, and in these difficult fiscal times, committing scarce Medicaid dollars to this model is premature. Individuals with eating disorders who receive Medicaid will continue to be eligible to receive the full scope of services available under the Medicaid State Plan to address their needs.

Issue: The legislation under which the CREDIT program was established did not intend to exclude the program from Medicaid.

Response: While there may have been no intent to exclude CREDIT from being a Medicaid-reimbursable service when the legislation was enacted, there was no appropriation made to include the program as a Medicaid service.

Issue: If a residential level of care is deemed appropriate for treatment and Medicaid enrollees are prevented from having this level of care, adverse outcomes could result. This could ultimately lead to increased costs for the Medicaid program with higher cost hospitalizations for the excluded Medicaid population.

Response: While on an individual basis that might be the case, it is impossible to project how often this would occur, and, therefore, impossible to project any savings to offset the cost of providing Medicaid reimbursement for these services. As indicated above, there was no funding included in the budget to include the program as a Medicaid service.

Issue: The regulation's purpose was to clarify that services provided by CREDIT programs do not qualify as rehabilitative. Therefore, the implication is that a prohibition on Medicaid reimbursement is already in existence. If that is the case, the regulation is redundant and unnecessary. In addition, the regulation could be problematic if, in the future, the State seeks to amend the State Medicaid Plan should it be determined that CREDIT programs should be eligible for Medicaid reimbursement.

Response: It is OMH's preference to avoid any confusion or ambiguity by specifically stating that these services are not included within the scope of services reimbursed under Part 593.

NOTICE OF ADOPTION

Operation of Licensed Housing Programs for Children and Adolescents with Serious Emotional Disturbances

I.D. No. OMH-09-09-00004-A

Filing No. 497

Filing Date: 2009-05-05

Effective Date: 2009-05-20

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

Action taken: Amendment of Part 594 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 31.04

Subject: Operation of Licensed Housing Programs for Children and Adolescents with Serious Emotional Disturbances.

Purpose: To amend Part 594 to include a new class of community residences for treatment of eating disorders.

Substance of final rule: Summary

This rule will amend 14 NYCRR Part 594, Operation of Licensed Housing Programs for Children and Adolescents with Serious Emotional Disturbances, by establishing a new sub-class of community residence for children and adolescents who have been diagnosed as having an eating disorder such as anorexia nervosa, bulimia, binge eating disorder, or other eating disorder identified as such in generally accepted medical or mental health diagnostic references.

Overview

The new category of community residences will be known as Community Residences for Eating Disorder Integrated Treatment (CREDIT), and will address the needs of individuals who have reached at least the 12th birthday but not the 19th, who have been referred by a provider who is a participant in a Comprehensive Care Center for Eating Disorders (CCCED) designated by the State Department of Health or by the individual's primary care physician or mental health provider, and whose individual treatment issues preclude being served in a family setting or other less restrictive residential alternative.

Requirements

CREDIT programs will be required to have written affiliation agreements with CCCED providers, which must include referral and admission procedures, as well as procedures for crisis clinical back-up. The agreements will be subject to approval by the Office of Mental Health, and will be required to assure continuity and integration of care with the CCCED. The agreements will provide, at a minimum, for the following:

- The performance of a psychiatric assessment;
- The development of an integrated service plan;
- The performance of a medical examination;
- The supervision of meal, bathroom and exercise time;
- Family participation, as appropriate;
- Coordination of residents' educational needs with residents' school districts.

CREDIT programs will be required to have sufficient staff to meet the special needs of children and adolescents residing in a community residence who have been diagnosed with an eating disorder. Services will be required to be provided pursuant to an initial service plan developed by program staff with the resident and family and/or any collateral identified for participation within three days of admission, and a more extensive plan to be developed within four weeks of admission. The service plan will be required to be reviewed weekly. The CREDIT program will be required to complete progress notes weekly.

Revisions Regarding Children's Residences other than CREDIT Program

Part 594 is also being amended to include several technical amendments concerning the operation of licensed housing programs for children and adolescents. Included in these amendments is utilization of "person first" language and an emphasis on family-centered community-based treatment, resilience and recovery. In addition, each licensed housing program will be required to submit a staffing plan which includes at least one full-time employee who is a registered nurse for each eight-bed community residence and for each 12-bed teaching family home.

Non-substantive changes to previous rulemaking

The non-substantive changes in the final version of the rulemaking serve to clarify certain definitions. "Behavioral support" is also known as "behavior management training" and "family-based treatment program (FBTP)" families are also known as "professional" families. Further, in the definition section of the rulemaking, the word "family" was removed from "Counseling services" to ensure consistency with other Parts in Title 14 NYCRR.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 594.4(a), (b), 594.6(b), 594.8(f), (g), 594.10(c), (d) and 594.11(j), (k).

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

Revised Regulatory Impact Statement

A revised regulatory impact statement is not submitted with this notice because the changes to the final version of the rulemaking are non-substantive. These changes provide definition clarification and assure consistency with other Parts of Title 14 NYCRR regarding "counseling services".

Revised Regulatory Flexibility Analysis

The changes to the final version of the rulemaking provide definition clarification and assure consistency with other Parts of Title 14 NYCRR

regarding "counseling services". As there is no adverse economic impact on small businesses or local governments as a result of these non-substantive changes, a regulatory flexibility analysis is not submitted with this notice.

Revised Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the changes to the final version of the rulemaking are non-substantive. These changes merely serve to clarify definitions and assure consistency with other Parts of Title 14 NYCRR.

Revised Job Impact Statement

A Job Impact Statement is not submitted with this notice because the changes to the final version of the rulemaking are non-substantive. These changes merely serve to clarify definitions and assure consistency with other Parts of Title 14 NYCRR.

Assessment of Public Comment

The agency received two letters in support of the adoption of Part 594 of Title 14 NYCRR. The letters stated that eating disorders can have severe effects on a patient's physical and mental health, and effective treatment requires an integrated team approach involving a physician, mental health provider, dietitian and supportive therapies. In addition, the rate of eating disorders among all age groups continues to rise both in New York State and throughout the country, and some patients require more than outpatient services to manage their eating disorder. A structured treatment program offered in a residential setting may be needed to facilitate recovery, and since a residential component for the treatment of eating disorders has not previously been available in New York State, many patients are forced to go out of state to access this level of care. The CREDIT program will help to alleviate this problem and allow therapeutic work to be done with the patient and his/her family.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Specific Large Industrial Gas and Electric Energy Efficiency Programs

I.D. No. PSC-20-09-00008-P

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

Proposed Action: The Commission is considering large industrial (generally demand of 2MW and greater) gas and electric energy efficiency program proposals as a component of the Energy Efficiency Portfolio Standard.

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

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

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

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, (a) large industrial (generally industrial customer with electric demand of 2MW and greater) gas energy efficiency program proposals made in response to a notice in Case 07-M-0548 entitled "Notice Requesting Proposals" issued by the Secretary to the Public Service Commission on April 20, 2009; and (b) large industrial (generally demand of 2MW and greater) electric energy efficiency program proposals made in response to an order in Case 07-M-0548 entitled "Order Establishing Energy Efficiency Portfolio Standard and Approving Programs" issued by the Public Service Commission on June 23, 2008 [see Ordering Clauses 8, 10 & 17]. For potential independent program administrators that submitted updated proposals for programs in accordance with Ordering Clause 8 of the aforementioned June 23, 2008 Order, such submissions shall be considered as pre-filed comments responsive to this notice to the degree that they relate to the provision of energy efficiency programs for large industrial customers. The program proposals under consideration for this rule include the following:

1. Case 09-G-0363 - Consolidated Edison Company of New York, Inc., "Energy Efficiency Portfolio Standard Multifamily, Multifamily Low Income and Large Industrial Gas Efficiency Programs" dated April 30, 2009: (a) Industrial Energy Efficient Equipment Rebate Program (gas).

2. Case 09-G-0363 - New York State Electric & Gas Corporation/

Rochester Gas and Electric Corporation, letter from James A. Lahtinen, Vice President, Rates and Regulatory Economics, dated April 30, 2009: (a) Non-Residential Commercial and Industrial (C&I) Rebate Program (gas); and (b) Block Bidding Program (gas).

3. Case 09-G-0363 - New York State Research and Development Authority, "Energy Efficiency Portfolio Program Administrator Proposal" dated September 22, 2008: (a) Existing Facilities Program (gas portion); (b) Commercial Loan Fund and Finance Program (gas portion); (c) Bidding Program (gas portion); (d) Solar Thermal for Commercial and Industrial Applications Program (gas portion); (e) Waste Energy Recovery Program (electric portion); and (f) Industrial and Process Efficiency Program (gas).

4. Case 08-E-1127 - Consolidated Edison Company of New York, Inc., "Residential and Commercial Energy Efficiency Programs" dated September 22, 2008: (a) Targeted Demand Side Management Program (electric); (b) Commercial and Industrial Equipment Rebate Program (electric); (c) Commercial and Industrial Custom Efficiency Program (electric); and (d) Steam Cooling Program (electric).

5. Case 08-E-1128 - Orange and Rockland Utilities, Inc., "Residential and Commercial Energy Efficiency Portfolio Programs" dated September 22, 2008: (a) Commercial and Industrial Existing Buildings Program (electric).

6. Case 08-E-1129 - New York State Electric & Gas Corporation and Case 08-E-1130 - Rochester Gas and Electric Corporation, "Electric Program Plan of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation" dated September 22, 2008: (a) Non-Residential Commercial and Industrial (C&I) Rebate Program (electric); and (b) Block Bidding Program (electric).

7. Case 08-E-1132 - New York State Research and Development Authority, "Energy Efficiency Portfolio Program Administrator Proposal" dated September 22, 2008: (a) Benchmarking and Operations Efficiency Program (electric); (b) Existing Facilities Program (electric portion); (c) Bidding Program (electric portion); (d) Commercial Loan Fund and Finance Program (electric portion); (e) Solar Thermal for Commercial and Industrial Applications Program (electric portion); (f) Statewide Combined Heat and Power Performance Program (electric); and (g) Waste Energy Recovery Program (electric portion).

8. Case 08-E-1133 - Niagara Mohawk Power Corporation d/b/a National Grid, "Electric and Gas Energy Efficiency Program Proposals" dated September 22, 2008: (a) Energy Initiative Program (electric).

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.

(09-G-0363SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Specific Multifamily and Multifamily Low-Income Residential Gas and Electric Energy Efficiency Programs

I.D. No. PSC-20-09-00009-P

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

Proposed Action: The Commission is considering multifamily and multifamily low-income residential gas and electric energy efficiency program proposals as a component of the Energy Efficiency Portfolio Standard.

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

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

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

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

1. Case 09-G-0363 - Consolidated Edison Company of New York, Inc., "Energy Efficiency Portfolio Standard Multifamily, Multifamily Low Income and Large Industrial Gas Efficiency Programs" dated April 30, 2009: (a) Multifamily Energy Efficient Equipment Rebate Program (gas); and (b) Multifamily Low Income Program (gas).

2. Case 09-G-0363 - New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation, letter from James A. Lahtinen, Vice President, Rates and Regulatory Economics, dated April 30, 2009: (a) Multifamily Program (gas).

3. Case 09-G-0363 - New York State Research and Development Authority, "Energy Efficiency Portfolio Program Administrator Proposal" dated September 22, 2008: (a) Multi-family performance Program (MFPP) Expansion (gas portion).

4. Case 09-G-0363 - Niagara Mohawk Power Corporation, "Electric and Gas Energy Efficiency Program Proposals" dated September 22, 2008: (a) EnergyWise Program (gas).

5. Case 09-G-0363 - The Brooklyn Union Gas Company/KeySpan Gas East Corporation, "Gas Energy Efficiency Program Proposals" dated September 22, 2008: (a) Commercial, Industrial and Multi Family Energy Efficiency Program (gas).

6. Case 08-E-1127 - Consolidated Edison Company of New York, Inc., "Residential and Commercial Energy Efficiency Programs" dated September 22, 2008: (a) Targeted Demand Side Management Program (electric); (b) Commercial and Industrial Equipment Rebate Program (electric); (c) Refrigerator Replacement Pilot Program; and (d) Steam Cooling Program (electric).

7. Case 08-E-1129 - New York State Electric & Gas Corporation and Case 08-E-1130 - Rochester Gas and Electric Corporation, "Electric Program Plan of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation" dated September 22, 2008: (a) Residential/Non-Residential Multifamily Program (electric).

8. Case 08-E-1132 - New York State Research and Development Authority, "Energy Efficiency Portfolio Program Administrator Proposal" dated September 22, 2008: (a) Electric Reduction in Master-metered Multi-family Building Program (electric); (b) GeoThermal Heat Pump Systems Incentives Program (electric); (c) Multi-family Performance Program (MFPP) Expansion (electric portion); and (d) Solar Thermal Incentives Program (electric).

9. Case 08-E-1133 - Niagara Mohawk Power Corporation d/b/a National Grid, "Electric and Gas Energy Efficiency Program Proposals" dated September 22, 2008: (a) EnergyWise Program (electric).

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.

(09-G-0363SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Approve an Agreement for the Provision of Water Service, Waive Certain Tariff Provisions and 16 NYCRR Parts 501 and 502

I.D. No. PSC-20-09-00012-P

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

Proposed Action: The Public Service Commission is considering a petition filed by Saratoga Water Services, Inc. requesting approval of an agreement for the provision of water service and requesting waiver of certain tariff provisions and 16 NYCRR Parts 501 and 502.

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

Subject: Approve an agreement for the provision of water service, waive certain tariff provisions and 16 NYCRR Parts 501 and 502.

Purpose: To approve an agreement for the provision of water service, waive certain tariff provisions and 16 NYCRR Parts 501 and 502.

Substance of proposed rule: On April 3, 2009, Saratoga Water Services, Inc. (Saratoga) filed a petition requesting approval of an agreement between Saratoga and Visionary Park, LLC (VPL) for the provision of water service by Saratoga to a proposed real estate subdivision known as Visionary Office Park, consisting of two, two-story commercial buildings that will house professional office space in the Town of Malta, Saratoga County. The petition also requested waiver of the requirements of inconsistent tariff provisions and 16 NYCRR Sections 501 and 502, concerning water main extensions. The agreement takes into account that all costs and associated charges arising out of the Saratoga's expansion will be borne by VPL. Saratoga currently provides water service to approximately 2,029 customers and is located in the Towns of Malta and Stillwater, Saratoga County. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

(07-W-0886SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Interconnection of the Networks between Verizon and Selectel, Inc. for Local Exchange Service and Exchange Access

I.D. No. PSC-20-09-00013-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Verizon New York Inc. (Verizon) for approval of an Interconnection Agreement with Selectel, Inc. executed on February 20, 2009.

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

Subject: Interconnection of the networks between Verizon and Selectel, Inc. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Verizon and Selectel, Inc.

Substance of proposed rule: Verizon New York Inc. and Selectel, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Selectel, 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 February 19, 2011, 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.

(09-00620SP1)

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

Approve an Agreement for the Provision of Water Service, Waive Certain Tariff Provisions and 16 NYCRR Parts 501 and 502

I.D. No. PSC-20-09-00014-P

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

Proposed Action: The Public Service Commission is considering a petition filed by Saratoga Water Services, Inc. requesting approval of an agreement for the provision of water service and requesting waiver of certain tariff provisions and 16 NYCRR Parts 501 and 502.

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

Subject: Approve an agreement for the provision of water service, waive certain tariff provisions and 16 NYCRR Parts 501 and 502.

Purpose: To approve an agreement for the provision of water service, waive certain tariff provisions and 16 NYCRR Parts 501 and 502.

Substance of proposed rule: On April 3, 2009, Saratoga Water Services, Inc. (Saratoga) filed a petition requesting approval of an agreement between Saratoga and Luther Forest Technology Campus-EDC (Luther) for the provision of water service by Saratoga to a proposed development known as Luther Forest POD 10, consisting of 36 single-family homes in the Town of Malta, Saratoga County. The petition also requested waiver of the requirements of inconsistent tariff provisions and 16 NYCRR Sections 501 and 502, concerning water main extensions. The agreement takes into account that all costs and associated charges arising out of Saratoga's expansion will be borne by Luther. Saratoga currently provides water service to approximately 2,029 customers and is located in the Towns of Malta and Stillwater, Saratoga County. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

(06-W-0943SP1)

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

Deferral of 2008 Transmission and Distribution Investment Costs

I.D. No. PSC-20-09-00015-P

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

Proposed Action: The Commission is considering whether to approve, modify or reject, in whole or in part, a petition by Niagara Mohawk Power Corporation d/b/a National Grid for authorization to defer 50% of the revenue requirement impact associated with its 2008 T&D costs.

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

Subject: Deferral of 2008 Transmission and Distribution Investment Costs.

Purpose: To consider a petition for deferral of certain transmission and distribution investment costs.

Substance of proposed rule: In a petition dated April 21, 2009, Niagara Mohawk Power Corporation d/b/a National Grid requested authority to defer 50% (\$8,977,441) of the revenue requirement impact associated with its 2008 Transmission and Distribution Investment Costs pursuant to Clause 1.2.4.16 of the October 11, 2001 Merger Joint Proposal in Case 01-M-0075 and the Commission's September 5, 2008 Order in Case 07-E-1533. The Commission may adopt, reject or modify, in whole or in part, the authority requested.

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.

(07-E-1533SP2)

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

Recovery of, and Accounting For, Costs Associated with the Companies' Advanced Metering Infrastructure (AMI) Pilots Etc.

I.D. No. PSC-20-09-00016-P

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

Proposed Action: The PSC is considering a plan, filed by Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilites, Inc. (the Companies) as to the recovery of, and accounting for, certain costs, and other matters.

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

Subject: The recovery of, and accounting for, costs associated with the Companies' advanced metering infrastructure (AMI) pilots etc.

Purpose: To consider a filing of the Companies as to the recovery of, and accounting for, costs associated with its AMI pilots etc.

Substance of proposed rule: In their joint filing of a Supplemental Plan on April 14, 2009, Consolidated Edison Company of New York, Inc. (Con Edison) and Orange and Rockland Utilities, Inc. (Orange and Rockland) (collectively, Companies), state that a 2007 Commission Order instructs the Companies to provide a detailed accounting proposal designed to identify and isolate all the costs and benefits of the advanced metering infrastructure (AMI) pilot program and identify lost revenues not otherwise accounted for through operation of revenue decoupling mechanisms. The Companies will track total costs associated with the pilot programs. Within the total costs, the Companies will also track the incremental costs, for which they would seek cost recovery. As a means of

recording costs applicable to the AMI pilot, the Companies will establish cost segregation orders (CSOs) to track:

- The cost of the meters with communication devices, including labor to install those meters;
- Related communication devices, e.g., receivers, including installation labor; and
- Associated software costs.

The CSOs established to track these costs will clear on a monthly basis to PSC account 182.3, "Other Regulatory Assets," to facilitate timely recovery of those expenditures. Separate Regulatory Asset accounts will be established for electric and gas expenditures. The Companies will establish separate work orders for incremental O&M expenses, (e.g., licensing fees, telecommunication charges, and marketing). The work orders will subsequently clear on a monthly basis to separate PSC accounts 182.3, "Other Regulatory Assets," to facilitate recovery of those expenses. Separate Regulatory Asset accounts will be established for electric and gas deferred expenses. Non-incremental O&M expenses (e.g., company labor, including overtime) will be tracked in a CSO and will clear to expense accounts monthly. The Companies will not seek recovery of non-incremental costs as part of the AMI pilot projects.

The Companies estimate the pilot projects to have a cost in the range of \$40 million to \$50 million. They believe that, for the efforts described in their Supplemental Plan, funding for up to one-half of the costs may be available under the Smart Grid portion of the American Reliability and Recovery Act of 2009 (ARRA) and plan to seek such funding. The Companies propose to recover from ratepayers the remaining pilot costs not funded under the ARRA. To accomplish this, the Companies are seeking the Commission's authorization of surcharge mechanisms to recover costs that are not provided by federal funding. Upon authorization of the surcharge mechanisms by the Commission, the Companies will make the appropriate compliance tariff filings. Upon receiving a grant of federal funding, the Companies will commence expenditures for the AMI pilot projects and will begin to recover their remaining costs through the approved mechanisms. As the AMI project capital costs are being incurred, the Companies propose to begin recovery of the carrying costs on such expenditures. Prior to the projects being placed in service, the carrying cost will be equal to each company's currently authorized pre-tax rate of return for each service. After the projects are placed in service, the carrying cost will also include an allowance for depreciation. Cost recovery would also include all incremental operation and maintenance (O&M) expenses incurred in the implementation and operation of the AMI projects. These capital and O&M costs would be recovered from all gas and electric customers on a monthly basis until such time as base rates are adjusted to include recovery of AMI costs. Federal funding will be applied against unrecovered costs as it is received. If portions of the federal funding exceed the Companies' unrecovered costs, the amounts above this level will be utilized to offset any remaining costs to be incurred. An amount equivalent to any remaining federal funds after the pilot projects are completed will be credited to ratepayers. If the Commission desires that the Companies commence work sooner, the Companies request that the Commission approve (at least 18 months before meter-to-bill capability must be in place) a cost recovery methodology that provides for full recovery of all Supplemental Plan costs. If the Commission so decides, the Companies will make the appropriate compliance tariff filings to begin the recovery of AMI costs.

The 2007 Order directs the Companies to identify lost revenues not otherwise accounted for through operation of revenue decoupling mechanisms (RDMs). Two years ago, the Commission required utilities to file revenue decoupling proposals in ongoing and new rate cases. In accordance with the order in that proceeding, revenue decoupling proposals were filed in the Con Edison and Orange and Rockland electric and gas cases. RDMs are currently in place for Con Edison and Orange and Rockland electric service and for Con Edison gas service and cover most of their revenues. The Orange and Rockland gas revenue decoupling proposal is under review in its pending rate proceeding. Almost all of the Companies' electric revenues are covered by the electric revenue decoupling mechanisms. Most of Con Edison's gas delivery revenues are covered by an RDM. Because rates may be developed based on load information from various programs and load research, the Companies seek recovery of lost electric and gas delivery revenues associated with customer participation in rate programs that encourage reduction in customer usage to the extent not accounted for through their RDMs. The Companies propose that any difference between expected supply costs and actual supply costs received from pilot participants be reconciled through their respective supply cost mechanisms.

As invited in the Commission order in Case 09-M-0074, Con Edison seeks a waiver of the minimum functional requirement mandating two-way capability and related requirements. Con Edison has implemented mobile AMR in a substantial portion of its service territory in Westchester County under a Commission-approved project that began before the Com-

mission issued its 2009 Order adopting minimum functional requirements for AMI and is on track to complete the saturation of this area with AMR technology. Mindful of the Commission's directive for two-way communication as a minimum AMI functionality, in this Supplemental Plan, Con Edison proposes to test the effectiveness of a "fixed network" installed over the AMR meters to enhance the communications capability of the AMR system in a portion of Westchester. As Con Edison explained in its 2007 filing, a "fixed network" requires the installation of data collectors and repeaters on utility pole tops, utility towers, or similar structures. The fixed network introduces an additional level of remote interaction between the utility and the data collectors to which the electric meters automatically communicate usage information hourly or more frequently. The utility would be able to gather this meter data information from the data collection system through radio signals more frequently than once per billing cycle -- for instance, once per hour. This meter data would provide the necessary information for demand response programs and the application of alternative rate forms, once billing is enabled. As indicated in that filing, comparing fixed network AMR with AMI, the fixed network will also enable other minimum functionalities required by the Commission that might have been assumed to require two-way communication, such as outage notification and on-demand meter reads. For Westchester, Con Edison plans to test home area network (HAN) devices that can interface with the existing AMR meter. The HAN equipment will provide, through use of the customer's existing Internet connection, two-way communications for customer and utility interaction. In addition, Con Edison believes that the AMR system will not fully meet the requirements for 60 days of data storage at the meter or the ability to reprogram the meter or add functionality remotely. With regard to the security capabilities defined, Con Edison believes that the information transmitted by the AMR meter meets most of the requirements.

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.

(09-M-0074SP3)

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

The Recovery of, and Accounting for, Costs Associated with CHG&E's AMI Pilot Program

I.D. No. PSC-20-09-00017-P

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

Proposed Action: The PSC is considering a filing of Central Hudson Gas & Electric Corporation (CHG&E) as to the recovery of, and accounting for, costs associated with its advanced metering infrastructure (AMI) pilot program.

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

Subject: The recovery of, and accounting for, costs associated with CHG&E's AMI pilot program.

Purpose: To consider a filing of CHG&E as to the recovery of, and accounting for, costs associated with its AMI pilot program.

Substance of proposed rule: In its filing of April 14, 2009, Central Hudson Gas and Electric Corporation (CHG&E) stated that the cost to establish the Advanced Metering Infrastructure (AMI) Pilot program (called for by the Commission order in Case 09-M-0074 and previous orders) for approximately 13,500 endpoints is estimated at \$14.9 million. CHG&E proposes and expects to request funding from the competitive grant process of the U.S. Department of Energy's Electricity Delivery and Energy Reliability (EDER) program established by the American Reliability and

Recovery Act of 2009, which can provide funding of up to 50 percent of the costs of qualified investments to successful applicants. CHG&E proposes to defer the balance of the AMI electric program costs, including internal labor, not funded by the EDER program grant and recover the balance by charging the net regulatory liability owed to customers that will be available at the conclusion of its pending rate case. In addition, CHG&E proposes that any AMI gas costs be deferred and recovered from customers at a later date. The Commission is considering whether to approve, reject or modify (in whole or in part) CHG&E's filing.

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.

(09-M-0074SP2)

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

Waiver of 16 NYCRR Sections 894.1, through 894.4 and 894.4(b)(2)

I.D. No. PSC-20-09-00018-P

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

Proposed Action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Sempronius (Cayuga County), for a waiver of 16 NYCRR sections 894.1, through 894.4(b)(2) pertaining to the franchising process.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1, through 894.4 and 894.4(b)(2).

Purpose: To allow the Town of Sempronius (Cayuga County) and Time Warner Cable to expedite the cable television franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Sempronius (Cayuga County) for a waiver of Section 894.1 through 894.4 and 894.4(b)(2) in order to expedite the cable television franchising process.

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.

(09-V-0356SP1)

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

Waiver of 16 NYCRR Sections 894.1, through 894.4 and 894.4(b)(2)

I.D. No. PSC-20-09-00019-P

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

Proposed Action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Colchester (Delaware County), for a waiver of 16 NYCRR sections 894.1 through 894.4(b)(2) pertaining to the franchising process.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1, through 894.4 and 894.4(b)(2).

Purpose: To allow the Town of Colchester and MTC Cable to expedite the cable television franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a Petition by the Town of Colchester (Delaware County) for a waiver of Section 894.1 through 894.4 and 894.4(b)(2) in order to expedite the cable television franchising process.

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.

(09-V-0313SP1)

Racing and Wagering Board

NOTICE OF ADOPTION

Bonus Ball Bingo

I.D. No. RWB-34-08-00003-A

Filing No. 492

Filing Date: 2009-05-04

Effective Date: 2009-05-20

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

Action taken: Addition of sections 5800.1(af) and 5820.57 to Title 9 NYCRR.

Statutory authority: Executive Law, section 4335(1)(a)

Subject: Bonus Ball Bingo.

Purpose: To create new rules for Bonus Ball Bingo.

Text or summary was published in the August 20, 2008 issue of the Register, I.D. No. RWB-34-08-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: John Googas, NYS Racing and Wagering Board, 1 Broadway Center, Suite 600, Schenectady, NY 12305-2553, (518) 395-5400, email: info@racing.state.ny.us

Assessment of Public Comment

The agency received no public comment.