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.

Banking Department

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Mortgage Loan Regulations

I.D. No. BNK-18-09-00009-P

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

Proposed Action: Amendment of Parts 38, 410, 413 and Supervisory Procedure MB 106 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 14(1), 6-I and 590(3)

Subject: Mortgage loan regulations.

Purpose: To make various amendments to mortgage loan regulations.

Substance of proposed rule (Full text is posted at the following State website:www.banking.state.ny.us): Section 38.1 - New definitions of net branch, branch manager, branch and application will be added and the definitions of loan solicitation branch and full service branch will be deleted. Additionally, most of the definitions will be re-lettered.

Section 38.3 - The amendment will require a statement to be added to the introductory paragraph of an application which will alert the borrower to the gravity of falsifying any information that they put on their application.

Section 38.3(a)(vii) - The amendment will clarify the disclosure requirements of mortgage brokers in connection with compensation to be received from lenders and borrowers. It specifically will require that fees and points, paid by lenders and borrowers, be disclosed separately and as an aggregate.

Section 38.3(b)(1)- A new section will be added to Part 38. It will require that a statement regarding the charging of discount points by the lender be added to the application. The statement will point out to the borrower that (i) discount points may lower the interest rate paid on the loan but may not lower the overall cost of the loan; (ii) if the borrower refinances or pays off the loan quickly, they will lose the benefit of any lower interest rate provided by the discount points; and (iii) if the borrower finances the discount points, this will increase the amount of money that they must repay to the lender and they will have to pay interest on the discount points as part of the amount they borrowed.

Section 38.11 - This section will be amended to address employees working from their homes and net branching. It will explicitly prohibit the establishment of a net branch and it specifically state that, if an employee, independent contractor, or consultant works from a place other than a defined branch, that person must be assigned to a specific branch location for purposes of managerial and regulatory oversight.

Part 410.6 - The amendment will eliminate the reference to ''full service branch'' and ''loan solicitation branch'' and replace these references with a single reference to ''branch''.

Part 413.3(a)(5) and MB 106 - The amendments will clarify the corporate surety bond requirements for mortgage brokers to act as FHA Mortgage Loan Correspondents.

Text of proposed rule and any required statements and analyses may be obtained from: Sam Abram, Esq. - Secretary to the Banking Board, Banking Department, 1 State Street, 6th floor, New York, NY 10004, (212) 709-1658, email: sam.abram@banking.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:

Banking Law section 14(1) authorizes the Banking Board to adopt regulations not inconsistent with the law. Section 6-i of the Banking Law specifically states that no banking organization, partnership, corporation, exempt organization or other entity (hereafter ''lender'') can make a mortgage loan in New York State unless those entities conform to Banking Law requirements pertaining to mortgage bankers (Article 12-D of the Banking Law) and rules and regulations promulgated by the Banking Board or prescribed by the Superintendent. Banking Law Section 590(3) authorizes and empowers the Banking Board to promulgate regulations that are consistent with the purposes of Article 12-D, which include such rules and regulations in connection with the activities of mortgage brokers, mortgage bankers and exempt organizations as may be necessary and appropriate for the protection of consumers and such rules and regulations as may define the terms used in, as may be necessary and appropriate to interpret and implement the provisions of Article 12.

2. Legislative objectives:

The Legislature enacted Banking Law Article 12-D because it found that it is essential for the protection of the citizens of New York State and the stability of the state's economy that reasonable standards governing the business practices of mortgage lenders and brokers be imposed. The Legislature further found that the obligations of lenders and brokers to consumers in connection with making, soliciting, processing, placing or negotiating of mortgage loans are such as to warrant the uniform regulation of the residential mortgage lending process. Consistent with the purposes of promoting mortgage lending for the benefit of citizens by responsible providers of mortgage loans and services and avoiding requirements inconsistent with legitimate and responsible business practices in the mortgage lending industry, the purpose of Article 12-D is to protect New York consumers seeking a residential mortgage loan and to ensure that the mortgage lending industry is operating fairly, honestly and efficiently, free from deceptive and anti-competitive practices.

In furtherance of this mandate, Part 38 was promulgated to provide definitions of terms used in the mortgage banking industry; advertising guidelines; rules regarding application and commitment disclosures and procedures; and prohibitions on improper conduct.

3. Needs and Benefits:

Definitions of Branch

Currently, New York State is the only state in the country to have two types of branches for the mortgage banking and mortgage brokerage industries, a full service branch and a loan solicitation branch. All other states have only a single type of branch defined in their laws or regulations. Since January of 2002, New York has been a participant in the Nationwide Mortgage Licensing System (''NMLS''). This system, developed by the Conference of State Banking Supervisors (''CSBS''), the American Association of Residential Mortgage Regulators (''AARMR'') and the Financial Industry Regulatory Authority (''FINRA''), streamlines the licensing process by utilizing uniform application forms that can be electronically submitted to participating state regulators. The applications include ones to become a mortgage banker or mortgage broker, to become a mortgage loan originator or to open a branch. The NMLS system uses only a single definition of branch. Additionally, in 2006, the Department's entire fee structure was changed by the enactment of Banking Law section 18-a. This new law set a single fee for an application to open a branch office. The elimination of the two types of branches listed in the regulation will make the regulation consistent with the Banking Law section 18-a. Furthermore, having a single definition will reduce the regulatory burden associated with manual applications for branch types that could not be processed through the NMLS.

Finally, over the past several years, the Department also met with various members and representatives of the mortgage industry a number of times regarding the amendment of the definitions of branch. The industry has recognized that because of technological advances that have taken place over the years, there needs to be changes in how a branch is defined and there needs to be clarification as to when a branch license will be required.

Section 38.11 (Requirements for full service, loan solicitation branches) needs to be amended to reflect the aforementioned sole definition of a branch as amended in Part 38.1. Part 410.5 (Branch applications; investigation fees) will be amended to reflect the elimination of the distinction between full service and loan solicitation branches.

Net Branching Prohibition

The Department has had a long-standing policy of disallowing any form of what it has termed ''net branching'' for mortgage bankers or mortgage brokers. This long-standing policy, which has previously been conveyed to the residential mortgage industry primarily by means of an Industry Letter, seeks to deter situations where an employee of a licensee or registrant, acting as a branch manager, operates and exercises control over his or her own branch office without being licensed or registered by the Department. In such instances, the individual or entity approved by the Department to make or broker mortgage loans is not the individual or entity that is actually performing such activities. Rather, an unknown, unapproved individual or entity is performing them outside of the regulatory construct created by Article 12-D. Since the prohibition has been conveyed primarily by means of an Industry Letter, there is a need to codify and update the Department's definition of and position regarding a ''net branch'' so that it may be clear to the industry what actions may be construed as net branching and therefore prohibited by the Department. Therefore, a definition of ''net branch'' will be added to Section 38.1.

Definition of Application

Part 38 does not currently contain a definition of ''application.'' Yet this is a term that is used constantly within the mortgage lending industry. Furthermore, the amount of the bond that mortgage brokers are required to have after July 1, 2004 is predicated on the number of New York applications. In order to provide a definition without causing undue confusion in the industry, the Department has decided to utilize the definition of ''application'' set forth in Regulation B of the Federal Reserve System since it is a definition that is familiar to all mortgage brokers and mortgage bankers. Therefore, a definition of ''application will be added to Section 38.1.

Disclosure of Points and Fees

Part 38.3(a)(vii) will be amended solely to clarify the disclosure requirements of mortgage brokers in connection with compensation to be received from lenders and borrowers. Currently, the language in Part 38.3(a)(vii) seems to cause some confusion among mortgage brokers: Should fees and points, paid by lenders and borrowers, be disclosed as an aggregate, or should they be disclosed separately? The proposed amendment would clarify this matter and require that fees and points, paid by lenders and borrowers, be disclosed separately, and as an aggregate.

Dual Employment Prohibition

Part 38.7 will be clarified by adding a specific prohibition against a mortgage banker, mortgage broker or exempt organization engaging any employee who has an employment relationship with any other mortgage banker, mortgage broker or exempt organization. This long-standing prohibition is based on the definition of ''employee''. Adding this prohibition to the list set forth in Part 38.7 should provide clarity to bankers and brokers as well as eliminate any conflicts of interests that could arise which could negatively affect and harm consumers.

Discount Points Disclosure

The Department has found in several examinations that discount points are not clearly explained to or understood by consumers who are charged such points. Accordingly, an addition to the subdivision of Part 38.3(b)(1) concerning application disclosures of mortgage bankers and exempt organizations will require that the mortgage banker or exempt organization alert consumers in writing of the consequences of lenders charging discount points. This will be accomplished by providing a new required disclosure in those instances in which such points are charged. This will benefit consumers by highlighting these consequences.

Corporate Surety Bond Requirements

Part 413.3 (Minimum standards required for approval to act as a Federal Housing Administration mortgage loan correspondent) and Supervisory Procedure MB 106.3(i) (Application to act as a FHA Mortgage Loan Correspondent) will be amended to clarify the already existing corporate surety bond requirements stated in Part 410.3 (Mortgage broker registration; minimum standards).

4. Costs:

In the case of the revised application disclosure, minimal increased costs are warranted in order to allow the Banking Department to ensure that consumers understand the costs of the mortgage loan that they are obtaining.

5. Local government mandates:

The amendments to Parts 38, 410 and 413 and Supervisory Procedure MB 106 do not impose any requirements or burdens upon any units of local government.

6. Paperwork:

The amendments to Parts 38, 410 and 413 and Supervisory Procedure MB 106 do not impose any additional paperwork requirements. However, the amendments to 38.3(b)(1) regarding the new disclosure concerning discount points and fees will result in minimal paperwork.

7. Duplication:

None.

8. Alternatives:

During the past few years, the Department has had numerous meetings with various members and representatives of the mortgage industry regarding the definition amendments and the disclosures issues concerning discount points. During these meetings, various alternative forms of definitions were discussed and the now-proposed definitions were finally settled upon among all parties. In January of 2006, the Banking Department, along with banking regulators and law enforcement officials from 48 states and the District Columbia entered into a settlement agreement with Ameriquest Mortgage Company, a subprime lender. This settlement agreement was predicated on the issue of easing consumer confusion regarding discount points. After discussions with the industry, it was decided that the best way to accomplish this goal would be to include an explanatory statement about the discount points in the required application disclosures given to customers.

In the past year, the Department had anticipated that enactment of the New York's Subprime Lending Reform Law and S.A.F.E. Mortgage Licensing Act of 2008 would lead to revisions of the Department's regulations relating to residential mortgages, and it was contemplated that action on the subject regulatory amendments would be included in that process. However, while the broader revision of the Department's mortgage regulations is proceeding, there is a desire to more forward on the subject regulatory changes without further delay given that these amendments are necessary to codify various positions taken by the Department over the years.

9. Federal standards:

None.

10. Compliance schedule:

With regard to the amendments to the disclosure statements, compliance should be within 90 days of the effective date.

Regulatory Flexibility Analysis

The proposed amendments to Parts 38, 410 and 413 and Supervisory Procedure MB 106 will not impose any impact on local governments.

In addition, the Department believes that the regulatory burden on its licensees and registrants will be reduced by the clarifications provided by the addition of definitions in Part 38.1 and the revision of the application disclosures and requirements for branches in sections 38.3 and 38.11. These changes should decrease confusion in the industry regarding these common terms and what is expected of licensees and registrants. Also, by the combination of the two different types of branches into one should significantly decrease the regulatory burden on these entities.

Accordingly, we anticipate that there will be minimal, if any, adverse impact on licensees or registrants that are small businesses.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for Small Business and Local Government is not submitted, based on the Department's conclusion that the amendments to Parts 38, 410 and 413 and Supervisory Procedure MB 106

will not impose any meaningful adverse economic impact upon private or public entities in rural areas. The proposed amendments will impose no adverse reporting, record keeping or compliance requirements private on public entities in rural areas. The possible higher costs to certain mortgage bankers and mortgage brokers from the new disclosure requirements in the regulations will be minimal and should not have any effect upon private or public entities in rural areas.

Job Impact Statement

The proposed amendments to Parts 38, 410 and 413 and Supervisory Procedure MB 106 will not have an adverse impact on jobs and employment opportunities. The possible higher costs to certain mortgage bankers and mortgage brokers from certain new required disclosures will be minimal, and accordingly, should not have any impact on current jobs and employment opportunities within the mortgage industry.

Office of Children and Family Services

EMERGENCY RULE MAKING

The Protection of Children in Residential Facilities from Child Abuse and Neglect

I.D. No. CFS-18-09-00004-E

Filing No. 380

Filing Date: 2009-04-17

Effective Date: 2009-04-17

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

Action taken: Amendment of Parts 166, 180 and 182 of Title 9 NYCRR; and amendment of Parts 433 and 434 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 34(3)(f); and L. 2008, ch. 23, section 19

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

Specific reasons underlying the finding of necessity: The adoption of these regulations on an emergency basis is necessary to protect the health, safety and welfare of children in residential care by implementing the provisions of Chapter 323 of the Laws of 2008, which relates to the protection of children in residential facilities from child abuse and neglect.

Subject: The protection of children in residential facilities from child abuse and neglect.

Purpose: To implement chapter 323 of the Laws of 2008.

Substance of emergency rule: Part 433 of Title 18 (Child Abuse and Neglect in Residential Care)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates the scope statement to include the statutory changes and implements the updated statutory definitions. The amendment also updates the obligations and procedures of the Office of Children and Family Services (OCFS), authorized agencies and residential care facilities in conformance with the statutory changes and updates outdated references to the former Department of Social Services.

Sections 434.1, 434.2, and 434.10 of Title 18 (Child Protective Services Administrative Hearing Procedure)

The amendment implements statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard. The amendment also updates outdated references to the former Department of Social Services.

Section 166-1.4 of Title 9 (Prevention and Remediation Procedures)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in OCFS-operated residential facilities in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 180.3 and 180.5 of Title 9 (Juvenile Detention Facilities Regulations)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in juvenile detention facilities in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 182-1.2 and 182-1.12 of Title 9 (Runaway and Homeless Youth Regulations for Approved Runaway Programs)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in runaway and homeless youth programs in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

Sections 182-2.2 and 182-2.11 of Title 9 (Runaway and Homeless Youth Regulations for Transitional Independent Living Support Programs)

The amendment implements Chapter 323 of the Laws of 2008, relating to the protection of children in residential facilities from child abuse and neglect. The amendment updates procedures for the protection of youth in runaway and homeless youth programs in conformance with statutory changes. The amendment also updates outdated references to the former Department of Social Services and the former Division for Youth.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 15, 2009.

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

Regulatory Impact Statement

1. Statutory Authority:

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

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

Chapter 436 of the Laws of 1997 transferred certain functions, powers, duties and obligations of the former Department of Social Services and all of the functions, powers, duties and obligations of the former Division for Youth to OCFS.

Chapter 323 of the Laws of 2008 amended sections 412, 413, 415, 422, 424-a, 424-b, 424-c and 460-c of the SSL and created sections 412-a and 424-d of the SSL to clarify the definitions of abuse and neglect of a child in residential care and strengthen the process used to investigate and respond to such allegations. Section 19 of Chapter 323 of the Laws of 2008 authorizes OCFS to promulgate rules and regulations on an emergency basis for the purpose of implementing the provisions of the Chapter.

2. Legislative objectives:

The regulations implement Chapter 323 of the Laws of 2008 relating to the protection of children in residential facilities from child abuse and neglect. Specifically, the regulations implement the updated statutory definitions and requirements for additional determinations relating to reports of child abuse and maltreatment in residential settings that were enacted in the new sections 412-a and 424-d of the

SSL. For example, residential care now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth, and care provided by an authorized agency licensed to provide both foster care and residential care as licensed or operated by OASAS.

3. Needs and benefits:

The regulations also implement statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard. In addition, the regulations make technical changes, such as updating outdated references to the former Department of Social Services and the former Division for Youth.

The regulations are necessary for OCFS to conform to statutory changes to the SSL relating to the protection of children in residential facilities from child abuse and neglect. Specifically, the regulations clarify and update the definitions of abuse and neglect of a child in residential care and strengthen the process used to investigate and respond to such allegations. For example, residential care now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth, and care provided by an authorized agency licensed to provide both foster care and residential care as licensed or operated by OASAS. Additionally, the statute and regulations require an immediate law enforcement referral in the event that an investigation reveals that it is likely that a crime may have been committed against a child.

The regulations are also necessary to conform the regulations to the statutory changes, which reflect existing practice, in conformance with past federal and state court decisions, requiring that administrative review and fair hearing determinations of child abuse and maltreatment be made using the fair preponderance of the evidence standard.

The regulations will not apply to incidents that occur before January 17, 2009, which is the effective date of the statutory changes.

4. Costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The fiscal impact to OCFS is $397,000 for six positions and associated non-personal service expenses.

5. Local government mandates:

For local governments that operate residential facilities for children, the regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

6. Paperwork:

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

The proposed regulations are required to implement the state law, Chapter 323 of the Laws of 2008. No alternatives were considered.

9. Federal standards:

The regulations and Chapter 323 of the Laws of 2008 are consistent with the requirements of the federal Child Abuse Prevention and Treatment Act (CAPTA), which does not have special requirements pertaining to children in residential care.

10. Compliance schedule:

Chapter 323 of the Laws of 2008 provides for a January 17, 2009 effective date of the changes set forth in the regulations. For purposes of transition between the former statutory and regulatory provisions and the new law, the effective date will apply to the date when the abuse or neglect was alleged to have occurred. If a report came in on or after January 17, 2009 that involves an incident or incidents that occurred before January 17, 2009, the former definitions of abuse and neglect of children in residential care will apply.

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

The regulations will affect social services districts, voluntary authorized agencies, residential runaway and homeless youth programs and counties that contract for detention programs. There are 58 social services districts, approximately 160 voluntary authorized agencies and 83 residential runaway and homeless youth programs. There are 38 counties plus New York City that contract for detention programs.

2. Reporting, recordkeeping and compliance requirements:

The regulations are necessary to comply with state statutory requirements relating to the protection of children in residential facilities from child abuse and neglect. The regulations reflect the enactment of Chapter 323 of the Laws of 2008, which requires implementation of the statutory changes to be effective January 17, 2009.

Social services districts and voluntary authorized agencies will continue to operate under the current definitions and determination standards for incidents that occurred before January 17, 2009. The regulations reflect the statutory clarification of the definitions of abuse and neglect of a child in residential care and the process used to investigate and respond to such allegations.

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

3. Professional services:

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

4. Compliance costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The fiscal impact to OCFS is $397,000 for six positions and associated non-personal service expenses.

5. Economic and technological feasibility:

The social services districts, counties, voluntary authorized agencies and other agencies affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impact. The regulations build on existing procedures.

7. Small business and local government participation:

The regulatory changes make the changes necessary to conform the regulations to the statutory changes made by Chapter 323. In December of 2008, OCFS conducted six regional trainings for voluntary authorized agencies and facilities licensed by OCFS, OMRDD and OMH regarding the changes in state statutory provisions relating to the protection of children in residential facilities from child abuse and neglect. A statewide teleconference was held in November of 2008 regarding the changes in law and that training was recorded so that the training is available to all agencies that were not able to attend one of the regional trainings. A reminder of the statutory changes will be sent to the voluntary agencies in an informational letter in January 2009.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect 44 social services districts that are defined as being rural counties and the seven social services districts that include significant rural areas within their borders. In addition,

there are approximately 100 voluntary authorized agencies that service rural communities that will be affected by the regulations.

2. Reporting, record keeping, and other compliance requirements and professional services:

The regulations are necessary to comply with state statutory requirements relating to the protection of children in residential facilities from child abuse and neglect. The regulations reflect the enactment of Chapter 323 of the Laws of 2008, which requires implementation of the statutory changes to be effective January 17, 2009.

Social services districts and voluntary authorized agencies will continue to operate under the current definitions and determination standards for incidents that occurred before January 17, 2009. The regulations reflect the statutory clarification of the definitions of abuse and neglect of a child in residential care and the process used to investigate and respond to such allegations.

The regulations require that a copy of a facility's and licensing state agency's corrective action plan or plan of prevention and remediation be sent to OCFS if OCFS conducted the investigation of the abuse or neglect, even where the facility is licensed by another State agency. This adds one copy of a report to the paperwork already required to be sent to the licensing State agency under the current statutory and regulatory standards.

3. Costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The fiscal impact to OCFS is $397,000 for six positions and associated non-personal service expenses.

4. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impact on rural areas. The regulations build on existing procedures.

5. Rural area participation:

The regulatory changes make the changes necessary to conform the regulations to the statutory changes made by Chapter 323. In December 2008, OCFS conducted six regional trainings for voluntary authorized agencies and facilities licensed by OCFS, OMRDD and OMH regarding the changes in state statutory provisions relating to the protection of children in residential facilities from child abuse and neglect. A Statewide teleconference was held in November of 2008 regarding the changes in law and that training was recorded so that the training is available to all agencies that were not able to attend one of the regional trainings. A reminder of the statutory changes will be sent to the voluntary agencies in an informational letter in January 2009.

Job Impact Statement

A full job impact statement has not been prepared for the regulations which contain new requirements imposed by Chapter 323 of the Laws of 2008. The regulations will not have an impact on jobs and employment opportunities because they will not adversely impact the number of staff authorized agencies must maintain to provide residential care for children.

Department of Correctional Services

EMERGENCY RULE MAKING

Privileged Correspondence and Inmate Correspondence Program

I.D. No. COR-18-09-00003-E

Filing No. 379

Filing Date: 2009-04-16

Effective Date: 2009-04-16

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

Action taken: Addition of sections 721.2(b)(6), 720.4(d)(7) and amendment of section 721.3(a)(2) of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. This emergency rule is in response to a scheme whereby inmates have fraudulently utilized provisions of the Uniform Commercial Code (UCC) to file baseless liens with the Secretary of State against Department employees and others. This has a severe detrimental effect on the individual's credit and can cause them significant financial hardship.

Accordingly, the Department has concluded that it must have the capability of making immediate changes to the process and procedure in respect to incoming correspondence from the Secretary of State, the Department of State, Corporation Division or Uniform Commercial Code unit of any state and to the processing of outgoing correspondence to such entities to prevent inmates from receiving without proper authorization the documents which make it possible to prepare and file a baseless lien, and further from submitting such documents to the Secretary of State.

Subject: Privileged Correspondence and Inmate Correspondence Program.

Purpose: To revise procedure in respect to inmate correspondence.

Text of emergency rule: The Department of Correctional Services amends 7NYCRR Part 721, section 721.3(a)(2) and adds a new subdivision (6) to Part 721 section 721.2(b). The Department also adds a new subdivision (7) to Part 720 section 720.4(d) as indicated below:

Amend section 721.3(a)(2).

(a) Outgoing privileged correspondence.

(1) For the purpose of this directive, outgoing mail will not be considered to be privileged correspondence until it has been placed in the control of the facility administration for processing.

(2) Outgoing privileged correspondence may be sealed by the inmate, and such correspondence shall not be opened, inspected, or read without express written authorization from the facility superintendent as specified in subdivision (c) of this section. *Notwithstanding the foregoing or any other provision of this Part, outgoing mail to the secretary of state, department of state, corporation division or uniform commercial code unit of any state shall be submitted by the inmate unsealed and is subject to inspection.*

Add new section 721.2(b)(6) as follows:

(b) The following shall not be defined as privileged correspondence but shall be processed as general incoming correspondence in accordance with Part 720 of this Title, ''Inmate Correspondence Program'':

(1) mail which is not delivered in an envelope bearing the identity and official business return address of one of the above listed persons or entities;

(2) mail received from a board of elections;

(3) mail received from the Department of Motor Vehicles;

(4) mail received from the State Education Department, excluding materials sent to inmates marked ''legal mail'' by the New York State Library's Prisoner Services Project; [and]

(5) mail received from any county or local tax assessor or clerk, except for a clerk of a court[.]; and

(6) mail received from the secretary of state, department of state, corporation division or uniform commercial code of any unit.

Add new section 720.4(d)(7).

(d) Contraband. When, in the course of inspection, contraband is found, it shall be removed and given special handling according to type:

(1) Third party mail. Defined as correspondence from a party who is not identified as the sender in the return address. The facility shall return the entire correspondence to the sender with a letter explaining that third-party mail is considered contraband, is against department rules and, therefore, will not be delivered to the inmate.

(2) Unauthorized items. Such items shall be either returned to the sender at the expense of the inmate, or otherwise disposed of. Such will be the choice of the inmate and accomplished at the inmate's expense. An inmate should be allowed 30 days to obtain funds to pay the cost of disposing of the contraband. If, after 30 days, the inmate is unable to pay for disposal of the contraband, it will be donated or destroyed.

(3) Personal identifying information. Any material which appears to contain personal identifying information (e.g., social security number, home address, private e-mail address or home telephone number) belonging to any person who is not a member of the inmate's immediate family shall be examined. If the information identifies a present or former employee of the department or a person presently or formerly employed in a department facility, or a member of such person's household, it shall be withheld for investigation unless it is determined that the inmate has authorization from the superintendent to receive such correspondence, or the personal identifying information pertains to a member of the inmate's immediate family.

(4) Crime and sentence information on other inmates. Any material which contains crime and sentence information on any other inmate shall be confiscated and delivered to the superintendent.

(5) Illegal items. Illegal items, e.g., drugs, weapons, etc., shall be forwarded to the security office, with appropriate chain-of-custody documentation. When appropriate, the State Police or other police agency shall be notified.

(6) Items received anonymously. Such items (e.g., cash, checks, money orders, etc.) will be confiscated, labeled, and forwarded to the fiscal office for safekeeping. An investigation will be conducted in an attempt to verify the source. If, after proper investigation, no source is identified, the monies will be turned over to the State Comptroller as miscellaneous receipts.

(7) Uniform Commercial Code (UCC) Financing Statements. Absent prior written authorization from the superintendent, UCC financing forms and associated documents are prohibited and shall be confiscated and forwarded to the superintendent and the material shall be examined by the superintendent in consultation with Counsel's Office.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 14, 2009.

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

Regulatory Impact Statement

Statutory Authority

Section 112 of Correction Law grants the Commissioner the management and control of the correctional facilities in the department. He shall make such rules and regulations, not in conflict with the statures of the state.

Legislative Objective

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner to promulgate such rules and regulations in the best interest of the public safety, in addition to the safe secure and orderly operation of the correctional facility.

Needs and Benefits

The Department seeks to amend the process and procedure with respect to the processing of correspondence from the Secretary of State, Department of State Corporation Division or Uniform Commercial Code of any state and the processing of outgoing correspondence to such entities; and make the unauthorized possession of Uniform Commercial Code financing statements and associated documents contraband.

This action is in response to a scheme whereby inmates have fraudulently utilized the Uniform Commercial Code to file baseless liens with the Secretary of State against Department employees, employees of state and local criminal justice agencies and employees of the Office of the Attorney General. This has a severe detrimental effect on the individual's credit and can cause them significant financial hardship.

Costs

a) To agency, the state and local governments: None.

b) Costs to private regulated parties: None.

c) This cost analysis is based upon the fact that this proposal merely amends the policy and procedure for handling inmate mail.

Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments. Correctional Facilities are State funded and operated.

Paperwork

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

Duplication

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

Alternatives

No alternatives are apparent. The Department of Correctional Services has communicated with the Department of State to inquire about any less restrictive measures and have been advised there are none.

Federal Standards

There are no minimum standards of the Federal government for amending the designation of a correctional facility.

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, record keeping or other compliance requirements on small businesses or local governments. This proposal is clarifying the Department's procedures for the processing of privileged correspondence and is providing instruction regarding the handling of regular correspondence that is determined to be contraband.

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 is clarifying the Department's procedures for the processing of privileged correspondence and is providing instruction regarding the handling of regular correspondence that is determined to be contraband.

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 is clarifying the Department's procedures for the processing of privileged correspondence and is providing instruction regarding the handling of regular correspondence that is determined to be contraband.

Education Department

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Computation of Nonresident Pupil Tuition Rate

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

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

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

Statutory authority: Education Law, sections 207, 3202(4)(d) and 3602

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 proposed rule: Section 174.2 of the Regulations of the Commissioner of Education is amended, effective August 20, 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) . . .

Text of proposed 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

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Comm of Educ. P-16, State Education Department, State Education Building Annex Room 875, 89 Washington Avenue, Albany, NY 12234, (518) 474-5915, email: p16education@mail.nysed.gov

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.

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.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Maintenance of Electronic Records by Pharmacists and Licensure Requirement for Pharmacists

I.D. No. EDU-18-09-00008-P

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

Proposed Action: Amendment of sections 29.7, 63.3 and 63.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6506(1), 6507(2)(a), (4)(h), 6509(9), 6801(not subdivided), 6805(3) and 6810(4) and (5)

Subject: Maintenance of electronic records by pharmacists and licensure requirement for pharmacists.

Purpose: Maintain records in electronic format and provide applicants with an alternative to passing practical examination.

Text of proposed rule: 1. Paragraph (2) of subdivision (a) of section 29.7 of the Rules of the Board of Regents is amended, effective August 20, 2009, as follows:

(2) Failure by a pharmacist to reduce to writing, *either through written communication or electronic record,* a prescription transmitted orally, which writing *or electronic record* shall include all the information required by paragraph (1) of this subdivision and the

signature, *or the electronic equivalent of a signature,* or readily identifiable initials of the receiver of the oral prescription, provided that oral prescriptions for controlled substances shall meet the requirements of Article 33 of the Public Health Law.

2. Subparagraph (v) of paragraph (8) of subdivision (a) of section 29.7 of the Rules of the Board of Regents is amended, effective August 20, 2009, as follows:

(v) For all refills of a prescription, the records introduced into the system shall be sufficient if:

(*a*) …

(*b*) a printout *or electronic record* is produced of all prescriptions filled and refilled each day and the pharmacist(s) whose initials appear(s) on the printout sign(s)*, either manually or electronically,* the printout *or electronic record* to indicate that it is [a] *an* accurate record.

3. Subdivision (b) of section 63.3 of the Regulations of the Commissioner of Education is amended, effective August 20, 2009, as follows:

(b) *Examination components.*

(1) *Part I of Examination.* The department may accept satisfactory scores on an examination of the National Association of Boards of Pharmacy as meeting the requirements of Part I of the licensing examination.

(2) Alternative to Part III of Examination. (i) The department may accept, as meeting the requirements of Part III of the licensing examination, certification that the applicant has successfully achieved each of the following competencies as part of a residency program in pharmacy practice approved by the department:

(a) sterile product preparation and technique;

(b) non-sterile compounding preparation and technique;

(c) performing dosing calculations, including but not limited to aliquot, proportions, and infusion drip-rates;

(d) medication safety procedures, including, but not limited to, identifying potential look-alike and sound-alike drugs and other medication error prevention techniques;

(e) drug distribution, including but not limited to preparing, dispensing and verifying the accuracy of filled prescriptions or medication orders; and

(f) such other competencies in pharmacy practice as may be required by the department.

(ii) Such certification shall be on a form prescribed by the commissioner and shall be completed by the residency program director who supervised the applicant's performance in such residency program, attesting that the applicant has successfully achieved such competencies and that in the supervisor's judgment the applicant is competent to practice pharmacy.

4. Subparagraph (ii) of paragraph (7) of subdivision (a) of section 63.6 of the Regulations of the Commissioner of Education is amended, effective August 20, 2009, as follows:

(ii) A pharmacist may, based upon his or her professional judgment, accept an electronically transmitted prescription from a prescriber, to the pharmacy of the patient's choice, subject to the following requirements:

(*a*) …

(*b*) …

(*c*) a permanent hard copy of an electronically transmitted prescription *or a copy of an electronically transmitted prescription stored securely and permanently by electronic means* shall be produced and maintained at the pharmacy for a period of five years from the date of the most recent filling. A permanent facsimile copy shall be considered a hard copy;

(*d*) …

(*e*) …

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

Data, views or arguments may be submitted to: Frank Munoz, Associate Commissioner, Education Department, 2nd Floor, West Wing, Education Bldg., Albany, NY 12234, (518) 473-4921, email: opopr@mail.nysed.gov

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

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 and the functions conferred upon the Education Department.

Section 6504 of the Education Law provides that admission to the practice of the professions and regulation of such practice shall be supervised by the Board of Regents and administered by the Education Department.

Subdivision (1) of section 6506 of the Education Law authorizes the Regents to promulgate rules in its supervision of the practice of the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner to promulgate regulations regarding the practice of the professions.

Paragraph (h) of subdivision (4) of section 6507 of the Education Law authorizes the Education Department to establish an administrative unit that shall be responsible for the investigation, prosecution, and determination of alleged violations of professional misconduct.

Subdivision (9) of section 6509 of the Education Law authorizes the Board of Regents to define unprofessional conduct in its rules or through regulations of the Commissioner.

Section 6801 of the Education Law defines the practice of pharmacy as the preparing, compounding, preserving, or the dispensing of drugs, medicines and therapeutic devices on the basis of prescriptions or other legal authority.

Paragraph (4) of subdivision 1 of section 6805 of the Education Law authorizes the Commissioner to promulgate regulations regarding the examination requirement for the licensure of pharmacists.

Section 6810 of the Education Law defines the record keeping requirements for pharmacies and other establishments registered by the Department.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative intent of the aforementioned statutes by establishing an alternative to the Department administered practical examination for applicants seeking licensure as a pharmacist and authorizes pharmacists to maintain mandated records in secure, electronic formats instead of hard copies.

3. NEEDS AND BENEFITS:

As a general rule, licensed professionals are allowed to maintain records electronically. Pharmacy rules and regulations, however, currently retain references to hard-copy records, despite the extremely large volume of records contemporary community and hospital pharmacies generate. The proposed amendment to section 29.7 of the Rules of the Board of Regents and section 63.6 of the Regulations of the Commissioner of Education remove this requirement and allow pharmacists and pharmacies the option of converting records to a secure, electronic format. It is anticipated that the proposed amendment will encourage greater acceptance of electronic prescribing which has been shown to be effective in reducing medication errors.

Pharmacists seeking licensure in New York State must complete a three-part series of examinations. The third part of the examination is a Department prepared and administered practical examination that tests candidates' abilities to actually compound and dispense medications, including sterile products. This examination is labor intensive, and the Department has been reviewing effective alternatives. An increasing number of pharmacy graduates voluntarily enroll in accredited residency programs wherein their knowledge and skills are further developed and confirmed. The proposed amendment to section 63.3 of the Regulations of the Commissioner of Education authorizes the Department to accept a certification from the residency program director, attesting to the applicant's attainment of specified skills and competencies within an accepted residency program in lieu of suc-

cessful completion of the current practical examination. The proposed amendment is similar to recent changes made in the licensure of dentists, who are now required to complete a dental residency in lieu of the previously administered practical examination. The proposed amendment permits an applicant to either complete certain competencies as part of an approved residency program or complete a Department administered practical examination.

4. COSTS:

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

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

(d) Costs to the regulating agency: As stated above in Costs to State Government, the proposed amendment does not impose any 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 government.

6. PAPERWORK:

The proposed amendment does not impose any additional paperwork requirement, and is expected to reduce paperwork.

7. DUPLICATION:

The proposed amendments do not duplicate other State or Federal requirements.

8. ALTERNATIVES:

There are no viable alternatives to the proposed amendments, and none were considered.

9. FEDERAL STANDARDS:

There are no applicable standards of the Federal government for the subject of the proposed amendment.

10. COMPLIANCE STANDARDS:

The proposed amendment will be effective immediately. No period of time is necessary to enable regulated parties to meet the amendment's requirements.

Regulatory Flexibility Analysis

The purpose of the proposed amendment is to enable applicants seeking to become licensed as a pharmacist with an alternative to passing a Department administered practical examination, one of three examinations that an applicant is required to take to become a licensed pharmacist. In addition, the proposed amendment enables licensed pharmacists to maintain required records in electronic format as an alternative to hard copies.

Because it is evident from the nature of the proposed amendment that it will 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:

The proposed amendment provides an alternative to the practical examination administered by the Department that is currently required for applicants seeking licensure in pharmacy. clarifies the current recordkeeping requirements that pharmacists are required to maintain may be maintained in a secure electronic format.

The proposed amendment does not impose any additional reporting, recordkeeping or other compliance requirements and is not expected to cause regulated parties to hire additional professional services in order to comply.

3. COSTS:

The proposed amendment will not result in any additional costs beyond those currently imposed by statute or regulation.

4. MINIMIZING ADVERSE EFFECT:

The proposed amendment provides alternatives to existing licensure requirements and recordkeeping requirements and in effect, minimizes the adverse effect for all individuals applying for licensure as a pharmacist and pharmacists who are currently practicing. Because of the nature of the proposed amendment, establishing different alternatives for pharmacists located in rural areas of New York State would not be appropriate.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from statewide organizations representing all parties having an interest in the licensure process for pharmacists and other affected stakeholders. 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, the New York State Chain Drug Association and other interested parties. These groups, which have representation in rural areas, have been provided with notice of the proposed rule making and an opportunity to comment on the proposed amendment.

Job Impact Statement

The purpose of the proposed amendment is to enable licensed pharmacists to maintain required records in electronic format and to provide applicants seeking licensure in pharmacy with an alternative to passing a Department administered practical examination, one of three examinations that a pharmacist must complete to become licensed. Because it is evident from the nature of the proposed amendments that they will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Health

EMERGENCY RULE MAKING

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

I.D. No. HLT-04-09-00002-E

Filing No. 382

Filing Date: 2009-04-17

Effective Date: 2009-04-17

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

Action taken: Addition of section 16.112 to Title 10 NYCRR.

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

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: We are proposing that these regulations be adopted on an emergency basis as authorized by Section 202(6) of the State Administrative Procedure Act because immediate adoption is necessary to protect the public health from the threat posed by this radioactive material security gap.

New York is the only state that has not implemented these requirements for radioactive material licensees. The US Nuclear Regulatory Commission issued these requirements in December 2007 with an implementation date of June 2008. NRC directed all state programs to implement the fingerprinting requirements by the June 2008 deadline as well. NRC and other states implemented the fingerprinting require-

ments in a short timeframe via orders or license conditions. Because of the restrictions on fingerprinting in Section 201-a of NYS Labor Law, we were unable to implement these requirements as a license condition or as department orders, and could only impose these in regulation.

The fingerprinting requirements were discussed in February 2008 with Deputy Secretary Balboni, representatives of the Governor's office, Office of Homeland Security, Division of Criminal Justice Services and New York State Police and it was agreed that DOH should implement the fingerprinting requirements as soon as possible. Since we are the only program that has not yet implemented these security requirements we stand alone as not being fully protective of public health and safety. We need to implement these requirements as soon as possible to close that gap.

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

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

Text of emergency rule: Pursuant to the authority vested in the Public Health Council by sections 225(5)(p) and 225(5)(q) of the Public Health Law and in the Commissioner of Health by section 201(l)(r) of the Public Health Law, Part 16 of the State Sanitary Code, contained in Chapter I of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended by adding a new section 16.112, to be effective upon filing with the Department of State, to read as follows:

Section 16.112 Fingerprinting and criminal background check requirements

(a) Applicability.

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

(b) Definitions

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

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

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

(c) Licensees shall, within ninety (90) days of the effective date of this section, establish and maintain a fingerprinting program that meets the requirements of this section for individuals who require unescorted access. Licensees shall implement this program in conformance with the following scheduled:

(1) Within sixty (60) days of the effective date of this section, the Licensee shall provide under oath or affirmation a certification that the Licensee's T & R Official is deemed trustworthy and reliable by the Licensee as required by subdivision (e) of this section.

(2) The Licensee shall, in writing, within thirty (30) days of the effective date of this section, notify the Department (1) if it is unable to comply with any of the requirements of this section, (2) if compliance with any of these requirements is unnecessary in its specific circumstances, or (3) if implementation of any of these requirements would cause the Licensee to be in violation of the provisions of any Department regulation or its license. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement. Such justification must explain the necessity for the relief and alternative actions to be taken. The Department may accept the justification if it determines that the action to be taken in lieu of compliance with the requirement is consistent with public health and is necessary to avoid undue financial hardship for the licensee.

(3) The Licensee shall complete implementation of the program established in accordance with subdivision (j) of this section within 90 days from the effective date of this section. In addition to the notifications in paragraphs 1 and 2 above, the Licensee shall notify the Department, in writing, within twenty-five (25) days after it has achieved full compliance with the requirements of this section. If within 60 days from the effective date of this section, the Licensee is unable to complete implementation of one or more requirements of this section, the Licensee shall submit a written request to the Department explaining the need for an extension of time to implement those requirements and providing a justification for the additional time for compliance that it seeks. The Department may grant such request if it determines that the requested extension of time will not jeopardize public health and is necessary to avoid undue financial hardship for the licensee.

(4) Licensees shall notify the Department and the United States Nuclear Regulatory Commission (NRC) Headquarters Operations Office by telephone within 24 hours if the results from a criminal history records check indicate an individual is listed on the Federal Bureau of Investigation (FBI) Terrorist Screening Data Base.

(d) Except as provided in subdivision (h) for individuals who are currently approved for unescorted access, the Licensee shall grant access to radioactive material in Table 1 in accordance with the requirements of its Increased Controls license conditions and the requirements of this Section.

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

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

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

(h) The Licensee shall make determinations on continued unescorted access for persons currently granted unescorted access, within 90 days from the effective date of this section, based upon the results of the fingerprinting and FBI identification and criminal history records check. The Licensee may allow any individual who currently has unescorted access to certain radioactive material in accordance with its Increased Controls license conditions to continue to have unescorted access, pending a decision by the T&R Official as to whether that individual should continue to have such access. After 90 days from the effective date of this section, no individual may have unescorted access to any radioactive material listed in Table 1 of this section and in a quantity equal to or exceeding that listed in Table 1, without a determination by the T&R Official (based upon fingerprinting, an FBI identification and criminal history records check and a previous trustworthiness and reliability determination) that the individual may have unescorted access to such materials.

(i) Licensee responses to subdivisions (c)(1), (c)(2), (c)(3) and (c)(4) shall be submitted in writing to the Department. Licensee responses shall be marked as ''Confidential - Security-Related Information''.

(j) Specific Requirements Pertaining to Fingerprinting and Criminal History Records Checks

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

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

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

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

(5) The licensee must submit one completed, legible standard FBI fingerprint card (Form FD-258,ORIMDNRCOOOZ)[1] for each affected individual, to the NRC's Division of Facilities and Security. The name and address of the individual (T&R Official) to whom the criminal history records should be returned must be included with the submission.

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

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

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

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

(ii) A Member of Congress;

(iii) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history check;

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

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

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

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

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

(9) All fingerprints obtained by the Licensee pursuant to this section must be submitted to the NRC.

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

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

(k) Prohibitions

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

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

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

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

(l) Right to Correct and Complete Information

Prior to any final adverse determination, the Licensee shall make available to the affected individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification. If, after reviewing the record, an affected individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either a direct application by the individual challenging the record to the agency (i.e., law enforcement agency) that contributed the questioned information, or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the FBI Identification Division[2]. The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI criminal history records check after the record is made available for his/her review. The Licensee may make a final unescorted access determination based upon an individual's criminal history record only upon receipt of the FBI's confirmation or correction of the record. Upon a final adverse determination on unescorted access the Licensee shall provide the individual its documented basis for denial. Unescorted access shall not be granted to an individual during the review process.

(m) Protection of Information

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

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

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

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

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

Table 1: Radionuclides of Concern

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

[1] *The aggregate activity of multiple, collocated sources of the same radionuclide should be included when the total activity equals or exceeds the quantity of concern.*

[2] *The primary values used for compliance with this Order are tera becquerel (TBq).*

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

[4] *If several radionuclides are aggregated, the sum of the ratios of the activity of each source, i of radionuclide, n, $A_{(i,n)}$, to the quantity of concern for radionuclide n, $Q_{(n)}$, listed for that radionuclide equals or exceeds one. That is:*

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

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

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

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. HLT-04-09-00002-P, Issue of January 28, 2009. The emergency rule will expire June 15, 2009.

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

Regulatory Impact Statement

Statutory Authority:

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

The Atomic Energy Act (see 42 USC § § 2021(j)(1), 2021(o), and 2022) requires Agreement States such as New York to comply with and adopt federal standards or their authority to regulate certain radioactive material is jeopardized. The fingerprinting and criminal history records check requirements incorporated by these regulations are such federal standards.

Legislative Objectives:

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

Needs and Benefits:

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

DOH regulates the use of radioactive material at approximately 1100 facilities in order to protect people and the environment. DOH radioactive material licensees have the primary responsibility to maintain the security and accountability of the radioactive material in their possession. The events of 9/11 put new emphasis on security to prevent the malicious use of radioactive material, such as in dirty bombs. In 2002, the New York State Office of Public Security commissioned a study of radioactive material security in NYS. A task force comprised of state and federal radiation and security experts evaluated the current security posture. This evaluation included reviewing existing regulatory structure, policies and procedures and making site visits to several different types of facilities that possess and use radioactive materials. The task force developed several recommendations to improve radioactive material security. One of those recommendations was to explore using background investigations for assessing employees who have access to certain quantities of radioactive materials.

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

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

Costs:

The cost impact of these regulations is a total of $50 for each affected individual; $36 for the Federal Bureau of Investigation identification and criminal history records check and $10-15 fingerprint impressions by a law enforcement agency. The later cost varies with jurisdiction. This cost will apply to several New York State government entities including the Department of Health, Roswell Park Cancer Center, State Emergency Management Office, and several SUNY facilities.

Local Government Mandates:

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

Paperwork:

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

Duplication:

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

Alternatives:

Taking no action was rejected as not consistent with NYS policies on public security. No other alternative exist for obtaining a FBI criminal background check.

Federal Standards:

These proposed fingerprinting and criminal background and identification checks are U.S. Nuclear Regulatory Commission's standards based on the Energy Policy Act of 2005.

Compliance Schedule:

The proposed rule will be effective upon filing with the Department of State. Affected licensees must begin to implement this immediately and it must be completed within 90 days after the effective date of the rule to implement the fingerprinting requirements. Licensees may submit a written request for more time to implement the fingerprinting requirements, in accordance with Section 16.112(c)(2). The DOH would review the request and make a determination.

Regulatory Flexibility Analysis

Effect of rule:

No local governments possess the quantity and type of radioactive material that would subject them to the proposed rule. There are 10 small businesses that will be affected by this regulation. Program staff have spoken with these facilities and 3 have already implemented the requirements since they have offices in other states and must comply with the NRC fingerprinting requirements in those states. All of these facilities were aware of the regulations and while some facilities had questions on implementation and timing, no one expressed opposition to the fingerprinting requirements.

Compliance requirements:

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

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

Professional services:

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

Compliance costs:

The FBI criminal history records check cost is $36 per individual, and the fee for taking fingerprinting is estimated to be $10 - $15 per individual. These are one-time costs per individual, not recurring or annual costs. Approximately 4-6 persons from each small business will be subject to fingerprinting. Indirect costs are estimated to be one-hour work time for fingerprinting for each individual.

Economic and technological feasibility:

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

Minimizing adverse impact:

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

Participation:

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

Rural Area Flexibility Analysis

Types and estimated numbers of rural areas:

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

Reporting, recordkeeping and other compliance requirements and professional services:

Licensees will be required to obtain, process and mail fingerprint cards to the Nuclear Regulatory Commission (NRC). Licensees will maintain records of fingerprinting activities including determinations of trustworthiness and reliability for review by the Department. Licensees must notify the department if any individual is identified on the FBI terror watchlist. The need for professional services will be limited to use of the applicable local law enforcement for fingerprint impressions.

Costs:

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

Minimizing adverse impact:

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

Rural area participation:

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

Job Impact Statement

Nature of impact:

It is anticipated that few, if any, persons will be adversely affected. The fingerprinting and criminal background check is an additional element or enhancement to the existing trustworthy and reliability (T&R) determination requirement. DOH inspections of these facilities

during 2007 indicated that all persons were deemed to be trustworthy and reliable. No person was adversely affected by that evaluation. A history of criminal activity is not automatically disqualifying. The Trustworthiness and Reliability Official (TRO) will review an individual's record of criminal activity and determine if that individual will be granted unescorted access to the applicable radioactive materials. If the determination indicates that an individual should not have unescorted access to radioactive materials, the person may be permitted to have escorted access. However, a situation where the licensee has no means to provide an escort, or has limited availability of an escort (e.g., shift work), could result in an affected individual not being able to perform tasks and duties that require access to applicable radioactive sources. In such situations the licensee may need to reassign the individual to tasks that do not require unescorted access, or reschedule tasks based on an escort's schedule.

Categories and numbers affected:

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

Regions of adverse impact:

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

Minimizing adverse impact:

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

Not all individuals who use these sources will require a criminal background check. If the radioactive material is used in the presence of more than one individual only one of those individuals must be determined to be trustworthy and reliable and may escort other individuals. During inspections of the affected licensees, DOH inspectors determine if the applicable radioactive sources are generally used in the presence of several persons. The use of radiation therapy units in hospitals involves a team of individuals including physicians, medical therapy physicists, nurses, and radiation therapy technologists. Use of industrial radiography sources is subject to two-person rule, meaning that two qualified individuals must be present. Blood banks/services are typically operated continuously (24/7) with several persons present.

Assessment of Public Comment

One public comment was submitted to the NYS Department of Health (''DOH'') in response to the emergency rule making (HTL-49-08-00012-E). Each concern is summarized below and is followed by the DOH response.

Comment (1):

The commenter stated that the proposed rule is a measure intended to enhance national security and any connection to public health is tenuous and remote. He noted that experts on terrorism and weapons of mass destruction (WMD) believe that radioactive dispersal devices (RDDs) are unlikely to result in mass casualties from radiation effects. The lethality of an explosive-type RDD would result from the kinetic effects of the explosive charge - the same as from a conventional bomb. Any attractiveness that an RDD may have for terrorists derives from its potential to disrupt economic activity within an urban area contaminated with non-lethal levels of radioactive material.

Although protecting the state's economy is a legitimate goal, it does not fall within the responsibilities assigned to the Department of Health under the State Public Health Law. Part 16 of the State Sanitary Code already contains requirements for securing radioactive materials so as to protect public health and safety. The additional measures contained in this rule will not enhance public health in any appreciable way. The security measures in place after 9/11 have been adequate to protect the public health and safety for all that time.

Response (1):

DOH does not agree that the proposed rule has only a tenuous and remote connection to public health. A Radiological Dispersal Device (RDD) creates a public health threat by dispersing radioactive material in a public area and thereby causing immediate and potentially long-term radiation exposure to persons in or near that area. Reducing or eliminating that threat is an appropriate public health goal. Moreover, DOH's concern that additional measures are needed to secure radioactive materials is not theoretical. The use of such materials in a public place creates a clear public health threat. Further, the State's implementation of additional measures for large quantities of radioactive material is consistent with the national effort of the US Nuclear Regulatory Commission (NRC) to secure such materials. As of June 2008, every state except New York had implemented the new requirements.

Comment (2):

The commenter states that under its agreement with New York State, the NRC has relinquished all authority to regulate the radioactive materials covered by this rule for the purpose of protecting public health and safety. Having no authority to regulate the subject materials for the stated purpose of this rule in the first place, the NRC cannot direct New York State to regulate in its stead.

Under the Agreement the NRC does retain the exclusive authority to issue orders directly to New York State radioactive materials licensees for the purpose of protecting the common defense and security. In emergency situations, the NRC, not the State, should take such action as is mandated by these regulations.

Response (2):

The Department does not dispute NRC's position that it has the authority to require Agreement States, like New York, to apply health and safety requirements to the Agreement State's licensees. DOH believes that the NRC has a valid basis for its fingerprinting requirements and that these requirements are appropriate. However, DOH's authority to implement these requirements through the proposed rule is derived, not from the Agreement with NRC, but from the New York Public Health Law (Sections 225(5)(p), 225(5)(q) and 201(1)(r)).

Comment (3):

DOH states that the fingerprinting requirements were discussed in February 2008 with Deputy Secretary Balboni, representatives of the Governor's Office, the Office of Homeland Security, the Division of Criminal Justice Services and the New York State Police. It was agreed that DOH should implement the fingerprinting requirements as soon as possible.

The finding of necessity for this emergency rule to preserve public health is not supported by the fact that these agencies and officials, whose primary responsibility is for public security, are eager to see it adopted, nor by the fact that DOH staff (untrained in security or counterterrorism) have the responsibility to enforce it.

Response (3):

DOH does not agree. The fact that certain state agencies with security responsibilities support the adoption of the proposed rule does not alter the public health basis for that rule. The public health justification for the emergency adoption is provided in the rulemaking package and discussed in response to comment 1 (above).

Comment (4):

DOH states that the purpose of the rule is to fulfill USNRC requirements.

However, the NRC cannot require this or any other rulemaking action to be taken by the State of New York. Although the NRC has no authority over the materials subject to this rule for the purpose of protecting public health it does retain the authority to regulate these materials for the purpose of protecting the common defense and security. In fact, the NRC has imposed the fingerprinting and criminal background check requirements upon its own licensees and could do so upon state licensees as well. The commenter also contends that the NRC intends to shift the costs of implementation and enforcement of this initiative to the states, by requesting states comply with the NRC's security requirements. It is inappropriate, at a time when the State of New York is experiencing such unprecedented budgetary pressures,

for the Department of Health to assume this regulatory burden on behalf of a federal agency, particularly since the state receives no federal funding for support its radiation control program.

Response (4):

As noted in the response to comment (2), the Department has an independent statutory responsibility to address this and similar public health issues pursuant to Public Health Law § § 225(5) and 201(1).

NOTICE OF ADOPTION

Childhood Lead Poisoning Screening and Follow-up

I.D. No. HLT-48-08-00023-A

Filing No. 381

Filing Date: 2009-04-17

Effective Date: 2009-06-20

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

Action taken: Amendment of Subparts 67-1 and 67-3 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 206

Subject: Childhood Lead Poisoning Screening and Follow-up.

Purpose: Expand follow-up for children with elevated blood lead levels; authorize point-of-care laboratory testing and require reporting.

Text of final rule: Subdivisions (c) through (h) of Section 67-1.1 are renumbered to be subdivisions (d) through (i), respectively.

A new Subdivision (c) of Section 67-1.1 is added to read as follows:

67-1.1(c) ''Child'' shall refer to an individual from birth to less than eighteen years, unless otherwise specified.

Paragraphs (5) through (10) of subdivision (a) of Section 67-1.2 are renumbered to be paragraphs (6) through (11), respectively.

Section 67-1.2(a) is amended to add a new paragraph (5) below, and existing paragraphs (5), (8), (9) and (10) are renumbered as (6), (9), (10) and (11), respectively and are amended to read as follows:

67-1.2(a)(5) Results of blood lead analysis performed in a health care practitioner's office pursuant to Public Health Law Section 579(1) that is certified by the Centers for Medicare and Medicaid Services under regulations implementing the federal Clinical Laboratory Improvement Amendments of 1988 (CLIA) must be reported to the Commissioner of Health and to the local health officer in whose jurisdiction the subject of the test resides. Such results shall be reported within fourteen business days of the date of analysis and on such forms as prescribed by the Commissioner of Health. Such reports must include the subject's name, date of birth, race, gender, address, county of residence, type of sample (venous or fingerstick) and blood lead level; the health care practitioner ordering the test, facility identifiers, the date of sample collection, and the date of analysis.

67-1.2(a)[(5)]*(6)* Each primary health care provider who screens a child for elevated blood lead levels shall explain the blood lead test results and [give a certificate] *provide documentation* of lead screening to the parent or guardian of the child or other person authorized to consent for the medical care of the child.

67-1.2(a)[(8)]*(9)* Primary health care providers shall confirm blood lead levels *equal to or* greater than [15] *10* micrograms per deciliter of whole blood obtained on a [fingerstick] *capillary* specimen from a child using a venous blood sample.

67-1.2(a)[(9)]*(10)* For each child who has a confirmed blood lead level equal to or greater than [20]*15* micrograms per deciliter of whole blood, primary health care providers shall provide or make reasonable efforts to ensure the provision of a complete diagnostic evaluation; medical treatment, if necessary; and referral to the appropriate local or State health unit for environmental management. A complete diagnostic evaluation shall include at a minimum: a detailed lead exposure assessment, a nutritional assessment including iron status, and a developmental screening.

67-1.2(a)[(10)]*(11)* Primary health care providers shall communicate and coordinate as appropriate with local health units to ensure that each child with an elevated blood lead level receives appropriate follow-up, as prescribed above in paragraphs [(5)]*(6)* through [(9)]*(10)* of this Section.

Paragraphs (1) and (3) of subdivision (b) of Section 67-1.2 are amended to read as follows:

67-1.2(b)(1) A health care provider that provides services to a child who is at least 6 months of age but under 6 years of age and who is not the child's ongoing primary care provider, such as a hospital inpatient facility, an emergency service if the child's condition permits, or other facility or practitioner which provides services to the child on a one-time or walk-in basis, shall inquire if the child has been appropriately assessed and screened for elevated blood lead levels in accordance with the schedule prescribed in paragraphs (1) and (3) of [this] subdivision *67-1.2(a)*.

67-1.2(b)(3) If screening is performed, the blood lead test result shall be sent to the child's primary care provider or to the local health unit to enable appropriate follow-up in accordance with paragraphs (a)[(5)]*(6)* through [(9)]*(11)* of this section.

Subdivision (a) of Section 67-1.3 is amended to read as follows:

67-1.3(a) All blood lead tests shall be performed by *(i)* a *clinical* laboratory approved for toxicology-blood lead under Article 5, Title V of the Public Health Law[.]*; (ii) a health care practitioner's office pursuant to Public Health Law Section 579(1) that is certified by the Centers for Medicare and Medicaid Services under regulations implementing the federal Clinical Laboratory Improvement Amendments of 1988 (CLIA); or (iii) an entity exempt from the requirements of Public Health Law Article 5, Title V pursuant to Section 579(3) of that Title, that holds a certificate of registration issued by the department and is authorized to conduct blood lead analyses*.

Subdivision (a) of Section 67-1.4 is amended to read as follows:

67-1.4(a) Prior to or within three months of initial enrollment, each child care provider, public and private nursery school and preschool, licensed, certified or approved by any State or local agency shall obtain [a copy of a certificate of] *a written statement signed by a health care provider that documents* lead screening for any child at least one year of age but under six years of age, and retain such documentation until one year after the child is no longer enrolled.

Subdivision (a) of 67-3.1 is amended to read as follows:

67-3.1(a) For purposes of this Subpart, laboratory shall mean*: (i)* any laboratory that holds a permit issued in accordance with Public Health Law Article 5, Title V and is authorized to conduct blood lead analyses [.]*; or (ii) an entity exempt from the requirements of Public Health Law Article 5, Title V pursuant to Section 579(3) of that Title, that holds a certificate of registration issued by the department and is authorized to conduct blood lead analyses*.

Subdivision (d) of Section 67-3.1 is repealed, subdivisions (e) through (h) are renumbered to be subdivisions (d) through (g), respectively and newly renumbered subdivisions (d), (e), and (f) are amended to read as follows:

67-3.1 [(e)]*(d)* [Laboratories that use an electronic system for tracking test results] *All laboratories* shall report electronically to the Commissioner of Health each blood lead analysis conducted [which]. *The report* must include the *subject's* name, date of birth, race, gender, address, county of residence, type of sample (venous or fingerstick)[,] *and* blood lead level[,]*;* the [physician] *health care practitioner* ordering *the* test, laboratory identifiers, *the* date the sample was collected and the date of analysis. Reporting pursuant to this subdivision shall be done using an electronic telecommunication system [or floppy disks] consistent with the technical specifications established by the Department.

67-3.1 [(f)]*(e)* Any [clinical] laboratory not permitted in accordance with Public Health Law Article 5, Title V to perform blood lead analysis which accepts a blood lead sample [from a health care provider for referral to a laboratory] *and refers the sample elsewhere* for analysis shall [insure that the requisition slip includes] *transmit to the laboratory performing the analysis* all of the information that is required by [subdivisions] *subdivision* (d) [and (e)] above. [and that this information is transmitted to the laboratory performing the analysis with the blood lead sample.]

67-3.1[(g)]*(f)*(2) In addition to any other reporting required by this Subpart, all [clinical] laboratories shall notify the provider ordering the blood lead test of the results of any analysis in a child [up to 72 months of age] *less than eighteen years of age* which is equal to or greater than 45 [mg/dl]*mcg/dL* (micrograms per deciliter) within 24 hours of the analysis.

Subdivision (b) of Section 67-3.2 is amended to read as follows:

67-3.2(b) All health care providers shall notify the health officer having jurisdiction of the occurrence of any blood lead level above 45 [mg/dl]*mcg/dL* (micrograms per deciliter) in a child [up to 72 months] *less than eighteen years of age* within 24 hours of having been notified of this result by the testing laboratory.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 67-3.1(d).

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

Revised Regulatory Impact Statement

Changes made to the last published rule do not necessitate revision to the previously published RIS.

Revised Regulatory Flexibility Analysis

Changes made to the last published rule do not necessitate revision to the previously published RFA.

Revised Rural Area Flexibility Analysis

Changes made to the last published rule do not necessitate revision to the previously published RAFA.

Revised Job Impact Statement

Changes made to the last published rule do not necessitate revision to the previously published JIS.

Assessment of Public Comment

Four public comments were submitted to the NYS Department of Health (''DOH,'' ''The Department'') in response to this proposed regulation from: the Coalition to End Lead Poisoning in New York State (''The Coalition''); the New York State Association of County Health Officials (''NYSACHO''); the Westchester County Executive; and the New York City Department of Health and Mental Hygiene (''NYCDOHMH'').

The Coalition expressed support for the proposed amendment to reduce the blood lead level (BLL) threshold that triggers comprehensive follow-up services from 20 mcg/dL to 15 mcg/dL, noting that ''intervention at this lower level will mean that fewer New York children will be further poisoned. Moreover, earlier intervention will benefit other children in the home who have been or would be exposed to lead paint dust in the absence of an investigation and appropriate remedial action.'' The Coalition also urged that the Department consider further reducing this threshold to 10 mcg/dL. As noted in the Coalition's comment, the Governor and DOH have committed to undertaking a review to assess further lowering this threshold; this review is currently in progress. Expanding the criteria for these services to 10 mcg/dL was considered as an alternative in developing these proposed regulations, but was rejected at this time because it would result in a significant increase in caseload that is not feasible within existing resources and because of the need to further assess scientific literature regarding the effectiveness of expanding this model of intervention to children with BLLs of 10-14 mcg/dL.

The Coalition also included in its comment two additional recommendations that are not directly related to the proposed amendments. First, the Coalition recommended that the state do more to increase blood lead testing rates among children and pregnant women. Provisions of the proposed regulation that authorize appropriate lead testing within private physician office laboratories (POLs) and limited service clinic laboratories, and that require reporting of lead test results from these laboratories, are aimed at supporting office-based testing using portable lead testing technology as a means of reducing known barriers to lead testing and increasing testing rates. Other provisions governing requirements for universal and targeted blood lead testing of children and pregnant women are found elsewhere in Part 67, and are not the subject of the proposed change. However, it may be noted that DOH conducts a number of strategies to improve blood lead testing, including a variety of population-based and targeted education, outreach, quality improvement and systems-based activities in collaboration with local health departments (LHDs), hospital-based regional lead resource centers, managed care plans, and other partners. A specific proposal to amend the public health law to authorize linkage of the department's childhood immunization and blood lead data systems was included in the proposed executive budget for 2009. If enacted, this data systems linkage will provide important new information tools to health care providers, insurers, LHDs and DOH to support improved practice and enforcement of blood lead testing requirements.

Second, the Coalition recommended that regulations related to reporting of blood lead test results from laboratories and health care practitioners should require that Medicaid identifier numbers be included on blood lead laboratory reports to provide an additional tool to monitor compliance with state and federal requirements for blood lead testing of children enrolled in Medicaid. While this is not the subject of the proposed rule, DOH will consider this recommendation as part of an assessment of additional potential regulations related to laboratory reporting of blood lead tests. The Coalition concludes its comment by re-stating its support for the proposed amendment to reduce the trigger for comprehensive public health interventions from 20 mcg/dL to 15 mcg/dL.

The Westchester County Executive and NYSACHO, while stating strong support for the goals of preventing and eliminating childhood lead poisoning, noted several concerns regarding the impact of the proposed regulations. Each concern is summarized below, followed by the DOH response. Closely related comments have been grouped together for purposes of summary and response.

Comment:

The proposed regulations would redefine age and blood lead level criteria, effectively increasing the number of children to be screened and managed. The proposed changes will lower the blood lead level that triggers health department intervention that legally defines lead poisoning from 20 mcg/dL to 15 mcg/dL, and will increase the age of covered children that currently ranges from infants to six year olds to 18 year olds.

Response:

While it is correct that the proposed regulations will expand the BLL criteria that trigger required environmental and other comprehensive interventions from 20 mcg/dL to 15 mcg/dL, the proposed amendments do not change the current definition of lead poisoning or requirements for routine blood lead testing (screening) of children. Current regulations that define an elevated blood lead level (EBLL) as greater than or equal to 10 mcg/dL (Subpart 67-1.1(d)); that define age-specific requirements for universal and targeted blood lead testing of children (Subparts 67-1.2(a)(1) and (3)); and that require LHDs to institute measures to identify and track children with EBLLs to assure appropriate follow-up services are provided (Subpart 67-1.6(f)) remain unchanged. LHDs are already required to track all children with EBLLs; the proposed amendments to 67-1.2(a)(10) will expand the scope of required services for children with BLLs 15-19 mcg/dL to include additional specific services, including complete diagnostic assessments and environmental management, which are currently required for children with BLLs greater than or equal to 20 mcg/dL. The proposed addition to define the term ''child'' as an individual less than 18 years of age is intended to clarify existing regulations for follow-up of children with EBLLs which, in contrast to the regulations for routine blood lead screening of children under age six years, are not age-specific.

Comment:

During discussions of the proposed changes with DOH, NYSACHO was under the impression that the result would be a guidance document, rather than new regulations.

Response:

Regulation changes are the necessary and sufficient mechanism for expanding the requirement for provision of comprehensive follow-up services to children with BLLs 15-19 mcg/dL. The proposed changes to the definition of ''child'' are intended to provide clarification that follow-up services are required for all children with EBLLs up to age eighteen years. DOH agrees that additional guidance documents are warranted to assist LHDs in tailoring follow-up services for older children to address individual case histories and sources of lead exposure that are likely to differ from the typical exposure patterns of younger children. NYSACHO has provided extensive substantive input on the development of these draft protocols and guidance documents, which are currently being finalized within DOH for dissemination to LHDs.

Comment:

The proposed regulatory change would result in a substantial program expansion that must be accompanied by an increase in aid to LHDs to handle the added workload that these changes will create. NYSACHO disagrees that an overall statewide decline in the number of lead poisoned children under the age of six has freed up LHD resources sufficient to absorb the significant caseload expansion that is proposed. Some LHDs indicated they will need to increase staffing to comply with the proposed regulations. The proposed programmatic expansion would occur at a time when all LHDs have seen a significant cut in state support for this program, on the heels of years of flat-level funding and an 8% reduction in funding in 2008-09 grant cycle, on top of recent reductions in state aid to localities. Hence NYSACHO finds that the proposed program expansion represents a new unfunded mandate to LHDs.

Response:

DOH does not agree. As described in detail in the Regulatory Impact Statement and other supporting documents accompanying the proposed regulation changes, the number of children who require environmental and other comprehensive follow-up services under current regulations (i.e., a BLL of greater than or equal to 20 mcg/dL) has declined dramatically over the past decade, while evidence of the harmful effects of lead at lower BLLs has grown, thereby providing both the opportunity and imperative to expand services to more children with EBLLs. As one measure of this dramatic decline, in 1996 there were 1,044 children under the age of six years newly identified with BLLs greater than or equal to 20 mcg/dL in New York State excluding New York City; in 2007 (the latest year for which complete statewide data are available), only 263 children were newly identified with BLLs in this range. While changing the BLL criteria for comprehensive follow-up services from 20 mcg/dL to 15 mcg/dL will result in an increase in the number of children requiring such services, the total number of estimated cases requiring these services under the proposed new criteria will still be well below the number of children who required such services under the current criteria a decade ago. Approximately 543 children with BLLs greater than or equal to 15 mcg/dL outside of New York City will require initiation of comprehensive follow-up services in 2009 (projections based on current data). This projected total is less than the 568 new cases of BLLs greater than or equal to 20 mcg/dL that required these services in 1999, and far below the 1,044 new cases that required these services in 1996.

Over this time period, Article 6 state aid for general public health work to LHDs for lead poisoning prevention activities and Lead Poisoning Prevention Program (LPPP) grant funding have been approximately level. Beginning in 2007, a total of $400,000 in annual funding was redirected

from other program activities to increase LPPP grant awards to the ten LHDs outside of New York City with the highest annual incidence of childhood lead poisoning cases to support expanded environmental lead prevention work. Cost of Living Adjustments (COLAs) for lead poisoning prevention activities were awarded to LHDs in 2006, 2007 and 2008, while in 2008 LHD LPPP grants were reduced as part of across the board state spending reductions. The net result of these changes is approximately level funding for most LHD LPPPs, with a net increase in funding to the subset of ten targeted LHDs. Article 6 state aid provides formula-based reimbursement that is responsive to local spending and revenue patterns. In 2007, the base grant reimbursement was increased by ten cents per capita, effectively increasing reimbursement by $100,000 for each county.

The dramatic decline in the number of children who require comprehensive services under the 20 mcg/dL criteria in current regulations provides a clear opportunity to expand services to additional children within existing resources. This conclusion is supported by the growing number of LHDs that have already adopted local protocols for providing comprehensive follow-up services to children with BLLs 15-19 mcg/dL with their current resources. At least ten LHDs already provide comprehensive services to children in this group, including the three LHDs with the highest number of cases (New York City and Monroe and Erie Counties). These ten LHDs together account for nearly two-thirds of the total statewide caseload of children with BLLs 15-19 mcg/dL, and for nearly one-third of the caseload outside of New York City. Moreover, at least 22 additional counties are already providing comprehensive services to a subset of children with BLLs 15-19 mcg/dL, such as children who meet the CDC's definition of persistently elevated 15-19 mcg/dL or children whose health care providers have requested environmental services. While this existing caseload cannot be readily quantified due the varying criteria used by counties, it further mitigates the impact of the proposed change on LHD workloads. The proposed change will make the requirements consistent statewide.

DOH staff have met with NYSACHO staff to discuss these concerns. In response to those discussions, for the upcoming grant year, DOH has made several changes to streamline the annual grant work plans and quarterly reports to reduce the administrative work load for LHD programs, and will offer LHDs appropriate flexibility in prioritizing activities within their annual LPPP grant work plans and budgets, within the parameters of those minimum activities that are required under Public Health Law and regulations. DOH has also agreed to assess potential changes to the methodology that is currently used to distribute funding across LHDs, and this assessment is in process. As noted above, in addition to their LPPP grant funds, LHD will be able to utilize Article 6 state aid funds to support implementation of the proposed changes.

Comment:

Between 1996-2007, LHDs reported an increase in the intensity and acuity of cases. The current caseloads in many LHDs consist of children who remain longer on the caseload and have multiple socioeconomic issues including lack of stable housing, transportation and adult supervision and support.

Response:

DOH does not agree. The most severe childhood lead poisoning cases - those with the highest BLLs of greater than or equal to 45 mcg/dL - have declined significantly since 1996 from 55 to 16 statewide excluding New York City. In response to these comments, DOH performed additional analysis of surveillance data over this period, which demonstrated that the median number of days that children's BLLs remain elevated after initial diagnosis has declined dramatically from 342 days in 1996 to 91 days in 2007. While detailed data on socioeconomic characteristics of children with lead poisoning are not readily available, it is not expected that children with BLLs 15-19 will have significant differences in this regard from children with higher BLLs currently managed by LHDs, nor that these trends would vary significantly across counties. As noted above, at least ten LHDs, including those with the highest annual caseloads, have demonstrated that these services can feasibly be extended to children with BLLs 15-19 even in the context of any changing demographic characteristics of children and families requiring services.

Comment:

Compounding the reduction in grant funding, DOH has increased grant deliverables over the 1996-2007 period, resulting in an increased workload for LHDs. Examples include increased coordination and training of medical providers; increased data and reporting requirements; and intensified case management and parent education. As a result of these increased deliverables, costs of lead poisoning screening and management have already shifted from the state to local governments.

Response:

DOH does not agree that grant deliverables have increased over this time period. In 2007, with significant input from NYSACHO, the annual grant work plan for LHD LPPPs was revised to more clearly define goals and objectives across existing program areas, and to require LHDs to propose specific, measurable activities to accomplish those objectives. While these improvements may have increased the amount of time required for LHDs to complete their work plan documents, they did not introduce additional mandated deliverables, and in some cases actually served to streamline activities and provide LHDs with additional flexibility in how they would meet objectives. For example, a previous work plan objective that required all LHDs to conduct very time-intensive outreach visits to health care providers to conduct detailed chart reviews and provide tailored feedback was removed in favor of an objective that provides LHDs the flexibility to select effective activities to improve local lead testing rates that best fit their local needs and resources. The minimum required activities outlined in the work plan directly reflect those LHD responsibilities that are required in current regulations (Subpart 67-1.6), and thus do not represent a change. Requirements for case coordination have not been intensified, and in some instances LHDs have discontinued more intensive case coordination strategies, such as frequent nurse home visits, in favor of more administrative tracking measures and communication with primary care providers to encourage delivery of lead testing and follow-up services within a child's medical home. Moreover, as described previously, the number of children with EBLLs requiring any case coordination services has declined dramatically over this time period.

NYSACHO's statement that ''costs of lead poisoning screening and management have already shifted from the state to local governments'' is unclear. The costs of providing or arranging for lead screening (testing) and management of children with elevated blood lead levels have never been borne directly by NYSDOH. Under New York State Public Health Law and implementing regulations, blood lead screening and testing of children, and medical management of children with EBLLs, is the responsibility of health care providers. LHDs are responsible for instituting measures to identify and track all children with EBLLs to assure that all required follow-up services are provided, and for direct provision of environmental management services for children who meet established BLL criteria, except in ''partial service'' LHDs that do not have environmental health programs and in which NYSDOH district office staff provide these environmental management services. These basic responsibilities have not changed as a result of modifications to the annual grant work plan or these proposed regulations. Therefore, there has been no ''shift'' in costs from the state to the local health departments.

As noted above, in response to concerns raised by some LHDs, several changes have been made for the grant project year beginning April 2009 to further streamline the work plan and reporting documents to reduce the administrative work load for LHD programs, and LHDs will continue to have appropriate flexibility in prioritizing activities within their LPPP grant work plans and budgets, within the parameters of those minimum activities that are required under Public Health Law and regulations.

Comment:

Even at its full 100% funding level the state Lead Poisoning Prevention Grant does not cover the complete costs of the local lead poisoning prevention program at the current 20 mcg/dL standard. Any further reduction in this grant or increase in work load by lowering the BLL standard and increasing the age of those covered translates into the imposition of an additional unfunded state mandate.

Response:

This comment does not accurately reflect the purpose of the Lead Poisoning Prevention Program (LPPP) grant funding that is provided by DOH to LHDs. The purpose of these grant funds has always been to enhance the provision of basic local public health services that are required under public health law and regulations, and for which Article VI state aid funds are provided. Grant funds may be used to supplement state aid funds for both minimum required activities as well as additional enhanced activities that are outlined in the annual grant work plan. In accordance with the formula for use of state aid funds, LPPP grant and other grant funds or sources of reimbursement are utilized first, with state aid payment for 36% of remaining eligible expenses. Grant funds should not be viewed as the sole source of funding to support required local lead poisoning prevention activities, and grant deliverables may exceed the minimum requirements outlined in state regulations to reflect additional program or policy priorities as part of the state's broader lead poisoning prevention program.

The NYCDOHMH offered several comments related to proposed changes that address reporting of blood lead test results from private physician office laboratories (POLs). Each comment is summarized below, followed by the DOH response.

Comment:

The proposed regulation fails to take into account that NYCDOHMH regulates the reporting of blood lead results to DOHMH. In order for their to be no uncertainty as to the reporting scheme for New York City residents, DOHMH believes it is critical that the regulations are clear that they do not affect the required reporting already set form in the New York City Health code, which requires that a person or entity who orders or performs blood lead tests but does not submit the specimen to a clinical

laboratory for analysis shall report results of less than 10 mcg/dL to the Department within five business days, or within 24 hours if the BLL is greater than or equal to 10 mcg/dL. NYCDOHMH suggests that the proposed Subpart 67-1.5(a)(5) be amended by inserting this language: ''Nothwithstanding anything contained herein, results of blood lead analysis performed on New York City residents shall be reported to the New York City Department of Health and Mental Hygiene in the manner and form required by the New York City Health Code.''

Response:

The proposed regulations do not change or limit New York City's current local requirements for reporting. Because New York City's local requirements for reporting within five days (or within 24 hours, for elevated results) are within the state's proposed 14-day reporting period, compliance with New York City's code constitutes compliance with the proposed state requirement. The Department will take steps to clearly inform health care providers and laboratories of this.

Comment:

NYCDOHMH questioned why the substance of proposed Subpart 67-1.2(a)(5) is in Subpart 67-1, noting that it would be more consistent with the existing structure of the lead regulations if the substance of this section is codified in Subpart 67-3, which governs the reporting of blood lead levels.

Response:

NYSDOH does not agree. The proposed amendment in question adds a new requirement that private physician office laboratories (POLs) that conduct blood lead testing report the results to the department. In drafting these regulations, placing this amendment in Subpart 67-3 was considered but rejected for two key reasons. First, although POLs are a type of laboratory, as private physician practices they are more likely to consult regulations aimed at lead testing and follow-up by health care providers (found in 67-1) than reporting of blood lead levels by laboratories (found in 67-3). Second, as defined in Subdivision (a) of 67-3.1, the requirements for reporting contained in Subpart 67-3 specifically pertain to permitted laboratories, including clinical laboratories and ''limited service'' registrant laboratories but exclusive of POLs, which are exempted from Title V of the Public Health Law. It was determined that to accommodate requirements of reporting by POLs, Subpart 67-3 would need to be significantly restructured, resulting in unnecessary loss of clarity.

Comment:

There are various references made in the proposed amendments to ''pursuant to Public Health Law Section 579(1),'' which addresses entities and providers who are exempt from Title V of the Public Health Law, for example laboratories operated by a physician who performs laboratory tests solely as an adjunct to the treatment of his or her own patients. We are unclear as to the appropriateness of the reference to PHL Section 579(1) when used in the proposed amendments, and believe it would be sufficient and clearer to omit the reference to PHL.

Response:

The purpose of the specific reference to PHL Section 579(1) is to accurately define a Physician Office Laboratory (POL), the entity to which the new requirements in question apply. Although it may be possible to define POLs without this reference, in drafting these regulations DOH determined that for clarity it is preferable to retain the specific reference to that law.

Comment:

For purposes of consistency we would suggest that instead of referring to ''health care practitioner's office,'' reference be made to ''health care provider,'' since that is the term generally used in 10 NYCRR Subparts 67-1 and 67-3 wherein ''health care provider'' is defined to include health care practitioner.

Response:

The term ''health care provider,'' as defined in Subpart 67-1.1, includes both individual health care practitioners as well as facilities licensed pursuant to Article 28 of the Public Health Law. The term ''practitioner'' is used in this amendment because it refers more specifically to individual private practitioners who operate POLs, and does not include Article 28 facilities.

In addition to these comments, a minor non-substantive change has been made to the amended Subpart 67-3.1(d) to clarify methods for electronic reporting. The reference to ''floppy disks'' as a method of electronic reporting has been removed because in accordance with current public health law all permitted laboratories must report through the department's electronic telecommunications system and floppy disks are no longer used for reporting by any laboratory.

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Appeals Process Pursuant to Chapter 508, Laws of 2008

I.D. No. MRD-18-09-00001-E
Filing No. 376
Filing Date: 2009-04-15
Effective Date: 2009-04-15

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

Action taken: Addition of Part 630 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b) and 13.37

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

Specific reasons underlying the finding of necessity: The appeals process may allow for persons who were determined incorrectly not to need OMRDD services, to actually be determined to be eligible for services upon appeal. The person will then receive the necessary services.

Subject: Appeals process pursuant to Chapter 508, Laws of 2008.

Purpose: To establish an appeals process to use when a person is determined not to be in need of OMRDD adult services.

Text of emergency rule: Add a new Part 630 to 14 NYCRR as follows:

PART 630

ELIGIBILITY DETERMINATIONS FOR CHILDREN WHO ARE AGING OUT

Section 630.1 Applicability.

This Part applies to the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD) and its local administrative offices, the Developmental Disabilities Services Offices (DDSOs). It does not apply to voluntary agencies or private providers of services.

Section 630.2 Background.

(a) The Education Law and Social Services Law require that the committee on special education, multidisciplinary team or social services official send a report to OMRDD (if certain conditions are met) about a child who will be aging out and who may need adult services in the OMRDD system. A person ages out when he or she is no longer able to receive services in the educational system, foster care system or other system for children because of his or her age (usually related to the person attaining 21 years of age).

(b) Section 13.37 of the New York State Mental Hygiene Law sets forth the responsibilities of OMRDD related to the planning and referral process for children who are aging out.

(1) Once a report about the child has been received by OMRDD, OMRDD is charged with reviewing the report to determine whether the child will likely need adult services, including evaluating the child if necessary.

(2) If OMRDD determines that the child will not require adult services, OMRDD is required to notify the child's parent or guardian and referring entity. Chapter 508 of the Laws of 2008 amended Section 13.37 MHL to establish that if this determination is not acceptable to the child's parent or guardian, he or she may appeal the determination.

(c) Subdivisions 1.03(21) and (22) of the Mental Hygiene Law define ''mental retardation'' and ''developmental disability.''

Section 630.3. Determination of eligibility for services in the OMRDD system.

OMRDD shall determine whether individuals meet the criteria established in subdivision 1.03(22) of the Mental Hygiene Law and are therefore eligible to receive services in the OMRDD system. OMRDD determinations shall be in accordance with the eligibility determination process described in ''Eligibility for OMRDD Services'' which is inserted into this Part in section 630.5.

Section 630.4. Procedures for children aging out.

(a) For the purposes of meeting the requirements of Section 13.37 MHL, a child is determined to ''likely need adult services'' if the child is eligible for services in the OMRDD system.

(b) Upon receiving a report submitted pursuant to subparagraph 4402(1)(b)(5) of the Education Law or subdivision 398(13) of the Social Services Law, OMRDD shall determine whether the child is eligible for services utilizing the eligibility determination process described in ''Eligibility for OMRDD Services.''

(c) If OMRDD determines that the child is not eligible for services, it shall notify the child's parent or guardian and the committee on special education, multidisciplinary team or social services official which submitted the report.

(1) Such notice shall state the reasons for the determination and may recommend a state agency which may be responsible for determining and recommending adult services.

(2) If the determination is not acceptable to the child's parent or guardian, he or she may appeal the determination in accordance with the eligibility determination process described in ''Eligibility for OMRDD Services.'' The notice to the parent or guardian shall also describe the procedures for appealing the determination.

Section 630.5. ''Eligibility for OMRDD Services.''

The following policy of OMRDD entitled ''Eligibility for OMRDD Services'' is hereby inserted into this Part.

New York State Office of Mental Retardation and Developmental Disabilities

ELIGIBILITY FOR OMRDD SERVICES

Important Facts

Revised December, 2008

OMRDD, through its local Developmental Disabilities Services Offices (DDSO), determines whether a person has a developmental disability and is eligible for OMRDD funded services. This fact sheet describes the Three-Step process used by OMRDD to make an eligibility determination of developmental disability.

NOTE: A determination of developmental disability does not mean the person is eligible for all OMRDD funded services. Some OMRDD funded services have additional eligibility criteria. For example, Intermediate Care Facilities, and Home and Community Based (HCBS) waiver programs include an additional level of care determination, and individuals are eligible for HCBS services only when they reside in appropriate living arrangements. These and other additional criteria for eligibility of specific OMRDD services are not reviewed through this process.

ELIGIBILITY DETERMINATION PROCESS

Eligibility Request

An OMRDD Transmittal Form must accompany all requests submitted to the DDSO for eligibility determinations. The Transmittal Form includes the name of the person, the name of the person's representative, and relevant contact information. Documentation of the person's developmental disability must also be included as part of the eligibility request.

1st Step Review

DDSO staff review the eligibility request for completeness and share the information with other staff designated by the Director, as necessary. After this review, the DDSO notifies the person in writing that:

(a) Eligibility or provisional eligibility has been determined; or

(b) The request is incomplete and requires additional documentation; or

*(c) The request has been forwarded for a **2nd Step Review**.*

2nd Step Review

*DDSO clinicians designated by the DDSO Director conduct a **2nd Step Review** of the eligibility request forwarded by the **1st Step Review**, along with any additional documentation provided by the person. If these clinicians require additional medical information, psychological test results, or historical documentation, the person is notified in writing of the type of information needed and the date by which it must be submitted to the DDSO.*

*Following the **2nd Step Review**, the DDSO provides the person with written notification of its determination. If the person is found ineligible for OMRDD services because he or she does not have a developmental disability, the letter shall offer the person and his or her representative the opportunity to:*

(a) Meet with DDSO staff to discuss the determination and documentation reviewed; and

*(b) Request a **3rd Step Review**; and*

(c) Request a Medicaid Fair Hearing in cases where Medicaid funded services are sought.

Note that a Notice of Decision informing the person of his or her right to request a Medicaid fair hearing is sent only when the Transmittal Form indicates that the person is interested in receiving Medicaid funded OMRDD services if determined eligible. If the person has not indicated Medicaid funded services, no fair hearing is offered and the decision of the DDSO is final.

*The person may choose one, two or all three of the above options. If a fair hearing is requested, a **3rd Step Review** will automatically be conducted.*

3rd Step Review

*3rd Step Eligibility Determination Committees established by OMRDD in NYC and Albany conduct the **3rd Step Reviews**. Committee members include licensed practitioners who are not directly involved in the determinations made at the **1st** and **2nd Step Reviews**. The Committee reviews the submitted eligibility request and any additional documentation provided by or on behalf of the person. The Committee forwards its recommendations to the DDSO Eligibility Coordinator. The DDSO Director or designated staff person considers the 3rd Step recommendations and informs the person of any change in the DDSO's determination. **3rd Step Reviews** will be made prior to any fair hearing date.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 13, 2009.

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director of Regulatory Affairs, Office of Mental Retardation & Developmental Disabilities, 44 Holland Avenue, Albany, NY 12229, (518) 474-1830, email: barbara.brundage@omr.state.ny.us

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

Regulatory Impact Statement

1. Statutory Authority:

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

b. Section 13.37 of the New York State Mental Hygiene Law establishes OMRDD's responsibilities in relation to the planning and referral of children with developmental disabilities for adult services. The statute requires OMRDD to determine whether a child referred to OMRDD through the planning and referral processes will likely need adult services.

2. Legislative objectives: The amendments further the legislative objectives embodied in Mental Hygiene Law Section 13.37. Chapter 508 of the Laws of 2008 amended Section 13.37 to establish that if OMRDD determines that a child will not require adult services, and that if the determination is not acceptable to the child's parent or guardian, the parent or guardian ''may appeal the determination pursuant to regulations adopted by the commissioner.'' Chapter 508 is effective on January 2, 2009.

3. Needs and Benefits:

Section 13.37 of the Mental Hygiene Law (MHL) sets forth OMRDD's responsibility to review referrals from school and social services districts to determine whether a child aging out of those systems is likely to need adult services. These responsibilities date back to 1983 with several subsequent amendments including those added by Chapter 600, Laws of 1994.

Section 13.37 MHL requires that OMRDD provide written notification to the child's parents or guardian, and referring entity, of the reasons for its determination that the child does not need adult services in the OMRDD system. Chapter 508 of the Laws of 2008 adds a requirement to Section 13.37 MHL that the parent or guardian may appeal the determination if it is not acceptable to him or her pursuant to regulations adopted by OMRDD. The addition of new Part 630 of Title 14 NYCRR by this emergency regulation implements this new statutory requirement.

OMRDD has longstanding policy documents which establish a process for determining whether an individual has a developmental disability as defined by the Mental Hygiene Law and is therefore eligible for services in the OMRDD system. The pre-existing OMRDD process already includes procedures that can be utilized to appeal a determination that an individual does not have a developmental disability. A determination by OMRDD that a person does not have a developmental disability according to the legal definition is tantamount to a determination that the child does not require (or need) adult services, which is the standard established by Section 13.37 MHL.

In order to implement the new statute, OMRDD will continue to adhere to the procedures outlined in its longstanding policy documents regarding eligibility for services, which include appeals procedures. The new regulations therefore merely require adherence to these policies.

OMRDD plans to develop new regulations in the future which incorporate standards and procedures for rendering a determination regarding eligibility for services in the OMRDD system. OMRDD views the emer-

gency regulations to implement Chapter 508 as temporary and plans to replace them with the more comprehensive eligibility regulations once the process of developing and promulgating the permanent regulations is complete.

4. Costs:

a. Costs to the Agency and the State and its local governments: There will be no new costs to OMRDD or the State. OMRDD already has appeals processes pursuant to longstanding agency procedures regarding eligibility for services, which include appeals processes.

There will be no new costs to local governments as a result of the proposed amendments.

b. Costs to private regulated parties: There will be no new costs to private regulated parties.

5. Local Government Mandates: There are no new mandates on local governmental units or any other special districts.

6. Paperwork: There will no new paperwork for private regulated parties or local government. There will be no new paperwork for OMRDD as it will merely continue to adhere to its longstanding procedures regarding eligibility for services.

7. Duplication: None.

8. Alternatives: OMRDD considered using general references in the regulations in lieu of including the actual text of its procedures for determining eligibility. However, OMRDD decided that it would be more valuable and clearer to regulated parties to include the existing eligibility determination process in the actual regulatory text.

9. Federal Standards: The proposed amendments do not exceed any minimum standards of the Federal government.

10. Compliance Schedule: OMRDD will continue to adhere to its longstanding policies regarding eligibility. No new compliance activities are necessary.

Regulatory Flexibility Analysis

1. Effect on small businesses: These amendments apply only to OMRDD and do not apply to small businesses that operate under the auspices of OMRDD.

The amendments result in no new costs for local government.

2. Compliance requirements: OMRDD will continue to adhere to its longstanding policies regarding eligibility, which include procedures to appeal a determination that a person is not eligible for services in the OMRDD system. The amendments contain no compliance requirements for small businesses or local governments.

3. Professional services: No additional professional services are required as a result of these amendments. The amendments will have no impact on the professional service needs of small businesses or local governments.

4. Compliance costs: There are no costs to local governments or to small businesses.

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

6. Minimizing adverse economic impact: These amendments impose no adverse economic impact on local governments or small businesses.

7. Small business and local government participation: Providers, individuals receiving services and family members were involved in the original development of OMRDD's longstanding policies and procedures regarding eligibility for services and have been familiar with the processes for years, including the appeals procedures. In the future, OMRDD will involve all regulated parties in the review of those policies and procedures and the development of regulatory standards related to eligibility for services.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for the proposed amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The amendments concern procedures for appealing a determination that a person aging out does not need services in the OMRDD system. No compliance activities are imposed on providers.

Job Impact Statement

A Job Impact Statement is not submitted because the amendment will not present an adverse impact on existing jobs or employment opportunities. The amendments concern procedures for appealing a determination that a person aging out does not need services in the OMRDD system. No compliance activities are imposed on providers and no new procedures will be utilized by OMRDD. OMRDD will continue to adhere to its longstanding policies and procedures related to determining eligibility for services in the OMRDD system.

Department of Motor Vehicles

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Safety Hearing Notice

I.D. No. MTV-18-09-00006-P

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

Proposed Action: This is a consensus rule making to amend section 127.1 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 469-a(1), (2) and 471-a

Subject: Safety Hearing Notice.

Purpose: To clarify that notice by certified mail is required only for hearings initiated through the Division of Safety.

Text of proposed rule: Section 127.1 of Part 127 is amended as follows:

127.1 Notice of hearing; answers.

(a) Generally. All parties shall be given reasonable notice of a hearing. The notice shall include (1) a statement of the time, place and nature of the hearing, (2) a statement of the legal authority and jurisdiction under which the hearing is to be held, (3) a reference to the particular sections of the statutes and regulations involved, where possible, (4) a short and plain statement of the matters asserted, (5) a statement that interpreter services will be made available, upon request of a deaf respondent, at no charge, (6) a statement that a party may be represented by counsel and (7) a statement of other rules and rights contained in the Department's Administrative Adjudication Plan pursuant to Executive Order 131, Section III(B)(11). No pre-hearing answers or responsive pleadings are permitted. (Added 2/27/91)

(b) [Vehicle safety hearings. Notices of vehicle safety hearings] *In a hearing initiated through a complaint or investigation of the Division of Vehicle Safety, notice* shall be mailed at least 30 days prior to the scheduled date of the hearing, unless a hearing is required by law to be held at an earlier time. Notices of vehicle safety hearings shall be mailed by certified mail to the respondent at his or her last-known address on file with the department.

(c) Except for hearings scheduled by a court or hearings governed by subdivision (b) of this section, it is the department's policy to mail notices of hearings at least 14 days prior to the scheduled date of the hearing, unless a hearing is required by law to be held at an earlier time. A notice of hearing shall be mailed by first class mail to the respondent at his or her last-known address on file with the department unless a different method of service is required by law. Any notice not returned by the post office for non-delivery shall be presumed received by the respondent.

Text of proposed rule and any required statements and analyses may be obtained from: Heidi A. Bazicki, Department of Motor Vehicles, Counsel's Office, Room 526, 6 Empire State Plaza, Albany, NY 12228, (518) 474-0871

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

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

Consensus Rule Making Determination

Hearings held by the Division of Vehicle Safety require a notice sent by certified mail, whereas other Department of Motor Vehicles (DMV) hearings only require notice by first class mail. The current regulation is written in a way that could be confusing, since the reference to "Vehicle Safety" could be interpreted as a generic term, and not a specific Division within DMV. This amendment clarifies the intent of the regulation because this proposal merely clarifies the original intent of the regulation.

Job Impact Statement

A Job Impact Statement is not submitted with this statement because it will not have an adverse impact on job creation or development in New York State.

Public Service Commission

NOTICE OF ADOPTION

Cancellation of Amendments to PSC No. 1—Gas

I.D. No. PSC-35-08-00017-A

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

Action taken: On April 21, 2009, the PSC adopted an order approving KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery - LI's (KEDLI) request to cancel the amendments to PSC No. 1—Gas.

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

Subject: Cancellation of amendments to PSC No. 1—Gas.

Purpose: To approve the cancellation of amendments to PSC No. 1—Gas.

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery - LI's (KEDLI) request to cancel the amendments to PSC No. 1 - Gas, to eliminate the provision of the "two-strike" rule from the Company's non-firm tariffs and to revise language related to the maximum size limitations for new gas service under Non-Residential and Multiple Dwelling Services.

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

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

Assessment of Public Comment

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

(08-G-0918SA1)

NOTICE OF ADOPTION

Cancellation of Amendments to PSC No. 12—Gas

I.D. No. PSC-35-08-00018-A

Filing Date: 2009-04-21

Effective Date: 2009-04-21

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

Action taken: On April 21, 2009, the PSC adopted an order approving The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery - NY's (KEDNY) request to cancel the amendments to PSC No. 12—Gas.

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

Subject: Cancellation of amendments to PSC No. 12—Gas.

Purpose: To approve the cancellation of amendments to PSC No. 12—Gas.

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery - NY's (KEDNY) request to cancel the amendments to PSC No. 12 - Gas, to eliminate the provision of the "two-strike" rule from the Company's non-firm tariffs and to revise language related to the maximum size limitations for new gas service under Non-Residential and Multiple Dwelling Services.

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

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

Assessment of Public Comment

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

(08-G-0919SA1)

NOTICE OF ADOPTION

Dissolution of Davenport Water Company and Filing of Certificate of Dissolution with the Department of State

I.D. No. PSC-04-09-00009-A

Filing Date: 2009-04-21

Effective Date: 2009-04-21

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

Action taken: On 4/21/09, the PSC adopted an order approving Davenport Water Company's petition for the dissolution of the company and authorization to file a Certificate of Dissolution with the Department of State.

Statutory authority: Public Service Law, section 108

Subject: Dissolution of Davenport Water Company and filing of Certificate of Dissolution with the Department of State.

Purpose: To approve the dissolution of Davenport Water Company and to file a Certificate of Dissolution with the Department of State.

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving Davenport Water Company's petition for the dissolution of the company and authorization to file a Certificate of Dissolution with the Department of State.

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

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

Assessment of Public Comment

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

(08-W-0317SA2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Con Edison's Report on 2008 Performance Under Electric Service Reliability Performance Mechanism

I.D. No. PSC-18-09-00010-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 (Commission) is considering whether Consolidated Edison Company of New York, Inc.'s (Con Edison) met its 2008 performance standards under the Electric Service Reliability Performance Mechanism.

Statutory authority: Public Service Law, sections 65 and 66

Subject: Con Edison's Report on 2008 Performance under Electric Service Reliability Performance Mechanism.

Purpose: To consider whether Con Edison has met its performance standards as prescribed by the Commission in Con Edison's rate plan.

Substance of proposed rule: The Public Service Commission (Commission) is considering Consolidated Edison Company of New York, Inc.'s (Con Edison or the company) Report on 2008 Performance under Electric Service Reliability Performance Mechanism (2008 RPM Report). Specifically, the Commission will consider whether Con Edison has met all of the required performance standards set forth in the company's current Rate Plan. Con Edison has stated that a revenue adjustment of $5 million is applicable for failure to meet threshold standards for interruption duration for its network system. The company states that it has met all other threshold targets, including targets for the interruption duration for its radial system, interruption frequency for its radial system, interruption frequency for its network system, major outages, reporting rate of its remote monitoring system, pole repairs, shunt removal, no current streetlight repairs, and over duty circuit breaker replacement.

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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

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

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

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

(07-E-0523SP6)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Interconnection of the Networks Between Verizon and 321 Communications, Inc. for Local Exchange Service and Exchange Access

I.D. No. PSC-18-09-00011-P

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

Proposed Action: The PSC is considering whether to approve or reject a proposal filed by Verizon New York Inc. for approval of an Interconnection Agreement with 321 Communications, Inc. executed on March 4, 2009.

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

Subject: Interconnection of the networks between Verizon and 321 Communications, Inc. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Verizon and 321 Communications, Inc.

Substance of proposed rule: Verizon New York Inc. and 321 Communications, Inc. have reached a negotiated agreement whereby Verizon New York Inc. and 321 Communications, Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their network lasting until March 3, 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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

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

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

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

(09-00406SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for Rehearing of Order Approving the Submetering of Electricity

I.D. No. PSC-18-09-00012-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 whether to grant, deny or modify, in whole or part, the petition for rehearing filed by Frank Signore concerning Commission Order issued 2-23-09 in Case 08-E-0389.

Statutory authority: Public Service Law, sections 2, 4(1), 22, 23, 30, 37, 38, 39, 43, 44, 51, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for rehearing of Order approving the submetering of electricity.

Purpose: To consider the request of Frank Signore to rehear petition to submeter electricity at One City Place in White Plains, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition for rehearing filed by Public Utility Law Project of New York, Inc. on behalf of Mr. Frank Signore, concerning the Commission Order in Case 08-E-0389 issued February 23, 2009 approving the submetering plan in the petition filed by Riverstone Residential NE, LLC to submeter electricity at One City Place, in White Plains, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(08-E-0389SP2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-18-09-00013-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Living Opportunities of DePaul to submeter electricity at East Main Street located in Batavia, New York.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Living Opportunities of DePaul to submeter electricity at E. Main St. located in Batavia, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Living Opportunities of DePaul, to submeter electricity at Living Opportunities of DePaul, DePaul Batavia Community Residence, at East Main Street in Batavia, New York, located in the territory of National Grid.

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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn__brilling@dps.state.ny.us

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

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

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

(09-E-0306SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Electric Utility Projects That May Qualify for Partial Funding Under the Federal American Recovery and Reinvestment Act of 2009

I.D. No. PSC-18-09-00014-P

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

Proposed Action: The Commission is considering whether to approve, reject or modify, in whole or in part, the filings of several electric utilities seeking recovery of potential costs associated with utility projects that may qualify for partial federal funding.

Statutory authority: Public Service Law, sections 4, 5, 6, 65 and 66

Subject: Electric utility projects that may qualify for partial funding under the federal American Recovery and Reinvestment Act of 2009.

Purpose: To determine the extent of costs associated with electric utility projects that may be recovered from ratepayers.

Substance of proposed rule: The Public Service Commission (Commission) is considering whether to accept, reject or modify, in whole or in part, the filings of Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., Niagara Mohawk Power Corporation d/b/a National Grid, Central Hudson Gas and Electric Corporation, New York State Electric and Gas Corporation, Rochester Gas and Electric Corporation, seeking Commission approval of recovery of certain costs associated with utility projects that may be eligible for a grant (covering up to 50 percent of the project costs) from the United States Department of Energy (DOE) for programs that are funded by the American Recovery and Reinvestment Act of 2009. Among the issues to be considered are the cost and benefits associated with each proposed utility project, the proposed project's impact on the reliability of New York's electric system, and the likelihood that the utility may receive a grant from DOE under programs. The Commission may also consider other matters related to the submission of utility project filings.

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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(09-E-0310SP2)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-18-09-00015-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by MP Liberty, LLC to submeter electricity at 200 North End Avenue, in New York, New York, a/k/a Liberty Luxe.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of MP Liberty, LLC to submeter electricity at 200 North End Avenue in New York, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by MP Liberty LLC, to submeter electricity at property known as Liberty Luxe at 200 North End Avenue in New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(09-E-0332SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-18-09-00016-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by MP Freedom, LLC to submeter electricity at 300 North End Avenue, in New York, New York, a/k/a Liberty Green.

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

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of MP Freedom, LLC to submeter electricity at 300 North End Avenue in NY, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by MP Freedom LLC, to submeter electricity at property known as Liberty Green at 300 North End Avenue in New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(09-E-0333SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Approval of an Arrangement for Attachment of Wireless Antennas to the Utility's Transmission Facilities in the City of Yonkers

I.D. No. PSC-18-09-00017-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 the petition of Consolidated Edison Company of New York, Inc. and Omnipoint Communications Inc. d/b/a T-Mobile for approval of an existing wireless attachment to transmission facilities in the City of Yonkers.

Statutory authority: Public Service Law, section 70

Subject: Approval of an arrangement for attachment of wireless antennas to the utility's transmission facilities in the City of Yonkers.

Purpose: To approve, reject or modify the petition for the existing wireless antenna attachment to the utility's transmission tower.

Substance of proposed rule: On April 14, 2004, in Case 02-M-1288, the Commission approved a generic proceeding for Consolidated Edison Company of New York, Inc. (Con Edison) allowing the utility to lease space on its electric transmission facilities for wireless communication equipment. As part of that Order, the Commission required Con Edison to submit applications for all wireless attachment agreements that predated the generic proceeding.

After requesting and receiving several delays, Con Edison has begun the process of submitting applications for preexisting attachments. On February 17, 2009, Con Edison filed a petition with Omnipoint Communications Inc. (d/b/a T-Mobile) for approval of an existing wireless attachment in the City of Yonkers, County of Westchester.

The petition includes the elements required by the approved generic proceeding: the financial terms of the agreement, a structural analysis of the tower and attachment, and copies of all required local permits and approvals. The Commission will use this information to determine if the attachment agreement is in the public interest and should be allowed to continue.

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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(09-M-0147SP1)

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-18-09-00018-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 Niles (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 Niles 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 Niles (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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(09-V-0324SP1)

Department of Taxation and Finance

EMERGENCY/PROPOSED
RULE MAKING
NO HEARING(S) SCHEDULED

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

I.D. No. TAF-18-09-00002-EP

Filing No. 377

Filing Date: 2009-04-15

Effective Date: 2009-04-15

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

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

Statutory authority: Tax Law, sections 171, subdivision First; 671(a)(1); 697(a); 1329(a); and 1332(a); Codes and Ordinances of the City of Yonkers, sections 15-105 and 15-108(a); L. 2009, ch. 57, part W-1, section 6 and part Z-1, section 5

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

Specific reasons underlying the finding of necessity: As part of the Budget legislation enacted on April 7, 2009, Part Z-1 of Chapter 57 of the Laws of 2009 increased the rate of personal income tax and the tax table benefit recapture for certain taxpayers. Part W-1 of Chapter 57 further limits the use of itemized deductions for certain taxpayers. Section 5 of Part Z-1 requires the Commissioner to adjust the withholding tables and methods accordingly and that a rule to implement the change for 2009 be adopted and effective as soon as practicable. Section 5 specifically authorizes that the rule be adopted by emergency action. Section 6 of Part W-1 also specifically authorizes emergency action to adopt the withholding table rule relating to the itemized deduction limitation. This rule is being adopted on an emergency basis in accordance with the requirement that a rule be adopted and effective as soon as practicable and consistent with the explicit legislative authorization to adopt the rule on an emergency basis.

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

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

Substance of emergency/proposed rule (Full text is posted at the following State website: www.tax.state.ny.us): Section 671(a)(1) and section 1329 of the Tax Law mandate that employers withhold from employee wages amounts that are substantially equivalent to the amount of New York State personal income tax and City of Yonkers income tax surcharge reasonably estimated to be due for the taxable year. The provisions authorize the Commissioner of Taxation and Finance to provide for withholding of these taxes through regulations promulgated by the Commissioner.

This rule amends Appendixes 10 and 10-A of Title 20 NYCRR, replacing pages T-13, T-14, and T-14-A, Method II: Exact Calculation Method (Single, Married, and Examples, respectively) of Appendix 10, New York State Income Tax Withholding Tables and Other Methods, and pages T-57, T-58, and T-58-A, Method II: Exact Calculation Method (Single, Married, and Examples, respectively) of

Appendix 10-A, City of Yonkers Income Tax Surcharge on Residents and Earnings Tax on Nonresidents Withholding Tables and Other Methods of such Title to provide new New York State and City of Yonkers withholding tables and other methods. The amendments to the Appendixes reflect the limitation of itemized deductions in Part W-1 of Chapter 57 of the Laws of 2009, the revision of the New York State and City of Yonkers tax tables and tax table benefit recapture in Part Z-1 of such Chapter, and the requirement in the new law that the withholding rates for the remainder of tax year 2009 reflect the full amount of tax liability for tax year 2009 as accurately as practicable. This rule also reflects the increases of the New York State and City of Yonkers supplemental withholding tax rates to be applied to supplemental wage payments.

The rule applies to wages and other compensation subject to withholding paid on or after May 1, 2009.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire July 13, 2009.

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

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations as are necessary to enforce the personal income tax; section 1329(a) of the Tax Law and section 15-105 of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be withheld in the same manner and form as that required by sections 671 through 678 of the Tax Law, except where noted; section 1332(a) of the Tax Law and section 15-108(a) of the Codes and Ordinances of the City of Yonkers provide that the City of Yonkers Income Tax Surcharge shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. Section 5 of Part Z-1 of Chapter 57 of the Laws of 2009 requires the Commissioner to adopt rules to implement changes in the withholding tax tables and methods relating to the personal income tax increases made by Part Z-1. Section 6 of Part W-1 authorizes the Commissioner to adopt rules to adjust the withholding tables in accordance with limitations on itemized deductions contained in Part W-1.

2. Legislative objectives: The proposal amends the appendixes related to the exact calculation method (Method II) for New York State income tax withholding purposes and for City of Yonkers income tax surcharge purposes to adjust the withholding tables and methods as required by Chapter 57 of the Laws of 2009. Because the income tax changes made by Chapter 57 relate to taxpayers with incomes over certain amounts, the wage bracket table method (Method I) tables are not affected. Amendments to provisions regarding withholding on supplemental wages are also made to reflect the new rate of withholding. The amendments implement revised New York State and City of Yonkers withholding tables and other methods applicable to wages and other compensation paid on or after May 1, 2009. Specifically, the amendments reflect the limitation of itemized deductions in Part W-1 of Chapter 57 and the revision of the tax tables and tax table benefit recapture in Part Z-1 of Chapter 57. As required by the new law, the withholding rates for the remainder of tax year 2009 reflect the full amount of tax liability for tax year 2009 as accurately as practicable.

3. Needs and benefits: This rule sets forth amendments to the New York State and City of Yonkers withholding tables and other methods, applicable to wages and other compensation paid on or after May 1, 2009, reflecting the limitation of itemized deductions and the revision of the tax tables and the tax table benefit recapture contained in Part W-1 and Part Z-1, respectively, of Chapter 57 of the Laws of 2009. This rule benefits taxpayers by providing New York State and City of Yonkers withholding rates that more accurately reflect the current income tax rates. If this rule is not promulgated, the use of the existing withholding tables would cause some under-withholding for some taxpayers.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law and the Codes and Ordinances of the City of Yonkers already mandate withholding in amounts that are substantially equivalent to the amounts of New York State and City of Yonkers personal income tax on residents reasonably estimated to be due for the taxable year, and (ii) this rule conforms Appendixes 10 and 10-A of Title 20 NYCRR to the rates of the New York State income tax and the City of Yonkers income tax surcharge on residents, as required by Chapter 57 of the Laws of 2009, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to make amendments to the New York State Personal Income Tax Regulations under Article 22 of the Tax Law, and to Appendixes 10 and 10-A, arises due to the statutory changes in the itemized deductions and rates of New York State personal income tax, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Tax Policy Analysis, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

5. Local government mandates: Local governments, as employers, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. Paperwork: This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers will be notified of the amendments to the tables and other methods and directed to the Department's website for the updated tables and other methods.

7. Duplication: This rule does not duplicate any other requirements.

8. Alternatives: Since section 671(a) of the Tax Law and Chapter 57 of the Laws of 2009 require that withholding tables and other methods be promulgated, there are no viable alternatives to providing such tables and other methods.

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

10. Compliance schedule: The required information will be made available to affected employers in sufficient time to implement the revised New York State and City of Yonkers withholding tables and other methods for wages and other compensation paid on or after May 1, 2009.

Regulatory Flexibility Analysis

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, that are currently subject to the New York State and City of Yonkers withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the New York State and City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised New York State and City of Yonkers withholding tables and other methods. The promulgation of this rule will not require small business or local governments to submit any new information, forms, or paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of such services.

4. Compliance costs: Small businesses and local governments are already subject to the New York State and City of Yonkers withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

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

6. Minimizing adverse impact: Section 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local government with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of the New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Every employer, including any public or private employer located in a rural area as defined in section 102(13) of the State Administrative Procedure Act, that is currently subject to the New York State and City of Yonkers withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the New York State and City of Yonkers withholding requirements to continue to deduct and withhold amounts from employees using the revised withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms, or other paperwork.

Further, many employers currently utilize bookkeepers, accountants, and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the New York State and City of Yonkers withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Section 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1332 of the Tax Law mandates, in part, that the City of Yonkers withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. There are no provisions in the Tax Law that exclude employers located in rural areas from the withholding requirements.

5. Rural area participation: The following organizations are being given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it could have no impact on jobs and employment opportunities. The purpose of the rule is to provide New York State and City of Yonkers withholding tables and other methods, applicable for compensation paid on or after May 1, 2009, which reflect a limitation on itemized deductions and the revision of the tax tables and the tax table benefit recapture enacted pursuant to Chapter 57 of the Laws of 2009. The rule also reflects the increases of the New York State and City of Yonkers supplemental withholding rates applied to supplemental wage payment.

NOTICE OF ADOPTION

Consumer Bill of Rights Regarding Tax Preparers

I.D. No. TAF-07-09-00011-A
Filing No. 401
Filing Date: 2009-04-21
Effective Date: 2009-05-06

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

Action taken: Addition of Part 2398 to Title 20 NYCRR.

Statutory authority: General Business Law, section 372

Subject: Consumer Bill of Rights Regarding Tax Preparers.

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

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

PART 2398

CONSUMER BILL OF RIGHTS REGARDING TAX PREPARERS

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

Section 2398.1 Definitions and Applicability.

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

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

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

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

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

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

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

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

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

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

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

Section 2398.2 Consumer Bill of Rights.

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

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

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

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

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

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

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

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

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

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

Section 2398.3 Dissemination.

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

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

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2398.2(b).

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

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

The changes to the last published rule merely track legislative changes made by Chapter 59 of the Laws of 2009, which was enacted April 7, 2009. The changes do not affect the statements contained in the Regulatory Impact Statement or the Statement in Lieu of a Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

Written comments on proposal TAF-07-09-00011-P, adding a new Part 2398 - Consumer Bill of Rights Regarding Tax Preparers, were received from Senator John L. Sampson and Assemblyman Michael N. Gianaris as Co-Chairs of the Administrative Regulations Review Commission.

The comments indicate that, at the time of the writing, legislation was pending to amend General Business Law section 372. The legislation has since been enacted as Chapter 59 of the Laws of 2009. The writers advise the Department to incorporate the provisions of the amended section 372 into the rule and note that this would involve minor language adjustments such as adding a reference to the Consumer Protection Board website in section 2398.2(b) and including the term ''refund anticipation check'' in the list of terminology requiring explanation in section 2398.2(b)(2). It was also noted that the term ''refund'' appearing in the original statute was inadvertently omitted. The writers note that ''[t]hese changes would ensure that the adopted rule tracks the statutory language as revised'' and ''would therefore not seem to rise to a substantive level, but could be included in a notice of adoption as nonsubstantial revisions.''

The Department agrees with the comments and has made the suggested changes.

NOTICE OF ADOPTION

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

I.D. No. TAF-07-09-00012-A

Filing No. 402

Filing Date: 2009-04-21

Effective Date: 2009-05-06

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

Action taken: Amendment of section 60.1 of Title 20 NYCRR.

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

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

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

Text or summary was published in the February 18, 2009 issue of the Register, I.D. No. TAF-07-09-00012-P.

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

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

Revised Regulatory Impact Statement

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

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

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

4. Costs:

(a) Costs to regulated persons: The regulated parties affected by this rule are approximately 750 out-of-state direct wine shippers and 185 licensed New York State farm wineries who are currently filing Form MT-40, ''Return of Tax on Wines, Liquors, Alcohol, and Distilled or Rectified Spirits,'' each month. The regulated parties may elect to file an annual wine tax return. Form MT-40 will be modified to accommodate both monthly and annual filing. The administrative cost and burden of tax return filing will be reduced. However, to make the election to file an annual return, the regulated party will need to file Form MT-38, ''Application For Annual Beer Tax Return Filing Status.'' Form MT-38 is a half-page form, currently used by certain beer distributors to elect to file annual beer tax returns. Form MT-38 will be modified to accommodate certain farm wineries, micro-wineries, and out-of-state direct wine shippers. The cost to the regulated parties choosing to file annually to fill out this ap-

plication form is miniscule. Overall, there is no measurable cost impact resulting from adopting this rule, which will benefit the regulated parties.

(b) Costs to the State and its local governments including this agency: It is estimated that implementation of this regulation will cause an estimated minimal State revenue loss, based on a one time spin-down in revenues, of approximately $70,000 in State fiscal year 2009-2010. It is further estimated that the implementation of this regulation will cause an estimated minimal State revenue loss of approximately $5,000 annually. The above estimates have been revised based on the increase in the rate of tax for wine, effective May 1, 2009, pursuant to Part X-1 of Chapter 57 of the Laws of 2009. It is estimated that annual, rather than monthly, processing of these returns should result in a slight reduction of this agency's administrative costs. This rule will have no cost in terms of revenue impact on local governments.

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

In addition, the estimated $5,000 annual State revenue loss is attributable to a minimal ''cash flow'' loss (i.e. interest) as ABT revenues which would have come in monthly under current rules will be delayed until January of the subsequent year under the rule. The estimate uses average quarterly collections for the 2007 calendar year for New York State farm wineries, micro-wineries, and out-of-state direct wine shippers and estimates the State revenue foregone in delaying the tax receipts. A two-month Jumbo CD with an annualized interest rate of 1.5% was used to project the estimated investment revenue lost to the State due to the delay in access to the tax receipts. It is projected that similar minimal ''cash flow'' losses (i.e. interest) will continue in subsequent years as ABT revenues are received on an annual basis rather than on a monthly basis. Estimates of foregone future interest will be based on market interest rates at the time.

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

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

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

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

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

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

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

Assessment of Public Comment

Written comments were received from the New York State Farm Bureau (Farm Bureau), as well as several New York State farm wineries regarding proposal TAF-07-09-00012-P, which amends section 60.1 of Title 20 NYCRR.

The comments support adoption of the proposed rule, which allows annual filing for farm wineries. The comments concur that current monthly filing requirements of alcoholic beverage tax returns is burdensome with respect to remitting minimal amounts of tax owed and that annual filing would allow them to reduce administrative expenses. The Farm Bureau further points out that this rule will provide significant regulatory relief to small businesses without reducing overall revenues to New York State. They also note that only winery businesses with limited tax liabilities are allowed the option of annual filing, subject to Department approval.

Additionally, two of the parties' comments alluded to the benefits of electronic filing of alcoholic beverage tax returns. The proposed rule does not address electronic filing. While the department has moved toward electronic filing of various returns, it does not anticipate that electronic filing of this return will be immediately available. No changes were made to the proposal as a result of the comments received.