

# RULE MAKING ACTIVITIES

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

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

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

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## Office of Alcoholism and Substance Abuse Services

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### ERRATUM

A Notice of Revised Rule Making, I.D. No. ASA-49-08-00009-RP, pertaining to Detoxification of Substances and Stabilization Services, published in the September 9, 2009 issue of the *State Register* contained an incorrect action taken. The correct action taken is: Amendment of Part 816 of Title 14 NYCRR.

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## Office of Children and Family Services

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### EMERGENCY RULE MAKING

#### Mandatory Disqualification of Foster and Adoptive Parents Based on Criminal History

**I.D. No.** CFS-39-09-00009-E  
**Filing No.** 1083  
**Filing Date:** 2009-09-15  
**Effective Date:** 2009-09-15

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

**Action taken:** Amendment of sections 421.27 and 443.8 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 378-a(2) as amended by L. 2008, ch. 623 and L. 1997, ch. 436

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

**Specific reasons underlying the finding of necessity:** The regulations must be filed on an emergency basis to protect the health and safety of children in foster boarding homes and adoptive placements. The regulations reflect newly enacted state statutory standards.

**Subject:** Mandatory disqualification of foster and adoptive parents based on criminal history.

**Purpose:** The regulations implement Chapter 623 of the Laws of 2008 relating to criminal history checks of foster and adoptive parents.

**Text of emergency rule:** Paragraph (1) of subdivision (d) of section 421.27 is amended to read as follows:

(d)(1) Except [as authorized herein and] as set forth in subdivision (h) of this section, the authorized agency must deny an application to be an approved adoptive parent or revoke the approval of an approved adoptive parent when a criminal history record of the prospective or approved adoptive parent reveals a conviction for:

(i) a felony conviction at any time involving;

(a) child abuse or neglect;

(b) spousal abuse;

(c) a crime against a child, including child pornography;

(d) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery[, unless the prospective adoptive parent or approved adoptive parent demonstrates that:

(1) such denial or revocation will create an unreasonable risk of harm to the physical or mental health of the child; and

(2) approval of the application or continuing approval will not place the child's safety in jeopardy and will be in the best interests of the child]; or

(ii) a felony conviction within five years for physical assault, battery, or a drug-related offense [, unless the prospective adoptive parent or approved adoptive parent demonstrates that:

(a) such denial will create an unreasonable risk of harm to the physical or mental health of the child; and

(b) approval of the applicant will not place the child's safety in jeopardy and will be in the best interests of the child].

*Notwithstanding any other provision to the contrary, with regard to an adoptive parent fully approved prior to October 1, 2008, the provisions of this paragraph only apply to mandatory disqualifying convictions that occur on or after October 1, 2008.*

Subdivision (k) of section 421.27 is repealed.

Paragraph (1) of subdivision (e) of section 443.8 is amended to read as follows:

(e)(1) Except as [authorized herein and as] set forth in this section, the authorized agency must deny an application for certification or approval as a certified or approved foster parent or deny an application for renewal of the certification or approval of an existing foster parent *submitted on or after October 1, 2008* or revoke the certification or approval of an existing foster parent when a criminal history record of the prospective or existing foster parent reveals a conviction for:

(1) a felony conviction at any time involving:

(a) child abuse or neglect;

(b) spousal abuse;

(c) a crime against a child, including child pornography; or

(d) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery[; unless the applicant or approval or certification as a foster parent or the certified or approved foster parent demonstrates that;

(1) such denial or revocation will create an unreasonable risk of harm to the physical or mental health of the child; and

(2) continued certification, approval or renewal will not place

the child's safety in jeopardy and will be in the best interests of the child]; or

(ii) a felony conviction within the past five years for physical assault, battery, or a drug-related offense[; unless the applicant for certification or approval as a foster parent or the certified or approved foster parent demonstrates that:

(a) such denial or revocation will create an unreasonable risk of harm to the physical or mental health of the child; and

(b) continued certification, approval or renewal will not place the child's safety in jeopardy and will be in the best interests of the child].

*Notwithstanding any other provision to the contrary, with regard to a foster parent fully certified or approved prior to October 1, 2008, the provisions of this paragraph only apply to mandatory disqualifying convictions that occur on or after October 1, 2008.*

Subdivision (k) of section 443.8 is repealed.

**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 December 13, 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, NY 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.

Section 378-a(2) of the SSL requires criminal history record reviews of prospective foster and adoptive parents, as well as other persons over the age of 18 who reside in the home of such applicants.

Chapter 623 of the laws of 2008 amended the criminal history record standards set forth in section 378-a(2) of the SSL. Section 5 of Chapter 623 of the Laws of 2008 authorizes OCFS to promulgate rules and regulations on an emergency basis for the purpose of implementing the provision of the Chapter.

##### 2. Legislative objectives:

The regulations implement Chapter 623 of the Laws of 2008 relating to criminal history record reviews of applicants for certification or approval as foster or adoptive parents. The regulations reflect amendments to federal and state statutory standards relating to situations where such applicant has been convicted of a mandatory disqualifying crime. The regulations eliminate the category of presumptive disqualifying crimes and replace that category with the category of mandatory disqualifying crimes for applicants for certification or approval as foster or adoptive parents.

Chapter 623 of the Laws of 2008 and the regulations implement changes in federal statutes that had previously allowed states to opt out of federal criminal history record review requirements for prospective foster or adoptive parents and that required the application of mandatory disqualification for certain categories of felony convictions. The federal Adam Walsh Child Protection and Safety Act of 2006 (P.L.109-248) eliminated effective October 1, 2008 the ability of states to opt out of federal criminal history review standards and required states to comply in order to receive federal Title IV-E payments for foster care or adoption assistance.

##### 3. Needs and benefits:

The regulations are necessary for OCFS to conform to federal and state statutory changes to criminal history record review standards. The regulations reflect the federal requirement set forth in the federal Adam Walsh Child Protection and Safety Act of 2006 that states must adopt federal mandatory disqualification standards for prospective foster and adoptive parents who are convicted of certain categories of felonies. Compliance with the federal requirement is a condition for New York State to have a compliant Title IV-E State Plan which is a condition for New York State to receive federal funding for foster care and adoption assistance.

The regulations are also necessary to reflect amendments to section 378-a(2) of the SSL that eliminated the category of presumptive disqualifying crimes. The regulations reflect the mandatory disqualification of an applicant to be certified or approved as a foster or adoptive parent when such applicant has been convicted of a certain category of felony.

The regulations will not impact persons who were fully certified or approved as a foster or adoptive parent prior to October 1, 2008 for convictions that occurred prior to that date.

##### 4. Costs:

The regulations are necessary to comply with federal requirements that states perform background checks and review the criminal history of prospective foster and adoptive parents as a prerequisite for continuation of federal funding under Title IV-E of the Social Security Act effective

October 1, 2008. New York State must implement provisions set forth in these regulations by October 1, 2008, or face significant losses of earned federal revenue. The enactment of Chapter 623 of the Laws of 2008 and these regulations will preserve approximately \$600 million in federal Title IV-E funding earned on an annual basis.

##### 5. Local government mandates:

The regulations adopt the standards that were in place in 1999 with the enactment of Chapter 7 of the Laws of 1999, but were amended by Chapter 145 of the Laws of 2000 that created the criteria of presumptive disqualifying crimes.

Social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe have been required to perform criminal history record reviews since 1999 in regard to New York State checks through the New York State Division of Criminal Justice Services and since 2007 in regard to a national criminal history record check through the Federal Bureau of Investigation. The regulations do not expand who must have a criminal history record check in relation to foster care or adoption.

##### 6. Paperwork:

Authorized agencies are currently required to document their criminal history record review activities. The regulations do not impose additional paperwork requirements on social services districts or voluntary authorized agencies.

##### 7. Duplication:

The regulations do not duplicate other State requirements.

##### 8. Alternatives:

The proposed regulations are required to implement the state law, Chapter 623 of the Laws of 2008 and the federal Adam Walsh Child Protection and Safety Act of 2006.

##### 9. Federal standards:

The federal Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248) eliminated the ability of states to opt out of the federal criminal history record review requirements set forth in section 471(a)(20) of the Social Security Act for prospective foster and adoptive parents. New York State had opted out of the federal requirements in 2000 through Chapter 145 of the Laws of 2000 that created the category of presumptive disqualifying crimes. Effective October 1, 2008, for a state to have a compliant Title IV-E State Plan, the state must apply the federal criminal history record review standards for applicants for certification or approval as foster or adoptive parents. Those standards prohibit the final certification or approval of a prospective foster or adoptive parent who has a felony conviction at any time for abuse or neglect, spousal abuse, or a crime against a child or for a crime involving violence. In addition, the federal statutes prohibit final certification or approval of a prospective foster or adoptive parent who has been convicted within 5 years of such application for assault or a drug related offense.

##### 10. Compliance schedule:

Chapter 623 of the Laws of 2008 provides for an October 1, 2008 effective date of the standards set forth in the regulations. OCFS is developing the necessary revised forms and instructions to authorized agencies to implement the revised standards.

#### **Regulatory Flexibility Analysis**

##### 1. Effect on small business and local governments:

The regulations will affect social services districts, Indian tribes with an agreement with the State of New York to provide foster care and adoption services and voluntary authorized agencies that certify or approve prospective foster and adoptive parents. There are 58 social services districts and approximately 160 voluntary authorized agencies. The St. Regis Mohawk Tribe has an agreement with the State of New York to provide foster care and adoption services.

##### 2. Reporting, recordkeeping and compliance requirements:

The regulations are necessary to comply with federal and state statutory requirements relating to criminal history record reviews of persons applying for certification or approval as foster or adoptive parents. The regulations reflect the enactment by Chapter 623 of the Laws of 2008 regarding mandatory disqualifying crimes for applicants for certification or approval as foster or adoptive parents and the elimination of the category of presumptive disqualifying crimes for such applicants. The adoption of mandatory disqualifying crimes is required by the federal Adam Walsh Child Protection and Safety Act of 2006 in order to enable New York State to continue to receive federal funding for foster care and adoption assistance pursuant to Title IV-E of the Social Security Act. The 2006 federal Act requires implementation of this provision effective October 1, 2008.

Social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe will continue to process requests for criminal history record reviews as originally mandated by Chapter 7 of the Laws of 1999. The regulations reflect modifications to the standards for the certification or approval of prospective foster or adoptive parents when an applicant has been convicted of a mandatory disqualifying crime.

The regulations will not impose additional recordkeeping or reporting

requirements on agencies. The regulations will eliminate a notification that is presently required in regard to presumptive disqualifying crimes.

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 federal requirements that states perform background checks and review the criminal history of prospective foster and adoptive parents as a prerequisite for continuation of federal funding under Title IV-E of the Social Security Act effective October 1, 2008. New York must implement the provisions set forth in these regulations by October 1, 2008, or face significant losses of earned federal revenue. The enactment of Chapter 623 of the Laws of 2008 and these regulations will preserve approximately \$600 million in federal Title IV-E funding earned on an annual basis.

5. Economic and technological feasibility:

The social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe affected by the regulations have the economic and technological ability to comply with the regulations. The regulations do not expand the categories of persons for whom a criminal history record review must be completed. OCFS is making modifications to the statewide automated child welfare information system, CONNECTIONS and to its criminal history information system, CHRS to support and implement the regulations.

6. Minimizing adverse impact:

The regulations reflect specific amendments to state statute enacted by Chapter 623 of the Laws of 2008 and amendments to federal standards as enacted by the Adam Walsh Child Protection and Safety Act of 2006. The process for fingerprinting foster or adoptive parents and other persons over the age of 18 who reside in the home of the applicants has been the same since 1999 for in-state checks through the New York State Division of Criminal Justice Services and since 2007 for national checks through the Federal Bureau of Investigation. While the regulations will change the standards following the receipt of the result of the criminal history check, the regulations will not change the process for taking and reviewing of fingerprints. The regulations build on existing procedures.

7. Small business and local government participation:

OCFS advised social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe of the federal amendment to criminal history record checks in the federal Adam Walsh Child Protection and Safety Act of 2006 and the anticipated impact on New York State standards in an administrative directive (07-OCFS-ADM-01 State and National Criminal History Record Checks (for Foster /Adoptive Parents) issued on February 7, 2007. A reminder of the federal statutory change and related impact on New York State standards was sent to the same parties in an informational letter (08-OCFS-INF-07 Preparation for the Elimination of the "Out-Out" Provision for conducting Criminal History Record Checks) issued May 21, 2008. The federal statute was posted on the OCFS website and was discussed at a video conference held in October of 2006 at which agencies were invited to view and to ask questions. A tape of that conference is also available to all agencies that were not able to attend.

**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. The regulations will also affect the St. Regis Mohawk Tribe that has an agreement with the State of New York to provide foster care and adoption services and which services a rural community. In addition, there are approximately 100 voluntary authorized agencies that service rural communities that will be affected by the regulations.

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

The regulations are necessary to comply with federal and state statutory requirements relating to criminal history record reviews of persons applying for certification or approval as foster or adoptive parents. The regulations reflect the enactment by Chapter 623 of the Laws of 2008 regarding mandatory disqualifying crimes for applicants for certification or approval as foster or adoptive parents and the elimination of the category of presumptive disqualifying crimes for such applicants. The adoption of mandatory disqualifying crimes is required by the federal Adam Walsh Child Protection and Safety Act of 2006 in order to enable New York State to continue to receive federal funding for foster care and adoption assistance pursuant to Title IV-E of the Social Security Act. The federal 2006 Act requires implementation of this provision effective October 1, 2008.

Social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe will continue to process requests for criminal history record reviews as originally mandated by Chapter 7 of the Laws of 1999. The regulations reflect modifications to the standards for the certification or

approval of prospective foster or adoptive parents when an applicant has been convicted of a mandatory disqualifying crime.

The regulations will not impose additional recordkeeping or reporting requirements on agencies. The regulations will eliminate a notification that is presently required in regard to presumptive disqualifying crimes.

3. Costs:

The regulations are necessary to comply with federal requirements that states perform background checks and review the criminal history of prospective foster and adoptive parents as a prerequisite for continuation of federal funding under Title IV-E of the Social Security Act effective October 1, 2008. New York State must implement the provisions set forth in these regulations by October 1, 2008, or face significant losses of earned federal revenue. The enactment of Chapter 623 of the Laws of 2008 and these regulations will preserve approximately \$600 million in federal Title IV-E funding on an annual basis.

4. Minimizing adverse impact:

It is anticipated that the regulations will not have an adverse impacts on rural areas.

5. Rural area participation:

The Office of Children and Family Services (OCFS) advised social services districts, voluntary authorized agencies and the St. Regis Mohawk Tribe of the federal amendment to criminal history record checks by the Adam Walsh Child Protection and Safety Act of 2006 and the anticipated impact on New York State standards in an administrative directive (07-OCFS-ADM-01 State and National Criminal History Record Checks (for Foster/Adoptive Parents) issued on February 7, 2007. A reminder of the federal statutory change and related impact on New York State standards was sent to the same parties in an informational letter (08-OCF-INF-07 Preparation for the Elimination of the "Opt-Out" Provision for Conducting Criminal History Record Checks) issued on May 21, 2008. The federal statute was posted on the OCFS website and was discussed at a statewide video conference held in October of 2006 at which agencies were invited to view and to ask questions. A tape of the video conference is available for agencies not able to attend.

**Job Impact Statement**

A full job impact statement has not been prepared for the regulations which contain new requirements imposed by Chapter 623 of the Laws of 2008. The regulations will not have an impact on jobs and employment opportunities because they will not impact the number of staff authorized agencies must maintain to certify, approve or supervise foster or adoptive homes. The regulations impact persons who are not in an employment relationship with the agency.

## EMERGENCY RULE MAKING

### Child Care Market Rate and Stimulus Regulations

**I.D. No.** CFS-39-09-00012-E

**Filing No.** 1089

**Filing Date:** 2009-09-15

**Effective Date:** 2009-10-01

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

**Action taken:** Amendment of sections 404.5, 415.2 and 415.9 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 34(3)(f), 410 and title 5-C

**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 families and children receiving subsidized child care in New York State. First, these regulations address the expanded need for child care services by families affected by the extensive loss of jobs and employment opportunities as a result in the economic downturn of the State and national economy. With the simultaneous severe downturn of the credit, housing, job and stock markets and expected unusually slow recovery of each, OCFS expects the need for child care services for those battling the economic depression to only continue to grow for the foreseeable future. Further, without this action OCFS believes that the consequences for those battling the economic depression will only deepen, and only lead to an even slower recovery for the affected families and, as a result, the State economy.

OCFS also believes that by implementing these regulations, it will allow social services districts to meet some of the expanding need for child

care services by families imperiled by the economic depression, which will hopefully allow those families to maintain or gain much needed services, training or employment. To be effective, and in order to best serve the families in the State that need child care services, OCFS must act quickly and without delay. Any delay in action may only exacerbate the financial crisis facing many families that need child care services in the State. Faced with this stark consequence, OCFS decided it had to act on an emergency basis, to get the needed child care services to those in the affected communities as soon as possible.

Second, it is also necessary to adopt these regulations on an emergency basis because Federal statute, section 658E(c)(4)(A) of the Social Security Act, and federal regulation, 45 CFR 98.43(a), require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure equal access for eligible children. The market rates that are being replaced are based on a survey conducted in 2007 and as a result, continuing to maintain the existing rates could result in subsidized families losing equal access for eligible children to child care arrangements or being unable to find appropriate child care.

In addition, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The current State Plan in effect covers the period October 1, 2007 through September 30, 2009. The proposed State Plan for the period October 1, 2009 through September 30, 2011 has been submitted to the federal government for approval. The federal Administration for Children and Families has indicated that the New York State Child Care and Development Fund (CCDF) Plan cannot be approved unless child care market rates have been adjusted, based upon a market rate survey, and are effective on October 1, 2009. Unless new market rates become effective on that date, the State's ability to use federal funds under CCDF and to transfer Temporary Assistance to Needy Families funds into CCDF for child care subsidies will be jeopardized.

**Subject:** Child Care Market Rate and Stimulus Regulations.

**Purpose:** To revise the market rates and address the expanded need for child care services caused by the economic downturn.

**Text of emergency rule:** Subparagraphs (xviii) and (xix) of subparagraph (6) of paragraph (b) of section 404.5 of Title 18 are amended, and a new subparagraph (xx) is added to such paragraph, to read as follows:

(xviii) veterans' assistance payments made to or on behalf of certain Vietnam veterans' natural adult or minor children for any disability resulting from spina bifida suffered by such children; [and]

(xix) veterans' assistance payments made for covered birth defects to or on behalf of the adult or minor children of women Vietnam veterans in service in the Republic of Vietnam during the period beginning on February 28, 1961 and ending on May 7, 1975. Covered birth defects means any birth defect identified by the Veterans' Administration as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period on February 28, 1961 and ending on May 7, 1975, and that has resulted or may result in permanent physical or mental disability[.]; and

(xx) one-time \$250 payments made under the American Recovery and Reinvestment Act of 2009 to Social Security, Supplemental Security Income (SSI), Railroad Retirement Benefits and Veterans Disability Compensation or Pension Benefits recipients for 10 months from the date the payment was received, including the month payment was received.

A new subparagraph (c) of subparagraph (vii) of paragraph (3) of paragraph (a) of section 415.2 of Title 18 is added to read as follows:

(c) a program to train workers in an employment field that currently is or is likely to be in demand in the near future, if the caretaker documents that he or she is a dislocated worker and is currently registered in such a program, provided that child care services are only used for the portion of the day the caretaker is able to document is directly related to the caretaker engaging in such a program. For the purposes of this provision, a dislocated worker is any person who: has been terminated or laid off from employment; has received a notice of termination or layoff from employment that will occur within six months of such notice; or was self-employed but is unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters.

Subparagraph (1) of paragraph (j) of section 415.9 of Title 18 is amended and reads as follows:

(1) Effective [May 15, 2009] October 1, 2009, the following are the local market rates for each social services district set forth by the type of provider, the age of the child and the amount of time the child care services are provided per week.

Subparagraph (2) of paragraph (j) of section 415.9 of Title 18 is renumbered as subparagraph (3) and a new subparagraph (2) is added to read as follows:

(2) Upon the effective date of these regulations, there will be two

market rates for the legally-exempt family child care and in-home child care categories, a standard market rate and an enhanced market rate. The standard market rate for legally-exempt family child care and in-home child care categories will be 65 percent of the applicable registered family day care market rate. The enhanced market rate for legally-exempt family child care and in-home child care categories will be 70 percent of the applicable registered family day care market rate. The enhanced market rate will apply to those caregivers of legally-exempt family child care and in-home child care who have provided notice to, and have been verified by, the applicable legally-exempt caregiver enrollment agency or by the district for those portions of the district that are not covered by a legally-exempt caregiver enrollment agency, as having completed ten or more hours of training annually in the areas set forth in section 390-a(3)(b) of the social services law. A social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement. The standard market rate will apply to all other caregivers of legally-exempt family child care and in-home child care.

Re-numbered subparagraph (3) of paragraph (j) of section 415.9 of Title 18 is amended and reads as follows:

[(2)] (3) The market rates are established in five groupings of social services districts. [Except for districts noted as an exception in the market rate schedule,] [t]he rates established for a group apply to all districts in the designated group. The district groupings are as follows:

**CHILD CARE MARKET RATES**

Market rates are established in five groupings of social services districts as follows:

- Group 1: Nassau, Putnam, Rockland, Suffolk, Westchester
- Group 2: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins, Warren
- Group 3: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, Yates
- Group 4: Albany, Dutchess, Orange, Ulster
- Group 5: Bronx, Kings, New York, Queens, Richmond

**GROUP 1 COUNTIES:**

Nassau, Putnam, Rockland, Suffolk, and Westchester  
DAY CARE CENTER

**AGE OF CHILD**

	Under 1½	1½-2	3-5	6-12
WEEKLY	\$330	\$304	\$265	\$265
DAILY	\$59	\$52	\$42	\$40
PART-DAY	\$39	\$35	\$28	\$27
HOURLY	\$9.32	\$9.00	\$8.56	\$9.16

**REGISTERED FAMILY DAY CARE**

**AGE OF CHILD**

	Under 1½	1½-2	3-5	6-12
WEEKLY	\$270	\$263	\$250	\$250
DAILY	\$48	\$41	\$40	\$37
PART-DAY	\$32	\$27	\$27	\$25
HOURLY	\$10.00	\$10.00	\$9.00	\$9.00

**GROUP FAMILY DAY CARE**

**AGE OF CHILD**

	Under 1½	1½-2	3-5	6-12
WEEKLY	\$275	\$275	\$265	\$257
DAILY	\$50	\$50	\$50	\$50

PART-DAY	\$33	\$33	\$33	\$33
HOURLY	\$9.88	\$9.13	\$9.13	\$8.00

(Group 1 Counties)

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$265
DAILY	\$0	\$0	\$0	\$40
PART-DAY	\$0	\$0	\$0	\$27
HOURLY	\$0	\$0	\$0	\$9.16

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$176	\$171	\$163	\$163
DAILY	\$31	\$27	\$26	\$24
PART-DAY	\$21	\$18	\$17	\$16
HOURLY	\$6.50	\$6.50	\$5.85	\$5.85

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$189	\$184	\$175	\$175
DAILY	\$34	\$29	\$28	\$26
PART-DAY	\$23	\$19	\$19	\$17
HOURLY	\$7.00	\$7.00	\$6.30	\$6.30

GROUP 2 COUNTIES:

Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins and Warren

DAY CARE CENTER

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$226	\$215	\$196	\$190
DAILY	\$48	\$45	\$40	\$35
PART-DAY	\$32	\$30	\$27	\$23
HOURLY	\$8.00	\$8.36	\$8.00	\$8.00

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$170	\$161	\$152	\$150
DAILY	\$35	\$32	\$30	\$30
PART-DAY	\$23	\$21	\$20	\$20
HOURLY	\$5.00	\$5.37	\$5.00	\$5.75

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$180	\$175	\$175	\$160
DAILY	\$36	\$35	\$35	\$34
PART-DAY	\$24	\$23	\$23	\$23
HOURLY	\$5.79	\$5.83	\$5.93	\$7.00

(Group 2 Counties)

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$190
DAILY	\$0	\$0	\$0	\$35
PART-DAY	\$0	\$0	\$0	\$23
HOURLY	\$0	\$0	\$0	\$8.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$111	\$105	\$99	\$98
DAILY	\$23	\$21	\$20	\$20
PART-DAY	\$15	\$14	\$13	\$13
HOURLY	\$3.25	\$3.49	\$3.25	\$3.74

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$119	\$113	\$106	\$105
DAILY	\$25	\$22	\$21	\$21
PART-DAY	\$17	\$15	\$14	\$14
HOURLY	\$3.50	\$3.76	\$3.50	\$4.03

GROUP 3 COUNTIES:

Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, and Yates

DAY CARE CENTER

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$180	\$171	\$160	\$150
DAILY	\$40	\$37	\$34	\$31
PART-DAY	\$27	\$25	\$23	\$21
HOURLY	\$6.50	\$6.50	\$6.50	\$6.25

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$140	\$139	\$135	\$130
DAILY	\$30	\$30	\$30	\$30
PART-DAY	\$20	\$20	\$20	\$20
HOURLY	\$4.00	\$3.88	\$3.50	\$4.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$150	\$145	\$140	\$140
DAILY	\$33	\$31	\$30	\$30
PART-DAY	\$22	\$21	\$20	\$20
HOURLY	\$4.00	\$4.00	\$4.00	\$5.00

(Group 3 Counties)

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
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WEEKLY	\$0	\$0	\$0	\$150
DAILY	\$0	\$0	\$0	\$31
PART-DAY	\$0	\$0	\$0	\$21
HOURLY	\$0	\$0	\$0	\$6.25

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$91	\$90	\$88	\$85
DAILY	\$20	\$20	\$20	\$20
PART-DAY	\$13	\$13	\$13	\$13
HOURLY	\$2.60	\$2.52	\$2.28	\$2.60

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$98	\$97	\$95	\$91
DAILY	\$21	\$21	\$21	\$21
PART-DAY	\$14	\$14	\$14	\$14
HOURLY	\$2.80	\$2.72	\$2.45	\$2.80

GROUP 4 COUNTIES:  
Albany, Dutchess, Orange, and Ulster  
DAY CARE CENTER

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$241	\$223	\$205	\$200
DAILY	\$50	\$48	\$43	\$37
PART-DAY	\$33	\$32	\$29	\$25
HOURLY	\$8.24	\$7.90	\$7.62	\$7.00

REGISTERED FAMILY DAY CARE  
AGE OF CHILD

	Under 1½	1½-2	3-5	6-12
WEEKLY	\$200	\$191	\$185	\$185
DAILY	\$44	\$40	\$38	\$38
PART-DAY	\$29	\$27	\$25	\$25
HOURLY	\$7.00	\$6.13	\$6.00	\$7.00

GROUP FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$220	\$200	\$195	\$195
DAILY	\$45	\$45	\$40	\$40
PART-DAY	\$30	\$30	\$27	\$27
HOURLY	\$8.00	\$7.22	\$8.00	\$7.25

(Group 4 Counties)  
SCHOOL AGE CHILD CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$200
DAILY	\$0	\$0	\$0	\$37
PART-DAY	\$0	\$0	\$0	\$25
HOURLY	\$0	\$0	\$0	\$7.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$130	\$124	\$120	\$120
DAILY	\$29	\$26	\$25	\$25
PART-DAY	\$19	\$17	\$17	\$17
HOURLY	\$4.55	\$3.98	\$3.90	\$4.55

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$140	\$134	\$130	\$130
DAILY	\$31	\$28	\$27	\$27
PART-DAY	\$21	\$19	\$18	\$18
HOURLY	\$4.90	\$4.29	\$4.20	\$4.90

GROUP 5 COUNTIES:  
Bronx, Kings, New York, Queens, and Richmond  
DAY CARE CENTER

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$338	\$255	\$217	\$195
DAILY	\$53	\$47	\$40	\$35
PART-DAY	\$35	\$31	\$27	\$23
HOURLY	\$16.09	\$17.00	\$15.70	\$10.00

REGISTERED FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$160	\$150	\$150	\$150
DAILY	\$30	\$30	\$32	\$30
PART-DAY	\$20	\$20	\$21	\$20
HOURLY	\$16.00	\$11.11	\$13.20	\$13.06

GROUP FAMILY DAY CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$194	\$181	\$175	\$160
DAILY	\$35	\$33	\$31	\$32
PART-DAY	\$23	\$22	\$21	\$21
HOURLY	\$18.14	\$15.65	\$12.83	\$18.00

(Group 5 Counties)  
SCHOOL AGE CHILD CARE

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$0	\$0	\$0	\$195
DAILY	\$0	\$0	\$0	\$35
PART-DAY	\$0	\$0	\$0	\$23
HOURLY	\$0	\$0	\$0	\$10.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

	AGE OF CHILD			
	Under 1½	1½-2	3-5	6-12
WEEKLY	\$104	\$98	\$98	\$98
DAILY	\$20	\$20	\$21	\$20

PART-DAY	\$13	\$13	\$14	\$13
HOURLY	\$10.40	\$7.22	\$8.58	\$8.49

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

	AGE OF CHILD			
	Under 1 <sup>1/2</sup>	1 <sup>1/2</sup> -2	3-5	6-12
WEEKLY	\$112	\$105	\$105	\$105
DAILY	\$21	\$21	\$22	\$21
PART-DAY	\$14	\$14	\$15	\$14
HOURLY	\$11.20	\$7.78	\$9.24	\$9.14

SPECIAL NEEDS CHILD CARE

The rate of payment for child care services provided to a child determined to have special needs is the actual cost of care up to the statewide limit of the highest weekly, daily, part-day or hourly market rate for child care services in the State, as applicable, based on the amount of time the child care services are provided per week regardless of the type of child care provider used or the age of the child.

The highest full time market rate in the State is:

WEEKLY	\$338
DAILY	\$59
PART-DAY	\$39
HOURLY	\$18.14

*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 December 13, 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, NY 12144, (518) 473-7793

**Regulatory Impact Statement**

1. Statutory authority:

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

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

Section 410 of the SSL authorizes a social services official of a county, city or town to provide day care for children at public expense and authorizes the Office to establish criteria for when such day care is to be provided.

Title 5-C (sections 410-u through 410-z) of the SSL governs the New York State Child Care Block Grant. It includes provisions regarding the use of funds by social services districts, the types of families eligible for services, the amount of local funds that must be spent on child care services, and reporting requirements. OCFS is required to specify certain NYSSCBG requirements in regulation.

Section 410-x(4) of the SSL requires the Office to establish, in regulation, the applicable market-related payment rates that will establish the ceilings for State and federal reimbursement for payments made under the New York Child Care Block Grant.

Federal statute, section 658E(c)(4)(A) of the Social Security Act, and federal regulation, 45 CFR 98.43(a), also require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure equal access to care that is provided to children whose parents/caretakers are not eligible to receive assistance under federal or state programs. Additionally, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund.

2. Legislative objectives:

The legislative intent of the child care subsidy program is to assist low income families in meeting their child care costs in programs that provide for the health and safety of their children. The legislative intent is to have child care subsidy payment rates that reflect market conditions and that are adequate to enable subsidized families to access child care services comparable to other families not in receipt of a child care subsidy.

The regulations support the legislative objectives underlying Sections

332-a, 334, 335 and 410 and Title 5-C of the SSL to provide child care services to public assistance recipients and low income families when necessary to promote self-sufficiency and protect children. In addition, the regulations provide social services districts with greater local flexibility to provide child care services in the manner that best meets the needs of their local communities.

3. Needs and benefits:

The State is required under the Federal Child Care and Development Fund to adjust child care payment rates with each new State Plan based on a current survey of providers. The current State Plan covers the period October 1, 2007 through September 30, 2009 and the proposed State Plan for the period October 1, 2009 through September 30, 2011 has been submitted for approval by the federal government. A current survey of providers was conducted in April and May of 2009. These regulations are needed to adjust existing rates that were established based on a survey done in 2007. Adjustments to the child care market rates reflect both increases and decreases in the five groupings of counties.

Decreases in the child care market rates reflect the market place and provide comparable access to those families in receipt of a child care subsidy as compared with families that do not receive a child care subsidy, which is required by federal and State laws.

In addition, this regulatory package includes the three provisions from the previous market rate stimulus regulatory package that was filed previously on an emergency basis on May 15, 2009 and was re-filed on August 13, 2009. The revised market rates that were in effect since August 13, 2009 are superseded by this filing.

The first provision is the exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 when determining the eligibility for social services programs. These regulations address the federal requirement that one time payments disbursed under the American Recovery and Reinvestment Act of 2009 to recipients of Social Security, Supplemental Security Income (SSI), Railroad Retirement Benefits and Veterans Disability Compensation or Pension Benefits be excluded as income for determining eligibility for any programs in receipt of federal funds.

Second, social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment.

Third, some districts have indicated that, in these difficult economic times, more families could be served without a negative impact on family access to child care if the enhanced child care market rate for legally-exempt family and in-home child care providers was lowered. Currently, there are two child care market rates established for legally-exempt family and in-home child care providers. One, the enhanced market rate, based on a 75 percent differential applied to the child care market rates established for registered family day care. The 75 percent reflects an incentive to legally exempt providers to pursue a minimum of ten hours of approved training. Two, the standard market rate, based on a 65 percent differential applied to the child care market rates established for registered family day care. The 65 percent applies to legally-exempt family and in-home child care providers that have not obtained ten hours of training annually. These regulations propose to establish the enhanced market rate for legally-exempt family and in-home providers at a 70 percent differential applied to the child care market rates established for registered family day care. Additionally, the regulation allows local social services districts, which so choose in their Child and Family Services Plans, to increase the enhanced market rate to up to 75 percent of the applicable registered family day care market rate. Further, a social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement.

4. Costs:

Under section 410-v(2) of the SSL, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; and, districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State

and/or federal funds allocated to the New York State Child Care Block Grant, and is limited on an annual basis to each district's New York State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2009-2010, social services districts received their allocations of \$736,036,409 in federal and State funds under the New York State Child Care Block Grant. This funding represented an increase of \$11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the adjusted market rates. Further, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations. In addition, social services districts may use block grant funds to serve the optional category of eligible individuals set forth in these regulations. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

5. Local government mandates:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the applicable market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. Payment adjustments will have to be made, as appropriate.

Social services districts will also be required to amend their existing Child and Family Services Plan to select the expanded categories of eligible families to include the parent/caretaker that is a dislocated worker participating in a training program in an employment field that currently is or is likely to be in demand in the near future, if social services districts so desire. In addition, social services districts would also be required to amend their existing Child and Family Services Plans to increase the enhanced market rate for legally-exempt providers of family child care or in-home child care to 75 percent of the registered family child care rate, if social services districts so desire.

6. Paperwork:

Social services districts will need to process any required payment adjustments after conducting the necessary case reviews.

7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

8. Federal standards:

The regulations are consistent with applicable federal regulations. 45 CFR 98.43(a) and (b)(2) and (3) require that the State establish payment rates that are sufficient to ensure equal access to comparable care received by unsubsidized families, based on a survey of providers and consistent with the parental choice provisions in 45 CFR 98.30.

9. Compliance schedule:

These provisions must be implemented effective on October 1, 2009.

**Regulatory Flexibility Analysis**

1. Effect on small businesses and local governments:

The adjustments to the child care market rates will affect the 58 social services districts. There is a potential effect on over 20,000 licensed and registered child care providers and an estimated 56,000 informal providers that may provide child care services to families receiving a child care subsidy.

2. Compliance requirements:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the applicable market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. Payment adjustments will have to be made, as appropriate.

Social services districts will also be required to amend their existing Child and Family Services Plans to select the expanded categories of eligible families to include the parent/caretaker that is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. In addition, social services districts would also be required to amend their existing Child and Family Services Plan to increase the enhanced market rate for legally-exempt providers of family child care or in-home child care to 75 percent of the registered family child care rate, if social services districts so desire.

3. Professional services:

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

4. Compliance costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is

made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2009-10, social services districts received their allocations of \$736,036,409 in federal and State funds under the New York State Child Care Block Grant, an increase of \$11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

Social services districts will be required to provide the subsidies on behalf of the parent for subsidized child care services to legally-exempt family child care and in-home child providers who have completed ten hours of training annually, as approved by the legally-exempt caregiver enrollment agency, at the enhanced rate of seventy percent (70%) of the family child care rate. Districts do have the option to pay seventy five percent (75%) of the family child care rate for the enhanced market rate to legally-exempt family child care and in-home care approved by the legally-exempt caregiver enrollment agency, if the district selects this option in its Children and Family Services Plan. In addition, a social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

The exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 related to the determination of eligibility for social services programs, which receive federal funds, will not require any additional compliance costs to implement.

Social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment. Social services districts may use the already allocated block grant funds to serve this optional category of families, if social services districts so desire.

5. Economic and technological feasibility:

The child care providers and social services districts affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers and with standard statistical methodology to minimize adverse impact. The Office applied standard statistical methods to choose a sample of approximately 5,020 licensed and registered child care providers so that it was representative throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care that were reported in the survey within the counties. Adjustments to the child care market rates reflect the market place and provide access comparable to those families not receiving a child care subsidy.

The regulations recognize that there may be differences in the needs among districts. To the extent allowed by statute, the regulations provide districts with flexibility in designing their child care subsidy programs in a manner that will best meet the needs of their communities.

7. Small business and local government participation:

In accordance with federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had the resources available to assist providers in other languages, if needed. Rate data was collected from almost 5,020 providers and that information formed the basis for the updated market rates.

The regulatory changes were discussed with a workgroup of local districts, including rural districts, for advice on potential impact.

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

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

The regulations will affect the 44 social services districts located in rural areas of the State and the child care providers located in those districts.

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

The regulations will not result in any new reporting or recordkeeping requirements for social services districts.

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine if the payments reflect the actual cost of care up to the appropriate market rate. Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

The exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 to the determination of eligibility for social services programs, which receive federal funds, will not place any additional compliance requirements on social services districts.

Social services districts that choose to serve the optional eligibility categories of families to serve families where the parent/caretaker is a dislocated worker participating in a program to train workers in an employment field that is currently or is likely to be in demand in the near future will be required to amend the district's current Child and Family Services Plan.

A district will be required to provide subsidies on behalf of the parents for subsidized child care services to legally-exempt family child care and in-home child providers who have completed ten hours of training annually, as long as such providers are approved by the appropriate legally-exempt caregiver enrollment agencies, for the enhanced rate; or by the district for those portions of the district that are not covered by a legally-exempt caregiver enrollment agency, at the rate of seventy percent (70%) of the family child care rate. A district has the option to pay seventy five percent (75%) of the family child care rate for the enhanced market rate to legally-exempt family child care and in-home care approved by an enrollment agency, if the district selects this option in its Child and Family Services Plan.

##### 3. Costs:

Under the State Budget for SFY 2009-2010, social services districts received their allocations of \$736,036,409 in federal and State funds under the New York State Child Care Block Grant, an increase of \$11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

The exclusion of the one time payment of \$250 under the American Recovery and Reinvestment Act of 2009 to the determination of eligibility for social services programs, which receive federal funds, will not require add any additional compliance costs to implement. In addition, social services districts may use block grant funds to serve the optional category of eligible individuals set forth in these regulations. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

##### 4. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers and with standard statistical methodology to minimize adverse impact. The Office applied standard statistical methods to choose a sample of approximately 5,020 licensed and registered child care providers so that it was representative throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care that were reported in the survey within the counties. Adjustments to the child care market rates

reflect the market place and provide access comparable to those families not receiving a child care subsidy.

Adjustments to the child care market rates reflect both increases and decreases in the five groupings of counties. Decreases in the child care market rates reflect the market place and provides access comparable to those families not receiving a child care subsidy to that received by families that do not receive a child care subsidy as required by federal and State laws. The adjustments in the rates will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of temporary assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

The market rates for legally-exempt family child care and in-home child care were established based on a 65 percent differential applied to the market rates established for family day care. This differential reflects the higher costs associated with meeting the higher regulatory standards to become a registered family day care provider. The enhanced market rate for legally-exempt family and in-home child care providers is based on a 70 percent differential applied to the child care market rates established for registered family day care. The 70 percent reflects an incentive to legally exempt providers to pursue a minimum of ten hours of approved training. Additionally, the regulation allows local social services districts, which so choose in their Child and Family Services Plans, to increase the enhanced market rate to up to 75 percent of the applicable registered family day care market rate.

The regulations recognize that there may be differences in the needs among districts. To the extent allowed by statute, the regulations provide districts with flexibility in designing their child care subsidy programs in a manner that will best meet the needs of their communities. Social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment.

##### 5. Rural area participation:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. In accordance with the federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. The sample drawn was representative of the regions across the State and, therefore, providers located in rural areas were appropriately represented in the survey. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had resources available to assist providers in other languages, if needed. Rate data was collected from almost 5,020 providers and that information formed the basis for the updated market rates.

The regulatory changes were also discussed with a workgroup of local districts, including rural districts, for advice on potential impact.

#### **Job Impact Statement**

Section 201-a of the State Administrative Procedures Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State.

Adjustments to the child care market rates reflect both increases and decreases. Decreases in the child care market rates reflect the market place and OCFS believes that they are not substantial enough to cause the loss of jobs in child care programs.

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## **Crime Victims Board**

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

#### **Reimbursement for Sexual Assault Forensic Examination**

**I.D. No. CVB-39-09-00005-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 525.12(h) of Title 9 NYCRR.

**Statutory authority:** Executive Law, section 631(13)

**Subject:** Reimbursement for sexual assault forensic examination.

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

**Text of proposed rule:** Subdivision (h) of section 525.12 is amended to read as follows:

(h) Direct reimbursement of forensic sexual assault examinations.

(1) Definitions:

(i) Licensed provider shall mean any New York State accredited hospital or licensed physician, nurse practitioner, registered nurse or physician assistant practicing within the State of New York whose performance of a sexual assault forensic examination is within the scope of practice of the discipline in which s/he holds a license or any other sexual assault examiner certified by the Department of Health to conduct a sexual assault forensic examination.

(ii) Sexual Assault shall mean any sexual offense defined in Article 130 of the New York State Penal Law.

(iii) Forensic Examination shall mean an examination conducted by a licensed provider as defined in Section 525.12(h)(1)(i) hereof for the purpose of collecting and preserving evidence to document a sexual assault, conducted in accordance with the New York State Department of Health's Protocol for the Acute Care of the Adult Patient Reporting Sexual Assault or the Child and Adolescent Sexual Offense Protocol. Copies of these protocols may be obtained from the Department of Health at the following address:

The Bureau of Women's Health  
NYS Department of Health  
Room 1882, Tower Building  
Empire State Plaza  
Albany, New York 12237-0621  
Phone: (518) 474-3664

(iv) Claim Form shall mean the New York State Crime Victims Board Medical Provider Forensic Rape Examination Claim Form. In addition to being included in the Sexual Offense Evidence Collection Kit, this form is available from [any office of] the Crime Victims Board [and is available] online at <http://www.cvb.state.ny.us>.

(v) Child victim shall mean a person less than eighteen years of age as defined in New York State Executive Law Article 22, Section 621(11).

(2) Notwithstanding any contrary provisions, whenever a licensed provider administers a forensic examination to a survivor of a sexual assault in accordance with the established protocol as defined in section 525.12(h)(1)(iii) hereof, such provider shall render such services without charge and shall bill the Board directly for such services, unless the sexual assault survivor assigns his or her private insurance benefits for the forensic examination, in which case the Board shall not be billed for such services *by the provider pursuant to this subdivision*. [Nothing] *Except as provided in section 525.12(h)(6) hereof*, nothing in this section shall preclude a licensed provider from billing a sexual assault survivor for medical services unrelated to the forensic exam as set forth in Section 525.12(h)(5)(i), (ii), (iii) and (iv).

(3) At the time of the initial visit, the provider shall:

(i) request assignment of any private health insurance benefits on a form prescribed by the Board,

(ii) advise a sexual assault survivor orally and in writing that he or she may decline to provide private health insurance information if he or she believes it would substantially interfere with his or her personal privacy or safety,

(iii) advise a sexual assault survivor that providing such information may provide additional resources to pay for services to other sexual assault victims, and

(iv) require that if he or she declines to provide such health insurance information, he or she shall indicate such decision on the form prescribed by the Board.

(4) Eligibility criteria:

(i) To establish eligibility, a licensed provider shall submit a completed Claim Form as defined in section 525.12(h)(1)(iv) and attach an itemized bill indicating the relevant *forensic examination related* current procedural terminology (CPT) codes associated with each service provided to the Board at the address below.

New York State Crime Victims Board

[845 Central Avenue - South 3] 1 Columbia Circle, Suite 200

Albany, NY [12206] 12203

(ii) Upon receipt of a completed Claim form with an itemized bill including CPT codes and acceptance by the Crime Victims Board, payment will be authorized directly to the licensed provider through the appropriate billing facility as set forth in Section 525.12(h)(8).

(5) The provider shall be reimbursed at the rate of *itemized charges not exceeding* \$800 for forensic examiner services, hospital or healthcare facility services directly related to the forensic exam, and related laboratory tests and pharmaceuticals directly related to the exam. The Board has determined that reimbursable expenses shall include at a minimum:

(i) Forensic examiner and hospital or healthcare facility services directly related to the exam, including integral forensic supplies.

(ii) Scope procedures directly related to the forensic exam including but not limited to anoscopy and colposcopy.

(iii) Laboratory testing directly related to the forensic examination, including drug screening, urinalysis, pregnancy screen, syphilis screening, chlamydia culture, gonorrhea coverage culture, blood test for HIV screening, hepatitis B and C, herpes culture and any other STD testing directly related to the forensic examination.

(iv) Pharmaceuticals directly related to the forensic examination including STD, pregnancy, initial HIV prophylaxis up to a three day supply and hepatitis prophylaxis.

(v) [Follow-up] *Except as provided in section 525.12(h)(6) hereof*, follow-up post exposure HIV prophylaxis and follow-up HIV counseling, charges for inpatient services, and for services other than those included in Section 525.12(h)(5)(i), (ii), (iii) and (iv) are not included in this rate and shall not be reimbursable under this part, but shall continue to be reimbursable under established Board procedure.

(6) The victim shall not be responsible for the payment of the cost of the forensic examination or any other services specified by the provider in its submission to the Board pursuant to Section 525.12(h)(4) hereof. The licensed provider must accept the reimbursement rate as payment in full for those services submitted to the Board pursuant to Section 525.12(h)(4) hereof and included in Section 525.12(h)(5)(i), (ii), (iii) and (iv). The licensed provider shall not submit any remaining balance due for such services after [reimbursement by] *submission* to the Board to the victim or commence civil actions against the victim to recover any balance due for such services.

(7) The costs for multiple forensic examinations of the same victim will not be reimbursed. The cost of only one forensic sexual assault examination per victim per alleged sexual assault will be considered a reimbursable cost.

(8) For the forensic examination and services directly related to the forensic examination, the Board will reimburse the facility in which the forensic examination was conducted and whose operator's certificate number or facility identification, if applicable, appears on the Claim Form, the amount of *itemized charges not exceeding* \$800. The [\$800] *amount reimbursed* shall be proportionately allocated among the service providers by the billing facility.

(9) Expenses must be related to a forensic examination performed within 96 hours following the incident. This reporting time shall be waived for a child victim or for any victim if good cause has been shown.

(10) A claim for reimbursement of expenses associated with a forensic examination made pursuant to this section must be submitted within one year of the date of the examination to the Albany Office of the Crime Victims Board.

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

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

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

**Consensus Rule Making Determination**

This rule is being proposed as a consensus rule because, in accordance with State Administrative Procedure Act § 102 (11) (b), it implements or confirms to non-discretionary statutory provisions. Section 68 of Chapter 264 of the Laws of 2003 added a new subdivision 13 to Executive Law section 631 to authorize the New York State Crime Victims Board direct reimbursement for the costs of certain services related to a sexual assault forensic exam performed by any New York State accredited hospital, accredited sexual assault examiner program or licensed health care provider.

Section 68 of Chapter 264 of the Laws of 2003 established the flat rate for reimbursement to be eight hundred dollars. The hospital, sexual assault examiner program or licensed health care provider must accept this fee as payment in full for the specified services. No additional billing of the survivor for said services is permissible. A sexual assault survivor may voluntarily assign any private insurance benefits to which she or he is entitled for the healthcare forensic examination, in which case the hospital or healthcare provider may not charge the board.

More recently, Chapter 56 of the Laws of 2009 became effective April 7, 2009. These new amendments changed the flat rate of eight hundred dollars to a reimbursement for the actual cost of itemized charges not to exceed eight hundred dollars for such exams under Executive Law, section 631(13).

Section 525.12(h) of Title 9 NYCRR governing the practice and procedures before the Board provides for “Direct reimbursement of forensic sexual assault examinations.” As New York State’s primary crime victim compensation agency, it is important that the Board’s regulations be updated to conform to the amendments introduced by Chapter 56 of the Laws of 2009. The proposed consensus rule would amend section 525.12(h) of Title 9 NYCRR as it relates to the rate the hospital, sexual assault examiner program or licensed health care provider is reimbursed. The proposed rule does not increase or decrease the statutory amount of eight hundred dollars established by Section 68 of Chapter 264 of the Laws of 2003; rather it would allow the New York State Crime Victims Board to reimburse the actual amount of itemized charges up to that eight hundred dollar amount. This proposed consensus rule also makes other amendments to reflect the fact that such reimbursement has been changed from a flat rate to a rate reflecting the actual costs up to an eight hundred dollar cap.

The proposed consensus rule is submitted by the New York State Crime Victims Board in order to conform to its statutory obligations.

**Job Impact Statement**

The Crime Victims Board projects no substantial adverse impact on jobs or employment opportunities in the State of New York as a result of this rule. The rule simply mirrors the statutory requirements and requires itemization of charges by licensed providers up to \$800, in accordance with Executive Law § 631. There will be no change in the number of agency employees as a result of these regulations. Nothing in the proposed regulations will increase or decrease the number of jobs in New York State, have an adverse impact on specific regions in New York State or negatively impact jobs in New York State.

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## Department of Economic Development

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**ERRATUM**

A Notice of Adoption, I.D. No. EDV-28-09-00013-A, pertaining to Minority and Women Business Enterprise Program, published in the September 23, 2009 issue of the *State Register* contained an incorrect action taken. The correct action taken is: Amendment of section 140.1 and addition of sections 144.9 and 144.10 to Title 5 NYCRR.

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## Education Department

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**EMERGENCY  
RULE MAKING**

**Museum Collections Management Policies**

**I.D. No.** EDU-01-09-00004-E

**Filing No.** 1084

**Filing Date:** 2009-09-15

**Effective Date:** 2009-09-15

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

**Action taken:** Amendment of section 3.27 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 216 (not subdivided), 217 (not subdivided), 233-aa(1), (2) and (5); L. 2008, ch. 220

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to implement Regents policy to protect the public’s interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution’s collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or
- (4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution’s collection.

In the current financial downturn, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. Currently, some 37 institutions in New York in 2006 reported deficits of \$100,000 or more. The Department is concerned that, in the absence of an express prohibition in Regents rule section 3.27, museums and historical societies in financial distress will deaccession items or materials for purposes of paying their outstanding debt. Consistent with generally accepted professional and ethical standards within the museum and historical society communities, the proposed amendment would expressly prohibit proceeds from deaccessioning from being used for the payment of outstanding debt or capital expenses. The proposed amendment would also restrict when an institution may deaccession its collections to the instances listed in (1) through (4) above. This specific language was added in response to museums which sought clarity on what constitutes proper and acceptable grounds for deaccessioning.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to protect the public’s interest in collections held by a chartered museum or historical society by immediately clarifying the limited circumstances under which an item or material in a collection may be deaccessioned, in order to deter institutions in financial distress in the current fiscal crisis from selling or otherwise disposing of collection items and materials, in a manner inconsistent with accepted museological standards and State law, such as using the proceeds from the deaccessioning for payment of outstanding debt or

operating expenses, and to prospectively limit the ability of museums and historical societies to designate a historic building as a collection item, so that institutions in financial distress will not make such designation for the purpose of justifying the sale of other items in their collections in order to pay capital expenses associated with the building.

The proposed amendment was adopted as an emergency rule at the December 2008 Regents meeting, and readopted as an emergency rule at the March, April and June 2009 Regents meetings. A Notice of Emergency Adoption and Proposed Rule Making was published in the *State Register* on January 7, 2009.

State Education Department staff have worked with the Legislature and with museum constituents to develop revised standards for museum deaccessioning that have been incorporated into recently introduced legislation (A.6959 and S.3078) applicable to all museums. Now that legislation has been introduced, further revisions to the proposed rule are necessary to conform to the legislation. Pursuant to the State Administrative Procedure Act, a revised rule cannot be permanently adopted until after publication of a Notice of Revised Rule Making and expiration of a 30-day public comment period. Because the Board of Regents meets at fixed intervals, the earliest the proposed revised rule could be presented for permanent adoption, after publication of the Notice and expiration of the 30-day public comment period, would be the October 19-20, 2009 Regents meeting. However, the emergency rule adopted at the June Regents meeting is only effective for 60 days and will expire on September 14, 2009. If the rule were to lapse, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. To avoid the adverse effects of a lapse in the emergency rule, another emergency action is necessary at the July Regents meeting to readopt the rule, effective September 15, 2009.

It is anticipated that the proposed revised rule will be presented for permanent adoption at the October 19-20, 2009 Regents meeting, after publication of a Notice of Revised Rule Making in the *State Register* and expiration of the 30-day public comment period prescribed for revised rule makings in the State Administrative Procedure Act.

**Subject:** Museum collections management policies.

**Purpose:** To clarify restrictions on the deaccessioning of items and materials in collections held by museums and historical societies.

**Text of emergency rule:** 1. Paragraph (7) of subdivision (a) of section 3.27 of the Rules of the Board of Regents is amended, effective September 15, 2009, to read as follows, provided that such amendment shall expire and be deemed repealed November 13, 2009:

(7) Collection means one or more original tangible objects, artifacts, records or specimens, including art generated by video, computer or similar means of projection and display, that have intrinsic historical, artistic, cultural, scientific, natural history or other value that share like characteristics or a common base of association and are accessioned; for purposes of this section, historic structures owned by an institution shall be considered as part of a collection *only* when so designated by the *board of trustees of the institution by vote conducted on or before December 19, 2008*;

2. Paragraphs (6) and (7) of subdivision (c) of section 3.27 of the Rules of the Board of Regents are amended, effective September 15, 2009, to read as follows, provided that such amendment shall expire and be deemed repealed November 13, 2009:

(6) Collections Care and Management. The institution shall:

(i) own, maintain and/or exhibit original tangible objects, artifacts, records, specimens, buildings, archeological remains, properties, lands and/or other tangible and intrinsically valuable resources that are appropriate to its mission;

(ii) ensure that the acquisition and deaccessioning of its collection is consistent with its corporate purposes and mission statement, *including that deaccessioning of items or material in its collection is limited to the circumstances prescribed in paragraph (7) of this subdivision*;

(iii) have a written collections management policy providing clear standards to guide institutional decisions regarding the collection, that is in regular use, available to the public upon request, filed with the commissioner for inspection by anyone wishing to examine it; and which, at a minimum, satisfactorily addresses the following subject areas:

(a) acquisition. The criteria and processes used for determining what items are added to the collections;

(b) loans. The criteria and processes used for borrowing items owned by other institutions and individuals, and for lending items from the collections;

(c) preservation. A statement of intent to ensure the adequate care and preservation of collections;

(d) access. A statement indicating intent to allow reasonable access to the collections by persons with legitimate reasons to access them; and

(e) deaccession. The criteria and process (including levels of

permission) used for determining what items are to be removed from the collections, *which shall be consistent with paragraph (7) of this subdivision*, and a statement limiting the use of any funds derived therefrom in accordance with subparagraph [(vii)] (vi) of this paragraph;

(iv) ensure that collections or any individual part thereof and the proceeds derived therefrom shall not be used as collateral for a loan;

(v) ensure that collections shall not be capitalized; and

(vi) ensure that proceeds derived from the deaccessioning of any property from the institution's collection be restricted in a separate fund to be used only for the acquisition, preservation, protection or care of collections. In no event shall proceeds derived from the deaccessioning of any property from the collection be used for operating expenses, *for the payment of outstanding debt, or for capital expenses other than such expenses incurred to preserve, protect or care for an historic building which has been designated part of its collections in accordance with paragraph (7) of subdivision (a) of this section*, or for any purposes other than the acquisition, preservation, protection or care of collections.

(7) *Deaccessioning of collections. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:*

(i) *the item or material is not relevant to the mission of the institution;*

(ii) *the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;*

(iii) *the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or*

(iv) *the institution is unable to conserve the item or material in a responsible manner.*

(8) Education and Interpretation. The institution shall offer programmatic accommodation for individuals with disabilities to the extent required by law.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-01-09-00004-EP, Issue of January 7, 2009. The emergency rule will expire November 13, 2009.

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

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

Education Law section 215 authorizes the Regents, the Commissioner, or their representatives, to visit, examine and inspect education corporations and other institutions admitted to the University of the State of New York, as defined in Education Law section 214, and to require, as often as desired, duly verified reports giving such information and in such form as they shall prescribe.

Education Law section 216 authorizes the Board of Regents to incorporate educational institutions, including museums and other institutions for the promotion of science, literature, art, history or other department of knowledge, with such powers, privileges and duties, and subject to such limitations and restrictions, as they Regents may prescribe.

Education Law section 217 empowers the Board of Regents to grant a provisional charter to an institution, which shall be replaced by an absolute charter when the conditions for such absolute charter have been fully met.

Education Law section 233-aa, as added by Chapter 220 of the Laws of 2008, enacts provisions governing the ownership and management of properties owned by or lent to museums, requires that the acquisition of property by a museum pursuant to section 233-aa must be consistent with the mission of the museum, and specifies that proceeds derived from the sale of any property title to which was acquired by a museum pursuant to section 233-aa shall be used only for the acquisition of property for the museum's collection or for the preservation, protection, and care of the collection and shall not be used to defray ongoing operating expenses of the museum.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the statutes by clarify-

ing criteria regarding the deaccessioning of items and materials in the collections of chartered museums or historical societies, consistent with generally accepted professional and ethical standards within the museum and historical society communities.

### 3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or
- (4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

### 4. COSTS:

- (a) Costs to the State: None.
- (b) Costs to local governments: 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 clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any costs on such institutions, the State, local governments or the State Education Department.

### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to museums and historical societies with collections chartered by the Board of Regents, and does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

### 6. PAPERWORK:

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any additional paperwork requirements on such institutions.

### 7. DUPLICATION:

The proposed amendment duplicates no existing state or federal requirements.

### 8. ALTERNATIVES:

There are no significant alternatives to the proposed amendment and none were considered.

### 9. FEDERAL STANDARDS:

There are no applicable federal standards regarding the chartering and registration of museums and historical societies by the Board of Regents.

### 10. COMPLIANCE SCHEDULE:

The proposed amendment clarifies criteria regarding the deaccessioning of items and materials in the collections of chartered museums or historical societies, consistent with generally accepted professional and ethical standards within the museum and historical society communities. It is anticipated that regulated parties can achieve compliance with the proposed amendment by its effective date.

### *Regulatory Flexibility Analysis*

The proposed amendment applies to museums and historical societies authorized to hold collections chartered by the Board of Regents and does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse financial impact, on small businesses or local governments. Because it is evident from the nature of the rules

that it does not affect small businesses or local governments, no further measures 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 will apply to all of the 644 museums and 884 historical societies in New York State (source: New York State Museum chartering database as of November 2008), 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 persons per square mile or less.

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

The purpose of the proposed amendment is to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or
- (4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

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

#### 3. COMPLIANCE COSTS:

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any costs on such institutions, the State, local governments or the State Education Department.

#### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies. The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, consistent with generally accepted professional and ethical standards within the museum and historical society communities, and does not impose any additional compliance requirements or costs on such institutions. Since these requirements must have State-wide application in order to ensure uniform, consistent practices relating to museum and historical society collections management, it is not feasible to impose a lesser standard on, or otherwise exempt, institutions located in rural areas.

#### 5. RURAL AREA PARTICIPATION:

The State Education Department consulted with the Museum Association of New York in the development of the proposed amendment.

In addition, the Department asked its museum and historical society constituents to comment on the proposed amendment through announcements on web sites, and copies sent to listservs and electronic mailing lists. All areas of the state, including rural areas, received the announcements.

### *Job Impact Statement*

The proposed amendment applies to museums and historical societies with collections, chartered by the Board of Regents and will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature 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.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF WITHDRAWAL****Licensure Requirements for Registered Professional Nurses and Licensed Practical Nurses and Certified Nurse Practitioners.**

**I.D. No.** EDU-35-09-00009-W

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

**Action taken:** Notice of proposed rule making, I.D. No. EDU-35-09-00009-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on September 2, 2009.

**Subject:** Licensure requirements for registered professional nurses and licensed practical nurses and certified nurse practitioners.

**Reason(s) for withdrawal of the proposed rule:** The Department has decided to revise these regulations at a later date upon further review of the licensure requirements.

**PROPOSED RULE MAKING  
NO HEARING(S) SCHEDULED****Teachers' Certificates and Teaching Practice**

**I.D. No.** EDU-39-09-00022-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 80-1.2, 80-1.6, 80-2.2, 80-2.9, 80-3.6, 80-4.3, 80-5.6, 80-5.7 and 80-5.9 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 210, 212, 305, 3001, 3004 and 3006

**Subject:** Teachers' certificates and teaching practice.

**Purpose:** To implement the provisions of the Patriot Plan to provide additional benefits and protections for service members.

**Substance of proposed rule (Full text is posted at the following State website: <http://www.highered.nysed.gov/tcert/>):** The Commissioner of Education proposes to amend sections 80-1.2, 80-1.6, 80-2.2, 80-2.9, 80-3.6, 80-4.3, 80-5.6, 80-5.7 and 80-5.9 of the Regulations of the Commissioner of Education relating to requirements for teachers' certificates and teaching practice in order to implement the provisions of the New York Patriot Plan. The following is a summary of the proposed amendment:

Subdivisions (a) and (b) of section 80-1.2 are amended to authorize the Commissioner to extend the time validity of an active application beyond the three years provided for in this section for candidates called to active duty with the Armed Forces prior to completion of all requirements for certification for the time of active service and an additional 12 months after the end of such service.

Subdivision (b) of section 80-1.6 is amended to authorize the Commissioner to extend the time validity of an expired provisional, initial or transitional certificate for individuals called to active duty with the Armed Forces for the time of such active service and an additional 12 months from the end of such service.

Paragraph (1) of subdivision (e) of section 80-2.2 is amended to authorize the Commissioner to extend a two-year nonrenewable conditional provisional certificate for individuals called to active duty with the Armed Forces for the time of active service and an additional 12 months from the end of such service.

Paragraph (5) of subdivision (a) of section 80-2.9 is amended to authorize the Commissioner to end the time validity of an interim bilingual education extension for holders called to active duty in the Armed Forces for the time of active service and an additional 12 months from the end of such service.

Subdivision (c) of section 80-3.6 is amended to authorize the Commissioner to reduce the professional development requirement proportionately for certificate holders called to active duty in the Armed Forces so that the holder is not required to complete professional development for the time of active service.

Subparagraph (i) of paragraph (3) of subdivision (a) of section 80-4.3 is amended to authorize the Commissioner to extend the time validity of an interim bilingual education extension for holders called to active duty in the Armed Forces for the time of active service and an additional 12 months from the end of such service.

Subparagraph (ii) of paragraph (2) of subdivision (b) of section 80-5.6 is amended to extend the time validity of a level I teaching assistant certifi-

cate, a level II teaching assistant certificate, a level III teaching assistant certificate and a pre-professional teaching assistant certificate for the time of active service and an additional 12 months from the end of such service.

Subdivision (c) of section 80-5.9 is amended to extend the validity period of the internship certificate for the time of active service and an additional 12 months from the end of such service, provided that the holder is a student in a registered or approved graduate program of teacher education.

**Text of proposed rule and any required statements and analyses may be obtained from:** Christine Moore, New York State Education Department, 89 Washington Avenue, Room 148, Albany, New York 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of P16, New York State Education Department, 89 Washington Avenue, 2nd Floor, Albany, NY 12234, (518) 474-3862, email: p16education@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 relating to education.

Section 210 of the Education Law authorizes the Department to fix the value of degrees, diplomas and certificates issued by institutions of other states or countries as presented for entrance to schools, colleges and the professions of the state.

Section 212 of the Education Law authorizes the Department to fix, in regulation, fees for certificates that are not otherwise provided in law.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the public schools of New York State.

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in all public schools in the State.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue such teacher certificates as the Regents Rules prescribe.

**2. LEGISLATIVE OBJECTIVES:**

The proposed amendment will carry out the objectives of the above referenced statutes by implementing the provisions of the Patriot Plan, by extending the expiration dates for various teachers' certificates for holders engaged in active military service for the period of active service and an additional 12 months from the end of such service and by reducing the professional development requirement for certificate holders called to active duty for the time of such active service.

**3. NEEDS AND BENEFITS:**

The proposed amendment is necessary to implement the provisions of the Patriot Plan, which was enacted by the Legislature in Chapter 106 of the Laws of 2003. The Patriot Plan was enacted by the Legislature to recognize members of the military who are called to active duty so that such members are not discriminated against based upon their military status in areas such as housing, employment and education.

Section 308-a of the Military Law, as added by the Patriot Plan in Chapter 106 of the Laws of 2003, waives professional continuing education requirements for persons in the military service who were licensed, registered or certified to engage in a profession or occupation prior to entering into military service for any entire licensing, registration or certification period during which such military service

occurs. Where such military service is partially within a licensing, registration or certification period, this section provides that continuing education requirements shall be reduced proportionately so that such individual is not required to complete such requirements while in military service.

Section 308-b of the Military Law, as added by the Patriot Plan in Chapter 106 of the Laws of 2003, provides that military personnel serving on active duty, who were licensed, certified or registered to engage in a profession or occupation prior to being called to active duty, and whose licensing certificate or registration shall expire during such period of active duty, shall have such license, certificate or registration automatically extended for the period of active duty and for twelve months after such military personnel have been released from active duty. However, this section shall not be construed to permit an individual whose authority to engage in a profession or occupation has been revoked or suspended to engage in such profession or occupation.

The proposed amendment implements the provisions of the Patriot Plan by reducing the professional development requirement for certificate holders called to active duty for the time of such active service. The proposed amendment also extends the validity of teaching certificates' for members of the military called to active duty for the period of such active service and an additional 12 months from the end of such service.

#### 4. COSTS:

(a) Cost to State government. The amendment will not impose any additional cost on State government, including the State Education Department.

(b) Cost to local government. The amendment does not impose additional costs upon local governments, including schools districts and BOCES.

(c) Cost to private regulated parties. The amendment will not impose additional costs on private regulated parties.

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

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any mandatory program, service, duty, or responsibility upon local government, including school districts or BOCES.

#### 6. PAPERWORK:

The proposed amendment will not increase reporting or recordkeeping requirements beyond existing requirements.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

The purpose of the proposed amendment is to implement the statutory provisions of Military Law sections 308-a and 308-b, as added by Chapter 106 of the Laws of 2003. Because the nature of the proposed amendment is to implement statutory requirements, no alternative proposals were considered.

#### 9. FEDERAL STANDARDS:

There are no Federal standards that deal with the subject matter of this amendment.

#### 10. COMPLIANCE SCHEDULE:

Regulated parties must comply with the proposed amendment on its effective date. Because of the nature of the proposed amendment, no additional period of time is necessary to enable regulated parties to comply.

#### *Regulatory Flexibility Analysis*

The purpose of the proposed amendment is to implement the provisions of the New York Patriot Plan to provide additional benefits and protections for service members. The proposed changes would extend teaching certificates that would expire while a holder is engaged in active military service for the period of active service and an additional 12 months from the end of such service. The proposed amendment

also implements the provisions of the Patriot Plan by reducing the professional development requirement for certificate holders called to active duty for the time of such active service. The amendment does not establish any requirements for small businesses or local governments, including school districts or boards of cooperative educational services (BOCES).

The amendment will not impose any adverse economic impact, recordkeeping, reporting, or other compliance requirements on small businesses or local governments, including school districts or BOCES. Because it is evident from the nature of the rule that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken.

#### *Rural Area Flexibility Analysis*

##### 1. TYPES AND NUMBER OF ESTIMATES OF RURAL AREAS:

The proposed amendment will affect holders of teaching certificates engaged in active military service in all parts of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square mile or less.

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

The purpose of the proposed amendment is to implement the provisions of the New York Patriot Plan to provide additional benefits and protections for service members. The proposed changes would extend teaching certificates that would expire while a holder is engaged in active military service for the period of active service and an additional 12 months from the end of such service. The proposed amendment also implements the provisions of the Patriot Plan by reducing the professional development requirement for certificate holders called to active duty for the time of such active service.

The proposed amendment will not increase reporting or recordkeeping requirements beyond existing requirements. The proposed amendment will not require regulated parties, including those located in rural areas, to hire professional services in order to comply.

##### 3. COSTS:

The proposed amendment will not result in additional costs to regulated parties.

##### 4. MINIMIZING ADVERSE IMPACT:

The purpose of the proposed amendment is to implement sections 308-a and 308-b of the Military Law, as added by the New York Patriot Plan to provide additional benefits and protections for service members. The State Education Department does not believe that establishing different standards for candidates who live or work in rural areas is warranted. A uniform standard ensures the quality of the State's teaching workforce.

##### 5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Rural Advisory Committee, which has representatives who live and/or work in rural areas.

#### *Job Impact Statement*

The purpose of the proposed amendment is to implement the provisions of the New York Patriot Plan to provide additional benefits and protections for service members. The proposed changes would extend teaching certificates that would expire while a holder is engaged in active military service for the period of active service and an additional 12 months from the end of such service. The proposed amendment also implements the provisions of the Patriot Plan by reducing the professional development requirement for certificate holders called to active duty for the time of such active service. Because it is evident from the nature of the rule that it could only have a positive impact or no impact on jobs 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.

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

#### **Diploma Requirements for Students with Disabilities**

**I.D. No.** EDU-39-09-00023-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 100.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 209 (not subdivided), 305(1) and (2), 308 (not subdivided) and 309 (not subdivided)

**Subject:** Diploma Requirements for Students with Disabilities.

**Purpose:** To amend section 100.5 to extend the RCT safety net for students with disabilities entering 9th grade prior to September 2011.

**Text of proposed rule:** 1. Section 100.5 of the Regulations of the Commissioner of Education is amended, effective January 7, 2010, as follows:

§ 100.5 Diploma requirements.

(a) General requirements for a Regents or a local high school diploma. Except as provided in paragraph (d)(6) of this section, the following general requirements shall apply with respect to a Regents or local high school diploma. Requirements for a diploma apply to students depending upon the year in which they first enter grade nine. A student who takes more than four years to earn a diploma is subject to the requirements that apply to the year that student first entered grade nine. Students who take less than four years to complete their diploma requirements are subject to the provisions of subdivision (e) of this section relating to accelerated graduation.

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .

(5) State assessment system. (i) Except as otherwise provided in subparagraphs (ii), (iii) and (iv) of this paragraph, all students shall demonstrate attainment of the New York State learning standards:

(a) English:

- (1) . . .
- (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1996 and prior to September [2010] 2011 and who fail the Regents comprehensive examination in English, the English requirements for a local diploma may be met by passing the Regents competency test in reading and the Regents competency test in writing or their equivalents. For students with disabilities who first enter grade nine in September 2005 and thereafter, the English requirements for a local diploma may also be met by passing the Regents comprehensive examination in English with a score of 55-64. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .

(b) Mathematics:

- (1) . . .
- (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1997 and prior to September [2010] 2011 and who fail a Regents examination in mathematics, the mathematics requirements for a local diploma may be met by passing the Regents competency test in mathematics or its equivalent. For students with disabilities who first enter grade nine in September 2005 and thereafter, the mathematics requirements for a local diploma may also be met by passing [the] a Regents examination in mathematics with a score of 55-64. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .

(c) United States history and government:

- (1) . . .
- (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1998 and prior to September [2010] 2011 and who fail the Regents examination in United States history and government, the United States history and government requirements for a local diploma may be met by passing the Regents competency test in United States history and government. For students with disabilities who first enter grade nine in September 2005 and thereafter, the United

States history and government requirements for a local diploma may also be met by passing the Regents examination in United States history and government with a score of 55-64. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .

(d) Science:

- (1) . . .
- (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1999 and prior to September [2010] 2011 and who fail a Regents examination in science, the science requirements for a local diploma may be met by passing the Regents competency test in science. For students with disabilities who first enter grade nine in [or after] September 2005 and thereafter, the science requirements for a local diploma may also be met by passing [the] a Regents examination in science with a score of 55-64. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .

(e) Global history and geography:

- (1) . . .
- (2) . . .

(3) for students with disabilities who first enter grade nine in or after September 1998 and prior to September [2010] 2011 and who fail the Regents examination in global history and geography, the global history and geography requirements for a local diploma may be met by passing the Regents competency test in global studies. For students with disabilities who first enter grade nine in [or after] September 2005 and thereafter, the global history and geography requirements for a local diploma may also be met by passing the Regents examination in global history and geography with a score of 55-64. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5);

- (4) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) . . .

- (6) . . .

- (7) . . .

- (8) . . .

(b) Additional requirements for the Regents diploma. Except as provided in paragraph (d)(6) of this section, the following additional requirements shall apply for a Regents diploma.

- (1) . . .

- (2) . . .

- (3) . . .

- (4) . . .

- (5) . . .

- (6) . . .

(7) Types of diplomas. (i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) . . .

(vi) For students with disabilities who first enter grade nine in or after September 2001 and prior to September [2010] 2011 and who fail required Regents examinations for graduation but pass Regents [Competency Tests] *competency tests* in those subjects, as provided for in paragraph (a)(5) of this section, a local diploma may be issued by the local school district. For students with disabilities who first enter grade nine in September 2005 and thereafter, a score by such student of 55-64 may be considered as a passing score on any Regents

examination required for graduation, and in such event and subject to the requirements of paragraph (c)(6) of this section, the school may issue a local diploma to such student. This provision shall apply only to students with disabilities who are entitled to attend school pursuant to Education Law, section 3202 or 4402(5).

- (vii) . . .
- (viii) . . .
- (ix) . . .
- (x) . . .
- (c) . . .
- (d) . . .
- (e) . . .
- (f) . . .

**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, New York 12234, (518) 473-8296, email: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Rebecca H. Cort, Deputy Commissioner, VESID, New York State Education Department, Room 1606, One Commerce Plaza, Albany, New York 12234, (518) 473-2714, email: SPEDPUBLICCOMMENT@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 101 continues the existence of the Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and educational work of the State.

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

Education Law section 208 authorizes the Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Regents to establish secondary examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Education Law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

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

**LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the Regents Competency Test (RCT) safety net for students with disabilities.

**NEEDS AND BENEFITS:**

The proposed amendment is necessary to extend the existing the

existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net for students with disabilities.

Under the existing regulation, the RCT safety net is only available to students with disabilities entering grade nine prior to September 2010. The Department proposes to extend the RCT safety net for an additional year to make it available to all students with disabilities entering grade nine in the 2010-11 school year. Extending the RCT safety net will allow enough time for the Regents and Department to fully analyze all of the policy issues concerning graduation, including policy implications for students with disabilities.

**COSTS:**

- a. Costs to State government: None.
- b. Costs to local governments: None.
- c. Costs to regulated parties: None.
- d. Costs to the State Education Department of implementation and continuing compliance: None.

The proposed amendment is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net, and does not impose any additional costs beyond those imposed by federal statutes and regulations and State statutes.

**LOCAL GOVERNMENT MANDATES:**

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments beyond those imposed by federal and State statutes and regulations. The proposed amendment will extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net for students with disabilities.

Section 100.5, as revised, would extend the existing RCT safety net provision for an additional year, and thereby allow students with disabilities who first enter grade nine prior to September 2011 and who fail one or more of the required Regents examinations to meet the testing requirements for the local diploma by passing the corresponding RCT(s) for English and mathematics, or their equivalent, or the Department approved alternatives to the RCTs.

**PAPERWORK:**

The proposed amendment will extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net, and does not impose any additional paperwork requirements.

**DUPLICATION:**

The proposed amendment does not duplicate, overlap or conflict with any other State or federal statute or regulation.

**ALTERNATIVES:**

The Department considered various alternative dates for the extension of the existing RCT safety net and determined that the proposed amendment, which will extend the RCT safety net for an additional year, will allow enough time for the Regents and Department to fully analyze all of the policy issues concerning graduation, including policy implications for students with disabilities.

**FEDERAL STANDARDS:**

The proposed amendment is not required by federal law or regulations, but is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net. There are no applicable Federal statutes, regulations or other requirements.

**COMPLIANCE SCHEDULE:**

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

**Regulatory Flexibility Analysis**

**Small Businesses:**

The proposed amendment relates to diploma requirements, and is necessary to extend for an additional year the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the Regents Competency Test (RCT) safety net. The proposed amendment 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 rule that it does not affect small businesses, no affirmative steps are 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 Governments:

EFFECT OF RULE:

The proposed amendment applies to all public school districts, charter schools, and registered nonpublic high schools in the State, to the extent that they offer instruction in the high school grades and issue Regents diplomas and local diplomas.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements upon local governments beyond those imposed by federal statutes and regulations.

Section 100.5, as revised, would extend the existing RCT safety net provision for an additional year, and thereby allow students with disabilities who first enter grade nine prior to September 2011 and who fail one or more of the required Regents examinations to instead meet the testing requirements for the local diploma by passing the corresponding RCT(s) for English and mathematics, or their equivalent, or the Department approved alternatives to the RCTs.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on local governments.

COMPLIANCE COSTS:

The proposed amendment is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net, and does not impose any additional costs beyond those imposed by federal statutes and regulations and State statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net, and does not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes.

Under the existing regulation, the RCT safety net is only available to students with disabilities entering grade 9 prior to September 2010. The Department proposes to extend the RCT safety net for an additional year to make it available to all students with disabilities entering grade 9 in the 2010-11 school year. Extending the RCT safety net will allow enough time for the Regents and Department to fully analyze all of the policy issues concerning graduation, including policy implications for students with disabilities.

LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

#### *Rural Area Flexibility Analysis*

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment will apply to all public school districts, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less. The proposed amendment also applies to charter schools and registered nonpublic high schools in such areas, to the extent they offer instruction in the high school grades and issue Regents diplomas and local diplomas.

REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional compliance requirements upon rural areas beyond those imposed by federal statutes and regulations.

Section 100.5, as revised, would extend the existing RCT safety net provision for an additional year, and thereby allow students with disabilities who first enter grade nine prior to September 2011 and who fail one or more of the required Regents examinations to instead meet testing requirements for the local diploma by passing the corresponding RCT(s) for English or mathematics, or their equivalent, or the Department approved alternatives to the RCTs.

The proposed amendment does not impose any additional professional service requirements on rural areas, beyond those imposed by federal statutes and regulations and State statutes.

COSTS:

The proposed amendment is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net, and does not impose any additional costs beyond those imposed by such federal statutes and regulations and State statutes.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the RCT safety net, and does not impose any additional costs or compliance requirements on these entities beyond those imposed by federal law and regulations and State statutes. Since these requirements apply to all school districts in the State, it is not possible to adopt different standards for school districts in rural areas.

Under the existing regulation, the RCT safety net is only available to students with disabilities entering grade 9 prior to September 2010. The Department proposes to extend the RCT safety net for an additional year to make it available to all students with disabilities entering grade 9 in the 2010-11 school year. Extending the RCT safety net will allow enough time for the Regents and Department to fully analyze all of the policy issues concerning graduation, including policy implications for students with disabilities.

RURAL AREA PARTICIPATION:

Copies of the proposed amendment were submitted for review and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas, and to charter schools.

#### *Job Impact Statement*

The proposed amendment is necessary to extend the existing regulatory requirements of section 100.5 of the Regulations of the Commissioner of Education relating to the Regents Competency Test (RCT) safety net from students who first enter grade nine prior to September 2010, to students who first enter grade nine prior to September 2011. The proposed rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it 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.

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## State Board of Elections

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### NOTICE OF ADOPTION

#### **Bipartisan Processing of All Voter Registration Information**

**I.D. No.** SBE-23-09-00006-A

**Filing No.** 1088

**Filing Date:** 2009-09-15

**Effective Date:** 2009-09-30

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

**Action taken:** Amendment of section 6217.5(c) of Title 9 NYCRR.

**Statutory authority:** Election Law, sections 3-102 and 5-614; L. 2005, ch. 24

**Subject:** Bipartisan processing of all voter registration information.

**Purpose:** Govern bipartisan voter registration processing of data and the transmission of same to the statewide voter registration list.

**Text or summary was published** in the June 10, 2009 issue of the Register, I.D. No. SBE-23-09-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Paul M. Collins, New York State Board of Elections, 40 Steuben Street, Albany, NY 12207, (518) 474-6367, email: pcollins@elections.state.ny.us

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

One public comment was received from the Commissioners of Elections in the City of New York.

The Commissioners consider the proposed amendments a move in the wrong direction. Indeed, rather than removing the electronic verification requirements from section 6217.5(3)(a), the State Board should add electronic verification requirements throughout section 6217, to ensure adherence to the Election Law's bipartisanship requirements in all aspects of NYSVoter's creation and maintenance.

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

#### **Voting Systems Standards Amendment to Remove Under Vote Notification by Ballot Counting Scanner**

**I.D. No.** SBE-39-09-00024-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 6209.2(a)(8) of Title 9 NYCRR.

**Statutory authority:** Election Law, sections 3-102, 7-201, 7-202, 7-203 and 7-204

**Subject:** Voting Systems Standards amendment to remove under vote notification by ballot counting scanner.

**Purpose:** To ensure that voters have the right to a private vote and that voting will not be unduly delayed by unnecessary requirements.

**Text of proposed rule:** (8) In a DRE voting system, the system must prevent voters from overvoting and indicate to the voter specific contests or ballot issues for which no selection or an insufficient number of selections has been made. A ballot marking device must prevent voters from overvoting and indicate to the voter specific contests or ballot issues for which no selection or an insufficient number of selections has been made. [In a paper-based voting system, the system]A ballot counting scanner must indicate to the voter specific contests or ballot issues for which an overvote [or undervote] is detected.

**Text of proposed rule and any required statements and analyses may be obtained from:** Paul M. Collins, New York State Board of Elections, 40 Steuben Street, Albany, NY 12207, (518) 474-6367, email: pcollins@elections.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:**

Election Law Section 3-102(1) provides for the State Board of Elections to promulgate rules and regulations relating to the administration of the election process; and Section 7-201(3) provides for the examination of voting systems to determine if they are safe for use in elections; and, if found not to be safe, a process is provided to rescind the approval to use such voting machine or system; Section 7-202(3) provides that the State Board of Elections may establish, by regulation, additional standards for voting machines or systems Section 7-203(2) authorizes the State Board of Elections to establish the minimum number of voting machines required at each polling place. This is necessary to ensure that the voting equipment used in New York State is safe, secure and reliable and will accurately record the votes cast on them in the elections in which they are used.

##### **2. Legislative Objectives:**

The Election Reform and Modernization Act of 2005 (Chapter 181/Laws of 2005), enacted a Help America Vote Act of 2002 required over vote notification requirement and authorized the State Board of Elections to implement that legislation. In implementing that legislation the State Board of Elections also included an under vote notification not required

by either federal or state statute. Upon subsequent reflection the State Board of Elections has determined that the under vote notification regulation set forth in 9 NYCRR 6209.2(a)(8) is not statutorily authorized, will result in long lines at the polling places and may be violative of a voter's constitutional and statutory right to cast a vote in private.

##### **3. Needs and Benefits:**

The Commissioners have previously determined that it was necessary for the preservation of the general welfare that this amendment be adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedure Act, effective immediately upon filing with the Department of State and also to pursue permanent adoption of this regulation. This amendment was adopted as an emergency measure because time was of the essence. The agency is under an order of the United States District Court for the Northern District of New York in United States of America v. State of New York et al (06-cv-263) to implement the Help America Vote Act across the state in the 2009 Fall Pilot Program wherein numerous counties are using optical scan voting systems in the September Primary and November General Election in 2009. The current regulation, 9 NYCRR § 6209.2(a)(8), would create serious violations of a voter's constitutional and statutory right to privacy in casting his/her vote in that it would be obvious that the voter choose not to vote in all races upon the ballot; would create delays in the voting process as the system must communicate the fact of the under vote to the voter and the voter must deal with the initial rejection of the voter's choice not to vote all races upon the ballot. In some areas of the state, Primary and Election Day are already days of long lines for voters without the unnecessary delay the under vote notification feature would occasion, which notification is not required by any state or federal statute. Currently only Illinois requires a notice of under vote of its voting systems.

As these issues became apparent, the State Board of Elections discussed this problem with the various County Boards of Elections at the June, 2009 Elections Commissioners Association Conference who unanimously requested that the regulation be changed to eliminate this requirement.

There is no more important function in a democracy than the act of voting and as New York moves to a new system of voting, that system of voting should not be impaired by suspect regulations which may be violative of voters' constitutional right to voting.

##### **4. Costs:**

There will be minimal costs to the State Board of Elections to establish uniform policies, procedures and forms, the development and implementation of training for county board of election commissioners and designated staff members, and to provide ongoing compliance supervision. The adoption of this regulation on an emergency basis minimized any increased costs for both the State Board of Elections and the various counties participating in the Fall 2009 Pilot Program as most counties had not as yet begun final training of inspectors for the Fall 2009 Pilot Program and this regulatory change will simply mean one less item that the inspectors will be called upon to explain to the voters as notice of under vote will not be generated by ballot scanning devices. There will be minimal costs to the local boards of elections.

##### **5. Local Government Mandates:**

The amended regulation creates uniform procedures that county boards of elections are mandated to follow pursuant to Election Law and these rules. The change will simplify what the counties are called upon to implement by removing the under vote notification requirement for ballot scanning devices in the change from lever to HAVA compliant machines for the 2009 Fall Pilot Program.

##### **6. Paperwork:**

The amended regulation will not alter the paperwork burden upon the counties as established in the Election Law and other portions of 9 NYCRR Part 6209.

##### **7. Duplication:**

This regulatory change does not duplicate or overlap with any other federal or state regulations and in fact simplifies existing requirements.

##### **8. Alternatives:**

An alternative that was considered was make this change applicable to all election system equipment but it became apparent, after consulting with disability advocates, that there was still a need to maintain the existing requirement of under vote notification with respect to Ballot Marking Devices so those devices were exempted from the rule change so that voters with disabilities would continue to receive such notices. At the present time there are no DRE voting systems under certification review so the portions of the former regulation pertaining to DREs was not changed in this amended regulation.

##### **9. Federal Standards:**

There are no federal mandatory standards pertaining to under vote notification.

##### **10. Compliance Schedule:**

Compliance can be achieved in conjunction with the first election conducted by the county board of elections immediately after adoption.

The State Board has formulated and developed instructional tools which were distributed to county boards of elections and a training schedule for county board commissioners and their staff is being developed.

#### **Regulatory Flexibility Analysis**

##### 1. Effect of Rule:

There are 58 local boards of elections which must meet these requirements. This does not have any effect on small businesses.

##### 2. Compliance Requirements:

County boards of elections and/or their election system vendors are required to remove or otherwise disable, in a manner prescribed by the State Board of Elections, the under vote notification feature of their ballot scanning equipment pursuant to this amended regulation.

This amendment does not have any impact on small businesses.

##### 3. Professional Services:

The county boards of elections and/or their designated staff or their election system vendors will be able to remove or otherwise disable the under vote notification on ballot scanning equipment to implement this amended regulation.

##### 4. Compliance Costs:

There will be minimal costs to the State Board of Elections to establish uniform policies, procedures and forms, the development and implementation of training for county board of election commissioners and designated staff members, and to provide ongoing compliance supervision. The adoption of this regulation on an emergency basis minimized any increased costs for both the State Board of Elections and the various counties participating in the Fall 2009 Pilot Program as most counties had not as yet begun final training of inspectors for the Fall 2009 Pilot Program and this regulatory change will simply mean one less item that the inspectors will be called upon to explain to the voters as notice of under vote will not be generated by ballot scanning devices.

##### 5. Economic and Technological Feasibility:

It is anticipated that no new or advanced technology is required to remove or disable the under vote notification by ballot scanning devices to implement this amended regulation.

As such, the amended regulation will not be cost prohibitive.

##### 6. Minimizing Adverse Impact:

The Commissioners have previously determined that it was necessary for the preservation of the general welfare that this amendment be adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedure Act, effective immediately upon filing with the Department of State and also to pursue permanent adoption of this regulation. This amendment was adopted as an emergency measure because time was of the essence. The agency is under an order of the United States District Court for the Northern District of New York in *United States of America v. State of New York et al* (06-cv-263) to implement the Help America Vote Act across the state in the 2009 Pilot Program wherein numerous counties are using optical scan voting systems in the September Primary and November General Election in 2009. The current regulation, 9 NYCRR § 6209.2(a)(8), would create serious violations of a voter's constitutional and statutory right to privacy in casting his/her vote in that it would be obvious that the voter choose not to vote in all races upon the ballot; would create delays in the voting process as the system must communicate the fact of the under vote to the voter and the voter must deal with the initial rejection of the voter's choice not to vote all races upon the ballot. In some areas of the state, Primary and Election Day are already days of long lines for voters without the unnecessary delay the under vote notification feature would occasion, which notification is not required by any state or federal statute. Currently only Illinois requires a notice of under vote of its voting systems.

An alternative that was considered was make this change applicable to all election system equipment but it became apparent, after consulting with disability advocates, that there was still a need to maintain the existing requirement of under vote notification with respect to Ballot Marking Devices so those devices were exempted from the rule change so that voters with disabilities would continue to receive such notices. At the present time there are no DRE voting systems under certification review so the portions of the former regulation pertaining to DREs was not changed in this amended regulation.

##### 7. Small Business and Local Government Participation:

As these issues became apparent, the State Board of Elections discussed this problem with the various County Boards of Elections at the June, 2009 Elections Commissioners Association Conference who unanimously requested that the regulation be changed to eliminate this requirement.

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

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

There are 44 county boards of elections which meet the definition of 'rural areas' as defined in the Executive Law § 481(7).

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

The statutory and regulatory requirement to remove the under vote notification by ballot scanning by county boards of elections from jurisdiction(s) in rural areas of this state will be governed by this amended regulation consistent with uniform statewide standards.

It is anticipated that such county boards of elections and/or their designated staff or their election system vendors will be able to easily implement the requirements of this regulation.

##### 3. Costs:

There will be minimal costs to the State Board of Elections to establish uniform policies, procedures and forms, the development and implementation of training for county board of election commissioners and designated staff members, and to provide ongoing compliance supervision. The adoption of this regulation on an emergency basis minimized any increased costs for both the State Board of Elections and the various counties participating in the Fall 2009 Pilot Program as most counties had not as yet begun final training of inspectors for the Fall 2009 Pilot Program and this regulatory change will simply mean one less item that the inspectors will be called upon to explain to the voters as notice of under vote will not be generated by ballot scanning devices.

##### 4. Minimizing adverse impact:

An alternative that was considered was make this change applicable to all election system equipment but it became apparent, after consulting with disability advocates, that there was still a need to maintain the existing requirement of under vote notification with respect to Ballot Marking Devices so those devices were exempted from the rule change. At the present time there are no DRE voting systems under certification review so the portions of the former regulation pertaining to DREs was not changed in this amended regulation. Rural counties will find it easy to comply with this amended regulation as it removes rather than adds a mandate.

##### 5. Rural area participation:

The State Board has participated in an Elections Commissioners Association session which was held in a rural county and rural county election commissioners were unanimous in their opinion that the requirement eliminated by this amended regulation should be removed immediately so that the 2009 Pilot Program can go forward with as much ease as possible and as little burden upon rural counties as possible.

#### **Job Impact Statement**

It is evident from the nature and purpose of this amended regulation that it neither creates nor eliminates employment positions and/or opportunities, and therefore, has no adverse impact on employment opportunities in New York State.

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## Department of Environmental Conservation

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### EMERGENCY RULE MAKING

#### **328.6(c) Is Amended to Allow Use of a Higher Dosage of Rotenone to Control Invasive Species by State and Federal Agencies**

**I.D. No.** ENV-39-09-00001-E

**Filing No.** 1060

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

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

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

**Action taken:** Amendment of section 328.6(c) of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, art. 15, section 0313; art. 24, section 0701; art. 33, sections 0301 and 0303

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

**Specific reasons underlying the finding of necessity:** An invasive species of fish, the Northern snakehead, has been confirmed in Orange County, New York. The allowable dosage of rotenone must be increased to levels necessary to eradicate this species and allow for the restoration of the aquatic ecosystem.

**Subject:** Section 328.6(c) is amended to allow use of a higher dosage of rotenone to control invasive species by State and Federal agencies.

**Purpose:** Allow the use of a higher dosage level of rotenone necessary to eradicate the Northern snakehead identified in Orange County.

**Text of emergency rule:** Subdivision 328.6(c) is amended to read as follows:

(c) Dosage. Not to exceed .5 to 1.0 ppm rotenone and vehicle of five percent by weight emulsifiable rotenone, or two and one-half percent synergized emulsifiable rotenone. The high dosage should be considered only for waters which are weedy, turbid or of high alkalinity. *The application rate of .5 to 1.0 ppm rotenone may be exceeded to allow for the control of invasive species by State and Federal agencies. This use will be authorized only by special permit and shall only be used in accordance with the label and labeling directions or as modified and approved by the department.*

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 7, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Steve Hurst, NYS Department of Environmental Conservation, Bureau of Fisheries, 625 Broadway, Albany, NY 12233, (518) 402-8920, email: sshurst@gw.dec.state.ny.us

#### **Regulatory Impact Statement**

##### 1. Statutory Authority

Section 15-0313 of the Environmental Conservation Law (ECL) authorizes the Department of Environmental Conservation (department) to adopt and enforce rules and regulations governing the direct application of pesticides to or in surface waters. In addition, such rules and regulations may specify the pesticides, chemicals, quantities, and concentrations thereof which may be directly applied or used in such waters.

##### 2. Legislative Objectives

Specifying allowable dosage limits of authorized chemicals in regulation for the extermination of entire fish complexes where reasonable and for purposes of sound fisheries management is an important and valuable function of the department, consistent with intent of the Legislature to protect the welfare of the people. Dosage limits were set in regulation over four decades ago to deal with certain types of fish species. However, with the transport of invasive species through the live food trade and secondarily through the aquarium trade, it is a reality that invasive species are being introduced into water bodies in New York State (NYS) and can pose a threat to many of our rare fish and wildlife species. When the department confirms the presence of an invasive species, immediate action may be necessary. Current dosage limits for rotenone in regulation are known to be ineffective against invasive species based on actions that other states have taken. A regulatory change to allow a higher dosage of authorized chemicals, in certain situations, to eliminate an invasive fish is within the legislative intent when the chemical is used properly and for a valuable and necessary purpose.

##### 3. Needs and Benefits

Subdivision 328.6(c) of 6 NYCRR allows a dosage limit not to exceed .5 to 1.0 ppm rotenone to be used for the extermination of entire fish complexes where reasonable as a basis for sound fisheries management. This regulation was promulgated July 16, 1964 and has not been amended since that time. Prentox Prenfish Toxicant, which contains rotenone, has an allowable limit of rotenone up to 5 ppm, for specific fish species, pursuant to a State and Federal approved label. However, the dosage limitation in regulation prohibits a dosage beyond 1.0 ppm rotenone. By amending the regulation to allow a dosage beyond 1.0 ppm rotenone, State and Federal agencies will be able to use rotenone at a higher dosage in full compliance with the State and Federal approved label, for certain fish species. Depending on the type of invasive fish species, it may be necessary for the department to issue a Special Local Need label to control invasive species. Such label will permit the use of rotenone on a target pest not specified on the label currently registered with Environmental Protection Agency and the department, such as the northern snakehead.

In mid June 2009, department fisheries staff conducted an investigation and verified the presence of at least two adult Northern snakehead (*Channa argus*), a species native to Asia, in Catlin Creek below Ridgebury Lake in the Town of Waywayanda, Orange County. The department has determined that the use of rotenone to eradicate the Northern snakehead will not be effective at the current dosage limits allowable by regulation. Although there is little information available

on the toxicity of rotenone to this species, recent work indicates that a higher dosage of rotenone is required to ensure complete mortality of adult snakehead. (North American Journal of Fisheries Management 26:628 - 630, 2006). Eradication using 5 ppm rotenone was successful in a small pond in Crofton, MD and in Ridgebury Lake in 2008. Rapid response using effective treatment is critical to successful eradication. Once into a large lake or riverine system, eradication is impossible. Eradication may be effective in smaller waters, particularly if the population is isolated.

The Northern snakehead entered the United States primarily through the live food trade and secondarily through the aquarium trade. This species has been prohibited from importation by the U.S. Fish and Wildlife Service under the Lacey Act 18 U.S.C. 42. The draft National Management Plan for the Northern Snakehead lists several objectives including: prevent new introductions and control the spread of established populations in new areas; detect and rapidly respond to Northern snakehead introductions in U.S. waters; and contain and eradicate newly discovered populations of Northern snakehead.

There is no evidence that any Northern snakehead survived the 2008 treatment of Ridgebury Lake. The discovery of two adult Northern snakeheads in Catlin Creek in June of 2009 indicates that some did survive our reclamation efforts in Catlin Creek or in adjacent wetlands. It is imperative that we take action to prevent this population from growing and expanding.

##### 4. Costs

Enactment of the emergency regulation described herein allowing a higher dosage of rotenone to be used by State and Federal agencies will not result in any cost to regulated parties, State or local governments, or the general public.

##### 5. Local Government Mandates

The amendment of subdivision 328.6(c) of 6 NYCRR will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, or fire district.

##### 6. Paperwork

No additional paperwork will be required as a result of this change in regulation.

##### 7. Duplication

There are no other State or Federal regulations which govern a dosage limit of rotenone.

##### 8. Alternatives

Options that have been evaluated include containment, electrofishing, and netting. Containment strategies have already been employed, but any blocking device is subject to failure in the face of natural episodic events such as flooding. In addition, electrofishing and/or netting would remove only a portion of the population due to accessibility and size selectivity of the gear.

The alternative to the regulatory change would be to take no action against this invasive species, which the department finds unacceptable. In the absence of a regulatory change, there will be no viable way to control this invasive fish species, which poses a threat to many of our rare fish and wildlife species. The Northern snakehead will have the ability to enter other bodies of water and change the ecosystem of our water bodies in NYS.

##### 9. Federal Standards

There are no minimum federal standards that apply to the dosage limit regulations.

##### 10. Compliance Schedule

This regulation will take effect immediately upon filing with the Department of State. The allowable dosage limit of 1.0 ppm rotenone can be exceeded by State and Federal agencies when controlling invasive species as of October 1, 2009.

#### **Regulatory Flexibility Analysis**

This rule making will not impose an adverse impact on small businesses or local governments. In addition, it will not impose reporting, record-keeping or other compliance requirements on small businesses or local government.

The new regulation will give State and Federal agencies the ability to use rotenone at a higher dosage in order to eradicate invasive

species. The regulation, on its face, will not require any reporting or recordkeeping requirements for anyone. State and Federal agencies that use rotenone at a higher dosage than currently allowed under regulation will need to comply with permitting requirements and obtain a permit for such application.

However, since the regulation will not apply to small businesses or local government, there will be no adverse effect. For these reasons, the department has determined that a regulatory flexibility analysis for small businesses and local government is not required.

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

This rule making will not impose any adverse impacts on rural areas and will not impose reporting, recordkeeping or other compliance requirements on public and private entities in rural areas. There will be no initial capital costs or any annual costs to comply with the rule.

The new regulation will give State and Federal agencies the ability to use rotenone at a higher dosage in order to eradicate invasive species. The regulation, on its face, will not require any reporting or recordkeeping requirements for anyone. State and Federal agencies that use rotenone at a higher dosage than currently allowed under regulation will need to comply with permitting requirements and obtain a permit for such application.

However, since the regulation will not apply to public and private entities, there will be no adverse effect. For these reasons, the department has determined that a rural area flexibility analysis is not required.

#### **Job Impact Statement**

The department has determined that this rule will not have a substantial adverse impact on jobs and employment opportunities. There are no jobs or employment opportunities that will be affected, since the nature and purpose of the emergency rulemaking simply increases the allowable dosage of rotenone that can be used by State and Federal agencies to exterminate undesirable, invasive fish species.

This rule will not eliminate any jobs or limit what a certified applicator can apply. The allowable dosage of rotenone that can be used under an aquatic permit will remain the same for certified applicators. However, the emergency regulation will allow State and Federal agencies to use rotenone at a higher dosage in order to eradicate invasive species. Therefore, the department has determined that a job impact statement is not required.

### **NOTICE OF ADOPTION**

#### **Open Fires**

**I.D. No.** ENV-19-08-00003-A

**Filing No.** 1081

**Filing Date:** 2009-09-14

**Effective Date:** 30 days after filing

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

**Action taken:** Addition of Part 215, and amendment of Parts 191 and 621 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 9-0105, 9-1103, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 70-0707, 71-2103 and 71-2105

**Subject:** Open Fires.

**Purpose:** Extending Ban of Open Burning and Elimination of Burn Permit Requirement.

**Text or summary was published** in the May 7, 2008 issue of the Register, I.D. No. ENV-19-08-00003-P.

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

**Revised rule making(s) were previously published in the State Register** on May 27, 2009.

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

**Additional matter required by statute:** Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been

prepared and are on file. This rule was approved by the Environmental Board.

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

The Department received almost 300 comments to the proposed changes to Parts 215, 191 and 621. The comments were categorized as follows:

##### **AGRICULTURAL PLASTICS**

Over half of the comments received were based on a Farm Bureau letter-writing campaign. While some of these commentators added their own specific text, they all shared a concern that the cost of disposing of agricultural plastics would be a logistical and financial burden to farmers. They also asked that the regulation not be finalized until Environmental Protection Fund money appropriated for an agricultural plastics collection program was spent to establish such a statewide program.

##### **RESTRICTIONS ON THE BURNING OF BRUSH, DOWNED LIMBS AND BRANCHES**

Most of the commenters supported the change to allow burning of brush in towns with population less than 20,000. Some of the comments stated that the general public lacked the resources needed to collect, process or transfer their brush/branches. Some raised concerns about excessive costs associated with disposal. Other comments cited a lack of adequate landfill and transfer station space, increased forest fire dangers, or the potential for pollution created from the transport and processing of brush, downed limbs and branches. However, some comments argued for promulgating the original proposal which did not allow open burning of brush.

##### **COST ISSUES**

These comments included concerns about costs associated with using an individual's car, landfill/transfer station permit increases, and landfill/transfer station equipment. Some were concerned about the lack of no-cost disposal alternatives.

##### **HEALTH ISSUES**

Many commenters supported extending open burning bans due to adverse health impacts. Some comments suggested that the Department has over-estimated the health risks associated with the open burning of trash and pure wood, such as branches and limbs while others provided anecdotal evidence of health impacts related to open burning of various materials. Comments included requesting exemptions for small amounts or specific types of trash while others called for strengthening the rule to ban burning of brush, outdoor firepits and chimineas.

##### **DISPOSAL IMPACTS**

These comments concerned the lack of refuse pick-up or the lack of adequate solid waste facilities.

##### **ENFORCEMENT**

These comments were regarding the difficulty of enforcement.

##### **LEGAL ISSUES**

These comments were regarding the control of open burning through legislation versus regulation, the Department's specific authority and the Department's adherence to the legal requirements of the rulemaking process.

##### **MISCELLANEOUS**

Comments were varied, regarding exemptions for fire training, campfires, bonfires, firepits, and burning of paper.

In addition to the above categories, the Department received several comments which were considered to be beyond the scope of the proposed regulation, and therefore, the Department did not respond to them.

### **NOTICE OF ADOPTION**

#### **Environmental Performance Labels**

**I.D. No.** ENV-14-09-00004-A

**Filing No.** 1091

**Filing Date:** 2009-09-15

**Effective Date:** 30 days after filing

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

**Action taken:** Addition of Part 252; and amendment of Part 200 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 19-1101, 19-1103 and 19-1105

**Subject:** Environmental Performance Labels.

**Purpose:** To incorporate revisions California has made to its vehicle emission control program to include environmental performance labels.

**Text or summary was published** in the April 8, 2009 issue of the Register, I.D. No. ENV-14-09-00004-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Jeff Marshall, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3255, (518) 402-8292, email: airregs@gw.dec.state.ny.us

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

**Assessment of Public Comment**

1. Comment: WE ACT believes that the new vehicle labeling requirement is a good mechanism for improving the air quality with the NYMA. Requiring new vehicles delivered for sale in New York State to be affixed with quantitative information concerning criteria pollutant and greenhouse gas emissions will give consumers and fleet owners/operators a tool for making informed decision about their purchasing and use behavior. We believe that the requirement that the label also include the vehicle’s emission performance relative to the average new vehicle for the same model year will prompt demand for cleaner vehicles, thus providing incentive for all auto manufacturers and retailers to produce and offer vehicles with the cleanest and lowest emission profile in order to meet the demand. Commentor 1.

Response: The Department agrees with this comment.

2. Comment: The State could meet its air quality improvement goals even more quickly if the required labeling would include emission profiles not just of the average new vehicle but also the profiles of vehicles in the same size and class. Commentor 1.

Response: The Department agrees that this change has the potential to slightly alter the global warming scores, but does not believe it is warranted. Vehicle manufacturers may choose to certify a test group consisting of one engine family that covers multiple vehicle configurations and models. Manufacturers have the option of certifying additional test groups that consist of individual models or configurations if they believe it will achieve a higher global warming score. The Department notes that higher scores will generally be achieved by advanced technology vehicles such as hybrids, average scores will generally be achieved by large passenger cars and light-duty trucks, and the lowest scores will generally be achieved by medium-duty passenger vehicles and larger light-duty trucks.

List of Commentors

1. Anhthu Hoang, General Counsel, WE ACT

**NOTICE OF ADOPTION**

**Volatile Organic Compound (VOC) Limits for 11 New Consumer Products Categories and Revisions to one Existing Category**

**I.D. No.** ENV-24-09-00005-A

**Filing No.** 1090

**Filing Date:** 2009-09-15

**Effective Date:** 30 days after filing

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

**Action taken:** Amendment of Parts 200 and 235 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105

**Subject:** Volatile organic compound (VOC) limits for 11 new consumer products categories and revisions to one existing category.

**Purpose:** To assist in attaining and maintaining the Federal eight-hour ozone standard for New York’s designated nonattainment areas.

**Substance of final rule:** SUBPART 235-1

APPLICABILITY

Sec. 235-1.1 Applicability

The proposed revisions to Part 235 remove the reference to “January 1, 2005” in section 235-1.1. The applicable effective dates are addressed in the Table of Standards in section 235-3.1.

SUBPART 235-2

DEFINITIONS

Sec. 235-2.1 Definitions

The proposed revisions to Part 235-2.1 include definitions for eleven new categories of consumer products that are being regulated in the revised Part 235. The new categories are: adhesive remover (including subcategories), anti-static (non-aerosol), electrical cleaner, electronic cleaner, fabric refresher, footwear or leather care, graffiti remover, hair styling products, shaving gel, toilet/urinal care, and wood cleaner. The Department is also proposing to add definitions for the contact adhesive product category and is revising the definitions for two previously regulated product categories: air fresheners and general purpose degreasers.

The Department proposes to modify several of the existing definitions and add other new definitions. For example, the Department is modifying the existing definition of “deodorant” and is adding a new definition for “deodorant body spray.” Some of the new definitions come from the revised Ozone Transport Commission (OTC) model rule for Consumer Products. These definitions include: “APC VOC Standard,” “Energized electrical cleaner,” and “Existing product.”

SUBPART 235-3

STANDARDS

Sec. 235-3.1 Standards

The proposed revisions to section 235-3.1 amend the Table of Standards to include the VOC limits for the new categories (including subcategories) and the revised VOC limits for the Contact Adhesive product category. The prohibitions concerning sale of these consumer products will apply to any such products manufactured on or after January 1, 2010 which contains volatile organic compounds (VOCs) in excess of the VOC content limits specified in the Table of Standards (Subpart 235-3.1[a]). The additions to the Table are listed below:

Additions to Table of Standards

Product Category	VOC Content Limit (percent by weight)
<b>Adhesives Remover:</b>	
Floor or Wall Covering	5
Gasket or Thread Locking	50
General Purpose	20
Specialty	70
<b>Adhesives:</b>	
Contact General Purpose	55
Contact Special Purpose	80
<b>Anti-Static Product:</b>	
Non-aerosol	11
Electrical Cleaner	45
Electronic Cleaner	75
<b>Fabric Refresher:</b>	
Aerosols	15
Non-Aerosols	6
<b>Footwear or Leather Care Product:</b>	
Aerosol	75
Solid	55
Other Forms	15
<b>Graffiti Remover:</b>	
Aerosol	50
Non-Aerosols	30
<b>Hair Styling Products:</b>	
Aerosols and Pump Sprays	6
All Other Forms	2
Shaving Gel	7
<b>Toilet/Urinal Care:</b>	

Aerosol	10
Non-Aerosol	3
Wood Cleaner:	
Aerosol	17
Non-Aerosol	4

The proposed revisions to Part 235-3.1 include an unlimited sell through for products that are manufactured before January 1, 2010, except for the products that contain the following compounds: para-dichlorobenzene (solid air fresheners and toilet/urinal care products), methylene chloride, perchloroethylene, or trichloroethylene (adhesive removers (including subcategories), contact adhesives, electrical cleaners, electronic cleaners, footwear or leather care products, general purpose degreasers and graffiti removers). Products containing these compounds will have a one year limited sell through until January 1, 2011. The VOC standards for the FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act) products listed under subdivision 235-3.1(a) will have an effective date of January 1, 2011.

The Department is also proposing modifications for Subpart 235-3.1(g), Requirements for aerosol adhesives. The Department is adding language to Subdivision 235-3.1(g)(2)(i) to help in determining the proper classifications of the spray adhesives products that fall under Part 235.

SUBPART 235-4  
EXEMPTIONS

Sec. 235-4.1 Exemptions

Under the proposed revisions, solid air fresheners containing at least 98 percent para-dichlorobenzene are exempted from the VOC limits in Subpart 235-3.1(a) until January 1, 2010. On or after January 1, 2010, solid air fresheners containing para-dichlorobenzene would fall under new Subpart 235-3.1(n), "Requirements for solid air fresheners and toilet/urinal care products."

SUBPART 235-5  
INNOVATIVE PRODUCTS

Sec. 235-5.1 Innovative Products

Added language stating that when approved by the director, Division of Air Resources, Department of Environmental Conservation, the innovative product exemption will be submitted to the United States Environmental Protection Agency as a State Implementation Plan revision for approval.

SUBPART 235-6

ADMINISTRATIVE REQUIREMENTS

Sec. 235-6.1 Administrative Requirements

Proposed section 235-6.1(a), "product dating," has added language that if a manufacturer uses the proposed product date code (YY DDD = year year day day day) to indicate the date of manufacture then the manufacturer shall not be subject to section 235-6.1(b)(1), "additional product dating requirements." The code must be listed separately from the other codes on the product container so that it is easily recognizable. Proposed section 235-6.1(b) has been updated to include language that if a manufacturer changes any code indicating the date of manufacture for any consumer product subject to section 235-3.6(b)(1) of this Part, an explanation of the modified code must be submitted to the Department before the close of business on December 31, 2010. No person shall erase, alter, deface, or otherwise remove or make illegible any date or code indicating the date of manufacture from any regulated product container without the express authorization of the manufacturer. Date code explanations for codes indicating the date of manufacture are public information and may not be claimed as confidential.

Proposed section 235-6.1(c), "most restrictive limit," has been amended so that if anywhere on the container or packaging, or on any sticker or label affixed thereto, any representation is made that the product may be used as, or is suitable for use as a consumer product for which a lower VOC limit is specified in Subpart 235-3.1(a), then the lowest VOC limit shall apply. This revision applies to consumer products manufactured on or after January 1, 2010 and FIFRA registered products manufactured on or after January 1, 2011. For consumer products manufactured before January 1, 2010 and FIFRA registered products manufactured before January 1, 2011, the current Part 235 only requires the most restrictive limit to appear only on the product's principal display panel. The revisions to Part 235 also include additional labeling requirements for the following categories: adhesives removers, electronic cleaner, energized electrical cleaner and contact adhesives.

SUBPART 235-7

REPORTING REQUIREMENTS

Sec. 235-7.1 Reporting Requirements

Proposed revisions to section 235-3.7(a) would clarify that if the responsible party does not have or does not provide the information requested by the director, Division of Air Resources, Department of Environmental Conservation, the director may require the reporting of this information by the person who has the information, including, but not limited to, any formulator, manufacturer, supplier, parent company, private labeler, distributor, or repackager. Other minor changes have made in this section to clarify the text for the purposes of reporting.

Subpart 235-7.1(d) had added language to include "energized electrical cleaners" as defined in Subpart 235-2.1(bf) for the purposes of reporting if the "energized electrical cleaners" contain 1.0 percent or more by weight (exclusive of the container or packaging) of either perchloroethylene or methylene chloride.

SUBPART 235-8  
VARIANCES

Sec. 235-8.1 Variances

Added language stating that when approved by the director, Division of Air Resources, Department of Environmental Conservation, the variance will be submitted to the United States Environmental Protection Agency as a State Implementation Plan revision for approval.

SUBPART 235-9  
TEST METHODS

Sec. 235-9.1 Test methods

Added language stating that when approved by the director, Division of Air Resources, Department of Environmental Conservation, the alternative test method will be submitted to the United States Environmental Protection Agency as a State Implementation Plan revision for approval.

SUBPART 235-10  
SEVERABILITY

Sec. 235-10.1 Severability

No Revisions.

SUBPART 235-11

ALTERNATIVE CONTROL PLAN (ACP) FOR CONSUMER PRODUCTS

Sec. 235-11.1 Alternative control plan for consumer products

Added language stating that when approved by the director, Division of Air Resources, Department of Environmental Conservation, the Alternative Control Plan (ACP) will be submitted to the United States Environmental Protection Agency as a State Implementation Plan revision for approval.

PART 200

General Provisions

Section 200.9 of 6 NYCRR Part 200 contains a list of documents that have been referenced by the Department in regulations contained in 6 NYCRR Chapter III, Air Resources. The Department is proposing to amend this list to reflect references necessary to amending Part 235.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 235-2.1(c), 235-3.1(l)(2), 235-5.1(a), (b)(5), 235-6.1(b)(1), 235-8.1(a), 235-9.1(a), 235-11.1 and 235-11.1(a).

**Text of rule and any required statements and analyses may be obtained from:** Arthur Robinson, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: airregs@gw.dec.state.ny.us

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

**Summary of Revised Regulatory Impact Statement**

STATUTORY AUTHORITY

The statutory authority for these amendments to the revised Part 235 is the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105.

LEGISLATIVE OBJECTIVES

It is the declared policy of the state of New York, as pronounced by the Legislature in the Environmental Conservation Law, to maintain a reasonable degree of purity of the air resources of the State consistent with the public health and welfare and the public enjoyment and the protection of physical property and other resources. In furtherance of this policy and the Legislature's objectives, the proposed rule will be protective of public health by providing limits to control ozone precursors.

## NEEDS AND BENEFITS

New York faces a significant public health challenge from ground-level ozone: which causes health effects in humans ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York has promulgated regulations designed to limit the VOCs emitted by various product categories known as consumer products. (See 6 NYCRR Part 235 (Consumer Products regulation)).

The New York City, Poughkeepsie, Buffalo-Niagara Falls and Jamestown metropolitan areas and Essex County (Whiteface Mountain above 1,900 feet) are currently designated as nonattainment for the 1997 ozone National Ambient Air Quality Standards (NAAQS) of 0.08 parts per million. As part of its ozone attainment demonstration, the Department has requested that the New York City Metropolitan Area be reclassified in accordance with the provisions of section 181(b)(3) of the Clean Air Act as a serious ozone nonattainment area and have an attainment date of 2013. The Poughkeepsie Metropolitan Area was classified as a moderate nonattainment area with an attainment date 2010. The Albany-Schenectady-Troy Metropolitan Area, Jefferson County and the Rochester Metropolitan Area are currently designated as nonattainment under the 1997 ozone NAAQS, but have a clean data determination for having at least 3 years of data meeting the standard. The Department is applying for clean data determinations for Essex County and the Poughkeepsie, Buffalo-Niagara Falls and Jamestown metropolitan areas based on monitored data from 2006 to 2008. This leaves the New York City area as the lone area in the State currently monitoring nonattainment with the 1997 ozone NAAQS.

On March 27, 2008, EPA promulgated a stricter ozone NAAQS. On March 12, 2009, the Department after analyzing measured ozone data for the years 2006 - 2008 recommended that the New York City, Poughkeepsie-Newburgh-Kingston, Albany-Schenectady-Troy-Glens Falls, Rochester, Buffalo-Niagara Falls and Jamestown metropolitan areas be designated nonattainment for the 2008 ozone NAAQS. This represents 32 counties with a population of nearly 17 million people or over 86 percent of the State's population. EPA is expected to designate and classify ozone nonattainment areas by March 12, 2010 which will likely establish 2016 and 2013 as the attainment dates for the New York City Metropolitan Area and the rest of the State, respectively.

As can be seen by the above listing, ozone nonattainment is a pervasive problem that exists in areas throughout the State. The emission reductions from this proposed action will assist the New York City Area in coming into compliance with both the 1997 and 2008 ozone NAAQS, and other areas of the State in coming into compliance with the 2008 ozone NAAQS.

As part of the Ozone Transport Region (OTR), which is comprised of the 12 Mid-Atlantic and Northeast States and the District of Columbia, New York State has participated in the State-led Ozone Transport Commission (OTC) Workgroups. The OTC has developed model rules to address the EPA identified emission reduction shortfalls. One of the model rules developed by the OTC to assist the OTR States in making progress towards reducing the eight-hour ozone levels by regulating VOCs was the 2001 model rule for consumer products. On October 22, 2004, the New York State Department of Environmental Conservation (Department) promulgated the existing consumer products regulation which sought to limit or reduce the amount of VOCs released into the atmosphere from Consumer Products. (See 6 NYCRR Part 235 (Consumer Products regulation)). Consistent with New York's obligations under the Clean Air Act, New York submitted its Consumer Products regulation to EPA as part of New York's SIP. On January 23, 2004, EPA approved the incorporation of Part 235 into New York's SIP.

In order to continue making progress towards reducing the eight-hour ozone levels in the EPA designated nonattainment areas within New York State, the Department once again has worked with the OTC in the process of updating existing and developing new model rules. The 2006 Consumer Products model rule is one of the OTC model rules that have been revised and the reductions in ozone precursors (VOCs) will assist the Department in attaining and maintaining the eight-hour ozone standard for New York's designated nonattainment areas.

The Department now proposes to amend 6 NYCRR Part 235 "Consumer Products" based on the revised OTC consumer products model rule. The amendments to Part 235 will be based on the work performed by the OTC workgroup which used the California Air Resources Board (CARB) consumer products program amendments that took effect on December 31, 2006. The Department's proposal incorporates 11 new categories of consumer products, along with their respective VOC limits, for the following: adhesive remover (including subcategories), anti-static (non-aerosol), electrical cleaner, electronic cleaner, fabric refresher, footwear or leather care, graffiti remover, hair styling products, shaving gel (the first tier VOC limit of seven percent), toilet/urinal care, and wood cleaner. The Department also proposes to incorporate the CARB amendments that will revise the existing VOC limit for the contact adhesive

product category and to include additional requirements for two previously regulated product categories: air fresheners and general purpose degreasers. The VOC content limit did not change in these two categories. The resulting revisions will result in an estimated VOC reduction benefit of 3.4 tons per day (tpd) for New York State.

The Department is proposing a prohibition on the use of three Toxic Air Contaminants (TACs), methylene chloride (MeCL), perchloroethylene (Perc), and trichloroethylene (TCE) in seven categories in the revised consumer products rule because they have the potential to cause cancer and could also cause non-cancer health issues. The seven categories are as follows: 1) adhesive removers (including subcategories: floor or wall covering, gasket or thread locking, general purpose, and specialty), 2) contact adhesive, 3) electrical cleaners, 4) electronic cleaners, 5) footwear or leather products, 6) general purpose degreasers, and 7) graffiti removers.

The Department is proposing a prohibition on the use of para-dichlorobenzene (PDCB), which is a chlorinated benzene compound, in the solid air fresheners and toilet/urinal care products categories. PDCB has been designated by the International Agency for Research on Cancer as a possible carcinogen to humans and has the potential to cause non-cancer health effects.

The Department is proposing modifications to several of the existing definitions. For example, the Department is proposing to modify the existing definition of "deodorant" to include certain body spray products. The amended definition will apply to products manufactured on or after January 1, 2010. Body spray products that contain language on the container or packaging, or on any sticker or label affixed thereto, stating that the product can be used on or applied to the human axilla are considered deodorants. Body spray products that are not so labeled are considered deodorant body sprays. The definition for "deodorant body spray" has been included in the proposed amendments to Part 235 to address body spray products which do not fall under the definition of "deodorant." There is no VOC content limit proposed for "deodorant body spray."

The Department is proposing to amend 6 NYCRR Part 200 (Table 1; section 200.9) to reflect changes made to Part 235. The Department has added and updated reference documents under Referenced Material in Table 1, section 200.9.

## COSTS

## Costs to Regulated Parties and Consumers:

The cost of the proposed regulation will affect any person who sells, manufactures or buys an applicable consumer product in New York State. A Statewide regulation consistent with the other OTC states will reduce production and marketing costs associated with the distribution of complying products to meet uniform standards.

A CARB analysis of consumer product reformulation costs was estimated to be \$2.00 per pound (\$4,000.00 per ton) of VOCs reduced. This estimate may be high depending on whether a manufacturer needs to reformulate or can substitute products with compliant products that are already on the market. The Department estimates that the costs incurred to comply with the VOC limits in the OTC model rule are the same as those determined by CARB.

As explained in CARB's Technical Support Document, the average increase in cost per unit to the manufacturer is estimated to be about \$0.16. Also, CARB expects most manufacturers to be able to absorb the added costs of the regulation without an adverse impact on their profitability.

## Costs to State and Local Governments:

There are no direct costs to State and local governments associated with this proposed regulation. No record keeping, reporting, or other requirements will be imposed on local governments. Requirements for record keeping, reporting, etc. are applicable only to the person(s) who manufactures, sells, supplies, or offers for sale consumer products.

## Costs to the Regulating Agency:

The Department will experience a small increase in workload as a result of this rule making. As noted above, the application of a Statewide regulation will help conserve resources as valuable staff time will not be required to track the trafficking of non-complying products across state and county lines.

## LOCAL GOVERNMENT MANDATES

No additional record keeping, reporting, or other requirements will be imposed on local governments under the proposed rulemaking. The authority and responsibility for implementing and administering proposed Part 235 resides solely with the Department. Requirements for record keeping, reporting, etc. are applicable only to the person(s) who manufactures, sells, supplies, or offers for sale consumer products.

## PAPERWORK

In the revised Part 235, the Department is proposing that manufacturers can use either the date of manufacture, the proposed specified code (YY DDD = year year day day day) or an explanation of the date portion of the code that must be on file with the Department by the close of business on December 31, 2010 if the proposed code is not used by the manufacturer.

Currently the most restrictive limit in existing Part 235 only applies to representations made on the principal display panel (front label) of the consumer product. If a representation is made that the same consumer product is suitable for use as a consumer product for which a lower VOC content limit is specified in existing Subpart 235-3.1(a) (Table of Standards), then the lowest VOC limit shall apply. In the proposed revisions to Part 235, any consumer product manufactured on or after January 1, 2010, or any FIFRA registered insecticide manufactured on or after January 1, 2011, is subject to the most restrictive VOC limit that applies. If a product represents anywhere on the label, packaging and all affixed labels or stickers, that the product may be used as, or is suitable for use as a consumer product for which a lower VOC limit is specified in revised Subpart 235-3.1(a) (Table of Standards), then the lowest VOC limit shall apply. This requirement to use the "most restrictive limit" does not apply to general purpose cleaners, antiperspirant/deodorant products and insecticide foggers.

Existing Part 235 carried only additional labeling requirements for aerosol adhesives but the revised Part 235, adds the following categories for additional labeling requirements: 1) adhesive remover, 2) electronic cleaner, 3) electrical cleaner, 4) energized electrical cleaner, and 5) contact adhesive.

Concerning Subpart 235-7.1(a) (Reporting requirements), revised Part 235 would clarify that if the responsible party does not have or does not provide the information requested by the director, Division of Air Resources, Department of Environmental Conservation, the director, Division of Air Resources, Department of Environmental Conservation may require the reporting of this information by the person that has the information, including, but not limited to, any formulator, manufacturer, supplier, parent company, private labeler, distributor, or re-packager.

#### DUPLICATION

The Department is the only government agency in New York State that regulates the VOC content in consumer products.

#### ALTERNATIVES

The following alternatives have been evaluated to address the goals set forth above. These are:

##### 1. Take No Action:

The first alternative evaluated was to take no action in the hope compliant products would eventually find their way into the Northeastern marketplace and meet with consumer acceptance. This alternative would have no impact on manufacturers. Furthermore, if DEC's regulations are not amended as proposed, the substance of the proposed changes would not be enforceable and the VOC emissions reductions would not be creditable for purposes of assisting NYS in attaining and maintaining the eight-hour ozone standard for the State's designated nonattainment areas. However, the product categories that will be incorporated into the proposed revisions for Part 235 are currently available to consumers in California and are meeting the requirements of the OTC model rule VOC content limits. For these reasons, the Department rejected this alternative.

##### 2. Regulating fewer product categories than the current CARB program:

The OTC 2006 model rule modifies the OTC 2001 model rule based on CARB's July 20, 2005 amendments. The OTC did not include the Anti-Static Aerosol products and the second tier Shaving Gel limit in its revisions to the OTC 2001 model rule because of industry concerns that meeting these VOC content limits may not be feasible. Reformulation is expected to be especially challenging for these two categories and in the case of shaving gel, CARB proposed a two-tiered limit to reflect technology and production challenges. We are proposing to adopt the first-tier VOC limit (seven percent) for shaving gel and the anti-static non-aerosol products from CARB's July 20, 2005 amendments.

##### 3. "Sell-through" Provision:

- A.) No sell through
- B.) Three year sell through
- C.) Unlimited sell through

The third alternative involves adopting the rule without a no "sell-through" and/or the three-year "sell-through" period. The no "sell-through" provision requires immediate compliance with the standards regardless of the date of manufacture. A three-year "sell-through" provision would allow non-compliant products manufactured prior to the January 1, 2010 compliance date to be sold, supplied, or offered for sale for up to three years. Allowing an unlimited sell-through period for the sale of non-compliant products manufactured before the January 1, 2010 compliance date was determined to be less burdensome to small businesses, less labor intensive, and is appropriate, given that consumer products move through the marketplace rather quickly. This approach also reflects the Department's experience that there has been excellent compliance with the existing Consumer Products rule.

The only exception to the Department's unlimited sell through proposal is an one year limited sell through (until January 1, 2011) for the following: 1) for the categories of solid air fresheners and toilet/urinal care products that contain para-dichlorobenzene; 2) for the categories adhesive remover

(including subcategories), contact adhesive, electrical cleaner, electronic cleaners, footwear or leather care products, general purpose degreasers and graffiti remover that contain methylene chloride, perchloroethylene, or trichloroethylene. The Department is proposing this limited sell through on para-dichlorobenzene, methylene chloride, perchloroethylene, or trichloroethylene because they are all suspected carcinogens and to be consistent with CARB.

#### COMPLIANCE SCHEDULE

The proposed amendments to Part 235 and Part 200 would take effect on January 1, 2010. Manufacturers, distributors and sellers of consumer products must comply with the VOC content limits in the revised regulation as of that date. Compliance alternatives (Subparts 235-5, 235-8, 235-9 and 235-11) when approved by the director, Division of Air Resources, Department of Environmental Conservation will be submitted to the USEPA as SIP revisions for approval.

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

No changes were made to the previously published Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

#### *Assessment of Public Comment*

The Department received 14 comments to the proposed changes to Parts 235 and 200. The comments were grouped as follows:

##### Applicability

1. Comment: Supports the Promulgation of Uniform Consumer Products Regulations throughout the Ozone Transport Region, therefore offers General Support for the Department's Proposed Amendment. Commentors: 1, 2, 3

Response: The Department thanks the commentors for their general support of the proposal.

2. Comment: Supports the Proposed New VOC Limits with the January 1, 2010, Effective Date. Commentors: 1, 2

Response: The Department thanks the commentors for their support.

3. Comment: Recommends that the Department modify the Alternate Control Plan (ACP) set forth in Subpart 235-11 to allow a California Air Resources Board's (CARB) approved ACP even if the CARB approved ACP is different than what the Department's rule covers. Commentors: 1, 2

Response: This comment is beyond the scope of this proposal. However, the Department has considered the recommendation and has decided not to modify these provisions. The approval of an ACP is specific to a set of circumstances that if altered, may impact by the conclusion drawn by the Department. Therefore, it is necessary to review the particular set of circumstances specific to an ACP application in order to determine its approvability.

4. Comment: Requests that the Department extend the one year sell-through for the seven consumer products categories containing methylene chloride, perchloroethylene or trichloroethylene in Subparts 235-3.1(l) and 235-3.1(m) to three years. Commentors: 1, 2

Response: The Department will not extend the sell through date for the seven consumer products categories containing methylene chloride, perchloroethylene or trichloroethylene since, "inter alia", the timing of the end of the sell through contained in Part 235 will be consistent with the California Air Resources Board Consumer Products Regulation (See, CARB's Advisory Number 341, November 2005).

In addition, as set forth in the Regulatory Impact Statement (RIS) for this rulemaking: "The TACs (Toxic Air Contaminants) methylene chloride, perchloroethylene and trichloroethylene are chlorinated solvents. They have the potential to cause cancer and exposure to these TACs, whether it is short term or long term, may result in non-cancer adverse health effects. 'See Initial Statement of Reasons for Proposed Amendments to the California Consumer Product Regulation, IX, Environmental Impacts, IX-225 - IX-234, (May 7, 2004)'. The ban on the use of these chlorinated compounds in previous CARB rulemakings has shown that the use of these compounds posed an unnecessary health hazard. In 2000, based on modeling results showing the potential for increased cases of cancer and because many alternative products were available, CARB banned the use of them in the following categories: 1) general purpose degreasers designed for automotive use, 2) engine degreasers, 3) brake cleaners, 4) carburetor and fuel injection cleaners, 5) aerosol adhesives, and 6) aerosol coatings. 'See Initial Statement of Reasons for Proposed Amendments to the California Consumer Product Regulation, IX, Environmental Impacts, IX-234, (May 7, 2004)'."

Based upon the health concerns stated in the RIS, and the consistency of the timing of the end of the sell-through period with the California regulation, the one year sell-through is appropriate.

5. Comment: Does not object to the one year sell through limit for Para-dichlorobenzene. Commentors: 1, 2

Response: The Department thanks the commentors for their support.

6. Comment: The Department should provide a reasonable amount of

time to file an explanation of their Unique Date Codes with regard to Subpart 235-6.1(b)(1). Commentors: 1, 2, 3

Response: Thank you for the comment. The Department will be modifying the proposal. The Department does not expect many new companies to be required to file a date code under this revised rule. Companies that have already filed this information with the Department need not file the information again unless it has changed.

7. Comment: Supports the Promulgation of the Consumer Products Regulation to control Volatile Organic Compounds (VOCs). Commentors: 5, 6, 7, 8

Response: The Department thanks the commentors for their support. Health

8. Comment: The Department should do more in regulating VOCs from products that are used indoors. Commentor: 5

Response: This comment is beyond the scope of this rulemaking. While many of the consumer products that are regulated under Part 235 are used indoors, the primary purpose of this regulation is to control VOC emissions because they are a precursor to the formation of ground level ozone (for a detailed discussion of the role of VOCs in ozone, please see the Regulatory Impact Statement pages 4 through 13). In addition to the ozone benefits resulting from this proposal, the Department has included restrictions on the Toxic Air Contaminants; methylene chloride, perchloroethylene and trichloroethylene.

9. Comment: Wants the Department to discontinue the Alternative Control Plan (ACP). The concern is that the ACP may allow hotspots from high VOCs to be sold and used in Environmental Justice communities in New York State. Commentor: 5

Response: The Department disagrees with this comment because of the mix and the wide distribution of consumer products makes the potential for hot spots highly unlikely. Historically, an ACP provides for an additional environmental benefit that otherwise would not happen by strictly adhering with VOC limits in the regulation. Therefore, the use of ACPs is likely benign or even beneficial.

10. Comment: The Department should do more to regulate floor finishers (moisture cure) and certain other products (Hagerty's Silver Polish, Well Done St. Moritz (oven cleaners), Tarrago (shoe polish)) since they are causing health problems when used indoors. Commentor: 6

Response: The Department points out that moisture cure floor coatings are currently regulated under Part 205 and metal polishes and oven cleaners are currently regulated under Part 235. In addition, this proposal includes new VOC limits and bans the TACs (Toxic Air Contaminants) methylene chloride, perchloroethylene or trichloroethylene for the category of "Footwear or Leather Care Product."

11. Comment: Supports the Promulgation of the Consumer Products Regulation to control VOCs and the banning certain toxic air emissions in Commercial Products. Commentors: 7, 8

Response: The Department thanks the commentors for their support.

12. Comment: VOCs are a dangerous contributor to greenhouse gases and can lead to cancer, liver disease and other health problems. Commentor: 7

Response: Thank you for your comment. As set forth in the RIS, New York faces a significant public health challenge from ground-level ozone: which causes health effects in humans ranging from respiratory disease to death. In response, the Department has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). This proposal is designed to limit the VOCs emitted by various product categories known as consumer products.

13. Comment: People are dying from lead poisoning and children are being exposed to lead from lead paint that is chipping in old buildings. Commentor: 9

Response: This comment is beyond the scope of this proposal.

Authority

14. Comment: Any compliance alternatives (Section 235-5.1 (Innovative Products), Section 235-8.1 (Variances), Section 235-9.1 (Test Methods), and Section 235-11.1 (Alternative Control Plan (ACP)) that are granted by or accepted by the Department, must be submitted to the USEPA as State Implementation Plan (SIP) revisions for approval in order for the compliance alternatives to be enforceable. Commentor: 4

Response: The Department has included language in Subparts 235-5.1, 235-8.1, 235-9.1 and 235-11.1 stating that the compliance alternatives when approved by the director, Division of Air Resources, Department of Environmental Conservation will be submitted to the USEPA as SIP revisions for approval.

List of Commentors

1. D. Douglas Fratz, Consumer Specialty Products Associations; Joseph T. Yost, Consumer Specialty Products Associations
2. Joseph T. Yost, Consumer Specialty Products Associations
3. Frances K. Wu, Personal Care Products Council
4. Richard Ruvo, United States Environmental Protection Agency
5. Meg Brown, WE ACT for Environmental Justice

6. Rabbi Lipa Sofa, Healthy Environment and Safety Solutions
7. Lucille Morales, UPROSE
8. Martha Moriano, Organization Unknown
9. Michael Cherry, Organization Unknown

## NOTICE OF ADOPTION

### Deer Management Permits

**I.D. No.** ENV-28-09-00009-A

**Filing No.** 1087

**Filing Date:** 2009-09-15

**Effective Date:** 2009-09-30

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

**Action taken:** Amendment of section 1.20 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303 and 11-0913

**Subject:** Deer management permits.

**Purpose:** To amend procedures for the issuance and use of deer management permits.

**Text of final rule:** Amend paragraph 1.20(b)(2) of 6 NYCRR as follows:

(2) Initial application period. The deadline for the initial application period is October [15th] *1st*. In order to receive consideration, applications for the initial application period made by phone, internet or at license issuing agents shall be submitted on or before October [15th] *1st* for that license year. Applications submitted by mail shall be postmarked on or before October [15th] *1st* for that license year.

Amend paragraph 1.20(b)(4) of 6 NYCRR as follows:

(4) Application fees. All applications must include the fee required in accordance with section 11-0913 of the Environmental Conservation Law. This fee will be waived for holders of junior archery, [sportsman, resident and nonresident super-sportsman, and conservation legacy] *junior hunting, and lifetime sportsman (if bought prior to October 1, 2009)* license types. [Fees and/or m]Monies received in excess of the application fee will not be refunded.

Add new subdivision 1.20(l) of 6 NYCRR as follows:

(l) "Sale of DMPs." *No person shall buy, sell or offer to sell a DMP.*

**Final rule as compared with last published rule:** Nonsubstantial changes were made in section 1.20(1).

**Text of rule and any required statements and analyses may be obtained from:** Gordon R. Batcheller, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: wildliferegs@gw.dec.state.ny.us

**Additional matter required by statute:** A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

### Revised Regulatory Impact Statement

1. Statutory authority:

Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (department) to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. Section 11-0913 provides for the issuance of deer management permits, including the fee for the application and processing of those permits.

2. Legislative objectives:

Deer management permits are the basic tool for managing New York's deer herd. The annual harvest of antlerless deer (primarily female deer) is essential to maintain ecological balance between deer and their habitats. The legislative objective of section 11-0913 ("Deer management permits") is to provide the tools necessary to manage the deer herd.

3. Needs and benefits:

The final rule amends three aspects of the deer management permit (DMP) program: (1) Establishing October 1st as the deadline for the "initial application period," (2) Prohibiting the sale of DMPs, and (3) Establishing hunting license types for which the \$10 DMP application fee is waived.

## October 1 Application Deadline

The current regulation establishes October 15th as the application deadline. The earlier application period of October 1st is needed to provide enough time to process applications, to identify wildlife management units where additional DMPs will be made available, and to mail those additional applications in time for the beginning of the Southern Zone bowhunting season.

## Prohibiting the Sale of DMPs

The department's Division of Law Enforcement has identified the sale of Deer Management Permits (DMPs) as an emerging law enforcement concern. During last year's hunting season, several regions uncovered schemes to sell DMPs via several commercial internet outlets. Such sale is not currently prohibited but if this situation is allowed to proliferate, the sale of DMPs will compromise deer management by complicating the calculation of DMP quotas that are based on hunter participation and success.

Since the sale of deer management assistance permits (DMAPs) is already prohibited pursuant to 6 NYCRR section 1.30, the prohibition on selling DMPs will establish a clear and uniform policy consistent with the premise that hunting opportunities should be provided with both equity and fairness and not to the "highest bidder." This practice should be ended by regulation to assure that the deer management system is not compromised.

The department has made a minor change in the text of the final rule to clarify that deer management permits may not be bought, sold, or offered for sale.

## Waiving the \$10 DMP Application Fee

Legislation signed into law in 2009 to increase license fees for hunting, trapping, and angling includes an amendment to subdivision 7 of the ECL section 11-0913 addressing the DMP application fee (\$10).

The final rule waives the DMP application fee for three categories of licenses: (1) Junior archery, (2) Junior hunting, and (3) Lifetime sportsman (if bought prior to October 1, 2009). All other categories of licensees are required to pay the \$10 DMP application fee.

Under the old law, the department's regulations provided for a DMP fee waiver for all authorized license types, including the conservation legacy and super-sportsman license types. Under the new law, the department will use the waiver authority for three license types (junior and lifetime), but not for the "super-sportsman."

The final rule ensures that the program is delivered with fairness and equity. In the case of the new law, two major categories of license types have been removed from the waiver authority: sportsman and conservation legacy. The department does not have the authority to waive the DMP fees for these license buyers. While the department does have the authority to waive the DMP application fee for the super-sportsmen license, the use of this authority will be widely viewed as unfair. Moreover, if the department were to waive the DMP fee for resident super-sportsman, very few people will continue to buy the higher priced conservation legacy license, and consequently we will sell fewer habitat/access stamps and subscriptions to the Conservationist (both are included in this license type). Finally, by requiring a DMP fee for resident super-sportsman, the department will collect an additional \$1 million (or more) in revenue.

## 4. Costs:

None, beyond normal administrative costs.

## 5. Local government mandates:

There are no local governmental mandates associated with this proposed regulation.

## 6. Paperwork:

No additional paperwork is associated with this proposed regulation.

## 7. Duplication:

There are no other regulations similar to this final rule.

## 8. Alternatives:

Maintaining the October 15th application deadline for DMPs will unnecessarily complicate DMP processing and issuance. October 15 is very close to the opening of the Southern Zone bowhunting season, and the Department strives to complete DMP issuance prior to that

date. The October 1st deadline application is needed to ensure that hunters receive their DMPs in time for hunting.

In the absence of a prohibition on the sale of DMPs, this practice will undoubtedly proliferate and subject the DMP application and issuance process to the vagaries of market economics. Moreover, it will complicate law enforcement. For this reason, the department has rejected the no action alternative.

Waiving the DMP fee for resident super-sportsman will create a sense of injustice among holders of other license types. It will also create confusion among license buyers. For this reason, the department has rejected the no action alternative.

## 9. Federal standards:

There are no federal standards associated with this proposal.

## 10. Compliance schedule:

Hunters will be able to comply with the new regulations as soon as they are adopted.

*Revised Regulatory Flexibility Analysis*

The proposed regulation has no effect on small businesses or local governments. It simply amends the procedures for issuing deer management permits, and stipulates that deer management permits may not be sold. Therefore, the department has determined that a Regulatory Flexibility Analysis for Small Businesses and Local Governments is not needed.

*Revised Rural Area Flexibility Analysis*

The proposed regulation has no effect on rural areas. It simply amends the procedures for issuing deer management permits, and stipulates that deer management permits may not be sold. Therefore, the department has determined that a Rural Area Flexibility Analysis is not needed.

*Revised Job Impact Statement*

The proposed regulation does not affect jobs. It simply amends the procedures for issuing deer management permits, and stipulates that deer management permits may not be sold. Therefore, the department has determined that a Job Impact Statement is not needed.

*Assessment of Public Comment*

The Department of Environmental Conservation (department) received comments on the proposed changes. A summary of the comments received and the department's response follows:

## Comment

The \$10 fee for deer management permits should be waived, especially because so many deer management permits are being issued.

## Response

The department's proposal is needed to ensure that the program is delivered with fairness and equity. While the department does have the authority to waive the deer management permit application fee for the super-sportsmen license, the use of this authority will be widely viewed as unfair because the conservation legacy fee cannot be waived. Moreover, if the department were to waive the fee for resident super-sportsman, very few people will continue to buy the conservation legacy license, and consequently fewer habitat/access stamps and subscriptions to the Conservationist (both are included in this license type) would be sold. Finally, by requiring a fee for resident super-sportsman, the department will collect an additional \$1 million (or more) in revenue.

## Comment

The deer herd is not being managed properly and we should not have to spend more money.

## Response

The department carefully manages and monitors the deer population on a wildlife management basis. Population objectives are based on recommendations from citizen task forces that are charged to establish objectives based on biological, social, and economic needs. The department's deer management program is responsive to those needs, and frequently adjusted to ensure that population objectives are achieved.

## Comment

The landowner preference should be reinstated (landowners should not have to pay the \$10 fee).

## Response

Landowner preference (in deer management permit selection) is based on ownership of at least 50 acres of land. The Environmental Conservation Law does not accommodate a fee waiver for landowners applying for a deer management permit.

**Comment**

The \$10 fee is unreasonable and hunters are unable to pay this new requirement.

**Response**

All fees for sporting licenses and deer management permit applications are established by the New York State Legislature. The department does not have the authority to increase or decrease these fees.

**Comment**

Imposing fees for deer management permits will reduce the deer harvest, causing the deer population to increase.

**Response**

The department will carefully monitor license sales and deer harvest. If deer harvest is not sufficient to meet deer population objectives, the department will adjust the deer management permit quotas in subsequent years.

**Comment**

The new fees will reduce the number of hunters and increase the number of deer management permits issued to farmers.

**Response**

As previously indicated, the department will carefully monitor the number of deer hunters and the annual deer harvest. When deer population objectives are not met, the department will adjust the number of permits issued in a given wildlife management unit.

**Comment**

It is unfair for residents to pay the fee for deer management permits and for non-residents to be exempt from paying the fee.

**Response**

Non-residents are required to pay the same amount for a deer management permit as residents. All applicants are now required to pay \$10 to apply for a permit. The sole exceptions are junior hunters and hunters who purchased a lifetime sportsman license prior to October 1, 2009.

throughout the State of New York and that this amendment be adopted on an emergency basis as authorized by section 202(6) of the State Administrative Procedure Act ("SAPA"), effective immediately upon filing with the Department of State.

This amendment has been adopted as an emergency measure as it is in the public interest to expeditiously use funds made available pursuant to the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants ("ARRA") to create jobs and stimulate the economy and thus, time is of the essence. The immediate promulgation and adoption of these amended regulations is necessary for the protection and preservation of life, health, property and natural resources due to the severe economic downturn, the possible destabilization of State and local government budgets, the prospect of reduction of essential services and counterproductive local tax increases which will exacerbate the current economic conditions. The expected duration of such emergency is expected to last through the 90-day emergency time period and any subsequent 60-day extension of such emergency period while EFC concludes formal rulemaking procedures for the amended regulations. Certain regulatory provisions need to be changed in order to streamline provisions as well as to provide the flexibility and provisions specific to and necessitated by ARRA in order for the State Revolving Fund ("SRF") to obtain ARRA funds and provide the same to SRF applicants. In order to meet the tight timeframes of ARRA, these regulations need to be adopted expeditiously. Therefore, compliance with the rule making requirements of section 202(1) of the SAPA would be contrary to the public interest and, as such, the current circumstance necessitates that the public and interested parties be given less than the minimum period for notice and comment provided for in section 202(1) of SAPA.

These revisions conform the current SRF regulations with the requirements and objectives set forth in the ARRA, which are to preserve and create jobs, promote economic recovery and invest in environmental protection and to provide short and long-term economic benefits.

ARRA requires that SRF funds be provided to projects on a State's intended use plan that are ready to proceed with construction within 12 months of the date of enactment of ARRA. Further, the Environmental Protection Agency Administrator is directed to reallocate funds where projects are not under contract or construction within 12 months of the date of enactment of ARRA.

In an effort to stimulate the economy and create or retain jobs, ARRA requires that at least 50 percent of the funds be provided as additional subsidization in the form of forgiveness of principal, negative interest loans, or grants. ARRA also provides that to the extent there are sufficient applications for eligible projects not less than 20 percent of the funds are to be provided for projects that address green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The amendments to the regulatory provisions will allow EFC to fund these types of projects.

With the downturn in the financial markets, residents have seen a dramatic decrease in home values as well as in other assets. Throughout the State, businesses are retrenching and closing. Home foreclosure rates in the State have increased. State unemployment levels have risen to 8.6 percent as of July, 2009.

The need to address drinking water infrastructure and to reduce operational costs has become more pressing as the economy trends downwards. Compliance with ARRA requirements will provide additional Federal funds to accomplish these purposes.

A potential stimulus package was widely discussed and broadcast on all major networks, television, radio, newspapers and on the web. The details and adoption of ARRA were similarly widely disseminated, as well as the State's interest in utilizing such funds.

The adoption of these emergency regulations is consistent with EFC's statutory mission, which is to provide financial assistance for essential environmental infrastructure projects for the benefit of the people of New York State.

**Subject:** The proposed regulations of are for the DWSRF co-administered by EFC and the NYS Department of Health (DOH).

**Purpose:** To set forth rules implementing the statutory provisions of the American Recovery and Reinvestment Act of 2009 (ARRA).

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## Environmental Facilities Corporation

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

**The Proposed Regulations of Are for the DWSRF Co-administered by EFC and the NYS Department of Health (DOH)**

**I.D. No.** EFC-39-09-00002-EP

**Filing No.** 1061

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

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

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

**Proposed Action:** Amendment of Part 2604 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1284(5) and 1285-m(4)

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

**Specific reasons underlying the finding of necessity:** The New York State Environmental Facilities Corporation ("EFC") has determined that the attached amendment to the Drinking Water State Revolving Fund ("DWSRF") Regulations, Part 2604 of Title 21 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is in the public interest and necessary for the preservation of the general welfare

**Substance of emergency/proposed rule (Full text is posted at the following State website: [www.nysefc.org](http://www.nysefc.org)):** I. SUBJECT:

The proposed revised regulations are for the New York Drinking Water State Revolving Fund (“DWSRF”), Section 1285-m of the Public Authorities Law (“PAL”), co-administered by the New York State Environmental Facilities Corporation (“EFC”) and the New York State Department of Health (“DOH”), pursuant to Chapter 413 of the Laws of 1996.

#### II. PURPOSE:

The proposed regulations set forth rules and procedures whereby EFC and DOH implement the requirements and objectives of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”) to enable the State Revolving Fund (“SRF”) to accept and expend Federal funds to stimulate the economy and retain and create jobs for the benefit of the people of the State.

Among the changes, EFC is expanding the definition of eligible project to include green infrastructure, water or energy efficiency improvements or other environmentally innovative activities as required by ARRA. DOH is creating an additional category G list for such green infrastructure projects in 10 NYCRR Section 53.5(c)(5). Through these changes, DWSRF funds may be made available to a variety of recipients (public and private) carrying out these types of projects.

#### III. GENERAL SUBSTANCE:

EFC is proposing to amend the DWSRF regulations found within 21 NYCRR Part 2604 in the following manner (Companion regulations found within 10 NYCRR Part 53 will also be modified):

The proposed regulatory amendments serve to incorporate provisions required by or necessitated by ARRA. The term of additional subsidization in the form of forgiveness of principal, a negative interest loan or a grant is added to allow the SRF to provide principal forgiveness or grants, as required by ARRA. Modifications are made to provide flexibility in certain financial terms and products to meet the objectives of ARRA to stimulate the economy and help initiate projects. In addition, the definition of project is expanded to incorporate green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The proposed amendments will also permit financing of pre-design planning costs prior to completion to further stimulate project development. The provisions regarding project bypassing are also clarified to meet the objectives of ARRA as to project readiness. The proposed regulations will also clarify disbursements and that if certain requirements, including those mandated by ARRA, are not met that the SRF may decline to disburse funds, and if released, recover said funds. Similarly, the remedies provisions are clarified.

Certain definitions are amended within the regulations to expand the types of financial products available. EFC is proposing to add a new definition of “direct interest rate” and other definitions be modified to allow the SRF to address current and changing market conditions. The hardship assistance program is simplified, and clarified to indicate that in the event of a shared municipal project, hardship eligibility will be based upon a municipality’s allocable portion of the shared project.

In addition, there are proposed administrative-oriented changes to EFC’s regulations. The following definitions, among others, will be changed for the purposes of providing flexibility to address changing market conditions and increase funding opportunities for recipients: “Interest rate subsidy”, “Leveraged financing”, “Market rate of interest”, and “Reduced interest rate.” Grammatical changes will include the consistent use of capitalized terms, such as “Corporation”, “Department”, “Commissioner”, “Comptroller” and “Administrator.”

**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 December 7, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Judith A. Avent, Esq., Deputy General Counsel, New York State Environmental Facilities Corporation, 625 Broadway, Albany, New York 12207-2997, (518) 402-6969, email: [avent@nysefc.org](mailto:avent@nysefc.org)

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

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY

When the Legislature enacted Chapter 413 of the Laws of 1996, it created the New York State Drinking Water Revolving Fund (“DWSRF”) and, in part, amended the State’s Public Authorities Law (“PAL”), creating Section 1285-m, which sets forth the provisions of the DWSRF. Under Section 1285-m of the PAL, the New York State Environmental Facilities Corporation (“EFC”) is given the statutory authority to administer the DWSRF. Pursuant to Section 1285-m(4), the Legislature provided that “Moneys in the drinking water revolving fund shall be applied by the corporation in accordance with this section and title four of article eleven of the public health law to provide financial assistance to recipients for construction of eligible projects and upon consultation with the director of the division of the budget, for such other purposes permitted by the federal safe drinking water act, as amended...” PAL Section 1284, which sets forth the general powers of the corporation, provides that EFC has the power “...to make and alter by-laws for its organization and internal management, and rules and regulations governing the exercise of its powers and fulfillment of its purposes under this title...” PAL Section 1284(5). In addition, the federal Safe Drinking Water Act (“SDWA”) provided for the establishment, by each state, of a revolving fund, for certain identified drinking water projects. During the last year, the economy has weakened significantly and the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”) was signed into law amending the SDWA in an effort to stimulate the economy through building environmental infrastructure.

##### 2. LEGISLATIVE OBJECTIVES

In creating the DWSRF under the PAL, the Legislature directed EFC and the New York State Department of Health (“DOH”) to provide assistance in support of the planning, development and construction of drinking water projects and other types of projects permitted by the SDWA. ARRA provides federal funds through the DWSRF to create and retain jobs, to stimulate the economy and to promote green infrastructure. EFC and DOH are amending the DWSRF regulations in order to comply with the objectives and requirements of ARRA in order to accept and utilize these Federal funds for projects within New York State. Certain regulatory provisions need to be changed in order to streamline provisions as well as to provide the flexibility and provisions specific to and necessitated by ARRA in order for the SRF to obtain ARRA funds and provide the same to DWSRF applicants.

These revisions conform the current DWSRF regulations with the requirements set forth in ARRA to more effectively carry out the legislative objectives, which are to preserve and create jobs, promote economic recovery, invest in environmental protection and to provide short and long-term economic benefits. ARRA requires that SRF funds be provided to projects on a State’s intended use plan that are ready to proceed with construction within 12 months of the date of enactment of ARRA.

In an effort to stimulate the economy and create or retain jobs, ARRA requires that at least 50 percent of the funds be provided as additional subsidization in the form of forgiveness of principal, negative interest loans, or grants. ARRA also provides that to the extent there are sufficient applications for eligible projects not less than 20 percent of the funds are to be provided for projects that address green infrastructure, water or energy efficiency improvements or other environmentally innovative activities. The amendments to the regulatory provisions will allow EFC to provide the same.

EFC is proposing to amend the DWSRF regulations found in 21 NYCRR Part 2604 and as appropriate, the 10 NYCRR Part 53 companion regulations of DOH to: (i) add a new definition of “additional subsidization” that will allow the provision of forgiveness of principal, a negative interest loan or a grant, as either financial assistance or hardship assistance; (ii) amend the definition for “project” to incorporate green infrastructure, water or energy efficiency improve-

ments or other environmentally innovative activities; (iii) permit financing of pre-design planning costs prior to completion to further stimulate project development; (iv) clarify provisions regarding project bypassing to meet the objectives of ARRA as to project readiness; and (v) other administrative-oriented changes, including the changing of various definitions in the regulations for purposes of increasing flexibility in DWSRF financial terms and products to address current market conditions and meet the objectives of ARRA to stimulate the economy and help initiate projects.

### 3. NEEDS AND BENEFITS

As set forth above, PAL Section 1284(5), gives EFC the authority to make and alter regulations to fulfill its purposes under its enabling statutes. PAL Section 1285-m(4) gives EFC the power to provide assistance for such other purposes permitted by the SDWA, as amended. Compliance with ARRA objectives and requirements will provide substantial additional Federal funds to the DWSRF to construct eligible drinking water infrastructure projects and to reduce operational costs.

The proposed regulations allow for DWSRF funding to be extended to green infrastructure, water or energy efficiency improvements or other environmentally innovative activities projects, and in the form of forgiveness of principal, a negative interest loan or a grant as set forth in the Intended Use Plan (IUP). Other provisions will allow EFC to bypass projects based upon project readiness to meet the requirements of ARRA and address changing market conditions through the provision of additional financial products as well as providing funds for pre-design planning prior to completion in order to facilitate project initiation. These changes will provide greater access to funding for DWSRF recipients and stimulate environmental projects.

The use of ARRA funds in New York State will create and retain jobs, and stimulate the construction of critical environmental infrastructure throughout New York State.

With the changes outlined above being made to the current DWSRF regulations, certain regulatory definitions will need to be revised to reflect these changes. For example, the following definitions, among others, will be changed for the purposes of providing flexibility to address changing market conditions and increase funding opportunities for recipients: "Interest rate subsidy", "Leveraged financing", "Market rate of interest", and "Reduced interest rate."

### 4. COSTS

Participation in the DWSRF program is voluntary. The proposed amendments will not result in any additional costs to recipients other than those with respect to meeting ARRA requirements.

### 5. LOCAL GOVERNMENT MANDATES

None. Participation in the DWSRF program is voluntary. Anyone choosing to apply for financial assistance from the DWSRF would be responsible for compiling the documentation necessary to submit a complete application to EFC for its consideration and review, and meet the requirements of ARRA.

### 6. PAPERWORK

The proposed amendments do not require any additional paperwork. Participation in the DWSRF program is voluntary. Anyone choosing to apply for financial assistance from the DWSRF would have to submit the documentation required for a complete application to EFC for its consideration, and meet the reporting requirements of ARRA.

### 7. DUPLICATION

The proposed amendments to 21 NYCRR Part 2604 will be consistent, as applicable, with the DOH DWSRF regulations found in 10 NYCRR Part 53.

### 8. ALTERNATIVES

Upon review of the current regulations and the programmatic changes sought to be implemented, the proposal outlined above is the most efficient means by which the DWSRF regulations can be updated and the programmatic changes implemented.

### 9. FEDERAL STANDARDS

The proposed amendments do not exceed any minimum federal government standards.

### 10. COMPLIANCE SCHEDULE

There is no relevant compliance schedule to consider with respect to the rule. However, ARRA imposes specific requirements including project readiness in order for a project to qualify for funding.

### Regulatory Flexibility Analysis

#### 1. EFFECT OF RULE

Small businesses and local governments throughout New York State will be affected in a positive manner as a result of the promulgation of this rule. The American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants ("ARRA") will provide over \$86 million dollars in additional funding for New York State Drinking Water State Revolving Fund ("DWSRF") projects intended to improve drinking water facilities. In addition, ARRA mandates that at least twenty percent of the funds be distributed for green infrastructure projects, water or energy efficiency or other environmentally innovative activities.

The infusion of these DWSRF funds into the New York State economy will preserve and create a significant number of jobs, primarily via funding for drinking water construction projects. This will have a commensurate positive effect on small businesses and consultants involved in the construction of these environmental infrastructure projects, in particular engineering firms, financial consulting firms and attorneys. Small businesses are actively involved in the drinking water construction industry in New York State. The rule will also expand the types of projects eligible to receive funding under the DWSRF to include green infrastructure projects, thereby creating additional opportunities for small businesses engaged in these types of projects. This will in turn provide an economic stimulus to localities, including additional tax revenues for local governments.

The types of local governments to be affected by this rule may include cities, towns, villages, and counties throughout New York State as they are considered eligible borrowers under the DWSRF. This rule will have a positive effect on local governments which maintain their own engineering and/or public works departments and are primarily responsible for the engineering, planning, design and construction of drinking water projects. This additional funding will allow such local governments to preserve and create jobs in connection with these types of projects.

#### 2. COMPLIANCE REQUIREMENTS

Participation in the DWSRF by small businesses and local governments is entirely voluntary. Any reporting or record keeping imposed by this rule would solely be the result of their decision to participate in the DWSRF program. Such participation would require compliance with existing DWSRF reporting and record keeping requirements and any reporting and record keeping requirements imposed by the ARRA.

#### 3. PROFESSIONAL SERVICES

Small businesses and local governments who voluntarily participate in the DWSRF program may need to retain professional services for green infrastructure projects to be authorized under the proposed rule. Otherwise, no new professional services will be required by this rule.

#### 4. COMPLIANCE COSTS

No initial capital costs will be incurred by a regulated business or industry or local government to comply with the rule. Initial or continuing compliance costs for reporting and record keeping should not vary depending on the size of such small business or local government. However, these reporting and record keeping requirements for small businesses and local governments will vary depending on the type, size and complexity of the project and the number of applicable local, state and federal approvals required. These initial or continuing compliance costs, however, only occur when the small business or local government voluntarily elects to participate in the DWSRF program.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

There are no anticipated economic or technological feasibility compliance requirements on small businesses or local governments as a result of this rule. The purpose of this rule is to provide funds to stimulate the economy of the New York State, to preserve and protect jobs and to stabilize local tax bases. Participation in the DWSRF

program is entirely voluntary and any direct or indirect compliance requirements will result from small businesses and local governments applying for and seeking DWSRF assistance.

#### 6. MINIMIZING ADVERSE IMPACT

The proposed rule will not have any adverse economic impact. The rule is designed to implement the statutory provisions and objectives of the ARRA, which are to preserve and create jobs, to promote economic recovery, to invest in environmental protection infrastructure and to stabilize State and local government budgets in order to minimize reductions in essential services and counterproductive local tax increases. In addition, the New York State Environmental Facilities Corporation (“EFC”) considered whether there were any feasible approaches for minimizing any conceivable adverse economic impacts pursuant to State Administrative Procedure Act section 202-b(1). Due to the nature and purpose of the proposed rule and the fact that there are no adverse economic impacts, EFC came to the conclusion that there were no feasible alternatives to promulgating the provisions of the rule on an emergency basis.

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

With respect to this rulemaking, EFC will publish this Notice of Emergency Rulemaking and Proposed Rulemaking and supporting documentation in the State Register and in the Environmental Notice Bulletin. EFC also intends to provide notice to the appropriate business councils, trade groups or other associations which represent small businesses and local governments to ensure that small businesses and local governments will be given an opportunity to participate in the rulemaking process.

##### *Rural Area Flexibility Analysis*

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

The proposed rule will affect all types of rural areas throughout all of New York State, particularly those in need of drinking water facilities to be funded under the Drinking Water State Revolving Fund (“DWSRF”).

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

Participation in the DWSRF by any recipient within a rural area is entirely voluntary. Any reporting, record keeping or other compliance requirements would solely be the result of their deciding to participate in the DWSRF program. Such participation would require compliance with existing DWSRF reporting and record keeping requirements and any reporting and record keeping requirements imposed by the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”). However, the provisions of the proposed rule, in and of themselves, will not require any additional reporting or record keeping by rural areas.

#### 3. COSTS

No initial capital or annual costs will be incurred by public or private entities in rural areas as a result of this rule. Initial capital costs and any annual costs to comply with the rule will vary depending upon the size and complexity of the project and the number of applicable local, state and federal approvals required. However, any initial capital or annual compliance costs occur only when public or private entities in rural areas voluntarily elect to participate in the DWSRF program.

#### 4. MINIMIZING ADVERSE IMPACT

The proposed rule will not have any adverse economic impact. The rule is designed to implement the statutory provisions and objectives of the ARRA, which are to preserve and create jobs, to promote economic recovery, to invest in environmental protection infrastructure and to stabilize State and local government budgets in order to minimize reductions in essential services and counterproductive local tax increases. In addition, the New York State Environmental Facilities Corporation (“EFC”) considered whether there were any feasible approaches for minimizing any conceivable adverse economic impacts pursuant to State Administrative Procedure Act section 202-bb(7). Due to the nature and purpose of the proposed rule and the fact that there are no adverse economic impacts, EFC came to the conclusion

that there were no feasible alternatives to promulgating the provisions of the rule on an emergency basis.

#### 5. RURAL AREA PARTICIPATION

With respect to this rulemaking, EFC will publish this Notice of Emergency Adoption and Proposed Rulemaking and supporting documentation in the State Register and in the Environmental Notice Bulletin. EFC also intends to provide notice to the appropriate organizations and other associations which represent rural areas to ensure that public and private entities will be given an opportunity to participate in the rulemaking process.

##### *Job Impact Statement*

#### 1. NATURE OF IMPACT

The rule will have a positive impact on jobs and employment opportunities. A primary goal of the American Recovery and Reinvestment Act of 2009, P.L. 111-5, Title VII, Environmental Protection Agency, State and Tribal Assistance Grants (“ARRA”) is job preservation and creation. The infusion of over \$86 million dollars into the New York State Drinking Water State Revolving Fund (“DWSRF”) will preserve and create a significant number of jobs, in particular those involving construction of water supply facilities intended to improve drinking water facilities. The rule will also provide jobs and employment opportunities for consultants involved with DWSRF projects, including engineers, attorneys and financial advisors. The rule will also create additional job opportunities for private and public entities interested in green infrastructure, water or efficiency improvements or other environmentally innovative activities.

#### 2. CATEGORIES AND NUMBERS AFFECTED

The categories of jobs most directly affected will be those of engineers, attorneys, financial advisors and construction related trades in the planning, design, construction and the obtaining of the necessary government permits and approvals regarding these projects.

#### 3. REGIONS OF ADVERSE IMPACT

None. This rule will have a positive impact on jobs and employment opportunities throughout all regions of New York State.

#### 4. MINIMIZING ADVERSE IMPACT

The provisions of the rule will have no unnecessary adverse impacts on existing jobs, but will promote the development of new employment opportunities. Therefore, no measures to minimize adverse impacts needed to be taken.

#### 5. SELF-EMPLOYMENT OPPORTUNITIES

The proposed rule will have a positive effect on self-employment opportunities related to the construction field and consultants therein.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **Criminal History Record Check**

**I.D. No.** HLT-41-08-00005-E

**Filing No.** 1071

**Filing Date:** 2009-09-11

**Effective Date:** 2009-09-12

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

**Action taken:** Addition of Part 402 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2899-a(4); and Executive Law, section 845-b(12)

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

**Specific reasons underlying the finding of necessity:** Emergency agency action is necessary for preservation of the public health, public safety and general welfare.

The regulation is needed on an emergency basis to implement the

Department of Health's statutory duty to act on requests for criminal history record checks which are required by law. The law is intended to protect patients, residents, and clients of nursing homes and home health care providers from risk of abuse or being victims of criminal activity. These regulations are necessary to implement the law as of its effective date so that the Department of Health can fulfill its statutory duty of ensuring that the health, safety and welfare of such patients, residents and clients are not unnecessarily at risk.

**Subject:** Criminal History Record Check.

**Purpose:** Criminal background checks of certain prospective employees of NHs, CHHAs, LHCSAs & long term home health care programs.

**Substance of emergency rule:** This regulation adds a new Part 402 to Title 10 NYCRR, which relates to prospective unlicensed employees of nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs who will provide direct care or supervision to patients, residents or clients of such providers.

The regulation establishes standards and procedures for criminal history record checks required by statute. Provisions govern the procedures by which fingerprints will be obtained and describe the requirements and responsibilities of the Department and the affected providers with regard to this process. The regulations address the identification of provider staff responsible for requesting the criminal history checks, supervision of temporary employees, notice to the Department when an employee is no longer employed, the content and procedure for obtaining consent and acknowledgment for finger printing from prospective employees. The Department's responsibilities for reviewing requests are set forth and specify time frames and sufficient information to process a request.

The proposed rule also describes the extent to which reimbursement is available to such providers to cover costs associated with criminal history record checks and obtaining the fingerprints necessary to obtain the criminal history record check.

**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-41-08-00005-P, Issue of October 8, 2008. The emergency rule will expire November 9, 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:

Section 2899-a (4) of the Public Health Law requires the State Commissioner of Health to promulgate regulations implementing new Article 28-E of the Public Health Law which requires all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs ("the providers") to request, through the Department of Health ("the Department"), a criminal history record check for certain unlicensed prospective employees of such providers.

Subdivision (12) of section 845-b of the Executive Law requires the Department to promulgate rules and regulations necessary to implement criminal history information requests.

##### Legislative Objectives:

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 establish a requirement for all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs to obtain criminal history record checks of certain unlicensed prospective employees who will provide direct care or supervision to patients, residents or clients of such providers. This is intended to enable such providers to identify and employ appropriate individuals to staff their facilities and programs and to ensure patient safety and security.

##### Needs and Benefits:

New York State has the responsibility to ensure the safety of its most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hands of the very persons charged with providing care to them. While the majority of unlicensed employees in all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs are dedicated, compassionate workers who provide quality care, there are cases in which criminal activity and patient abuse by such employees has occurred. While this proposal will not eliminate all instances of abuse, it will eliminate many of the opportunities for individuals with a criminal record to provide direct care or supervision to those most at risk. Pursuant to Chapter 769 of the laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 ("the Chapter Laws"), this proposal requires the providers to request the Department to obtain criminal history information from the Division of Criminal Justice Services ("the Division") and a national criminal history check from the FBI, concerning each prospective unlicensed em-

ployee who will provide direct care or supervision to the provider's patients, residents or clients.

Each provider subject to these requirements must designate "authorized persons" who will be empowered to request, receive, and review this information. Before a prospective unlicensed employee who will provide direct care or supervision to patients, residents or clients can be permanently hired, he or she must consent to having his/her fingerprints taken and a criminal history record check performed. Two sets of fingerprints will be taken and sent to the Department, which will then submit them to the Division. The Division will provide criminal history information for each person back to the Department.

The Department will then review the information and will advise the provider whether or not the applicant has a criminal history, and, if so, whether the criminal history is of such a nature that the Department disapproves the prospective employee's eligibility for employment, (e.g., the person has a felony conviction for a sex offense or a violent felony or for any crime specifically listed in section 845-b of the Executive Law and relevant to the prospective unlicensed employees of such providers). In some cases, a person may have a criminal background that does not rise to the level where the Department will disapprove eligibility for employment. The proposed regulations allow the provider, in such cases, to obtain sufficient information to enable it to make its own determination as to whether or not to employ such person. There will also be instances in which the criminal history information reveals a felony charge without a final disposition. In those cases, the Department will hold the application in abeyance until the charge is resolved. The prospective employee can be temporarily hired but not to provide direct care or supervision to patients, residents or clients of such providers.

The proposal implements the statutory requirement of affording the individual an opportunity to explain, in writing, why his or her eligibility for employment should not be disapproved before the Department can finally inform a provider that it disapproves eligibility for employment. If the Department maintains its determination to disapprove eligibility for employment, the provider must notify the person that the criminal history information is the basis for the disapproval of employment.

The proposed regulations establish certain responsibilities of providers in implementing the criminal history record review required by the law. For example, a provider must notify the Department when an individual for whom a criminal history has been sought is no longer subject to such check. Providers also must ensure that prospective employees who will be subject to the criminal history record check are notified of the provider's right to request his/her criminal history information, and that he or she has the right to obtain, review, and seek correction of such information in accordance with regulations of the Division, as well as with the FBI with regard to federal criminal history information.

##### COSTS:

##### Costs to State Government:

The Department estimates that the new requirements will result in approximately 108,000 submissions for a criminal history record check on an annual basis. This number of submissions for an initial criminal history record check will decrease overtime as the criminal history record check database (CHRC) is populated. The Department will allow providers to access any prior Department determination about a prospective employee at such time as the prospective employee presents himself or herself to such provider for employment. In the event that the prospective employee has a permanent record already on file with the Department, this information will be made available promptly to the provider who intends to hire such prospective employee.

The provider will forward with the request for the criminal history review, \$75 to cover the projected fee established by the Division for processing a State criminal history record check, and a \$19.25 fee for a national criminal history record check. The Department estimates that the provider's administrative costs for obtaining the fingerprints will be \$13.00 per print. The total annual cost to providers is estimated to be approximately \$12 million.

Requests by licensed home care services agencies (LHCSAs) are estimated to constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual cost to LHCSAs is estimated to be approximately \$6 million. Reimbursement shall be made available to LHCSAs in an equitable and direct manner for the above fees and costs subject to funds being appropriated by the State Legislature in any given fiscal year for this purpose. Costs to State government will be determined by the extent of the appropriations.

The Department estimates that nursing homes, certified home health agencies and long term home health care programs will constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual costs to nursing homes, certified home health agencies and long term home health care programs is estimated to be approximately \$6 million. These providers may, subject to federal financial participation, claim the above fees and costs as reimbursable costs under the medical as-

sistance program (Medicaid) and may recover the Medicaid percent of such fees and costs. Reimbursement to such providers will be determined by the percent of Medicaid days of care to total days of care. Therefore, approximately \$6 million of the total costs for these providers will be subject to a 50 percent federal share and approximately \$2.3 million will be borne entirely by the State.

#### Costs to Local Governments:

There will be no costs to local governments for reimbursement of the costs of the criminal history record check paid by LHCSAs. LHCSAs will receive reimbursement from the State subject to an appropriation (See "Costs to State Government").

Costs to local governments for reimbursement of the costs of the criminal history record check paid by nursing homes, certified home health agencies, and long term home health care programs will be the local government share of Medicaid reimbursement to such providers which is estimated to be annual additional cost to local governments of approximately \$123,727 (See "Costs to State Government").

#### Costs to Private Regulated Parties:

Costs to LHCSAs will be determined by the extent of annual appropriations by the State Legislature (See "Costs to State Government").

Costs to nursing homes, certified home health agencies and long term home health care programs will be determined by their Medicaid percentage of total costs (See "Costs to State Government").

#### Costs to the Department of Health:

The start up costs for CHRC in SFY 2006/2007 were 5,972,419 which included \$3,982,103 for the reimbursement of non-medicare eligible providers such as LHCSAs (Licensed Home Care Services Agencies) and \$1,990,316 in operational costs such as PS (Personnel Services) and OTPS (supplies, equipment and contractual services (temps)). The LHCSAs were fully compensated for their costs. The 1.9 million in operational costs relates to the DOH costs for SFY 2006/2007.

#### Local Government Mandates:

The required criminal history record check is a statutory requirement, which does not impose any new or additional duties or responsibilities upon county, city, town, village, school or fire districts. The Chapter Laws state that they supercede any local laws or laws of any political subdivision of the state to the extent provided for in such Chapter Laws.

#### Paperwork:

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 require that new forms be developed for use in the process of requesting criminal history record information. The forms are, for example, an informed consent form to be completed by the subject party and the request form to be completed by the authorized person designated by the provider. Temporarily approved employees are required to complete an attestation regarding incidents/abuse. Provider supervision of temporary employees must be documented. In addition, other forms will be required by the department such as a form to designate an authorized party or forms to be completed when someone who has had a criminal history record check is no longer subject to the check.

The regulations also contain a requirement to keep a current roster of subject parties.

#### Duplication:

This regulatory amendment does not duplicate existing State or federal requirements. The Chapter Laws state that they supercede and apply in lieu of any local laws or laws of any political subdivision of the state to the extent provided for in such Chapter Laws.

#### Alternatives:

No significant alternatives are available. The Department is required by the Chapter Laws to promulgate implementing regulations.

#### Federal Standards:

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

#### Small Business Guide:

A small business guide as required by section 102-a of the State Administrative Procedure Act is unnecessary at this time. The Department provided an intensive orientation of program operations to those providers affected by criminal history record program.

Information was provided and continues to be provided to providers about implementation; process and procedures; and compliance with rules and regulations through a message board, staff attendance at trade association meetings, dear administrator letters, a training script or frequently asked questions document, and a dedicated e-mail log.

#### Compliance Schedule:

The Chapter Laws mandate that the providers request criminal history record checks for certain unlicensed prospective employees on and after September 1, 2006. These regulations are proposed to be effective upon filing with the Secretary of State.

#### Regulatory Flexibility Analysis

Effect of Rule on Small Businesses and Local Governments:

For the purpose of this Regulatory Flexibility Analysis, small busi-

nesses are considered any nursing home or home care agency within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes and 200 home care services agencies would therefore be considered "small businesses," and would be subject to this regulation.

For purposes of this regulatory flexibility analysis, small businesses were considered to be long term home health care programs with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the long term home health care program cost report 77 out of 110 long term home health care programs were identified as employing fewer than 100 employees. Twenty-eight local governments have been identified as operating long term home health care programs.

#### Compliance Requirements:

Providers must, by statute, on and after September 1, 2006, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform prospective unlicensed employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State and the FBI. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not the prospective employee's eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervision requirements imposed on providers by the regulations.

#### Professional Services:

No additional professional services will be required by small businesses or local governments to comply with this rule.

#### Compliance Costs:

For programs eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers (See "Regulatory Impact Statement - Costs to State Government").

For LHCSAs which are unable to access reimbursement from state and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to an appropriation by the State Legislature (See "Regulatory Impact Statement - Costs to State Government").

There will be costs to local governments only to the extent such local governments are providers subject to the regulations.

#### Economic and Technological Feasibility:

The proposed regulations do not impose on regulated parties the use of any technological processes. Fingerprints will be taken generally by the traditional "ink and roll" process. Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. Two cards would then need to be mailed to the Division by the Department. However, before the Department could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into the Department databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint cards is difficult to read.

The Department hopes to move in the future to Live Scan. Live Scan is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Department to obtain criminal history information.

#### Minimizing Adverse Impact:

The Department considered the approaches for minimizing adverse economic impact listed in SAPA Section 202-b (1) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

#### Small Businesses and Local Government Participation:

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments were solicited from all affected parties. Informational briefings were held with such associations. There will be informational letters to providers prior to the effective date of the regulations.

#### Rural Area Flexibility Analysis

##### Effect of Rule:

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population of greater than 200,000 includes towns with population densities of 150 persons or less per square mile. The following 42 counties have a population less than 200,000.

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie

Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Reporting, Recordkeeping and Other Compliance Requirements:**  
 Providers, including those in rural areas, must, by statute, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform covered unlicensed prospective employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervision requirements imposed on providers by the regulations.

**Professional Services:**  
 No additional professional services will be necessary to comply with the proposed regulations.

**Compliance Costs:**  
 For programs located in rural areas eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers. (See "Regulatory Impact Statement – Costs to State Government").

For LHCSAs located in rural areas which are unable to access reimbursement from state/and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to appropriation by the State Legislature. (See "Regulatory Impact Statement – Costs to State Government").

**Minimizing Adverse Impact:**  
 The Department considered the approaches for minimizing adverse economic impact listed in SAPA section 202-bb (2) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

**Rural Area Participation:**  
 Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments solicited from all affected parties. Such associations include members from rural areas. Informational briefings were held with such associations. There will be informational letters to providers to include rural area providers prior to the effective date of the regulations.

**Job Impact Statement**  
 A Job Impact statement is not necessary for this filing. Proposed new 10 NYCRR Part 402 does not have any adverse impact on the unlicensed employees hired before September 1, 2006 as they apply only to future prospective unlicensed employees. The number of all future prospective unlicensed employees of providers who provide direct care or supervision to patients, residents or clients will be reduced to the degree that the criminal history record check reveals a criminal record barring such employment.

Since the inception of the program approximately 14% of all unlicensed employees applying for positions with nursing homes or home health care providers were found to have a criminal record barring such employment.

**Assessment of Public Comment**  
 The agency received no public comment

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

**Criminal History Record Check**  
**I.D. No. HLT-41-08-00005-RP**

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

**Proposed Action:** Addition of Part 402 to Title 10 NYCRR.  
**Statutory authority:** Public Health Law, section 2899-a(4); Executive Law, section 845-b(12)  
**Subject:** Criminal History Record Check.

**Purpose:** Criminal background checks of certain prospective employees of NHs, CHHAs, LHCSAs & long term home health care programs.

**Substance of revised rule:** This regulation adds a new Part 402 to Title 10 NYCRR, which relates to prospective unlicensed employees of nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs who will provide direct care or supervision to patients, residents or clients of such providers.

The regulation establishes standards and procedures for criminal history record checks required by statute. Provisions govern the procedures by which fingerprints will be obtained and describe the requirements and responsibilities of the Department and the affected providers with regard to this process. The regulations address the identification of provider staff responsible for requesting the criminal history checks, supervision of temporary employees, notice to the Department when an employee is no longer employed, the content and procedure for obtaining consent and acknowledgment for finger printing from prospective employees. The Department's responsibilities for reviewing requests are set forth and specify time frames and sufficient information to process a request.

The proposed rule also describes the extent to which reimbursement is available to such providers to cover costs associated with criminal history record checks and obtaining the fingerprints necessary to obtain the criminal history record check.

**Revised rule compared with proposed rule:** Substantial revisions were made in section 402.4(b)(2)(ii).

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

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

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

**Revised Regulatory Impact Statement**

Statutory Authority:

Section 2899-a(4) of the Public Health Law requires the State Commissioner of Health to promulgate regulations implementing new Article 28-E of the Public Health Law which requires all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs ("the providers") to request, through the Department of Health ("the Department"), a criminal history record check for certain unlicensed prospective employees of such providers.

Subdivision (12) of section 845-b of the Executive Law requires the Department to promulgate rules and regulations necessary to implement criminal history information requests.

Legislative Objectives:

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 establish a requirement for all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs to obtain criminal history record checks of certain unlicensed prospective employees who will provide direct care or supervision to patients, residents or clients of such providers. This is intended to enable such providers to identify and employ appropriate individuals to staff their facilities and programs and to ensure patient safety and security.

Needs and Benefits:

New York State has the responsibility to ensure the safety of its

most vulnerable citizens who may be unable to protect and defend themselves from abuse or mistreatment at the hands of the very persons charged with providing care to them. While the majority of unlicensed employees in all nursing homes, certified home health agencies, licensed home care services agencies and long term home health care programs are dedicated, compassionate workers who provide quality care, there are cases in which criminal activity and patient abuse by such employees has occurred. While this proposal will not eliminate all instances of abuse, it will eliminate many of the opportunities for individuals with a criminal record to provide direct care or supervision to those most at risk. Pursuant to Chapter 769 of the laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 ("the Chapter Laws"), this proposal requires the providers to request the Department to obtain criminal history information from the Division of Criminal Justice Services ("the Division") and a national criminal history check from the FBI, concerning each prospective unlicensed employee who will provide direct care or supervision to the provider's patients, residents or clients.

Each provider subject to these requirements must designate "authorized persons" who will be empowered to request, receive, and review this information. Before a prospective unlicensed employee who will provide direct care or supervision to patients, residents or clients can be permanently hired, he or she must consent to having his/her fingerprints taken and a criminal history record check performed. Two sets of fingerprints will be taken and sent to the Department, which will then submit them to the Division. The Division will provide criminal history information for each person back to the Department.

The Department will then review the information and will advise the provider whether or not the applicant has a criminal history, and, if so, whether the criminal history is of such a nature that the Department disapproves the prospective employee's eligibility for employment, (e.g., the person has a felony conviction for a sex offense or a violent felony or for any crime specifically listed in section 845-b of the Executive Law and relevant to the prospective unlicensed employees of such providers). In some cases, a person may have a criminal background that does not rise to the level where the Department will disapprove eligibility for employment. The proposed regulations allow the provider, in such cases, to obtain sufficient information to enable it to make its own determination as to whether or not to employ such person. There will also be instances in which the criminal history information reveals a felony charge without a final disposition. In those cases, the Department will hold the application in abeyance until the charge is resolved. The prospective employee can be temporarily hired but not to provide direct care or supervision to patients, residents or clients of such providers.

The proposal implements the statutory requirement of affording the individual an opportunity to explain, in writing, why his or her eligibility for employment should not be disapproved before the Department can finally inform a provider that it disapproves eligibility for employment. If the Department maintains its determination to disapprove eligibility for employment, the provider must notify the person that the criminal history information is the basis for the disapproval of employment.

The proposed regulations establish certain responsibilities of providers in implementing the criminal history record review required by the law. For example, a provider must notify the Department when an individual for whom a criminal history has been sought is no longer subject to such check. Providers also must ensure that prospective employees who will be subject to the criminal history record check are notified of the provider's right to request his/her criminal history information, and that he or she has the right to obtain, review, and seek correction of such information in accordance with regulations of the Division, as well as with the FBI with regard to federal criminal history information.

Costs:

Costs to State Government:

The Department estimates that the new requirements will result in approximately 108,000 submissions for a criminal history record check on an annual basis. This number of submissions for an initial criminal history record check will decrease over time as the criminal

history record check database (CHRC) is populated. The Department will allow providers to access any prior Department determination about a prospective employee at such time as the prospective employee presents himself or herself to such provider for employment. In the event that the prospective employee has a permanent record already on file with the Department, this information will be made available promptly to the provider who intends to hire such prospective employee.

The provider will forward with the request for the criminal history review, \$75 to cover the projected fee established by the Division for processing a State criminal history record check, and a \$19.25 fee for a national criminal history record check. The Department estimates that the provider's administrative costs for obtaining the fingerprints will be \$13.00 per print. The total annual cost to providers is estimated to be approximately \$12 million.

Requests by licensed home care services agencies (LHCSAs) are estimated to constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual cost to LHCSAs is estimated to be approximately \$6 million. Reimbursement shall be made available to LHCSAs in an equitable and direct manner for the above fees and costs subject to funds being appropriated by the State Legislature in any given fiscal year for this purpose. Costs to State government will be determined by the extent of the appropriations.

The Department estimates that nursing homes, certified home health agencies and long term home health care programs will constitute approximately 50% of the estimated 108,000 requests on an annual basis. The total annual costs to nursing homes, certified home health agencies and long term home health care programs is estimated to be approximately \$6 million. These providers may, subject to federal financial participation, claim the above fees and costs as reimbursable costs under the medical assistance program (Medicaid) and may recover the Medicaid percent of such fees and costs. Reimbursement to such providers will be determined by the percent of Medicaid days of care to total days of care. Therefore, approximately \$6 million of the total costs for these providers will be subject to a 50 percent federal share and approximately \$2.3 million will be borne entirely by the State.

Costs to Local Governments:

There will be no costs to local governments for reimbursement of the costs of the criminal history record check paid by LHCSAs. LHCSAs will receive reimbursement from the State subject to an appropriation (See "Costs to State Government").

Costs to local governments for reimbursement of the costs of the criminal history record check paid by nursing homes, certified home health agencies, and long term home health care programs will be the local government share of Medicaid reimbursement to such providers which is estimated to be annual additional cost to local governments of approximately \$123,727 (See "Costs to State Government").

Costs to Private Regulated Parties:

Costs to LHCSAs will be determined by the extent of annual appropriations by the State Legislature (See "Costs to State Government").

Costs to nursing homes, certified home health agencies and long term home health care programs will be determined by their Medicaid percentage of total costs (See "Costs to State Government").

Costs to the Department of Health:

The start up costs for CHRC in SFY 2006/2007 were 5,972,419 which included \$3,982,103 for the reimbursement of non-medicaid eligible providers such as LHCSAs (Licensed Home Care Services Agencies) and \$1,990,316 in operational costs such as PS (Personnel Services) and OTPS (supplies, equipment and contractual services (temps)). The LHCSAs were fully compensated for their costs. The 1.9 million in operational costs relates to the DOH costs for SFY 2006/2007.

Local Government Mandates:

The required criminal history record check is a statutory requirement, which does not impose any new or additional duties or responsibilities upon county, city, town, village, school or fire districts. The Chapter Laws state that they supercede any local laws or laws of any

political subdivision of the state to the extent provided for in such Chapter Laws.

**Paperwork:**

Chapter 769 of the Laws of 2005 as amended by Chapters 331 and 673 of the Laws of 2006 require that new forms be developed for use in the process of requesting criminal history record information. The forms are, for example, an informed consent form to be completed by the subject party and the request form to be completed by the authorized person designated by the provider. Temporarily approved employees are required to complete an attestation regarding incidents/abuse. Provider supervision of temporary employees must be documented. In addition, other forms will be required by the department such as a form to designate an authorized party or forms to be completed when someone who has had a criminal history record check is no longer subject to the check.

The regulations also contain a requirement to keep a current roster of subject parties.

**Duplication:**

This regulatory amendment does not duplicate existing State or federal requirements. The Chapter Laws state that they supercede and apply in lieu of any local laws or laws of any political subdivision of the state to the extent provided for in such Chapter Laws.

**Alternatives:**

No significant alternatives are available. The Department is required by the Chapter Laws to promulgate implementing regulations.

**Federal Standards:**

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

**Compliance Schedule:**

The Chapter Laws mandate that the providers request criminal history record checks for certain unlicensed prospective employees on and after September 1, 2006. These regulations are proposed to be effective upon publication of a Notice of Adoption in the New York State Register.

**Revised Regulatory Flexibility Analysis**

**Effect of Rule on Small Businesses and Local Governments:**

For the purpose of this Regulatory Flexibility Analysis, small businesses are considered any nursing home or home care agency within New York State which is independently owned and operated, and employs 100 individuals or less. Approximately 100 nursing homes and 200 home care services agencies would therefore be considered "small businesses," and would be subject to this regulation.

For purposes of this regulatory flexibility analysis, small businesses were considered to be long term home health care programs with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the long term home health care program cost report 77 out of 110 long term home health care programs were identified as employing fewer than 100 employees. Twenty-eight local governments have been identified as operating long term home health care programs.

**Compliance Requirements:**

Providers must, by statute, on and after September 1, 2006, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform prospective unlicensed employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State and the FBI. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not the prospective employee's eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervisory requirements imposed on providers by the regulations.

**Professional Services:**

No additional professional services will be required by small businesses or local governments to comply with this rule.

**Compliance Costs:**

For programs eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers (See "Regulatory Impact Statement - Costs to State Government").

For LHCSAs which are unable to access reimbursement from state and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to an appropriation by the State Legislature (See "Regulatory Impact Statement - Costs to State Government").

There will be costs to local governments only to the extent such local governments are providers subject to the regulations.

**Economic and Technological Feasibility:**

The proposed regulations do not impose on regulated parties the use of any technological processes. Fingerprints will be taken generally by the traditional "ink and roll" process. Under the "ink and roll" method, a trained individual rolls a person's fingers in ink and then manually places the fingers on a card to leave an ink print. Two cards would then need to be mailed to the Division by the Department. However, before the Department could submit the card, demographic information would need to be filled in on the card (such as the person's name, address, etc.) into the Department databases. Additional time delays may be encountered if it is determined that the fingerprint has been smudged and must be taken again, or when the handwriting on the fingerprint cards is difficult to read.

The Department hopes to move in the future to Live Scan. Live Scan is a technology that captures fingerprints electronically and would transmit the fingerprints directly to the Department to obtain criminal history information.

**Minimizing Adverse Impact:**

The Department considered the approaches for minimizing adverse economic impact listed in SAPA Section 202-b (1) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

**Small Businesses and Local Government Participation:**

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments were solicited from all affected parties. Informational briefings were held with such associations. There will be informational letters to providers prior to the effective date of the regulations.

**Revised Rural Area Flexibility Analysis**

**Effect of Rule:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population of greater than 200,000 includes towns with population densities of 150 persons or less per square mile. The following 42 counties have a population less than 200,000.

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Chayuga	Jefferson	Schuylar
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

#### Reporting, Recordkeeping and Other Compliance Requirements:

Providers, including those in rural areas, must, by statute, request criminal history information concerning prospective unlicensed employees who will provide direct care or supervision to patients, residents or clients. One or more persons in their employ must be designated to check criminal history information. The criminal history record check must be obtained through the Department. Providers must inform covered unlicensed prospective employees of their right to request such information and of the procedures available to them to review and correct criminal history information maintained by the State. Although prospective employees cannot be permanently hired before a determination is received from the Department about whether or not eligibility for employment must be disapproved, providers can give temporary approval to prospective employees and permit them to work so long as they meet the supervision requirements imposed on providers by the regulations.

#### Professional Services:

No additional professional services will be necessary to comply with the proposed regulations.

#### Compliance Costs:

For programs located in rural areas eligible for Medicaid funding, fees and costs will be considered an allowable cost in the Medicaid rates for such providers. (See "Regulatory Impact Statement - Costs to State Government").

For LHCSAs located in rural areas which are unable to access reimbursement from state/and/or federally funded programs, reimbursement will be provided on a direct and equitable basis subject to appropriation by the State Legislature. (See "Regulatory Impact Statement - Costs to State Government").

#### Minimizing Adverse Impact:

The Department considered the approaches for minimizing adverse economic impact listed in SAPA section 202-bb (2) and found them inapplicable. The requirements in this proposal are statutorily required. Compliance with them is mandatory.

#### Rural Area Participation:

Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing nursing homes and home care providers and comments solicited from all affected parties. Such associations include members from rural areas. Informational briefings were held with such associations. There will be informational letters to providers to include rural area providers prior to the effective date of the regulations.

#### Revised Job Impact Statement

A Job Impact statement is not necessary for this filing. Proposed new 10 NYCRR Part 402 does not have any adverse impact on the unlicensed employees hired before September 1, 2006 as they apply only to future prospective unlicensed employees. The number of all future prospective unlicensed employees of providers who provide direct care or supervision to patients, residents or clients will be reduced to the degree that the criminal history record check reveals a criminal record barring such employment.

Since the inception of the program approximately 14% of all unlicensed employees applying for positions with nursing homes or home health care providers were found to have a criminal record barring such employment.

#### Assessment of Public Comment

The Department received comments from 16 individuals/organizations in regard to the Criminal History Record Check (CHRC) regulations. The Department believes this regulation simply fulfills the statutory requirement of Chapter 331 of the Laws of 2006, amending Public Health Law (PHL) Article 28-E and Executive Law (EL) Section 845-b relating to requiring the review of criminal history of prospective employees of nursing homes and home health care ser-

vices agencies, and that most of the comments submitted are in opposition to several provisions of the Department of Health (DOH) regulations at 10 NYCRR Part 402 which were promulgated following the enactment of the statute. The specific issues raised and responses to those issues follow:

#### Comment:

In response to the provision that would require PHL Article 28 and Article 36 covered providers to designate one or more "Authorized Persons" to request, receive and maintain the confidentiality of criminal history information provided by the Department, virtually all comments received emphasized that this provision is unduly restrictive and recommended the automatic designation of two "Authorized Persons". Likewise, the commenters also stated concerns that the need for backup "Authorized Persons" to cover potential employee absences such as vacation, employee turnover or other employment issues also requires the designation of at least two "authorized persons". As such, the commenters stated that this change eliminates additional administrative burden for both providers and DOH.

#### Response:

The DOH disagrees because the designation of at least two authorized persons is already permitted by regulation. An "Authorized Person" is defined by the 2006 statute to mean the "one individual designated by a provider who is authorized to request, receive and review criminal history information, except that where the number of applications received by a provider is so great that one person cannot reasonably perform the functions of the authorized person, a provider may designate one or more additional persons to serve as authorized persons". Executive Law 845-b(1)(b). Similarly, 10 NYCRR Section 402.4(a)(1) requires the designation of as many authorized persons as are needed to assure compliance with the CHRC requirements. In order for covered providers to comply with the timely access and response to criminal history information provided by the DOH, covered providers have been instructed in both DOH training sessions and CHRC administrative letters that the designation of at least two authorized persons is encouraged and will not require DOH pre-approval. This was encouraged because the Department requires that the providers not allow prospective employees to provide direct care or supervision to patients, residents or clients in response to CHRC correspondence concerning proposed or final disapproval of eligibility for employment. It follows that due to the provider response requirements to CHRC correspondence, an authorized person should be made available at all times and notwithstanding a provider's internal staffing issues. Moreover, the larger PHL Article 28 and 36 entities have historically been encouraged by the Department to designate more than two authorized persons in recognition of the high volume of criminal history record checking requests submitted by them.

#### Comment:

Most raised the comment that the supervision requirements concerning prospective employees awaiting the results of the CHRC be revised to require one direct on-site visit and 3 telephone calls for the first month and then monthly calls thereafter to check-in with the patient/client or the patient/client's representative. The commenters also stated since providers speak with patients/clients on a continual basis already, such a requirement would provide financial relief from the restrictive supervision requirements currently imposed, while continuing to maintain appropriate supervision of those temporary employees. The commenters also stated that the supervision requirements be revised to allow the direct on-site visit to be completed by a licensed health care professional, senior aide or other paraprofessional who meets the one year requirement of employment in home care.

#### Response:

The DOH agrees in part, and to the extent that the current regulation requirement requires Certified Home Health Agencies (CHHAs), Licensed Home Care Services Agencies (LHCSAs) and Long Term Home Health Care Providers (LTHHCPs) to provide direct observation and evaluation of the temporary employee on-site in the home the first week by a registered professional nurse, licensed practical nurse or other professional personnel and should be modified. PHL 2899-a(10) requires that for the purposes of providing direct observation and evaluation, the provider shall utilize an individual employed by

such provider with a minimum of one-year's experience working in an agency certified, licensed or approved under Article 36 of the Public Health Law. The DOH agrees that the language in the statute ensures appropriate oversight while allowing the health care agencies to determine what level of supervision is appropriate for the prospective employees. Therefore, the regulation will be changed to allow, solely for the purposes of the CHRC supervision, the direct on-site visits to be completed by a licensed health care professional, senior aide or other paraprofessional who meets the one year requirement of employment in home care. This regulation change, however, does not supplant the existing clinical supervision requirement to be completed by a Registered Nurse or Licensed Practical Nurse. The DOH, however, also recognizes that the home health care setting poses a greater risk to the home care client pending the completion of the criminal history record checking process. On several occasions, the DOH has been informed by law enforcement or media sources of criminal offenses, both physical and financial in nature, by prospective employees during the supervisory period. The regulations at 402.4(b)(2)(ii) provide for a minimal level of CHRC supervisory contacts that ensures providers are supervising individuals while awaiting a response from the Department. Commenters also noted that some providers are still experiencing long delays in turnaround time for processing and finalizing criminal record checks, thereby increasing their supervision costs. Current CHRC processing time has been reduced to about 7 to 10 days for a non-indent (no criminal history information on file) response. The Department strives to further reduce the response time to a provider's or applicant's request for a criminal history record check determination. Several factors may delay issuing a determination to the provider and the prospective employee where there is criminal history. Once the CHRC Legal unit receives a criminal history from the Division of Criminal Justice Services (DCJS) it must be reviewed for completeness and accuracy. Very often the information provided by the FBI and to a lesser extent, the DCJS, is incomplete. The legal unit's responsibility is to assure the completeness and the accuracy of the criminal history provided and the outcome of criminal charges before making a final determination about the individual's suitability for employment. Perfection of a criminal history requires the CHRC unit to contact a number of sources including courts, parole officers, probation officers and district attorneys in New York and other jurisdictions. This process can take several days to weeks. We appreciate that this may delay some responses and providers are incurring supervisory costs while awaiting a response from the Department, but we must resolve these issues first in order to protect the health, safety, and welfare of the resident or home care patient. The protections are wholly within the purview of the Department.

**Comment:**

Most also recommended the removal of the regulation provision allowing prospective employees to withdraw applications for employment prior to the completion of the CHRC process. Commenters stated that this provision subjects providers to additional CHRC related costs while waiting for DOH reimbursement for applicants who may not complete the employment process because of withdrawal.

**Response:**

The DOH disagrees. Executive Law Section 845-b(3)(d) provides that a prospective employee may withdraw his or her application for employment, without prejudice, at any time before employment is offered or declined, regardless of whether the subject individual or provider has reviewed such individual's criminal history information. Furthermore, CHRC initial fingerprinting costs for the prospective employee remains reimbursable based on availability, whether or not the applicant completes the employment process. The DOH also wishes to underscore that the intent of the DOH CHRC Form 102 "Acknowledgement and Consent Form for Fingerprinting and Disclosure of Criminal History Record Information" is to also inform prospective employees of their right to withdraw their application for employment at any time. This right to withdraw is clearly noted on the consent form. This form was drafted with the intent of full disclosure. Moreover, the DOH CHRC Form 102 also required approval by both the NYS Division of Criminal Justice Services and the FBI prior to its implementation.

**Comment:**

Several commenters stated that there should be strict time lines, for example 5 days, for the DOH to review criminal history information and make employment eligibility determinations. In large part, due to the supervision costs associated with prospective employees waiting for the results of the CHRC, commenters added that such time limits would reduce their CHRC costs and also enable the DOH to more promptly notify the provider whether or not the CHRC has revealed any criminal history information, and if so, what actions shall or may be taken by the DOH and the provider.

**Response:**

Executive Law 845-b(5)(e) explicitly states that upon receipt of criminal history information from the division (NYS Division of Criminal Justice Services), the DOH may request, and is entitled to receive, information pertaining to any crime identified in such criminal history information from any state or local law enforcement agency, district attorney, parole officer, probation officer or court for the purposes of determining whether any ground relating to such crime exists for denying an application, renewal, or employment. Furthermore, paragraph (f) of the same subsection follows and states that the DOH shall thereafter promptly notify the provider concerning whether its check has revealed any criminal history information, and if so, what actions shall or may be taken by the DOH and the provider. As mentioned above, several factors may delay issuing a determination to the provider and the prospective employee where there is criminal history. Once the CHRC Legal unit receives a criminal history from the Division of Criminal Justice Services (DCJS) it must be reviewed for completeness and accuracy. Very often the information provided by the FBI and to a lesser extent, the DCJS, is incomplete. The legal unit's responsibility is to assure the completeness and the accuracy of the criminal history provided and the outcome of criminal charges before making a final determination about the individual's suitability for employment. Therefore, it is not practical to limit the CHRC response time to 5 days.

**Comment:**

The proposed regulation at 10 NYCRR Section 402.9(a)(1) requiring providers to establish, maintain, and keep current, a record of employees should be withdrawn given the high turnover rate in the home care industry.

**Response:**

DOH does not agree. Executive Law Section 845-b(8) requires that providers notify DOH when an employee is no longer subject to a criminal history record check so that the Division of Criminal Justice Services and DOH no longer provides subsequent criminal history information to that provider. Further, the DOH is required by law to annually validate the records maintained on its behalf by the Division of Criminal Justice Services.

**Comment:**

The proposed regulation at 10 NYCRR Section 402.9(c)(1) requiring providers to retain CHRC records for six years is administratively burdensome.

**Response:**

The Departmental standard document retention requirement is six years.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### Standards for the Management of the New York State Retirement Systems

**I.D. No.** INS-39-09-00011-E

**Filing No.** 1086

**Filing Date:** 2009-09-16

**Effective Date:** 2009-09-16

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

**Action taken:** Amendment of Part 136 (Regulation No. 85) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 314, 7401(a) and 7402(n)

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

**Specific reasons underlying the finding of necessity:** The Second Amendment to Regulation 85 (11 NYCRR 136), effective November 19, 2008, established new standards of behavior with regard to investment of the Common Retirement Fund's assets, conflicts of interest, and procurement. In addition, it created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent events surrounding how placement agents conduct business on behalf of their clients with regard to the Fund compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. Rather, only an immediate ban on the use of placement agents will ensure sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments. Accordingly, emergency adoption of the regulation is necessary for the general welfare.

This regulation was previously promulgated on an emergency basis on June 18, 2009. The emergency regulation will expire on September 16, 2009. Regulation No. 85 needs to remain effective for the general welfare.

**Subject:** Standards for the management of the New York State Retirement Systems.

**Purpose:** To ban the use of placement agents by investment advisors engaged by the state employees retirement system.

**Text of emergency rule:** Section 136-2.2 is amended to read as follows:

§ 136-2.2 Definitions.

The following words and phrases, as used in this Subpart, unless a different meaning is plainly required by the context, shall have the following meanings:

[(a) Retirement system shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.]

[(b) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law, which holds the assets of the retirement system.]

[(c)](a) Comptroller shall mean the Comptroller of the State of New York in his capacity as administrative head of the Retirement System and the sole trustee of the [fund] Fund

[(d) OSC shall mean the Office of the State Comptroller.]

[(e)](b) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the [fund] Fund to provide technical or professional services to the [fund] Fund relating to investments by the [fund] Fund, including outside investment counsel and litigation counsel, custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of money managers, securities, or other investments, or monitor investment performance.

(c) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.

(d) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law ("RSSL"), which holds the assets of the Retirement System.

[f](e) Investment manager shall mean any person (other than an OSC employee) or entity engaged by the Fund in the management of part or all of an investment portfolio of the [fund] Fund. "Management" shall include, but is not limited to, analysis of portfolio holdings, and the purchase, sale, and lending thereof. For the purposes hereof, any investment made by the Fund pursuant to RSSL § 177(7) shall be deemed to be the investment of the Fund in such investment entity (rather than in the assets of such investment entity).

(f) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the Fund.

(g) OSC shall mean the Office of the State Comptroller.

[(g)](h) Placement agent or intermediary shall mean any person or entity, including registered lobbyists, directly or indirectly engaged and compensated by an investment manager (other than [an] a regular employee of the investment manager) to promote investments to or solicit investment by [assist the investment manager in obtaining investments by the fund, or otherwise doing business with] the [fund] Fund, whether

compensated on a flat fee, a contingent fee, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of securing or influencing the decision to secure a particular transaction or investment by the Fund. [obtaining investments or providing other intermediary services with respect to the fund.] For purpose of this paragraph, the term "employee" shall include any person who would qualify as an employee under the federal Internal Revenue Code of 1986, as amended, but shall not include a person hired, retained or engaged by an investment manager to secure or influence the decision to secure a particular transaction or investment by the Fund.

[(h) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the fund.]

[(i) Third party administrator shall mean any person or entity that contractually provides administrative services to the retirement system, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits or paying benefits and maintaining any other retirement system records. Administrative services do not include services provided to the fund relating to fund investments.]

(i) Retirement System shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.

(j) Third party administrator shall mean any person or entity that contractually provides administrative services to the Retirement System, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits, paying benefits or maintaining any other Retirement System records. "Administrative services" do not include services provided to the Fund relating to Fund investments.

[(j)](k) Unaffiliated Person shall mean any person other than: (1) the Comptroller or a family member of the Comptroller, (2) an officer or employee of OSC, (3) an individual or entity doing business with OSC or the [fund] Fund, or (4) an individual or entity that has a substantial financial interest in an entity doing business with OSC or the [fund] Fund. For the purpose of this paragraph, the term "substantial financial interest" shall mean the control of the entity, whereby "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no individual shall be deemed to control an entity solely by reason of his being an officer or director of such entity. Control shall be presumed to exist if any individual directly or indirectly owns, controls or holds with the power to vote ten percent or more of the voting securities of such entity.

[(k) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity.]

Section 136-2.4 (d) is amended to read as follows:

(d) Placement agents or intermediaries: In order to preserve the independence and integrity of the [fund] Fund, to [address] preclude potential conflicts of interest, and to assist the Comptroller in fulfilling his or her duties as a fiduciary to the [fund] Fund, [the Comptroller shall maintain a reporting and review system that must be followed whenever the fund] the Fund shall not [engages, hires, invests with, or commits] engage, hire, invest with or commit to[,] an outside investment manager who is using the services of a placement agent or intermediary to assist the investment manager in obtaining investments by the [fund] Fund. [, or otherwise doing business with the fund. The Comptroller shall require investment managers to disclose to the Comptroller and to his or her designee payments made to any such placement agent or intermediary. The reporting and review system shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.]

Section 136-2.5 (g) is amended to read as follows:

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the [retirement system's] Retirement System's financial statement, together with an opinion of an independent certified public accountant on the financial statement;

(2) file with the superintendent the Comprehensive Annual Financial Report within the time prescribed by law, but no later than the time it is published on the OSC public website;

(3) disclose on the OSC public website, on at least an annual basis, all fees paid by the [fund] Fund to investment managers, consultants or advisors, and third party administrators;

[(4) disclose on the OSC public website, on at least an annual basis, instances where an investment manager has paid a fee to a placement agent or intermediary;]

[(5)](4) disclose on the OSC public website the [fund's] *Fund's* investment policies and procedures; and

[(6)](5) require fiduciary and conflict of interest reviews of the [fund] *Fund* every three years by a qualified unaffiliated person.

**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 December 13, 2009.

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

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201, 301, 314, 7401(a), and 7402(n) of the Insurance Law.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 314 vests the Superintendent with the authority to promulgate standards with respect to the public retirement and pension systems of the State of New York, and to make an examination into the affairs of every system at least once every five years in accordance with sections 310, 311 and 312 of the Insurance Law. The implementation of the standards is necessarily through the promulgation of regulations.

As confirmed by the Court of Appeals in *Matter of Dinallo v. DiNapoli*, 9 N.Y. 3d 94 (2007), the Superintendent functions in two distinct capacities. The first is as regulator of the insurance industry. The second is as a statutory receiver of financially distressed insurance entities. Article 74 of the Insurance Law sets forth the Superintendent's role and responsibilities in this latter capacity.

Section 7401(a) sets forth the entities, including the public retirement systems, to which Article 74 applies. Section 7402(n) provides that it is a ground for rehabilitation if an entity subject to Article 74 has failed or refused to take such steps as may be necessary to remove from office any officer or director whom the Superintendent has found, after appropriate notice and hearing, to be a dishonest or untrustworthy person.

2. Legislative objectives: Section 314 of the Insurance Law authorizes the Superintendent to promulgate and amend, after consultation with the respective administrative heads of public retirement and pension systems and after a public hearing, standards with respect to the public retirement and pension systems of the State of New York.

This amendment is consistent with the public policy objectives that the Legislature sought to advance in enacting Section 314, which provides the Superintendent with the powers to promulgate standards with respect to administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness of the Fund.

3. Needs and benefits: The Second Amendment to 11 NYCRR 136 (Regulation 85), effective November 19, 2008, established new standards with regard to investment of the assets of the New York State Common Retirement Fund ("the Fund"), conflicts of interest and procurement. In addition, the Second Amendment created new audit and actuarial committees, and greatly strengthened the investment advisory committee. The Second Amendment also set high ethical standards, strengthened internal controls and governance, enhanced the operational transparency of the Fund, and strengthened supervision by the Insurance Department.

Nevertheless, recent events surrounding how placement agents conduct business on behalf of their clients with regard to the Fund compel the Superintendent to conclude that the mere strengthening of the Fund's control environment is insufficient to protect the integrity of the state employees' retirement systems. The Third Amendment to Regulation 85 will adopt an immediate ban on the use of placement agents to ensure sufficient protection of the Fund's members and beneficiaries, and safeguard the integrity of the Fund's investments. Further, the amendment defines "placement agent or intermediary" in a manner that both thwarts evasion of the ban while ensuring that such ban not extend to persons otherwise acting lawfully on behalf of investment managers.

4. Costs: The rule does not impose any additional requirements on the Comptroller, and no additional costs are expected to result from the implementation of the ban imposed by this amendment. There are no costs to the Insurance Department or other state government agencies or local governments.

5. Local government mandates: The amendment imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: No additional paperwork should result from the prohibition imposed by the amendment.

7. Duplication: This amendment will not duplicate any existing state or federal rule.

8. Alternatives: The Superintendent considered other ways to limit the influence of placement agents, including a partial ban, increased disclosure requirements, and adopting alternative definitions of placement agent or intermediary. But in the end, the Superintendent concluded that only an immediate total ban on the use of placement agents could provide sufficient protection of the Fund's members and beneficiaries and safeguard the integrity of the Fund's investments.

In developing the rule, the Superintendent and State Comptroller not only consulted with one another, but also briefed representatives of: (1) New York State and New York City Public Employee Unions; (2) New York City Retirement and Pension Funds; (3) the Borough Presidents of the five counties of New York City; and (4) officials of the New York City Mayor's Office, Comptroller's Office and Finance Department. The standards set forth in the amendment rule will be subject to comment and discussion at the public hearing required by Section 314 of the Insurance Law.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The emergency adoption of this regulation on June 18, 2009 ensured that the ban would become enforceable immediately. However, since the emergency is slated to expire on September 16, 2009, this proposal is needed to make the ban permanent.

#### **Regulatory Flexibility Analysis**

1. Small businesses: This amendment sets standards for the management of the New York State and Local Employees' Retirement System and New York State and Local Police and Fire Retirement System (collectively, "the Retirement System"), and the New York State Common Retirement Fund ("the Fund"). These standards are intended to assure that the conduct of the business of the Retirement System and the Fund, and of the State Comptroller (as administrative head of the Retirement System and as sole trustee of the Fund), are consistent with the principles specified in the rule. Most among all affected parties, the State Comptroller, as a fiduciary whose responsibilities are clarified and broadened, is impacted by the amendment. The State Comptroller is not a "small business" as defined in section 102(8) of the State Administrative Procedure Act.

This amendment is also directed to placement agents that may be engaged by investment managers that do business with the Fund. Some placement agents may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

The amendment bans the use of placement agents in connection with investments by the Fund. This may adversely affect the business of placement agents, who may lose opportunities to earn profits in connection with investments by the Fund. Nevertheless, in view of recent events about how placement agents conduct business on behalf of their clients with regard to the Fund the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries and to safeguard the integrity of the Fund's investments.

2. Local governments: This amendment will not impose any adverse compliance requirements or result in any adverse impacts on local governments. The basis for this finding is that this amendment is directed at the State Comptroller; employees of the Office of State Comptroller; and investment managers, placement agents, consultant or advisors - none of which are local governments.

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

1. Types and estimated number of rural areas: Investment managers, placement agents, consultants or advisors that do business in rural areas as defined under State Administrative Procedure Act Section 102(13) will be affected by this proposal. The amendment bans the use of placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"), which may adversely affect the business of placement agents and of other entities that utilize placement agents and are involved in Fund investments.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment will not impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas, with the exception of requiring investment managers, consultants and advisors who provide services to the fund to discontinue the use of placement agents.

3. Costs: The costs to placement agents are lost opportunities to earn profits in connection with investments by the Fund.

4. Minimizing adverse impact: The amendment does not adversely impact rural areas.

5. Rural area participation: Affected parties doing business in rural areas of the State, will have the opportunity to comment upon and discuss the rule at the public hearing required by Section 314 of the Insurance Law.

**Job Impact Statement**

The Insurance Department finds that this rule will have little or no impact on jobs and employment opportunities. The amendment bans investment managers from using placement agents in connection with investments by the New York State Common Retirement Fund ("the Fund"). The amendment may adversely affect the business of placement agents, who could lose the opportunity to earn profits in connection with investments by the Fund. Nevertheless, in view of recent events about how placement agents conduct business on behalf of their clients with regard to the Fund, the Superintendent has concluded that an immediate ban on the use of placement agents is necessary to protect the Fund's members and beneficiaries, and to safeguard the integrity of the Fund's investments.

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## Department of Labor

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### EMERGENCY RULE MAKING

#### Provision of Safety Ropes and System Components for Firefighters at Risk of Being Trapped at Elevations

**I.D. No.** LAB-26-09-00007-E

**Filing No.** 1082

**Filing Date:** 2009-09-14

**Effective Date:** 2009-09-14

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

**Action taken:** Addition of Section 800.7 to Title 12 NYCRR.

**Statutory authority:** Labor Law, art. 2, section 27; art. 2, section 27-a; art. 7, section 200

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

**Specific reasons underlying the finding of necessity:** To give fire departments sufficient time to conduct risk assessments regarding the types of safety ropes and rescue system needed, to purchase needed equipment, and to train firefighters in their effective use before the date of the statutory requirement.

**Subject:** Provision of safety ropes and system components for firefighters at risk of being trapped at elevations.

**Purpose:** To insure that firefighters are provided with appropriate ropes and system components for self-rescue and emergency escape.

**Text of emergency rule:** 12 NYCRR Section 800.7

*Emergency Escape and Self Rescue Ropes and System Components for Firefighters*

(a) *Title and Citation:* Within and for the purposes of the Department of Labor, this part may be known as Code Rule 800.7, *Emergency Escape and Self Rescue Ropes and System Components for Firefighters*, specifying the requirements for safety ropes and associated system components.

(b) *Purpose and Intent:* This rule is intended to ensure that firefighters are provided with necessary escape rope and system components for self rescue and emergency escape and to establish specifications for such ropes and system components.

(c) *Application:* This part shall apply throughout the State of New York to the State, any political subdivision of the State, Public Authorities, Public Benefit Corporations or any other governmental agency or instrumentality thereof employing firefighters within the meaning of § 27-a of the Labor Law.

This Part shall not apply to such employers located in a city with a population of over one million.

(d) **DEFINITIONS.** Within this part, the following terms shall have the meanings indicated:

(1) "System Components" means safety harnesses, belts, ascending devices, carabiners, descent control devices, rope grab devices, and snap links.

(2) "Escape Rope" means a single purpose, single use, emergency escape (Self-rescue) rope.

(3) "Interior Structural Fire Fighting" means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage.

(4) "Interior Structural Fire Fighter" means a firefighter who is

designated by their employer to perform interior structural firefighting duties in an immediately dangerous to life and health (IDLH) atmosphere and is medically qualified to use self-contained breathing apparatus (SCBA) as defined in 29 CFR 1910.134.

(5) "Entrapment at Elevations" means a situation where a firefighter finds the normal route of exit is made unusable by fire, or other emergency situation, that requires the firefighter to immediately exit the structure from an opening not designed as an exit, that is above the ground floor and at an elevation above the surrounding terrain which would reasonably be expected to cause injury should the firefighter be required to exit.

(e) *Specifications for Escape Ropes and System Components*

Escape ropes and system components provided to firefighters shall conform to the requirements of "The National Fire Protection Association Standard 1983, Standard on Fire Service Life Safety Rope and Equipment for Emergency Services" in effect at the time of their manufacture. Escape ropes and system components purchased after the effective date of this Part shall conform to the 2006 edition (NFPA1983-2006) of such standard.

(f) *Risk Assessment and Equipment Selection*

(1) Each employer who employs firefighters shall develop a written risk assessment to be used to determine under what circumstances escape ropes and system components will be required and what type will be required to protect the safety of firefighters in its employ. In performing the assessment, the employer shall:

(i) Identify the types and heights of buildings and other structures in the area the firefighters are expected to work. Such area shall include the regular scope of the fire district or other area covered by the fire department in question as well as any other districts or communities to which the fire department provides mutual aid with a reasonably predictable frequency.

(ii) Assess the standard operating procedures followed by the department with regard to rescue of firefighters from elevations.

(iii) Identify the risks to firefighters of being trapped at an elevation during structural fire fighting operations given the types of buildings or other structures located in the area(s) in which firefighters are expected to work. Identification of the risk in question shall include an assessment of:

(a) the extent to which standard operating procedures already in place will mitigate the risks identified;

(b) the type of escape ropes and system components that will be necessary to protect the safety of firefighters if operating procedures do not sufficiently mitigate the risk.

(2) Should the risk assessment establish that firefighters employed by the department performing interior structural firefighting are reasonably expected to be exposed to the risk of entrapment at elevations, the employer shall provide to each interior structural firefighter in its employ a properly fitted escape rope and those system components which meet the specifications for such rope and system components set forth in Section 800.7(e) and which would mitigate the danger to life and health associated with such risk.

(g) *Training*

(1) The employer shall ensure that each firefighter who is provided with an escape rope and system components is instructed in their proper use by a competent instructor. Instruction shall include the requirements of paragraph (h) of this Part and the user information provided by the manufacturer as required by NFPA 1983 Chapter 5.2 for each rope and system component.

(2) Instruction shall include hands-on use of the equipment in a controlled environment.

(3) A record of such instruction including the name of the individual being trained, the name of the individual delivering the training, and the date on which the training was provided shall be maintained by the employer until such time as the firefighter is no longer employed by the employer or the employer delivers a subsequent training on this topic, whichever comes first.

(h) *Employer Duties.* In addition to the duties set forth in Parts 800.7(f) and (g), employers covered by this Part shall have the following duties:

(1) To ensure the adequacy of the safety ropes and system components, the employer shall routinely inspect and ensure that:

(i) Existing safety ropes and system components meet the codes, standards, and recommended practices adopted by the Commissioner;

(ii) Existing safety ropes and system components still perform their function by taking precautions to identify any of their limitations through reasonable means, including, but not limited to:

(a) Checking the labels or stamps on the equipment; and

- and
- (b) *Checking any documentation or equipment specifications;*
  - (c) *contacting the supplier or approval agency.*
  - (iii) *Firefighters are informed of the limitations of any safety rope or system components;*
  - (iv) *Firefighters are not allowed or required to use any safety rope or system components beyond their limitations;*
  - (v) *Existing or new safety ropes and system components have no visible defects that limit their safe use;*
  - (vi) *Safety ropes and system components are used, cleaned and maintained according to the manufacturer's instructions;*
  - (vii) *Firefighters are instructed in identifying to the employer any defects the firefighter may find in safety ropes and system components; and*
  - (viii) *Any identified defects are corrected or immediate action is taken to eliminate the use of the equipment by:*
    - (a) *Ensuring that escape rope and system components with defects which are repairable are tagged as unsafe and stored in such a manner that they cannot be used until repairs are made;*
    - (b) *Ensuring that escape rope and system components that cannot be repaired are immediately destroyed or rendered unusable as an escape rope and system components; and*
    - (c) *Ensuring that any escape rope that has been utilized under load for the purpose of self rescue / emergency escape is immediately removed from service, destroyed, or rendered unusable as an escape rope and immediately replaced.*

(2) *The employer's routine inspection cycle required by this paragraph shall be based upon the volume of activity the Department undertakes but, in no case, any less frequently than once each month.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. LAB-26-09-00007-EP, Issue of July 1, 2009. The emergency rule will expire November 12, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Thomas J McGovern, NYS Department of Labor, State Office Campus; Bldg. 12; Rm. 509, Albany, NY 12240, (518) 457-4380, email: thomas.mcgovern@labor.state.ny.us

#### **Regulatory Impact Statement**

**Statutory Authority:** The legislature placed the amendment in Article 2 Section 27-a of the Labor Law, Public Employee Safety and Health Act. Section 27-a(4)(c) directs the Commissioner to promulgate rules to provide for the enforcement of the amendment and require that the latest edition of the National Fire Protection Association's standard on Life Safety Ropes and System Components be adopted.

**Legislative Objective:** The intent of the Legislature was to insure that firefighters are provided with the appropriate ropes and system components to allow self-rescue from upper stories of buildings should they become trapped. The Legislature also specified the national consensus standard to which life safety ropes and system components must conform as well as the testing criteria that must be followed by the manufacturer.

**Needs and Benefits:** Firefighters occasionally become trapped on upper stories during fire suppression activities. Many times the firefighter is rescued by ladders or aerial apparatus; however, there are cases where the trapped firefighter cannot be reached or the rapid development of the emergency situation does not allow for rescue by other means and those cases could result in death or serious injury. One such case involved 6 trapped firefighters who were forced to jump from a fourth story. Four were seriously injured and two died of their injuries. Some of these injuries and deaths were attributable, in part, to either the lack of rescue ropes or the failure of the rope involved.

**Costs:** The ropes and system components needed to equip a firefighter for self rescue can be obtained for as little as \$60.00. New York City has provided each of its firefighters with a system that costs more than \$400.00. The proposed rule contains no minimum cost threshold. This allows the employer to take appropriate steps to reduce the cost of providing the equipment required by the rule, so long as the employer provides equipment appropriate for the risks identified in its risk assessment. Moreover, the equipment need only be provided to interior structural firefighters who work in areas where they could become trapped. Employers need not purchase or provide ropes and rescue devices to apparatus drivers and fire policemen or other employees not expected to perform interior structural firefighting.

Additional costs would be incurred for training in instructing employees in the use of the selected equipment and self rescue techniques. These costs will vary but as an example of the potential costs associated with the rule, one manufacturer sells a system which costs \$400.00 while the training in the system use is \$250.00 per person. On the other hand, the

manufacturer will offer train the trainer instruction to a Fire Department Trainer for a one time cost; this instruction will then permit the Department to train its affected employees at a much lower cost than it would incur if it purchased the manufacturer's training for each of its members. Also, as mentioned elsewhere in this rulemaking, fire departments may also consider other methods to reduce training costs such as using in-house trainers and consolidating training classes with fellow departments to maximize training resources.

**Paperwork:** The paperwork requirements contained in the proposed rule are minimal. The employer must certify that the hazard assessment has been completed and must maintain that document. The employer must also keep training records identifying all employees trained under the rule. Since other standards and laws already require that training records be maintained, this provision will have minimal impact on the employer.

**Local Government Mandates:** Fire protection is a function of local government and as such the monetary burden of providing this equipment will be borne by the local government responsible for fire protection. The legislature did not provide funding for mandate relief.

**Duplication:** This rule does not duplicate any state or federal regulations. **Alternatives:** The legislation requiring promulgation of the rule provided little room for any alternative to be considered. The amendment specifically requires equipment that meets a defined national consensus standard for specific purposes. The alternatives provided by the Department involve the judgment of the Department with regard to the risks faced by its employees performing interior structural firefighting and the ropes and equipment needed to mitigate that risk. The agency determined that the employer would be best suited to survey the hazards in the local protection area and select the equipment based upon the hazards firefighters would be exposed to, as opposed to imposing its own stringent requirements specifying the type of equipment needed.

**Federal Standards:** There are no federal standards with like requirements.

**Compliance Schedule:** The provisions of the amendment were effective on May 18, 2008 and employers have been required to be in compliance since November 1, 2008. The effective date of the rule will be upon adoption. The compliance aspects are not difficult and under normal inspection protocols an employer would be given 30 days to comply.

#### **Regulatory Flexibility Analysis**

**Effect of the Rule:** The proposed rule does not apply to small businesses. The rule will apply to all local governmental entities that employ a firefighter except for the City of New York. Not all governmental entities employ firefighters. With regard to fire departments that will be affected by this rule, the rule requires them to conduct an assessment of the potential risk of entrapment at elevations faced by their employees, identify those employees subject to this risk, obtain protective equipment for these employees, and train them in its proper use. There should be little or no cost to performing the risk assessment. Basically a fire department must identify a responsible party to determine whether there are buildings or other structures within the district or in neighboring districts where the department provides mutual aid firefighting services which are of sufficient height that they pose a risk of entrapment at elevations. The individual must then identify those firefighters within their department who perform interior structural firefighting to determine how much equipment needs to be purchased, and must then review available equipment and determine which equipment to purchase. This process should, at most, take a couple of hours to conduct. It should ideally be conducted by an officer of the fire department, not a consultant, so no professional services should be needed. The most significant potential effect of the rule will be the costs associated with purchasing protective equipment. In some areas of the state, compliance costs are expected to be less than \$100.00 per firefighter. For all governmental entities that do employ firefighters, the effect of the rule would be limited by the results of the hazard assessment conducted by the fire department; costs would accrue depending on the nature of the hazard identified and the number of firefighters that would require the protective equipment addressed in the rule. Further details regarding potential costs are discussed below under the section entitled "Compliance Costs."

**Local Governments with hazards requiring the provision of protective equipment and training for firefighters may collaborate on the training and use quantity buying practices to reduce costs.** Training requirements could also be met by utilizing free training provided by the Department of State, Office of Fire Prevention and Control, although that agency does not have the resources to train every firefighter affected by this rule.

**Compliance Requirements:** The enabling legislation requires that each employer that employs firefighters must provide emergency escape rope and system components appropriate for the risk to which firefighters in their employ are exposed. To determine this, the employer must conduct an assessment of the types of structures in the fire protection area, determine what the hazard to employees would be and then provide the appropriate harnesses, ropes and equipment so that employees may

perform self rescue should they become trapped at an elevation expected to cause injury should the individual be required to jump. The law also requires that the employer provide training in the use of the provided equipment and inspect and assure the safety of the equipment. The authorizing legislation was also specific as to the design and testing of the provided equipment citing a national consensus standard, The National Fire Protection Association Standard 1983, "Life Safety Rope and Equipment for Emergency Responders". The law requires the commissioner to adopt the latest edition which is the 2006 edition. NFPA 1983-2006 established the design, construction and testing requirements for emergency escape and life safety ropes and system components and all such equipment must bear a label attesting to its conformance.

To meet the statutory compliance requirements the proposal includes the following steps that the employer must take:

- 1 Conduct a hazard assessment to establish the risk.
- 2 Identify employees subject to the risk.
- 3 Select the appropriate ropes and system components.
- 4 Provide properly fitted ropes and system components (many belts and harnesses are sized) to each employee at risk.
- 5 Train each firefighter in the use of the selected rope and system components.
- 6 Inspect the ropes and system components at least once each month to assure they are safe for use.

**Professional Services:** Training on the required subject matter is provided free of charge by the Office of Fire Prevention and Control. OFPC classes are limited and would not meet the needs of all employers. There are also many experts in the field who provide rope training and smaller employers could collaborate and share the expense of training. Under provisions of the executive law, career departments must have a Municipal Training Officer who would be capable of providing the training. See New York Executive Law § 156(6).

**Compliance Costs:** Purchase of the ropes and system components would be relatively inexpensive in suburban fire protection areas. As the height and complexity of structures increase, the equipment will become more expensive and the required training more comprehensive. Many suppliers can provide ropes and attachment devices at a price range from \$ 20.00 to \$50.00. Harnesses or escape belts can run from \$50.00 to \$100.00. On the high end of the cost spectrum, the system developed and used by FDNY costs approximately \$400.00 per firefighter and the Manufacturer (Petzl) requires that the employer participate in their training program at \$250.00 per person. They will provide train-the-trainer services.

In an effort to estimate the cost of compliance with the proposed rule, the Department contacted three fire departments of different size. A suburban volunteer department purchased a harness for \$150.00 which is suitable for not just emergency escape but for other technical rope rescues that the department performs. The Chief stated that he had purchased escape rope in bulk and cut it into prescribed length. He estimates that the rope cost about \$30.00 per member. He also purchased "Crosby Hooks" (an anchoring device designed for this purpose) at \$40.30 each. He estimates that it cost \$230.30 to equip each member with individual equipment assigned to them. 50 sets were purchased for a total of \$11,015.00. Since the Chief and one other member are OFPC Level 2 instructors certified to teach rope work no cost was incurred for training.

Albany Fire Department, a career fire department, reports that after conducting a risk assessment they chose a "Manufactured System" which costs \$410.00. The Fire Department Training Division will be trained by FDNY in the use of the system. Additional costs will be incurred in sending the trainers to NYC and time away from duty for each firefighter to receive training. Albany FD has opted to issue each firefighter a system for their exclusive use. They will require 260 sets at a cost of \$106,600.00. The City has applied for a grant to finance the cost. Outside of NYC there are an estimated 5500 career firefighters in NYS. Following Albany FD's assessment of the risks (which is representative of the majority of areas covered by career fire departments), the statewide cost could be \$2,255,000 for equipment alone.

On the other hand, a volunteer fire department in a rural area consisting of one and two story homes and agricultural buildings conducted a risk assessment and determined that a Belt, 30 feet of rope, and two carabiners were all that was necessary. The department already has a number of harnesses which are serviceable and utilized for high angle rescue. These harnesses will be issued to interior structural firefighters at no additional cost. The cost of the escape rope was set at \$30.00, and two carabiners at \$8.99 each. The rope and the carabiners will be attached to the firefighters' airpacs. This Department has 12 airpacs. Training in rope work has consistently been provided by a member who is certified to teach rope work. As a result, this department can be adequately equipped for \$552.00.

Since the determination of what equipment is necessary under the rule and the numbers of firefighters who will need the equipment will be based on the department assessment, such figures will be inexact. However, other potential costs under the rule are standardized, for example, the

requirement that the equipment purchased meet the NFPA standards. If each local government bought one copy of the NFPA Standard at \$34.50 per copy, the cost would be \$55,441.50.

**Economic and Technological Feasibility:** The emergency regulation does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

**Minimizing Adverse Impact:** The regulation is necessary to implement Labor Law, Section 27-a(4)(c), as enacted by chapter 433 of the Laws of 2007 and amended by chapter 47 of the Laws of 2008, and to that extent, does not exceed any minimum State standards. Section 27-a(4)(c) requires the Commissioner to adopt the codes, standards and recommended practices promulgated by the most recent edition of the National Fire Protection Association 1983, Standard on Fire Service Life Safety Ropes and System Components, and as are appropriate to the nature of the risk to which the firefighter shall be exposed. This regulation has been carefully drafted to minimize the potential impact of the statute by allowing employers to assess risks based upon individual needs of their fire departments, by identifying those firefighters who are subject to such risk, and by identifying the types and quantity of equipment necessary to address the risk. Once the risk assessment has been performed, the regulation requires distribution of ropes and rescue equipment only to those interior structural firefighters who the assessment identifies as being at risk of entrapment. Moreover, the regulation requires that written training records be made available to the Department only upon request, limits required hands-on training only to those firefighters identified as being at risk through the risk assessment, and limits the inspection of the life safety rope systems to one time each month. These requirements help minimize potential adverse impacts. For example, if the proposal required every fire fighter to be provided equipment and undergo training, costs and record keeping requirements would have increased; if inspection was required more than once a month, it may have been unnecessarily burdensome, if less than once a month, it may have compromised the suitability of the equipment or the safety of the firefighters.

**Small Business and Local Government Participation:** This regulation will have no impact on small business. The regulation applies to all governmental entities that employ a firefighter. This rule reflects input obtained through consultation with the Executive Director of the New York State Association of Fire Chiefs and the NYS Department of State, Office of Fire Prevention and Control (OFPC). An initial meeting was held in the summer of 2007 and corrected or improved copies of the proposed rule were circulated among the agencies for consensus. The Proposed rule was also reviewed by the Department of State Counsel and their comments were incorporated into the proposed rule. Input was also solicited from the NYS Professional Firefighters Association, the NYS AFL CIO, and the Counsel for the Firemen's Association of the State of New York. The Department's Public Employee Safety and Health program staff also conducted outreach and information sessions at a dozen different meetings of fire departments and fire-related associations around the state and feedback received at these sessions was also considered by the Department in arriving at this final language.

The Department also posted the proposed rule on the Division of Safety and Health web page and filed it as an emergency rule.

Comments received through all these outreach efforts primarily requested that the document include direction to employers with regard to the selection of appropriate equipment and with regard to the identification of employees who might be at risk of entrapment such that they would require ropes and system components. As a result of these comments, the rule was altered to include additional guidance on conducting a risk assessment and the definitions were changed to make it clear who would need to be equipped and what job duties would require ropes and system components.

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

1. Types and estimated numbers of rural areas:

The rule will apply to all public employers who employ firefighters. As many as 800 employers in rural or suburban areas will be affected by this rule.

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

The rule will require the employer to maintain training records to show that the firefighters have been trained. Employers are already required to maintain training records by other rules such as the OSHA requirements promulgated under 12NYCRR Part 800. The proposed rule does not appear to impose an additional recordkeeping burden on the employer and will require a minimum amount of effort to comply. The training record must be maintained until the training is repeated, for a period of one year.

Compliance with the overall rule will be less and less burdensome as the size of the employer decreases. The employer must perform a hazard assessment to determine the level of risk to which its employees are exposed and use that information to select the appropriate equipment to be provided. Depending on the height and types of structures in the area

where the employer provides fire protection, the equipment could be a little as a rope, belt, and attachment devices.

The employer must also train employees in the techniques of self rescue. Many Fire Departments have the expertise in-house to provide this service, particularly in rural areas where building size and configurations may limit the risks addressed by the rule. Moreover, in rural areas rope work is part of high angle rescue work which a number of fire departments in mountainous areas provide. Individuals trained in high angle rescue techniques would require little or no extra training to meet the requirements of this proposed rule.

Training provided by the State Office of Fire Prevention and Control also covers the criteria involved. However, this office does not have sufficient staff resources to provide the training on a statewide basis. Some rope and rescue system manufacturers will provide training in their equipment; there will typically be a cost associated with this service, however.

Another option open to employers is to group together and hire a professional trainer to provide a train-the-trainer course for individuals from a number of departments who would then train the members of their own department. This method would make the expense of hiring a contractor a shared expense.

### 3. Costs:

There are two primary areas of cost imposed by the rule: the cost of purchasing and maintaining the equipment and the cost of providing the required training. The cost of the equipment would fluctuate by department, depending upon the risks identified in the risk assessment conducted by the Department and the equipment needed to address the risk. Each firefighter who is at risk of entrapment at elevation must be provided with properly fitted (belts and harnesses come in different sizes) self-rescue rope and other components such as a belt and carabiners. A rural fire department employer could reasonably outfit each employee covered by the rule for as little as \$100.00; if employers were to coordinate purchases and buy these items in bulk that cost could be reduced substantially. We should note that some of the manufactured systems cost as much as \$400.00. In most rural areas such expensive systems should not be necessary.

Costs associated with the provision of training in systems are discussed above. If training is provided in-house, costs would be minimal or none at all. A professional trainer could be provided by a manufacturer "free of charge" if the employer purchases a sufficient number of units of equipment. [Note: although this is classified as a free service, it is really a service whose cost is included in the equipment purchase cost.] If the professional trainer's services are not provided along with the purchase, the charges for the trainer's time could range up to \$500.00.

### 4. Minimizing adverse impact:

The only adverse impact resulting from the proposed rule are the costs associated with compliance. As discussed previously, covered employers can try to minimize such costs through coordination with other fire departments to purchase equipment in bulk and through train the trainer sessions which will allow one or more members to deliver the training to their fellow firefighters.

### 5. Rural area participation:

The proposed rule was posted on the department web site along with a contact. Numerous emails and phone calls were taken during the 6 months it was posted.

Meetings were held with employer groups such The New York State Association of Fire Chiefs and Regional Fire Administrators from around the state. The rule was discussed with the Counsel for The Firemen's Association of the State of New York.

Meetings were also held with representatives of the Office of Fire Prevention and Control and with Department of State Counsel.

Comments from these meetings and contacts were used to develop the rule.

### Job Impact Statement

This rule concerns the provision of safety ropes and system components for public sector Firefighters. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

## Office of Medicaid Inspector General

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

#### Provider Hearings

I.D. No. MED-39-09-00007-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 519.4(b) and addition of section 540.6(e)(8) to Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 32(20); Social Services Law, section 363-a(2)

**Subject:** Provider Hearings.

**Purpose:** To clarify hearing rights and introduce consistency with respect to the recoupment of third party liability overpayments.

**Text of proposed rule:** Subdivision (b) of section 519.4 is amended to read follows:

(b) There is no right to a hearing when the department:

(1) discontinues payment pursuant to the automatic termination provisions, mandatory exclusion provisions or immediate sanction provisions of Parts 504 or 515 of this Title, *except 504.7(b) of this Title, or*

(2) authorizes a mass change, or

(3) denies an application for enrollment or reenrollment under Part 504 of this Title, or

(4) seeks reimbursement for payments resulting from cases involving third party liability where the payment recovery process includes an opportunity to be heard in accordance with the procedures established under Parts 540.6(e) and 542 of this Title.

A new paragraph (8) of subdivision (e) of section 540.6 is added to read as follows:

(8) Appeals. Providers subject to reimbursement for payments resulting from cases involving third party liability established under this subdivision and Part 542 of this Title are not entitled to administrative hearings but may, within 30 days of the date of the notice, submit written arguments and documentation regarding whether the determination was based upon mistake of fact.

**Text of proposed rule and any required statements and analyses may be obtained from:** Erin C. Morigerato, Esq., Senior Attorney, Office of the Medicaid Inspector General, 800 N. Pearl Street, (518) 408-0508, email: ecm03@omig.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:

Social Services Law § 363-a(2) authorizes the Department of Health (Department) to promulgate such regulations as are necessary to implement the medical assistance program.

The Office of the Medicaid Inspector General (OMIG) was created within the Department under Chapter 442 of the Laws of 2006 as the entity responsible for coordinating and implementing state-wide initiatives related to fraud and abuse within the medical assistance program.

Public Health Law § 32(20) specifically authorizes OMIG to implement and amend, as needed, rules and regulations related to the prevention, detection, investigation and referral of fraud and abuse within the medical assistance program and the recovery of improperly expended medical assistance program funds.

##### 2. Legislative Objectives:

To amend the regulations regarding hearings for persons to contest reimbursement of third party liability overpayments identified and demanded by the medical assistance program.

Pursuant to Public Health Law § 30 et seq., the Office of the Medicaid Inspector General was established to, among other reasons, prevent, detect, and recover fraud and abuse within the medical assistance program. Public policy and legal considerations require that the State be able to take appropriate and final action to ensure that medical providers are not permitted to abuse or defraud the Medicaid program if it is found that they do not comport with the medical or financial obligations for participation in the Medicaid program. Similarly, it is important that the state be able to recoup

funds that were improperly paid to medical providers under circumstances consistent with and delineated in federal law and regulation. This proposed regulation assists the Office of the Medicaid Inspector General to achieve these legislative goals.

### 3. Needs and Benefits:

§ 519.4 and § 540.6:

Pursuant to § 515.7 and § 515.8 of Title 18, there are immediate and mandatory exclusions from the program for varying reasons and terms. Under those regulations, the affected provider is not entitled to administrative hearings under Part 519. This change is needed to ensure that the state does not inadvertently provide hearing rights where none are intended or due. The regulations should be revised to reflect that status.

Under the proposed revision of § 519.4(b) third-party liability recoveries arising under Parts 18 NYCRR 540.6(e) and 18 NYCRR 542 would be excluded from the Part 519 administrative hearings. Furthermore, an administrative appeals process is simultaneously being created under 18 NYCRR 540.6(e)(8) in an effort to ensure that providers have adequate due process rights.

This change would result in greater consistency and compliance with federal regulations. This change is also needed to clarify the regulatory structure, as a recent court decision, *Visiting Nurse Service of New York Come Home Care v. New York State Dept. of Health, et al.*, 5 N.Y. 3d 499, 840 N.E. 2d 577, 806 N.Y.S. 2d 465 (NY 2005), overturned the department's regulatory interpretation and changed the department's historic practice of not providing hearings in these circumstances. This change is needed in order to avoid a potential inundation of hearing requests by providers to whom the department never previously afforded nor intended to offer hearing rights that would endanger the department's ability to insure the financial integrity of and quality of service provided by the Medicaid program.

Due to the large number of recipient care episodes in need of timely medical review determinations in third party insurance medical coverage liability cases, there is an inherent impracticability in mandating administrative hearing reviews. Instead, providers are afforded ample opportunity to provide documentary evidence and argument during an administrative review process.

Where third party payments have been made to providers, they are the result of prior administrative action by the paying agent, so further hearings as to the necessity of refunding the same to the Medicaid program would not only be duplicative but also inconsistent with current federal regulations<sup>1</sup>

### 4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule:

Private regulated parties are not anticipated to incur additional costs as a result of the proposed amendments.

b. Costs to State government:

State government is not expected to incur any additional costs as a result of the proposed amendment. To the contrary, it is expected that adoption of this rule will result in greater receipt of revenue to the state, as the OMIG will be able to take prompt action to obtain reimbursement from providers who owe revenue to the state, reducing the need for the state to search for assets that errant providers were able to hide during the pendency of unnecessary hearings. It is also expected that adoption of this rule will save the state from what would otherwise be needed additional personnel costs for additional hearing officers and support staff.

Costs to the Office of the Medicaid Inspector General:

OMIG is not expected to incur costs attributable to this proposed amendment. To the contrary, OMIG anticipates cost savings from eliminating costly and resource intensive administrative hearings and increased revenue resulting from the promulgation of this regulation as a result of an anticipated increased ability to identify responsible providers and to pursue reimbursement.

Costs to local government:

Local government is not expected to incur costs attributable to this proposed amendment. Revenue recovered that would otherwise evade collection due to delays and the opportunity for providers to hinder recovery will enable the state to reimburse local government's share of recouped funds.

Because failure to enact this regulation will result in currently unquantifiable additional costs due to the unknown quantity of future hearing requests should this regulation not be promulgated, precise cost savings cannot be projected at this time.

### 5. Local Government Mandates:

The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

### 6. Paperwork:

The proposed regulation change will create no additional paperwork.

### 7. Duplication:

This regulation change does not duplicate any other law, rule or regulation.

### 8. Alternatives:

OMIG invited comments from various small business groups and provider associations at an advisory meeting for this regulation held on November 5, 2008. No significant alternatives were suggested beyond minor language changes which have been incorporated in the final text. Leaving the regulation in its current form would impose additional costs, reduced program quality, and diminished revenues. As previously noted, leaving the regulation unchanged may jeopardize an unquantifiable amount in gross Medicaid recoveries annually.

### 9. Federal Standards:

The proposed regulation violates no federal statute or regulation but is necessary to bring State regulations into conformity with Federal regulations.

### 10. Compliance Schedule:

To be made effective upon publication and promulgation pursuant to the State Administrative Procedure Act.

<sup>1</sup>42 C.F.R. 433.139 and 42 C.F.R. 433.310 -433.320

## Regulatory Flexibility Analysis

### 1. Effect of Rule:

There are over 173,000 providers, such as physicians, nurses, home health aides, hospitals, etc. that are enrolled in the medical assistance program, all of which are potentially affected by this proposed rule. There are some local governmental entities that will be affected by this rule.

### 2. Compliance Requirements:

There are no reporting, recordkeeping, or other affirmative acts that a small business or local government will have to undertake to comply with this rule.

### 3. Professional Services:

Neither small business nor local government will require professional services to comply with this proposed rule.

### 4. Compliance Costs:

This rulemaking does not impose any additional costs on any regulated business or industry or local government to comply with the rule. There is no annual cost anticipated for continuing compliance with the rule. However, there may be an additional cost to regulated business or industry should they fail to comply with the regulations.

### 5. Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses or local governments that participate in the medical assistance program. This proposal does not impose a requirement for purchase or use of new technologies.

### 6. Minimizing Adverse Impact:

This proposed rule will not have an adverse economic impact on the ability of small businesses or local governments to comply with Department requirements, as this rule does not change the substance of the requirements but instead may impose additional costs only upon medical providers who are not in compliance with regulations.

### 7. Small Business and Local Government Participation:

OMIG invited comments from various small business groups and provider associations at an advisory meeting for this regulation held on November 5, 2008. No significant alternatives were suggested beyond minor language changes which have been incorporated in the final text.

Small businesses and local government entities affected by this regulation will have the opportunity to submit written comments after publication of a general notice of proposed rulemaking.

Furthermore, because provider participation in the Medicaid program is voluntary, providers who disagree with the regulatory scheme can choose to decline participation in the Medicaid program.

Finally, because the Office of the Medicaid Inspector General is an enforcement agency whose purpose is to detect, prevent and address fraud, and because participation is voluntary, input from providers from whom OMIG attempts to detect and prevent fraud will necessarily carry less weight than in rulemaking where provider participation is mandatory or where the purpose of the rule is not enforcement of wrongdoing by the regulated providers.

## Rural Area Flexibility Analysis

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

Rural areas are defined as counties with a population under 200,000

and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas. This rule will apply to all medical assistance program providers in rural areas.

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

There will be no additional reporting, recordkeeping, or other compliance requirements for rural providers regarding this rule. There are no professional services likely to be needed in a rural area to comply with this rule.

3. Costs:

There will be no initial capital costs or annual costs to comply with this rule for public or private entities in urban or rural areas.

4. Minimizing adverse impact:

These amendments will not have an adverse impact on parties in rural areas.

5. Rural area participation:

OMIG invited comments from various small business groups and provider associations at an advisory meeting for this regulation held on November 5, 2008. No significant alternatives were suggested beyond minor language changes which have been incorporated in the final text. Public and private interests in rural areas will have the same opportunity as public and private interests in urban areas to submit written comments after publication of a general notice of proposed rulemaking.

**Job Impact Statement**

1. Nature of Impact:

This proposed rulemaking would not affect current employment opportunities in the public or private sector. However, passage of this proposed rule will assist the state in avoiding the projected need to hire additional staff to address an anticipated significant increase in hearings. This projection is based upon a recent court decision affording medical providers an opportunity for hearings in certain circumstances when none have been previously offered.

2. Category and Numbers Affected:

Should this proposed regulation be enacted, employment opportunities will remain status quo. Should this proposed regulation fail to be enacted, it is anticipated that the State of New York will require additional hearing officers, attorneys, support staff, auditors, and possibly other types of personnel to conduct and participate in hearings that are not presently being conducted. The quantity of personnel projected to be needed is presently unknown, as the number of hearings that may be requested cannot be quantified at this time.

3. Regions of Adverse Impact:

Enactment of this proposed regulation would not have an adverse impact on jobs or employment opportunities. As such, there is no area of the state disproportionately affected.

4. Minimizing Adverse Impact:

There will be no adverse impact on existing jobs.

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

**Provider Hearings**

**I.D. No.** MED-39-09-00008-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 518.1(c) and 518.5(b) of Title 18 NYCRR.

**Statutory authority:** Public Health Law, section 32(20); Social Services Law, section 363-a(2)

**Subject:** Provider Hearings.

**Purpose:** To clarify hearing rights and introduce consistency with respect to the recoupment of third party liability overpayments.

**Text of proposed rule:** Subdivision (c) of section 518.1 is amended to read as follows:

(c) An overpayment includes any amount not authorized to be paid under the medical assistance program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse or mistake. *An overpayment as defined in this paragraph does not include amounts related to cases involving third party liability established under Parts 540.6(e) and 542 of this Title.*

Subdivision (b) of section 518.5 is amended to read as follows:

(b) The procedures set forth in subdivision (a) of this section do not apply:

(1) Where the department or its fiscal agent: adjusts or denies a claim prior to payment or withholds payment pursuant to a notice of withholding;[.]

(2) To cases involving third party liability under Parts 540.6 and 542 of this Title.

**Text of proposed rule and any required statements and analyses may be obtained from:** Erin C. Morigerato, Esq., Senior Attorney, Office of the Medicaid Inspector General, 800 N. Pearl Street, Albany, NY 12204, (518) 408-0508, email: ecm03@omig.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:

Social Services Law § 363-a(2) authorizes the Department of Health (Department) to promulgate such regulations as are necessary to implement the medical assistance program.

The Office of the Medicaid Inspector General (OMIG) was created within the Department under Chapter 442 of the Laws of 2006 as the entity responsible for coordinating and implementing state-wide initiatives related to fraud and abuse within the medical assistance program.

Public Health Law § 32 (20) specifically authorizes OMIG to implement and amend, as needed, rules and regulations related to the prevention, detection, investigation and referral of fraud and abuse within the medical assistance program and the recovery of improperly expended medical assistance program funds.

2. Legislative Objectives:

To amend the regulations regarding hearings for persons to contest reimbursement of third party liability overpayments identified and demanded by the medical assistance program. Pursuant to Public Health Law § 30 et seq., the Office of the Medicaid Inspector General was established to, among other reasons, prevent, detect, and recover fraud and abuse within the medical assistance program. Public policy and legal considerations require that the State be able to take appropriate and final action to ensure that medical providers are not permitted to abuse or defraud the Medicaid program if it is found that they do not comport with the medical or financial obligations for participation in the Medicaid program. Similarly, it is important that the state be able to recoup funds that were improperly paid to medical providers under circumstances consistent with and delineated in federal law and regulation. This proposed regulation assists the Office of the Medicaid Inspector General to achieve these legislative goals.

3. Needs and Benefits:

§ 518.1:

Currently, § 518.1(c) affords hearings for recoupment efforts regarding all overpayments. This unnecessarily affords hearing rights for certain improper Medicaid payments identified through third-party liability reviews under Parts 18 NYCRR 540.6(e) and 18 NYCRR 542. The amendment would eliminate the costly and administratively burdensome duplication of review processes noted by the Court of Appeals in *Visiting Nurse v. Health Dept.* (5 N.Y.3d 499 (2005)). In that case the Court held that as the regulatory definition of overpayment made no exception for hearings rights for third-party liability claims, the recoupment of such payments was required to be governed by the hearing provisions set forth in Parts 515, 517 and 519 of Title 18. The Court noted that while alternative review procedures were provided for in the third-party liability review program, it was unable to rule on “due process” adequacy thereof because of the present regulatory definition of overpayment.

Due to the large number of recipient care episodes in need of timely

medical review determinations in third party insurance medical coverage liability cases, there is an inherent impracticability in mandating administrative hearing reviews. Instead, providers are afforded ample opportunity to provide documentary evidence and argument during an administrative review process.

Where third party payments have been made to providers, they are the result of prior administrative action by the paying agent, so further hearings as to the necessity of refunding the same to the Medicaid program would not only be duplicative but also inconsistent with current federal regulations.<sup>1</sup>

#### § 518.5:

Due to the revision to § 518.1(c) discussed above, a conforming change must be made to § 518.5 regarding the right to an administrative hearing. As these claims are subject to separate administrative review, the right to a Part 519 hearing would be unnecessarily duplicative and burdensome.

#### 4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule:

Private regulated parties are not anticipated to incur additional costs as a result of the proposed amendments.

#### b. Costs to State government:

State government is not expected to incur any additional costs as a result of the proposed amendment. To the contrary, it is expected that adoption of this rule will result in greater receipt of revenue to the state, as the OMIG will be able to take prompt action to obtain reimbursement from providers who owe revenue to the state, reducing the need for the state to search for assets that errant providers were able to hide during the pendency of unnecessary hearings. It is also expected that adoption of this rule will save the state from what would otherwise be needed additional personnel costs for additional hearing officers and support staff.

#### Costs to the Office of the Medicaid Inspector General:

OMIG is not expected to incur costs attributable to this proposed amendment. To the contrary, OMIG anticipates cost savings from eliminating costly and resource intensive administrative hearings and increased revenue resulting from the promulgation of this regulation as a result of an anticipated increased ability to identify responsible providers and to pursue reimbursement.

#### Costs to local government:

Local government is not expected to incur costs attributable to this proposed amendment. Revenue recovered that would otherwise evade collection due to delays and the opportunity for providers to hinder recovery will enable the state to reimburse local government's share of recouped funds.

Because failure to enact this regulation will result in currently unquantifiable additional costs due to the unknown quantity of future hearing requests should this regulation not be promulgated, precise cost savings cannot be projected at this time.

#### 5. Local Government Mandates:

The proposed regulation imposes no new mandates on any county, city, town or village government; or school, fire or other special district.

#### 6. Paperwork:

The proposed regulation change will create no additional paperwork.

#### 7. Duplication:

This regulation change does not duplicate any other law, rule or regulation.

#### 8. Alternatives:

OMIG invited comments from various small business groups and provider associations at an advisory meeting for this regulation held on November 5, 2008. No significant alternatives were suggested beyond minor language changes which have been incorporated in the final text. Leaving the regulation in its current form would impose additional costs, reduced program quality, and diminished revenues. As previously noted, leaving the regulation unchanged may jeopardize an unquantifiable amount in gross Medicaid recoveries annually.

#### 9. Federal Standards:

The proposed regulation violates no federal statute or regulation but is necessary to bring State regulations into conformity with Federal regulations.

#### 10. Compliance Schedule:

To be made effective upon publication and promulgation pursuant to the State Administrative Procedure Act.

<sup>1</sup>42 C.F.R. 433.139 and 42 C.F.R. 433.310-433.320

#### *Regulatory Flexibility Analysis*

##### 1. Effect of Rule:

There are over 173,000 providers, such as physicians, nurses, home health aides, hospitals, etc. that are enrolled in the medical assistance program, all of which are potentially affected by this proposed rule. There are some local governmental entities that will be affected by this rule.

##### 2. Compliance Requirements:

There are no reporting, recordkeeping, or other affirmative acts that a small business or local government will have to undertake to comply with this rule.

##### 3. Professional Services:

Neither small business nor local government will require professional services to comply with this proposed rule.

##### 4. Compliance Costs:

This rulemaking does not impose any additional costs on any regulated business or industry or local government to comply with the rule. There is no annual cost anticipated for continuing compliance with the rule. However, there may be an additional cost to regulated business or industry should they fail to comply with the regulations.

##### 5. Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses or local governments that participate in the medical assistance program. This proposal does not impose a requirement for purchase or use of new technologies.

##### 6. Minimizing Adverse Impact:

This proposed rule will not have an adverse economic impact on the ability of small businesses or local governments to comply with Department requirements, as this rule does not change the substance of the requirements but instead may impose additional costs only upon medical providers who are not in compliance with regulations.

##### 7. Small Business and Local Government Participation:

OMIG invited comments from various small business groups and provider associations at an advisory meeting for this regulation held on November 5, 2008. No significant alternatives were suggested beyond minor language changes which have been incorporated in the final text.

Small businesses and local government entities affected by this regulation will have the opportunity to submit written comments after publication of a general notice of proposed rulemaking.

Furthermore, because provider participation in the Medicaid program is voluntary, providers who disagree with the regulatory scheme can choose to decline participation in the Medicaid program.

Finally, because the Office of the Medicaid Inspector General is an enforcement agency whose purpose is to detect, prevent and address fraud, and because participation is voluntary, input from providers from whom OMIG attempts to detect and prevent fraud will necessarily carry less weight than in rulemaking where provider participation is mandatory or where the purpose of the rule is not enforcement of wrongdoing by the regulated providers.

#### *Rural Area Flexibility Analysis*

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

Rural areas are defined as counties with a population under 200,000 and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas. This rule will apply to all medical assistance program providers in rural areas.

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

There will be no additional reporting, recordkeeping, or other compliance requirements for rural providers regarding this rule. There are no professional services likely to be needed in a rural area to comply with this rule.

##### 3. Costs:

There will be no initial capital costs or annual costs to comply with this rule for public or private entities in urban or rural areas.

##### 4. Minimizing adverse impact:

These amendments will not have an adverse impact on parties in rural areas.

5. Rural area participation:

OMIG invited comments from various small business groups and provider associations at an advisory meeting for this regulation held on November 5, 2008. No significant alternatives were suggested beyond minor language changes which have been incorporated in the final text. Public and private interests in rural areas will have the same opportunity as public and private interests in urban areas to submit written comments after publication of a general notice of proposed rulemaking.

**Job Impact Statement**

1. Nature of Impact:

This proposed rulemaking would not affect current employment opportunities in the public or private sector. However, passage of this proposed rule will assist the state in avoiding the projected need to hire additional staff to address an anticipated significant increase in hearings. This projection is based upon a recent court decision affording medical providers an opportunity for hearings in certain circumstances when none have been previously offered.

2. Category and Numbers Affected:

Should this proposed regulation be enacted, employment opportunities will remain status quo. Should this proposed regulation fail to be enacted, it is anticipated that the State of New York will require additional hearing officers, attorneys, support staff, auditors, and possibly other types of personnel to conduct and participate in hearings that are not presently being conducted. The quantity of personnel projected to be needed is presently unknown, as the number of hearings that may be requested cannot be quantified at this time.

3. Regions of Adverse Impact:

Enactment of this proposed regulation would not have an adverse impact on jobs or employment opportunities. As such, there is no area of the state disproportionately affected.

4. Minimizing Adverse Impact:

There will be no adverse impact on existing jobs.

(“Brady Act”) prohibits any person from selling or otherwise disposing of any firearm or ammunition to any person who has been involuntarily “committed to a mental institution” (18 U.S.C. Section 922(d)(4)) and further prohibits any person who has been involuntarily “committed to a mental institution” from shipping or transporting in interstate or foreign commerce, or possessing in or affecting commerce, any firearm or ammunition; or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce (18 U.S.C. Section 922(g)(4)).

(b) Under the federal NICS Improvement Amendments Act of 2007, Public Law 110-180, Section 105, the Brady Act was amended to establish the National Instant Criminal Background Check System (NICS). Upon being contacted by a federal firearm licensee prior to transferring a firearm to an unlicensed person, NICS will provide information on whether a person is prohibited from receiving or possessing a firearm under State or federal law. NICS contains records concerning certain events, such as criminal convictions and mental health adjudications and findings that may disqualify a person from purchasing a firearm. The 2007 amendments also require the establishment of a “certificate of relief from disabilities” process to permit a person who has been or may be disqualified from possessing a firearm pursuant to 18 U.S.C. Sections 922(d)(4) and (g)(4) to petition for relief from that disability.

(c) Section 7.09 of the Mental Hygiene Law authorizes the Office of Mental Health to collect, retain, modify or transmit data or records for inclusion in the NICS system for the purpose of responding to NICS queries regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 U.S.C. 921(a)(3). The records which the Office of Mental Health is authorized by law to collect, retain, modify, or transmit are expressly limited to persons who have been involuntarily committed pursuant to Articles 9 or 10 of the Mental Hygiene Law, Article 730 or Section 330.20 of the Criminal Procedure Law, Sections 402 or 508 of the Correction Law or Sections 322.2 or 353.4 of the Family Court Act. Mental Hygiene Law Section 7.09 also requires the Office to promulgate regulations establishing a “certificate of relief from disabilities” process for those persons whose records were provided to the Division of Criminal Justice Services or the Federal Bureau of Investigation by the Office pursuant to Mental Hygiene Law Section 7.09, and who have been or may be disqualified from possessing a firearm pursuant to 18 U.S.C. Sections 922(d)(4) and (g)(4).

(d) The purpose of these regulations is to establish the required administrative “certificate of relief from disabilities” process for persons whose records were submitted to the NICS system by the Office of Mental Health in accordance with Section 7.09 of the Mental Hygiene Law. (The Office of Mental Health has the authority under Section 7.09 of the Mental Hygiene Law to transmit the records either directly to the NICS system or through the Division of Criminal Justice Services). Such relief will be based on a determination of whether the person’s record and reputation are such that he/she will not be likely to act in a manner dangerous to public safety and where granting the relief would not be contrary to the public interest.

§ 543.2 Legal Base.

(a) Section 7.09(b) of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

(b) Section 7.09(j) of the Mental Hygiene Law gives the Commissioner of Mental Health the power and responsibility to establish within the Office of Mental Health an administrative process to permit a person who has been or may be disqualified pursuant to an adjudication under New York State law from possessing a firearm to petition for relief from that disability, and to promulgate regulations for this purpose.

§ 543.3 Applicability.

This Part applies to any person who has been or may be disqualified from possessing a firearm pursuant to 18 U.S.C. Sections 922 (d)(4) and (g)(4), due to being committed to a mental institution or adjudicated as having a mental disability, as such terms are defined in this Part and whose records were submitted to the NICS system by the Office of Mental Health in accordance with Section 7.09 of the Mental Hygiene Law.

§ 543.4 Definitions. For the purposes of only this Part:

(a) Adjudicated as having a mental disability or adjudication as having a mental disability means, and shall have the same meaning as the term “adjudicated as a mental defective” is defined in federal regulations at 27 C.F.R. 478.11, a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease is a danger to himself or to others or lacks the mental capacity to contract or manage

**Office of Mental Health**

**EMERGENCY  
RULE MAKING**

**Certificate of Relief from Disabilities Related to Firearms Possession**

**I.D. No.** OMH-39-09-00010-E

**Filing No.** 1085

**Filing Date:** 2009-09-15

**Effective Date:** 2009-09-15

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

**Action taken:** Addition of Part 543 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 7.09(b) and (j)

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

**Specific reasons underlying the finding of necessity:** The NICS Improvement Amendments Act of 2007 (Public Law 110-180, Section 105, enacted on January 8, 2008) requires that states have a relief from disabilities program that meets the requirements of the Act. In order to apply for the grant funding provided for under the NICS Improvement Amendments Act of 2007, the U.S. Department of Justice required that all states certified by June 22, 2009, that they implemented a relief from disabilities program. This rulemaking is meant to continue the emergency which was filed on June 17, 2009.

**Subject:** Certificate of Relief from Disabilities Related to Firearms Possession.

**Purpose:** To establish an administrative “certificate of relief from disabilities” process pursuant to Federal law.

**Text of emergency rule:** A new Part 543 is added to read as follows:

PART 543

CERTIFICATE OF RELIEF FROM DISABILITIES RELATED TO FIREARMS POSSESSION

(Statutory authority: Mental Hygiene Law § 7.09)

§ 543.1 Background and intent.

(a) The federal Brady Handgun Violence Prevention Act of 1993

his own affairs. Such term includes a finding of insanity by a court in a criminal case; and those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

(b) Committed to a mental institution means, as such term is defined in federal regulations at 27 C.F.R. 478.11, a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. Such term includes a commitment to a mental institution involuntarily; commitment for mental defectiveness or mental illness; and commitments for other reasons, such as for drug use, provided, however, that such term does not include a person in a mental institution for observation or a voluntary admission to a mental institution. For purposes of this Part, committed to a mental institution shall include persons who have been involuntarily committed or confined pursuant to Articles 9 or 10 of the Mental Hygiene Law, Article 730 or Section 330.20 of the Criminal Procedure Law, Section 402 or 508 of the Correction Law, or Section 322.2 or 353.4 of the Family Court Act.

(c) Mental Institution means and includes hospitals, as defined in Section 1.03 of the Mental Hygiene Law, that are licensed or operated by the Office of Mental Health and secure treatment facilities operated by such Office.

(d) Qualified psychiatrist means, as that term is defined in Section 9.01 of the Mental Hygiene Law, a physician licensed to practice medicine in New York state who:

(1) is a diplomate of the American board of psychiatry and neurology or is eligible to be certified by that board; or

(2) is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.

§ 543.5 Process.

(a) Request for relief.

(1) An individual who has been or may be disqualified from attempting to purchase or otherwise possess a firearm in accordance with the provisions of subdivision (j) of Section 7.09 of the Mental Hygiene Law and whose records were submitted to the NICS system by the Office of Mental Health, may request administrative review by the Office to have his or her civil rights restored for such limited purpose.

(2) A request for relief shall be made on forms developed by the Office, which shall be available on the Office's public website. At a minimum, the forms shall require the applicant to answer all of the following questions under penalty of perjury:

(i) Is the applicant under indictment for, or has he/she been convicted of, a crime punishable by imprisonment for more than one year?

(ii) Is the applicant a fugitive from justice?

(iii) Is the applicant an unlawful user of, or is addicted to, any controlled substance?

(iv) Has the applicant been adjudicated as having a mental disability or committed to a mental institution?

(v) Is the applicant an illegal alien, or has he/she been admitted to the United States under a nonimmigrant visa?

(vi) Was the applicant discharged from the U.S. Armed Forces under dishonorable conditions?

(vii) Has the applicant renounced U.S. citizenship?

(viii) Is the applicant subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child?

(ix) Has the applicant been convicted in any court of a misdemeanor crime of domestic violence?

(3) In addition to the forms provided, the applicant shall be required to submit further information in support of the certificate of relief. The information must include, but is not limited to:

(i) true and certified copies of medical records detailing the applicant's psychiatric history, which shall include the records pertaining to the commitment to a mental health facility, or adjudication as having a mental disability (as defined in this Part), which is the subject of the request for relief;

(ii) true and certified copies of medical records from all of the applicant's current treatment providers, if the applicant is receiving treatment;

(iii) a true and certified copy of all criminal history information maintained on file at the New York State Division of Criminal Justice Services and the Federal Bureau of Investigation pertaining to the applicant, or a copy of a response from such Division and Bureau indicating that there is no criminal history information on file;

(iv) evidence of the applicant's reputation, which may include notarized letters of reference from current and past employers, family members or personal friends, affidavits from the applicant or other character evidence;

(v) any further information specifically requested by the Office. Such documents requested by the Office shall be certified copies of original documents.

(4) The applicant may provide a psychiatric evaluation performed no earlier than 90 calendar days from the date the request for the certificate of relief was submitted to the Office, conducted by a qualified psychiatrist. The evaluation should include an opinion as to whether or not the applicant's record and reputation are such that the applicant will or will not be likely to act in a manner dangerous to public safety and whether or not the granting of the relief would be contrary to the public interest.

(5) The Office reserves the right to request that the applicant undergo a clinical evaluation and risk assessment as determined by the Commissioner or his/her designee(s). The evaluation must be performed within 45 calendar days from the date the Office requests the evaluation, unless the Office allows an extension of time.

(6) The request for relief must include an authorization form permitting the Office to obtain and/or review health information from any health, mental health, or alcohol/substance abuse providers with respect to care provided prior to the date of the application, for the purposes of reviewing the application for relief. Such authorization must comply with applicable federal or state laws governing the privacy of health information, including but not limited to, as relevant, 45 CFR Parts 160 and 164, 42 CFR Part 2, Public Health Law Section 17 and Article 27-F, and Mental Hygiene Law Section 33.13.

(7) It is the responsibility of the applicant to ensure that all required information accompanies the request for relief at the time it is submitted to the Office. Unless specifically requested by the Office, information provided after receipt by the Office of the initial request for relief will not be considered. Information specifically requested by the Office must be received by the Office within 60 days of the date requested in order for it to be considered. Failure to meet this time frame will result in a denial of the certificate of relief.

(b) Scope of review.

(1) The Commissioner or his/her designee(s) shall perform an administrative review of the request for relief, which shall consist of a review of all information submitted by the applicant that was required or requested by the Office, in accordance with paragraph (a)(3) of this Section. The person(s) who conducts the review will not be the individual(s) who gathered the evidence for the administrative request for relief.

(2) Failure of the applicant to provide required or requested information may be the sole basis for denial of the certificate of relief.

(3) The scope of the review shall be to determine, from the materials submitted, whether the applicant will not be likely to act in a manner dangerous to public safety and granting the relief will not be contrary to the public interest.

(c) Decision.

(1) After review of the application in accordance with subdivision (b) of this Section, the Commissioner or his/her designee(s) shall prepare a written determination, which shall include:

(i) a summary of the information utilized in reaching the decision;

(ii) a summary of the applicant's criminal history (if any);

(iii) a summary of the psychiatric evaluation prepared to support the request for relief (if any);

(iv) a summary of the applicant's mental health history;

(v) a summary of the circumstances surrounding the firearms disability imposed by 18 U.S.C. Sections 922(d)(4) and (g)(4);

(vi) an opinion as to whether or not the applicant's record and reputation are such that the applicant will or will not be likely to act in a manner dangerous to public safety and whether or not the granting of the relief would be contrary to the public interest; and

(vii) a determination as to whether or not the relief is granted.

(2) The Office shall provide a copy of the written determination to the applicant without undue delay. In addition to a copy of the written determination:

(i) if the relief is granted:

(A) the applicant must be provided with written notice that while the certificate of relief removes the disability from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. § 922(d)(4) and (g)(4), the determination does not otherwise qualify the applicant to purchase or possess a firearm, and does not fulfill the requirements of the background check pursuant to the Brady Act (Pub. L. 103-159); and

(B) the Office must notify the National Instant Criminal Background Check System (NICS) that the certificate of relief has been granted; or

(ii) if the relief is denied:

(A) the applicant must be notified of the right to have the decision reviewed in accordance with applicable State law; and

(B) the Office must further advise that the applicant cannot apply again for a request for relief until a year after the date of the written determination to deny the relief requested.

§ 543.6 Records.

The Office of Mental Health, on being made aware that the basis under which a record was made available by the Office to the National Instant Criminal Background Check System does not apply or no longer applies, shall, as soon as practicable:

(a) update, correct, modify or remove the record from any database that the Federal or State government maintains and makes available to the National Instant Criminal Background Check System, consistent with the rules pertaining to that database; and

(b) notify the United States Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to 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 December 13, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

**Regulatory Impact Statement**

1. Statutory Authority: Subdivision (b) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction.

Subdivision (j) of Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the power to adopt regulations to establish the relief from disabilities program.

2. Legislative Objectives: The implementation of this administrative “certificate of relief from disabilities” process is required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993, as well as Subdivision (j) of Section 7.09 of the Mental Hygiene Law.

3. Needs and Benefits: These regulations will establish within the Office of Mental Health a process whereby a person who has been or may be disqualified pursuant to an adjudication under New York State law, as articulated in Mental Hygiene Law Section 7.09(j), from possessing a firearm to petition for relief from that disability. The implementation of this administrative “certificate of relief from disabilities” process is required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993 to establish the National Instant Criminal Background Check system (NICS). Upon being contacted by a federal firearm licensee prior to transferring a firearm to an unlicensed person, NICS will provide information on whether a person is prohibited from receiving or possessing a firearm under state or federal law. These regulations establish a process for individuals who have been or may be disqualified pursuant to New York law, as articulated in Mental Hygiene Law Section 7.09 (j), from possessing a firearm to petition for relief from disabilities by demonstrating that their gun ownership would not be dangerous to public safety or contrary to public interest. Failure to implement this administrative process could result in loss of future federal funds under the federal legislation.

4. Costs:

(a) Cost to regulated persons: This regulation will impact members of the public who have been or may be disqualified pursuant to an adjudication under New York State law, as articulated in Mental Hygiene Law Section 7.09(j), from possessing a firearm and who choose to petition for relief from that disability. To date, over 100,000 records have been submitted for this purpose, and record submission is ongoing. The Office has no experiential data from which to estimate the number of persons from the variable number of total records submitted who will voluntarily elect to petition for relief, nor is it known to what extent they will undergo costs in obtaining the documentation necessary for the regulatory process. Thus, although there may be some costs incurred by individuals who wish to avail themselves of the certificate of relief process in gathering the required materials, there are no mandatory fees required of applicants, except the cost of retrieving a certified copy of their criminal history information from the New York State Division of Criminal Justice Services and the Federal Bureau of Investigation. There will be no costs to providers regulated by the Office of Mental Health as a result of this regulatory amendment.

(b) Cost to State and local government: There will be no costs to local government. The 2009-2010 enacted State budget has included an appropriation of \$272,000 to support the costs associated with the hiring of new employees to implement the administrative program.

5. Paperwork: This rule should not substantially increase the paperwork requirements of regulated parties.

6. Local government mandates: This regulatory amendment will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

7. Duplication: There are no duplicate, overlapping or conflicting mandates which may affect this rule.

8. Alternative approaches: The only alternative to this regulatory amendment would be inaction. The development of an administrative relief process is mandated by Section 7.09 of the Mental Hygiene Law. A failure to promulgate these regulations would be contrary to the legislation. Therefore, that alternative was necessarily rejected.

9. Federal standards: The regulatory amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The regulatory amendment would be effective immediately upon adoption.

**Regulatory Flexibility Analysis**

The rulemaking serves to establish a “certificate of relief from disabilities” process as required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993. There will be no adverse economic impact on small businesses or local governments; therefore, a regulatory flexibility analysis is not submitted with this notice.

**Rural Area Flexibility Analysis**

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking, which serves to establish a “certificate of relief from disabilities” process, will not impose any adverse economic impact on rural areas. The implementation of this process is required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993.

**Job Impact Statement**

A Job Impact Statement is not submitted with this notice because there will be no adverse impact on jobs and employment opportunities. The rulemaking establishes a certificate of relief from disabilities process. Implementation of this administrative process is required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993.

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## Office of Mental Retardation and Developmental Disabilities

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### EMERGENCY RULE MAKING

**Appeals Process Pursuant to Chapter 508, Laws of 2008**

**I.D. No.** MRD-28-09-00014-E

**Filing No.** 1072

**Filing Date:** 2009-09-11

**Effective Date:** 2009-09-12

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) Subparagraph 4402(1)(b)(5) of the New York State Education Law and subdivision 398(13) of the New York State 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.

**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. MRD-28-09-00014-P, Issue of July 15, 2009. The emergency rule will expire November 9, 2009.

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

**Additional matter required by statute:** Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has determined that the action 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."

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 proposed regulation assists in the implementation of the 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.

## 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 be 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. Further, compliance was required by emergency regulations effective January 14, 2009, April 15, and July 14, 2009. 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 technology 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. OMRDD also notified all providers about the promulgation of previous emergency regulations which contained the same provisions.

**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.

**Assessment of Public Comment**

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

Section 465.1 describes the purpose of the Summer Empire State Games (ESG) which is to promote the:

public health and welfare of New York residents by encouraging wholesome amateur athletic competition particularly for youths; providing opportunities and incentives to improve amateur athletics; publicly recognizing dedicated amateur athletes; showcasing the different regions of the State; providing economic benefits to the host community; and, fostering and encouraging volunteerism.

The purpose of the proposed regulation is to clarify and standardize procedures and participation requirements.

Section 465.2 defines agency, applicant, finals, region, regional trial, resident or residency, roster, and summer ESG.

Section 465.3 outlines the general eligibility requirements.

Section 465.4 outlines the age-eligibility requirements and the sports-specific eligibility requirements for the scholastic and open divisions.

Section 465.5 outlines the age-eligibility requirements and the sports-specific eligibility requirements for the masters division.

Section 465.6 describes the code of conduct.

Section 465.7 describes the sanctions.

Section 465.8 contains the severability language.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, Empire State Plaza, Agency Building 1, 19th Floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

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

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

**Consensus Rule Making Determination**

The Office of Parks, Recreation and Historic Preservation (OPRHP) is proposing to add a new Subchapter C entitled "Empire State Games" and a new Part 465 "Summer Empire State Games" to Chapter VI of Subtitle I of Title 9 NYCRR. The largest competition of its kind in the nation, the Summer Games is a multi-sport event that is patterned after the Olympic program primarily for amateur youth athletes who are residents of New York State. Following regional trials in each of six State regions, thousands of athletes participate in finals competitions. No one is likely to object because the proposed regulation clarifies procedures and participation requirements that previously were available to the public through OPRHP publications and its website.

**Job Impact Statement**

The existing rule does not affect jobs or employment opportunities and its repeal would not affect jobs or employment opportunities.

**Office of Parks, Recreation and Historic Preservation**

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

**The Summer Empire State Games - an Annual Multi-Sport Recreational Event Conducted by OPRHP Primarily for Young Athletes**

**I.D. No.** PKR-39-09-00004-P

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

**Proposed Action:** This is a consensus rule making to add Part 465 to Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, section 3.09(3), (5), (6), (8), (9), (10) and (16)

**Subject:** The Summer Empire State Games - an annual multi-sport recreational event conducted by OPRHP primarily for young athletes.

**Purpose:** To clarify the procedures and requirements for participating in the Summer Empire State Games.

**Substance of proposed rule (Full text is posted at the following State website:OPRHP):** The Office of Parks, Recreation and Historic Preservation (OPRHP) is proposing to add a new Subchapter C entitled "Empire State Games" and a new Part 465 "Summer Empire State Games" to Chapter VI of Subtitle I of Title 9 NYCRR. The largest competition of its kind in the nation, the Summer Games is a multi-sport event for amateur athletes, primarily New York State youths. It is patterned after the Olympic program. Following regional trials in each of six State regions, thousands of athletes participate in finals competitions.

**Public Service Commission**

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

**Granting Incumbent Local Exchange Carriers Rate Flexibility and Other Possible Relief**

**I.D. No.** PSC-39-09-00013-P

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

**Proposed Action:** The Commission is considering whether to extend the rate flexibility granted by its competitive framework for Incumbent Local Exchange Carriers beyond the initial two years.

**Statutory authority:** Public Service Law, sections 94(2) and 97

**Subject:** Granting Incumbent Local Exchange Carriers rate flexibility and other possible relief.

**Purpose:** Consideration of extension of rate flexibility beyond the initial two years of the program.

**Substance of proposed rule:** In its competitive framework orders the Commission granted rate flexibility for two years to Incumbent Local Exchange Carriers based on their competitive environments and financial performances. The Commission is now considering whether to extend the rate flexibility beyond the initial two years, and in what form that flexibility might take.

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

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

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

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

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

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

(07-C-0349SP2)

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

**Modification of Customer Satisfaction Survey Instrument, Survey Method and Performance Measurement**

**I.D. No.** PSC-39-09-00014-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 a petition filed by Niagara Mohawk Power Corporation d/b/a National Grid to modify the contents and process for the Company's Customer Satisfaction Survey in accordance with the May 15, 2009 Order in Case No. 08-G-0609.

**Statutory authority:** Public Service Law, sections 2, 5, 65 and 66

**Subject:** Modification of customer satisfaction survey instrument, survey method and performance measurement.

**Purpose:** Consideration of a petition to streamline survey process to improve customer service and provide timely response to concerns.

**Substance of proposed rule:** By petition dated September 10, 2009, Niagara Mohawk Power Corporation d/b/a National Grid (the Company) requested approval to modify the Company's Customer Satisfaction Survey in accordance with the Joint Proposal approved by the Commission in its May 15, 2009 Order in Case No. 08-G-0609. The Company seeks to modify survey process, revise the survey instrument and measurement, and adjust the threshold performance measure. The Commission is considering whether to grant or deny, in whole or in part, approval of the survey program revisions which are intended to improve customer service with timely responses by the Company to customer concerns.

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

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

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

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

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

(08-G-0609SP4)

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

**Modifications to the \$5 Bill Credit Program**

**I.D. No.** PSC-39-09-00015-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, deny or modify a September 10, 2009 petition of Niagara

Mohawk Power Corporation d/b/a National Grid (National Grid), to make certain modifications to the Low Income \$5 Bill Credit Program.

**Statutory authority:** Public Service Law, section 66(1)

**Subject:** Modifications to the \$5 Bill Credit Program.

**Purpose:** Consideration of petition of National Grid to modify the Low Income \$5 Bill Credit Program.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, a September 10, 2009 petition of Niagara Mohawk Power Corporation d/b/a National Grid (Company) to make certain modifications to the low income \$5 bill credit program. Specifically, to enable a wider population of eligible customers to participate in the program, the Company is requesting approval to increase the unique bill credit cap from 1.2 million per year to 1.5 million per year.

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

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

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

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

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

(01-M-0075SP45)

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

**To Review Utility Austerity Filings**

**I.D. No.** PSC-39-09-00016-P

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

**Proposed Action:** The PSC is considering proposals submitted by all New York State utilities for austerity measures made in response to the PSC's Notice Requiring the Filing of Utility Austerity Plans, issued 5/15/09.

**Statutory authority:** Public Service Law, sections 5(2) and 65(1)

**Subject:** To review utility austerity filings.

**Purpose:** To respond to the current economic environment and assist ratepayers, where possible, with utility cost reductions.

**Substance of proposed rule:** The Commission is considering whether to approve, reject or modify, in whole or in part, proposals submitted by all New York State utilities for austerity measures made in response to the Public Service Commission's Notice Requiring The Filing Of Utility Austerity Plans (issued May 15, 2009).

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

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

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

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

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

(09-M-0435SP1)

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

**Approval of a Transfer of Ownership Interests in an Electric Substation**

**I.D. No.** PSC-39-09-00017-P

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

**Proposed Action:** The Commission is considering a petition from the General Motors Company (GM) requesting approval of the transfer of ownership interests in an electric substation located in the Town of Tonawanda.

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

**Subject:** Approval of a transfer of ownership interests in an electric substation.

**Purpose:** Consideration of approval of a transfer of ownership interests in an electric substation.

**Substance of proposed rule:** The Public Service Commission is considering a petition from the General Motors Company (GM) requesting approval of the transfer of ownership interests in an electric substation located in the Town of Tonawanda, including the continuation of incidental and lightened regulatory treatment. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto: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](mailto: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-0656SP1)

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

**The Offset of Deferral Balances with Positive Benefit Adjustments**

**I.D. No.** PSC-39-09-00018-P

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

**Proposed Action:** The Commission is considering a petition filed by New York State Electric & Gas and Rochester Gas & Electric Corporations seeking authorization to utilize their Positive Benefit Adjustments established in Case 07-M-0906 to offset deferral balances.

**Statutory authority:** Public Service Law, section 66(4), (10)

**Subject:** The offset of deferral balances with Positive Benefit Adjustments.

**Purpose:** To consider a petition to offset deferral balances with Positive Benefit Adjustments.

**Substance of proposed rule:** The Public Service Commission is considering a petition by the New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation to utilize the Positive Benefits Adjustments provided for in the Order issued September 9, 2008 in Case 07-M-0906 to offset certain deferral balances. The Commission may accept, reject, or modify, in whole or in part, the recovery requested.

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

**Data, views or arguments may be submitted to:** Jaclyn A. Brilling, Secre-

tary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [jaclyn\\_brilling@dps.state.ny.us](mailto: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-0642SP1)

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

**Approval of a Transfer of Ownership Interests in Waterworks Facilities**

**I.D. No.** PSC-39-09-00019-P

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

**Proposed Action:** The Commission is considering a petition from Eastman Kodak Company (Kodak) and the Monroe County Water Authority (MCWA) requesting approval of a transfer, from Kodak to MCWA, of ownership interests in waterworks facilities.

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Approval of a transfer of ownership interests in waterworks facilities.

**Purpose:** Consideration of approval of a transfer of ownership interests in waterworks facilities.

**Substance of proposed rule:** The Public Service Commission is considering a petition from Eastman Kodak Company (Kodak) and the Monroe County Water Authority (MCWA) requesting approval of a transfer, from Kodak to MCWA, of ownership interests in waterworks facilities, consisting of a pumping station, a water treatment plant, water transmission lines and other appurtenant facilities for the supply of industrial water to the Eastman Business Park.

**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](mailto: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](mailto: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-0659SP1)

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

**Water Rate Charges or a Waiver of Rate Setting Authority**

**I.D. No.** PSC-39-09-00020-P

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

**Proposed Action:** The PSC is considering a petition by Yellow Barn Water Company, Inc. to increase its annual revenues by about \$19,511 or 83%. The company filed a supplement to its original filing requesting a waiver of the Commission's rate setting authority.

**Statutory authority:** Public Service Law, sections 4(1), 5(1)(f), (4), 89-c(1), (10) and 89-h

**Subject:** Water rate charges or a waiver of rate setting authority.

**Purpose:** Approval of a rate increase or a waiver of rate setting authority.

**Text of proposed rule:** On March 17, 2009, Yellow Barn Water Company, Inc. (Yellow Barn) filed a petition requesting approval of an increase in annual revenues of \$19,511 or 83%. Subsequently, on August 17, 2009, Yellow Barn submitted a supplement to its original filing requesting a waiver of the Public Service Commission's rate setting authority pursuant to Public Service Law (PSL) § 5(4). Rates would be established by the customers (who are all equal shareholders in the company) from time to time to cover the expenses associated with the operation and maintenance of the water system. Each customer would have the right at any time to ask the Public Service Commission to investigate the rates and charges. Details of the filing are available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us)) located under Commission Documents.

Yellow Barn provides metered water service to 76 year-round customers in the Town of Freeville, Thompsons County. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(09-W-0260SP1)

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

#### Whether a Proposed Agreement for the Provision of Water Service by Saratoga Water Services is in the Public Interest

**I.D. No.** PSC-39-09-00021-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, deny, or modify, in whole or in part, the petition of Saratoga Water Services, Inc. for a waiver of the company's tariff and approval of the terms of a service agreement.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 89-b

**Subject:** Whether a proposed agreement for the provision of water service by Saratoga Water Services is in the public interest.

**Purpose:** Whether the Commission should issue an order approving the proposed provision of water service.

**Substance of proposed rule:** The Commission is considering a Petition in which Saratoga Water Services, Inc. (Saratoga) seeks issuance of an Order (a) approving the terms and conditions of a certain "Agreement For The Provision of Water Service", dated June 10, 2009 (Agreement) between Saratoga and the Luther Forest Technology Campus, Economic Development Corporation as being in the public interest; (b) determining that the provision of water service by Saratoga in accordance with the terms set forth in the Agreement, is in the public interest; (c) waiving Saratoga's tariff provisions to the extent they are inconsistent with the Agreement and (d) waiving the applicability of the provisions of 16 N.Y.C.R.R. Parts 501 and 502, to the extent they are inconsistent with the Agreement.

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

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

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

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

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

(09-W-0505SP1)

## Office of Real Property Services

### EMERGENCY/PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Reimbursement of Training Expenses

**I.D. No.** RPS-39-09-00025-EP

**Filing No.** 1093

**Filing Date:** 2009-09-15

**Effective Date:** 2009-09-15

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

**Action taken:** Amendment of Part 188 of Title 9 NYCRR.

**Statutory authority:** Real Property Tax Law, sections 202(1)(l), 318(4) and 1530(3)(f)

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

**Specific reasons underlying the finding of necessity:** These amendments are intended to assure that training reimbursement funds are effectively managed in a time of fiscal crisis. As required by the Real Property Tax Law, there has been established in rules (9 NYCRR 188) programs of certification for assessors and directors of county real property tax service agencies and continuing education programs for county directors and sole elected and appointed assessors. Travel and other actual and necessary expenses incurred by these local officials in satisfying these requirements are a charge against the State (RPTL, § § 318[4], 1530[3][f]). Funds for this reimbursement are contained in an annual appropriation. The 2009-2010 budget contains an appropriation of \$690,000.

At present officials can "bank" three years worth of continuing education credit for future use in satisfying the annual requirement of 24 credit hours. They are also able to receive reimbursement for attending an approved conference even if they receive no continuing education credit at that conference. Given the current budgetary situation, a change in this process is necessary to assure that reimbursement is paid in a manner that is more consistent with the legislative intent. Under this proposal, assessors and directors will be limited in the "banking" of continuing education credit to twenty-four credit hours, i.e., one year's worth of credits.

We recognize that there is a need for some flexibility in planning to attend training. However, allowing the accumulation of credits to satisfy requirements three years in the future, at the state's expense, is not defensible in the current fiscal situation. In addition, assessors and directors would no longer be able to attend an approved conference at the State's expense without receiving continuing education credit. This largess is no longer acceptable in the current fiscal situation.

**Subject:** Reimbursement of training expenses.

**Purpose:** Revise the continuing education requirements in regard to reimbursement.

**Public hearing(s) will be held at:** 1:30 p.m., October 7, 2009 at the Office of Real Property Services, 16 Sheridan Ave., 5th Fl., Albany, NY.

**Interpreter services:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request to the agency contact designated in this notice.

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

**Text of emergency/proposed rule:** Section 1. Subdivision a of section 188-2.8 of Title 9 is amended to read as follows:

(a) Each appointed and sole elected assessor must comply with the applicable continuing education requirement set forth herein. All other

elected assessors may voluntarily participate in the continuing education program but are subject to the same requirements for all purposes.

(1) Within one year of attaining certification as a State Certified Assessor each appointed or sole elected assessor must successfully complete the introduction to mass appraisal component if the introduction to mass appraisal component was not elected for certification.

(2) Each appointed or sole elected assessor must successfully complete an average of 24 continuing education credits every year. Continuing education credit means the number of contact hours awarded for attendance at approved courses, conferences, and seminars. Continuing education credits are awarded on [a] an hour for hour basis in full hour amounts only. If an assessor successfully completes more than 24 continuing education credits in one year, as many as [72] 24 of the excess credits may be applied toward the requirement for the following [three years] year.

(3) The continuing education requirement commences upon the following date:

(i) For a certified assessor or certified acting assessor, the requirement commences upon the October 1st next succeeding the date such certification was issued.

(ii) For a certified assessor who is subsequently appointed, the requirement commences upon the October 1st next succeeding the date of such appointment.

(iii) For an assessor certified as a candidate for assessor prior to his or her appointment pursuant to Subpart 188-3 of this Part and appointed prior to the expiration of his or her certificate, the requirement commences upon the October 1st next succeeding the date of appointment.

(4) If an assessor exceeds the number of required credits set forth in this section, ORPS shall grant retroactive continuing education credit to meet prior requirements, but in no case shall such credit be used to cover more than one year.

Section 2. Subdivision d of section 188-2.9 is repealed and subdivisions e, f and g are relettered d, e and f respectively.

Section 3. A new subdivision g is added to section 188-2.9 to read as follows:

(g) For reimbursement of expenses for training attended on or after October 1, 2009, any assessor who has more than 24 excess credits on that date shall apply 24 credits to satisfying the continuing education requirement in 2009-10 and any additional remaining credits to satisfying the continuing education in 2010-11. Any remaining credits shall be applied to satisfying the continuing education requirement in 2011-12.

Section 4. Paragraph one of subdivision a of section 188-4.8 is amended to read as follows:

(1) A county director must successfully complete an average of 24 continuing education credits every year. Continuing education credit means the number of contact hours awarded for attendance at approved courses, conferences, and seminars. Continuing education credits are awarded on [a] an hour for hour basis in full hour amounts only. If a county director successfully completes more than 24 continuing education credits in one year, as many as [72] 24 of the excess credits may be applied toward the requirement for the following [three years] year.

Section 5. Subdivisions b and c of section 188-4.9 are amended to read as follows:

(b) [Travel and other actual and necessary expenses incurred by a county director or a person appointed county director for a forthcoming term while attending training at one county director conference per State fiscal year shall be a State charge upon audit by the State Comptroller, provided that the county director or county director appointee has successfully completed the components set forth in section 188-2.6(b)(1) through (7) of this Part of the basic course of training for assessors and introduction to farm appraisal if one or more assessing units in the county meet the criteria set forth in section 188-2.8(b)(8) of this Part.

(c) Reimbursement shall be in the same manner and to the same extent as provided in section 188-2.9 of this Part.

(c) For the reimbursement of expenses for training attended on or after October 1, 2009, any director who has more than 24 excess credits on that date shall apply 24 credits to satisfying the continuing education requirement in 2009-10 and any additional remaining credits to satisfying the continuing education in 2010-11. Any remaining credits shall be applied to satisfying the continuing education requirement in 2011-12.

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

**Text of rule and any required statements and analyses may be obtained from:** Philip J. Hawver, Office of Real Property Services, 16 Sheridan Avenue, Albany, New York 12210, (518) 474-8821, e-mail: internet.legal@orps.state.ny.us

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

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

### Regulatory Impact Statement

1. Statutory Authority: Section 202(1)(l) of the Real Property Tax Law (RPTL) authorizes the State Board of Real Property Services to adopt such rules "as may be necessary for the exercise of its powers and the performance of its duties."

As required by the Real Property Tax Law, there has been established in rules (9 NYCRR 188) programs of certification for assessors and directors of county real property tax service agencies and continuing education programs for county directors and sole elected and appointed assessors. Travel and other actual and necessary expenses incurred by these local officials in satisfying these requirements are a charge against the State (RPTL, § § 318[4], 1530[3][f]). Funds for this reimbursement are contained in an annual appropriation.

2. Legislative Objectives: Real Property Tax Law, § 318(4) provides, in relevant part, that: "the travel and other actual and necessary expenses incurred by an appointed or elected assessor, . . . , in satisfactorily completing courses of training as required by this title or as approved by the state board, including continuing education courses prescribed by the state board which are satisfactorily completed by any elected assessor, shall be a state charge upon audit by the comptroller." The statutory provision authorizes the payment of certain enumerated reasonable and necessary expenses but any such costs and expenses beyond this stated mandate cannot be justified, especially during the current severe economic downturn. Essentially, these amendments are intended to assure that training reimbursement funds are effectively managed in a time of fiscal crisis.

3. Needs and Benefits: These amendments are intended to assure that training reimbursement funds are effectively managed in a time of fiscal crisis. A single annual appropriation is available to reimburse local officials for expenses in obtaining basic certification and pursuing continuing education. These amendments only affect the latter program. At present officials can "bank" three years worth of continuing education credit for future use in satisfying the annual requirement of 24 credit hours. They are also able to receive reimbursement for attending an approved conference even if they receive no continuing education credit at that conference.

Given the current budgetary situation, a change in this process is necessary to assure that reimbursement is paid in a manner that is more consistent with the legislative intent. Under these amendments, assessors and directors will be limited in the "banking" of continuing education credit to twenty-four credit hours, i.e., one year's worth of credits. The State Board recognizes that there is a need for some flexibility in planning to attend training. However, allowing the accumulation of credits to satisfy requirements three years in the future, at the State's expense, is not defensible in the current fiscal situation.

In addition, assessors and directors would no longer be able to attend an approved conference at the state's expense without receiving continuing education credit. This largess is no longer acceptable in the current fiscal situation. Finally, the amendments also contain minor, non-substantive changes to the assessor continuing education provisions. These amendments become effective on October 1, 2009, allowing reimbursement for training scheduled for the summer and early fall of 2009.

4. Costs: (a) To State Government. The 2009-2010 budget contains an appropriation of \$690,000. "The appropriation of \$690,000 in the 2009-10 budget is to cover basic training for NYC assessors and basic and continuing education for assessors and county directors of real property tax services throughout the State."

These amendments will insure the efficient expenditure of State funds and the availability of those funds to reimburse local officials for expenses in attaining certification. The amendments are expected to reduce State expenditures by \$150,000 to \$200,000 annually. The full benefit of this reduction will not be seen during the 2009-2010 State fiscal year because the amendments become effective midway through on October 1, 2009.

Staff has determined that there are approximately 215 assessors and county directors who would be ineligible to attend continuing education training and receive reimbursement for that training during the 2009-2010 education year (begins October 1, 2009) under the proposed rules. These individuals have already received credit and reimbursement for continuing education training that meets their training requirements 2-3 years in advance. The estimate of approximately \$150,000-\$200,000 in savings in the first year is based on no reimbursement being available to this group.

(b) To local governments: None in 2009. Some local governments may decide to reimburse assessors or directors for some or all of the estimated \$150,000-\$200,000 that these amendments will save.

(c) To private regulated parties: None. There are no private regulated parties in this program.

(d) Basis of cost estimates – paid expenses and current training needs.

5. Local Government Mandates: None

6. Paperwork: None

7. Duplication: There are no conflicting State or Federal requirements.

8. Alternatives: There were careful discussions and consideration of other potential modifications to the reimbursement procedures, such as

curtailing reimbursement to a greater degree or allowing a more generous benefit, but ultimately it was decided that proposed amendments were the optimum alternative.

9. Federal Standards: There are no Federal regulations concerning this subject.

10. Compliance Schedule: The amendments will take effect upon the publication of the adoption of the rule in the *State Register*.

#### **Regulatory Flexibility Analysis**

The amendments proposed would generally not impose any adverse economic conditions or any reporting, record-keeping or other compliance requirements on small businesses.

However, to the extent certain local governments decide to reimburse local officials with respect to the cost of training no longer reimbursed by the State, such municipalities may incur additional costs.

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

Many of the assessors impacted by this proposal reside and are employed in rural areas of the State. However the proposal would generally pertain only to a single assessor in such a municipality, which in effect means that any economic impact would be minimal.

To the extent certain rural local governments decide to reimburse local officials with respect to the cost of training no longer reimbursed by the State, such municipalities may incur additional costs.

#### **Job Impact Statement**

A job impact statement is not required for this rule making because the amendments only concern local officials whose offices are mandated by statute. The proposal has no effect on job opportunities in the private or public sector.

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## Department of Taxation and Finance

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### NOTICE OF ADOPTION

#### **Automatic Extension of Time to File Partnership and Fiduciary Returns**

**I.D. No.** TAF-27-09-00009-A

**Filing No.** 1062

**Filing Date:** 2009-09-10

**Effective Date:** 2009-09-30

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

**Action taken:** Amendment of section 157.2(a) of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subdivision First, 657(a) and 697(a)

**Subject:** Automatic extension of time to file partnership and fiduciary returns.

**Purpose:** To conform to federal treatment concerning the automatic extension of time to file partnership and fiduciary returns.

**Text or summary was published** in the July 8, 2009 issue of the Register, I.D. No. TAF-27-09-00009-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: John\_Bartlett@tax.state.ny.us

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### **Registration Fees and Related Penalties for Retail Dealers of Cigarettes and Tobacco Products**

**I.D. No.** TAF-27-09-00010-A

**Filing No.** 1063

**Filing Date:** 2009-09-10

**Effective Date:** 2009-09-30

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

**Action taken:** Amendment of section 73.1 and repeal of sections 73.2 and 73.3 of Title 20 NYCRR.

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

**Subject:** Registration fees and related penalties for retail dealers of cigarettes and tobacco products.

**Purpose:** To reference current statutory provisions, eliminate obsolete and unnecessary provisions, and make technical changes.

**Text or summary was published** in the July 8, 2009 issue of the Register, I.D. No. TAF-27-09-00010-P.

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

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

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

The agency received no public comment.

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

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

**I.D. No.** TAF-39-09-00003-P

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

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

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

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

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

**Substance of 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 and the revision of the New York State and City of Yonkers tax tables and tax table benefit recapture enacted by Chapter 57 of the Laws of 2009, implemented over a twelve month period rather than the shorter implementation period required for tax year 2009. This rule also adjusts the New York State and City of Yonkers supplemental withholding tax rates to reflect the twelve-month implementation period to be applied to supplemental wage payments, rather than the shorter period for tax year 2009.

The rule applies to wages and other compensation subject to withholding paid on or after January 1, 2010.

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

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

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

**Regulatory Impact Statement**

1. Statutory authority: Tax Law, 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 changes made by Part Z-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 to implement the changes necessitated by Chapter 57 of the Laws of 2009 applicable to wages and other compensation paid on or after January 1, 2010. The amendments implement revised New York State and City of Yonkers withholding tables and other methods. Specifically, the withholding rates reflect the implementation of the changes necessitated by Chapter 57 over a twelve-month period, rather than the shorter implementation period required for tax year 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 implemented over a twelve-month period, rather than the shorter period required for tax year 2009.

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 January 1, 2010, reflecting the changes necessitated by 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 over-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, the City of Yonkers Income Tax Surcharge on Residents Regulations, and to Appendixes 10 and 10-A, arises due to the statutory changes in the itemized deductions and rates applied over a twelve-month period, 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 costs assessment is based on a review of the rule and the statutory requirements and their effect as described above by and 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.

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; the Tax Section of the New York State Bar Association; the Association of the Bar of the City of New York; the National Tax Committee for the National Conference of CPA Practitioners; the New York State Society of CPAs; and the Business Council of New York State. No comments were received from any of these parties.

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 January 1, 2010.

**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; the Tax Section of the New York State Bar Association; the Association of the Bar of the City of New York; the National Tax Committee for the National Conference of CPA Practitioners; the New York State Society of CPAs; and the Business Council of New York State. No comments were received from any of these parties.

#### *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; the New York Association of Convenience Stores; the Tax Section of the New York State Bar Association; the Association of the Bar of the City of New York; the National Tax Committee for the National Conference of CPA Practitioners; the New York State Society of CPAs; and the Business Council of New York State. No comments were received from any of these parties.

#### *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 amend the New York State and City of Yonkers withholding tables and other methods, applicable to wages and other compensation paid on or after January 1, 2010, to implement the changes necessitated by Chapter 57 of the Laws of 2009 over a twelve-month period, rather than the shorter period required for tax year 2009. The rule also reflects adjustments to the New York State and City of Yonkers supplemental withholding rates applied to supplemental wage payment.

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## Workers' Compensation Board

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### EMERGENCY RULE MAKING

#### Filing Written Reports of Independent Medical Examinations (IMEs)

**I.D. No.** WCB-39-09-00006-E

**Filing No.** 1073

**Filing Date:** 2009-09-11

**Effective Date:** 2009-09-11

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

**Action taken:** Amendment of section 300.2(d)(11) of Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 117 and 137

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

**Specific reasons underlying the finding of necessity:** This amendment is adopted as an emergency measure because time is of the essence. Memorandum of Decisions issued by Panels of three members of the Workers' Compensation Board (Board) have interpreted the current regulation as requiring reports of independent medical examinations be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays to receive the report, and the U.S. Postal Service is not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is not accepted into evidence and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, the workers' compensation insurance carrier/self-insured employer, the claimant's treating provider, the claimant's representative and the claimant it is not possible to send the report by facsimile or electronic means. The Decisions have greatly, negatively impacted the professionals who conduct independent medical examinations and the entities that arrange and facilitate these exams, as well as the workers' compensation insurance carriers and self-insured employers. When untimely reports are not accepted into evidence, the insurance carriers and self-insured employers are prevented from adequately defending their position in a workers' compensation claim. Accordingly, emergency adoption of this rule is necessary.

**Subject:** Filing written reports of Independent Medical Examinations (IMEs).

**Purpose:** To amend the time for filing written reports of IMEs with the Board and furnished to all others.

**Text of emergency rule:** Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination. *A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.*

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 9, 2009.

**Text of rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

##### 2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

##### 3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ

decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

##### 4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

##### 5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

##### 6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

##### 7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

##### 8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

##### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

##### 10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

#### Regulatory Flexibility Analysis

##### 1. Effect of rule:

Approximately 2511 political subdivisions currently participate as mu-

municipal employers in self-insured programs for workers' compensation coverage in New York State. Any independent medical exams conducted at their request must be filed by the physician, chiropractor, psychologist or podiatrist conducting the exam or by an independent medical examination (IME) entity. Workers' Compensation Law § 137(1)(a) does not permit self-insured employers or insurance carriers to file these reports, therefore there is no direct action a self-insured local government must or can take with respect to this rule. However, self-insured local governments are concerned about the timely filing of an IME report as one filed late will not be admissible as evidence in a workers' compensation proceeding. This rule makes it easier for a report to be timely filed as it expands the timeframe from 10 calendar days to 10 business days. Small businesses that are self-insured will also be affected by this rule in the same manner as self-insured local governments.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

#### 2. Compliance requirements:

This rule requires the filing of IME reports within 10 business days rather than 10 calendar days. Prior to this rule medical providers authorized to conduct IMEs and IME entities hired to perform administrative functions for IME examiners, such as filing the report with the Board, had less time to file such reports. Self-insured local governments and small employers, who are not authorized or registered with the Chair to perform IMEs or related administrative services, are not required to take any action to comply with this rule. As noted above, WCL § 137(1)(a) does not permit self-insured employers or insurance carriers to file IME reports with the Board. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

#### 3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

#### 4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

#### 5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

#### 6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

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

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

### **Rural Area Flexibility Analysis**

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

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

#### 2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

#### 3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

#### 4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

#### 5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

### **Job Impact Statement**

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.