

# 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 Children and Family Services

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### EMERGENCY RULE MAKING

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

**I.D. No.** CFS-17-10-00003-E

**Filing No.** 395

**Filing Date:** 2010-04-12

**Effective Date:** 2010-04-12

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

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

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

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

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

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

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

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

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(OCFS), authorized agencies and residential care facilities in conformance with the statutory changes and updates outdated references to the former Department of Social Services.

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

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 The amendment also updates outdated references to the former Department of Social Services.

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 10, 2010.

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

#### Regulatory Impact Statement

1. Statutory authority:

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

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

Chapter 436 of the Laws of 1997 transferred certain functions, powers,

duties and obligations of the former Department of Social Services and all of the functions, powers, duties and obligations of the former Division for Youth to OCFS.

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

2. Legislative objectives:

The regulations implement Chapter 323 of the Laws of 2008 relating to the protection of children in residential facilities from child abuse and neglect. Specifically, the regulations implement the updated statutory definitions and requirements for additional determinations relating to reports of child abuse and maltreatment in residential settings that were enacted in the new sections 412-a and 424-d of the SSL. For example, residential care now includes inpatient or residential settings certified by the Office of Alcoholism and Substance Abuse Services (OASAS) and designated as serving youth, and care provided by an authorized agency licensed to provide both foster care and residential care as licensed or operated by OASAS.

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

3. Needs and benefits:

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

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

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

4. Costs:

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

5. Local government mandates:

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

6. Paperwork:

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

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

**Regulatory Flexibility Analysis**

1. Effect on small business and local governments:

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

2. Reporting, recordkeeping and compliance requirements:

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

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

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

3. Professional services:

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

4. Compliance costs:

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

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

7. Small business and local government participation:

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

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas:

The regulations will affect 44 social services districts that are defined as being rural counties and the seven social services districts that include significant rural areas within their borders. In addition, there are approximately 100 voluntary authorized agencies that service rural communities that will be affected by the regulations.

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

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

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

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

3. Costs:

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

**Job Impact Statement**

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

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## Education Department

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### NOTICE OF EXPIRATION

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

**Museum Collections Management Policies**

I.D. No.	Proposed	Expiration Date
EDU-01-09-00004-ERP	January 7, 2009	April 7, 2010

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## Department of Environmental Conservation

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

**Recreational Harvest Limits for Summer Flounder (Fluke), Scup (Porgy) and Black Sea Bass**

**I.D. No.** ENV-17-10-00004-EP  
**Filing No.** 396  
**Filing Date:** 2010-04-12  
**Effective Date:** 2010-04-12

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

**Proposed Action:** Amendment of Part 40 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 13-0105, 13-0340-b, 13-0340-e and 13-0340-f

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

**Specific reasons underlying the finding of necessity:** These regulations are necessary for New York to remain in compliance with the Fishery Management Plan (FMP) for Summer Flounder, Scup and Black Sea Bass

as adopted by the Atlantic States Marine Fisheries Commission (ASMFC), to avoid potential federal sanctions for lack of compliance with such plan, and to optimize recreational fishing opportunities available to New Yorkers.

Each member state of ASMFC is expected to promulgate regulations that comply with FMPs adopted by ASMFC. These regulations are needed to properly manage the State's recreational fisheries and prevent the State from exceeding the State's recreational harvest limit, as assigned by the FMP. Failure by a state to adopt, in a timely manner, necessary regulations may result in a determination of non-compliance by ASMFC and the imposition of federal sanctions on the particular fishery in that state. A closure, for example, of the New York summer flounder fishery could result in significant adverse impacts to the State's economy. New York State must adopt regulations that are in compliance with the FMP and prevent the recreational harvest of summer flounder, scup and black sea bass from exceeding the State's assigned limits for those species.

The promulgation of this regulation as an emergency rule making is necessary because the normal rule making process would not promulgate these regulations in the time frame necessary for the commencement of the proposed summer flounder, scup and black sea bass seasons, pursuant to the proposed regulations. National Marine Fisheries Service (NMFS) usually publishes the recommended management measures for summer flounder, scup and black sea bass in the Federal Register in the first quarter of each year. As of this writing (April 8, 2010), the 2010 management measures have not yet published by NMFS. However, New York State did determine its 2010 management measures for summer flounder in March based on preliminary data released by ASMFC and NMFS, and after consultation with New York's Marine Resources Advisory Council. Traditionally, the recreational seasons for summer flounder and scup in New York begin in May, while black sea bass has been open year-round. If this rule making were to be promulgated by the normal rule making process, it would not be effective until several months after the traditional start of the fishing seasons. New York State anglers, party and charter boat concerns and bait and tackle shops are dependent on the seasons opening on time. It is in the best interests of New York State's anglers and recreational fishing industry not to delay the opening of the seasons by promulgating the proposed regulation through the normal rule making process.

Rulemaking for recreational black sea bass in particular is necessary to correct emergency action previously taken in response to federal action. On January 13, 2010 the department filed a Notice of Emergency Adoption and Proposed Rule Making reducing the recreational season for black sea bass from year-round to just the months of June and September. This proposal kept New York in compliance with the management measures adopted by ASMFC and MAFMC. In February 2010, MAFMC and ASMFC changed their recommendations based on new scientific information. The black sea bass recreational season now recommended is from May 22 through September 12. As the fishery management plan for black sea bass requires regulations to be consistent among the states along the Atlantic coast, the department must promulgate this proposed regulation to remain in compliance with the fishery management plan. Failure to do so would also cause unnecessary hardship in the recreational fishing industry and for recreational anglers, as the new recommendation would provide greatly enhanced fishing opportunities.

**Subject:** Recreational harvest limits for summer flounder (fluke), scup (porgy) and black sea bass.

**Purpose:** To modify the recreational harvest limits for summer flounder, scup and black sea bass in compliance with ASMFC and MAFMC.

**Text of emergency/proposed rule:** Existing subdivision 40.1 (f) of 6 NYCRR is amended to read as follows: Species Striped bass through Atlantic cod remain the same. Species Summer flounder is amended to read as follows:

40.1(f) Table A - Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Summer flounder	May 15 - [June 15 and July 3 - August 17] <i>Sept 6</i>	21"TL	2

Species Yellowtail founder through Winter flounder remains the same. Species Scup (porgy) licensed party/charter boat anglers is amended to read as follows:

Scup (porgy) licensed party/charter boat anglers****	June [12] 8 - [Aug 31] Sept 6	11"TL	10
	Sept [1] 7 - Oct [15] 11	11"TL	[45] 40

Species Scup (porgy) all other anglers remains the same. Species Black sea bass is amended to read as follows:

Black sea bass	[June 1 - June 30 and Sept 1 - Sept 30] May 22 - Sept 12	12.5	25
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**This notice is intended:** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire July 10, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Stephen W. Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, New York 11733, (631) 444-0483, email: swheins@gw.dec.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.

**Additional matter required by statute:** Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

#### Regulatory Impact Statement

##### 1. Statutory authority:

Environmental Conservation Law (ECL) sections 13-0105, 13-0340-b, 13-0340-e and 13-0340-f authorize the Department of Environmental Conservation (DEC or department) to establish by regulation the open season, size, catch limits, possession and sale restrictions and manner of taking for summer flounder, scup and black sea bass.

##### 2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies, and interstate fishery management plans.

##### 3. Needs and benefits:

These regulations are necessary for New York to maintain compliance with the Interstate Fishery Management Plan (FMP) for Summer Flounder and Black Sea Bass as adopted by the Atlantic States Marine Fisheries Commission (ASMFC). New York, as a member state of ASMFC, must comply with the provisions of the Interstate Fishery Management Plans adopted by ASMFC. These FMPs are designed to promote the long-term sustainability of quota managed marine species, preserve the States' marine resources, and protect the interests of both commercial and recreational fishermen. All member states must promulgate any necessary regulations that implement the provisions of the FMPs to remain in compliance with the FMPs. If ASMFC determines a state to be in non-compliance with a specific FMP, the state may be subject to a complete prohibition on all fishing for the associated species in the waters of the non-compliant state until the state comes into compliance with the FMP.

Under the FMP for summer flounder, ASMFC will assign New York an annual harvest for summer flounder for the 2010 recreational season. The 2010 quota will be greater than the 2009 quota. Under existing regulations, it is unlikely that New York will meet the 2010 assigned harvest. The proposed regulations will increase the duration of the 2010 recreational summer flounder season to allow New York State recreational anglers to utilize the fishing opportunities made available by the increase in summer flounder quota. According to a report released by NOAA Fisheries, recreational fishing in New York generated \$424 million in total sales in 2006. Summer flounder is one of the most popular fish taken by recreational harvesters in New York.

The promulgation of this regulation is necessary for DEC to remain in compliance with the FMP for summer flounder. The regulatory changes in this emergency rule are calculated, and have been approved by ASMFC. The proposed rule will allow New York State recreational anglers to achieve the harvest level provided by the 2010 quota, yet to prevent these anglers from exceeding the assigned summer flounder quota. New York State would remain in compliance with the FMP.

Specific amendments to the current regulations include the following:

1. Summer Flounder: Implement an open season for the summer flounder recreational fishery from May 15 through September 6.

2. Scup: Implement an open season for scup for recreational anglers

aboard licensed party charter vessels from June 8 through September 6. In 2009, the season for recreational anglers aboard licensed party charter vessels was from June through August 31. The scup "bonus" season will be reduced from 45 days in 2009 to 35 days in 2010 with a reduced possession limit, from 45 to 40 fish.

2. Black sea bass: Implement an open season for the black sea bass recreational fishery from May 22 through September 12. In 2009, the black sea bass recreational fishery was yearlong.

##### 4. Costs:

###### (a) Cost to State government:

There are no new costs to state government resulting from this action.

###### (b) Cost to local government:

There will be no costs to local governments.

###### (c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action. Certain regulated parties (party/charter businesses, bait and tackle shops) may experience some adverse economic effects through a reduction of the recreational black sea bass season from yearlong in 2009 to 108 days in 2010.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The department will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying recreational harvesters, party and charter boat operators and other recreational support industries of the new rules.

##### 5. Local government mandates:

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

##### 6. Paperwork:

None.

##### 7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

##### 8. Alternatives:

1. Summer flounder "No Action" Alternative (no amendment to summer flounder regulations) - The "no action" alternative would leave current summer flounder regulations in place. Under existing regulations, it is unlikely that New York recreational anglers will meet the 2010 assigned harvest. New York recreational anglers would not be able to utilize the summer flounder resources that would be made available with the increased quota. Party and charter boat businesses would not be able to benefit from the increased duration of the recreational summer flounder in New York State waters. This alternative was rejected.

2. Scup "No Action" Alternative (no amendment to scup regulations) - The "no action" alternative would leave current scup regulations in place. This alternative implies that New York would take no steps to comply with ASMFC's recommendation and the fishery management plan (FMP) for scup. This may result in a finding of non-compliance by the ASMFC and a prohibition by National Oceanic and Atmospheric Administration (NOAA) on all fishing for scup until the State comes into compliance with the FMP.

3. Black Sea Bass "No Action" Alternative (no amendment to black sea bass regulations) - The "no action" alternative would leave the current black sea bass season in place. This option would, however, impede DEC's ability to achieve its management objectives for the stock and likely result in New York failing to remain in compliance with the FMP for black sea bass and a possible closure of all fishing for black sea bass in New York. This would have a much more severe economic impact than the imposition of a limited recreational season; therefore, this option was rejected.

##### 9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs.

##### 10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via DEC's website of the changes to the regulations. The emergency regulations will take effect upon filing with the Department of State.

#### Regulatory Flexibility Analysis

##### 1. Effect of rule:

The Atlantic State Marine Fisheries Commission (ASMFC) facilitates cooperative management of marine and anadromous fish species among the fifteen Atlantic Coast member states. The principal mechanism for implementation of cooperative management of migratory fish is the ASMFC's Interstate Fishery Management Plans (FMPs) for individual species or groups of fish. The FMPs are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

ASMFC recently adopted quota changes for summer flounder, scup and black sea bass. The Department of Environmental Conservation (DEC or department) now seeks to amend its summer flounder, scup and black sea

bass regulations to comply with the requirements of the ASMFC FMP. There are severe consequences for failure to comply with FMPs. If ASMFC determines a state to be in non-compliance with a specific FMP, the state may be subject to a complete prohibition on all fishing for the associated species in the waters of the non-compliant state until the state comes into compliance with the FMP. Furthermore, failure to take required actions to protect our marine and anadromous resources may lead to the collapse of the targeted species' populations. Either situation could have a significant adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

Those most affected by the proposed rule are recreational anglers, licensed party and charter businesses, and retail and wholesale marine bait and tackle shops operating in New York State. The department consulted with the Marine Resources Advisory Council (MRAC) and other individuals who chose to share their views on summer flounder recreational management measures. The response indicates that there is a belief that a long season will provide economic benefits to businesses because their customers will take advantage of the additional opportunities to go fishing for summer flounder. The responses received by DEC suggest that a long season will result in more charter bookings, more party boat trips, and more bait and tackle sales. In addition, private individuals (mostly boating anglers) indicated their preference for as long a season as possible to provide them more opportunities to fish for summer flounder. The proposed rule increases the number of days available to recreationally fish for summer flounder, from 78 days in 2009 to 115 days as proposed in the regulations, an increase of 37 days.

There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected by these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Economic and technological feasibility:

The proposed regulations do not require any expenditure on the part of affected businesses in order to comply with the changes. The changes required by the proposed regulations may reduce the income of party and charter businesses and marine bait and tackle shops because of the reduction in the number of days available for recreational fishers to take summer flounder.

There is no additional technology required for small businesses, and this action does not apply to local governments; there are no economic or technological impacts for either.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary for DEC to maintain compliance with the FMPs for summer flounder, scup and black sea bass and to avoid a punitive closure of the scup and black sea bass fisheries and the economic hardship that would ensue with such a closure. Since these regulatory amendments are consistent with Federal and Interstate FMPs, DEC anticipates that New York State will remain in compliance with the FMPs.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail bait and tackle shops and other support industries for recreational fisheries. Failure to comply with FMPs and take required actions to protect our natural resources could cause the collapse of a stock and have a severe adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being proposed in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

7. Small business and local government participation:

The department received recommendations from the MRAC, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon comments received from recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners, recreational anglers and state law enforcement personnel. There was no special effort to contact local governments because the proposed rule does not affect them.

**Rural Area Flexibility Analysis**

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The summer flounder, scup

and black sea bass fisheries directly affected by the proposed rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the state. Further, the proposed rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments of 6 NYCRR Part 40, a Rural Area Flexibility Analysis is not required.

**Job Impact Statement**

1. Nature of impact:

The promulgation of this regulation is necessary for the Department of Environmental Conservation (DEC) to maintain compliance with the Fishery Management Plan for Summer Flounder, Scup and Black Sea Bass, to avoid potential federal sanctions for lack of compliance with such plan, and to optimize recreational fishing opportunities available to New Yorkers. The proposed rule increases the summer flounder recreational fishing season by 37 days, from 78 days in 2009 to 115 days. The proposed rule will also reduce the recreational season for black sea bass from a yearlong fishery to the period from May 22 through September 12. The season for scup for recreational anglers aboard licensed party and charter vessels will be from June 8 through September 6. The scup "bonus" season will be reduced to from 45 days to 35 days, from September 7 through October 11 and the daily possession limit reduced from 45 fish to 40.

Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will be affected by these regulations. Due to the reduction in the number of fishing days for black sea bass, there may be a corresponding reduction of the number of fishing trips and bait and tackle sales during the upcoming fishing season.

2. Categories and numbers affected:

In 2009, there were 524 licensed party and charter businesses in New York State. There were also a number of retail and wholesale marine bait and tackle shop businesses operating in New York; however, DEC does not have a record of the actual number. The number of recreational fishers in New York has been estimated by the National Marine Fisheries Service to be just over 1 million in 2007. However, this Job Impact Statement does not include them in this analysis, since fishing is recreational for them and not related to employment.

3. Regions of adverse impact:

The regions most likely to receive any adverse impact are within the marine and coastal district of the State of New York. This area included all the waters of the Atlantic Ocean within three nautical miles from the coast line and all other tidal waters within the state, including Long Island Sound and the Hudson River up to the Tappan Zee Bridge.

4. Minimizing adverse impact:

In the development of the proposed rule making, DEC consulted with the Marine Resources Advisory Council and many individuals who chose to share their views on summer flounder recreational management measures to the DEC. In the long term, the maintenance of sustainable fisheries will have a positive affect on employment for the fisheries in question, including party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the summer flounder, scup and black sea bass resources is essential to the survival of the party and charter boat businesses and bait and tackle shops that are sustained by these fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest and to continue to rebuild stocks and maintain them for future utilization.

Based on the above and DEC staff's knowledge and past experience with similar regulations, DEC has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of this rule making.

**NOTICE OF WITHDRAWAL**

**Recreational Harvest Limits for Black Sea Bass**

I.D. No. ENV-05-10-00003-W

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

**Action taken:** Notice of emergency/proposed rule making, I.D. No. ENV-05-10-00003-EP, has been withdrawn from consideration. The notice of emergency/proposed rule making was published in the *State Register* on February 3, 2010.

**Subject:** Recreational harvest limits for black sea bass.

**Reason(s) for withdrawal of the proposed rule:** Atlantic State Marine

Fisheries Commission has modified the recommended management measures States must adopt for black sea bass.

## Division of Human Rights

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

#### Payment of Civil Fines and Penalties

I.D. No. HRT-17-10-00002-P

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

**Proposed Action:** Addition of section 466.12 to Title 9 NYCRR.

**Statutory authority:** Executive Law, section 297.4(c)

**Subject:** Payment of Civil Fines and Penalties.

**Purpose:** Establish procedures for ordering payment of civil fines and penalties in installments upon request of an employer.

**Text of proposed rule:** A new section 466.12 is added to read as follows:

*466.12 Payment of civil fines and penalties in installments by employers of fewer than fifty employees.*

(a) *Statutory Authority. Pursuant to N.Y. Executive Law § 297.4(c), where the Commissioner finds that a respondent has engaged in any unlawful discriminatory practice, the Commissioner shall issue an order which may include, inter alia, the assessment of civil fines and penalties, in an amount not to exceed fifty thousand dollars, to be paid to the State by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the State by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious. § 297.4(c)(vi). Pursuant to Executive Law § 297.4(e), in cases of employment discrimination where the employer has fewer than fifty employees, such civil fine or penalty may be paid in reasonable installments, with reasonable interest resulting from the delay, and in no case may installments be made over a period longer than three years. Executive Law § 297.4(e) further requires the Division to promulgate regulations regarding installment payments.*

(b) *Installment payments; general. Any Commissioner's order assessing civil fines and penalties shall be made in accordance with the following:*

(1) *Civil fines and penalties shall be due no later than 60 days from the date of the Commissioner's order, unless payment in installments has been requested and ordered.*

(2) *Where the employer has fewer than fifty employees, and makes application in accordance with the provisions of paragraph (c) of this section, payment may be ordered in installments, in accordance with paragraph (d) of this section.*

(c) *Application for payment in installments.*

(1) *Payment in installments will only be ordered upon application of the respondent employer.*

(2) *Application for payment in installments shall be made (i) orally or in writing on the record at the public hearing, or (ii) may be included in any written objections to the Administrative Law Judge's recommended order, filed pursuant to the Division's Rules of Practice, 9 N.Y.C.R.R. § 465.17(c).*

(3) *The burden of proof on the issue of whether the employer has fewer than fifty employees rests with the employer, who is responsible to offer evidence on the issue into the record in accordance with the Division's Rules of Practice, 9 N.Y.C.R.R. § 465.12(e) ("Form and content of proof"), 9 N.Y.C.R.R. § 465.12(i) ("Hearing record"), and 9 N.Y.C.R.R. § 465.17(c) ("Preparation and order").*

(d) *Commissioner's order after hearing assessing civil fines payable in installments; required content. Any Commissioner's order assessing civil fines and penalties, and providing that such civil fines and penalties are payable in installments by an employer of fewer than fifty employees, shall be made in accordance with the following:*

(1) *Payment shall be made in no more than three installments, in such form as the Division may now or in future be able to accept, and as specifically directed in the order.*

(2) *The amount and due date of each installment shall be explicitly stated in the Commissioner's order.*

(3) *The final payment shall be due no later than three years from the date of the Commissioner's order.*

(4) *The first installment shall be due 60 days from the date of the*

*Commissioner's order, unless otherwise provided in the discretion of the Commissioner.*

(e) *Interest. Any portion of civil fines and penalties paid within 60 days after the date of the Commissioner's order shall not accrue any interest. Interest on any remaining installments may be reduced on all or any portion of an installment by paying in advance of the due dates. Any portion or installment of civil fines and penalties paid after 60 days from the date of the Commissioner's order shall accrue interest, from the date of the Commissioner's order to the date of payment, at the rate set forth in CPLR § 5004. Any other provision of law, applicable to the employer or the facts of the case, which indicates a different rate of interest is applicable, may be taken into consideration in the discretion of the Commissioner.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Sharon A. Clarke, Division of Human Rights, One Fordham Plaza - Fourth Floor, Bronx, New York 10458, (718) 741-8407, email: sclarke@dhr.state.ny.us

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

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

#### Regulatory Impact Statement

1. **Statutory authority:** The Division is required to promulgate the regulation by Executive Law § 297(4)(e).

Pursuant to N.Y. Executive Law § 297.4(c), where the Commissioner finds that a respondent has engaged in any unlawful discriminatory practice, the Commissioner shall issue an order which may include, inter alia, the assessment of civil fines and penalties, in an amount not to exceed fifty thousand dollars, to be paid to the State by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars, to be paid to the State by a respondent found to have committed an unlawful discriminatory act, which is found to be willful, wanton or malicious. See § 297.4(c)(vi).

Pursuant to Executive Law § 297.4(e), in cases of employment discrimination where the employer has fewer than fifty employees, such civil fine or penalty may be paid in reasonable installments, but in no case may installments be made over a period longer than three years. Executive Law § 297.4(e) further requires the Division to promulgate regulations regarding reasonable installment payments.

Executive Law § 297.4(e) also requires the payment of reasonable interest resulting from the delay caused by paying in installments. To effectuate this provisions the Division has referenced the standard interest provision of Civil Practice Law and Rules (CPLR) § 5004. The Division has long utilized CPLR §§ 5001-04 as a guide for setting interest on all payments ordered by the Division, and such use has been upheld by the courts. Any other provision of law, applicable to the employer or the facts of the case, which indicates a different rate of interest is applicable, may be taken into consideration in the discretion of the Commissioner. The Division considered other interest rates found in law, and the Division has found that CPLR § 5004 is reasonable. The Division's interest in having the civil fine paid as promptly as possible is balanced against the burden placed on the employer.

The Division has general rulemaking authority pursuant to Executive Law § 295.5 to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of the Human Rights Law (Executive Law, art 15).

2. **Legislative objectives:** The proposed regulation effectuates the requirements of Executive Law, § 297.4(e) which permits employers with fewer than fifty employees to pay any civil fine imposed in reasonable installments, at a reasonable interest rate. This provision in the statute is intended to limit the impact of civil fines on smaller employers, by allowing payments to be spread over three years.

3. **Needs and benefits:** The Division is required to promulgate this regulation by Executive Law, § 297.4(e). The Division proposes that installments will be considered when requested by the employer, and requires the employer to demonstrate that it has fewer than fifty employees, as this information in uniquely within the control of the employer. The employer must demonstrate that it has fewer than fifty employees by offering admissible testamentary or documentary evidence into the record, in accordance with the Division's Rules of Practice, 9 N.Y.C.R.R. § 465.12(e) ("Form and content of proof"), 9 N.Y.C.R.R. § 465.12(i) ("Hearing record"), and 9 N.Y.C.R.R. § 465.17(c) ("Preparation and order"). The Division also proposes limiting the number of payments to three, and requiring that the dollar amount and due date of each installment shall be set in the order. Any portion of civil fines and penalties paid within 60 days after the date of the Commissioner's order will not accrue interest. Interest on any remaining installments may be reduced by paying in advance of the due dates. These proposals allow the imposition of civil fines payable in installments to be tailored to the fiscal needs of the smaller company, while maintaining a means of monitoring enforcement of the payments that will not be overly cumbersome to the Division.

4. Costs: Payment in installments is optional. There is no requirement that a smaller employer request payments in installments, or otherwise comply with any part of this rule. At its option, in order to receive the benefit of installment payments over three year's time, the smaller employer will pay interest as provided in the statute and regulation. Civil Practice Law and Rules § 5004, which will be relied upon for the interest rate in most cases, currently sets the interest rate at 9% per annum.

5. Local government mandates: There are no mandates for local governments. As with any other employer, employment discrimination by local governments is prohibited by the Human Rights Law. If any local government is found to have discriminated against its employees, civil fines may be imposed as provided by the statute. To the extent that a local government so fined has fewer than fifty employees, it may opt to pay such fine in installments, as provided by the statute and regulation.

6. Paperwork: Documentary or testamentary evidence must be submitted to establish the number of employees, in order for a small employer to take advantage of the provision for installment payments. This regulation requires no paperwork of any employer not requesting installment payments. Permitting a maximum of three installments limits paperwork for both the employer and the Division in processing these payments. Payment shall be by check, or in such form as the Division may in future be able to accept, as directed in the order.

7. Duplication: No duplication, overlap or conflict.

8. Alternatives: Although the statutory authority sets out a three year time frame for installments, the Division determined, as discussed, that three installment payments is a reasonable number of payments within that time frame. The Division has long utilized CPLR § 5004 as a guide for setting interest on all payments ordered by the Division.

The Division shared a copy of the pre-proposal with the National Federation of Independent Business, which responded with a statement of its support for the draft regulation, noting that the regulation will assist small businesses, and achieve the goal of regulatory compliance without placing an unreasonable burden on small businesses.

9. Federal standards: No relevant federal standard.

10. Compliance schedule: The provision for civil fines in employment cases has no retroactive effect, and applies only to complaints alleging discriminatory action occurring on or after July 6, 2009. It is anticipated therefore that no case before the Division will advance to a hearing and be eligible for imposition of a civil fine prior to formal adoption of these rules. However, should this nevertheless occur, any request for installment payments will be handled in accordance with the proposed rule. The Division's website, since July 8, 2009, has contained a press release explaining the new provision regarding civil fines and the installment payment option, and indicating that this rule, as required by the statutory authority, will be forthcoming. This rule, when adopted, will be posted with all other Division rules on the Division's website. Training will be provided to Division Administrative Law Judges and order preparation staff on applying this rule, regarding optional installment payment of civil fines, to applicable Division orders.

**Regulatory Flexibility Analysis**

This rule establishes procedures for ordering payment of civil fines and penalties in installments, upon request of the employer, by employers of fewer than fifty employees. These procedures will not impose any adverse economic impact on small business and local governments, because requesting installment payments is optional, is limited to employers with fewer than fifty employees, and need only be requested if the employer finds installment payments are in the employer's best interest. Installment payments, if requested and ordered, would impose reporting, recordkeeping or other compliance requirements associated with the installment payments, as well as interest costs. All civil fines, including those payable in installments, will be payable to the State of New York, by check mailed or delivered to the Division. Payment of a civil fine in installments will require the employer to remit payments by certain dates, extending over three years. Compliance costs are nominal based on the fact that small businesses or local governments already have persons authorized to pay bills on staff, who would only be required to remit one additional payment per year for the second and third installments.

**Rural Area Flexibility Analysis**

This rule establishes procedures for ordering payment of civil fines and penalties in installments, upon request of the employer, by employers of fewer than fifty employees. These procedures will not impose any adverse economic impact on employers, public or private entities, who happen to be in rural areas of New York State, because requesting installment payments is optional, is limited to employers with fewer than fifty employees, and need only be requested if the employer finds that installment payments are in the employer's best interest.

**Job Impact Statement**

A Job Impact Statement is not submitted with this Notice since the proposed rule-making will have no significant impact on jobs, economic

development or employment opportunities. Employers with fewer than fifty employees are considered to be small businesses, however, providing the option for the employer with fewer than fifty employees to make reasonable installment payments of civil fines should be a positive option for the small business.

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## Insurance Department

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### NOTICE OF EXPIRATION

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

**Mandatory Catastrophe Reserves for Property/Casualty Insurance Companies**

I.D. No.	Proposed	Expiration Date
INS-14-09-00020-P	April 8, 2009	April 8, 2010

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## Department of Labor

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### EMERGENCY RULE MAKING

**Restrictions on the Consecutive Hours of Work for Nurses As Enacted in Section 167 of the Labor Law**

**I.D. No.** LAB-17-10-00005-E

**Filing No.** 397

**Filing Date:** 2010-04-13

**Effective Date:** 2010-04-13

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

**Action taken:** Addition of Part 177 to Title 12 NYCRR.

**Statutory authority:** Labor Law, section 21

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

**Specific reasons underlying the finding of necessity:** Section 167 of the Labor Law is effective July 1, 2009. However, Section 167 does not provide sufficient details with regard to what is expected of health care providers so as to avoid mandatory overtime for nurses, except in emergency situations. Section 167 was enacted to improve the health care environment for patients and the working environment for nurses.

**Subject:** Restrictions on the consecutive hours of work for nurses as enacted in Section 167 of the Labor Law.

**Purpose:** To clarify the emergency circumstances under which an employer may require mandatory overtime for nurses.

**Substance of emergency rule:** By L. 2008, Ch. 493, § 1, the New York State Legislature created Section 167 of the Labor Law with the title "Restrictions on consecutive hours of work for nurses."

The proposed rule creates a new part of regulations designated as 12 NYCRR Part 177 entitled "Restrictions on Consecutive Hours of Work for Nurses."

Subpart 177.1, entitled "Application," sets forth that Part 177 applies to the hours of work for all nurses by health care employers.

Subpart 177.2, entitled "Definitions," sets forth the definitions, for the purposes of Part 177, of the following terms: "emergency," "health care disaster," "health care employer," "nurse," "on call," "overtime," "patient care emergency," and "regularly scheduled work hours."

Subpart 177.3, entitled "Mandatory Overtime Prohibition," provides that a health care employer is prohibited from requiring a nurse to work overtime. Subpart B sets forth the exceptions to that prohibition, which are entitled: "Health Care Disaster," "Government Declaration of Emergency," "Patient Care Emergency," and "Ongoing Medical or Surgical Procedure." Subpart B provides that the Part 177 does not prohibit a nurse from voluntarily working overtime.

Subpart 177.4, entitled "Nurse Coverage Plans," provides that health care employers are required to prepare and implement a "Nurse Coverage

Plan” within ninety days of the effective date of this part and also sets forth the requirements for such a plan.

Subpart 177.5, entitled “Report of Violations,” provides the Department of Labor shall establish a procedure to file a complaint of a violation of Part 177.

Subpart 177.6, entitled “Conflicts of Law and Regulation; Collective Bargaining Rights Not Diminished,” provides that the provisions of Part 177 shall not be construed to diminish or waive the rights of nurses.

Subpart 177.7, entitled “Waiver of Rights Prohibited,” provides that a health care employer may not utilize employee waivers as an alternative to compliance with Labor Law Section 167 or Part 177.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire July 11, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Teresa Stoklosa, New York State Department of Labor, Counsel’s Office State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: teresa.stoklosa@Labor.ny.gov

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Section 21 of the Labor Law provides the Commissioner with authority to issue regulations governing any provision of the Labor Law as she finds necessary and proper. This rule is proposed pursuant to Section 167 of the Labor Law enacted by chapter 493 of the Laws of 2008. The effective date of the law is July 1, 2009.

##### 2. Legislative objectives:

Legislation passed during the last legislative session (Chapter 493 of the Laws of 2008) recognizes the physical and emotional toll that mandatory overtime can take on nurses and on patient care. In response to these concerns, the legislation requires that health care employers take steps to prudently plan for adequate nursing staff coverage in their facilities so as to avoid the need to require mandatory overtime of nurses in most instances.

The rule improves the health care environment for patients and the working environment for nurses by clarifying the emergency circumstances under which an employer may require mandatory overtime. The Legislature’s intent in enacting Section 167 was to encourage employers to attract and retain nurses in the profession during this period of shortage.

##### 3. Needs and benefits:

Nurses work in a demanding and stressful environment where sound decision-making is a matter of life and death for patients. Limitations on mandatory overtime avoid successive work shifts which take a physical and mental toll on nurse’s performance and can impact the quality of patient care. Labor Law Article 6, section 167 places restrictions on consecutive hours of work for nurses, except in emergency situations, while not prohibiting a nurse from voluntarily working overtime and allows an employer who experiences an unanticipated staffing emergency that does not regularly occur, to require overtime to ensure patient safety.

The enabling legislation does not provide sufficient details with regard to what is expected of health care employers so as to avoid mandatory overtime, except in emergency situations. The rule addresses these statutory gaps by requiring that covered employers develop a Nurse Coverage Plan (the Plan), by setting forth the minimum elements to be addressed in the Plan, and by requiring that the Plan be posted and made available to the Commissioner, to nursing staff and their employee representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will allow health care employers to use mandatory overtime to cover nurse staffing needs.

Finally, the rule will improve overall patient care by allowing patients to be cared for by nurses who can exercise sound decision-making because they have had the proper rest needed to perform their duties. In sum, the reduction of the use of mandatory overtime should help employers attract and retain adequate numbers of nurses to ensure patient safety.

##### 4. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses’ registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action, the Division of Budget estimated compliance would

cost approximately \$13 million in its first year. However, these costs – attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime – will be offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the one year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer’s facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

##### 5. Paperwork:

The employer will be required to develop and post the Nurse Coverage Plan discussed above, along with all necessary paperwork to log the efforts to obtain staff coverage in compliance with the Plan. Additionally, the Nurse Coverage Plan may require the drafting of contracts with alternative staffing providers such as per diem agencies and the posting of a list of nurses seeking voluntary overtime.

##### 6. Local government mandates:

This rule will have an impact on any county, city, town, village, school district, fire district or other special district that employ nurses. The impact will depend on the size of the facility and nursing staff and the degree to which mandatory, unscheduled overtime is currently being used on a routine basis.

##### 7. Duplication:

This rule does not duplicate any state or federal regulations.

##### 8. Alternatives:

One alternative is to draft regulations which allow the employers to have full discretion to make determinations regarding the existence of an emergency on an ad hoc basis. However, such discretion is inconsistent with the letter and spirit of the statute. Clearly, certain levels of absenteeism based upon sick leave, bereavement, leaves of absences, and breaks during shifts will always exist in all employment settings, including health care facilities. A health care employer must plan for these expected staffing issues, based upon patterns that have emerged from operating a facility and must have staffing options that address the need to provide appropriate nursing care. Accordingly, the Commissioner must retain the right to cite an employer whose declaration of an emergency situation is not supported by the facts or is intended to evade the restrictions imposed by the law or limit the protections afforded nurses under the law.

The Department of Labor circulated draft regulations for comment to State Agencies and other employer groups, and to various employee representative groups. In some instances, changes to the regulations were made in response to such concerns. For example, the Department of Corrections (DOCS) requested clarification regarding examples of health care disasters set forth in Section 177.3 of the regulations. Specifically, DOCS requested that the regulations include language that a health care disaster included the occurrence of a riot, disturbance, or other serious event within an institution that increases the level of nursing care needed. The regulations were revised to include such language.

The Department received comments from one employer group, the Healthcare Association of New York State, that the regulations should provide alternatives to healthcare employers regarding the conspicuous posting of the Nurse Coverage Plans. It was suggested that the regulations authorize employers to utilize other means to make the Nurse Coverage Plans available to nursing staff such as the employer’s intranet. The Department considered this comment and revised the regulations to allow for the use of other means to make the Nurse Coverage Plan available to nursing staff.

The Department also received a comment from employee representatives about requiring the filing of all Nurse Coverage Plans with the Commissioner of Labor. The Department considered such a filing requirement but decided it was unnecessary since the Commissioner will request such

Plans once a complaint has been received about an employer. Moreover, since employees or their representatives are entitled to receive the Plan on request or otherwise have access to the plan, they can take immediate steps to ensure that the Plan has been prepared and notify the Commissioner if it has not.

Finally, the Department heard from representatives of public sector nurses that the definition of regularly scheduled work hours should include a reference to regulations governing such typical work hours. The language in relevant sections of the rule has been changed in response to this request.

In other instances, the Department has not made changes in response to comments received, so that comments from other regulated parties, nurses, and their representatives could be obtained during the rulemaking process and considered along with some comments before final action is taken.

#### 9. Federal standards:

There are no federal standards with like requirements.

#### 10. Compliance schedule:

The rule would be effective on the same date as the statute: July 1, 2009. However, the Nurse Coverage Plans required by Section 177.4 of the regulations are to be prepared within ninety days of the effective date of the regulations. This gives employers ample time to develop and implement these Nurse Coverage Plans.

### **Regulatory Flexibility Analysis**

#### 1. Effect of rule:

This rule will apply to all health care employers which include any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, which provides health care services in a facility licensed or operated pursuant to Article 28 of the Public Health Law, including any facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law or in a facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law, operated or licensed pursuant to the Mental Hygiene Law, the Education Law, or the Correction Law. Accordingly, small businesses and local governments may be impacted if they provide health care services in a facility noted above. The Department's Division of Research and Statistics estimates that there are 4,175 health care facilities in the State with fewer than 100 employees. Of these 4,175 employers, 4,143 are private employers and 32 are public employers.

#### 2. Compliance requirements:

The record and reporting requirements contained in the proposed rule are minimal. Healthcare employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. Additionally, the health care must make the Nurse Coverage Plan available to: nursing staff by posting the Plan or making it available to nursing staff by the intranet, employee representatives and to the Commissioner upon request. The health care employer must also maintain a log of efforts to obtain staff coverage in compliance with the Plan.

#### 3. Professional services:

Legal services may be required to negotiate, draft and review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

The rule will require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis.

#### 4. Compliance costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. At the time this legislation was before the Governor for action, the Division

of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs – attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime – will be offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the one year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

#### 5. Economic and technological feasibility:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

#### 6. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

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

The Department solicited input on these regulations from various employer representatives. These employer representatives have members from small businesses and local governments.

### **Rural Area Flexibility Analysis**

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

Any rural area where nurses are employed will be affected. The type of affect will depend on the degree to which those areas are currently relying on unscheduled, mandatory overtime to fill staffing requirements.

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

The reporting, recordkeeping and compliance requirements contained in the proposed rule are minimal. The employer will be required to develop a Nurse Coverage Plan which identifies and describes as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of overtime, including, but not limited to, contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list of nurses seeking voluntary overtime. The healthcare employer must log all good faith attempts to seek alternative staffing through the methods identified in the health care employers' Nurse Coverage Plan. The Plan must be in writing, and be provided to the nursing staff, to any collective bargaining representative representing nurses at the health care facility and to the Commissioner of Labor upon request.

The rule will also require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current

nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis. This may necessitate the drafting of contracts with alternative staffing providers such as per diem agencies.

### 3. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs – attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime – will be offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the one year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan in place that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

### 4. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

### 5. Rural area participation:

The Department sought input on these regulations from various employee representative groups which represent rural area employees. Additionally, the Department received input from various employer representative groups which also represent rural area employers.

### Job Impact Statement

Health care employers covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. At the time Section 167 of the Labor Law (the statutory authority for this rule) was before the Governor for

signature, the Division of the Budget estimated compliance would cost approximately \$13 million in its first year, which was attributable to the hiring of per diem nurses to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime. Accordingly, this rule would not have a substantial adverse impact on jobs; in fact it will create more jobs.

## Office of Mental Retardation and Developmental Disabilities

### NOTICE OF ADOPTION

#### Rate/Fee/Price Setting for Various Programs and Services Provided Under the Auspices of OMRDD

**I.D. No.** MRD-07-10-00006-A

**Filing No.** 399

**Filing Date:** 2010-04-13

**Effective Date:** 2010-05-02

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

**Action taken:** Amendment of sections 81.10, 635-10.5, 671.7, 681.14 and 690.7 of Title 14 NYCRR.

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

**Subject:** Rate/Fee/Price setting for various programs and services provided under the auspices of OMRDD.

**Purpose:** To establish trend factors for rates/fees/prices effective February 1, 2010.

**Text of final rule:** Paragraph 81.10(b)(4) - Add new subparagraphs (vi) and (vii).

(vi) Effective February 1, 2010, integrated residential communities shall receive an amount that they would have received if the trend factor in subparagraph (v) had been 3.06 percent. On January 1, 2010, the trend factor for the previous fee period shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

(vii) From February 1, 2010 to December 31, 2010, integrated residential communities shall be reimbursed operating costs that result in a full annual trend factor of 2.08 percent for the annual fee period. On January 1, 2011, the trend factor for the previous fee period shall be deemed to be the 2.08 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

Paragraph 635-10.5(a)(3) – Add a new subparagraph (v) and renumber existing subparagraphs (v)-(vii).

(v) Effective February 1, 2010, the fee will be subject to a trend factor if one is specified in paragraph (i)(4) of this section.

Paragraph 635-10.5(i)(1) - Amend paragraph (1); add new subparagraphs (xxviii) and (xxix); renumber existing subparagraph (xxviii) as (xxx); and renumber erroneously numbered subparagraph (xix) as (xxxi).

(1) Except for At Home Residential Habilitation as of February 1, 2009, Plan of Care Support Services and Family Education and Training, the following applies to [For] HCBS waiver providers in Region I, including those providers in Region II or III designated or elected to a Region I reporting year-end and fiscal cycle and excluding those HCBS waiver providers in Region I designated or elected to a Region II or III reporting year-end and fiscal cycle. For providers in operation on June 30th, the appropriate trend factor shall be applied to the operating portion, exclusive of property, of the price or fee in effect on June 30th.

(xxviii) Effective February 1, 2010, facilities shall receive an amount that they would have received if the trend factor in subparagraph (xxvii) of this paragraph for the price or fee period of July 1, 2009 through June 30, 2010 had been 3.06 percent. The trend factor in effect for the price or fee period ending June 30, 2010 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner. In addition, for agency sponsored family care, the agency

must pay the trend factor related to the difficulty of care payment to the individual family care provider.

(xxix) 2.08 percent to trend 2009-2010 costs to 2010-2011. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner. In addition, for agency sponsored family care, the agency must pay the trend factor related to the difficulty of care payment to the individual family care provider.

[(xix)] (xxxi) Once reimbursable costs are determined in accordance with this section, OMRDD shall apply an appropriate combined trend factor to the HCBS residential habilitation costs.

Paragraph 635-10.5(i)(2) - Amend paragraph (2) and add new subparagraphs (xxviii) and (xxix) and renumber existing subparagraphs (xxviii) and (xxix).

(2) Except for At Home Residential Habilitation as of February 1, 2009, Plan of Care Support Services and Family Education and Training the following applies to [For] HCBS waiver providers in Regions II and III, including those providers in Region I designated or elected to Region II or III reporting year-end and fiscal cycle and excluding those HCBS waiver services providers in Regions II and III designated or elected to a Region I reporting year-end and fiscal cycle. For providers in operation on December 31st, the appropriate trend factor shall be applied to the operating portion, exclusive of property, of the price or fee in effect on December 31st.

(xxviii) Effective February 1, 2010, facilities shall receive an amount that they would have received if the trend factor in subparagraph (xxvii) of this paragraph for the price or fee period of January 1, 2009 through December 31, 2009 had been 3.06 percent. The trend factor in effect for the calendar year price or fee period ending December 31, 2009 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner. In addition, for agency sponsored family care, the agency must pay the trend related to the difficulty of care payment to the individual family care provider.

(xxix) From February 1, 2010 to December 31, 2010, facilities shall be reimbursed operating costs that result in a full annual trend factor of 2.08 percent for the calendar year price or fee period. For providers operating both Individual Residential Alternatives (IRA) and Community Residences (CR) before January 1, 2010, the trend factor shall be applied to the allowable operating costs contained in the initial consolidated IRA/CR price in effect on January 1, 2010 instead of December 31, 2009. The trend factor in effect for the price or fee period ending December 31, 2010 shall be deemed to be the 2.08 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner. In addition, for agency sponsored family care, the agency must pay the trend related to the difficulty of care payment to the individual family care provider.

Subdivision 635-10.5(i) - Add new paragraphs (3) and (4).

(3) Effective February 1, 2010, for At Home Residential Habilitation (AHRH) programs operating after January 31, 2009, only the standard regional fees shall be trended.

(i) Effective February 1, 2010, providers shall receive an amount that they would have received if the trend factor of 3.06 percent had been incorporated into the standard regional fees on February 1, 2009. The trend factor in effect for the period February 1, 2009 through December 31, 2009 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

(ii) From February 1, 2010, to December 31, 2010 providers shall be reimbursed operating costs that result in a full annual trend factor of 2.08 percent for the 2010 calendar year fee period. The trend factor in effect for the annual period ending December 31, 2010 shall be deemed to be the 2.08 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

(4) Effective February 1, 2010, reimbursement for Plan of Care Support Services (PCSS) and Family Education and Training (FET) shall be trended for the years indicated as follows:

(i) Effective February 1, 2010, providers shall receive an amount that they would have received if the trend factor of 3.06 percent had been incorporated into the fees on April 1, 2009. The trend factor in effect for the annual period ending March 31, 2010 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

(ii) 2.08 percent to trend 2009-2010 to 2010-2011. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

Paragraph 635-10.5(o)(3) - Add a new subparagraph (vii) and renumber current subparagraph (vii) as (viii).

(vii) Effective February 1, 2010, the fee will be subject to a trend factor if one is specified in paragraph (i)(4) of this section.

Subparagraphs 671.7(a)(8)(i) and (ii) - Amend as follows:

(8) Total reimbursable costs derived through the application of the methodologies described in this subdivision shall be trended as follows:

(i) For providers reporting as Region I providers in operation on June 30th, the appropriate trend factor shall be applied to the allowable operating costs, exclusive of property, used to establish the price in effect on June 30th. That trend factor is 2.08 percent to trend June 30, 2010 costs to 2010-2011. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

(ii) For providers reporting as Region II or Region III providers in operation on December 31st, the appropriate trend factor shall be applied to the allowable operating costs, exclusive of property, used to establish the price in effect on December 31 except that for calendar year 2010, the initial price exclusive of property in effect on January 1, 2010 shall be trended. From February 1, 2010 to December 31, 2010, facilities shall be reimbursed operating costs that result in a full annual trend factor of 2.08 percent for the calendar year price period. The trend factor in effect for the price period ending December 31, 2010 shall be deemed to be the 2.08 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

Clause 681.14(c)(3)(ii)(b) - Add a new subclause (10).

(10) If a facility is subject to an expanded desk audit per subclause (2) of this clause, but the desk audit has not been completed by January 1, 2010 or July 1, 2010, OMRDD shall continue the rate established according to the first sentence of subclause (3) of this clause and, if applicable, further trended to 2010 or 2010-2011 dollars until OMRDD completes the expanded desk audit. Upon OMRDD's completion of the expanded desk audit, for the base period and subsequent periods beginning January 1, 2003 or July 1, 2003, the methodology described in this section shall apply.

Paragraph 681.14(h)(1) - Amend subparagraphs (xix) and (xx) and add new subparagraphs (xxi) and (xxii).

(xix) 3.52 percent for 2007-2008 to 2008-2009; [and]

(xx) 0.00 percent for 2008-2009 to 2009-2010[.];

(xxi) Effective February 1, 2010, facilities shall receive an amount that they would have received if the trend factor in subparagraph (xx) of this paragraph for the rate period of July 1, 2009 through June 30, 2010 had been 3.06 percent. The trend factor in effect for the rate period ending June 30, 2010 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner; and

(xxii) 2.08 percent for 2009-2010 to 2010-2011. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

Paragraph 681.14(h)(2) - Amend subparagraphs (xix) and (xx) and add new subparagraphs (xxi) and (xxii).

(xix) From February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend; [and]

(xx) 0.00 percent for 2008 to 2009[.];

(xxi) Effective February 1, 2010, facilities shall receive an amount that they would have received if the trend factor in subparagraph (xx) of this paragraph for the rate period of January 1, 2009 through December 31, 2009 had been 3.06 percent. The trend factor in effect for the rate period ending December 31, 2009 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner; and

(xxii) From February 1, 2010 to December 31, 2010, facilities shall be reimbursed operating costs that result in a full annual trend factor of 2.08 percent for the 2010 calendar year rate period. The trend factor in effect for the rate period ending December 31, 2010 shall be deemed to be the 2.08 percent full annual trend. Retention of the proceeds attribut-

able to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

Paragraph 681.14(h)(3) - Amend subparagraphs (xxvii) and (xxviii) and add new subparagraphs (xxix) and (xxx).

(xxvii) 3.52 percent for 2007-2008 to 2008-2009; [and]

(xxviii) 0.00 percent for 2008-2009 to 2009-2010[.];

(xxix) Effective February 1, 2010, facilities shall receive an amount that they would have received if the trend factor in subparagraph (xxviii) of this paragraph for the rate period of July 1, 2009 through June 30, 2010 had been 3.06 percent. The trend factor in effect for the rate period ending June 30, 2010 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner; and

(xxx) 2.08 percent for 2009-2010 to 2010-2011. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

Paragraph 681.14(h)(4) - Amend subparagraphs (xxvii) and (xxviii) and add new subparagraphs (xxix) and (xxx).

(xxvii) from February 1, 2008 to December 31, 2008, facilities will be reimbursed operating costs that result in a full annual trend factor of 3.52 percent for the 2008 rate period. On January 1, 2009, the trend factor for the previous rate period shall be deemed to be the 3.52 percent full annual trend; [and]

(xxviii) 0.00 percent for 2008 to 2009[.];

(xxix) Effective February 1, 2010, facilities shall receive an amount that they would have received if the trend factor in subparagraph (xxviii) of this paragraph for the rate period of January 1, 2009 through December 31, 2009 had been 3.06 percent. The trend factor in effect for the calendar year rate period ending December 31, 2009 shall be deemed to be the 3.06 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner; and

(xxx) From February 1, 2010 to December 31, 2010, facilities shall be reimbursed operating costs that result in a full annual trend factor of 2.08 percent for the 2010 calendar year rate period. The trend factor in effect for the rate period ending December 31, 2010 shall be deemed to be the 2.08 percent full annual trend. Retention of the proceeds attributable to the application of the trend factor increase shall be contingent upon the provider reporting the use of the funds in the form and format specified by the Commissioner.

Subparagraph 690.7(d)(6)(iii) – add a new clause (i):

(i) From April 1, 2010 to March 31, 2011 the trend factor shall be 0.00 percent for all facilities.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in sections 635-10.5(o)(3) and 690.7(d)(6).

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

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

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

The proposed regulations as published in the *State Register* of February 17, 2010 contained mistakes in numbering in subparagraph 635-10.5(o)(3)(vii) and in clause 690.7(d)(6)(iii)(i).

The minor technical changes to correct the numbering do not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement.

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

Comments: On April 7, 2010, at the public hearing held in Schenectady, New York, testimony was given by a direct service professional employed by a voluntary provider agency who was representing a service employees union. She regards the trend factors as “one of the few weapons agencies have to fight high turnover.” She described in detail the effects of low wages on recruitment and retention and more importantly the effects of staff turnover on the individuals served in terms of eroding their sense of security and the unsettling disruption that occurs when service continuity is not maintained. As a thirteen year veteran in the field of human services, she stresses the difficulty of living paycheck to paycheck and emphasizes the importance both the trend factors and health care initiatives have played in her life.

The executive director of a provider association wrote to “commend the Governor, DOB and OMRDD for recognizing the necessity of a trend factor...” He cited this portion of the Regulatory Impact Statement directly: “In deference to providers to exercise their discretion and to allocate in ways most productive for their specific circumstances, OMRDD does not intend to mandate any particular use of these funds.” He acknowledges OMRDD’s push to see direct support professionals benefit from the trend factor increases and he asserts that his organization “shares this goal.” He does pose many questions regarding the required form and format for reporting. The questions are reproduced in the response below.

OMRDD received written comments from a consultant to agencies serving persons with developmental disabilities. He advocated that “the requirement to report on ‘the use of these funds’ should be removed from the regulation...” He suggests that by imposing the reporting requirement OMRDD may “usurp all of the discretion the board has over the investment of limited new resources...” He also states that “Requiring the commitment to a recurring long term obligation of increased payroll costs in an atmosphere of fiscal uncertainty and service cuts, as the only option, is at best counterproductive and at worst a serious undermining of the role of a board of directors.” He identifies cost categories where these resources may be spent such as ways that would guarantee continued service levels, allow for corporate compliance staff, provide a capital improvement fund, as well as support transportation needs, community outings of individuals, and activities at individual’s homes. In his view, “The requirement to submit a plan is simply busy work, creates an unnecessary burden on overworked DDSO staffs, and distracts providers from the need to operate their facilities.”

OMRDD also received correspondence from a parent whose child receives services and who is a board member of long standing of a voluntary provider. Per his understanding, agencies are required to use the additional funding exclusively to benefit direct care staff and he criticized this “restriction.”

Response: While the mandate applies to reporting the use of funds, there is no prescription for the actual use of the resources. In keeping with the outcry over the lack of a trend factor for 2009, OMRDD has echoed the overriding concerns expressed by providers, their employees, individuals receiving services, parents, advocates and other stakeholders that direct support staff must be recognized as the essential stabilizing agents of service delivery through adequate compensation. OMRDD has adopted a position that resonates from our allies in the field and has set forth an expectation that the funds be used in part to support its vital work force. OMRDD has not imposed its authority to dictate the use of funds because it is sensitive to the fact that a provider may have compelling reasons to use the funds in another manner as each provider has a unique set of circumstances.

Because compliance with the reporting requirements does not involve DDSO staff, they should not experience increased duties from this regulation.

In a time of heightened transparency, OMRDD is demonstrating responsibility by exercising its authority to monitor the use of significant but finite resources. OMRDD expects the plans which providers must develop for the use of the trend factor funding increases to substantiate that the best interests of the individuals with developmental disabilities have been served.

OMRDD’s responses to specific questions about providers reporting their plans as posed by the provider association are as follows:

1. “Does the report specify in any way how the provider must spend the trend factor proceeds?”

Response: No. It is, however, fashioned to extract information specific to providers’ intentions relative to increasing staff compensation and benefits.

2. “Is the report, once filed by the provider, subject to OMRDD’s approval?”

Response: No.

3. “Is it OMRDD’s intent that the report be used for audit purposes which could result in disallowance of the trend factor proceeds? If not, what prevents another control agency from using the report for audit purposes?”

Response: No and because there is no regulatory dictate for the use of funds, there can be no audit imperative.

4. “If the provider is unable to spend the trend factor proceeds as they have specified in the report filed with OMRDD, have they still met the requirement for retaining the trend factor proceeds or must they file an amended report? If an amended report is required, how much deviation from their original calculations will be tolerated before an amended report is required?”

Response: Providers which deviate from their original plan will be required to amend their report. The tolerance for deviation is tentatively set at 10% although this could change as the report is still being developed.

5. “If the report will be posted on OMRDD’s website will it include an

optional narrative section that will enable the provider to explain, for example, why the agency is granting wage and benefit increases which exceed trend factor or the norm in their community, or conversely, what factors limited the agency from granting wage and benefit increases in the amount they had hoped to?"

Response: Yes, the report will be formatted to allow providers space to justify the use of trend factor funds if they so choose.

### NOTICE OF ADOPTION

#### Fee Setting for HCBS Waiver Day Habilitation Services

**I.D. No.** MRD-07-10-00007-A

**Filing No.** 398

**Filing Date:** 2010-04-13

**Effective Date:** 2010-05-01

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

**Action taken:** Amendment of section 635-10.5 of Title 14 NYCRR.

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

**Subject:** Fee setting for HCBS waiver day habilitation services.

**Purpose:** To implement an efficiency adjustment.

**Text or summary was published** in the February 17, 2010 issue of the Register, I.D. No. MRD-07-10-00007-P.

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

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

**Additional matter required by statute:** Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

#### Assessment of Public Comment

Comments: OMRDD received two comments—one from the CEO of a small voluntary provider and another from a parent whose child participates in Day Habilitation programs and who is also a board member of long standing of a voluntary provider. The first individual contends that for a small agency, a 2.5% reduction in reimbursement is not modest, but is difficult particularly in light of escalating costs. She cites the 21% climb in health insurance rates in one year. She views the percent reduction for NPS as very high. The second individual projects that the 4% cut to the Day Habilitation program sponsored by the agency he represents can spell "disaster." He asks OMRDD to rethink this measure.

Response: OMRDD reviewed the specific impact of the day habilitation efficiency adjustment on small providers prior to the issuance of the regulations. The efficiency adjustment methodology was not found to disproportionately impact small providers. Additionally, the interests of small providers were represented through participation of provider agencies at OMRDD/Provider Association discussions addressing the implementation of the adjustment. Regulations do empower the Commissioner to exercise her discretion regarding the NPS reduction at the request of a provider who experiences hardship.

Over the last five years, OMRDD has instituted five separate initiatives intended to assist or enable providers to enhance health care coverage for their employees or to fund the spiraling costs. A sixth health care initiative is slated for 2010.

Concurrent with the efficiency adjustment, providers will realize additional reimbursement in many of their programs deriving from trend factor increases for the years 2009 and 2010.

## Public Service Commission

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Major Water Rate Filing

**I.D. No.** PSC-17-10-00013-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 a proposal filed by United Water Westchester Inc. (UWW) to make various changes in the rates, charges, rules and regulations contained in its Schedule for Water Service—P.S.C. No. 1.

**Statutory authority:** Public Service Law, section 89-c(1) and (10)

**Subject:** Major water rate filing.

**Purpose:** To consider a proposal to increase annual base rate revenues for UWW by about \$4.1 million or 42.8 percent.

**Public hearing(s) will be held at:** 10:30 a.m., (Evidentiary Hearing\*), July 13 and 14, 2010 at Three Empire State Plaza, Third Fl. Hearing Rm., Albany, NY. \*There could be requests to reschedule the hearings. Notification of the start of the hearing or any subsequent scheduling changes will be available at the DPS website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-W-0828.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Substance of proposed rule:** The Commission is considering a proposal filed by United Water Westchester Inc. (UWW) which would increase its annual revenues by \$1.8 million, or 14.8%. The statutory suspension period for the proposed filing runs through October 22, 2010. The Commission may adopt in whole or in part or reject terms set forth in UWW's proposal and/or other negotiated proposals. UWW provides general water service to approximately 12,500 customers in the City of Rye and the Villages of Port Chester and Rye Brook, Westchester County.

**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:** Jaelyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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-0828SP1)

### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Major Water Rate Filing

**I.D. No.** PSC-17-10-00014-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 proposal filed by United Water New Rochelle Inc. (UWNR) to make various changes in the rates, charges, rules and regulations contained in its Schedule for Water Service—P.S.C. No. 1.

**Statutory authority:** Public Service Law, section 89-c(1) and (10)

**Subject:** Major water rate filing.

**Purpose:** To consider a proposal to increase annual base rate revenues for UWNR by about \$20.9 million or 55 percent.

**Public hearing(s) will be held at:** 11:00 a.m., (Evidentiary Hearing\*), May 12-14, 2010 at Three Empire State Plaza, Third Fl. Hearing Rm., Albany, NY. \*There could be requests to reschedule the hearings. Notification of the start of the hearing or any subsequent scheduling changes will be available at the DPS website ([www.dps.state.ny.us](http://www.dps.state.ny.us)) under Case 09-W-0824.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Substance of proposed rule:** The Commission is considering a proposal filed by United Water New Rochelle Inc. (UWNR or company) which would increase its annual revenues by about \$20.9 million or 55% for the rate year ending October 31, 2011. In addition, the company is proposing changes to the rate structure it uses to bill its customers for water service. The statutory suspension period for the proposed filing runs through October 20, 2010. The Commission may adopt in whole or in part or reject terms set forth in United Water New Rochelle Inc.'s proposal.

**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: [Secretary@dps.state.ny.us](mailto:Secretary@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-0824SP1)

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

**Con Edison's Report on 2009 Performance Under Electric Service Reliability Performance Mechanism**

**I.D. No.** PSC-17-10-00006-P

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

**Proposed Action:** The Public Service Commission (Commission) is considering whether Consolidated Edison Company of New York, Inc.'s (Con Edison) met its 2009 performance standards under the Electric Service Reliability Performance Mechanism.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Con Edison's Report on 2009 Performance under Electric Service Reliability Performance Mechanism.

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

**Substance of proposed rule:** The Public Service Commission (Commission) is considering Consolidated Edison Company of New York, Inc.'s (Con Edison or the Company) Report on 2009 Performance under Electric Service Reliability Performance Mechanism (2009 RPM Report). Specifically, the Commission will consider whether Con Edison has met all of the required performance standards set forth in the Company's Rate Plan. Con Edison states that a revenue adjustment of \$10 million is not applicable for its failure to meet its Remote Monitoring System metric due to extraordinary circumstances in the Long Island City network. The Company states that it has met all the remaining performance metrics, which include system-wide threshold standards, major outages, radial restoration, pole repairs, shunt removals, no current streetlight and traffic signal repairs, and over duty circuit breaker replacements.

**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: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)

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

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

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

(08-E-0539SP5)

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

**Interconnection of the Networks between Verizon and Jay Telecom Inc. In for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-17-10-00007-P

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

**Proposed Action:** The PSC is considering whether to approve or reject a proposal filed by Verizon New York Inc. for approval of an Interconnection Agreement with Jay Telecom Inc. executed on March 18, 2010.

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

**Subject:** Interconnection of the networks between Verizon and Jay Telecom Inc. for local exchange service and exchange access.

**Purpose:** To review the terms and conditions of the negotiated agreement between Verizon and Jay Telecom Inc.

**Substance of proposed rule:** Verizon New York Inc. and Jay Telecom Inc. have reached a negotiated agreement whereby Verizon New York Inc. and Jay Telecom Inc. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until March 17, 2012, or as extended.

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

(10-00676SP1)

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

**Requests for Late Submission and Waiver of Certain Filing Requirements**

**I.D. No.** PSC-17-10-00008-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, reject or modify requests by St. Lawrence Gas Company (St. Lawrence) regarding certain requirements regarding its application for a Certificate of Environmental Compatibility and Public Need.

**Statutory authority:** Public Service Law, sections 4(1) and 122(1)(f)

**Subject:** Requests for late submission and waiver of certain filing requirements.

**Purpose:** Consider requests for late submission and waiver of certain filing requirements.

**Substance of proposed rule:** On April 7, 2010, St. Lawrence Gas Company filed an application for a Certificate of Environmental Compatibility and Public Need pursuant to Article VII of the Public Service Law. Accompanying the application was a motion seeking late submission and waiver of specified filing requirements as follows: New York State Department of Transportation (Topographic Edition) 1:24,000 Scale Mapping (16 NYCRR § 86.3(a)(1)(i)), New York State Department of Transportation 1:250,000 (16 NYCRR § 86.3(a)(2)), Exhibit 4: environmental impact (16 NYCRR § 86.5(b)(4), (5), (6), (7)), Exhibit 7: Local Or-

dinances (16 NYCRR § 86.8). While the application for a certificate is licensing, the request for late submission and waiver of filing requirements is rule making.

*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: Secretary@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.

(10-T-0154SP1)

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

**To Examine the Reasonableness of the Temporary Rates of Rand Water Corporation - Brandt Farms**

**I.D. No.** PSC-17-10-00009-P

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

*Proposed Action:* The Public Service Commission is considering whether to approve or modify the rates of Rand Water Corporation – Brandt Farms which were made temporary by Order issued and effective April 2, 2010 in Case 09-W-0644.

*Statutory authority:* Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10), 89-j, 113 and 114

*Subject:* To examine the reasonableness of the temporary rates of Rand Water Corporation - Brandt Farms.

*Purpose:* To set the appropriate level of permanent rates.

*Substance of proposed rule:* By Commission Order in Case 09-W-0644 issued and effective April 2, 2010, the rates of Rand Water Corporation – Brandt Farms (Brandt Farms) were made temporary pending the results of an investigation into their reasonableness. The Order also directed that a new proceeding be instituted to conduct this review and to set a proper level of permanent rates for Brandt Farms. Brandt Farms provides metered water service to 188 residential and 4 commercial customers in the Brandt Farms Estates subdivision in the Town of East Fishkill, Dutchess County. The Commission may approve or reject, in whole or in part, or modify Staff's recommendation as to the appropriate level of permanent rates for Brandt Farms.

*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: secretary@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.

(10-W-0157SP1)

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

**Interconnection of the Networks between Verizon and New Dimension Wireless for Local Exchange Service and Exchange Access**

**I.D. No.** PSC-17-10-00010-P

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

*Proposed Action:* The PSC is considering whether to approve or reject a proposal filed by Verizon New York Inc. for approval of an Interconnection Agreement with New Dimension Wireless Ltd. executed on April 5, 2010.

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

*Subject:* Interconnection of the networks between Verizon and New Dimension Wireless for local exchange service and exchange access.

*Purpose:* To review the terms and conditions of the negotiated agreement between Verizon and New Dimension Wireless.

*Substance of proposed rule:* Verizon New York Inc. and New Dimension Wireless Ltd. have reached a negotiated agreement whereby Verizon New York Inc. and New Dimension Wireless Ltd. will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting until April 4, 2012, or as extended.

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

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

(10-00799SP1)

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

**A Specific Electric Energy Efficiency Program**

**I.D. No.** PSC-17-10-00011-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 proposal submitted April 7, 2010 by Orange and Rockland Utilities, Inc., for an electric energy efficiency program for the utility's residential customers.

*Statutory authority:* Public Service Law, sections 4(1), 5(2) and 66(1)

*Subject:* A specific electric energy efficiency program.

*Purpose:* To enhance efficiency of energy use by utility residential customers.

*Substance of proposed rule:* The Public Service Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to the terms of a proposal entitled "Efficient Products Program" submitted by Orange & Rockland Utilities, Inc., on April 7, 2010. The proposed program would promote the purchase of energy-efficient equipment and appliances by residential electricity customers of the utility in order to reduce energy consumption. It was submitted as a part of the Commission's Energy Efficiency Portfolio Standard proceeding in Case 07-M-0548 et al.

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

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

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

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

(08-E-1128SP1)

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

**Gas Adjustment Tariff Provisions**

**I.D. No.** PSC-17-10-00012-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 tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid (NiMo) to revise its Gas Adjustment provisions so that NiMo may file their monthly gas adjustment on less than three day's notice to the Commission.

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

**Subject:** Gas Adjustment tariff provisions.

**Purpose:** To revise tariff language to allow NiMo to file its monthly gas adjustment on less than three day's notice to the Commission.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Niagara Mohawk Power Corporation d/b/a National Grid (NiMo or the company) to revise its gas adjustment provisions to allow the company to file its monthly gas adjustment on less than three day's notice to the Commission. The Commission may adopt, reject, or modify, in whole or in part, NiMo's proposal.

**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. Brillinger, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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.

(10-G-0159SP1)

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## Workers' Compensation Board

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

**Employer Compliance, Enforcement, Record and Reporting Requirements and Stop-work Orders**

**I.D. No.** WCB-17-10-00001-P

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

**Proposed Action:** Addition of Part 308 to Title 12 NYCRR.

**Statutory authority:** Workers' Compensation Law, sections 2(22), 117 and 141-a

**Subject:** Employer compliance, enforcement, record and reporting requirements and stop-work orders.

**Purpose:** To define the cost of compensation calculation, list records employers must keep, describe reports and redetermination process.

**Substance of proposed rule (Full text is posted at the following State website: [www.wcb.state.ny.us](http://www.wcb.state.ny.us)):** The proposed rule adopts a new Part 308 to govern employer compliance, enforcement, record and report requirements and stop work orders.

Section 308.1 defines relevant terms used in this Part including "cost of compensation", "domestic workers", "New York State Assessments" and "payroll".

Section 308.2 sets forth how the cost of compensation will be calculated. Section 308.3 lists the records that employers must maintain and produce for review by the Chair or his or her designee. The records listed in this section include, but are not limited to: 1) documents reflecting an employer's Federal Employer Identification Number, business name, and business form; 2) employment records pertaining to every person whom the employer paid or owes remuneration and who is an employee which must indicate the name of the person, social security number, date when the employer hired the person, a description of general duties, amount of remuneration paid, wage checks, annual wage or earnings statements, written contracts that describe terms of employment and all employment reports and quarterly combined withholding, wage reporting and unemployment insurance quarterly combined tax returns; 3) tax records; 4) account records; and 5) workers' compensation insurance and certificates of election to be exempt.

Section 308.4 describes the periodic reports the Chair may require an employer to file after a stop-work order issued to the employer is removed.

Section 308.5 sets forth the process for a redetermination review of a stop-work order including the application requirements, who will defend the issuance of the stop-work order, who will decide the redetermination review, when a hearing will be held and to whom an appeal must be filed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Cheryl M. Wood, Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.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.

**Summary of Regulatory Impact Statement**

1. Statutory authority: Workers' Compensation Law (WCL) § 117(1) authorizes the Workers' Compensation Board (Board) and Chair to adopt reasonable rules. WCL § 2(22) defines cost of compensation as the amount an employer pays to secure compensation coverage as calculated in accordance with the regulation of the Board. WCL § 141-a(2) specifically directs the Chair to adopt a rule specifying the business records which employers are required to keep, maintain and produce. Subdivision (4) of WCL § 141-a authorizes the Chair to issue a stop-work order to an employer directing it to cease operations. An employer may request a redetermination review of the stop-work order by filing an application within 30 days and the Chair must issue a written decision in response. As a condition of release from a stop-work order, the Chair may require an employer to file periodic reports which show that the employer maintains workers' compensation coverage. Subdivision 4 directs the Board to specify by regulation the reports required and the time for filing them.

2. Legislative objectives: Chapter 6 of the Laws of 2007 significantly increased the penalties and assessment for failing to maintain workers' compensation coverage. In addition it increased the records that must be maintained by employers and added a civil penalty for failing to comply. The Legislature intended to provide disincentives and eliminate any advantage for employers who fail to provide workers' compensation coverage for their employees or fail to keep payroll records. This rule implements the Legislature's intent.

3. Needs and benefits: The WCL requires employers to secure workers' compensation coverage for their employees. Significant penalties and assessments are imposed if the employer fails to secure such coverage and/or a worker is injured when the employer is uninsured. One of the methods for determining such penalty or assessment is two times the cost of compensation for the employer's payroll for the period of non-compliance.

WCL § 131 requires employers to keep the records specified for four years and keep them available for inspection by the Board. If an employer fails to do this, it is subject to a penalty which may equal to the sum of two times the cost of compensation for its payroll for the period of non-compliance.

WCL § 2(22) defines cost of compensation as the amount an employer must pay to secure compensation as calculated pursuant to regulation of the Board. In other words, the cost of compensation is the cost an employer would incur to secure a workers' compensation insurance policy. This rule specifies how the cost of compensation will be calculated. The Chair must

have the ability to fully penalize employers who fail to comply with the WCL so if an employer purposefully ignores the requirement to maintain coverage because it may have cost as much as hundreds of thousands of dollars in premium, the penalty should not be limited by the time-based method of \$2,000 for each 10 days of non-compliance but should be the cost of compensation method to eliminate the incentive to ignore coverage requirements. If an employer fails to obtain coverage and a worker is injured, or fails to maintain records, and is only out of compliance for 9 days or less, the straight time based method cannot be used to calculate these penalties or assessment so the only way to penalize or assess the employer is to use the cost of compensation method.

WCL § 141-a(2) requires the Chair to adopt regulations listing the records employers must maintain and produce upon demand. Employers must keep and maintain the listed business records so the Chair may determine if: (1) the business has or had employees; (2) if the business had or has employees, whether workers' compensation coverage was obtained and maintained; and (3) if workers' compensation coverage was obtained, did the business properly report payroll, number of employees and job classification to ensure the proper premium was paid.

This proposal also addresses the requirement in WCL § 141-a(4)(a) that the Board set by rule the reports the Chair may require an employer to file when he lifts a stop-work order. A stop-work order is issued when an employer fails to comply with the workers' compensation coverage requirements. As a condition of release of a stop-work order, in addition to obtaining coverage, the Chair may require an employer to file reports that demonstrate the employer's continued compliance with the coverage requirements. This rule sets forth the information to be contained in such reports.

Finally, this rule sets forth the redetermination review process when a stop-work order is issued.

#### 4. Costs:

(a) Costs to regulated parties. This rule may impose minimal costs on compliant employers. The provision defining how the cost of compensation will be calculated to impose penalties or assessments does not impose any costs on employers as it merely sets forth the formula used by the Chair.

The recordkeeping requirements of the rule may impose minimal costs on employers. The records employers are required to keep under this rule are those which an employer is required to keep and maintain by federal and New York State law or in the regular course of business. Employers who do not currently maintain four years worth of records may incur some minimal cost in storing the records for this time period. Employers who are issued a stop-work order may be required to file periodic reports when the stop-work order is released, which will impose some costs. However, the information included in the periodic reports is a subset of the records employers are required to maintain for four years. Further, employers can avoid this cost entirely by maintaining workers' compensation coverage. This is also true for the redetermination review process. Only employers who are issued a stop-work order and have grounds to challenge it will file for a redetermination review. Such employers will incur costs in preparing the application affidavit, submitting evidence and if scheduled, attending a hearing. These employers may also incur the cost of hiring an attorney.

Any costs from complying with the requirement to file such periodic reports when a stop-work order is released or from applying for a redetermination review, will vary depending on the employer and will only be incurred if the employer fails to maintain workers' compensation coverage.

(b) Costs to the Board, State and Local Governments. The Chair will incur some costs when calculating the cost of compensation as he will need to obtain the highest rate for each job classification from the Insurance Department's website. The Chair will also need to obtain the non-compliant employer's payroll records, which must include the job classification for each employee. Obtaining and reviewing the records will be performed by existing Board employees, so there will be no cost for additional staff.

The recordkeeping requirements of this rule will impose minimal to no costs on the Board, State or local governments as employers for the reasons set forth above. As the State and local governments are always authorized to be self-insured, they always have workers' compensation coverage and will never be issued a stop-work order. Therefore they will not have to file periodic reports or apply for a redetermination review. The Board will incur costs when it reviews the records employers are required to keep. However, this review will be part of the Board's regular enforcement actions, so there will be no new or additional costs. The Board will incur costs to handle the applications for redetermination reviews which will be handled within existing resources.

5. Local government mandates: This rule imposes minimal new mandates on local governments. The portion of the rule which defines how the Board will calculate the cost of compensation to penalize/assess employers who fail to maintain workers' compensation coverage or payroll records does not impose any mandates on local governments. As

local governments are presumed to be self-insured if they do not buy an insurance policy, the penalties and assessment for failing to maintain coverage will never be imposed on them. In addition, this means that a stop-work order will never be issued to them so they will not have to file periodic reports or request redetermination review.

All local governments are required to keep and maintain payroll records pursuant to statute, WCL § 131. The calculation defined in this rule will only be performed when a local government is not in compliance with the record maintenance requirements. The proposed regulation requires local governments, as employers, to maintain the records detailed in the rule. However, the business records outlined in this new Part are records employers, including government employers, are required to keep and maintain by federal and state law and regulations.

6. Paperwork: This rule imposes minimal paperwork requirements on regulated entities. The portion of the rule that defines how the Chair will calculate the cost of compensation to penalize/assess employers does not impose any reporting requirements on regulated parties as it merely sets forth a formula for determining a penalty. The portion of the proposed regulation that requires employers to keep and maintain business records to comply with WCL §§ 131 and 141-a does impose paperwork requirements. However, the records employers are required to keep pursuant to this rule are the same as records employers are required to keep pursuant to federal and state law. Employers are required to maintain these records for four years pursuant to WCL § 131.

WCL § 141-a(4)(a) authorizes the Chair to require an employer who has been issued a stop-work order to file periodic reports as a condition of release from the stop-work order. As directed by statute, this rule sets forth the reports that may be required. Only employers who are issued a stop-work order for failing to maintain workers' compensation coverage and are directed by the Chair are required to file these reports. Employers who are issued a stop-work order may seek a redetermination review by filing an application in affidavit form with the Chair pursuant to WCL § 141-a(4)(a). This rule requires the submission of the application and affidavit and any evidence to be considered. Only employers who have been issued a stop-work order and wish to apply for a redetermination review must comply with these paperwork requirements.

7. Duplication: This rule does not duplicate any other state or federal rule.

8. Alternatives: In drafting this rule alternatives were considered such as limiting the definition of payroll to only salary, commission and bonuses or excluding the New York State Assessments from the calculation of cost of compensation. Other alternatives considered include: 1) requiring employers to maintain the actual notice assigning Federal Employer Identification Number (FEIN) or Social Security Number (SSN), a general ledger, or a journal of all checks and cash disbursements; 2) requiring employers to maintain the records at the corporate office or principle place of business in New York; or 3) requiring employers of domestics to maintain all of the records specified in the rule.

9. Federal standards: There are no federal standards that apply.

10. Compliance schedule: Regulated parties do not need to take any action to comply with the portion of the rule that defines how the Chair will calculate the cost of compensation. The Chair will be able to comply with this rule upon its adoption.

With respect to the portion which requires employers to maintain certain records, since employers must already maintain the records listed for other purposes they should be able to immediately comply with the requirements.

Employers will be able to immediately comply with the periodic report and redetermination review process as they only apply after a stop-work is issued. If employers maintain compliance with the coverage requirement, they will not have to comply with these requirements.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: This rule: 1) defines how to determine cost of compensation when an employer fails to obtain and maintain workers' compensation coverage [Workers' Compensation Law (WCL) § 52(5)], an employee of a non-compliant employer is injured on the job [WCL § 26-a], and/or an employer fails to keep and maintain payroll records [WCL § 131]; 2) details the records all employers must keep and maintain to comply with Workers' Compensation Law (WCL) §§ 131 and 141-a; 3) describes the periodic reports that the Chair may require employers to file as a condition of release from stop-work orders; and 4) sets forth the process for a redetermination review of a stop-work order.

The portion of the rule that defines how to determine the cost of compensation only applies to an employer that fails to comply with WCL § 52(5), § 26-a or § 131 to the extent it determines the amount of the penalty imposed by the Chair or the assessment imposed by the Workers' Compensation Board (Board). Any of the hundreds of thousand small businesses in New York could fail to comply with the requirements to maintain coverage or records. If a small employer fails to comply with these requirements and the cost of compensation was going to be used to

impose the penalty, it would be calculated in accordance with this rule to impose the statutory penalties. In 2006, 62,800 employers with less than 100 employees were penalized for not complying with the workers' compensation coverage requirements. Over 28,000 small businesses were penalized in 2007, and in 2008 over 42,000 small employers were cited.

Currently, 2,511 local governments are self-insured while the remainder have purchased insurance policies. Local governments are presumed to be self-insured if they do not buy an insurance policy. Therefore the penalty in WCL § 52(5) and the assessment in WCL § 26-a will never be imposed on local governments, so the cost of compensation calculation in this rule is not applicable to them for these purposes. However, all local governments are required to keep and maintain payroll records pursuant to WCL § 131. The calculation defined in this rule will only be performed when a local government is not in compliance with the record maintenance requirements of the law. No local government has been cited for failing to maintain payroll records.

All employers, including all small businesses and local governments in New York, must keep and maintain the records listed in this rule. However, employers of domestics, many of whom are small employers, must only maintain a record of part-time and full-time domestics employed at any time.

The provisions of the rule which detail the periodic reports the Chair may require an employer to file as a condition of release of a stop-work order and the redetermination review process for a stop-work order only apply when an employer fails to maintain workers' compensation coverage and a stop-work order is issued. Any of the small businesses in New York could fail to maintain coverage and be issued a stop-work order. If a small employer is issued a stop-work order it may have to file periodic reports with the Chair as a condition of release or may decide to apply for redetermination review.

As local governments are presumed to be self-insured if they do not buy an insurance policy so they always have coverage, the provisions regarding stop-work orders will never apply to them.

2. Compliance requirements: This rule imposes reporting and record-keeping requirements on small businesses and local governments. The portion of the rule that defines how the penalty or assessment will be calculated using the cost of compensation when employers do not have coverage or the required payroll records does not impose any reporting or recordkeeping requirement. The requirement to obtain and maintain workers' compensation coverage is imposed by statute, WCL § 50. The requirement to keep and maintain payroll records is also imposed by statute, WCL § 131. The calculation defined in this rule will only be performed when a small business is not in compliance with the coverage requirements of the law and/or when a small business or local government is not in compliance with the record maintenance requirements of the law. In 2008 the WCB issued 451 penalties pursuant to WCL § 131(3), none of the penalties were against local governments.

To comply with portions of this rule, small businesses and local governments will have to keep and maintain certain business records. However, the records listed in the rule are the same as the records employers are required to keep pursuant to the WCL and New York and federal labor and tax laws. For example, employers are already required to keep and maintain records about their employees, including the compensation paid, tax records, account records, and workers' compensation coverage information. Employers are required to maintain these records for four years pursuant to WCL § 131.

Pursuant to WCL § 141-a(4) the Chair may require an employer who has been issued a stop-work order to file periodic reports as a condition of release from the stop-work order. This rule sets forth the reports that may be required. Only employers who are issued a stop-work order and are directed by the Chair must comply with this provision. Local governments will never be required to file such reports as they are deemed self-insured if they do not purchase an insurance policy.

Employers who are issued a stop-work order may seek a redetermination review by filing an application in affidavit form with the Chair pursuant to WCL § 141-a(4). This rule requires the submission of the application and an affidavit setting forth the facts supporting the application. Finally, if the designated judge determines that a hearing is necessary, the employer must serve upon the opposing party and the judge: 1) a list of all witnesses who will testify; and 2) all documentary evidence the party will introduce not contained in the application or evidentiary material submitted by the UEF representative. Only employers who have been issued a stop-work order and wish to apply for a redetermination review must comply with these paperwork requirements. The initial application is required by statute and the other requirements are to ensure a fair and complete review. Further, local governments for the reason discussed above will never need to apply for a redetermination review.

3. Professional services: Small businesses and local governments will not need any professional services to comply with the portion of the rule that defines how the cost of compensation will be calculated.

Small businesses and local governments will not need any professional services to comply with the recordkeeping portion of this rule because employers are required to keep such records pursuant to the New York Labor Law and WCL and the State and federal tax law. Local governments will not need professional services as they will never be issued a stop-work order for the reasons discussed above and therefore will never have to file the periodic reports noted in the rule or apply for a redetermination review of a stop-work order. Small businesses issued a stop-work order may have to file periodic reports as a condition of release from the stop-work order. Such employers will not need to hire any professional services to compile the periodic reports as the information is contained in the business records the small business must keep. If a small business applies for a redetermination review, it may need the professional services of an attorney. Only employers issued a stop-work order have a need to apply for redetermination review and the law requires that they make this application.

4. Compliance costs: The proposed rule will impose minimal to no costs on small businesses and local governments. The portion of the rule that defines how the cost of compensation will be calculated does not impose any costs on small businesses or local governments. Rather the rule defines how the cost of compensation will be calculated to impose civil penalties or assessments pursuant to WCL §§ 52(5), 26-a(2) and 131. The cost of obtaining and maintaining workers' compensation coverage is imposed by WCL § 50, and the cost of keeping and maintaining specified records is imposed by WCL § 131. Further, all employers are required to keep payroll records for income tax, unemployment insurance, and insurance premium purposes. This rule builds upon the existing statutory and business requirements to keep and maintain payroll records to determine the cost of compensation. Therefore, this rule does not impose costs on small businesses or local governments in order to calculate the cost of compensation. Also, the rule itself does not impose the cost of compensation on any small business or local government. Rather it defines how the cost of compensation will be calculated to impose civil penalties or assessments.

The portion of the rule that lists the records employers must keep to comply with WCL § 131(1) and § 141-a(2) will impose minimal to no costs on small businesses and local governments. The records these entities must keep under this rule are those an employer is required to keep and maintain by the New York Labor Law and WCL, New York and federal tax law, or by other laws. Employers, including small businesses and local governments, may incur some cost in storing the records for four years as required by statute. However, those costs should be minimal.

Small businesses who fail to maintain workers' compensation coverage and are issued a stop-work order will incur some costs in filing the periodic reports required by WCL § 141-a(4)(a). However, the information included in the periodic reports is a subset of the records employers are required to maintain for four years, so there will be minimal costs. Further, small businesses can avoid this cost entirely by maintaining workers' compensation coverage. This is also true for the redetermination review process. Only employers, including small businesses, which are issued stop-work orders and have grounds to challenge such orders, will file for a redetermination review. Such employers who are small businesses will incur costs in preparing the application affidavit, submitting evidence and if scheduled, attending a hearing. The costs may include retaining an attorney to represent the employer. However, the redetermination review option and the requirement that the application be an affidavit are imposed by statute.

As local governments are authorized by law to be self-insured, such entities are never out of compliance with the workers' compensation coverage requirements and therefore will never be issued a stop-work order. The requirement to file periodic reports or apply for a redetermination review will never apply to them.

5. Economic and technological feasibility: It is economically and technologically feasible for small businesses and local governments to comply with this rule. The portion of the rule that defines how to determine the cost of compensation does not impose any requirements on small businesses or local governments with which they must comply. The portion of the rule that lists the records employers must keep does not impose any additional implementation or technology costs on them. The records all employers, including small businesses and local governments, must keep and maintain under this rule are those an employer is required to keep and maintain by the New York Labor Law and WCL, New York and federal tax law, or by other laws. This rule does not require small businesses and local governments to keep these records in any specific format.

Only employers issued a stop-work order may be required to file periodic reports or may apply for a redetermination review. If a small business must file periodic reports as a condition of release from a stop-work order, the contents of such reports are derived from information contained in the records employers are required to maintain. Employers who are issued a stop-work order are not required to apply for a redetermi-

nation review. As noted above, local governments will never be issued a stop-work order so they will never be required to file periodic reports as a condition of release and will never need to apply for a redetermination review.

6. Minimizing adverse impact: Most of the provisions of this rule will only impact non-compliant small businesses and local governments. The purpose of calculating the cost of compensation is to arrive at an appropriate penalty or assessment that will punish non-compliant employers and deter those thinking of not complying. For the most part, the purpose is to have a negative economic impact so employers obtain and maintain workers' compensation coverage and keep the required records. If a small business or local government is compliant, this rule will have no direct adverse effect on them.

To minimize the adverse impacts of the record requirements in WCL §§ 131 and 141-a, the rule does not require employers to maintain: 1) the actual notice assigning Federal Employer Identification Number (FEIN) or Social Security Number (SSN); 2) a general ledger; or 3) a journal of all checks and cash disbursements. The decision was made not to require these records, as some employers, especially small ones, may not have them. Instead it was decided to require a record reflecting an employer's FEIN or SSN rather than the notice assigning the number and any record of transactions rather than a general ledger and a journal.

Another way the rule minimizes any adverse impact is by not requiring employers, including small businesses or local governments, to maintain the records at a specific location. Rather the rule requires employers to make the records specified in the rule available at a specified location when the Chair needs to review them.

The rule minimizes any adverse impact on employers of domestics by exempting them from the requirement to maintain all of the records specified in the rule. Such records are not necessary for domestics because the premium for domestics is calculated on a per capita basis. It was decided to only require such employers to maintain the number of such employees.

Another way the rule minimizes the impact on small businesses is by not requiring all employers to file periodic reports as a condition of release from a stop-work order. It was determined that it is not necessary to require such periodic reports every time a stop-work order is released.

7. Small business and local government participation: The Board distributed the proposed rule to representatives of the New York State Business Council and the AFL-CIO, and to the New York Conference of Mayors, New York State Association of Counties, Association of Towns of the State of New York and New York City for review and they did not have any objections or issues.

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

1. Types and estimated numbers of rural areas: This rule: 1) defines how to determine cost of compensation when an employer fails to obtain and maintain workers' compensation coverage [Workers' Compensation Law (WCL) § 52(5)], an employee of a non-compliant employer is injured on the job [WCL § 26-a], and/or an employer fails to keep and maintain payroll records [WCL § 131]; 2) details the records all employers must keep and maintain to comply with Workers' Compensation Law (WCL) §§ 131 and 141-a; 3) describes the periodic reports that the Chair may require employers to file as a condition of release from stop-work orders; and 4) sets forth the process for a redetermination review of a stop-work order.

Employers who fail to maintain coverage or required records will be located across the state, including rural areas. If an employer located in a rural area does not comply with these requirements, the formula in this rule could be used to calculate the cost of compensation to impose the statutory penalties. The provisions of the rule which detail the periodic reports the Chair may require an employer to file as a condition of release of the stop-work order and the redetermination review process for a stop-work order only apply when an employer fails to maintain workers' compensation coverage and a stop-work order is issued. Any employer, including one in a rural area of New York, could fail to comply maintain coverage and have a stop-work order issued against it. If an employer in a rural area is issued a stop-work order it may have to file periodic reports with the Chair as a condition of release or may decide to apply for redetermination review.

All employers must keep and maintain the records listed in this rule. Employers are located all across the State, including the rural areas. Therefore, this rule will apply to all rural areas in the State.

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule imposes reporting and recordkeeping requirements on all employers, including those in rural areas. The portion of the rule that defines how the cost of compensation will be calculated to penalize/assess employers who do not have coverage or do not keep the required payroll records does not impose any reporting or recordkeeping requirements. The requirement to obtain and maintain workers' compensation coverage is imposed by statute, WCL § 50. The requirement to keep and maintain payroll records is also imposed by statute, WCL § 131. The

calculation defined in this rule is will only be performed when an employer does not have coverage and/or has not kept the required records. In 2008 the WCB issued 451 penalties pursuant to WCL § 131(3) against private employers.

To comply with record requirement portion of this rule, employers will have to keep and maintain the business records listed. However, the records employers are required to keep pursuant to this rule are the same as the records employers are required to keep pursuant to the New York Labor Law and WCL and the State and federal tax law. For example, employers are required to keep and maintain records about their employees, including the compensation paid, tax records, account records, and workers' compensation coverage information. Employers are required to maintain these records for four years pursuant to WCL § 131.

Pursuant to WCL § 141-a(4) employers, including those located in rural areas, who fail to maintain workers' compensation coverage may have stop-work orders issued them. The Chair may require an employer who has been issued a stop-work order to file periodic reports as a condition of release from the stop-work order. This rule sets forth the reports that may be required. Only employers who are issued a stop-work order and are directed by the Chair must comply with this provision.

Employers who are issued a stop-work order may seek a redetermination review by filing an application in affidavit form with the Chair pursuant to WCL § 141-a(4). This rule requires the submission of the application and an affidavit setting forth the facts supporting the application. Finally, if the designated judge determines that a hearing is necessary, the employer must serve upon the opposing party and the judge: 1) a list of all witnesses who will testify; and 2) all documentary evidence the party will introduce not contained in the application or evidentiary material submitted by the UEF representative. Only employers who have been issued a stop-work order and wish to apply for a redetermination review must comply with these paperwork requirements. The initial application is required by statute and the other requirements are to ensure a fair and complete review.

Employers located in rural areas will not need any professional services to comply with the portion of the rule that defines how the cost of compensation will be calculated to penalize employers who are uninsured or fail to keep the required payroll records as it does not impose any requirements, duties or responsibilities on them.

Employers, including those located in rural areas, will not need any professional services to comply with the recordkeeping portion of this rule because employers are required to keep such records pursuant to the New York Labor Law and WCL and state and federal tax law. Employers issued a stop-work order may have to file periodic reports as a condition of release from the stop-work order. Such employers will not need to hire any professional services to compile the periodic reports as the information is contained in the business records the employer must keep. If an employer, including one located in a rural area, applies for a redetermination review, it may need the professional services of an attorney. Attorneys are located all across New York, including rural areas, so such employers should have no trouble finding attorneys to represent them. Only employers issued a stop-work order have a need to apply for redetermination review and it is required that they make this application.

3. Costs: The proposed rule will impose minimal to no costs on employers located in rural areas. The portion of the rule that defines how the cost of compensation will be calculated does not impose any costs on employers. Rather the rule defines how the cost of compensation will be calculated to impose civil penalties or assessments pursuant to WCL §§ 52(5), 26-a(2) and 131. The cost of obtaining and maintaining workers' compensation coverage is imposed by WCL § 50, and the cost of keeping and maintaining specified records is imposed by WCL § 131. Further, all employers are required to keep payroll records for income tax, unemployment insurance, and insurance premium purposes. This rule builds upon the existing statutory and business requirements to keep and maintain payroll records to determine the cost of compensation. Therefore, this rule does not impose costs on employers in order to calculate the cost of compensation. Also, the rule itself does not impose the cost of compensation on employer as it merely defines how the cost of compensation will be calculated to impose civil penalties or assessments.

The portion of the rule that lists the records employers must keep to comply with WCL § 131(1) and § 141-a(2) will impose minimal to no costs on employers, including those in rural areas. The records employers must keep under this rule are those they are required to keep and maintain by the New York Labor Law and WCL, New York and federal tax law, or by other laws. Employers may incur some cost in storing the records for four years as required by statute. However, those costs should be minimal.

Employers who fail to maintain workers' compensation coverage and are issued a stop-work order will incur some costs in filing the periodic reports required by WCL § 141-a(4)(a). However, the information included in the periodic reports is a subset of the records employers are required to maintain for four years, so there will be minimal costs. Fur-

ther, employers can avoid this cost entirely by maintaining workers' compensation coverage. This is also true for the redetermination review process. Only employers, including those in rural areas, which are issued stop-work orders and have grounds to challenge such orders, will file for a redetermination review. Such employers will incur costs in preparing the application affidavit, submitting evidence and if scheduled, attending a hearing. The costs may include retaining an attorney to represent the employer. However, the redetermination review option and the requirement that the application be an affidavit are imposed by statute.

4. Minimizing adverse impact: Most of the provisions of this rule will only impact non-compliant employers in rural areas. The purpose of calculating the cost of compensation is to arrive at an appropriate penalty or assessment that will punish non-compliant employers and deter those thinking of not complying. For the most part, the purpose is to have a negative economic impact so employers obtain and maintain workers' compensation coverage and keep the required records. If an employer is compliant, this rule will have no direct adverse effect on them.

To minimize the adverse impacts of the record requirements in WCL §§ 131 and 141-a, the rule does not require employers to maintain: 1) the actual notice assigning Federal Employer Identification Number (FEIN) or Social Security Number (SSN); 2) a general ledger; or 3) a journal of all checks and cash disbursements. The decision was made not to require these records, as some employers, especially small ones, may not have them. Instead it was decided to require a record reflecting an employer's FEIN or SSN rather than the notice assigning the number and any record of transactions rather than a general ledger and a journal.

Another way the rule minimizes any adverse impact is by not requiring employers, including those in rural areas, to maintain the records at a specific location. Rather the rule requires employers to make the records specified in the rule available at a specified location when the Chair needs to review them.

The rule minimizes any adverse impact on employers of domestics by exempting them from the requirement to maintain all of the records specified in the rule. Such records are not necessary for domestics because the premium for domestics is calculated on a per capita basis. It was decided to only require such employers to maintain the number of such employees.

Another way the rule minimizes the impact on employers is by not requiring all of them to file periodic reports as a condition of release from a stop-work order. It was determined that it is not necessary to require such periodic reports every time a stop-work order is released.

5. Rural area participation: The Board distributed the proposed rule to representatives of the New York State Business Council and the AFL-CIO, and to the New York Conference of Mayors, New York State Association of Counties, Association of Towns of the State of New York and New York City for review and they did not have any objections or issues.

#### **Job Impact Statement**

The proposed rule will not have an adverse impact on jobs. This rule is required by WCL § 2(22), § 131 and § 141-a to: 1) define how to determine cost of compensation when an employer fails to obtain and maintain workers' compensation coverage [Workers' Compensation Law (WCL) § 52(5)], an employee of a non-compliant employer is injured on the job [WCL § 26-a], and/or an employer fails to keep and maintain payroll records [WCL § 131]; 2) detail the records all employers must keep and maintain to comply with Workers' Compensation Law (WCL) §§ 131 and 141-a; 3) describe the periodic reports that the Chair may require employers to file as a condition of release from stop-work orders; and 4) set forth the process for a redetermination review of a stop-work order.

The cost of obtaining and maintaining workers' compensation coverage is imposed by statute, WCL § 50, and the cost of keeping and maintaining records regarding number of employees, job classifications, employee accidents and payroll is also imposed by statute, WCL § 131. Further, all employers are required to keep payroll records for income tax, unemployment insurance, and insurance premium purposes. This rule builds upon the existing statutory and business requirements to keep and maintain payroll records to determine the cost of compensation. In addition, the rule builds upon the existing statutory and business requirements for the business records that must be maintained pursuant to WCL § 141-a(2). In addition the rule sets forth the periodic reports an employer may be required to file as a condition of release of a stop-work order. Such reports will not be required in each case, will not impact jobs and the contents are derived from information in the records employers must keep. Finally, the rule sets forth the process for the redetermination review of a stop-work order. It is entirely voluntary on the part of the employer to apply for such redetermination review. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment, and therefore a job impact statement is not required.