

RULE MAKING ACTIVITIES

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

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

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

Office of Children and Family Services

EMERGENCY RULE MAKING

Educational Stability of Foster Children, Transition Planning and Relative Involvement in Foster Care Cases

I.D. No. CFS-48-10-00004-E

Filing No. 1262

Filing Date: 2010-12-14

Effective Date: 2010-12-14

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

Action taken: Amendment of sections 421.24, 428.3, 428.5, 430.11 and 430.12 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d) and 34(3)(f)

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

Specific reasons underlying the finding of necessity: The regulations must be filed on an emergency basis to prevent the loss of federal funding that supports the health, safety and welfare of the children in foster care, children receiving adoption assistance and families receiving child welfare services.

Subject: Educational stability of foster children, transition planning and relative involvement in foster care cases.

Purpose: The regulations implement the federal Foster Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351).

Text of emergency rule: Paragraph (19) of subdivision (c) of section 421.24 is amended to read as follows:

(19) The social services official on an *annual* [a biennial] basis in a written notification must remind the adoptive parents of their obligation to support the adopted child and to notify the social services official if the adoptive parents are no longer providing any support or are no longer legally responsible for the support of the child. *Where the adopted child is school age under the laws of the state in which the child resides, such notification must include a requirement that the adoptive parents must certify that the adopted child is a full-time elementary or secondary student or has completed secondary education. For the purposes of this paragraph, an elementary or secondary school student means an adopted child who is: (i) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (ii) instructed in elementary or secondary education at home, in accordance with the laws in which the adopted child's home is located; (iii) in an independent study elementary or secondary education program, in accordance with the laws in which the adopted child's education program is located, which is administered by the local school or school district; or (iv) incapable of attending school on a full-time basis due to the adopted child's medical condition, which incapacity is supported by annual information submitted by the adoptive parents as part of this certification.*

Subparagraphs (iii) and (iv) of paragraph (2) of subdivision (b) of section 428.3 are amended and a new subparagraph (v) is added to read as follows:

(iii) educational and/or vocational training reports or evaluations indicating the educational goals and needs of each foster child, including school reports and Committee on Special Education evaluations and/or recommendations; [and]

(iv) if the child has been placed in foster care outside of the state, a report prepared every six months by a caseworker employed by either the authorized agency with case management and/or case planning responsibility for the child, the state in which the placement home or facility is located, or a private agency under contract with either the authorized agency or other state, documenting the caseworker's visit(s) with the child at his or her placement home or facility within the six-month period; and

(v) *the child's transition plan prepared in accordance with the standards set forth in section 430.12(j) of this Title.*

Paragraph (6) of subdivision (c) of section 428.5 is amended to read as follows:

(6) description of contacts with educational/vocational personnel on behalf of the child, *including, but not limited to, contacts made with school personnel in accordance with sections 430.11(c)(1)(i) and 430.12(c)(4) of this Title;*

Subparagraph (viii) of paragraph (10) of subdivision (c) of section 428.5 is amended to read as follows:

(viii) any information acquired about an absent or non-respondent parent that is in addition to information recorded pursuant to section 428.4(c)(1) of this Part, [and] the results of an investigation into the location of any relatives, including grandparents of a child subject to article 10 of the Family Court Act or section 384-a of the Social Services Law, *and the efforts to identify and provide notification to grandparents and other adult relatives in accordance with the requirements of section 430.11(c)(4) of this Title;*

Subparagraph (i) of paragraph (1) of subdivision (c) of section 430.11 is amended to read as follows:

(1)(i) Standard. Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents, or to which the child will be discharged. It shall be deemed inappropriate to place a child in a setting which conforms with this standard only if the child's service needs can only be met in another available setting at the same or lesser level of care. *The placement of the child into foster care must take into account the appropriateness of the child's existing educational setting and the proximity of such setting to the child's placement location. When is it in the best interests of the foster*

child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child is placed in order that the foster child is provided with immediate and appropriate enrollment in a new school; and the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child are provided to the new school.

Subparagraph (viii) of paragraph (2) of subdivision (c) of section 430.11 is amended, subparagraph (ix) is renumbered as subparagraph (x) and a new subparagraph (ix) is added to read as follows:

(viii) if the child has been placed in a foster care placement a substantial distance from the home of the parents of the child or in a state different from the state in which the parent's home is located, the uniform case record must contain documentation why such placement is in the best interests of the child; [and]

(ix) show in the uniform case record that efforts were made to keep the child in his or her current school, or where distance was a factor or the educational setting was inappropriate, that efforts were made to seek immediate enrollment in a new school and to arrange for timely transfer of school records; and

(x) if the child has been placed in foster care outside of the state in which the home of the parents of the child is located, the uniform case record must contain a report prepared every six months by a caseworker employed by the authorized agency with case management and/or case planning responsibility over the child, the state in which the home is or facility is located, or a private agency under contract with either the authorized agency or other state documenting the caseworker's visit to the child's placement within the six-month period.

Paragraph (4) of subdivision (c) of section 430.11 is added to read as follows:

(4) Within 30 days after the removal of a child from the custody of the child's parent or parents, or earlier where directed by the court, or as required by section 384-a of the Social Services Law, the social services district must exercise due diligence in identifying all of the child's grandparents and other adult relatives, including adult relatives suggested by the child's parent or parents and, with the exception of grandparents and/or other identified relatives with a history of family or domestic violence. The social services district must provide the child's grandparents and other identified relatives with notification that the child has been or is being removed from the child's parents and which explains the options under which the grandparents or other relatives may provide care of the child, either through foster care or direct legal custody or guardianship, and any options that may be lost by the failure to respond to such notification in a timely manner. The identification and notification efforts made in accordance with the paragraph must be recorded in the child's uniform case record as required by section 428.5(c)(10)(viii) of this Title.

Paragraph (4) of subdivision (c) of section 430.12 is amended and renumbered paragraph (5) and a new paragraph (4) is added to read as follows:

(4) Education. (i) Standard. The social services district with care and custody or guardianship and custody of a foster child who has attained the minimum age for compulsory education under the Education Law is responsible for assuring that the foster child is a full-time elementary or secondary school student or has completed secondary education. For the purpose of this paragraph, an elementary or secondary school student means a child who is: (a) enrolled, or in the process of enrolling, in a school which provides elementary or secondary education, in accordance with the laws where the school is located; (b) instructed in elementary or secondary education at home, in accordance with the laws in which the foster child's home is located; (c) in an independent study elementary or secondary education program, in accordance with the laws in which the foster child's education program is located, which is administered by the local school or school district; or (d) incapable of attending school on a full-time basis due to the foster child's medical condition, which incapability is supported by regularly updated information in the child's uniform case record.

(ii) Documentation. The progress notes for each school age child in foster care must reflect either the education program in which the foster child is presently enrolled or is enrolling; or the date the foster child completed his or her compulsory education; or where the child is not capable of attending school on a full-time basis, what the medical condi-

tion is and why such condition prevents full-time attendance. The social services district must update the progress notes on an annual basis to reflect why such medical condition continues to prevent the foster child's full-time attendance in an education program. On an annual basis, by the first day of each October, the education module in CONNECTIONS must be updated with education information about each school age foster child in the form and manner as required by the Office.

(5) [(4)] Discharge planning. (i) Standard. For any child age 18 or under who is discharged from foster care, the district [shall] must consider the need to provide preventive services to the child and his or her family subsequent to [his] the child's discharge.

(ii) Documentation. The uniform case record form to be completed upon discharge of the child [shall] must show either the recommended type of preventive services and the district's attempts to provide or arrange for these services, or the reasons why these services are deemed unnecessary.

Subdivision (j) of section 430.12 is added to read as follows:

(j) Transition plan. Whenever a child will remain in foster care on or after the child's eighteenth birthday, the agency with case management, case planning or casework responsibility for the foster child must begin developing a transition plan with the child 180 days prior to the child's eighteenth birthday or 180 days prior to the child's scheduled discharge date where the child is consenting to remain in foster care after the child's eighteenth birthday. The transition plan must be completed 90 days prior to the scheduled discharge. Such plan must be personalized at the direction of the child. The transition plan must include specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services. The transition plan must be as detailed as the foster child may elect.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. CFS-48-10-00004-P, Issue of December 1, 2010. The emergency rule will expire March 13, 2011.

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 and regulations to carry out its duties pursuant to the provisions of the SSL.

Section 34(3) (f) of the SSL requires the Commissioner of OCFS to promulgate regulations for the administration of public assistance and care within the state.

2. Legislative objectives

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008.

3. Needs and benefits

The regulations will reduce disruption experienced by a child when removed from the child's home and placed into foster care and will enhance continuity in the child's environment.

Regarding the relationship of the child with his or her relatives, the regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to relatives to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. The regulations take into consideration the safety of the child by excluding the need to notify any relative who has a history of family or domestic violence.

The regulations address the need to minimize disruption by requiring the social services district to assess the proximity of the foster care placement to the school the child attended before placement into foster care and the appropriateness of the child remaining in that school upon entry into foster care. Where it is not in the best interests of the child to attend such school, the regulations require the social services district to work with the appropriate local school officials to see that the child is immediately enrolled in a new school.

The regulations also support the preparation of the foster child to transition out of foster care. One of the fundamental needs of any child is his or her education. The regulations clarify that each foster child of school age must either be enrolled in an appropriate educational setting, unless the child is incapable of attending school, or has completed his or her second-

ary education. The regulations impose a similar requirement in regard to a child who is in receipt of an adoption subsidy and is of school age. The regulations implement section 204 of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 that amended 42 U.S.C. § 671(a)(30) to provide that States must provide assurances that each school age child receiving Title IV-E foster care or adoption assistance payments is either a full-time elementary or secondary school student, has completed secondary education or is not capable of attending school due to a documented medical condition. This requirement that applies to both foster and adopted children is also reflected in instructions provided to the States by the federal Department of Health and Human Services in Program Instruction ACYF-CB-PI-08-05 issued on October 23, 2008.

The regulations support the transition of older foster children out of foster care by requiring the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. This plan must be developed to meet the needs of the particular foster child, with such child's input. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. Such plan must address such basic post discharge issues as housing, health insurance, education, supports services and employment.

4. Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoption Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained in the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to New York's statewide automated child welfare information system, called CONNECTIONS. As defined in 18 NYCRR 466.2(a), the CONNECTIONS system is administered by OCFS and contains data elements required by applicable State and federal statutes and regulations relating to the provision of child welfare services, including foster care, adoption assistance, adoption services, preventive services, child protective services and other family preservation and family support services. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

5. Local government mandates

The regulations require social services districts to carry out functions similar to those they already have been obligated by State statute and OCFS regulations to perform. Current OCFS regulation 18 NYCRR 430.11(c) requires the social services district placing a child into foster care, whenever possible, to place the child in a foster care setting that permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents. OCFS regulation 18 NYCRR 430.10(b) currently requires the social services district that is contemplating the placement of a child into foster care to attempt, prior to placement, to locate adequate alternative living arrangements with a relative or family friend which would enable the child to avoid placement into foster care. Section 1017 of the Family Court Act and section 384-a of the SSL currently provide that when a child is to be removed from his or her home, the social services district must identify and discuss with such relative, including grandparents, available options to function as the child's foster parent or to assume direct legal custody of the child. The social services district must also notify the relative that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are unsuccessful.

Social services districts are obligated pursuant to section 409-e of the SSL and OCFS regulations 18 NYCRR Part 428 and 430.12 to develop for each foster child a family assessment and service plan that addresses

the needs of the child, including those related to education and the preparation of the child for discharge from foster care. These standards also presently require that foster children over the age of 10 be invited to participate in such planning.

6. Paperwork

The regulations require the recording of the actions taken by the social services district or voluntary authorized agency with case management responsibility in meeting the standards referenced above. Such documentation will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

7. Duplication

The regulations do not duplicate other state or federal requirements. The regulations build on related existing requirements.

8. Alternative approaches

Given the mandates imposed by the federal Foster Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) and the adverse financial consequences for non-compliance, there is no viable alternative to implementing the regulations.

9. Federal standards

Each of the regulatory amendments reflects requirements imposed by the federal Foster Connections to Success and Increasing Adoptions Act of 2008. The regulatory changes relating to relatives and education are federally mandated under Title IV-E of the Social Security Act. New York State must demonstrate that it has implemented such standards in order to have a compliant Title IV-E State Plan which is a condition for New York to continue to receive federal funding for foster care and adoption assistance. The regulatory change relating to the transition plan for aging out foster children is federally mandated under Title IV-B, Subpart 1 of the Social Security Act. New York must demonstrate that it has implemented such standard in order to have a compliant Title IV-B State Plan which is a condition for New York to continue to receive federal child welfare services funding.

10. Compliance schedule

Compliance with the regulations would take effect upon adoption.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments

Social service districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social service districts to provide foster care, will be affected by the regulations. There are 58 social service districts and approximately 160 voluntary authorized agencies.

2. Compliance Requirements

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to the relatives to become the child's foster parent or to otherwise care for the child and any option that may be lost by the failure of the relatives to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives who have a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities or mentors and continuing support services, and work force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that same school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child will be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be

enrolled in an appropriate educational setting, unless incapable of attending school or have completed secondary education. The regulations impose a similar requirement post discharge from foster care for a child who is school age and is in receipt of an adoption subsidy.

3. Professional Services

It is anticipated that the requirements imposed by the regulations will be implemented by existing case work staff.

4. Compliance Costs

The regulatory amendments are required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these regulations. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adopted children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

5. Economic and Technological Feasibility

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

6. Minimizing Adverse Impact

The standards set forth in the regulations reflect mandates imposed on the states by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. Implementation is necessary for New York to continue to be eligible to receive federal funding for foster care, adoption assistance child welfare services and the administration thereof, as required by Title IV-B and title IV-E of the Social Security Act. The regulations do not go beyond the scope of the federal mandates.

7. Small Business and Local Government Participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each of the local department of social services in the State of New York of the amendments to OCFS regulations that are necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the OCFS regulations was provided along with a contact person if the local commissioners or their staff had any questions.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas

Social services districts, the St. Regis Mohawk Tribe and voluntary authorized agencies that have contracts with social services districts to provide foster care will be affected by the regulations. There are 44 social services districts and the St. Regis Mohawk Tribe that are in rural areas. Currently, there are also approximately 100 voluntary authorized agencies in rural areas of New York State.

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

The regulations implement standards required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) that went into effect on October 7, 2008. Implementation of the regulations is necessary for the State of New York to maintain compliant Title IV-B and Title IV-E State Plans which are required for New York to continue to receive federal funding under Title IV-B and Title IV-E of the Social Security Act for foster care, adoption assistance, child welfare services and the administration of those programs.

The regulations require that within 30 days of the removal of a foster

child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the option available to the relative to become the child's foster parent or to otherwise care for the child and any options that may be lost by the failure of the relative to respond to such notification in a timely manner. Notification must be made earlier than 30 days of removal if directed by the court. Notification is not required in regard to relatives with a history of family or domestic violence.

The regulations require the authorized agency with case management responsibility to develop a transition plan for a foster child who is aging out of foster care. Such plan must be personalized to the particular foster child and developed with the involvement of such child. Development of the transition plan must commence 180 days prior to the scheduled discharge date of the foster child, with the completion of the plan 90 days prior to the scheduled discharge. The transition plan must address housing, health insurance, education, local opportunities for mentors and continuing support services and work force supports and employment services.

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child be provided with immediate and appropriate enrollment in a new school.

The regulations require that foster children of school age must either be enrolled in an appropriate educational setting, unless incapable of attending school, or have completed secondary education. The proposed regulations would impose a similar requirement post discharge from foster care in regard to a school age child who is in receipt of an adoption subsidy.

3. Costs

Each of the regulatory amendments is required by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. There is no fiscal impact associated with implementing the regulations because current OCFS regulations require social services districts to carry out similar functions as those prescribed in these amendments. With the exception of the regulatory amendment associated with the transition plan, the regulatory changes are federally mandated under Title IV-E of the Social Security Act. Currently, New York must demonstrate that it has implemented these requirements in order to have a compliant Title IV-E State Plan. This is a condition for continuing to receive federal funds for foster care, adoption assistance and the administration of these programs.

The regulatory change regarding the transition plan for children who are aging out of foster care is a federal mandate under Title IV-B, Subpart 1 of the Social Security Act. In order to have a compliant Title IV-B State Plan, and to continue to receive federal Child Welfare Services funding, New York State must demonstrate that it has implemented such standard.

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported in CONNECTIONS.

4. Minimizing adverse impact

The regulations require the recording of the actions taken to comply with the regulatory standards noted above. Such information will be recorded in New York State's statewide automated child welfare information system, CONNECTIONS.

5. Rural area participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each local department of social services in the State of New York of the amendments to OCFS regulations necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the local commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the regulations was provided along with a contact person if the local commissioners or their staff had any questions.

Job Impact Statement

A full job impact statement has not been prepared for the regulations. The amendments will not result in the loss or creation of any jobs.

NOTICE OF ADOPTION**Removal of the Requirement to Report an Alien Receiving Referral Services and Protective Services to US Homeland Security**

I.D. No. CFS-41-10-00023-A

Filing No. 1259

Filing Date: 2010-12-10

Effective Date: 2010-12-29

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

Action taken: Amendment of section 403.7(b) of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 427(1)

Subject: Removal of the requirement to report an alien receiving referral services and protective services to US Homeland Security.

Purpose: To remove the requirement to report an alien receiving referral services and protective services to US Homeland Security.

Text or summary was published in the October 13, 2010 issue of the Register, I.D. No. CFS-41-10-00023-P.

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

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

Assessment of Public Comment

The Office of Children and Family Services (OCFS) received comments from two community organizations, one that represents a statewide network of providers dedicated to providing a full range of health care services to individuals in their communities and another whose mission is to promote fundamental constitutional rights of individuals. Both organizations strongly supported the proposed regulation. The provider organization noted that removing the requirement to contact immigration or the consulate will encourage more vulnerable individuals to seek protective services. The individual rights organization stated that the regulation will help strengthen the relationship between immigrant communities and government agencies, and encourage immigrants to pursue protective services.

Accordingly, the proposed regulation was not revised.

**PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED****The Protection of Children in Residential Facilities from Child Abuse and Neglect**

I.D. No. CFS-52-10-00005-P

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

Proposed Action: Amendment of 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

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 proposed rule (Full text is posted at the following State website: www.ocfs.state.ny.us): 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.

Text of proposed 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

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

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

Regulatory Impact Statement

1. Statutory authority:

Section 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 actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

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 actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

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 actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

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.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Appeals to Commissioner of Education Relating to New York City Charter School Location/Co-Location and Building Usage Plans

I.D. No. EDU-52-10-00012-P

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

Proposed Action: Amendment of Parts 275 and 276 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101, 207, 305(1) and (2), 310, 311 and 2853(3)(a-5); and L. 2010, ch. 101, section 15

Subject: Appeals to Commissioner of Education relating to New York City charter school location/co-location and building usage plans.

Purpose: Establish special procedures for appeals relating to New York City charter school location/co-location and building usage plans.

Substance of proposed rule (Full text is posted at the following State website: <http://www.counsel.nysed.gov/rulesandregs/>): The Commissioner of Education proposes to amend Parts 275 and 276 of the Commissioner's Regulations, effective March 30, 2011, relating to appeals concerning New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5). The following is a summary of the substance of the proposed amendment.

Section 275.8(a) and (b) of the Commissioner's Regulations are amended to require that the memorandum of law in such appeals be served with the petition.

Section 275.9(a) is amended to require that pleadings and papers in such appeals be filed with the Department's Office of Counsel within the period specified in new section 276.11.

Section 275(a) is amended to provide that petitions in such appeal must contain the notice prescribed in section 276.11.

Section 275.13(a) is amended to provide that the time to answer in an expedited charter school location/co-location appeal shall be governed by Education Law section 2853(3)(a-5) and section 276.11.

Section 275.14(a) is amended to provide that a reply in an expedited charter school location/co-location appeal shall be served within the time prescribed by section 276.11.

Section 276.1(d) is added to provide that the provisions of section 276.1, relating to stay of proceedings, shall not apply to an expedited charter school location/co-location appeal.

Section 276.2(g) is added to provide that the provisions of section 276.2, relating to oral argument, shall not apply to an expedited charter school location/co-location appeal.

Section 276.4(a) is amended to provide that memoranda of law in expedited charter school location/co-location appeals shall be served and filed in the manner prescribed in section 276.11.

Section 276.8(f) is added to provide that the provisions of section 276.8, relating to reopening of a prior decision, shall not apply to an expedited charter school location/ co-location appeal.

Section 276.11 is added to establish procedures in expedited charter school location/co-location appeals.

Section 276.11(a) sets forth definitions of "board of education" and "day."

Section 276.11(b) sets forth the applicability of the section. The procedures set forth in the section shall apply to appeals pursuant to Education Law § 2853(3)(a-5) from:

(1) final determinations of the board of education to locate or co-locate a charter school within a public school building;

(2) the implementation of, and compliance with, the building usage plan developed pursuant to Education Law § 2853(3)(a-3); and/or

(3) revisions of such a building usage plan on the grounds that such revision fails to meet the standards set forth in Education Law § 2853(3)(a-3)(2)(B).

Except as provided in section 276.11, the procedures set forth in Part 275 and Part 276 shall govern the practice in such appeals. The initiation of an appeal shall not, in and of itself, effect a stay of any proceedings on the part of respondent and a stay order shall not be available in an expedited appeal pursuant to section 276.11.

Section 276.11(c) establishes requirements relating to the petition and

notice of petition in such appeals. The petition shall be served in the manner prescribed in section 275.8(a) of this Title, together with all of petitioner's affidavits, exhibits and supporting papers and petitioner's memorandum of law. The petition may not include any claims challenging actions other than determinations of the City School District of the City of New York to locate or co-locate a charter school within a public school building or the implementation of, and compliance with, the building usage plan developed pursuant to Education Law § 2853(a-3), or the revision of such a building usage plan, as set forth in subdivision (a) of this section. The petition must contain the notice prescribed in section 276.11. The failure to use the Notice of Petition required by this subdivision shall result in dismissal of the expedited appeal and the Commissioner may dismiss the appeal on such ground at any stage of the proceedings.

Section 276.11(d) establishes requirements for the filing of pleadings and papers. Within 1 day after the service of any pleading or paper, the original of any pleading or paper served under section 276.11, together with the affidavit of verification and an affidavit proving the service of a copy thereof, shall be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234, by personal delivery, express mail delivery, or equivalent means reasonably calculated to assure receipt of such pleading or paper within 24 hours of service. The affidavit of service shall be in substantially the form set forth in section 275.9. The fee for filing the petition shall be as provided in section 275.9(c).

Section 276.11(e) establishes requirements relating to service of subsequent pleadings and supporting papers. An answer shall be served within 10 days of service of the petition and a reply to each affirmative defense raised in the answer shall be served within two days of service of the answer. The Commissioner, in his/her sole discretion, may excuse a failure to serve an answer or reply within the time prescribed herein for good cause beyond the control of the requesting party; the reasons for such failure shall be set forth in the answer or reply. Service of all subsequent pleadings and supporting papers shall be made by personal delivery or next day delivery by express mail or a private express delivery service, in accordance with the provisions of section 275.8(b); provided that, upon consent of the receiving party, service of subsequent pleadings and supporting papers may be made by electronic mail (e-mail) communication.

Section 276.11(f) establishes requirements relating to the memorandum of law. The petitioner's memorandum of law shall be served and filed with the petition and respondent's memorandum of law shall be served and filed with the answer. The petitioner may serve and file a reply memorandum of law with the reply.

Section 276.11(g) establishes requirements relating to the dismissal of claims. Any claims included in the petition in an expedited appeal in violation of 276.11(c)(1) shall be dismissed by the Commissioner without prejudice to commencing a non-expedited appeal pursuant to Education Law § 310, Part 275 of this Title and this Part within 10 days after receipt of the decision dismissing such claims. Any claims raised in a non-expedited appeal brought pursuant to Education Law § 310, Part 275 of this Title and Part 276 which challenge actions set forth in section 276.11(b)(1) shall be dismissed with prejudice unless the petitioner has waived the right to an expedited appeal in accordance with section 276.11(h).

Section 276.11(h) establishes procedures for waiver of an expedited appeal. The petitioner may intentionally waive the right to an expedited appeal pursuant to this section and opt to commence a non-expedited appeal pursuant to Education Law § 310, Part 275 of this Title and this Part. Such waiver shall be in writing and shall explicitly state that the right to an expedited appeal pursuant to Education Law § 2853(3)(a-5) and section 276.11 of the Regulations of the Commissioner is waived.

Text of proposed rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Erin M. O'Grady-Parent, Acting Counsel, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 authorizes the Regents and Commissioner to adopt rules and regulations implementing State law regarding education.

Education Law section 305(1) designates the Commissioner as chief executive officer of the State system of education and the Regents, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents' educational policies. Section 305(2) authorizes the Commissioner to have general supervision over schools subject to the Education Law.

Education Law section 310 provides that an aggrieved party may appeal by petition to the Commissioner of Education in consequence of certain specified actions by school districts and school officials.

Education Law section 311 authorizes the Commissioner to regulate the practice of appeals to the Commissioner brought pursuant to Education Law section 310.

§ 15 of Chapter 101 of the Laws of 2010 amended Education Law section 2853(3) and added five new paragraphs (a-1) through (a-5) to, among other things, establish requirements for the location or co-location of a charter school in a public school building. Education Law § 2853(3)(a-5) provides for an expedited Education Law § 310 appeal to the Commissioner of:

(1) determinations by the New York City School District to locate or co-locate a charter school within a public school building;

(2) implementation of and compliance with the building usage plan developed pursuant to Education Law § 2853(a-3), that has been approved by the board of education pursuant to Education Law § 2590-g(1)(h) after satisfying the requirements of Education Law § 2590-h(2-a); and

(3) revision of a building usage plan approved by the board of education consistent with the requirements pursuant to Education Law § 2590-g(7), that is appealed on the grounds that the revision fails to meet the standards set forth in Education Law § 2853(3)(a-3)(2)(B).

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes to regulate the practice and procedures to be followed in Education Law section appeals, and is necessary to implement Chapter 101 of the Laws of 2010 by establishing procedures for appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5).

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Chapter 101 of the Laws of 2010 by establishing procedures for expedited appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5). Education Law § 2853(3)(a-5) requires that petitions in such appeals must be dismissed, adjudicated or disposed of by the Commissioner within ten days of the receipt of the New York City School District's response. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for such expedited appeals consistent with statutory requirements. The proposed amendment establishes procedures that accommodate the extremely short time frames imposed by the statute, while assuring that due process is provided through procedures which are workable and fair to both parties.

4. COSTS:

Cost to the State: None.

Costs to local government: None.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment will not impose any costs on the State or local governments beyond those imposed by State law. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for expedited appeals relating to charter school location/co-location and building usage plans consistent with statutory requirements.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State statutes. The proposed amendment is necessary to implement Chapter 101 of the Laws of 2010, by establishing procedures for appeals relating to charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5). The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for expedited appeals consistent with statutory requirements.

6. PAPERWORK:

The proposed amendment imposes no additional reporting, forms or other paperwork requirements. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner

pursuant to Education Law § 310, to provide for expedited appeals relating to New York City charter school location/co-location and building usage plans consistent with statutory requirements.

7. DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with State and Federal rules or requirements, and is necessary to implement Chapter 101 of the Laws of 2010, by establishing procedures for appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5).

8. ALTERNATIVES:

There were no significant alternatives. The proposed amendment is necessary to implement Chapter 101 of the Laws of 2010, by establishing procedures for appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5).

9. FEDERAL STANDARDS:

The proposed amendment is necessary to implement Chapter 101 of the Laws of 2010, by establishing procedures relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5). There are no applicable standards of the Federal government for the same or similar subject areas.

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to appeals to the Commissioner of Education pursuant to Education Law § 310 and 2853(3)(a-5) relating to New York City charter school location/co-location and building usage plans. Education Law § 2853(3)(a-5) requires that petitions in such appeals must be dismissed, adjudicated or disposed of by the Commissioner within ten days of the receipt of the New York City School District's response. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for such expedited appeals consistent with statutory requirements. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed amendment applies to the City School District of the City of New York.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements beyond those imposed by State law. The proposed amendment is necessary to implement Chapter 101 of the Laws of 2010, by establishing procedures for appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5). Education Law § 2853(3)(a-5) requires that petitions in such appeals must be dismissed, adjudicated or disposed of by the Commissioner within ten days of the receipt of the New York City School District's response. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for expedited appeals consistent with statutory requirements.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs beyond those imposed by State law. The proposed amendment merely modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for expedited appeals consistent with statutory requirements.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new economic costs or technological requirements on local governments.

MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or compliance costs beyond those imposed by State law. The proposed amendment is necessary to implement Chapter 101 of the Laws of 2010, by establishing procedures for appeals of New York City charter

school location/co-location and building usage plans brought pursuant to Education Law §§ 310 and 2853(3)(a-5). Education Law § 2853(3)(a-5) requires that petitions in such appeals must be dismissed, adjudicated or disposed of by the Commissioner within ten days of the receipt of the New York City School District's response. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for expedited appeals consistent with statutory requirements.

LOCAL GOVERNMENT PARTICIPATION:

A copy of the proposed amendment was provided to the New York City Department of Education for review and comment.

Rural Area Flexibility Analysis

The proposed amendment relates to appeals to the Commissioner of Education pursuant to Education Law §§ 310 and 2853(3)(a-5) relating to New York City charter school location/co-location and building usage plans. Education Law § 2853(3)(a-5) requires that petitions in such appeals must be dismissed, adjudicated or disposed of by the Commissioner within ten days of the receipt of the New York City School District's response. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for such expedited appeals consistent with statutory requirements. The proposed amendment is applicable to the City School District of the City of New York and will not have an adverse impact on rural areas or impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Because it is evident from the nature of the proposed amendment that it does not affect rural areas or public or private entities in rural areas, no further measures were needed to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed amendment relates to appeals to the Commissioner of Education pursuant to Education Law §§ 310 and 2853(3)(a-5) relating to New York City charter school location/co-location and building usage plans. Education Law § 2853(3)(a-5) requires that petitions in such appeals must be dismissed, adjudicated or disposed of by the Commissioner within ten days of the receipt of the New York City School District's response. The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law § 310, to provide for such expedited appeals consistent with statutory requirements. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Regents Standing Committees

I.D. No. EDU-52-10-00013-P

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

Proposed Action: Amendment of section 3.2 of Title 8 NYCRR.

Statutory authority: Education Law, section 207

Subject: Regents standing committees.

Purpose: Establish the Committee on Audits/Budget and Finance as a standing committee of the Board of Regents.

Text of proposed rule:

1. Subdivision (a) of section 3.2 of the Rules of the Board of Regents is amended, effective March 30, 2011, as follows:

(a) The chancellor shall appoint the following standing committees and designate the leadership of each committee:

- (1) Higher Education.
- (2) P-12 Education.
- (3) Cultural Education.
- (4) Ethics.
- (5) Professional Practice.
- (6) Adult Education and Workforce Development.
- (7) Audits/Budget and Finance.

2. Subdivision (d) of section 3.2 of the Rules of the Board of Regents is amended, effective March 30, 2011, as follows:

(d) The functions of the standing committees shall include:

- (1) . . .
- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .

(7) *Committee on Audits/Budget and Finance shall assist the Board of Regents in carrying out its financial oversight responsibilities by ensuring accountability through centralizing review and discussion of fiscal and audit issues related to the State Education Department. The Committee shall:*

- (i) *review State and federal budget actions;*
- (ii) *review financial reports and all audits of the Department;*
- (iii) *recommend budget priorities for the upcoming State fiscal year and actions needed to achieve budget reductions and close structural deficits;*
- (iv) *review select audits of other institutions in the University of the State of New York which may require Department action and submit recommendations and reports to the Full Board, as appropriate; and*
- (v) *provide oversight of the Department's Office of Audit Services.*

Text of proposed rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Valerie Grey, Chief Operating Officer, State Education Department, State Education Building, Room 121, 89 Washington Avenue, Albany, NY 12234, (518) 474-2547

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 207 gives the Board of Regents broad authority to adopt rules to carry into effect the laws and policies of the State pertaining to education and the functions, powers and duties conferred upon the University of the State of New York and the State Education Department. Inherent in such authority is the authority to adopt rules concerning the internal management and committee structure of the Board of Regents.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to establish the Committee on Audits/ Budget and Finance as a standing committee of the Board of Regents to assist the Board in meeting its statutory responsibility to determine the educational policies of the State and to carry out the laws and policies of the State relating to education.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to establish the Committee on Audits/Budget and Finance as a standing committee of the Board of Regents to assist the Board of Regents in carrying out its financial oversight responsibilities by ensuring accountability through centralizing review and discussion of fiscal and audit issues related to the State Education Department. The Committee will:

- review State and federal budget actions;
- review financial reports and all audits of the Department;
- recommend budget priorities for the upcoming State fiscal year and actions needed to achieve budget reductions and close structural deficits;
- review select audits of other institutions in the University of the State of New York which may require Department action and submit recommendations and reports to the Full Board, as appropriate; and
- provide oversight of the Department's Office of Audit Services.

4. COSTS:

- (a) Cost to State government: None.
- (b) Cost to local government: None.
- (c) Costs to private regulated parties: None.
- (d) Costs to the regulating agency for implementation and continuing administration of the rule: None.

The proposed amendment relates to the internal organization of the Board of Regents, specifically the committee structure of the Board of Regents, and will not impose any costs on State and local government, private regulated parties or the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to the internal organization of the Board of Regents and consequently will not impose any program, service, duty or responsibility on local governments.

6. PAPERWORK:

The proposed amendment does not impose any reporting, record keeping or other paperwork requirements.

7. DUPLICATION:

The proposed amendment does not duplicate any existing State or federal requirements.

8. ALTERNATIVES:

There are no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

The amendment does not exceed any minimum federal standards for the same or similar subject areas, since it relates solely to the internal organization of the Board of Regents of New York State and there are no federal standards governing such.

10. COMPLIANCE SCHEDULE:

The proposed amendment relates solely to the internal organization of the Board of Regents and will not impose compliance requirements on local governments or private parties.

Regulatory Flexibility Analysis

The proposed amendment relates to the internal organization of the Board of Regents and therefore will not have any adverse economic impact or impose any compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it will have no impact on small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis is not required and one has not been prepared.

Rural Area Flexibility Analysis

The proposed amendment relates to the internal organization of the Board of Regents and therefore will not have any adverse economic impact or impose any compliance requirements on entities in rural areas. Because it is evident from the nature of the proposed amendment that it will have no impact on entities in rural areas of the State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed amendment relates to the internal organization of the Board of Regents and will not have a substantial adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Sanitary Condition of Shellfish Lands

I.D. No. ENV-41-10-00003-E

Filing No. 1261

Filing Date: 2010-12-13

Effective Date: 2010-12-13

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

Action taken: Amendment of Part 41 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

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

Specific reasons underlying the finding of necessity: This rule making is necessary to protect the public health. The department has filed a previous Notice of Emergency Adoption and Proposed Rule Making to designate certain shellfish lands as uncertified for the harvest of shellfish. However, the Notice of Adoption for the rule will not be submitted and published before the original emergency adoption expires. This current emergency rule making is necessary to maintain the recently adopted shellfish closures in place and prevent the harvest and subsequent consumption of shellfish from areas that do not meet the sanitary criteria for a certified

area for harvest. Shellfish harvested from areas that do not meet the bacteriological standards for certified shellfish lands have an increased potential to cause illness in shellfish consumers. Environmental Conservation Law section 13-0307 requires the department to examine shellfish lands and certify those that are in such sanitary condition that shellfish may be taken therefrom and used as food; all other lands must be designated as uncertified.

Subject: Sanitary Condition of Shellfish Lands.

Purpose: To reclassify underwater lands to prohibit the harvest of shellfish.

Text of emergency rule: 6 NYCRR Part 41, Sanitary Condition of Shellfish Lands, is amended to read as follows:

Section 41.0 through clause 41.2(b) (1)(ii)(f) remain unchanged.

New Clauses 41.2(b)(1)(ii)(g) and 41.2(b)(1)(ii)(h) are adopted to read as follows:

(g) During the period May 15-September 30, both dates inclusive, all that area of East Bay, Hempstead Bay, and all other bays creeks and tributaries south of a line running southeasterly to the easternmost point of land at Fighting Island (west side of Merrick Bay) to the northernmost point of land at False Channel Meadow; continuing southeasterly to the northernmost point of land at Ned's Meadow; continuing southeasterly to the northernmost point of land at Ball Island; continuing southeasterly across Broad Creek Channel to the northernmost point of land at Cuba Island; continuing southeasterly to the northwesternmost point of land at East Island; west of a line running south from the northwesternmost point of East Island along the western shoreline of Middle Island to the northwestern most point of Deep Creek Meadow; and north of a line from the northwestern most point of Deep Creek Meadow over Sloop Channel running along the northern shoreline of East Crow Island to the Northern Shoreline of Middle Crow Island; and along the northern shoreline of West Crow Island to the southwestern end of the Fundy Channel Bridge of the Meadowbrook State Parkway; and East of a line running north from the southwestern tip of the Fundy Channel Bridge along the eastern shoreline of Pettit Marsh (Pettit Island) and Great Sand Creek; and along the Eastern Shoreline of False Channel to the easternmost point of land at Fighting Island.

(h) During the period December 1 - February 29, both days inclusive, all that area of East Bay, Hempstead Bay, and all other bays creeks and tributaries south of a line running southeasterly from the northwestern most point of East Island along the northern shoreline of East Island; to the northeasternmost point of land at East Island; continuing southeasterly to the southernmost point of land at Low Island at the northwestern base of the Goose Creek Bascule Bridge; continuing southerly across Goose Creek along the western side of said bascule bridge (Wantagh State Parkway-Jones Beach Causeway); to Green Island and running southerly along the western coast of Green Island to the southeasternmost point of the Sloop Channel Bridge; to the Eastern Shore of Sripe Island; running north along the northern coast of Sripe Island over the channel to the northern coast of Deep Creek Meadow to the northwesternmost point and; east of a line running northerly from the northwesternmost point at Deep Creek Meadow to the southern tip of Middle Island; and north along the western coast of Middle Island to the northwestern most tip of East Island.

Subparagraph 41.2(b)(1)(iii) through clause 41.3(b)(2)(i)(c) remains unchanged.

Existing clauses 41.3(b)(2)(i)(d) through 41.3(b)(2)(i)(m) are renumbered to 41.3(b)(2)(i)(e) through 41.3(b)(2)(i)(n).

New clause 41.3(b)(2)(i)(d) is adopted to read as follows:

(d) All that area of Nicoll Bay lying within a 500 foot radius of the southernmost tip of the pier on the western side of Homan Creek at the Town of Islip's Bayport Beach.

Renumbered clauses 41.3(b)(2)(i)(e) through 41.3(b)(2)(i)(n) remain unchanged.

Subparagraphs 41.3(b)(2)(ii) through 41.3(b)(5)(iii) remain unchanged.

Existing clauses 41.3(b)(5)(iv)(a) and (b) are repealed.

New clauses 41.3(b)(5)(iv)(a) and (b) are adopted to read as follows:

(a) During the period May 1st through November 30th (both dates inclusive), all that area of Three Mile Harbor within a 500 foot radius in all directions of the entrance to the East Hampton Point Marina (located on the eastern shoreline at 295 Three Mile Harbor Road) and extending across the entrance into the Maidstone Harbor/Maidstone Marina Boat Basin, locally known as Duck Creek, located approximately 50 feet north of the East Hampton Point Marina.

(b) All that area of the Maidstone Harbor/Maidstone Marina Boat Basin, locally known as Duck Creek, lying east of a line extending northerly from the landward end of the northern wave break wall of the East Hampton Point Marina, including the entrance leading into the harbor.

Existing clauses 41.3(b)(5)(iv)(c) and (d) are renumbered 41.3(b)(5)(iv)(g) and (h).

New clauses 41.3(b)(5)(iv)(c), (d), (e), and (f) are adopted to read as follows:

(c) During the period from May 1st through November 30th (both dates inclusive), all that area of Three Mile Harbor within a 500 foot radius in all directions of the entrance to Shagwong Marina (local name), located on the eastern shoreline of Three Mile Harbor Road.

(d) During the period from May 1st through November 30th (both dates inclusive), all that area of Three Mile Harbor and tributaries lying southeast of a line extending northeasterly from the northeastern most point of land on the peninsula located at the western side of the entrance into "Head of the Harbor" (local name), at the southern end of Three Mile Harbor and continuing to the western terminus of Breeze Hill Road, and lying north of a line extending northeasterly from the northernmost corner of the residence located at 5 South Pond Road on the western shoreline, to the northern side of the entrance of an unnamed creek on the opposite eastern shoreline (the entrance to this creek is located approximately 350 feet northwest of the entrance to Gardiner's Marina).

(e) All that area of "Head of the Harbor" (local name) at the southern end of Three Mile Harbor, lying south of a line extending northeasterly from the northernmost corner of the residence located at 5 South Pond road on the western shoreline, to the northern side of entrance of an unnamed creek on the opposite eastern shoreline (the entrance to this creek is located approximately 350 feet northwest of the entrance to Gardiner's Marina).

(f) During the period May 1st through November 30th (both dates inclusive), all that area of Hands Creek, including tributaries and all that area within a 500 foot radial closure in all directions of the entrance to Hands Creek.

Renumbered clauses 41.3(b)(5)(iv)(g) and (h) remain unchanged.

Existing clause 41.3(b)(5)(v)(a) is amended to read as follows:

(a) During the period [April 1st through December 14th] May 1st through November 30th (both dates inclusive), all that area of Hog Creek, including tributaries, lying easterly of a line extending southeasterly from the flagpole (located near the east side of the entrance to Hog Creek) on the property of the Clearwater Beach Property Owners Association, Inc. (local landmarks, local name) to the western end of the dock serving the residence at No. 152 Water Hole Road (local landmark, local name).

Existing clause 41.3(b)(5)(v)(b) remains unchanged.

New clauses 41.3(b)(5)(v)(c) and (d) are adopted to read as follows:

(c) All that area of Hog Creek lying south of a line extending easterly from the highest point of the white center peak of the residence located at 59 Isle of Wight Road to the red brick chimney on the north facing side of the residence located at 50 Fenmarsh Road on the opposite shoreline.

(d) During the period May 1st through November 30th (both dates inclusive), all that area of Hog Creek lying north of a line extending easterly from the highest point of the white center peak of the residence located at 59 Isle of Wight Road to the red brick chimney on the north facing side of the residence located at 50 Fenmarsh Road on the opposite shoreline, and lying south of a line extending easterly from the highest point of the center peak of the grey residence located at 99 Isle of Wight Road to the northerly corner of the whitish-grey, hexagon shaped residence located at 120 Fenmarsh Road on the opposite shoreline.

Existing subparagraphs 41.3(b)(5)(vi) through 41.3(b)(7)(xi)(d) remain unchanged.

New clause 41.3(b)(7)(xi)(e) is adopted to read as follows:

(e) West Creek. During the period of May 1 through November 30, all that area of West Creek including all that area of Great Peconic Bay within 750 feet in all directions of the southernmost point of the jetty on the east side of the mouth of West Creek.

Existing subparagraph 41.3(b)(7)(xii) through section 41.5 remain unchanged.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. ENV-41-10-00003-EP, Issue of October 13, 2010. The emergency rule will expire February 10, 2011.

Text of rule and any required statements and analyses may be obtained from: Gina M. Fanelli, NYSDEC, 205 N. Belle Meade Rd., East Setauket, NY 11733, (631) 444-0482, email: gmfanell@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a Negative Declaration is on file with the Department of Environmental Conservation.

Regulatory Impact Statement

Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is Environmental Conservation Law (ECL) section 13 0307. Subdivision 1 of section 13 0307 of the ECL requires the department to periodically conduct examinations of shellfish lands within the marine

district to ascertain the sanitary condition of said lands. Subdivision 2 of this section requires that the department certify which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified.

The statutory authority for promulgating regulations with respect to the harvest of shellfish is section 13 0319 of the ECL.

Legislative objectives:

There are two purposes of the legislation: to protect public health and to ensure that shellfish lands are appropriately classified as certified or uncertified for the harvest of shellfish. This legislation requires the department to examine shellfish lands and determine which shellfish lands meet the sanitary criteria for a certified shellfish land, as set forth in Part 47 of Title 6 NYCRR, promulgated pursuant to section 13 0319 of the ECL. Shellfish lands which meet these criteria must be designated as certified. Shellfish lands which do not meet criteria must be designated as uncertified to prevent the harvest of shellfish from those lands.

Needs and benefits:

To protect public health and to comply with ECL 13 0307, the Bureau of Marine Resources' shellfish sanitation program conducts and maintains sanitary surveys of shellfish growing areas (SGA) in the marine district of New York State. Maintenance of these surveys includes the regular collection and bacteriological examination of water samples to monitor the sanitary condition of shellfish growing areas and shoreline surveys to document actual and potential pollution sources.

Annually, water quality evaluation reports are prepared by the staff of the shellfish sanitation program for each SGA which contains certified shellfish lands. These reports present the results of statistical analyses of water quality data gathered by the program, and annual updates to the shoreline pollution source surveys. Each report includes a summary and recommendations for the appropriate classification of that particular shellfish growing area. The report summary may state that all or portions of an SGA should be designated as uncertified for the harvest of shellfish or that all, or portions of, an SGA should be designated as certified for the harvest of shellfish based on criteria in 6 NYCRR Part 47. These reports are on file at the NYSDEC Bureau of Marine Resources office in East Setauket, NY.

The most recent Annual Review of Great Peconic Bay, dated June 2010, indicates that water quality in West Creek no longer meets bacteriological criteria for certified shellfish lands, as specified in 6 NYCRR Part 47, during the period May 1 through November 30. It recommends that all of West Creek, including a radial closure at the mouth, within Peconic Bay, be designated as seasonally certified.

The most recent Triennial Review of Three Mile Harbor, dated May 2010, indicates that water quality at the following locations no longer meets bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47: The area outside the mouth of Hands Creek no longer meets its certified classification; Maidstone Harbor (known locally as Duck Creek) and the southernmost portion of Head of the Harbor no longer meet their seasonal classifications. The report recommends that a radial closure outside the mouth of Hands Creek be reclassified and seasonally uncertified from May 1 through November 30, each year and the areas of Maidstone Harbor and Head of the Harbor be reclassified as uncertified throughout the year.

The most recent Triennial Review of Hog Creek, dated August 2009, indicates that water quality in the southern half of the creek, which is certified throughout the year, no longer meets bacteriological criteria for certified shellfish lands as specified in 6 NYCRR Part 47. The report recommends that the southernmost portion be reclassified as uncertified throughout the year and a portion north of that be reclassified as seasonally uncertified from May 1 through November 30, each year.

The most recent Triennial Review of Great South Bay (Nicoll/Sayville), dated January 2010, indicates that water quality in the area of Nicoll Bay at the mouth of Homan Creek no longer meets bacteriological criteria for certified shellfish lands, as specified in 6 NYCRR Part 47. It recommends that the area at the mouth of Homan Creek be designated as uncertified throughout the year.

The most recent Annual Review of Hempstead Bay, dated March 2010, indicates that water quality in currently certified areas of East Bay, in Hempstead Bay, no longer meets bacteriological criteria for certified shellfish lands, as specified in 6 NYCRR Part 47, throughout the year. The report recommends that the currently certified area of East Bay west of the Wantagh Parkway and adjacent to an existing north side seasonal area be designated as seasonally certified from March 1 through November 30. The report also indicates that the currently certified area of East Bay East of the Meadowbrook Parkway and south of the north side uncertified area shall be designated as seasonally certified from October 1 through May 14.

There will be no costs to State or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form

of initial capital investment or initial non capital expenses, in order to comply with these proposed regulations.

The department cannot provide an estimate of potential lost income to shellfish harvesters when areas are designated as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of August 1, 2010, the department had issued 1,680 New York State shellfish digger's permits. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish diggers permits for that type of recreational harvest is unknown. The department's records do not differentiate between full time and part-time commercial or recreational shellfishing.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the department's proposed regulatory action. Harvesters can shift their efforts to other certified areas.

Estimates of the existing shellfish resource in a particular embayment are not known. Recent shellfish population assessments have not been conducted by the department. Without this information, the department cannot determine the effect a closure or reopening would have on the existing shellfish resource.

The department's actions to designate areas as certified or uncertified are not dependent on the resources in a particular area. They are based solely on public health concerns and legal mandates.

There is no cost to the department. Administration and enforcement of the proposed amendment are covered by existing programs.

Local government mandates:

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

Paperwork:

No new paperwork is required.

Duplication:

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

Alternatives:

There are no significant alternatives. By law, ECL section 13 0307, when the department has determined that a certified shellfish land fails to meet the sanitary criteria for certified shellfish lands, the department shall designate the land as uncertified and close the area to shellfish harvesting.

Federal standards:

There are no Federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. The NSSP is a cooperative program consisting of the Federal government, states and the shellfish industry. Participation in the NSSP is voluntary each state adopts its own standards. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non conformity with NSSP guidelines can result in sanctions being taken by FDA and the NSSP, including removal of a state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non conforming state's shellfish product from interstate commerce.

Compliance schedule:

Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes to SGA classification by mail either prior to, or concurrent with, the adoption of new regulations.

Compliance with new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork, record keeping or any action by the regulated parties in order to comply, except that harvesters must observe the new closure lines. Therefore, immediate compliance can be readily achieved.

Regulatory Flexibility Analysis

Effect on small business and local government:

As of August 1, 2010, there were 1,680 licensed shellfish diggers in New York State. The number of permits issued for areas in the State is as follows: New York City, 36; Westchester, 5; Town of Hempstead, 104; Town of Oyster Bay, 123; Town of North Hempstead, 4; Town of Babylon, 71; Town of Islip, 122; Town of Brookhaven, 294; Town of Southampton, 161; Town of East Hampton, 245; Town of Shelter Island, 40; Town of Southold, 224; Town of Riverhead, 53; Town of Smithtown, 29; Town of Huntington, 155; other, 14.

Any change in the designation of shellfish lands may have an effect on shellfish diggers. Each time shellfish lands or portions of shellfish lands

are designated as uncertified; there may be some loss of income for a number of diggers who may be harvesting shellfish from the lands to be closed. This loss is determined by the acreage to be closed, the type of closure (whether year-round or seasonal), the species of shellfish present in the area, its productivity, and the market value of the shellfish resource in the particular area.

When uncertified shellfish lands are found to meet the sanitary criteria for a certified shellfish land, and are then designated as certified, there is also an effect on shellfish diggers. More shellfish lands are made available for the harvest of shellfish, and there is a potential for an increase in income. Again, the effect of the re opening of a harvesting area is determined by the shellfish species present, the area's productivity, and the market value of the shellfish resource in the area.

Local governments on Long Island exercise management authority and share law enforcement responsibility for shellfish with the State and the Counties of Nassau and Suffolk. These are the Towns of Hempstead, North Hempstead and Oyster Bay in Nassau County and the Towns of Babylon, Islip, Brookhaven, Southampton, East Hampton, Southold, Shelter Island, Riverhead, Smithtown and Huntington in Suffolk County. Changes in the classification of shellfish lands impose no additional requirements on local governments above what level of management and enforcement that they normally undertake; therefore, there should be no effect on local governments.

Compliance requirements:

There are no reporting or recordkeeping requirements for small businesses or local governments.

Professional services:

Small businesses and local governments will not require any professional services to comply with proposed rules.

Compliance costs:

There are no capital costs which will be incurred by small businesses or local governments.

Minimizing adverse impact:

The designation of shellfish lands as uncertified may have an adverse impact on commercial shellfish diggers. All diggers in the towns affected by proposed closures will be notified by mail of the designation of shellfish lands as uncertified, prior to the date the closures go into effect. Shellfish lands which fail to meet the sanitary criteria during specified times of the year will be designated as uncertified only during those times. At other times, shellfish may be harvested from those lands (seasonally certified). To further minimize any adverse effects of proposed closures, towns may request that uncertified shellfish lands be considered for conditionally certified designation or for a shellfish transplant project. Under appropriate conditions, shellfish may be harvested from uncertified lands and microbiologically cleansed in a shellfish depuration plant. Shellfish diggers will also be able to shift harvesting effort to nearby certified shellfish lands. There should be no significant adverse impact on local governments from most changes in the classification of shellfish lands.

Small business and local government participation:

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the department, is comprised of representatives of local baymen's associations and local town officials. Through their representatives, shellfish harvesters can express their opinions and give recommendations to the department concerning shellfish land classification. Local governments, state legislators, and baymen's organizations are notified by mail and given the opportunity to comment on any proposed rule making prior to filing with the Department of State.

Economic and technological feasibility:

As specified above, there are no reporting, recordkeeping or affirmative acts that small businesses or local governments must undertake to comply with the proposed rules which result in the reclassification of shellfish harvesting areas as certified or uncertified. Similarly, small businesses and local governments will not have to retain any professional services or incur any capital costs to comply with such rules. As a result, it should be economically and technically feasible for small businesses and local governments to comply with rules of this type.

Rural Area Flexibility Analysis

Amendments to Part 41 will not impose an adverse impact on rural areas. Only the State's marine district will be directly affected by regulatory initiatives to open or close shellfish lands. The Department of Environmental Conservation (department) has determined that there are no rural areas within the marine district, and no shellfish lands within the marine district are located adjacent to any rural areas of the State. The proposed regulations will not impose reporting, record keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by amendments of Part 41 "Sanitary Condition of Shellfish Lands" of Title 6 NYCRR, the department has determined that a Rural Area Flexibility Analysis is not required.

Job Impact Statement

Nature of impact:

Environmental Conservation Law section 13-0307 requires that the department examine shellfish lands and certify which shellfish lands are in such sanitary condition that shellfish may be taken therefrom for use as food. Shellfish lands that do not meet the criteria for certified (open) shellfish lands must be designated as uncertified (closed) to protect public health.

Rule makings to amend 6 NYCRR 41, Sanitary Condition of Shellfish Lands, can potentially have a positive or negative effect on jobs for shellfish harvesters. Amendments to reclassify areas as certified may increase job opportunities, while amendments to reclassify areas as uncertified may limit harvesting opportunities.

The department does not have specific information regarding the locations in which individual diggers harvest shellfish, and therefore is unable to assess the specific job impacts on individual shellfish diggers. In general terms, amendments of 6 NYCRR Part 41 to designate areas as uncertified can have negative impacts on harvesting opportunities. The extent of the impact will be determined by the acreage closed, the type of closure (year-round or seasonal), the area's productivity, and the market value of the shellfish. In general, any negative impacts are small because the department's actions to designate areas as uncertified typically only affect a small portion of the shellfish lands in the state. Negative impacts are also diminished in many instances by the fact that shellfish harvesters are able to redirect effort to adjacent certified areas.

Categories and numbers affected:

Licensed commercial shellfish diggers can be affected by amendments to 6 NYCRR Part 41. Most harvesters are self-employed, but there are some who work for companies with privately controlled shellfish lands or who harvest surf clams or ocean quahogs in the Atlantic Ocean.

As of August, 2010, there were 1,680 licensed shellfish diggers in New York State. The number of permits issued for areas in the State is as follows: New York City, 36; Westchester, 5; Town of Hempstead, 104; Town of Oyster Bay, 123; Town of North Hempstead, 4; Town of Babylon, 71; Town of Islip, 122; Town of Brookhaven, 294; Town of Southampton, 161; Town of East Hampton, 245; Town of Shelter Island, 40; Town of Southold, 224; Town of Riverhead, 53; Town of Smithtown, 29; Town of Huntington, 155; other, 5. It is estimated that ten (10) to twenty-five (25) percent of the diggers are full-time harvesters. The remainder are seasonal or part-time harvesters.

Regions of adverse impact:

Certified shellfish lands that could potentially be affected by amendments to 6 NYCRR Part 41 are located in or adjacent to Nassau County, Suffolk County, and a portion of the Atlantic Ocean south and east of New York City. There is no potential adverse impact to jobs in any other areas of New York State.

Minimizing adverse impact:

Shellfish lands are designated as uncertified to protect public health as required by the Environmental Conservation Law. Some impact from rule makings to close areas that do not meet the criteria for certified shellfish lands is unavoidable.

To minimize the impact of closures of shellfish lands, the department evaluates areas to determine whether they can be opened seasonally during periods of improved water quality. The department also operates Conditional Harvesting Programs at the request of, and in cooperation with, local governments. Conditional Harvesting Programs allow harvest in uncertified areas under prescribed conditions, determined by studies, when bacteriological water quality is acceptable. Additionally, the department operates transplant harvesting programs which allow removal of shellfish from closed areas for cleansing in certified areas, thereby recovering a valuable resource. Conditional and transplant programs increase harvesting opportunities by making the resource in a closed area available under controlled conditions.

In this particular rule making, a number of the areas affected have only been closed seasonally. This is intended to minimize the adverse impact on individual shellfish diggers.

Self-employment opportunities:

A large majority of shellfish harvesters in New York State are self-employed. Rule makings to change the classification of shellfish lands can have an impact on self-employment opportunities. The impact is dependent on the size and productivity of the affected area and the availability of adjacent lands for shellfish harvesting.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Incorporation by Reference of Federal NESHAP Rules

I.D. No. ENV-52-10-00014-P

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

Proposed Action: This is a consensus rule making to amend Part 200 of Title 6 NYCRR.

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

Subject: Incorporation by reference of Federal NESHAP rules.

Purpose: Incorporation by reference of the Federal NESHAP rules, update the reference to the Consumer Price Index, and correct errors.

Public hearing(s) will be held at: 2:00 p.m., Feb. 14, 2011 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-B, Albany, NY; 2:00 p.m., Feb. 15, 2011 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY; and 2:00 p.m., Feb. 16, 2011 at Department of Environmental Conservation Region 8 Office Conference Rm., 6274 E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY.

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

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

Text of proposed rule:

Existing sections 200.1 through 200.8 remain unchanged.

Existing section 200.9 is amended as follows:

Section 200.9 Referenced material.

Table 1

Regulation	Referenced Material	Availability
6 NYCRR Part/sec./etc	CFR (Code of Federal Regulations) or other	
200.10(b)		
Table 2	40 CFR Part 60 (July 1, 2003)	*
	71 FR 27324-27348 (May 10, 2006)	*
	70 FR 74870-74924 (December 16, 2005)	*
200.10(c)		
Table 3	40 CFR Part 61 (July 1, [2003] 2007)	*
200.10(d)		
Table 4	40 CFR Part 63 (July 1, [2007] 2009)	*
200.10(e)		
Table 5	40 CFR Part 52.21 (July 1, [1995] 2009)	*
	[40 CFR Part 72 to 85 (July 1, 2003)]	*
	40 CFR Part 72-74 (July 1, 2003)	*
	40 CFR Part 75 (July 1, 2006)	*
	40 CFR Part 76-78 (July 1, 2003)	*
	40 CFR Part 82 (July 1, 2003)	*
242-1.2(b)(38)	U.S. Department of Labor, Bureau of Labor Statistics unadjusted Consumer Price Index for all Urban Consumers for the U.S. (September [2007] 2010)	**

The remainder of section 200.9 remains unchanged. Existing section 200.10, subdivisions 200.10(a) through 200.10(b) remain unchanged.

Existing subdivision 200.10(c) is amended to read as follows: (c) Table 3.

Table 3 National Emission Standards for Hazardous Air Pollutants

'40 CFR 61 Subpart'	'Source Category'	'Page Numbers in July 1, [2003] 2007 Edition of 40 CFR 61'
A*	General Provisions	8-39
B	Radon Emissions from Underground Uranium Mines	[36-38] 39-41
C*	Beryllium	[38-40] 41-43
D*	Beryllium Rocket Motor Firing	[40-41] 43-44

E*	Mercury	[41-47] 44-50
F*	Vinyl Chloride	[47-64] 50-68
H	Emissions of Radionuclides Other Than Radon From Department of Energy Facilities	[64-70] 68-73
I	Radionuclide Emissions From Federal Facilities [Licensed by the] Other Than Nuclear Regulatory Commission Licensees and [Federal Facilities not] Not Covered by Subpart H	[70-75] 73-79
J	Equipment Leaks (Fugitive Emission Sources) [for] of Benzene	[75-76] 79
K	Radionuclide Emissions from Elemental [Phosphate] Phosphorous Plants	[76-78] 79-82
L	Benzene Emissions From Coke By-Product Recovery Plants	[79-91] 82-94
M*	Asbestos [(Manufacturing)]	[91-124] 94-127
N	Inorganic Arsenic Emissions From Glass Manufacturing Plants	[124-131] 127-134
O	Inorganic Arsenic Emissions From Primary Copper Smelters	[131-138] 134-141
P	Inorganic Arsenic Emissions from Arsenic Trioxide and Metallic Arsenic Production Facilities	[138-142] 141-145
Q	Radon Emissions from Department of Energy Facilities	[142] 145
R	Radon Emissions from Phosphogypsum Stacks	[142-148] 145-151
T	Radon Emissions from the Disposal of Uranium Mill Tailings	[148-151] 151-154
V	Equipment Leaks (Fugitive Emission Sources)	[151-167] 154-169
W	Radon Emissions from Operating Mill Tailings	[167-168] 170-171
Y	Benzene Emissions From Benzene Storage Vessels	[168-178] 171-181
BB	Benzene Emissions from Benzene Transfer Operations	[178-187] 181-190
FF	Benzene Waste Operations	187-224] 190-227
Appendix A	Compliance Status Information	[225-231] 228-234
Appendix B	Test Methods [101-115]	[231-300] 234-318
Appendix C	Quality Assurance Procedures	[300-302] 319-321
Appendix D	Methods for Estimating Radionuclide Emissions	[302] 321-322
Appendix E	Compliance Procedures Methods for Determining Compliance with Subpart I	[302-309] 322-330

Existing subdivision 200.10(d) is amended to read as follows:

(d) Table 4.

Table 4 National Emission Standards for Hazardous Air Pollutants

'40 CFR 63 Subpart'	'Source Category'	'Page Number in July 1, [2007] 2009 Edition or Date of Promulgation & Federal Register Cite'
*A	General Provisions	[11-70] 11-74 Vol. 1

*B	Requirements for Control Technology [Determination] <i>Determinations</i> for Major Sources in Accordance with Clean Air Sections, Sections 112(g) and 112(j)	[70-93] 74-97 Vol. 1	*II	[Shipbuilding/Ship] <i>Shipbuilding and Ship Repair</i> (Surface Coating)	263-278 Vol. 2
*F	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry	[153-188] 174-209 Vol. 1	*JJ	Wood Furniture Manufacturing Operations	279-307 Vol. 2
*G	Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry for Process Vents, Storage Vessels, Transfer Operations and Wastewater	[189-349] 209-370 Vol. 1	*KK	Printing and Publishing Industry	307-340 Vol. 2
*H	Organic Hazardous Air Pollutants for Equipment Leaks	[349-390] 370-411 Vol. 1	*LL	Primary Aluminum Reduction Plants	340-360 Vol. 2
*I	Organic Hazardous Air Pollutants for Certain Processes Subject to the Negotiated Regulations for Equipment Leaks	[390-400] 411-421 Vol. 1	*MM	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semicheical Pulp Mills	360-378 Vol. 2
[*J	Polyvinyl Chloride and Copolymers Production	400-401 Vol. 1]	*OO	[National Emission Standards for] Tanks-Level 1	378-383 Vol. 2
*L	Coke Oven Batteries	[401-428] 422-449 Vol. 1	*PP	[National Emission Standards for] Containers	383-391 Vol. 2
*M	Perchloroethylene Air Emission Standards for Dry Cleaning Facilities	[428-438] 449-459 Vol. 1	*QQ	Surface Impoundments	391-397 Vol. 2
*N	Chromium [Electroplating and Anodizing] <i>Emissions from Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks</i>	[438-467] 459-488 Vol. 1	*RR	Individual Drain Systems	397-401 Vol. 2
*O	Ethylene Oxide [Commercial Sterilizers] <i>Emissions Standards for Sterilization Facilities</i>	[467-482] 488-503 Vol. 1	*SS	Closed Vent Systems, Control Devices, Recovery Devices, and Routing to a Fuel Gas System or a Process	402-439 Vol. 2
*Q	Industrial Process Cooling Towers	[482-486] 503-507 Vol. 1	*TT	Equipment Leaks - Control Level 1	439-461 Vol. 2
*R	Gasoline Distribution Facilities (<i>Bulk Gasoline Terminals and Pipeline Breakout Stations</i>)	[486-499] 507-520 Vol. 1	*UU	Equipment Leaks - Control Level 2 <i>Standards</i>	461-494 Vol. 2
*S	Pulp and Paper [(P&P I and III)] <i>Industry</i>	[500-532] 521-553 Vol. 1	*VV	Oil-Water Separators and Organic-Water Separators	494-502 Vol. 2
*T	Halogenated Solvent Cleaning	[532-563] 553-584 Vol. 1	*WW	Storage Vessels (<i>Tanks</i>) - Control Level 2	503-509 Vol. 2
*U	Group I Polymer and Resins	[563-683] 584-704 Vol. 1	*XX	Ethylene Manufacturing Process Units: Heat Exchange Systems and Waste Operations	509-518 Vol. 2
*W	[National Emission Standards for Hazardous Air Pollutants for] Epoxy Resins Production and Non-Nylon Polyamides Production	[683-696] 704-717 Vol. 1	*YY	Generic Maximum Achievable Control Technology Standards	518-579 Vol. 2
*X	Secondary Lead [Smelters] <i>Smelting</i>	[696-709] 717-730 Vol. 1	*CCC	Steel Pickling – HCl <i>Process Facilities and [HCl] Hydrochloric Acid Regeneration Plants</i>	579-588 Vol. 2
*Y	Marine Tank Vessel Loading Operations	[709-739] 730-760 Vol. 1	*DDD	Mineral Wool Production	588-599 Vol. 2
*AA	Phosphoric Acid Manufacturing Plants	11-21 Vol. 2	*EEE	[Hazardous Air Pollutants From] Hazardous Waste Combustors	[9-111] 9-115 Vol. 3
*BB	Phosphate Fertilizers Production Plants	21-31 Vol. 2	*GGG	Pharmaceuticals Production	[111-222] 115-226 Vol. 3
*CC	Petroleum Refineries	31-93 Vol. 2	*HHH	Natural Gas Transmission and Storage Facilities	[222-250] 226-254 Vol. 3
*DD	Off-Site Waste and Recovery Operations	93-146 Vol. 2	*III	Flexible Polyurethane Foam Production	[250-280] 254-284 Vol. 3
*EE	Magnetic Tape Manufacturing Operations	146-174 Vol. 2	*JJJ	Group IV [Polymer] <i>Polymers and Resins</i>	[280-401] 284-403 Vol. 3
*GG	Aerospace Manufacturing and Rework Facilities	174-226 Vol. 2	*LLL	Portland Cement Manufacturing Industry	[401-423] 404-425 Vol. 3
*HH	Oil and Natural Gas Production [Plants] <i>Facilities</i>	226-263 Vol. 2	*MMM	Pesticide Active Ingredient Production	[423-504] 425-506 Vol. 3
			*NNN	Wool Fiberglass Manufacturing	[504-519] 507-522 Vol. 3
			*OOO	<i>Manufacture of</i> Amino/Phenolic Resins [Manufacturing]	[519-584] 522-587 Vol. 3
			*PPP	Polyether Polyols Production	[584-663] 587-665 Vol. 3
			*QQQ	Primary Copper <i>Smelting</i>	27-51 Vol. 4
			*RRR	Secondary Aluminum Production	51-94 Vol. 4
			*TTT	Primary Lead Smelting	95-103 Vol. 4
			*UUU	Petroleum Refineries: Catalytic Cracking <i>Units</i> , Catalytic Reforming <i>Units</i> , and Sulfur Recovery Units	103-179 Vol. 4
			*VVV	Publicly Owned Treatment Works	179-188 Vol. 4

*XXX	Ferroalloys Production: Ferromanganese and Silicomanganese	188-200 Vol. 4	*IIIII	Mercury Emissions from Mercury Cell Chlor-Alkali Plants	[282-309] 290-317 Vol. 5
*AAAA	Municipal Solid Waste Landfills	200-207 Vol. 4	*LLLLL	Asphalt [Roofing and] Processing and Asphalt Roofing Manufacturing	[356-378] 364-386 Vol. 5
*CCCC	Manufacturing of Nutritional Yeast	207-220 Vol. 4	*MMMMM	Flexible Polyurethane Foam Fabrication Operations	[378-392] 386-400 Vol. 5
*DDDD	Plywood and Composite Wood Products	[220-280] 220-262 Vol. 4	*NNNNN	Hydrochloric Acid Production	[10-28] 16-33 Vol. 6
*EEEE	Organic Liquid Distribution (Non-Gasoline)	[280-322] 262-305 Vol. 4	*PPPPP	Engine Test Cells/Standards	[28-54] 34-59 Vol. 6
*FFFF	Miscellaneous Organic Chemical Manufacturing	[322-367] 305-349 Vol. 4	*QQQQQ	Friction [Productions] Materials Manufacturing Facilities	[54-62] 60-68 Vol. 6
*GGGG	Solvent Extraction For Vegetable Oil Production	[367-391] 349-374 Vol. 4	*RRRRR	Taconite Iron Ore Processing	[62-86] 68-92 Vol. 6
*HHHH	[Wet Formed] <i>Wet-Formed</i> Fiberglass Mat Production	[392-407] 374-389 Vol. 4	*SSSSS	Refractory Products Manufacturing	[87-135] 92-141 Vol. 6
*IIII	Surface Coating of Automobiles and Light-Duty Trucks	[407-467] 389-449 Vol. 4	*TTTTT	Primary Magnesium Refining	[135-147] 141-153 Vol. 6
*JJJJ	Paper and Other Web Coating	[467-499] 449-481 Vol. 4	*WWWWW	Hospital Ethylene Oxide Sterilizers	153-157 Vol. 6
*KKKK	Surface Coating of Metal Cans	[499-553] 481-535 Vol. 4	*YYYYY	Electric Arc Furnace Steelmaking Facilities	157-166 Vol. 6
*MMMM	Surface Coating of Miscellaneous Metal Parts and Products	[553-608] 536-590 Vol. 4	*ZZZZZ	Iron and Steel Foundries Area Sources	166-187 Vol. 6
*NNNN	[Large Appliance] Surface Coating of Large Appliances	[608-648] 590-630 Vol. 4	*BBBBB	Gasoline Distribution Bulk Terminals, Bulk Plants, and Pipeline Facilities	187-204 Vol. 6
*OOOO	Printing, Coating, and Dyeing of Fabrics and Other Textiles	[648-711] 630-694 Vol. 4	*CCCCCC	Gasoline Dispensing Facilities	204-214 Vol. 6
*PPPP	Surface Coating of Plastic Parts and Products	[711-762] 694-745 Vol. 4	*DDDDD	Polyvinyl Chloride and Copolymers Production Area Sources	[147-148] 214-216 Vol. 6
*QQQQ	Surface Coating of Wood Building Products	[762-806] 745-789 Vol. 4	*EEEEEE	Primary Copper Smelting Area Sources	[148-161] 216-228 Vol. 6
*RRRR	[Metal Furniture] Surface Coating of Metal Furniture	[806-848] 789-831 Vol. 4	*FFFFFF	Secondary Copper Smelting Area Sources	[161-166] 229-233 Vol. 6
*SSSS	[Metal Coil] Surface Coating of Metal Coil	[848-874] 831-857 Vol. 4	*GGGGG	Primary [Nonferrous] Nonferrous Metals Area Sources – Zinc, Cadmium, and Beryllium	[166-176] 234-243 Vol. 6
*TTTT	Leather Finishing Operations	[874-890] 857-873 Vol. 4	*HHHHH	Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources	243-257 Vol. 6
*UUUU	Cellulose Products Manufacturing	[890-939] 873-922 Vol. 4	*LLLLL	Acrylic and Modacrylic Fibers Production Area Sources	257-264 Vol. 6
*VVVV	Boat Manufacturing	[939-967] 922-950 Vol. 4	*MMMMM	Carbon Black Production Area Sources	264-265 Vol. 6
*WWWW	Reinforced Plastic Composites Production	[967-1026] 950-1009 Vol. 4	*NNNNN	Chemical Manufacturing Area Sources: Chromium Compounds	265-275 Vol. 6
*XXXX	Rubber Tire Manufacturing	[1026-1061] 1009-1044 Vol. 4	*OOOOO	Flexible Polyurethane Foam Production and Fabrication Area Sources	275-279 Vol. 6
*YYYY	Stationary Combustion Turbines	[1061-1077] 1044-1060 Vol. 4	*PPPPP	Lead Acid Battery Manufacturing Area Sources	279-282 Vol. 6
*ZZZZ	Stationary Reciprocating Internal Combustion Engines	[15-37] 16-41 Vol. 5	*QQQQQ	Wood Preserving Area Sources	282-286 Vol. 6
*AAAAA	Lime Manufacturing Plants	[38-61] 42-65 Vol. 5	*RRRRR	Clay Ceramics Manufacturing Area Sources	286-291 Vol. 6
*BBBBB	Semiconductor Manufacturing	[61-71] 65-75 Vol. 5	*SSSSS	Glass Manufacturing Area Sources	291-302 Vol. 6
*CCCCC	Coke [Oven] <i>Ovens</i> : Pushing, Quenching, and Battery Stacks	[71-97] 75-102 Vol. 5	*TTTTT	Secondary Nonferrous Metals Processing Area Sources	302-307 Vol. 6
*EEEEE	Iron and Steel [Foundries] <i>Foundries</i>	[150-178] 155-186 Vol. 5	*WWWWW	Plating and Polishing Operations	308-322 Vol. 6
*FFFFF	Integrated Iron and Steel Manufacturing Facilities	[178-202] 186-210 Vol. 5	*XXXXX	Nine Metal Fabrication and Finishing Source Categories	322-340 Vol. 6
*GGGGG	Site Remediation	[202-258] 210-266 Vol. 5	*YYYYY	Ferroalloys Production Facilities	341-346 Vol. 6
*HHHHH	Miscellaneous Coating Manufacturing	[258-282] 266-290 Vol. 5	*ZZZZZ	Aluminum, Copper, and Other Nonferrous Foundries	346-356 Vol. 6

*Appendix A	Test Methods	[176-375] 357-556 Vol. 6
*Appendix B	Sources Defined for Early Reduction Provisions	[376] 557 Vol. 6
*Appendix C	Determination of the Fraction Biodegraded (F _{bio}) in a Biological Treatment Unit	[376-407] 557-588 Vol. 6
*Appendix D	Alternative Validation Procedure For EPA Waste and Wastewater Methods	[407-408] 588-589 Vol. 6
*Appendix E	Monitoring Procedure For Nonthoroughly Mixed Open Biological Treatment Systems at Kraft Pulp Mills Under Unsafe Sampling Conditions	[408-420] 589-601 Vol. 6

Existing subdivision 200.10(e) is amended to read as follows:
 (e) Table 5. Table 5 Miscellaneous Federal Regulations that are Applicable Requirements
 (*Those that are delegated)

'Federal Register or CFR Cite'	'Regulation'	'Page Number in July 1, 2003 Edition of CFR'
40 CFR Part 52	Prevention of Significant Deterioration of Air Quality	[4-57 July 1, 1995] 14-51 July 1, 2009

Text of proposed rule and any required statements and analyses may be obtained from: Rick Leone, NYSDEC Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: neshaps@gw.dec.state.ny.us

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

Public comment will be received until: February 23, 2011.

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

Consensus Rule Making Determination

NYCRR Part 200, section 200.10 incorporates by reference the Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) which appear in 40 CFR Parts 61 and 63. The purpose of the rulemaking is to update two tables of National Emission Standards for Hazardous Air Pollutants. Table 3 will add a reference to 40 CFR Part 61 Subpart A and will cite the 2007 Code of Federal Regulations. Table 4 will cite the 2009 Code of Federal Regulations for 40 CFR Part 63. Table 5 will be updated to reference the 2009 Code of Federal Regulations for Prevention of Significant Deterioration of Air Quality.

In addition to the amendments to section 200.10, section 200.9 will be updated to reflect the new and modified references in Section 200.10 and update the reference to the Consumer Price Index to 2010.

The rulemaking will also correct typographical errors.

The proposed rulemaking adopts already existing Federal standards only and therefore does not impose additional requirements on regulated entities. Consequently, no person is likely to object to this rulemaking.

Job Impact Statement

Nature of impact:

This proposed rulemaking will have no impact on numbers of jobs or employment opportunities in the State. The purpose of the rulemaking is to update two tables of National Emission Standards for Hazardous Air Pollutants; Table 3 will add a reference to Subpart A and cite the 2007 Code of Federal Regulations and Table 4 will cite the 2009 Code of Federal Regulations, update the reference to the Consumer Price Index in 200.9 to the 2010 version, Table 5 will update the reference to Prevention of Significant Deterioration of Air Quality to the 2009 version. This rulemaking will also correct typographical errors. The proposed rulemaking adopts Federal standards only and does not impose additional requirements on regulated entities.

2. Categories and numbers affected:

This proposed rulemaking will not affect specific categories of jobs nor will it affect the number of jobs or employment opportunities.

3. Regions of adverse impact:

There are no regions of the State where the proposed revisions would

have a disproportionate adverse impact on jobs or employment opportunities.

4. Minimizing adverse impact:

Since this proposed rulemaking will not affect the number of jobs or employment opportunities, there have been no steps taken to minimize the impact on existing jobs.

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

Sanitary Condition of Shellfish Lands

I.D. No. ENV-52-10-00004-P

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

Proposed Action: Amendment of sections 41.2 and 41.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

Subject: Sanitary Condition of Shellfish Lands.

Purpose: To reclassify shellfish lands to allow the harvest of shellfish during all or part of the year.

Text of proposed rule: 6 NYCRR Part 41, Sanitary Condition of Shellfish Lands, is amended to read as follows:

Section 41.0 through clause 41.2(b)(4)(ii)('e') remains unchanged.

Existing clause 41.2(b)(4)(ii)('f') is repealed.

Subparagraph 41.2(b)(4)(iii) through clause 41.3(b)(3)(i)('j') remain unchanged.

Existing clause 41.3(b)(3)(ii)('a') is repealed.

New clause 41.3(b)(3)(ii)('a') is adopted to read as follows:

('a') All that area of Great South Bay, Patchogue Bay and its tributaries lying northerly of a line extending easterly from the southeast corner of the wooden bulkhead located at the foot of Blue Point Avenue, Blue Point, to the southeastern corner of the southeasternmost residence on Rod Street, approximately 100 yards southeast of the foot of Dunton Avenue, West Bellport (said residence is a two-story house, white brick and light grey shingle with light grey roof).

Existing clause 41.3(b)(3)(ii)('b') through clause 41.3(b)(4)(iv)('a') remain unchanged.

Existing clause 41.3(b)(4)(iv)('b') is repealed.

Existing subparagraph 41.3(b)(4)('v') through clause 41.3(b)(4)(ix)('e') remain unchanged.

Existing clause 41.3(b)(4)(ix)('f') is repealed.

Existing subparagraphs 41.3(b)(4)(x) through 41.3(b)(7)(iii) remain unchanged.

Subparagraph 41.3(b)(7)(iv) is repealed.

New subparagraph 41.3(b)(7)(iv) is adopted to read as follows:

(iv) Mattituck Inlet and Mattituck Creek

('a') During the period April 16 through January 14, both dates inclusive, all that area of Mattituck Creek north of a line extending easterly from the end of West Mill Road to the end of East Mill Road on the opposite shore.

('b') During the period January 1 through December 31, both dates inclusive, all that area of Mattituck Creek south of a line extending easterly from the end of West Mill Road to the end of East Mill Road on the opposite shore.

Subparagraph 41.3(b)(7)(v) through clause 41.3(b)(7)(vi)('c') remains unchanged.

Existing clause 41.3(b)(7)(vii)('a') is repealed.

New clause 41.3(b)(7)(vii)('a') is adopted to read as follows:

('a') During the period January 1 through December 31, both dates inclusive, all that area of Hashamomuck Pond and Long Creek lying west of a line extending southerly from the orange marker located on the shore at the Terrace Garden Colony Cottages to the opposite shoreline; and lying southerly of the line extending easterly from the orange marker located on the shoreline of the residence at 645 Mill Creek Drive to the orange marker on the opposite shore.

Existing clause 41.3(b)(7)(vii)('b') through clause 41.3(b)(8)(i)('e') remain unchanged.

Existing clause 41.3(b)(8)(i)('f') is repealed.

Existing subparagraph 41.3(b)(8)(ii) through section 41.5 remain unchanged.

Text of proposed rule and any required statements and analyses may be obtained from: Melissa Albino Hegeman, Department of Environmental Conservation, 205 N Belle Meade Rd., Suite 1, East Setauket, NY 11733, (631) 444-0491, email: maalbino@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 DEC.

Consolidated Regulatory Impact Statement

This Consolidated Regulatory Impact Statement is part of a rule making that will classify State shellfish lands as certified (open to shellfish harvesting) or uncertified (closed to shellfish harvesting) based on standards specified in 6 NYCRR 47.

1. Statutory authority:

The statutory authority for designating shellfish lands as certified or uncertified is given in Environmental Conservation Law (ECL) section 13 0307. Subdivision 1 of section 13 0307 of the ECL requires the Department of Environmental Conservation (the department) to periodically conduct examinations of all shellfish lands within the marine district to ascertain the sanitary condition of these areas. Subdivision 2 of this section requires the department to certify which shellfish lands are in such sanitary condition that shellfish may be taken for food. Such lands are designated as certified shellfish lands. All other shellfish lands are designated as uncertified.

The statutory authority for promulgating regulations with respect to the harvest of shellfish is given in ECL section 13 0319.

2. Legislative objectives:

The legislative objectives are to ensure that shellfish lands are appropriately classified as either certified or uncertified and to protect public health by preventing the harvest and consumption of shellfish from lands that do not meet the standards for a certified shellfish land.

3. Needs and benefits:

Regulations that designate shellfish lands as certified are needed to ensure that state shellfish resources located within lands that meet the sanitary criteria for a certified area are available for harvest. Shellfish are a valuable state resource and, where possible, should be available for commercial and recreational harvest. The classification of previously uncertified shellfish lands as certified may provide additional sources of income for commercial shellfish diggers by increasing the amount of areas available for harvest. Recreational harvesters also benefit by having increased harvest opportunities and the ability to make use of a natural resource readily available to the public. The direct harvest of shellfish for use as food is allowed from certified shellfish lands only.

Regulations that designate shellfish lands as uncertified are needed to prevent the harvest and consumption of shellfish from lands that do not meet the sanitary criteria for a certified area. Shellfish harvested from uncertified shellfish lands have a greater potential to cause human illness due to the possible presence of pathogenic bacteria or viruses. These pathogens may cause the transmission of infectious disease to the shellfish consumer.

These regulations also protect the shellfish industry. Seafood wholesalers, retailers, and restaurants are adversely affected by public reaction to instances of shellfish related illness. By prohibiting the harvest of shellfish from lands that fail to meet the sanitary criteria, these regulations can ensure that only wholesome shellfish are allowed to be sold to the shellfish consumer.

4. Costs:

There will be no costs to State or local governments. No direct costs will be incurred by regulated commercial shellfish harvesters in the form of initial capital investment or initial non capital expenses, in order to comply with these proposed regulations.

The department cannot provide an estimate of potential lost income

to shellfish harvesters when areas are classified as uncertified, due to a number of variables that are associated with commercial shellfish harvesting; nor can the potential benefits be estimated when areas are reopened. Those variables are listed in the following three paragraphs.

As of August 1, 2010, the department had issued 1,680 New York State shellfish digger's permits. However, the actual number of those individuals who harvest shellfish commercially full time is not known. Recreational harvesters who wish to harvest more than the daily recreational limit of 100 hard clams, with no intent to sell their catch, can only do so by purchasing a New York State digger's permit. The number of individuals who hold shellfish diggers permits for that type of recreational harvest is unknown. The department's records do not differentiate between full time and part-time commercial or recreational shellfish harvesters.

The number of harvesters working in a particular area cannot be estimated for the reason stated above. In addition, the number of harvesters in a particular area is dependent upon the season, the amount of shellfish resource in the area, the price of shellfish and other economic factors, unrelated to the department's proposed regulatory action. When a particular area is classified as uncertified (closed to shellfish harvesting), harvesters can shift their efforts to other certified areas.

Estimates of the existing shellfish resource in a particular embayment are not known. Recent shellfish population assessments have not been conducted by the department. Without this information, the department cannot determine the effect a closure or reopening would have on the existing shellfish resource.

The department's actions to classify areas as certified or uncertified are not dependent on the shellfish resources in a particular area. They are based solely on the results of water quality analyses, the need to protect public health and statutory requirements.

There is no cost to the department. Administration and enforcement of the proposed amendment are covered by existing programs.

5. Local government mandates:

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

6. Paperwork:

No new paperwork is required.

7. Duplication:

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

8. Alternatives:

There are no significant alternatives. ECL section 13 0307 stipulates that when the department has determined that a shellfish land meets the sanitary criteria for certified shellfish lands, the department must designate the land as certified and open to shellfish harvesting. All other shellfish lands must be designated as uncertified and closed to shellfish harvesting. These actions are necessary to protect public health.

9. Federal standards:

There are no federal standards regarding the certification of shellfish lands. New York and other shellfish producing and shipping states participate in the National Shellfish Sanitation Program (NSSP) which provides guidelines intended to promote uniformity in shellfish sanitation standards among members. NSSP is a cooperative program consisting of the federal government, states and the shellfish industry. Participation in the NSSP is voluntary; each state adopts its own regulations to implement a shellfish sanitation program consistent with the NSSP. The U.S. Food and Drug Administration (FDA) evaluates state programs and standards relative to NSSP guidelines. Substantial non conformity with NSSP guidelines can result in sanctions being taken by FDA, including removal of a state's shellfish shippers from the Interstate Certified Shellfish Shippers List. This would effectively bar a non conforming state's shellfish products from interstate commerce.

10. Compliance schedule:

Compliance with any new regulations designating areas as certified or uncertified does not require additional capital expense, paperwork,

record keeping or any action by the regulated parties. Immediate compliance with any regulation designating shellfish lands as uncertified is necessary to protect public health. Shellfish harvesters are notified of changes in the classification of shellfish lands by mail either prior to, or concurrent with, the adoption of new regulations. Therefore, immediate compliance can be readily achieved.

Consolidated Regulatory Flexibility Analysis

This Consolidated Regulatory Flexibility Analysis for Small Businesses and Local Governments is part of a rule making that will classify State shellfish lands as certified (open to shellfish harvesting) or uncertified (closed to shellfish harvesting) based on standards specified in 6 NYCRR 47.

Effect on small business and local government:

As of August 1, 2010, there were 1,680 licensed shellfish diggers in New York State. The number of permits issued for areas in the State is as follows: New York City, 36; Westchester, 5; Town of Hempstead, 104; Town of Oyster Bay, 123; Town of North Hempstead, 4; Town of Babylon, 71; Town of Islip, 122; Town of Brookhaven, 294; Town of Southampton, 161; Town of East Hampton, 245; Town of Shelter Island, 40; Town of Southold, 224; Town of Riverhead, 53; Town of Smithtown, 29; Town of Huntington, 155; other, 14.

Whenever shellfish lands are classified as uncertified (closed to shellfish harvesting), there may be some loss of income for shellfish diggers who harvest shellfish from the lands to be closed. This loss is determined by the acreage to be closed, the amount of time the shellfish land is closed (whether year-round or only closed seasonally), the species of shellfish present in the area, the area's productivity, and the market value of the shellfish resource present in the particular area.

When uncertified shellfish lands are found to meet the sanitary criteria for a certified shellfish land and are then classified as certified (open to shellfish harvesting), there is also a potential to affect the income of commercial shellfish diggers. More shellfish lands are made available for the harvest of shellfish, and there is a potential for an increase in shellfish harvest and in income. The effect of the re opening a shellfish land on the income of a digger is determined by the shellfish species present in the area, the area's productivity, and the market value of the shellfish resource present in the area.

Local governments on Long Island exercise management authority for shellfish lands within their boundaries and share law enforcement responsibility for shellfish with the State and the Counties of Nassau and Suffolk. These are the Towns of Hempstead, North Hempstead and Oyster Bay in Nassau County and the Towns of Babylon, Islip, Brookhaven, Southampton, East Hampton, Southold, Shelter Island, Riverhead, Smithtown and Huntington in Suffolk County. Changes in the classification of shellfish lands impose no additional requirements on local governments above the level of management and enforcement that they normally undertake; therefore, there should be no effect on local governments.

Compliance requirements:

There are no reporting or recordkeeping requirements for small businesses or local governments.

Professional services:

Small businesses and local governments will not require any professional services to comply with proposed rules.

Compliance costs:

There are no capital costs which will be incurred by small businesses or local governments.

Minimizing adverse impact:

The classification of shellfish lands as uncertified may have an adverse impact on the harvest opportunities available to commercial shellfish diggers. All diggers in the towns affected by proposed closures will be notified by mail of the changes in classification of local shellfish lands, prior to the date the changes go into effect. To minimize any adverse effects of proposed closures, towns may request that uncertified shellfish lands be considered for a conditional shellfish harvest program or a shellfish transplant project. These programs allow shellfish harvesters to utilize shellfish resources present in areas uncertified for the harvest of shellfish, under the direction of the department. Shellfish diggers will also be able to shift harvesting ef-

fort to nearby certified shellfish lands. Lastly, seasonal closures will be implemented whenever possible; harvest will be closed only those times during the year when an area fails to meet the sanitary criteria for a certified land. There should be no significant adverse impact on local governments from most changes in the classification of shellfish lands.

Small business and local government participation:

Impending shellfish closures are discussed at regularly scheduled Shellfish Advisory Committee meetings. This committee, organized by the department, is comprised of representatives of local baymen's associations and local town officials. Through their representatives, shellfish harvesters can express their opinions and give recommendations to the department concerning shellfish land classification. Local governments, State legislators, and baymen's organizations are notified by mail and given the opportunity to comment on any proposed rulemaking prior to filing with the Department of State.

Economic and technological feasibility:

As specified above, there are no reporting, recordkeeping or affirmative acts that small businesses or local governments must undertake to comply with the proposed rules which result in the reclassification of shellfish harvesting areas as certified or uncertified. Similarly, small businesses and local governments will not have to retain any professional services or incur any capital costs to comply with such rules. As a result, it should be economically and technically feasible for small businesses and local governments to comply with rules of this type.

Consolidated Rural Area Flexibility Analysis

This Consolidated Rural Area Flexibility Analysis is part of a rule making that will classify State shellfish lands as certified (open to shellfish harvesting) or uncertified (closed to shellfish harvesting) based on standards specified in 6 NYCRR 47.

Amendments to Part 41 of 6 NYCRR Sanitary Conditions of Shellfish Lands will not impose an adverse impact on rural areas. Only the State's marine district will be directly affected by regulatory amendments to open or close shellfish lands. The Department of Environmental Conservation (department) has determined that there are no rural areas within the marine district, and no shellfish lands within the marine district are located adjacent to any rural areas of the State. The proposed regulations will not impose reporting, record keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by amendments to Part 41 of 6 NYCRR, the department has determined that a Rural Area Flexibility Analysis is not required.

Consolidated Job Impact Statement

This Consolidated Job Impact Statement is part of a rule making that will classify State shellfish lands as certified (open to shellfish harvesting) or uncertified (closed to shellfish harvesting) based on standards specified in 6 NYCRR 47.

Nature of impact:

The proposed rule will amend 6 NYCRR Part 41 and classify shellfish lands as certified or uncertified for the harvest of shellfish based on sanitary criteria specified in 6 NYCRR Part 47.

When a shellfish land is classified as certified (open to shellfish harvesting), there may be increased job opportunities for shellfish harvesters due to the increased area available for harvest, a positive impact on jobs. In the event an area is classified as uncertified (closed to shellfish harvesting) there may be a decrease in harvesting opportunities due to the decrease in area available for harvest and negative impacts on jobs for shellfish harvesters. The extent of the impact on shellfish harvesters will be determined by the amount of area opened or closed, the amount of time during the year the area is closed (year-round or seasonally), the area's productivity, and the market value of the shellfish present in the area. In general, any negative impacts are small because the department's actions to designate areas as uncertified typically only affect a small portion of the shellfish lands in the State. Negative impacts are also diminished in many instances by the fact that shellfish harvesters are able to redirect fishing effort to adjacent certified areas.

The department does not have specific information regarding the specific locations in which individual diggers harvest shellfish, and

therefore is unable to assess the specific job impacts on individual shellfish diggers.

Categories and numbers affected:

Licensed commercial shellfish diggers can be affected by amendments to 6 NYCRR Part 41. Most harvesters are self-employed, but there are some who work for companies with privately controlled shellfish lands or who harvest surfclams or ocean quahogs in the Atlantic Ocean.

As of August, 2010, there were 1,680 licensed shellfish diggers in New York State. The number of permits issued for areas in the State is as follows: New York City, 36; Westchester, 5; Town of Hempstead, 104; Town of Oyster Bay, 123; Town of North Hempstead, 4; Town of Babylon, 71; Town of Islip, 122; Town of Brookhaven, 294; Town of Southampton, 161; Town of East Hampton, 245; Town of Shelter Island, 40; Town of Southold, 224; Town of Riverhead, 53; Town of Smithtown, 29; Town of Huntington, 155; other, 5. It is estimated that ten (10) to twenty-five (25) percent of the diggers are full-time harvesters. The remainder is seasonal or part-time harvesters.

Regions of adverse impact:

Certified shellfish lands that could potentially be affected by amendments to 6 NYCRR Part 41 are located in or adjacent to Nassau County, Suffolk County, and a portion of the Atlantic Ocean south and east of New York City. There is no potential adverse impact to jobs in any other areas of New York State.

Minimizing adverse impact:

There are no adverse impacts when areas are classified as certified.

Shellfish lands are classified as uncertified to protect public health as required by the Environmental Conservation Law. Some impact from rule makings to close areas that do not meet the criteria for certified shellfish lands is unavoidable.

To minimize the impact of closures of shellfish lands, the department evaluates areas to determine whether they can be opened seasonally during periods of improved water quality. The department also operates conditional harvesting programs at the request of, and in cooperation with, local governments. Conditional Harvesting Programs allow harvest in uncertified areas under prescribed conditions, determined by studies identifying when the area meets the sanitary criteria. Additionally, the department operates transplant harvesting programs which allow removal of shellfish from uncertified areas for relay and cleansing in certified areas, thereby recovering a valuable resource. Conditional and transplant programs increase harvesting opportunities by making the resource in uncertified areas available to harvest under controlled conditions.

Self-employment opportunities:

A large majority of shellfish harvesters in New York State are self-employed. Rule makings to amend the classification of shellfish lands may have an impact on self-employment opportunities. The impact is dependent on the amount of area affected by the amendment, the productivity of the affected area, the type of shellfish present in the area and the availability of adjacent lands for shellfish harvesting.

Department of Health

NOTICE OF ADOPTION

Post Anesthesia Evaluations at Free-Standing and Hospital Off-Site Ambulatory Surgery Centers (ASCs)

I.D. No. HLT-39-10-00005-A

Filing No. 1266

Filing Date: 2010-12-14

Effective Date: 2010-12-29

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

Action taken: Amendment of section 755.6 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

Subject: Post Anesthesia Evaluations at Free-Standing and Hospital Off-Site Ambulatory Surgery Centers (ASCs).

Purpose: Authorize those individuals who can administer anesthesia in Free-Standing and Hospital Off-Site ASCs to do post anesthesia evaluations.

Text or summary was published in the September 29, 2010 issue of the Register, I.D. No. HLT-39-10-00005-P.

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

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

Assessment of Public Comment

The public comment period for this regulation ended on November 15, 2010. The Department received 1 comment from the Healthcare Association of New York State (HANYs) and it was in support of the proposed changes. It stated that it would conform 2 sections of New York State regulations to allow the same individuals who are qualified to administer anesthesia in ambulatory surgery centers to conduct the post-anesthesia assessments prior to discharge and noted that it also conforms more closely to federal requirements.

NOTICE OF ADOPTION

Standards of Construction for Health Care Facilities

I.D. No. HLT-39-10-00007-A

Filing No. 1265

Filing Date: 2010-12-14

Effective Date: 2010-12-29

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

Action taken: Amendment of Parts 711, 712, 713, 714, 715 and 716 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2802 and 2803

Subject: Standards of Construction for Health Care Facilities.

Purpose: Update and clarify construction and physical environment standards for hospital, nursing home and certain ambulatory care facilities.

Substance of final rule: Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Parts 711, 712, 713, 715 and 716 set forth the architectural, engineering, equipment and construction and other physical environment standards for all health facilities subject to Department of Health oversight pursuant to Public Health Law (PHL) Article 28.

Proposed Revisions to 10 NYCRR Part 711

10 NYCRR Section 711.1 would be revised to more clearly identify the facilities and the standards that are subject to regulation. In addition, language would be added to clearly identify construction related information that must be filed with construction applications. The proposal would clarify the process for submitting a construction application.

10 NYCRR Section 711.2 would be revised to require health care facilities to comply with more current National Fire Protection Association ("NFPA") standards, including NFPA 101, Life Safety Code, 2000 edition, which is the life safety code currently mandated by the federal government for Medicare and Medicaid certification. In addition, 10 NYCRR Section 711.2 would be revised to require that health care facilities comply with more current national codes addressing radiation protection, facility heating, cooling and ventilation (HVAC) and gas and vacuum systems. 10 NYCRR section 711.2 would be revised to require that future health care facility construction conform to the 2010 edition of Guidelines for Design and Construction of Health Care Facilities.

10 NYCRR Section 711.3, which establishes general site requirements for health care facilities, would be revised to clarify language, add requirements for facility occupants other than patients and eliminate outdated site requirements. 10 NYCRR Sections 711.4, 711.5, 711.7, 711.8, 711.9 and 711.10 would be repealed. New 10 NYCRR Section 711.9 would set forth specific requirements for obtaining waivers of construction standards.

Proposed Revisions to 10 NYCRR Part 712

The regulatory proposal would repeal existing 10 NYCRR Part 712, which includes standards of construction for some hospitals, and replace it with a new Part 712 (Standards of Construction for General Hospital Facilities). The proposal would consolidate all requirements specific to general hospital construction into 10 NYCRR Part 712. New Part 712 would be divided into two Subparts based on the date when general hospital construction was or is to be undertaken.

New Subpart 712-1 would set forth minimum construction and physical environment standards applicable to general hospitals built and to portions of general hospitals altered or renovated pursuant to Department or commissioner approval granted prior to October 14, 1998 and to general hospital construction projects not requiring such approvals that were completed prior to October 14, 1998. New Subpart 712-1 would include requirements in existing 10 NYCRR Section 711.4 and existing 10 NYCRR Part 712.

New Subpart 712-2 would set forth minimum construction and physical environment standards applicable to general hospitals built and to portions of general hospitals altered or renovated pursuant to Department or commissioner approval granted on or after October 14, 1998 and to general hospital construction projects not requiring such approvals that were or will be completed after October 14, 1998. New Subpart 712-2 would require that construction projects comply with Guidelines for Design and Construction of Health Care Facilities and would include some additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 713

The regulatory proposal would repeal existing Part 713, which sets forth construction standards for some nursing homes, and replace it with a new Part 713 (Standards of Construction for Nursing Home Facilities). The proposal would consolidate all requirements specific to nursing home construction into 10 NYCRR Part 713. Part 713 would be divided into four subparts based on the date when nursing home construction was or is to be undertaken.

Subpart 713-1 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing home facilities renovated or altered prior to August 25, 1975 and to nursing home construction projects approved by the commissioner or Department prior to August 25, 1975. New Subpart 713-1 would include requirements that are in existing 10 NYCRR Section 711.4.

Subpart 713-2 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing home facilities renovated or altered between August 25, 1975 and July 1, 1990 and to nursing home construction projects approved by the commissioner or Department between August 25, 1975 and July 1, 1990. Subpart 713-2 would include requirements that are in existing 10 NYCRR Section 711.5.

Subpart 713-3 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing home facilities renovated or altered between July 1, 1990 and December 31, 2010 and to nursing home construction projects approved by the commissioner or Department between July 1, 1990 and December 31, 2010. Subpart 713-3 would incorporate by reference Guidelines for Design and Construction of Health Care Facilities. Additional requirements not addressed in this document would be included in the proposed Subpart.

Subpart 713-4 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing home facilities renovated or altered after December 31, 2010 and to nursing home construction projects approved by the commissioner or Department after December 31, 2010. Subpart 713-4 would require that construction projects comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 714

The regulatory proposal would consolidate all requirements specific to adult day health care program facility construction into 10 NYCRR Part 714, including requirements in existing 10 NYCRR Part 713. It would require future adult day health care program facility construction to comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 715

The regulatory proposal would repeal existing 10 NYCRR Part 715 and replace it with a new Part 715 (Standards of Construction for Freestanding Ambulatory Care Facilities). The regulatory proposal would consolidate all requirements specific to freestanding ambulatory care facilities into 10 NYCRR Part 715. New Part 715 would be divided into two Subparts based on the date when ambulatory care facility construction was or is to be undertaken.

New Subpart 715-1 would set forth minimum construction and physical environment standards applicable to: (1) diagnostic center and treatment center facilities built and to portions of such facilities renovated or altered prior to January 1, 2011; (2) general hospital offsite outpatient facilities built and to portions of such facilities renovated or altered prior to January 1, 2011; and, (3) general hospital offsite outpatient facility construction projects and diagnostic center and treatment center facility construction projects approved by the commissioner or Department prior to January 1, 2011. New Subpart 715-1 would include requirements that are in existing 10 NYCRR Section 711.7 and existing 10 NYCRR Part 715.

New Subpart 715-2 would set forth minimum construction and physical environment standards applicable to: (1) diagnostic center and treatment center facilities built and to portions of such facilities renovated or altered after January 1, 2011; (2) general hospital offsite outpatient facilities built and to portions of such facilities renovated or altered after January 1, 2011; and, (3) general hospital offsite outpatient facility construction projects and diagnostic center and treatment center facility construction projects approved by the commissioner or department after January 1, 2011. New Subpart 715-2 would require future ambulatory care construction to comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 716

The regulatory proposal would repeal existing 10 NYCRR Part 716 and replace it with a new Part 716 (Standards of Construction for Rehabilitation Facilities). The regulatory proposal would consolidate into New Part 716 all standards of construction specifically applicable to rehabilitation facilities. New Part 716 would include requirements that are in existing 10 NYCRR Section 711.8 and existing 10 NYCRR Part 712. New Part 716 would also require that future rehabilitation facility construction comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 712-1.8, 712-1.11, 712-2.5(c)(2), 713-1.3, 713-1.7, 713-2.5, 713-4.4, 713-4.7, 713-4.9, 715-1.3(d)(8)(i), 715-1.5(b)(4), 715-2.4 and 715-2.5.

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

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

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS.

Assessment of Public Comment

A Notice of Proposed Rulemaking for an amendment to 10 NYCRR Parts 711, 712, 713, 714, 715 and 716 was published in the State Register on for a 45 day comment period on September 29, 2010. During that time, the Department of Health posted on its website the proposed amendment and made available to the public, upon request, copies of all documents to be incorporated by reference into the proposed amendment. Prior to its publication, copies of the proposed amendment were distributed to industry groups that represent hospitals, nursing homes and clinics, as well as to industry groups with an interest in architectural and engineering standards for health care facilities. No substantive revisions need to be made to the published regulations as a result of the comments. As noted in this assessment, a few editorial changes will be made.

The Department of Health received comments from twenty-six commentors. Of those, twenty-three explicitly expressed support for the proposed amendment. The following is a summary of additional comments provided to the Department.

Some commentors urged the Department to require that health care facilities comply with the New York State Building Code, New York State Plumbing Code, or other code rather than the standards required by NFPA 101: Life Safety Code, 2000 Edition. The Department has determined that health care facilities should comply with NFPA 101: Life Safety Code, 2000 Edition, because the federal Centers for Medicaid and Medicare Services requires health care facilities to comply with it. The Department's reference to NFPA 101: Life Safety Code, 2000 Edition is for the specific purpose of licensure for Article 28, Medicaid and Medicare certification. The building codes referenced above are enforced by local municipalities having jurisdiction over building code enforcement, for which the Department is not responsible.

One commentor sought confirmation that the proposed amendment would apply only to construction projects approved after the effective date of the proposed regulations. The Department notes that the proposed amendment would apply to all health care facilities licensed pursuant to Article 28 of Public Health Law. In particular, all such health care facilities must comply with NFPA 101: Life Safety Code, 2000 Edition. However, the proposed amendment makes few changes to existing regulations that govern architectural standards for health care facilities that have already been built, or for projects which have received Certificate of Need approval prior to the effective date. The commentor also sought confirmation that the Department would apply the new regulatory standards in a flexible manner. The proposed amendment includes provisions to enable health care facilities to obtain waivers from compliance with certain construction standards. The Department intends to be flexible in its implementation of the proposed regulations, when warranted.

One commentor claimed that the proposed amendment would adversely affect the safety of nursing home residents and recommended that the

Department delay implementation of proposed 10 NYCRR Parts 711 and 713. The commentator further claimed that the proposed amendment fails to require newly built nursing homes to have back up generators and suggested changes to proposed 10 NYCRR Sections 713-4.3 and Section 711.9. The Department of Health believes that the proposed amendment requires that health care facility construction to be functional and safe for occupancy. The proposed amendment explicitly requires that all newly built nursing homes have emergency electrical service when normal electrical services are interrupted. Since the only reasonable means by which a nursing home could have emergency electrical service in the case of a regional black out is to have an emergency generator, the Department interprets its regulations to require that newly constructed nursing homes have back up generators that comply with NFPA 110: Standard for Emergency and Standby Power Systems, 1999 edition. The Department believes that proposed 10 NYCRR Sections 713-4.3 and 711.9 are clearly written and do not require revision.

One commentator expressed concern that proposed 10 NYCRR Subpart 713-4 lacked specific minimum space requirements for communal areas and also lacked specific requirements relating to: furnishings and space requirements in resident rooms; grooming areas and centralized bathing facilities. The Department notes that proposed 10 NYCRR Subpart 713.4, (which incorporates by reference the 2010 edition of the Guidelines for the Design and Construction of Health Care Facilities), includes specific criteria for centralized bathing facilities and grooming areas as well as reasonable, flexible and cost effective criteria relating to the use and size of resident and communal areas. The proposed amendment requires that many of the specific space requirements be addressed in a functional program, which the Department has authority to review and approve.

One commentator made several editing suggestions to improve the clarity of the regulations. As a result, the Department is making the following nonsubstantive revisions to the proposed amendment that was filed in the State Register. In 10 NYCRR Section 712-1.8(a), the phrase "fifteen square feet by eighteen square feet" shall be substituted with the phrase "fifteen feet by eighteen feet". In 10 NYCRR Section 712-1.11(b), the phrase "ten square feet" shall be substituted with the phrase "ten linear feet". In 10 NYCRR Sections 712-2.5(c)(2) and 713-1.3(j) and 713-2.5(b)(3), the term "floor" shall be substituted with the phrase "finished floor". In 10 NYCRR Section 713-2.5(d)(1), the phrase "three square feet by six square feet" will be substituted with the phrase "three feet by six feet". In 10 NYCRR Section 713-4.7(a)(5) and (6), the term "net" shall be added immediately before the phrase "square feet". In 10 NYCRR Section 715-1.3(d)(8)(i), the phrase "twelve square feet by fifteen square feet" shall be substituted with the phrase "twelve feet by fifteen feet". In 10 NYCRR Section 715-1.3(g)(6), term "process" shall be substituted with the term "processed".

The commentator also suggested several changes to 10 NYCRR Subpart 712-1 (which applies to general hospitals built before 1998). Most of the proposed changes would, if implemented, require hospital facilities built before 1998 to comply with more modern architectural and equipment standards. The Department decided not to require such changes, since it would be too costly and burdensome for hospital facilities to involuntarily undertake such measures.

Two commentators sought clarification regarding whether the 2010 edition of the Guidelines for the Design and Construction of Health Care Facilities would apply to construction projects currently under consideration by the Department or contingently approved by the Commissioner. The Department intends to be flexible in its implementation of the proposed regulations and intends to clarify this issues relating to the applicability of the Guidelines in a guidance document. The Department also notes that health care facilities can seek from the Department waivers from compliance with certain construction standards.

Insurance Department

EMERGENCY RULE MAKING

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-52-10-00002-E

Filing No. 1257

Filing Date: 2010-12-09

Effective Date: 2010-12-09

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

Action taken: Amendment of Part 83 (Regulation 172) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404; Public Health Law, sections 4403, 4403-a, 4403-c and 4408-a; L. 2002, ch. 599; and L. 2008, ch. 311

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

Specific reasons underlying the finding of necessity: Certain provisions of the Insurance Law require that insurers file financial statements annually and quarterly with the superintendent. These insurers are subject to the provisions of Sections 307 and 308 of the Insurance Law and are required to file what are known as annual and quarterly statement blanks on forms prescribed by the superintendent. The superintendent has prescribed forms and annual and quarterly statement instructions that are adopted from time to time by the National Association of Insurance Commissioners ("NAIC"), as supplemented by additional New York forms and instructions. To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy procedure and instruction manuals. The latest edition of one of the manuals, the "Accounting Practices and Procedures Manual as of March 2009" ("Accounting Manual") includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). This regulation incorporates by reference the Accounting Manual adopted by the NAIC in March, 2010.

The Accounting Manual represents a codification of statutory accounting principles. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. The preamble to the Accounting Manual states that "this Manual is not intended to preempt states' legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations." Section 83.4 of the proposed regulation sets out the "Conflicts and Exceptions" to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers. Insurance Law Section 1302 provides a listing of non-admitted assets. Chapter 311 removed "goodwill" from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset. Chapter 311 also modified certain limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. Chapter 311 made the changes regarding the treatment of goodwill and EDP equipment subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, "health insurers") will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis. As compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small, certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

Absent the amendment being effective immediately, health insurers would be allowed to treat goodwill and EDP equipment, for financial statement purposes, as other regulated insurers do. In other words, the Department is concerned that absent an amendment, the financial statements that health insurers must file with the Department on an annual and quarterly basis may not reflect with sufficient accuracy the true financial condition of such companies.

The proposed rule also adopts SSAP #10R, which was adopted by the NAIC on December 8, 2009. SSAP #10R extends the period over which deferred tax assets ("DTAs") are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section

1301(a)(16), to 15%. SSAP #10R will be included in the Accounting Manual.

Insurance Law Section 1301(a)(18) provides that the superintendent may, by regulation, modify any requirement of Section 1301(a) to conform to any subsequent amendment to the Accounting Manual as adopted from time to time by the NAIC. SSAP #10R will be effective for the annual statement for the year ending December 31, 2009 and going forward.

Adoption of SSAP #10R will allow New York authorized life insurers to increase the admitted value of deferred tax assets. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on insurers to maintain the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with raising additional capital.

New York authorized insurers would have been at a competitive disadvantage if SSAP #10R was not adopted. Failure to implement the changes in New York at the same time they were implemented in other states would have made New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to report a higher admitted asset value, the lower RBC ratios generated by the lower admitted asset value will create the impression among producers and consumers that there is a real difference in financial stability among the companies – an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the September 30, 2010 quarterly statement is November 15, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009, March 25, 2010, June 22, 2010, and September 15, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 7, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the general welfare.

Subject: Financial statement filings and accounting practices and procedures.

Purpose: To update the regulation to conform to NAIC guidelines, statutory amendments, and to clarify existing provisions.

Substance of emergency rule: Subdivision (c) of Section 83.2 of Part 83 is amended to update the publication dates for the Accounting Practices and Procedures Manual ("Accounting Manual"), which is incorporated by reference in Regulation 172. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs").

Subdivision (c) of Section 83.3 is repealed and a new subdivision (c) is adopted to clarify the fact that the Accounting Manual is adopted in its entirety, subject to such conflicts and exceptions as found in Section 83.4 of this part.

Section 83.4 is amended to conform to updates to the Accounting Manual and the provisions of Chapter 311 of the Laws of 2008. Section 83.4 sets out "Conflicts and Exceptions" to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control. Section 83.4 is amended as follows:

Subdivision (b) is amended so that the admitted value of gross deferred tax assets is in accordance with SSAP No. 10R.

Subdivision (c) is repealed and a new subdivision (c) is added to require insurers other than accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans to depreciate electronic data processing equipment and operating system software over three years.

Paragraph (3) of subdivision (e), which permitted insurers to take credit for aircraft as admitted assets, has been deleted.

Paragraph (2) of Subdivision (g) has been amended to refer to SSAP No. 25, Paragraphs 7 and 8, in order to be consistent with a similar change to SSAP No. 25.

Subdivision (h) is amended so that insurers may no longer take credit for certain prepaid real estate taxes as admitted assets.

Subdivision (i), which set forth rules different from the rules set forth in the Accounting Manual for valuing investments in common shares of insurers which are not subsidiaries, has been deleted.

Subdivision (j), which set forth rules different from the rules set forth in the Accounting Manual for the calculation of investment income due and accrued has been deleted.

Subdivision (k) is relettered (i).

Subdivision (l), which set forth rules different from the rules set forth in the Accounting Manual for limitations on accrued mortgage loan interest, has been deleted.

Paragraph (1) of subdivision (m), which set forth rules different from the rules set forth in the Accounting Manual, for depreciation of life insurers' investments in real estate, has been deleted.

Paragraph (2) of subdivision (m) has been relettered 83.4(j).

Paragraphs (1) and (3) of subdivision (n) have been renumbered paragraphs (1) and (2) of subdivision (k) respectively.

Paragraph (2) of subdivision (n), which set forth rules different from the rules set forth in the Accounting Manual for valuing investments in common shares of insurers which are subsidiaries, has been deleted.

Subdivision (o) is relettered (l).

Subdivision (p), which required all goodwill from assumption reinsurance transactions pertaining to life, deposit-type and accident and health reinsurance to be non-admitted, has been deleted.

Subdivision (q) is relettered (m).

Subdivision (r) is relettered (n).

Subdivision (s) is relettered (o).

Subdivision (t) has been relettered (p), and has been amended to permit insurers, other than accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans, to admit goodwill in accordance with the Accounting Manual.

Subdivision (u), which set forth rules for declaring and distributing dividends, in the case of the quasi-reorganization of a domestic stock property/casualty insurer, has been deleted.

Subdivision (v) is relettered (q).

Subdivision (w) is relettered (r).

Subdivision (x) is relettered (s).

A new subdivision (t) is added to recognize an asset for the gross reinsurance premiums which were paid to the reinsurer for coverage beyond the paid-to-date of the policy for insurers receiving credit for reinsurance pursuant to paragraph 25 of SSAP No. 61.

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 March 8, 2011.

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

Regulatory Impact Statement

1. Statutory authority: Insurance Law Sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1407, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404 of the Insurance Law; Sections 4403, 4403-a, 4403-(c)(12) and 4408-a of the Public Health Law; and Chapter 599 of the Laws of 2002 and Chapter 311 of the Laws of 2008.

Insurance Law Section 107(a)(2) defines the term "accredited reinsurer", which is used in sections 83.2, 83.3, and 83.5 of Part 83, to mean an assuming insurer not authorized to do an insurance business in this state but which (i) presents satisfactory evidence to the superintendent that it meets the applicable standards of solvency required in this state, (ii) is in compliance with the conditions prescribed by regulation under which a ceding insurer may be allowed credit for reinsurance recoverable from an insurer not authorized in this state, and (iii) has received a certificate of recognition as an accredited reinsurer issued by the superintendent pursuant to such regulation; provided that no insurer shall be an accredited reinsurer with respect to any kind of insurance not provided for in such certificate.

Insurance Law Sections 201 and 301 authorize the superintendent to prescribe forms and regulations interpreting the Insurance Law, and to effectuate any power granted to the superintendent under the Insurance Law.

Insurance Law Sections 307 and 308 require insurers to file annual and quarterly statements on forms prescribed by the superintendent and in accordance with instructions prescribed by the superintendent. Section 307(a)(1) of the Insurance Law requires every insurer authorized in New York to file an annual statement showing its financial condition in such form as prescribed by the superintendent. Section 307(a)(2) permits the use of the annual statement form adopted from time to time by the National Association of Insurance Commissioners (NAIC).

Insurance Law Section 1109(a) provides that an organization complying with the provisions of Article 44 of the Public Health Law is subject to various specified sections of the Insurance Law, including section 308. Section 1109(e) provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Article 13 specifies the requirements regarding the treat-

ment of assets and deposits in determining the financial condition of insurers for the purposes of the Insurance Law.

Insurance Law Sections 1301 and 1302 define which assets are “admitted” or “not admitted” (only “admitted” assets are included in determining an insurer’s solvency).

Insurance Law Section 1301(a)(18) provides that the superintendent may, by regulation, modify any requirement of Section 1301(a) to conform to any subsequent amendment to the NAIC’s Accounting Practices and Procedures Manual (“Accounting Manual”).

Insurance Law Section 1308 (in conjunction with Insurance Law Section 1301(a)(14)) allows for an authorized insurer to reduce the amount that it must hold in its reserves through the use of reinsurance with another authorized insurer or an accredited reinsurer.

Insurance Law Article 14 establishes the investments that may be used by insurers to satisfy minimum capital, surplus and reserve requirements. It further governs those classes of investments in which insurance companies may invest after satisfying minimum capital, surplus and reserve requirements, and establishes allocation or diversification limits among assets classes. Article 14 also sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Section 1404 establishes the types of reserve investments that may be used by non-life insurers to satisfy reserve requirements.

Insurance Law Section 1405 establishes the types of surplus investments that may be used by life insurers, after minimum capital and reserve requirements have been satisfied.

Insurance Law Section 1407 establishes the types of surplus investments that may be used by property/casualty and certain other insurers, after minimum capital and reserve requirements have been satisfied.

Insurance Law Section 1411 establishes the types of investments that domestic insurers are prohibited from making.

Insurance Law Section 1415 sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Article 15 contains provisions that govern the establishment and operation of holding company systems, including controlled insurers. Insurance Law Section 1501 provides for an administrative determination of the existence or absence of control to determine whether the insurer is a member of a holding company system. Insurance Law Section 1505 establishes standards for transactions between a controlled insurer and other members of the holding company system to safeguard the interests of the insurer and policyholders.

Insurance Law Section 3233 sets forth provisions concerning stabilization of health insurance markets and premium rates.

Insurance Law Section 4117 sets forth provisions concerning loss reserves and loss expense reserves of property/casualty insurance companies.

Insurance Law Section 4233 sets forth provisions concerning the annual statements of life insurance companies, including a provision that in addition to any other matter that may be required to be stated therein, either by law or by the superintendent pursuant to law, every annual statement of every life insurer doing business in New York shall conform substantially to the form of statement adopted from time to time for such purpose by, or by the authority of, the NAIC, together with such additions, omissions or modifications, similarly adopted from time to time, as may be approved by the superintendent.

Insurance Law Section 4239 sets forth provisions concerning allocation and reporting of income and expenses of life insurers.

Insurance Law Article 43 establishes organizational requirements, investment and reserve requirements for non-profit medical and dental indemnity, or health and hospital service corporations organized in this state. The article also establishes “stop loss” funds, from which health maintenance organizations, corporations or insurers may receive reimbursement for claims paid by such entities for members covered under certain contracts.

Insurance Law Section 4301 establishes requirements applicable to the formation and operation of the corporate entity, including composition and term limits of the corporation’s board of directors.

Insurance Law Section 4310 sets forth requirements applicable to investments, reserves and the financial condition of not-for-profit health insurers and health maintenance organizations (HMOs).

Insurance Law Sections 4321-a, 4322-a, and 4327 establish state-funded stop loss pools to subsidize claim payments made by HMOs pursuant to policies issued in the individual market and the Healthy NY market.

Insurance Law Section 6404 sets forth provisions concerning the investments that may be used by title insurance corporations. It also sets forth provisions concerning the valuation of various assets of title insurers.

Insurance Law Sections 1109(e) and 4301(e)(5), respectively, provide that the superintendent may promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law pertaining to health maintenance organizations. Public Health Law Article 44 authorizes the superintendent to establish standards

governing the fiscal solvency of integrated delivery systems, and requires the filing of financial reports by prepaid health service plans and comprehensive HIV special needs plans.

Pursuant to the above provisions, the superintendent is authorized to implement the Accounting Manual, subject to any provisions in New York law that conflict with particular points in the Accounting Manual. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles (“SSAPs”). The Accounting Manual represents a codification of Statutory Accounting Principles.

Chapter 599 of the Laws of 2002 amended the Insurance Law relating to the treatment of deferred tax assets in the filing of quarterly and annual financial statements by certain insurers.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain insurers. Insurance Law Section 1302 provides a listing of non-admitted assets. Chapter 311 removed “goodwill” from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer’s capital and surplus (adjusted for certain items) as an admitted asset, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Chapter 311 also modified the limitations on the ability of insurers to take credit for electronic data processing (EDP) equipment as an admitted asset.

2. Legislative objectives: Certain provisions of the Insurance Law provide that authorized insurers, accredited reinsurers, authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations and integrated delivery systems shall file financial statements annually and quarterly with the superintendent. These entities are subject to the provisions of Sections 307 and 308 of the Insurance Law, which require the filing of what are known as Annual and Quarterly Statement Blanks on forms prescribed by the superintendent. Except with regard to filings made by Underwriters at Lloyd’s, London, the superintendent has prescribed forms and Annual and Quarterly Statement Instructions that have been adopted from time to time by the NAIC, as supplemented by additional New York forms and instructions. To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy, procedure and instruction manuals. One of these manuals, the Accounting Manual, sets forth Statements of Statutory Accounting Principles. The Accounting Manual is incorporated by reference into this regulation.

The preamble to the Accounting Manual states that “this Manual is not intended to preempt states’ legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations.” Section 83.4 of the proposed regulation sets out the “Conflicts and Exceptions” to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control.

3. Needs and benefits: Section 83.3 of the regulation provides that the financial statements of all authorized insurers, accredited reinsurers (except Underwriters at Lloyd’s, London), authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans (collectively, to as “regulated insurers”) shall be completed in accordance with statutory accounting practices and procedures as prescribed by applicable provisions of the Insurance Law and regulations.

The purpose of this Part is to enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by regulated insurers, by clearly setting forth the accounting practices and procedures to be followed in completing annual and quarterly financial statements that must be filed with the Department.

The NAIC adopted a new Accounting Manual as of March, 2010. The Accounting Manual represents a codification of statutory accounting principles, presented in the form of the SSAPs. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. Codification provides examiners and analysts with uniform accounting rules against which insurers’ financial statements can be evaluated.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers. Section 1302 provides a listing of non-admitted assets. Chapter 311 removed “goodwill” from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer’s capital and surplus (adjusted for certain items) as an admitted asset, subject to such

limitations and conditions as may be established in regulations promulgated by the superintendent.

Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, "health insurers") will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis. As compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

Chapter 311 also modified the limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small, certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

On December 8, 2009, the NAIC adopted a new accounting guidance relating to Deferred Tax Assets (SSAP #10R) which was effective for the annual statement for the year ending December 31, 2009. The accounting guidance has been included in the Accounting Manual.

The proposed rule adopts SSAP #10R. SSAP #10R extends the period over which deferred tax assets ("DTAs") are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section 1301(a)(16), to 15%.

In 2010, the Insurance Department issued Circular Letter No. 11, dated August 6, 2010, describing the parameters for an insurer to calculate an asset for the premium payments not yet received (the "deferred premium asset") and the rules for reducing the asset when the risk is reinsured. The proposed rule adds language to Paragraph 25 of SSAP No. 61 affirming that Circular Letter 11 and Paragraph 25 conform.

4. Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs \$465 for a hard copy, or \$395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states' requirements as much as New York's.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies' net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers' overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC's Accounting Practices and Procedures Manual and adopted in other states.

There is no cost to the Insurance Department for the Accounting Manual, since the Department may obtain it free of charge from the NAIC.

5. Paperwork: To the extent that this rule makes changes in accounting principles, regulated insurers will need to familiarize themselves with this regulation. To the extent that the rule conforms New York's requirements to those of other states, the need for separate New York filings will be reduced. Once insurers are familiar with the changes, there should be no increase in required paperwork or a net decrease because of the reduced necessity for separate New York filings in other states.

6. Local government mandate: This rule does not impose any obligations on local governments.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Viable alternatives: Chapter 311 amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent. Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, "health insurers") will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis.

The superintendent determined that, as compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis,

which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

The Department also contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department's request and none of the four raised any objections.

9. Federal standards: There are no minimum standards of the federal government in the same or similar areas.

10. Compliance schedule: Regulated insurers already should be aware of the need to comply with the provisions of the Accounting Manual, since the NAIC issued the Accounting Manual in March, 2010. In addition, the NAIC publishes changes to accounting guidance during the interim period before issuance of the new Accounting Manual. Regulated insurers use the Accounting Manuals in preparing their Quarterly Statements and the Annual Statements.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule will have no adverse economic impact on local governments, and will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis of this finding is that this rule is directed at regulated insurers, as defined under section 83.3 of this regulation, none of which are local governments.

The Insurance Department is not aware of any adverse impact that this rule will have on small businesses or of any reporting, recordkeeping or other compliance requirements that it will impose on small businesses. This rule is directed at regulated insurers, most of which do not come within the definition of "small business" found in Section 102(8) of the State Administrative Procedure Act, because none is independently owned and operated, and employs less than one hundred individuals.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: This rule applies to regulated insurers doing business or resident in every county in the state, including those that are, or contain, rural areas, as defined under Section 102(13) of the State Administrative Procedure Act. Some of the home offices of these insurers are located within rural areas.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment does not impose new reporting or recordkeeping requirements. To the extent that the rule conforms New York filings to other states' requirements, the need for separate New York filings will be reduced. To the extent that the rule renders changes in accounting principles, insurers will need to familiarize themselves with the principles themselves.

3. Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs \$465 for a hard copy, or \$395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states' requirements as much as New York's.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies' net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers' overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC's Accounting Practices and Procedures Manual and adopted in other states.

The Accounting Manual specifies substantive changes to nine of the ninety-six "Statements of Statutory Accounting Principles" contained therein. Affected parties will have the opportunity to assess the changes and provide comments to the Department.

4. Minimizing adverse impact: This rule applies to regulated insurers that do business in New York State. It does not impose any unique adverse impact on rural areas. The impact(s) are discussed in items 2 and 3 above.

5. Rural area participation: The Department contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department's request and none of the four raised any objections. All affected parties, including those doing business in rural areas of the State, will have the opportunity to comment upon and discuss the rule after the proposal is published in the State Register.

Job Impact Statement

The Insurance Department has no reason to believe that this rule will have any impact on jobs and employment opportunities. The rule codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

Department of Labor

NOTICE OF ADOPTION

Hotel and Restaurant Wage Orders

I.D. No. LAB-42-10-00005-A

Filing No. 1268

Filing Date: 2010-12-14

Effective Date: 2011-01-01, see Public Notice in this issue of the Register

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

Action taken: Repeal of Parts 137 and 138; and addition of Part 146 to Title 12 NYCRR.

Statutory authority: Labor Law, sections 21(11), 199, 653 and 656

Subject: Hotel and Restaurant Wage Orders.

Purpose: To combine the Hotel and Restaurant Wage Orders into one Wage Order titled Hospitality Wage Order.

Substance of final rule: The proposed new rule will combine the wage orders for the restaurant and hotel industries (12 NYCRR 137 and 138) into a single new Minimum Wage Order for the Hospitality Industry (12 NYCRR 146). Regarding tips, the proposed regulations replace departmental policies and case law with new regulations to provide clarity and uniformity throughout the hospitality industry. They simplify by consolidating the current two-tiered tip credits, which depend on the amount of tips received, into a single tier for most employees. They eliminate a separate tip credit for housekeeping employees in resort hotels, consolidating them with other tipped service employees. (However, the proposed regulations do retain several special provisions for resort hotels only, namely a higher tip credit for non-food service employees and higher meal and lodging credits for all employees.) They consolidate two-tiered meal credits into a single tier for most employees. They eliminate unnecessary housing regulations by simply requiring compliance with all state, county and local health and housing codes. They eliminate overtime pay requirements unique to the hotel industry, leaving only time-and-a-half after 40 hours as the common rule for all covered workers in the hospitality industry. They extend extra payments that currently apply only to employees at or near the minimum hourly rate (call-in pay, excessive spread of hours pay, uniform maintenance pay) to all covered employees, thus eliminating a phase-out as wage rates rise that is poorly understood and cumbersome to calculate. Extending these extra payments from a limited class to all covered employees will help to make these requirements less obscure and more widely known.

Subpart 146-1 entitled "Minimum Wage Rates" sets forth the basic minimum hourly wage rate for employees in the hospitality industry, allows for tips credits toward the minimum wage, requires that employers in the hospitality industry pay an increased hourly rate for hours worked over forty per week, provides for payment of wages in "call-in" situations and requires spread of hours pay for employees in restaurants and non-resort hotels. Further, this section provides for uniform maintenance pay, the cost of purchasing required uniforms and allows for credits toward the minimum wage for meals and lodging.

Subpart 146-2 entitled "Regulations" sets forth the records employers are required to keep, mandates written notice to employees of pay rates, tip credit and pay day, as well as the provision of wage statements to each employee with every payment of wages. Employers must post minimum wage provisions in the place of employment, and must pay employees at an hourly rate, rather than salary, piece rate, or any other non-hourly rate of pay. The minimum wage requirements must be met on a week by week basis, regardless of the frequency of the payment of wages. Employers are prohibited from making deductions from pay for such things as spoilage and breakage. Minimum requirements are set forth for the provision of meals and housing for employers taking those allowances toward the minimum wage. Employees working in both tipped and non-tipped jobs, or occupations covered by both the hospitality wage order and another wage order, must be paid at whatever rate is applicable to the highest paying job or wage order, depending on the hours worked or percentage of hours worked at each job. Trainees, learners or apprentices must still be paid in accordance with this part. Students obtaining vocational experience to meet curriculum requirements shall not be deemed to have been permitted or suffered to perform work, and participants in rehabilitation programs approved by the commissioner shall be paid in accordance with the

requirements of the approved program to satisfy this part. Definition of the terms "tip pooling" and "tip sharing" are provided, as well as the circumstances under which each is permissible, the degree to which the employer may require tip pooling and sharing, and the records the employer is required to keep when operating tip pooling or tip sharing. A rebuttable presumption is created that any charge in addition to the bill for such things as food, beverage and lodging is to be considered a gratuity. Employers are permitted to run the employees' tips through the employer's credit card machine without incurring the extra cost of associated with the same.

Subpart 146-3 entitled "Definitions" provides definitions for the terms "hospitality industry", "hotel", "all year hotel" and "resort hotel". This subpart specifies which types of employees are covered, and provides definitions of individuals employed in a bona fide executive, administrative or professional capacity, as an outside sales person, golf caddy, camper worker and staff counselor. This subpart further defines "service employee", "non-service employee" and "food service worker". Definitions of the terms "regular rate of pay", "working time", "meal", "lodging", "split shift", "required uniform", "ordinary wardrobe" and "week of work" are all contained in the this subpart, as applicable to the entire part.

Final rule as compared with last published rule: Nonsubstantial changes were made in sections 146-1.1(b) and 146-1.3.

Text of rule and any required statements and analyses may be obtained from: Benjamin Shaw, New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, New York 12240, (518) 457-4380, email: usfbas@labor.ny.gov

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

There have been no substantial revisions or changes in the text of the Proposed Rule necessitating a modification in the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement as published in the *State Register* on October 20, 2010, a revised RIS, RFA, RAFA and JIS is not required.

Assessment of Public Comment

The Department received twenty (20) comments from interested parties during the 45-day public comment period which followed the publication of the proposed regulations in the *State Register* on October 20, 2010. All comments received were reviewed and assessed in accordance with the provisions of the State Administrative Procedure Act. The issues raised in these comments are discussed below.

COMMENT: Five commenters urged delay in the effective date of the regulations to give the industry time to learn about and prepare for changes and two commenters urged their immediate adoption.

RESPONSE: The effective date will be 1/1/11 for these regulations, for the food service worker rate to increase from \$4.65/hr to \$5.00/hr, and for the service employee rate to increase from \$4.90/hr to \$5.65/hr. The regulations have been through a long period of development that included three public hearings on 5/6, 5/15 and 5/20/09, wide publicity, a record amount of public and industry input, and the posting of the proposed regulations on our website since October 20, 2010. In the Wage Board's report and recommendations issued 9/18/09, they recommended the new regulations become effective on 1/1/10, including minimum rate increases of \$.75/hr for service employees and \$.10/hr for food service workers, with a follow-up rate increase of \$.25/hr for food service workers effective 1/1/11. The pay increases have been delayed a year but we think the industry has been alertly watching and that businesses are capable of implementing the new rates and regulations by the effective date. Due to the length of the rulemaking process, the phase-in for the tip credits for food service workers would have been reduced to, at most, a two (2) day period (i.e. December 30 and 31, 2010). Therefore, the removal of the phase-in from the proposed rulemaking is a non-substantive revision. The final effective date of January 1, 2011, for the implementation of the wage rate is clearly listed in the proposed regulation, and was recommended by the Wage Board in September of 2009.

COMMENT: Seven commenters objected to the \$.35 per hour increase in the minimum rate of pay for tipped food service workers and five commenters were supportive of the increase. Objectors variously argued that it would be a hardship to the restaurant industry and to hotels with food service operations; that it would force businesses to reduce the number of employees or close down operations; that when tip income is included, waitstaff are already more highly paid

than other hourly workers, such as kitchen workers, and even managers. Several cited a troubled economy; one mentioned that the smallest operations have less ability to offset cost increases than larger ones; and one recommended deferring the pay increase until the economy improved.

RESPONSE: We are not making any change to this provision as a result of the comments received. In the Regulatory Impact Statement, we noted that the minimum rate for tipped food service workers as a proportion of the general minimum rate declined from 70% in 1974 to 64% in 2010. This decline amounts to \$.425 per hour or \$17 per 40-hour week or \$884 per year. We believe this long-run decline was not recognized at the time and was not a policy goal. The proposed \$.35 per hour increase partially recoups the loss, restoring the rate to 69% of the general minimum rate. Food service workers are by far the largest group of tipped workers in the industry and include waitstaff, bussers, food runners, short-order counter workers, bartenders, barbacks, and room service waitstaff. We believe the \$.35 rate increase is a modest one not out-of-line with historical levels.

COMMENT: Five commenters objected to the spread of hours pay requirement and/or its extension to workers at all pay levels. One commenter supported the requirement and its extension in recognition that an employee has given a large portion of a workday to an employer. Some objectors felt it should be eliminated entirely, and if not eliminated, should be limited to employees at or very near the minimum rate of pay (as existing regulations do). Commenters argued that it reduces the availability of alternative work schedules needed by today's workforce of working mothers, elder caretakers, and working students. Extending it to all workers regardless of pay rate is an unwarranted windfall to the more highly compensated employees (line cooks, sommeliers) who employers view as more indispensable, while being an incentive to reduce the hours of the lower paid, less skilled workers (bussers, runners) who are more easily substitutable. One commenter said that spread of hours pay is not beneficial for tipped workers, because it penalizes scheduling them for a split workday consisting of the busiest periods, when tip earnings are maximized. Commenters also argued that compliance is costly and difficult to achieve because spreads are not picked up by automated timekeeping systems; they require time-consuming and onerous daily manual perusal of time records; that the requirement is obscure, unique to New York State, not understood, and causes litigation with costs dwarfing the amounts of money involved; that it is an ineffective way to encourage increased employment in the industry. One commenter said the additional pay is insignificant to the employee but costly in the aggregate to the employer and asked that if the provision is retained, gratuities received in excess of the tip credit be allowed to offset it; this commenter also disagreed with extending call-in and uniform maintenance pay to all employees at any pay level. Another commenter argued that extending spread of hours, call-in and uniform maintenance pay to all employees at any pay level exceeded our minimum wage authority. One commenter asked for clarification whether extra call-in pay hours must be counted in determining whether a spread of hours greater than 10 has been worked (the answer is no).

RESPONSE: We are keeping the spread of hours pay and its extension to covered employees at any pay rate. Spread of hours pay has long been required in NYS; the only change contained in the proposed regulations is its extension to workers at any pay rate. Departmental interpretation of the existing regulations has been that spread of hours, call-in and uniform maintenance pay all phase out as workers' pay rates rise above the minimum, or in other words, that they are offset by amounts paid above the minimum. Many employers have found this difficult to understand and/or unwieldy to calculate. In the case law, different courts have made different interpretations regarding whether or not spread of hours pay applies to workers at or near minimum wage only, or also to workers at higher pay rates. It is necessary to clear up the confusion and desirable to make it easier to calculate. The extension of spread of hours pay to covered employees at any pay rate does both. In recognition of the added burden of workdays of any length but spread out over a period of more than ten hours in a day, sometimes with added travel back and forth, this form of inconvenience pay remains relevant and appropriate. The Wage Board recommended its retention and extension and we are reluctant to disregard that.

COMMENT: Regarding charges purported to be gratuities on bills for banquets, special functions, and package deals, one commenter says the "rebuttable presumption" that "any charge in addition to charges for food, beverage, lodging, and other specified materials or services is a charge purported to be a gratuity" is overbroad and proposed instead that only charges explicitly for "gratuities" or "service" be presumed so.

RESPONSE: We are unwilling to say that only the terms "service" or "gratuities" are presumptively gratuities. Ways to suggest or imply or give the impression to a reasonable customer that a charge is for gratuities, tantamount to gratuities, a substitute for gratuities, or will be distributed to employees as gratuities, etc., are numerous and are not limited to two particular terms. The Wage Board recommended the broad language with its open possibilities, thus placing the obligation on the employer to make it clear if a charge is NOT for gratuities, which can easily be done.

COMMENT: Regarding charges not purported to be gratuities in banquets, special functions, and package deals, one commenter says that term "administrative charge" in the proposed regulations will not cover all possible charges; some are more appropriately classified as "overhead fees" or "operations charges" and there may be other terms as well.

RESPONSE: The Wage Board intended the term "administrative charge" to be a generic term. The wage order cannot list all the possible names for charges that might appear on a guest bill that might be construed by a reasonable customer to be for distribution to employees as gratuities, tantamount to gratuities, or a substitute for gratuities, unless accompanied by a notification to the customer that such charge is not a gratuity or tip.

COMMENT: Requiring customer notification that a charge is not a gratuity in 12-point font is too specific and cannot be accommodated on all marketing documents created in the industry, some of which are the size of a postcard and use text smaller than 12-point. Several commenters felt that "in the same font size as the surrounding text" was sufficient.

RESPONSE: 12-point font is quite small and the notice required is quite brief. To be effective, it does need to be quite noticeable rather than obscure. We think that the industry can accommodate such small notices on its advertising material, menus, bills and contracts, whenever such charges are listed or mentioned, and are keeping the 12-point font requirement.

COMMENT: One commenter wants it clarified that delivery charges are not charges presumed to be gratuities.

RESPONSE: We are reluctant to add delivery charges to the list of charges not purported to be gratuities, since we think many customers will presume they are paid to the worker as gratuities unless informed otherwise.

COMMENT: One commenter said the exclusion of food delivery workers from the food service worker category is fine but could leave the impression that they are excluded from tipped employees altogether and it should be clarified.

RESPONSE: The wage order excludes food delivery workers from the food service workers classification. However, the wage order cannot say that all food delivery workers will instead qualify as service employees; some may meet the definition while some may not.

COMMENT: One commenter objected to allowing employers to mandate tip pools and set the percentages that each occupation will receive from tip pools. This invites abuse by making it easier for employers to skim off the top while administering the pool. The commenter, however, thinks we can mitigate this by strict enforcement of the regulations and, if found necessary in the future, by promulgating additional tip pool regulations. Another commenter contends that mandatory tip pools will violate Section 196-d on its face, even if tips can be distributed only to certain classifications of workers.

RESPONSE: We think that in some, but not all, work settings, it is both impractical not to pool tips and impractical for the tip pools to be employee-run. The composition of the employee rosters, shift rosters, and service teams can vary constantly. Employees' starting times and lengths of work shift can vary. The production of tips can vary accord-

ing to time of day, type of meals/beverages/snacks being served, and type of service being provided. Employees' work assignments or locations can vary during their shifts. When several occupations are employed in providing service, no single person who picks up the cash tip or charge slip from a table is the one for whom that tip is intended, or to whom it belongs. Practical means for allocating and disbursing the tip must be provided for. It would be possible, if foolish, to read Section 196-d on its face as prohibiting a group of employees from controlling a tip pool and engaging in the allocation of the tips not left for them alone.

COMMENT: Several commenters think it would be helpful for us to add sommeliers, maitre d'hotels, coffee persons, fromagieres and tea sommeliers to the list of occupations eligible to receive shares of tips or distributions from tip pools. They also urge us to add language stating that the list of occupations is not intended to be exhaustive. One commenter recommends that we add a clause that no manager can be included in the tip pool. Another commenter suggests using the term "non-management maitre d'hotels and sommeliers."

RESPONSE: The wage order (146-2.14) already is fairly clear that the occupations listed are examples only. The requirement in the wage order that "eligible employees must perform, or assist in performing, personal service to patrons that is a principal and regular part of their duties and is not merely occasional or incidental" should exclude persons performing managerial functions.

COMMENT: One commenter supports the employee notification requirement in order for the employer to take a tip credit, saying that this will block attempts at retroactive application of tip credits by employers whose illegal practices are challenged.

RESPONSE: So noted.

COMMENT: The 2 hours or 20% limitation on the amount of non-service work a food service worker can do in a day and still be classified and paid as a food service worker generated several comments. Several stated that the proposed language leaves it unclear whether the limits include the side work that food service workers traditionally do. One commenter claimed that a higher limit than 2 hours or 20% was needed in order to be reasonable. Several commenters noted the difficulty of tracking time spent on intermingled duties. Finally, several commenters noted that some food service workers want the opportunity to work another shift in a different occupation on the same day. Several commenters recommend allowing payment in accordance with the job being performed. One commenter recommends we explicitly exclude traditional side work from "work at an occupation in which tips are not customarily received," in which case the sidework would not count towards the 2 hours or 20%. Another suggestion is that we merely require that weekly tips be sufficient to permit the tip credit to be applied to all hours worked.

RESPONSE: The 2 hours or 20% limitation is intended to be sufficient to allow a reasonable amount of traditional side work before, during and after the period of customer service that produces tips on a single shift, while prohibiting excessive so-called side work or the assignment of a food service worker to other duties altogether while still paying the tipped rate. It is not intended to apply to dual jobs in one day when the jobs are distinct, are during separate shifts distinguished in the time records, the duties are not intermingled, and they are paid at the rate applicable to the job being performed. If the duties are intermingled, or no records show when the different duties are worked, then the 2 hour or 20% limit applies.

COMMENT: One commenter said the definition of a uniform is inadequate; "ordinary wardrobe" is open to various interpretations; the Department's intent in "permit variations in details of dress" is unclear. The commenter proposes that we expressly allow employers to prescribe a specific color, style, vendor, or all three so long as it does not bear a logo and is not of such extreme fashion that it would never be worn outside of work. The commenter urged us to allow employers to sell such garments to employees so long as the employer does not make a profit. Further, uniform maintenance pay should be premised on the items actually being laundered; for example, a tie or vest that does not need weekly laundering should not invoke the uniform maintenance pay. We should expressly state that uniform maintenance pay is not part of the regular rate for the purpose of

calculating overtime. Another commenter asked us to define the number of uniforms considered "adequate" for the wash-and-wear exemption.

RESPONSE: To qualify as "ordinary wardrobe," the proposed wage order states that the employer must permit variations in details of dress (see 146-3.10). Any garment that an employer sells to an employee that the employer requires to be worn is a uniform garment and the employer must provide a sufficient number of such uniforms free of charge. We think it is well known that uniform maintenance pay is not part of the regular rate and we believe we have adequate educational efforts on the subject of the regular rate and overtime. How many uniforms are sufficient depends on the full set of circumstances.

COMMENT: One commenter asked that the wage order expressly state that employers can take meal credits so long as meals are legitimately offered; allowing the meal credit only if the meal is actually taken imposes an enormous record-keeping obligation on the employer.

RESPONSE: The definition in 146-3.7 should suffice: "Meals shall be deemed to be furnished by an employer to an employee when made available to that employee during reasonable meal periods and customarily eaten by that employee."

COMMENT: One commenter says the deductions and expenses section needs to include deductions for the benefit of the employee as allowed deductions, such as for health insurance and 401(k) plans.

RESPONSE: Deductions voluntarily authorized by the employee for benefits or savings plans similar to the examples given in the law are permitted by Labor Law Section 193 and so would be permitted by Part 146-2.7 as "deductions authorized ... by law."

COMMENT: Several commenters recommended that the wage order permit the payment of credit card tips through the payroll for the week in which the tips were earned. It is unsafe for employers and employees to carry or handle large amounts of cash; it is difficult for tipped employees to participate in benefits such as health insurance and 401(k) plans if credit card tips are required to be paid out to them in cash daily and cannot be run through payroll, as there is not enough money in their net pays to allow the necessary deductions; the employee loses the ability to take advantage of paying for benefits with pretax income as permitted by federal law; net pay doesn't always cover the employee's mandatory taxes; putting credit card tips on the paycheck better promotes accuracy of tip reporting to the tax authorities; not doing so leaves employees with a greater burden in accounting for their tips and paying any taxes owed that were not covered by the withholdings from wages; it will be difficult to comply with the forthcoming Health Care Reform Act provisions if not allowed; employers in financial distress have an added burden of paying tips out daily in cash while they do not normally receive credit/debit card funds in their bank accounts for several days following the transaction.

RESPONSE: We are not amending the wage order at this time by adding a provision permitting employers to pay out credit card tips in the paycheck. However, the Department will review its policy on this issue in the near future.

COMMENT: Prohibiting expenses that bring an employee's wages below the minimum is too narrow under Section 193. The Wage Order should require that employers reimburse any expense that is required in order to carry out duties assigned by the employer.

RESPONSE: This can be a topic for consideration at a later time.

COMMENT: There were several comments in support of, and no objections to, requiring hourly rates to be paid to all non-exempt employees (except commission salespersons). Several commenters also supported the new treatment of non-hourly pay as only covering the first 40 hours, with full overtime pay due for any hours over 40. One commenter objected to this provision because it increases costs to business and hurts jobs.

RESPONSE: To the objection, we say that the cost of keeping hours records under both the old and new regulation is the same and the cost of wages owed can be the same. Under both the old and new regulations, employers are required to keep true and accurate records of daily and weekly hours worked and retain such records for six years, regardless of whether the worker's pay is based on hours worked. Fur-

ther, the requirement to pay an hourly rate plus overtime can be neutral regarding the cost to business. A salary can be converted to an hourly rate plus overtime at 1½ times the hourly rate for the average number of hours worked by the employee. The employee's pay will then fluctuate in accordance with hours worked, but the employee's total earnings in the course of a year can be approximately the same. Only if a business does not comply with the new law and fails to pay an hourly rate plus overtime does the new regulation make it more costly for the employer, as the employer will owe more back overtime pay under the new regulation than under the old one.

COMMENT: One commenter asked that we expressly clarify that a blended rate calculation can be used when an employee works dual jobs at dual pay levels and that we give an example. Another commenter asked that we illustrate how overtime is calculated for a banquet server and how service charges and/or amounts purported to be a gratuity are included.

RESPONSE: A number of examples with different fact sets could be added to the wage order. While we have given some basic examples in the wage order, we think it best not to add more. The proposed wage order states that any charge for "service" will be considered a charge purported to be a gratuity. The calculation of the banquet server's overtime will depend on whether or not the employer takes a tip credit in paying the banquet server. The two examples already given in 146-1.4 illustrate how to calculate overtime with or without a tip credit.

COMMENT: One commenter requests the wage order expressly allow electronic notices and electronic acknowledgments of receipt.

RESPONSE: The wage order is not the best place to cover that particular subject.

Department of Motor Vehicles

NOTICE OF ADOPTION

Eliminate the NYTEST Emissions Program in the New York Metropolitan Region on January 1, 2011

I.D. No. MTV-43-10-00007-A

Filing No. 1263

Filing Date: 2010-12-14

Effective Date: 2010-12-29

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

Action taken: Amendment of Part 79 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a), 301(a), (c), (d)(1), 302(a), (e) and 303(d)(1)

Subject: To eliminate the NYTEST emissions program in the New York Metropolitan Region on January 1, 2011.

Purpose: Provides for the elimination of the NYTEST emissions inspection program in the New York Metropolitan Region.

Text or summary was published in the October 27, 2010 issue of the Register, I.D. No. MTV-43-10-00007-P.

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

Text of rule and any required statements and analyses may be obtained from: Monica J Staats, NYS Department of Motor Vehicles, Legal Bureau, Room 526, 6 Empire State Plaza, Albany, NY 12228, (518) 486-3131, email: monica.staats@dmv.state.ny.us

Assessment of Public Comment

Comment: Al Rand commented that the Department of Motor Vehicles has justified higher inspection fees in the NYMA due to the high cost of maintaining the NYTEST system. With the termination of the NYTEST system, Mr. Rand suggests that the inspection fee should be \$27.00 throughout the state.

Response: The Department has received similar comments from other inspection industry members. The scope of this rulemaking is focused solely on how to efficiently terminate the NYTEST program by the end of 2010. However, in light of industry concerns, the issue of fees will continue to be considered by the Department.

Office for People with Developmental Disabilities

NOTICE OF ADOPTION

Reimbursement of Equipment and Property Insurance

I.D. No. PDD-41-10-00024-A

Filing No. 1267

Filing Date: 2010-12-14

Effective Date: 2011-01-01

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

Action taken: Amendment of Parts 635 and 671 of Title 14 NYCRR.

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

Subject: Reimbursement of equipment and property insurance.

Purpose: To revise and streamline the methodology for reimbursement of equipment and property insurance.

Text or summary was published in the October 13, 2010 issue of the Register, I.D. No. PDD-41-10-00024-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, OPWDD, 44 Holland Ave., Albany, NY 12229, (518) 474-1830, email: barbara.brundage@opwdd.ny.gov

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

OPWDD received one comment on proposed regulations from the Executive Director of a provider which primarily serves individuals with cerebral palsy and related disabilities. A high proportion of these individuals are non-ambulatory.

COMMENT: The Executive Director asserted that the new methodology to reimburse moveable capital equipment and property insurance discriminates against those providers serving populations of individuals with physical disabilities. He alluded to the disproportionately high costs incurred by those providers because the individuals they serve require specialized equipment as compared to populations which primarily have cognitive impairments. He suggested, further, that adaptive modifications to the physical environments contribute to higher insurance rates. As costs rise and this population ages and manifests increasing needs, he predicted that the substitution of an inflationary trend factor applied to fixed values, as opposed to pass through payments for capital moveable equipment and property insurance, will not be adequate.

RESPONSE: OPWDD disagrees. OPWDD fashioned these regulations to factor in, on a provider specific basis, the highest capital outlay for capital moveable equipment and property insurance over a recent three year period. Accordingly, the fixed values are predicated on individual providers' actual costs and do recognize differences in resource demands among providers. Absent exceptional circumstances, providers are not likely to be impacted negatively. Rather, these measures intend to safeguard provider revenues while they facilitate streamlining in OPWDD's administrative operations. They are regarded as cost neutral. Not only do the regulations prohibit the imposition of any future efficiency adjustments on these components of reimbursement, a remedy for losses is available through the price adjustment process. In addition, OPWDD cites its intention to examine the effects of these regulations as warranted in five years. The regulations are unchanged.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-52-10-00006-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 is considering whether to grant, deny or modify, in whole or part, the petition filed by GAIR 1-2, LLC to submeter electricity at 30 Washington Street, Brooklyn, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of GAIR 1-2, LLC to submeter electricity at 30 Washington Street, Brooklyn, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by GAIR 1-2, LLC to submeter electricity at 30 Washington Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

Data, views or arguments may be submitted to: Jaclyn A. 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.

(10-E-0611SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

New York State Reliability Council's Establishment of an Installed Reserve Margin of 15.5%

I.D. No. PSC-52-10-00007-P

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

Proposed Action: The Commission is considering whether to adopt, modify, or reject, in whole or in part, an Installed Reserve Margin of 15.5% established by the New York State Reliability Council for the Capability Year beginning May 1, 2011, and ending April 30, 2012.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4) and (5)

Subject: The New York State Reliability Council's establishment of an Installed Reserve Margin of 15.5%.

Purpose: To adopt an Installed Reserve Margin for the Capability Year beginning May 1, 2011, and ending April 30, 2012.

Substance of proposed rule: The Public Service Commission (PSC) is considering whether to adopt, modify, or reject, in whole or in part, an Installed Reserve Margin (IRM) of 15.5% established by the New York State Reliability Council for the Capability Year beginning May 1, 2011, and ending April 30, 2012. The IRM is based on the Technical Study Report entitled "New York Control Area Installed Capacity Requirements for the Period May 2011 Through April 2012" (Report), dated December 10, 2010. The Report is available on the internet at: http://www.nysrc.org/NYSRC_NYCA_ICR_Reports.asp

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

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

(07-E-0088SP5)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition by Con Edison for Reconsideration of its Order Establishing Recovery Mechanism for Smart Grid Projects

I.D. No. PSC-52-10-00008-P

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

Proposed Action: The Commission is considering whether to grant, deny or modify, in whole or in part, the petition of Consolidated Edison for reconsideration of the Commission's Order Establishing Recovery Mechanism for Smart Grid Projects dated October 19, 2010.

Statutory authority: Public Service Law, sections 22, 65(1), 66(1), (4) and (9)

Subject: The petition by Con Edison for reconsideration of its Order Establishing Recovery Mechanism for Smart Grid Projects.

Purpose: The petition by Con Edison for reconsideration of its Order Establishing Recovery Mechanism for Smart Grid Projects.

Substance of proposed rule: The Commission is considering whether to grant or deny, in whole or in part, the petition of Consolidated Edison Company of New York, Inc. (Con Edison), seeking reconsideration of the Commission's Order Establishing Recovery Mechanism for Smart Grid Projects, issued October 19, 2010.

Con Edison requests that the Commission grant its petition for reconsideration and allow it to recover expenses related to labor and fringe benefits incurred in connection with the Smart Grid Demonstration Project (SGDP), provided that Con Edison demonstrates that such expenses are incremental to the labor expenses provided for in the Order Establishing Three-Year Electric Rate Plan issued March 26, 2010 (2010 Electric Rate Order), even if the company's overall rate-year labor expenses are below what was assumed in the 2010 Electric Rate Order.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: 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-E-0310SP9)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Fees Refund

I.D. No. PSC-52-10-00009-P

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

Proposed Action: The PSC is considering a proposal filed by United Water New York, Inc. (UWNY) to recover \$73,577 under-collection from UIRP Surcharge, and approve accounting treatment of additional MTBE proceeds totaling \$19,492 received in late October 2010.

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

Subject: Water Fees Refund.

Purpose: Recover \$73,577 under-collection from the UIRP Surcharge and accounting treatment of additional MTBE proceeds totaling \$19,492.

Substance of proposed rule: United Water New York Inc. (UWNY or the company) provides water service to approximately 70,240 customers or 90% of the population of Rockland County, living in the Towns of Ramapo, Clarkstown, Orangetown, Stony Point, and Haverstraw. UWNY also encompasses United Water South County Water Inc. that provides water service to approximately 486 customers, in portions of the Towns of Tuxedo, Warwick, and Monroe, in Orange County.

On December 5, 2010, the company filed a petition requesting approval to recover \$73,577 under-collection from the Underground Infrastructure Renewal Program (UIRP) Surcharge for the period January 1, 2010 through August 31, 2010, and for approval for treatment of additional Methyl Tertiary Butyl Ether (MTBE) settlement proceeds totaling \$19,492, to become effective March 1, 2011.

The company requests that these two balances be netted against the MTBE proceeds approved in Case 09-W-0731. The netting of these two items results in a reduction of current MTBE of \$3,599,080, by \$59,887, for a total of \$3,539,193 to be passed back to customers. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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.

(09-W-0731SP2)

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

Petition for the Submetering of Electricity

I.D. No. PSC-52-10-00011-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 25 Washington, LLC to submeter electricity at 25 Washington Street, Brooklyn, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of 25 Washington, LLC to submeter electricity at 25 Washington Street, Brooklyn, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 25 Washington, LLC to submeter electricity at 25 Washington Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secre-

tary, 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-E-0612SP1)

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

Petition for the Submetering of Electricity

I.D. No. PSC-52-10-00011-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Clinton Park Development, LLC to submeter electricity at 770 11th Avenue, New York, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Clinton Park Development, LLC to submeter electricity at 770 11th Avenue, New York, NY.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Clinton Park Development, LLC to submeter electricity at 770 11th Avenue, New York, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

Data, views or arguments may be submitted to: Jaclyn A. 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-E-0618SP1)

Racing and Wagering Board

**EMERGENCY
RULE MAKING**

Electronic Application Procedure to Open an Advanced Deposit Wagering Account

I.D. No. RWB-52-10-00001-E

Filing No. 1254

Filing Date: 2010-12-08

Effective Date: 2010-12-08

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

Action taken: Amendment of section 5300.4(a)(4) and (5) of Title 9 NYCRR.

Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law, sections 101, 227, 301, 305, 401, 405, 520 and 1002

Finding of necessity for emergency rule: Preservation of general welfare. **Specific reasons underlying the finding of necessity:** This emergency rulemaking is necessary to preserve the general welfare. Article I Section 9 of the New York State Constitution states that pari-mutuel wagering is authorized so that "the state shall derive a reasonable revenue for the support of government." In October, 2009, financial analysts announced that New York State faces a deficit of nearly \$50 billion over the next three and a half years. The State Comptroller has warned that the budget deficit for the 2010-2011 budget is almost \$1 billion. As a result of this budget crisis, layoffs have been ordered and cutbacks in governmental services loom large. Similarly, local governments which benefit from pari-mutuel wagering activity conducted by OTBs are facing layoffs and curtailment of services as revenues decline. The New York City Off-Track Betting Corporation has voted to abruptly cease operations effective December 7, 2010. NYCOTB takes in \$166 million a year in handle through its telephone (\$144 million) and internet (\$21 million) wagering accounts. This emergency rulemaking is necessary to ensure that former NYCOTB customers are able to safely and securely continue internet and telephone wagering with trustworthy New York State-based pari-mutuel wagering entities. This emergency rulemaking will facilitate the procedure to open new advanced deposit wagering accounts at other authorized pari-mutuel entities within the State of New York that offer internet and telephone wagering. Without this rulemaking, former NYCOTB customers may elect to open accounts with internet wagering entities that offer electronic registration but operate outside out-of-state and outside of the United States - entities that contribute no direct portion of their handle in support of government. By adopting this measure, the wagering public will be able to conveniently open ADW accounts with OTBs and pari-mutuel wagering entities in New York State. This emergency rulemaking is needed to preserve and provide valuable revenue for a state that faces multi-year deficits and local governments that are contemplating reduced services in light of dwindling revenues.

Subject: Electronic application procedure to open an advanced deposit wagering account.

Purpose: To provide guidelines and procedures for online applications for advanced deposit wagering accounts.

Text of emergency rule: Paragraphs (4) and (5) of subdivision (a) of Section 5300.4 9 NYCRR are amended to read as follows:

(4) Application shall be signed attesting to its accuracy. *In the case of an online application, the applicant shall provide an electronic signature to attest to the accuracy of the information provided. "Electronic signature" shall mean an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record.*

(5) *Except in the case of an online application, [T]he name of each new account holder will be confirmed in accordance with the Federal Government's standards for evaluating and confirming government issued identification and credentials (U.S. Department of [Justice]Homeland Security Employment Verification Form I9[, which can be obtained online at <http://www.usdoj.gov/usao/nh/pdf/releases/Forms/i9.pdf>].) A copy of each properly validated credential will be maintained with the appropriate account application. A copy of a social security card is not required to be maintained at the time of the application if the number is verified with a credit reporting agency and such report is maintained with the account application. *In the case of an online application, the pari-mutuel wagering entity shall verify the applicant's identity using, at a minimum, the name, address, social security number and date of birth of the applicant through a credit reporting agency, public database, or similarly reliable sources as provided for in the plan of operation. If there is a discrepancy between the minimum information submitted and the information provided by the electronic verification described above or if no information on the applicant is available from such electronic verification, then the pari-mutuel wagering entity shall not open the account and shall require verification through the Federal Government's standards for evaluating and confirming government issued identification and credentials (U.S. Department of Homeland Security Employment Verification Form I9).**

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 7, 2011.

Text of rule and any required statements and analyses may be obtained from: John Googas, New York State Racing & Wagering Board, One Broadway Center, Suite 600, Schenectady, New York 12305-2553, (518) 395-5400, email: info@racing.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Racing, Pari-Mutuel Wagering and Breeding Law Sections 101, 227, 301, 305, 401, 405, 520, and 1002. Section 101 vests the Board with general jurisdiction over all horse racing and all pari-mutuel wagering activities in New York State. Section 227 grants the Board the authority to make rules regarding the conduct of pari-mutuel

wagering activities associated with thoroughbred horse racing events. Section 301 grants the Board the authority to supervise generally all harness race meetings in New York State at which pari-mutuel betting is conducted and the authority to adopt rules accordingly. Section 305 grants the Board the authority to make rules regarding the conduct of pari-mutuel wagering activities associated with harness horse racing events. Section 401 grants the Board the authority to supervise generally all quarterhorse race meetings in New York State at which pari-mutuel betting is conducted and the authority to adopt rules accordingly. Section 405 grants the Board the authority to make rules regarding the conduct of pari-mutuel wagering activities associated with quarter horse racing events. Section 520 grants the Board general jurisdiction over the operation of off-track betting facilities within the state and the authority to adopt rules accordingly. Section 1002 grants the Board general jurisdiction over the simulcasting of horse races within the state and the authority to adopt rules accordingly.

2. Legislative objectives: This proposed amendment advances the legislative objective of regulating the conduct of pari-mutuel wagering activity in a manner designed to maintain the integrity of racing while generating a reasonable revenue for the support of government.

3. Needs and benefits. This rule is necessary to allow person to apply on-line to wager through advanced deposit wagering (ADW). Pari-mutuel operators, such as Nassau Downs OTB, Catskill OTB, and Yonkers Raceway will be able to process electronic application for telephone and internet accounts on the same day without having to appear in person to submit an application.

The Board adopted its Internet and Telephone Wagering Rules (Part 5300 of 9 NYCRR) in January 2009. This rulemaking will amend those rules to expressly authorize the online applications for opening an internet or telephone wagering account.

This rule is needed to compete with various internet wagering sites located off-shore and out-of-state. The Board has received concerns from pari-mutuel wagering entities in New York State that they may be losing customers to these competing internet wagering sites. This rulemaking is necessary for New York State OTBs and racetracks to remain competitive in the realm of internet and telephone wagering.

4. Costs:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule. None. This rule is permissive in nature and doesn't impose costs on pari-mutuel wagering entities with internet and telephone wagering systems.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule: None. Local governments would bear no costs because the regulation of pari-mutuel wagering is exclusively regulated by the New York State Racing and Wagering Board. This rule would not impose costs upon the New York State Racing and Wagering Board because the amendments would not alter the regulatory practices employed by the Board.

(c) The information related to costs was obtained by the New York State Racing and Wagering Board based upon analysis of current practices by authorized pari-mutuel wagering entities in the State of New York.

5. Paperwork: This rule will not require any additional paperwork. In fact, by authorizing the electronic submission of applications, pari-mutuel wagering companies should experience a decrease in paperwork compared to the current application submission requirements.

6. Local government mandates: Since the New York State Racing & Wagering Board is solely responsible for the regulations of pari-mutuel wagering activities in the State of New York, there is no program, service, duty or responsibility imposed by the rule upon any county, city, town, village, school district, fire district or other special district.

7. Duplication: There are no relevant rules or legal requirements of the state and federal governments that duplicate, overlap or conflict with the rule.

8. Alternative approaches: This Board considered various requirements for proof of identification. It considered a number of various sources that could be utilized to verify a person's identity electronically, and whether those sources should be expressly identified in the rule. Ultimately, the Board determined that the language in the current text is general enough to provide practical implementation of the rule, and specific enough to be enforceable.

9. Federal standards: There are no federal standards for pari-mutuel wagering. The New York State Racing and Wagering Board is solely responsible for regulating pari-mutuel wagering activity in New York State.

10. Compliance schedule: As an emergency rule, this rule will go into effect the day that it is submitted to the Department of State. As regular rule, this rule will go into effect permanently on the day that it is published in the State Register under a Notice of Adoption.

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

As is evident by the nature of this rulemaking, this proposal affects the procedures for same-day electronic enrollment for advanced deposit wa-

gering and does not require a Regulatory Flexibility Statement, Rural Area Flexibility Statement or Job Impact Statement because it will not impose an adverse impact on rural areas, nor will it affect jobs. A Regulatory Flexibility Statement and a Rural Area Flexibility Statement are not required because the rule does not adversely affect small business, local governments, public entities, private entities, or jobs in rural areas. The rule will have a positive impact on local governments by facilitating the enrollment of former New York City Off-Track Betting customers with other OTBs that support local government through surcharges and dividend payments. There will be no impact for reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. There will also be no adverse impact on small businesses and jobs in rural areas. A Jobs Impact Statement is not required because this rule amendment will not adversely impact jobs. This rulemaking may help preserve government service jobs. This rulemaking does not impact upon a small business pursuant to such definition in the State Administrative Procedure Act § 102(8) nor does it negatively affect employment. The proposal will not impose adverse economic impact on reporting, recordkeeping or other compliance requirements on small businesses in rural or urban areas nor on employment opportunities. The rule does not impose any technological changes on the industry either. This rulemaking merely explains the procedures for processing an application using technology adopted by the pari-mutuel wagering entities.

Workers' Compensation Board

EMERGENCY RULE MAKING

Independent Livery Driver Benefit Fund

I.D. No. WCB-45-10-00004-E

Filing No. 1258

Filing Date: 2010-12-10

Effective Date: 2010-12-11

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

Action taken: Amendment of section 300.1(a)(9); and addition of Part 309 to Title 12 NYCRR.

Statutory authority: Executive Law, section 160-eee; and Workers' Compensation Law, sections 2(9), 18-c(2)(a) and 117

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

Specific reasons underlying the finding of necessity: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the Independent Livery Driver Benefit Fund (ILDDBF), then the livery base is deemed the employer of the driver pursuant to WCL § 18-c(5). If the livery base is a member of the ILDDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. To provide the workers' compensation benefits in the limited situations, the legislation created the ILDDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

Since Chapter 392 was enacted the Board has been working to find a carrier willing to write the policy for the ILDDBF. Due to the fact that it is not clear what the liability will be it took almost 18 months to secure an insurance carrier willing to write the policy at an affordable price. During this time the Board reviewed claims of livery drivers that have been established to determine an appropriate presumptive wage as required by Workers Compensation Law § 2(9). The Board also worked with the livery industry and the Board of Directors of the ILDDBF to develop appropriate criteria that livery bases must meet to be members of the ILDDBF.

Workers' Compensation Law (WCL) § 18-c(5) provides that a livery base that is not a member of the ILDDBF is deemed the employer of any livery driver it dispatches for purposes of the WCL. This means that a

livery base that does not join the ILDDBF must purchase and maintain a full workers' compensation insurance policy covering all drivers that it dispatches. The cost to a livery base for a full workers' compensation policy is approximately \$1,400.00 per car. A base that dispatches 25 cars will be required to pay approximately \$35,000 in premium for the drivers plus premium for any other employees.

In order to join the ILDDBF, livery bases must submit an affirmation sworn under penalties of perjury that it meets the prescribed criteria. WCL § 18-c(2) directs the Chair to set by regulation the criteria the livery base must meet. If the Chair fails to act the statute provides default criteria which almost all bases cannot swear are true. For example, the statutory criteria provide that the livery base does not own any of the liveries dispatched. Almost all of the livery bases own one or more of the liveries. In addition, some of the criteria conflict with rules of the Taxi and Limousine Commission that licenses the livery bases and drivers.

The statute does not address the process for terminating membership in the ILDDBF. The rule provides such process. It also sets the presumptive wage that will be the basis of the indemnity benefits injured livery drivers will receive.

This rule must be adopted on an emergency basis to ensure that livery bases can submit the required affirmation and join the ILDDBF. Without the rule all livery bases would be required to obtain a full workers' compensation policy which most cannot afford and many would normally not be considered the drivers' employer.

Subject: Independent Livery Driver Benefit Fund.

Purpose: To set criteria for membership in Independent Livery Driver Benefit Fund, termination from the Fund and presumptive wage.

Substance of emergency rule: The proposed rule amends paragraph (9) of subdivision (a) of section 300.1 to modify the definition of "Prima Facie Medical Evidence" and adds new Part 309 to implement specific provisions regarding the Independent Livery Driver Benefit Fund (ILDDBF).

Section 300.1(a) provides definitions of terms. The proposed rule modifies the definition of "Prima Facie Medical Evidence" in paragraph (9) to account for the special requirements for claims of independent livery drivers. Specifically, for independent livery drivers Prima Facie Medical Evidence means a medical report referencing an injury covered the ILDDBF as provided in Executive Law § 160-ddd or, if the injury results from a crime, a medical report referencing an injury and a police report stating that a crime occurred.

A new Part 309 to govern the implementation of the ILDDBF.

Section 309.1 provides definitions of terms used in Part 309. Among the definitions are "covered services," "crime," "governing Taxi and Limousine Commission," "independent livery base," "independent livery driver," "livery," "livery base," "livery driver," and "New York State Average Weekly Wage."

Section 309.2 provides rules for who may be members of the ILDDBF and how membership is terminated. Subdivision (a) of this section states that only livery bases designated by the Workers' Compensation Board (Board) may join the ILDDBF. Subdivision (b) of this section provides that a livery base will only be designated by the Board as an independent livery base if it submits the affirmation required by WCL § 18-c(2) attesting that the base meets the criteria set forth in subdivision (c) of § 309.2 and if it provides written notice in the stated time periods of any inaccuracies in or changes to the information in the affirmation. Subdivision (c) of this section requires a livery base to meet the following criteria:

(1) The livery base is not classified by the governing Taxi and Limousine Commission as a black car base or luxury limousine base and is not a member of the New York Black Car Operators' Injury Compensation Fund, Inc.;

(2) All livery drivers dispatched by the livery base provide and determine their own clothing;

(3) All livery drivers dispatched by the livery base set their own hours and days of work;

(4) All livery drivers choose which dispatches or fares to accept, and no livery driver suffers any consequence by the livery base for failing to respond to its dispatch, except that every livery driver must comply with all requirements of his or her governing taxi and limousine commission regarding acceptance of dispatches, fares, trips, passengers and destinations and a livery base may temporarily deny access to its dispatches for failing to respond to a dispatch in violation of local and state laws and governing taxi and limousine commission rules and regulations regarding refusing dispatches;

(5) All livery drivers may affiliate with one or more other livery bases, except if prohibited by rules or regulations of the governing taxi and limousine commission;

(6) Either the livery driver or livery base may terminate their affiliation at any time, except that a livery base must terminate its relationship with the livery driver in accordance with any rules and regulations of the governing taxi and limousine commission;

(7) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, the owner or registrant of more than fifty (50) percent of the liveries dispatched by the livery base;

(8) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, paying or participating in paying for the purchase, maintenance, repair, insurance, licensing, or fuel, of more than fifty (50) percent of the liveries dispatched by the livery base;

(9) No livery driver dispatched by the livery base receives an Internal Revenue Service form W-2 from such base, or is subject to the withholding of any federal income taxes by the livery base, except a livery base that is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base meets the criteria of paragraph (10) of this subdivision;

(10) If the livery base is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base and it issues an Internal Revenue Service form W-2 to a livery driver or livery drivers, or withholds any federal income taxes for a livery driver or livery drivers, such livery base provides workers' compensation coverage for that livery driver or those livery drivers that is separate from the Fund; and

(11) The livery base does not impose any fines or penalties or both on any livery drivers, except the livery base may impose fines or penalties or both on a livery driver for violating the rules and regulations of the governing taxi and limousine commission regarding the conduct of livery drivers while performing their duties as livery drivers and in order to recover the cost of any fines or penalties or both imposed on the livery base by the governing taxi and limousine commission due to the behavior of that livery driver that violated the rules and regulations of the governing taxi and limousine commission.

Subdivision (d) of § 309.2 sets forth the procedures to terminate the membership of a livery base in the ILDBF.

Subdivision (e) of § 309.2 sets forth that any livery base not designated as an independent livery base shall be deemed the employer of any driver it dispatches and will be responsible for providing workers' compensation coverage for such drivers.

Section 309.3 sets forth requirements for livery drivers. Subdivision (a) of this section states that an independent livery driver is a livery driver who is licensed to drive a livery by the appropriate governing taxi and limousine commission and is dispatched by an independent livery base with which he or she is affiliated. This subdivision provides an independent livery driver injured during a dispatch by an independent livery base may be entitled to benefits in accordance with Insurance Law Article 51 and is not entitled to workers' compensation benefits except as set forth in Workers' Compensation Law § 160-ddd and § 309.3(a)(3). Paragraph (3) of § 309.3(a) sets forth when an independent livery driver is entitled to workers' compensation benefits from the ILDBF. Paragraph (4) of this subdivision makes clear that an independent livery driver is not entitled to workers' compensation benefits from the ILDBF if he or she was not performing covered services or was in violation of the rules and regulations of the governing taxi and limousine commission regarding the solicitation or picking up of passengers at the time of death, crime or injury. Paragraph (5) of this subdivision requires independent livery drivers to file all claims in New York with the Board. Paragraph (6) requires an independent livery driver to provide written notice to the ILDBF in accordance with Workers' Compensation Law § 18. Finally, paragraph (7) sets the presumptive wage for independent livery drivers as \$13,000 annual wage for an average weekly wage of \$250. The presumptive wage may be rebutted by the submittal of competent evidence. Further the presumptive wage will increase each year on July 1st by the percentage increase in the New York State Average Weekly Wage.

Pursuant to subdivision (b) of § 309.3 a livery driver that is not an independent livery driver is the employee of the livery base with which he or she is affiliated.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. WCB-45-10-00004-P, Issue of November 10, 2010. The emergency rule will expire January 19, 2011.

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

Summary of Regulatory Impact Statement

1. Statutory authority: Chapter 392 of the Laws of 2008 amended the Executive Law and WCL to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with

workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage.

Executive Law § 160-eee authorizes the Chair of the Workers' Compensation Board (Board) to adopt regulations necessary to effectuate the provisions of Executive Law Article 6-G.

Workers' Compensation Law (WCL) § 18-c(2)(a) directs the Chair to set by regulation the criteria livery bases must meet in order to be considered an independent livery based eligible to join the ILDBF.

The last paragraph of WCL § 2(9) provides that the Chair shall set by regulation the amounts livery drivers are presumptively deemed to receive in annual wages.

WCL § 117 authorizes the Chair to make reasonable rules consistent with the WCL and Labor Law.

2. Legislative objectives: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the ILDBF, then the livery base is deemed the employer of the driver pursuant to WCL § 18-c(5). If the livery base is a member of the ILDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. The legislation created the ILDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

3. Needs and benefits: The purpose of this rule is to implement specific provisions of Chapter 392. While Executive Law Article 6-G and the amendments to the WCL set forth a framework to govern the ILDBF and the benefits it will pay, the amendment to 12 NYCRR § 300.1 and the addition of Part 309 provide the detail and clarification necessary to actually implement the legislation by setting forth: 1) necessary definitions; 2) the criteria to determine which livery bases may join the ILDBF; 3) clarification on when and which benefits are payable from the ILDBF; and 4) the presumptive average weekly wage. Such detail and clarification is necessary to assist the insurance carrier writing the policy, the bases in determining if it is eligible to join the ILDBF, and the drivers in understanding what action they need to take to obtain benefits.

Currently § 300.1 defines "Prima Facie Medical Evidence" as "a medical report referencing an injury, which includes traumas and illness." This definition is too broad for claims by independent livery drivers as it encompasses all injuries and not just those listed in Executive Law § 160-ddd and or those caused by the commission of a crime. This rule amends the definition of "Prima Facie Medical Evidence" to encompass such provisions.

Executive Law § 160-aaa sets forth the statutory definitions relating to the ILDBF such as "independent livery driver," "covered services," "independent livery base," "livery," "livery driver," and "livery base." Section 309.1 sets forth necessary definitions to properly understand Part 309 and to clarify the implementation of Chapter 392.

In order to be designated as an independent livery base, WCL § 18-c(2) requires an officer or director of the base to submit an affirmation sworn under penalty of perjury attesting that the criteria set by the Chair in regulation are true with respect to the base. In the absence of regulations setting forth the criteria, the statute lists default criteria.

After consulting with the livery industry and the appropriate TLCs, it was determined that the livery bases cannot meet all of the statutory default criteria, in part due to the rules of the TLCs. In addition the statutory criteria does not comport with how the livery industry operates. The criteria in § 309.2(c) has been drafted to reflect how the livery industry operates. By prescribing the criteria livery bases must meet through regulation, it assures that there are owners of livery bases who can attest to the truth of such criteria and join the ILDBF.

In addition to setting forth the criteria that the livery base must attest to in the affirmation, § 309.2 requires livery bases to provide the Board and ILDBF with written notice of any inaccuracies in the information in the affirmation within 5 business days of discovery or knowledge of the inaccuracies and to provide written notice of any changes in the information in the affirmation within 10 business days of the changes. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c) as required by WCL § 18-c(3).

Article 6-G fails to set forth the procedures and timeframes for termination of a livery base's membership in the ILDBF. Subdivision (d) of § 309.2 covers such termination by setting forth the process when the livery base fails to make the required payments to the ILDBF, when the livery base must leave the ILDBF because it is no longer designated as an independent livery base, and when a livery base decides to leave the ILDBF.

Section 309.3 provides necessary clarification and detail for livery drivers. For example, this section clarifies that a livery driver is an independent livery driver when he or she is appropriately licensed and dispatched by a livery base that is a member of the ILDBF. It also clarifies that the ILDBF only has jurisdiction over claims filed in New York with the Board and that written notice of an injury, illness or death must be provided to the ILDBF in accordance with WCL § 18.

As statutorily mandated § 309.3 sets forth the presumptive wages for livery drivers. After reviewing numerous cases in which a livery driver was found to be an employee and an average weekly wage was set, the Board determined that it was usually set at \$250 per week, unless tax returns or other records showed otherwise. Because this is the rate that is set in existing cases for livery drivers, the rule sets \$250 as the presumptive wage. To ensure the presumptive wage is current, the regulation also provides for yearly adjustments in accordance with the percentage increase in the New York State Average Weekly Wage.

4. Costs: The rule imposes minimal costs on regulated parties. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur postage if the notice is sent through the United States Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. Livery bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver.

Livery drivers will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

The Board will incur costs to approve the affirmations for membership in the ILDBF and provide written notice of the charges and conduct a hearing with regard to possible revocation of a livery base's designation as an independent livery base. These activities will be performed by existing staff and incorporated into existing procedures.

5. Local government mandates: This rule does not impose any mandates or requirements on local governments.

6. Paperwork: This rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. If a livery base wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked.

Livery drivers must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

The Board is required to send written notice to a livery base of the charges which form the basis for its decision to seek the revocation of the base's designation as an independent livery base.

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

8. Alternatives: One alternative would be to modify the definition of "covered services" to require the independent livery base that dispatched the livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term.

Another alternative would be to fail to clarify that claims for benefits from the ILDBF must be filed in New York. This alternative was rejected and the clarification included to ensure drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3).

A third alternative would be to eliminate all criteria to join the ILDBF so all bases could join. This alternative was rejected as the intent was to address those situations where the status of the driver is unclear. Some livery bases own all of the cars that the drivers operate. In such a case the base is the employer and it is inappropriate for such bases to be part of the ILDBF. However, there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c(2)(i) to allow ownership up to 50% of the vehicles.

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

10. Compliance schedule: The regulated parties can comply with these requirements upon adoption of the rule.

Regulatory Flexibility Analysis

1. Effect of rule: This rule only governs livery drivers, livery owners and livery bases in New York City (NYC), Westchester County and Nassau County. Therefore, this rule has no impact on small businesses or local governments outside these three areas. Further, the rule only governs livery drivers and bases so it does not impose any requirements or mandates on local governments in NYC, Westchester County or Nassau County. If the rule did govern local governments, it would only govern the NYC Taxi and Limousine Commission (TLC), the Westchester County TLC, the Nassau County TLC and the local governments in Nassau County that license livery bases, livery drivers and/or liveries. The rule will affect the approximately 800 livery bases in the three locations and the owners and drivers of the approximately 25,000 liveries. It is estimated that the majority of livery bases, drivers and livery owners are small businesses. Finally, the rule effects the Independent Livery Driver Benefit Fund (ILDBF) which is a statutorily created non-profit.

2. Compliance requirements: This rule imposes reporting and record-keeping requirements on small businesses. First the rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. There is no specific form for the notice, but it does have to be filed within the specified time periods. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is in violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c). If a livery base that is a small business wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC. This notice is necessary to ensure that the ILDBF does not accept liability for any further claims; the Board is informed that the livery base is now required to have full workers' compensation coverage for all drivers, and the TLC ensures the base complies with its rules.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked. The notice mirrors the required notice when a workers' compensation insurance carrier cancels coverage of an employer.

Livery drivers or their dependents must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who are small businesses who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

3. Professional services: Small businesses will not need any professional services to comply with this rule. The affirmation the livery bases must complete is a form created by the Board and does not require any professional services to complete. The same is true of the written notices the livery bases and livery drivers who are small businesses must submit.

4. Compliance costs: The proposed rule will impose minimal costs on small businesses. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. WCL § 18-c(2)(a) requires livery bases, including those that are small businesses, to submit an affirmation sworn under penalty of perjury in order to be designated as an independent livery base. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur the cost of postage if the notice is sent through the U. S. Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. The cost will be for postage for the notice to the three entities. Livery bases that join the ILDBF will pay \$260 per car

but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver. Such costs would include obtaining documentation as to the actual wage the driver earned.

Livery drivers, including those that are small businesses, will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. However, the Board may excuse the lack of notice if there is sufficient reason that the notice could not be given, the employer had actual knowledge, or the employer is not prejudiced by the lack of notice. The notice can be hand delivered or mailed. The cost is mainly postage if mailed and is incurred by all workers injured on the job. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Injured workers may file claims by calling a toll free number and providing information over the telephone, by completing and submitting the form online, or by completing a paper form and mailing it to the Board. Only if the livery driver completes and mails the paper form will he or she incur costs. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage. Livery drivers, who are small businesses, may hire a legal representative with respect to a claim for workers' compensation benefits. Such livery drivers will not incur any out of pocket costs as WCL § 24 requires legal representatives to be paid fees awarded by the Board and paid out of any indemnity benefits paid to the livery driver. The acceptance of a fee directly from a livery driver is a misdemeanor.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

5. Economic and technological feasibility: It is economically and technologically feasible for small businesses to comply with this rule. The affirmation is a form prescribed by the Board and is simple to complete. There are no required forms or formats for the written notices livery bases must submit. Livery drivers who are small businesses can provide the written notice and complete the claim form for benefits without any assistance. However, livery drivers may retain a legal representative with respect to their claim who may assist them when completing the claim form and seeking a higher wage than the presumptive wage. Pursuant to Executive Law § 160-ddd requires the ILDBF to purchase an insurance policy, which it has done. The insurance carrier will handle the claims and payment of benefits and bill and collect the annual payment from the livery bases.

6. Minimizing adverse impact: The rule was drafted to ensure that livery bases would be able to join the ILDBF and livery drivers could access benefits when injured or killed within the provisions of Executive Law § 160-ddd. To minimize adverse impact on both the livery bases and drivers the regulation does not modify the definition of "covered services." It was suggested that "covered services" be defined to require the independent livery base that dispatched the injured livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term. The definition of "covered services" for the ILDBF is almost the same as the definition for that same term for the Black Car Fund. The Appellate Division, Third Department in *Aminov v. N.Y. Black Car Operators Injury Comp. Fund*, 2 A.D.3d 1007 (3d Dept. 2003) specifically found that the time waiting for a dispatch is covered. Therefore, modifying the definition as suggested would not be appropriate. Further defining "reasonable time" as twenty minutes has no reasonable basis.

To minimize adverse impacts the rule clarifies that claims for benefits from the ILDBF must be filed in New York. This clarification ensures livery drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3). For example, benefits could be awarded for injuries that do not meet the statutory requirements or set an average weekly wage above the presumptive wage without further evidence. When the insurance carrier writing the policy to cover these claims set the cost of the policy it was based on benefits only being paid as provided in statute and regulation. Any awards above the statutory or regulatory levels would cause the premium for the policy to increase, potentially beyond the means of the bases.

The rule sets criteria bases must meet to join the ILDBF to minimize the adverse impact of the default criteria provided in WCL § 18-c(2). Without the criteria in the rule livery bases that own any liveries would be unable to join the ILDBF. While it is inappropriate for the livery base to own all or a majority of the liveries, as such a base would clearly be the employer; there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c(2)(i) to allow ownership up to 50% of the vehicles.

The criteria in the rule account for the rules of the governing TLCs to eliminate adverse impacts from conflicts between the rules and the criteria in the statute. The criteria in WCL § 18-c(2)(iv) provides that livery drivers choose which dispatches or fares to accept, however the governing TLCs have rules prohibiting drivers from refusing to accept certain fares. If this criterion was not modified in the rule, no base would be able to submit the affirmation sworn under penalties of perjury.

7. Small business and local government participation: The rule was drafted after discussions with groups representing the livery bases, the ILDBF Board of Directors, the NYC TLC and the Westchester County TLC. Drafts of the regulation were shared with representatives of livery bases, the ILDBF Board of Directors, the NYC TLC, Westchester County TLC and Nassau County TLC.

Rural Area Flexibility Analysis

This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. The rule only applies to livery bases, livery owners and taxi and limousine commissions in New York City, Westchester County and Nassau County. The seven affected counties do not have populations less than 200,000 and therefore do not fall within the definition of a rural area as provided in Executive Law § 481(7). As the rule does not apply to any rural areas a Rural Area Flexibility Analysis is not required.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates the Independent Livery Driver Benefit Fund (ILDBF) to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. This rule ensures that livery bases are eligible and can afford to join the ILDBF so that the bases can continue to operate. This rule also implements Chapter 392 so that livery drivers who are killed, injured due to a crime or suffer a catastrophic injury as provided in Executive Law § 160-ddd can obtain workers' compensation benefits.

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies

I.D. No. WCB-52-10-00003-E

Filing No. 1260

Filing Date: 2010-12-13

Effective Date: 2010-12-13

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 13 and 13-o

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

Specific reasons underlying the finding of necessity: This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claim-

ants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and there reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

Subject: Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

Purpose: To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payor.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances under which an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay

any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets forth that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 12, 2011.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Special Counsel to the Chair, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to voluntarily decide to designate a pharmacy or pharmacy network and require claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation

will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days as required by statute. This section describes how carriers and self-insured employers which decide to require the use of a designated network will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation with other forms. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement the savings afforded to carriers and self-insured employers will be substantially the same for local governments. If a local government decides to mandate the use of a designated network it will incur some costs from providing the required notice.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills if they object to any such bills. This process is required by WCL § 13(i)(1) - (2). This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all

pharmacies in a network comply with the new rule. The new rule will provide savings to small businesses and local governments by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements:

Self-insured municipal employers and self-insured non-municipal employers are required by statute to file objections to prescription drug bills within a forty five day time period if they object to bills; otherwise they will be liable to pay the bills if the objection is not timely filed. If the carrier or self-insured employer decides to require the use of a pharmacy network, notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that chooses to utilize a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is the source for average whole sale prices and it can be obtained for less than \$100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government from imposition of new fee schedules and payment procedures. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.