

RULE MAKING ACTIVITIES

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

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

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

Office of Alcoholism and Substance Abuse Services

EMERGENCY RULE MAKING

Opioid Treatment Services

I.D. No. ASA-08-10-00001-E

Filing No. 72

Filing Date: 2010-02-08

Effective Date: 2010-02-08

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

Action taken: Repeal of Part 828 and addition of new Part 828 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 32.01, 32.05, 32.07 and 32.09

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

Specific reasons underlying the finding of necessity: 1. The regulation has not been changed substantially in 34 years and the treatment of opioid addiction has changed substantially over that period of time and recognizes and allows for advances in toxicology testing and pharmacology.

2. Federal regulations were promulgated 9 years ago and this regulation brings NYS more reflective of the Federal regulations.

Subject: Opioid Treatment Services.

Purpose: Bring the current practice of opioid treatment services within NYS and to bring the regulation into alignment with Federal regs.

Substance of emergency rule: 14 NYCRR Part 828

OPIOID TREATMENT PROGRAMS

The proposed regulations would revise Section 828 of the Mental Hygiene law (Requirements for the operation of chemotherapy substance abuse programs) to allow for changes in addiction treatment services as the last changes to the regulation occurred under DSAS as Part 1040 in 1984 as 1040.21. It was then renumbered as Part 828 and moved to OASAS in 2000, with no significant changes. The methadone regulation has existed for 24 years without change even though the Federal rules of opioid treatment have changed due to advancements and evidence based practice.

Changes for Opioid Treatment Programs

- Conform OASAS regulations to federal regulations (42 CFR Part 8) regarding certification of opioid treatment programs (OTP).
- Adds regulations related to buprenorphine (methadone alternative) treatment, removing an obstacle to physicians to administer buprenorphine in OTPs where clients may receive supportive services.
- Provides for opioid medical maintenance (OMM), pursuant to federal waiver, for certain qualified opioid patients and providers.
- Provides guidelines for certified providers to provide services at additional locations.
- Requires medical directors to become certified in an area of addiction medicine.
- Requires testing for Hepatitis and makes testing for STDs optional.
- Increases flexibility in toxicology testing.
- No longer requires OASAS approval for methadone dosage increases above 200 milligrams.
- Recognizes that treatment for opioid addiction may be provided in a residential or in-patient setting and makes provisions for regulation of such services.
- Greater consistency between federal and state regulations will benefit both providers and clients.
- Adds language that states only clients with a primary diagnosis of opioid addiction may be admitted to an OTP.
- Annual physical still required however at clinics discretion patient may be able to go to their private MD.
- New language added for transfer patients.
- More flexibility for counselor to patient staffing ratios.
- Greater flexibility in providing patients with take home medication and removes agency approval on a one-time basis for up to 30 days take home dose.
- Adds recall to reduce diversion.
- Defines role of security guards at the OTP.
- Defines aftercare.
- States specialized services that are not defined by regulation must be approved by OASAS prior to implementation.
- States providers must establish a community relations policy and committee.
- Providers must establish a quality improvement policy.
- Requires 50% of the counseling staff to be CASAC or CASAC-T within four years.

This regulation was originally published in the NYS Register in December 2008. Many providers commented and OASAS responded. Here are the additional changes to the regulation.

- Adds language for approved medication which provides programs the ability to use methadone, buprenorphine or any other agent approved for opioid treatment by federal authorities.
- Provides for opioid medical maintenance (OMM), pursuant to federal waiver, for certain qualified opioid patients and providers.
- Adds language for health care coordinator which is consistent with other regulations in the Part.

- Changed language for nurse/patient ratio back to prior language as no change was intended.
- Continuing care treatment is limited to four months, where after a client who requires more counseling should be referred to another modality.
- Increases flexibility in toxicology testing.
- Multidisciplinary team language changed to be consistent with our regulations in the Part.
- Mandatory use of Locatdr form lifted.
- Allows for prescribing professionals to perform medical services except for initial dose and medical maintenance.
- Clarified definitions for taper and detox.
- Clarified language for transfer patients.
- Recognizes that treatment for opioid addiction may be provided in a residential or in-patient setting and makes provisions for regulation of such services.
- Changed the language and now allows an individual who voluntarily completed treatment to return to treatment without confirming current opioid dependence of two years and instead can accept them with one year.

A primary goal of the proposed amendments is to improve treatment cost effectiveness in all opioid treatment programs. The proposed amendments accomplish this in several ways. OTPs flexibility in toxicology testing is expanded to permit the option of oral fluid testing which is less onerous to staff, more dignified for the patient, and allows several patients to be tested simultaneously. Increased toxicology testing will improve patient outcomes through early identification and appropriate counseling. Because fewer patients present with sexually transmitted disease (STD) testing for STD is no longer required, but can be completed as necessary for those patients who request testing or exhibit signs and symptoms. However, to protect the public, testing for Hepatitis is mandated but federal funding or local DOH funds are available for Hepatitis testing and vaccines to offset costs.

More efficient and cost-effective administration is also a goal of the proposed rule. OASAS does not expect to incur increased costs related to administering the new rule. OASAS will modify the review instrument currently used to evaluate OTPs and will provide additional technical assistance to OTPs, but this is not expected to increase agency costs because staff time currently needed to process individual and general regulatory waivers to current regulations will be decreased and can be allocated more efficiently.

Municipalities may recognize savings because the proposed regulation changes the number of years it may take a client to achieve a monthly reduced medication pick-up schedule for take home medications from four years to three years. Medicaid costs for visits and billing will be reduced because the patient goes to an OMM only once per month rather than weekly.

The proposed amendments will result in a reduction in paperwork for both OASAS and its certified providers. For example, the proposed regulations will reduce the number of individual patient exemptions and general waivers from current regulation, saving providers and the agency costly administrative time. An estimated monthly average of 10 requests for waivers would be eliminated. The proposed regulation allows more flexibility in take home medication and clinic schedule changes, areas of the highest number of individual patient exemptions.

The proposed regulation removes a requirement for OASAS approval for methadone dosage increases above 200 milligrams based on review of several available studies. In January 2007, 103 of 115 certified clinics requested a waiver from OASAS regarding prior OASAS approval for methadone dosage increases; granting the waiver resulted in 114 fewer individual patient exemptions regarding dosage increases during 2007. The proposed draft regulations would eliminate the need for providers to submit this waiver renewal upon recertification.

Federal regulations set the minimum standards and preserve states' authority to regulate OTPs and determine appropriate additional regulations. New York state has many unique concerns because the state has more OTP clinics and patients (115 and 39,314 respectively) than any of the other 44 states and territories providing opioid treatment. In New York City, multiple clinics serving thousands of patients may exist within blocks of each other leading to community resistance and public opposition to community based treatment programs. As a result, New York state regulations tend to be more stringent than federal standards.

OASAS solicited comments on the proposed regulations and possible alternatives from a cross-section of New York's upstate and downstate treatment provider community, as well as urban and rural programs. OASAS utilized a statewide coalition group, the Committee of Methadone

Program Administrators (COMPA), to distribute the proposed regulation to all of its members and to collect comments. All comments received were reviewed and incorporated wherever appropriate. The proposed regulations were also shared with the National Alliance of Methadone Advocates (NAMA), New York States Council of Local Mental Hygiene Directors, New York State's Advisory Council, and Alcoholism and Substance Abuse Providers of New York State (ASAP).

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 May 8, 2010.

Text of rule and any required statements and analyses may be obtained from: Deborah Egel, 1450 Western Ave., Albany, NY 12203, (518) 485-2312, email: DeborahEgel@oasas.state.ny.us

Regulatory Impact Statement

The proposed Opioid Treatment for Addiction regulation was originally submitted for public review and comment within the field and then publicly in the NYS Department of State Register in December 2008. Prior to these proposed changes the last amendment to the regulation occurred under DSAS as Part 1040 in 1984 as 1040.21. It was then renumbered as Part 828 and moved to OASAS in 2000, with no significant changes. The methadone regulation has existed for 26 years without change even though the Code of Federal Regulations, title 42, Part 8 of opioid treatment have changed due to advancements and evidence based practice. Therefore the impact of the proposal will more closely align state regulations with federal rules that were promulgated in 2001, that changed due to advancements and evidence based practice.

Opioid addiction is a chronic illness which can be treated effectively with medications that are administered under conditions consistent with their pharmacological efficacy, and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and, when appropriate, vocational rehabilitation. Medication assisted treatment is an evidence based practice for opioid dependency treatment. The proposed regulation sets forth standards to guide opioid dependency treatment.

Proposed changes recognize opioid addiction as a chronic illness that can be treated with certain medications (medication assisted treatment) in conjunction with supportive services (counseling, treatment for co-occurring disorders, and vocational rehabilitation).

1. Statutory Authority:

Mental Hygiene Law (MHL) § 19.07(e) authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services (OASAS) to ensure that persons who abuse or are dependent on alcohol and/or substances and their families receive effective and high quality care and treatment.

MHL § 19.09(b) authorizes the Commissioner to adopt regulations to implement any matter under his or her jurisdiction.

MHL § 19.16 requires the commissioner to establish and maintain, either directly or through contract, a central registry for purposes of preventing multiple enrollment in methadone programs.

MHL § 19.40 authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

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

MHL § 19.21 (b) requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

MHL § 19.21(d) requires the Commissioner to promulgate regulations to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

MHL § 32.01 authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by MHL article 32.

MHL § 32.05 requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services including but not limited to methadone.

MHL § 32.09(b) gives the Commissioner the power to withhold an operating certificate for a Methadone provider until statutory requirements are satisfied.

2. Legislative Objectives:

Article 32 of the Mental Hygiene Law (§ 32.01) enables the Commissioner to regulate and assure consistent high quality of services within the state for persons suffering from chemical abuse or dependence, their families and significant others, and those at risk of becoming chemical abusers. 14 NYCRR Part 828 establishes requirements for chemotherapy substance abuse treatment (methadone). Revising policy and procedures with regard

to opioid treatment, will establish a standard for all facilities, which is in the best interest of the patient, and will assist opioid treatment programs to provide better health care services and recovery from opioid dependency.

3. Needs and Benefits:

The proposed amendments advance the goals of guaranteeing patients the best treatment in a manner that is cost effective and accountable. The proposed amendments are needed because of developments inside and outside the agency including: (1) issues identified during an on-going broad-based dialogue with OASAS certified providers and affiliated stakeholders to define a "gold standard" for treatment and/or identify "best practices" for quality patient-centered care; (2) the need to conform regulations to updated federal standards related to opioid treatment (42 CFR Part 8), and; (3) evolution of social attitudes toward greater acceptance of persons recovering from chemical dependence.

Part 828 conforms state and federal regulations affecting approximately 36% (40,000) of addiction patients in New York State. Opioid Treatment Program (OTP) physicians may administer buprenorphine (methadone alternative) in an OTP where clients will receive additional beneficial services such as counseling, toxicology, and medical support. Opioid Medical Maintenance (OMM; pursuant to a federal waiver to select providers approved by OASAS) permits monthly dispensing in a physician's office for certain patients who do not need long-term counseling.

This regulation was originally published in the NYS Register in December 2008. Many providers responded and offered comments. Here are the resulting changes to the regulation.

- Adds regulations related to buprenorphine (methadone alternative) treatment, removing an obstacle to physicians to administer buprenorphine in OTPs where clients may receive supportive services.
- Provides for opioid medical maintenance (OMM), pursuant to federal waiver, for certain qualified opioid patients and providers.
- Adds language for health care coordinator which is consistent with other regulations in the Part.
- Changed language for nurse/patient ratio back to prior language as no change was intended.
- Continuing care treatment is limited to four months, where after a client who requires more counseling should be referred to another modality.
- Increases flexibility in toxicology testing.
- Multidisciplinary team language changed to be consistent with our regulations in the Part.
- Mandatory use of Locatdr lifted.
- Allows for prescribing professionals to perform medical services except for initial dose and medical maintenance.
- Clarified definitions for taper and detoxification.
- Clarified language for transfer patients.
- Recognizes that treatment for opioid addiction may be provided in a residential or in-patient setting and makes provisions for regulation of such services.
- Changed the language and now allows an individual who voluntarily completed treatment to return to treatment without confirming current opioid dependence of two years and instead can accept them with one year.

In addition, all technical issues such as lettering, grammar and punctuation were fixed where necessary.

4. Costs:

Additional costs, if any, are up-front, minimal, and offset by improved treatment outcomes, increased staff efficiency, and clearer compliance directives.

a. Costs to regulated parties:

Patients and service providers are regulated parties. Patients will not incur additional costs. Providers may incur minimal up-front costs associated with laboratory testing, training and/or hiring qualified health professionals, but costs will be offset by improved outcomes, increased staff efficiency, and clearer compliance directives.

The proposed toxicology regulations are more cost effective: optional oral fluid testing is less onerous to staff, more dignified for the patient, and can address several patients simultaneously. Providers will know when patients relapse to deliver appropriate services for improved outcomes. The proposed regulation no longer mandates sexually transmitted disease (STD) testing but recommends testing to be completed as necessary for patients who request testing or exhibit signs and symptoms. However, to protect the public, testing for Hepatitis is mandated because Hepatitis C has become epidemic; federal and DOH funds offset costs of testing and vaccines.

OASAS proposes requiring medical directors hired after the promulgation of the new rule to be certified in Addiction Medicine. All medical directors must obtain a board certification in one of three types of addiction medicine subspecialties and become buprenorphine certified within four months of employment (completion of an 8-hour course). Physicians may be hired on a probationary basis with four years to obtain certification.

The regulation requires fifty percent of staff to be Qualified Health Professionals (QHPs). Patients in OTPs with multiple medical, psychiatric and psychosocial barriers require specially trained staff. Most OASAS outpatient programs already meet or exceed this requirement because Credentialed Alcohol and Substance Abuse Counselors (CASAC) trainees are counted towards the 50 percent requirement. The proposed amendments for OTPs include a two year implementation to reach the 50% level plus flexibility in medication administration, toxicology and staffing configurations.

Providers will not incur any additional costs for materials. Requirements for OTP quality assurance are already mandated under Federal standards.

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

OASAS does not anticipate increased administrative costs. OASAS will modify the review instrument currently used to evaluate OTPs and provide technical assistance to OTPs. Staff time needed to process individual and general regulatory waivers to current regulations will be decreased and such time can be allocated more efficiently.

Counties, cities, towns or local districts will incur no additional costs. Municipalities may realize savings because the regulation reduces (four years to three years) the time for an OTP client to achieve a monthly medication pick-up schedule; Medicaid costs will be reduced because the patient goes to an OMM monthly rather than weekly.

5. Local Government Mandates:

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

6. Paperwork / Reporting:

Paperwork will be reduced by reducing the requests for patient exemptions and regulatory waivers (average of 10 per month). The requirement that OASAS approve methadone dosage increases above 200 milligrams is removed. Studies show that adequate dosage varies among patients depending on metabolism and interaction with concurrent medications, yet inadequate methadone dosing is common (NIH, 1998; Marion, 2005). Dosing flexibility can be safe and improves treatment retention (Tenore, 2004; Maddux, et al, 1997). In January 2007, 103 of 115 OASAS clinics requested a waiver for dosage increases; granting the waiver resulted in 114 fewer individual patient exemptions. The proposed regulation eliminates the necessity of submitting this waiver renewal upon recertification.

7. Duplications:

There are no duplications of other state or federal requirements.

8. Alternatives:

The only other alternative is to keep the existing regulation in place. This would be detrimental to both the opioid treatment providers and patients being served. In an effort to elicit comments on the proposed regulations and possible alternatives, these amendments were shared with New York's treatment provider community, representing a cross-section of upstate and downstate, as well as urban and rural programs. OASAS used a statewide coalition group, the Committee of Methadone Program Administrators (COMPA), to facilitate distribution of this proposed regulation to all of its members and have collected comments. The regulations has been published, more comments were received, reviewed and more changes were made. Additionally, these regulations were also shared with the National Alliance of Methadone Advocates (NAMA), New York State's Council of Local Mental Hygiene Directors, New York State's Advisory Council, and Alcoholism and Substance Abuse Providers of NYS (ASAP).

9. Federal Standards:

Federal regulations set minimum standards for OTPs. New York's take-home regulations are more stringent than federal standards; New York has more OTP clinics and patients (115 and 39,314 respectively) than any of the other states and territories providing opioid treatment. Multiple New York City clinics serve thousands of patients within blocks of each other and often face community resistance.

Methadone diversion and related mortality is a concern because of the number of clinics and a substantial black market (Bell & Zador, 2000, Breslin & Malone, 2006, & Lewis, 1997). Regulations addressing diversion limit patients' receipt of take-home medication (minimum two years of treatment and additional criteria to receive a 30 day take-home supply). The proposed regulation seeks to reduce diversion yet balance patients' ease of access by increasing testing frequency and adding routine "call backs" for patients with take home doses (Varenbut, et al, 2007). Studies show benefits to take home options: improves treatment retention, attracts new patients, rewards patients' abstinence or treatment compliance, and improves patient quality of life (Ritter, et al, 2005). Most methadone-related deaths linked to diversion involved patients in pain management centers, not OTPs (Center for Substance Abuse Treatment, 2004; Cicero, 2005).

10. Compliance Schedule:

Providers may comply with the proposed changes upon adoption. Full

implementation of this Part will be completed within one year of adoption with the exception of phased-in staffing requirements.

References

Bell, J., & Zador D.A. (2000). A risk-benefit analysis of methadone maintenance treatment. *Drug Safety* 2000, 22(3):179-190.

Breslin K.T. & Malone S. (2006). Maintaining the viability and safety of the methadone maintenance treatment program. *Journal of Psychoactive Drugs* 2006, 38(2):157-160.

Center for Substance Abuse Treatment. (2004). Methadone associated mortality: Report of a national assessment, May 8-9, 2003. CSAT Publication No. 28-03. Rockville, MD: Center of Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration.

Cicero T.J. (2005). Diversion and abuse of methadone prescribed for pain management. *Journal of American Medical Association*, 293(3): 297-298.

Leavitt, S.B. (2003). Methadone dosing and safety in the treatment of opioid addiction. *Addiction Treatment Forum* (special report), Available at: <http://www.atforum.com>.

Lewis D. (1997). Credibility, support for methadone treatment-finally. *Brown University Digest of Addiction: Theory & Application*, 1997.

Maddux, J.F., Prihoda, T.J., & Vogtberger, K.N. (1997). The relationship of methadone dose and other variables to outcomes of methadone maintenance. *The American Journal on the Addictions*, Vol. 6, No. 3, 246-255.

National Institute of Health. (1998). National Consensus Development Panel on Effective Medical Treatment of Opiate Addiction. *Journal of the American Medical Association*, 280 (1998): 1936-43.

Ritter, A. & Di Natalie, R. (2005). The relationship between take-away methadone policies and methadone diversion. *Drug and Alcohol Reviews*, 24:347-352.

Tenore, P. (2004). DINO-VAMP: A helpful acronym in determining optimal methadone dosing and brief review of dosing literature. *Journal of Maintenance in the Addictions*, Vol. 2(4), 29-45.

Varenbut, M., Teplin, D., Daiter, J., Raz, B., Worster, A, Emadi-Konjin, P., Frank, N., Konyer, A., Greenwald, I., & Snider-Adler, M. (2007) "Tampering by office-based methadone maintenance patients with methadone take home privileges: a pilot study", *Harm Reduction Journal* 2007, 4:15 doi:10.1186/1477-7517-4-15. Available at: <http://www.pharmreductionjournal.com/content/4/1/15>.

The Center of Substance Abuse Treatment (CSAT) of the Substance Abuse and Mental Health Services Administration (SAMHSA) within the US Department of Health and Human Services (HHS).

Regulatory Flexibility Analysis

Effect of the Rule: The proposed Part 828 will impact certified and/or funded providers. It is expected that the development of opioid treatment programs will require providers to amend some of their policies and procedures in their treatment modality. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking medication assisted treatment for opioid dependency due to less restrictive procedures for medication assisted treatment. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts will not be affected because any nominal increase in cost will be offset by better patient outcomes.

Compliance Requirements: It is expected that there will be some changes in compliance requirements. However, providers are equipped to make the changes which will enhance patient care. Also, providers are already required by federal statutes to provide certain services such as utilization review, so it is not expected that this regulation, which provides additional guidance on good utilization review practices, will have additional costs.

Professional Services: While it is expected that programs may require additional professional services the impact is nominal because over half of the current opioid treatment providers already meet the criteria set forth in the regulation for qualified health professionals and the regulation allows for phased implementation over four years.

Compliance Costs: Some programs may need additional formally trained staff to meet the proposed requirements; however, new CASAC credentialing rules, acceptance of CASAC trainees and phased implementation will decrease any barriers for compliance. Laboratory fees may increase; however, existing reimbursement fees should be sufficient to meet these requirements.

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

Minimizing Adverse Impact: Part 828 has been carefully reviewed to ensure minimum adverse impact to providers. Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare of New York, The Federal Center for Substance Abuse Treatment, The Federal Drug Enforcement Agency, the OASAS Methadone Transformation Team, the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services and approximately 50 opioid treatment programs were given the opportunity to comment on this proposal. Any impact this rule may have on small businesses and the administration of state or local governments and agencies will either be a positive impact or the nominal costs and compliance are small and will be absorbed into the already existing economic structure. The positive impact for our patients and our health care system, out weigh any potential minimal costs.

Small Business and Local Government Participation: The proposed regulations were shared with New York's treatment provider community including, Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare of New York, The Federal Center for Substance Abuse Treatment, The Federal Drug Enforcement Agency, the OASAS Methadone Transformation Team, the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services.

Rural Area Flexibility Analysis

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

Job Impact Statement

The implementation of Part 828 will have an impact on jobs in that it will require 50% of the staff at an OTP to be a qualified health professional which is in alignment with other NYS treatment regulations (eg. Part 822). The hiring of formally trained staff will improve patient outcomes. At the present time OASAS has determined that most programs already meet or exceed this requirement. In addition, the regulation allows for CASAC trainees to be counted towards the 50% of QHP on staff and there is a phased implementation over the course of four (4) years. Finally, the change in CASAC testing requirements should increase the number of CASAC's in NYS. So while the current staff may need to enter formal education programs in order to maintain their employment this will help create new professional staff in New York State. This regulation will not adversely impact jobs outside of the agency.

New York State Athletic Commission

NOTICE OF ADOPTION

Change of Address of the Office Location of the New York State Athletic Commission

I.D. No. ATH-05-09-00007-A

Filing No. 73

Filing Date: 2010-02-04

Effective Date: 2010-02-24

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

Action taken: Amendment of section 206.1 of Title 19 NYCRR.

Statutory authority: Unconsolidated Laws, section 8901

Subject: Change of address of the office location of the New York State Athletic Commission.

Purpose: To change the address stated for the New York State Athletic Commission's office.

Text or summary was published in the February 4, 2009 issue of the Register, I.D. No. ATH-05-09-00007-P.

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

Text of rule and any required statements and analyses may be obtained from: James W. Leary, Esq., New York State Department of State, 99 Washington Avenue, Suite 1120, Albany, NY 12231-0001, (518) 474-6740

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Emissions Verification, 202-1 Emissions Testing, Sampling, and Analytical Determinations and 202-2 Emission Statements

I.D. No. ENV-08-10-00012-P

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

Proposed Action: Amendment of Part 202 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0301, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0311, 71-2103, 71-2105 and 72-0303

Subject: Emissions verification, 202-1 Emissions testing, sampling, and analytical determinations and 202-2 Emission Statements.

Purpose: Details the applicability, acceptable procedures, required contents and record keeping for testing and reporting of emissions.

Public hearing(s) will be held at: 10:00 a.m., April 12, 2010 at Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129-A, Albany, NY; 2:00 p.m., April 13, 2010 at Department of Environmental Conservation Annex, Region 2, 11-15 47th Ave., Hearing Rm. 106, Long Island City, NY; 2:00 p.m., April 14, 2010 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.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov): The New York State Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Subpart 202-2, Emission Statements to make some minor language changes and include the reporting of six Greenhouse Gases (GHGs) as part of the existing annual emission statement process. The Department needs to develop a more complete and accurate inventory of GHG emissions generated in New York State. The inventory data collected will be used in the planning for and development of additional global warming reduction programs.

The express terms contain provisions which detail the requirements for emissions testing, sampling and analytical determinations, and emission statements. There were no substantial changes made to these provisions beyond what is identified in this summary.

The six GHGs will be added to 202-2.3(c). These six GHGs include: Carbon Dioxide (CO₂), Methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). These additional GHGs are not regulated air contaminants and therefore will not be included in the bill calculations for the annual operating permit program fee for affected sources.

Text of proposed rule and any required statements and analyses may be obtained from: Michael Miliani, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: 202emis@gw.dec.state.ny.us

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

Public comment will be received until: April 21, 2010.

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.

Summary of Regulatory Impact Statement

STATUTORY AUTHORITY

The New York State (NYS) Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Part 202, Emissions Verification, to make some minor language changes to 202-1 and 202-2. Specifically, in 202-1, the Department is proposing to change Commissioner to more accurately represent the Department's ability to require stack tests for inventory purposes, as part of the permitting process, and to be more consistent with the language used in 202-2. Within 202-2, the Department is proposing to clarify language and include the reporting of greenhouse gases (GHGs) as part of the existing annual emission statement process. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

Sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0311, 71-2103, 71-2105 and 72-0303 of the NYS Environmental Conservation Law (ECL) authorize the Department to promulgate this regulation.

LEGISLATIVE OBJECTIVES

The Department is authorized to require emissions reporting from affected facilities subject to this rule for a variety of reasons, and has been collecting such information for years. Primarily, this reporting enables the Department to fulfill the State's obligation under Section 182 of the CAA to submit a comprehensive, accurate and current inventory of actual emissions from all affected sources. Reports generated from emission tests may be used for emission inventories as well as for compliance assurance purposes.

Combating climate change is one of the priority issues of the Department's Commissioner. This includes reducing GHG emissions, encouraging low-carbon design technologies, elevating climate change awareness, research and adaptation ability, fostering carbon sequestration and sustainable forestry, and leading state agencies' efforts to tackle climate change. The proposed rulemaking will enable the Department to collect and quantify GHG emissions from affected sources in NYS. This will help serve the Commissioner's priorities by identifying large sources of GHG emissions, establishing baseline emission levels, and tracking trends to determine the effectiveness of the Department's efforts at reducing GHG emissions.

On December 26, 2007, President George W. Bush signed into law the Consolidated Appropriations Act of 2008 (Pub. L. No. 110-161, 121 Stat 1844, 2128 (2008)) ("Act"). Under this Act, Congress directed EPA to publish a mandatory GHG reporting rule, using the Agency's existing authority under the CAA. The rule requires mandatory reporting of GHGs "above appropriate thresholds in all sectors of the economy." EPA is responsible for determining those thresholds, as well as the frequency of reporting. Congress requested EPA to include reporting of emissions "resulting from upstream production and downstream sources," to the extent that the Agency deems appropriate. The proposed rule was signed by the Administrator on March 10, 2009. The Proposed Mandatory Greenhouse Gas Reporting Rule public comment period ended June 9, 2009. The comment period was open for 60 days, following publication of the proposed rule in the "Federal Register", April 10, 2009, (www.regulations.gov) under Docket ID No. EPA-HQ-OAR-2008-0508. The final rule was signed by the Administrator on September 22, 2009 and published in the "Federal Register" (www.regulations.gov) under Docket ID No. EPA-HQ-OAR-2008-0508-2278 on October 30, 2009. The rule became effective on December 29, 2009. <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.

NEEDS AND BENEFITS

Annual emission statements provide an accurate accounting of all emissions from major stationary sources, and assist the state in tracking progress towards attainment and maintaining the national ambient air quality standards for the criteria pollutants (ozone, SO₂, NO_x, CO, PM₁₀, PM_{2.5} and lead).

Emission statements are used by the Department for a number of regulatory purposes. Emission statements assist the Department with the administration of its operating permit program for major stationary sources subject to Title V of the CAA. Emission statements are also used to determine whether a facility is operating in compliance with its permit and are a critical component of a facility's annual Title V compliance certification. In addition, emission statements provide a means for a Title V facility source owner or operator to document actual annual emissions to the Department for the purpose of determining its annual operating permit fees. Facilities subject to the Title V permitting program are required to pay a per ton emission fee for all regulated air contaminants (criteria and hazardous air pollutants) pursuant to Title V of the CAA and Section 72-0303 of the ECL.

GHG emissions are considered to be responsible for the changing

climate, which poses serious threats to New York's environmental resources and public health. Climate change is expected to affect air quality, water quality, fisheries, drinking water supplies, wetlands, forests, wildlife, and agriculture. Flooding from severe weather events and the rising sea levels will damage communities and infrastructure in flood plains and along coastlines. Tropical diseases will appear as far north as NYS. An emissions inventory that identifies and quantifies primary anthropogenic sources of GHGs is essential for addressing climate change. A GHG inventory is a critical first step in reducing NYS's contribution to global GHG levels. By identifying the largest sources of GHGs in NYS, identifying trends, and demonstrating impacts of actions taken to date, NYS can better design strategies for achieving the desired reduction in GHGs. Working together with the public, private, and nonprofit sectors, NYS will lead by example in the fight to combat climate change.

By collecting GHG emissions data as part of the annual emission statement process, the Department will be able to establish and maintain the data which it will use to manage and generate reports, to create GHG emission inventories, and in turn, more accurately identify the sources and levels of these emissions in NYS. The GHG emission estimates included in the annual emission statement will be certified as complete and accurate by a facility representative. A GHG inventory will provide information on the activities that cause these emissions, as well as background on the methods used to make the calculations. Department staff will use GHG inventories to track emission trends, develop strategies and policies and assess the progress of state and federal programs. Department staff will also use GHG inventories to input data into atmospheric and economic models to help more accurately forecast emissions and determine cost-effective ways to reduce GHG emissions. The outlines of NYS's GHG emissions inventory are broadly known: the bulk of these gases are generated in roughly equal parts by transportation, space heating/cooling for buildings, and electric power production. To cost-effectively mitigate GHG emissions, however, more detailed emissions assessments are needed.

With the release of its final rule, EPA has taken a first step towards mandatory reporting of GHG emissions. The gases covered by EPA's mandatory GHG emissions reporting rule are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF₆). These six GHGs are the gases that members of The Climate Registry (www.theclimateregistry.org) have agreed to calculate and register. The Department is proposing to add these same GHGs as a reporting requirement under Subpart 202-2 to be consistent with EPA's rule, other federal and voluntary programs, and allow affected sources who participate in similar programs to be able to easily report these same contaminants to the Department.

COSTS

Costs to Regulated Parties: The cost of compliance with this regulation is not expected to appreciably increase as a result of any of the proposed amendments. The tracking of GHG emissions is expected to cause only a marginal increase in the burden to regulated facilities. Currently, there are approximately 450 facilities that report under Subpart 202-2. This proposed rulemaking does not change which facilities must report, it merely adds the requirement to report GHG emissions. For most of the facilities, the only requirement would be to utilize an EPA emission factor to calculate for example, CO₂ and N₂O emissions.

Cost to the Regulating Agency: Other than costs associated with the promulgation of this amendment, the Department is not expecting to incur additional costs for implementing and continued administration of the proposed amendments to this regulation. The modifications will not alter the way the Department will administer the emissions statement program and therefore requires no additional staff. The amount of staff time to process the additional requirements proposed by this rulemaking is also not expected to appreciably increase.

Costs to State and Local Governments: This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. State and local governments that own facilities which operate under a Title V permit and are subject to Subpart 202-2 will be affected in the same way as other regulated parties.

PAPERWORK

Little, if any, additional paperwork is expected to be required by the proposed amendments to Part 202. Affected facilities are currently required to complete and submit an annual emission statement. If any of the sources at these facilities emit any of the GHGs listed in Subpart 202-2, they will be required to include them in their annual emission statement.

LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. Local governments have no additional compliance obligations as compared to other subject entities. No additional local government mandates will be imposed as a result of the proposed amendments to this rule. Part 202 requires local governments operating facilities that trigger the reporting thresholds to complete annual emission statements. Otherwise, no local government mandates will ensue from this regulation.

DUPLICATION

The proposed requirement to report GHGs as part of the annual emission statement may create some duplication between this regulation and EPA's Mandatory Greenhouse Gas Reporting Rule, in that both rules require Title V sources to report annual GHG emissions. As discussed above, the Department already collects annual emissions data from the Title V sources in NYS in a format quite different from what is required by EPA. Although similar data is being reported under both programs, the Department does not believe that any duplication in reporting under Subpart 202-2 would be burdensome to the facilities.

ALTERNATIVES

The only alternative to the amendment of Part 202 is no rulemaking. This alternative will result in the Department not being able to collect accurate GHG emissions data and leave a significant amount of GHGs unaccounted for each year from NYS major source facilities. The Department believes that amending Subpart 202-2 will provide useful information, while not burdening the affected reporting sources. Without the collection of GHG emissions data, Department staff will not be able to track emission trends, develop strategies and policies and assess progress of existing and future programs relative to GHGs and/or climate change. Further, without this rulemaking, Department staff will not have sufficient data to perform accurate atmospheric and economic models.

FEDERAL STANDARDS

The proposed revisions to Part 202 do not exceed any minimum standards of the federal government for any of the same or similar subject areas. ECL Section 19-0303 requires specific justification of regulations that are more stringent than the CAA, or regulations promulgated under the Act. Subpart 202-1 allows EPA test methods to be used for emissions controlled under state regulations. These methods are in fact required under some EPA regulations. Allowing their use at other sources (for example those sources smaller than an EPA applicability threshold) will encourage uniformity in emissions information.

This regulation combines the reporting requirements of Title I and Title V of the CAA. The Title I requirements are concerned with the annual emissions of VOC and NO_x for ozone pollution abatement. Title V is concerned with the provisions for a federally enforceable operating permit program for "major" facilities. Subpart 202-2 enables the Department to collect emission statements that meet the Title I reporting requirements and provide the information to identify Title V affected facilities.

COMPLIANCE SCHEDULE

Owners and/or operators of affected sources will be required to comply with the proposed revisions to Part 202 and submit an annual emission statement to the Department by April 15th, following the adoption of this rule.

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

The proposed revisions to Part 202 include minor clarifications, and the additional requirement of reporting 6 Greenhouse Gases (GHGs) as part of the existing annual emission statement process. These proposed revisions do not substantially change the purpose, structure, or operation of this rule. The Department has reviewed the potential impacts related to the proposed revisions to Parts 202 and has determined that they will not impose any appreciable reporting, recordkeeping, costs or compliance requirements on affected sources, the agency, local governments, or rural areas. The number and type of sources affected will not be changed as a result of the proposed revisions to this rule. Further, the revisions being proposed will not have any adverse impacts on small businesses, local governments, public or private entities in rural areas, or on available jobs and employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Protection of the Zoar Valley Multiple Use Area Including the Zoar Valley Unique Area

I.D. No. ENV-08-10-00003-P

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

Proposed Action: Amendment of sections 190.10 and 190.25 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), 3-0301(1)(b), (2)(m), 9-0105(1), (3), 45-0111(6) and 45-0117(2)(n)

Subject: Protection of the Zoar Valley Multiple Use Area Including the Zoar Valley Unique Area.

Purpose: Protection of public safety and natural resources on the Zoar Valley Multiple Use Area Including the Zoar Valley Unique Area.

Text of proposed rule: 6 NYCRR Section 190.10 is amended to read as follows:

Subdivision (a) of 6 NYCRR section 190.10 is amended to read as follows:

(a) Applicability. [Unless otherwise specified, sections 190.0, 190.1, 190.2, 190.3, 190.4, 190.8 and 190.9 of this Part apply to all unique areas administered by the Division of Lands and Forests.] All unique areas are posted as such; descriptions of each unique area are available at the central and regional offices of the Department of Environmental Conservation. Specific regulations for individual unique areas are set forth in the following subdivisions of this section and supersede the general regulations enumerated in this [subdivision] *Part* in the event of a conflict.

New subdivision (d) of section 190.10 is added to read as follows:

(d) *Zoar Valley Unique Area. Specific regulations for Zoar Valley Unique Area are included in section 190.25.*

6 NYCRR section 190.25 Zoar Valley Multiple Use Area is amended to read as follows:

Section 190.25 Zoar Valley Multiple Use Area *including Zoar Valley Unique Area*

6 NYCRR section 190.25 subdivision (a) is amended to read as follows:

(a) [Description] *Applicability.* For purposes of this section, Zoar Valley Multiple Use Area *including Zoar Valley Unique Area* means all those State lands, *excluding East Otto State Forest*, lying and situated in the Towns of Otto and Persia, Cattaraugus County, and the Town of Collins, Erie County, including a five-mile segment of Cattaraugus Creek and a two-mile segment of the south branch of Cattaraugus Creek, and being the same lands as more particularly described in several deeds conveying said lands to the People of the State of New York, on file in the Department of Environmental Conservation, Albany, NY, and duly recorded in the office of the County clerk of the County of Cattaraugus and the office of the County clerk of the County of Erie, respectively. Said Zoar Valley Multiple Use Area *including the Zoar Valley Unique Area* shall be hereinafter referred to in this section as "area." *The provisions of this section shall not apply to, and the references hereinafter to the "area" shall not include, the detached parcel of Zoar Valley Multiple Use Area, generally located between Wickham Road and Forty Road. The provisions of this section shall supersede the general regulations enumerated in this Part in the event of a conflict.*

Subdivisions (b) through (e) remain unchanged.

Repeat subdivision (f) of 6 NYCRR section 190.25 and adopt a new subdivision (f) as follows:

(f) *No fires shall be permitted in the area.*

Subdivisions (g) and (h) remain unchanged.

Subdivision (i) is amended to read as follows:

(i) No person shall bathe[,] or swim [or wade] in any of the waters flowing or standing through or on the area.

Subdivisions (j) through (o) remain unchanged.

New subdivisions (p) and (q) of 6 NYCRR section 190.25 are added to read as follows:

(p) *No person shall possess or carry alcoholic beverages or glass containers, except for prescription medicines.*

(q) *No bicycles, skateboards or similar equipment, horses or other work animals shall be permitted in or on the area, except on Town or County roads therein, or as permitted on roads and parking areas designated and marked for motor vehicle use by the Commissioner.*

Text of proposed rule and any required statements and analyses may be obtained from: David M. Forness, NYS Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4255, (518) 402-9428, email: dmforness@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: A Negative Declaration has been prepared in compliance with Article 8 of the Environmental Conservation Law.

Regulatory Impact Statement

1. Statutory authority

On July 3, 2007 a law dedicated a portion of Zoar Valley Multiple Use Area to the State Nature and Historical Preserve, Environmental Conservation Law (ECL) section 45-0117(2)(n). Regulations that were approved for the Multiple Use Area on May 1, 1972 will now be revised to include Zoar Valley Multiple Use Area and Zoar Valley Unique Area.

"ECL" section 1-0101(3)(b) directs the Department of Environmental Conservation (Department) to guarantee that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintentional consequences." ECL section 3-0301(1)(b) gives the Department the

responsibility to promote and coordinate management of...land resources to assure their protection...and take into account the cumulative impact upon all such resources in...promulgating any impact upon all such resources...in promulgating any rule or regulation." ECL section 9-0105(1) authorizes the Department to "exercise care, custody, and control" of State lands. ECL section 3-0301(2)(m) authorizes the Department to adopt rules and regulations as may be necessary, convenient or desirable to effectuate the purposes of (the ECL)," and ECL 9-0105(3) authorizes DEC to make necessary rules and regulations to secure proper enforcement of (ECL Article 9)". Furthermore, section 45-0111(6) authorizes the Commissioner to make such rules and regulations as necessary for the purpose of carrying out the functions, powers and duties necessary to ensure the protection of the State Nature and Historical Preserve. Section 45-0117(1) and section 45-0117(2)(n) authorize the Department to manage and exercise custody and control over lands dedicated pursuant to this article which includes the Zoar Valley Unique Area.

2. Legislative objectives

In adopting various articles of the ECL, the legislature has established forest, fish, and wildlife conservation to be policies of the State and has empowered DEC to exercise care, custody, and control" over certain State lands and other real property. Consistent with these statutory interests, the proposed regulations will protect natural resources and the safety and welfare of those who engage in recreational activities on Department managed lands. Natural resources will be protected by prohibiting bicycles, skateboards or similar equipment, horses and other work animals. Fires also will be prohibited on the area. The public will also be protected by prohibiting the possession of alcoholic beverages and glass containers except for medicinal purposes. Based on public input received in the Unit Management Planning process, the public will be allowed to wade in the waters on the unit.

3. Needs and benefits

As previously mentioned, the change in the legislative designation of this land has created a problem as regulations established in 1972 no longer cover those lands originally part of the Zoar Valley Multiple Use Area that have been dedicated to the State Nature and Historical Preserve. These lands are now referred to as the Zoar Valley Unique Area. This has exposed the public to added risks and removed provisions established for resource protection. The proposed regulations will once again apply the 1972 regulations, with needed updates, to the entire property.

The proposed regulations will prohibit possession of alcoholic beverages and glass containers, except for medicinal purposes, in order to promote public safety and protect the property from excessive littering. Past history has shown that consumption of alcoholic beverages has contributed to serious injuries and deaths on the property. The gorge running through the property is framed by cliffs ranging from 100 to 500 feet in height. Trails closely follow some of the drop-offs providing spectacular views for visitors. However, this has resulted in dangerous conditions resulting in serious accidents for intoxicated hikers. On similar properties administered by the Department, prohibiting alcoholic beverages has been shown to save lives.

Bicycles, skateboards, horses and other work animals will be prohibited to protect trails on the property from erosion. The main trail accessing the gorge is steep and is located in rugged terrain as it leads into the gorge. Because of the steep terrain, soils in the area are prone to erosion and therefore cannot support all forms of recreational use.

Based on public input received in the Unit Management planning process, the 1972 regulation prohibiting wading in Cattaraugus Creek and its South Branch will be eliminated. Wading does not create an undue risk to the public. The current prohibition is counterproductive in promoting fishing, especially since the portion of Cattaraugus Creek which flows through the area is an important steelhead trout fishery. It is expected that the proposed regulation will enhance recreational fishing opportunities in the creek and add to the enjoyment of people recreating in the gorge.

Since the Zoar Valley Multiple Use Area is closed from sunset to sunrise, fires will be prohibited on the area. The prohibition is necessary to protect public health and safety and to reduce related problems with littering and underage drinking. The prohibition could result in a cost savings to the State since there would be a less likely chance of a forest fire in the area and therefore a possible realization in savings to put it out.

Provisions of the proposed rulemaking for the Zoar Valley Multiple Use Area including the Unique Area were addressed in the Unit Management Plan. The plan underwent a lengthy public review process including two public meetings, direct mailings, a press release, extensive public distribution, a responsiveness summary and web postings. This was designed to assure public participation in the planning process by all stakeholders, including, the following groups: Buffalo Audubon Society, Audubon New York, Citizens Campaign for the Environment, Adirondack Mountain Club, the Nature Conservancy, Sierra Club, Cattaraugus County Economic, Development, Planning and Tourism, Erie County Conservation Society, Inc., Safari Club International, WNY Environmental Federation,

American Chestnut Foundation, Inc., Erie County Federation of Sportsmen's Clubs, Inc., Friends of the Ancient Forests and Cattaraugus Creek Outfitters. In addition to the above there were numerous individuals that provided comments on this plan. All of these comments were addressed in a responsiveness summary that is a part of the final Unit Management Plan. During the public meetings for the Zoar Valley Unit Management Plan and in subsequent written comments on the plan, the majority of the public requested the changes proposed or otherwise supported the changes.

The Zoar Valley Multiple Use Area has attracted numerous visitors over the years to view the gorges and waterfalls. The proposed regulations will be put in place to protect this area for the enjoyment of future generations and to preserve for future generations what has made this area unique.

4. Costs

There would be no increased staffing, construction or compliance costs projected for State or local governments or to private regulated parties. Costs to the regulating agency would be minimal, approximately \$100 for the necessary signage. Savings are expected from reduced trail maintenance costs by limiting trail use to sustainable activities only. There may be some increased costs to those who are ticketed for violation of the new regulations. Costs incurred by rescue squads and EMTs should be reduced by the rulemaking as it provides additional opportunities to protect public safety and minimizes the potential for accidents. Further, the risk of a forest fire will be reduced as well as the cost to the State of fighting any forest fires.

5. Local government mandates

This proposal will not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district and may lessen the burden for local government with respect to fire fighting.

6. Paperwork

With the possible exception of a slight increase in the number of citations issued by the Department during the first few months after the regulation takes effect, an increase in paperwork is not expected. The proposed regulations will not impose any reporting requirements or other paperwork on any private or public entity.

7. Duplication

There is no duplication, overlap, or conflict with State or Federal rules. The proposed regulations will not duplicate, overlap or conflict with other rules and legal requirements of State and Federal governments.

8. Alternative approaches

The no action alternative would retain existing regulations on that part of the property designated as Zoar Valley Multiple Use Area. Zoar Valley Unique Area would not have any special regulations. It is the Unique Area portion of the former Multiple Use Area that has had most of the problems in the past. Without revising the regulations, the resources of the area would not be protected and the public would encounter unsafe conditions. Failure to prohibit alcoholic beverages will inevitably contribute to additional accidents on the property. Failure to prohibit certain recreational uses and allowing fires on the property would lead to degradation of the natural resources.

9. Federal standard

The proposed regulations do not exceed any minimum standards of the Federal government. There are no relevant federal standards to these related regulations.

10. Compliance schedule

The proposed regulations do not impose any compliance requirements or mandates, therefore, there is no compliance schedule. The proposed regulation will become effective on the date of publication of the rulemaking in the New York State Register. Once the regulations are adopted, they are effective immediately.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not submitted with these regulations because the proposal will not impose any reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Since there are no identified cost impacts for compliance with the proposed regulations on the part of small businesses and local governments, they would bear no economic impact as a result of this proposal. The proposed rule relates solely to protecting public safety and the natural resources on the Zoar Valley Multiple Use Area including the Zoar Valley Unique Area.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposal because the proposal will not impose any reporting, record-keeping or other compliance requirements on rural areas. The proposed rule relates solely to protecting public safety and the natural resources on the Zoar Valley Multiple Use Area including the Zoar Valley Unique Area.

Job Impact Statement

A Job Impact Statement is not submitted with this proposal because the proposal will have no substantial adverse impact on existing or future jobs

and employment opportunities. The proposed rule relates solely to protecting public safety and the natural resources on the Zoar Valley Multiple Use Area including the Zoar Valley Unique Area.

Division of Housing and Community Renewal

NOTICE OF ADOPTION

Low-income Housing Credit Qualified Allocation Plan

I.D. No. HCR-37-09-00006-A

Filing No. 96

Filing Date: 2010-02-09

Effective Date: 2010-02-24

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

Action taken: Amendment of Part 2040 of Title 9 NYCRR.

Statutory authority: Executive Order No. 135, dated February 27, 1990, as continued by Executive Order No. 9, dated June 18, 2008; U.S. Internal Revenue Code, section 42(m); Public Housing Law, section 19

Subject: Low-income Housing Credit Qualified Allocation Plan.

Purpose: To amend threshold criteria and application scoring utilized in the allocation of low-income housing credits.

Text of final rule: 9 NYCRR Part 2040 is amended as follows:

Subdivisions (k) through (v) of section 2040.2 are renumbered as subdivisions (l) through (w), respectively.

A new subdivision (k) of section 2040.2 is adopted to read as follows:

(k) *Historic building shall mean a structure that meets one of the following criteria:*

(1) *it is listed on the New York State or National Register of Historic Places, either individually or as a contributing building to a historic district; or*

(2) *it has been issued a Determination of Eligibility by the Keeper of the National Register of Historic Places; or*

(3) *it has been identified as a contributing building to a Local Historic District that has been certified by the Keeper of the National Register of Historic Places as substantially meeting the National Register Criteria for Evaluation; or*

(4) *it has been issued a State Historic Preservation Officer opinion or certification that the building is eligible to be listed on the National Register of Historic Places, either individually or as a contributing building to a historic district.*

Subdivision (a) of section 2040.3 is amended to read as follows:

(a) Funding rounds. The division[, no later than January of each year,] will publish at least annually in the State Register a notice of credit availability which informs applicants of submission dates and deadlines for future funding rounds.

Subdivision (c) of section 2040.3 is amended to read as follows:

(c) Processing fees. The division shall charge an application fee of \$[2000]3000, due at the time of application. A credit allocation fee of [six]eight percent of the first year credit allocation amount is due at the time of request for the issuance of carryover allocation. Not-for-profit applicants (or their wholly-owned subsidiaries) which will be the sole general partner of the partnership/project owner or sole managing member of the limited liability company/project owner may request and be approved to defer payment of fees until the time of carryover allocation.

Subdivision (e)(15)(i) of section 2040.3 is amended to read as follows:

(i) it is a preservation project (as defined at section 2040.2 ([q]r) of this Part); or

Subdivision (e)(18) of section 2040.3 is repealed and a new subdivision (e)(18) is adopted to read as follows:

(18) *The project must meet the following green building measures:*

(i) *select native or non-invasive new trees and plants that are appropriate to the site's soil and microclimate;*

(ii) *where indicated by local conditions: for new construction, install a passive radon-reduction system to be activated should tests confirm the presence of radon gas in the building; or, for rehabilitation projects, install passive radon-reduction measures to be activated should tests confirm the presence of radon gas in the building upon completion; and*

(iii) *for properties built before 1978, use lead-safe work practices during renovation, remodeling, painting and demolition.*

A new subdivision (e)(19) of section 2040.3 is adopted to read as follows:

(19) *Projects must meet an energy efficiency standard, acceptable to DHCR, beyond that required by applicable building codes, and shall include the following energy efficiency measures:*

(i) *new heating systems must utilize Energy Star heating equipment or the equivalent which will produce the same or comparable energy efficiency or savings;*

(ii) *all new lighting fixtures must be Energy Star labeled or, at a minimum, provide equivalent energy efficiency, with the exception of light fixtures located in basements or storage areas;*

(iii) *new plumbing fixtures must be of a water-conserving type;*

(iv) *daylight sensors or timers on outdoor lighting must be installed to maximize energy efficiency;*

(v) *appliances that are labeled Energy Star, including refrigerators and other appliances, must be utilized to the greatest extent possible.*

Subdivision (f)(1)(iii) of section 2040.3 is amended to read as follows:

(iii) *the project is part of a comprehensive community revitalization plan which includes the use or reuse of existing buildings, which may include the historic rehabilitation of existing buildings, and addresses employment, educational, cultural [and] or recreational opportunities within the community (5 points);*

Subdivision (f)(4) of section 2040.3 is repealed and a new subdivision (f)(4) is adopted to read as follows:

(4) *Green building (maximum of 8 points).*

Green building consists of three major components: mandatory criteria (required to qualify for points); standard green building criteria (points awarded for compliance); and green measures beyond the standard criteria (additional points awarded for compliance after meeting the standard criteria).

(i) *Mandatory criteria (must satisfy) all:*

(a) *submission of a green development plan outlining an integrated design approach for the operation and development of the project;*

(b) *a surface water management plan; and*

(c) *a green building operation plan that includes a manual prescribing proper building maintenance, a handbook and an orientation program for tenants and residents which provides information and training on the proper operation of relevant green features.*

(ii) *Standard green building criteria (up to 6 points total). Scored to the extent the project includes:*

(a) *smart growth principles including location and neighborhood fabric measures (up to 3 points);*

(b) *a Phase I Environmental Site Assessment (1 point);*

(c) *healthy living environment measures, which promote the use of non-toxic materials and improves indoor air quality (up to 3 points).*

(iii) *Green measures beyond the standard criteria (2 points).*

Scored to the extent the project meets the minimum standard criteria in (ii) above and includes at least one of the following green building measures:

(a) *project is located on a brownfield, grayfield or adaptive reuse site;*

(b) *installation of an acceptable renewable energy system that will provide at least 10 percent of the project's estimated electricity; or*

(c) *utilization of various building products and techniques beneficial to the environment.*

Subdivision (f)(6) of section 2040.3 is amended to read as follows:

(6) *Fully accessible and adapted, move-in ready units ([6]up to 5 points). Scored on whether:*

(i) *at least 5 percent (rounded up to the next whole number) of the project units are fully accessible and adapted, move-in ready, which includes a roll-in shower, for person(s) who have a mobility impairment and the unit(s) will be marketed to households with at least one member who has a mobility impairment; and at least 2 percent (rounded up to the next whole number) of the project units are fully accessible and adapted, move-in ready for person(s) who have a hearing or vision impairment and the unit(s) will be marketed to households with at least one member who has a hearing or vision impairment ([3] 2 points); or*

(ii) *the percentages of units meeting the requirements of subparagraph (i) of this paragraph are equal to or exceed 10 percent and 4 percent (rounded up to the next whole number) respectively (a minimum of two units each)([6]5 points).*

Subdivision (f)(9) of section 2040.3 is amended to read as follows:

(9) *Energy efficiency (5 points). Scored to the extent the applicant demonstrates that, if approved for a credit reservation by the division, [it] the project will be eligible for, will participate in, and will meet the energy efficiency standards of the New York State Energy Research and Development Authority Multifamily Building Performance Program or the New York Energy Star Labeled Homes Program or, [if the project is not eligible to participate in the aforementioned programs,]the applicant demonstrates that, if approved for a credit reservation by the division, the project will*

meet [comparable]enhanced energy efficiency standards acceptable to the division that provide energy efficiencies and operational cost savings above what is required under section 2040.3(e)(19).

Subdivision (f)(12) of section 2040.3 is amended to read as follows:

(12) *Persons with special needs (5 points). Scored if:] the project will give preference in tenant selection to persons with special needs, with priority being given to such persons who have served in the armed forces of the United States for a period of at least 6 months (or any shorter period due to injury incurred in such service) and have been thereafter discharged or released therefrom under conditions other than dishonorable, for at least 15 percent of the LIHC-assisted units and whether the persons with special needs will be served by supportive services as evidenced by a comprehensive service plan and an agreement or commitment in writing with an experienced service provider.*

Subdivision (f)(13)(iii) of section 2040.3 is amended to read as follows:

(iii) *whether a non-profit organization that does not qualify as a local non-profit organization under section 2040.2(m)n, or its for-profit wholly owned subsidiary, has a defined and substantive role in the development or management of the project through the extended use period (1 point).*

Subdivision (f)(15) of section 2040.3 is renumbered as subdivision (f)(16) and amended to read as follows:

([15]16) *Project amenities (maximum of 2 points). Scored to the extent the project provides any of the following (1 point each):*

(i) *access to discounted broadband internet service to each residential unit;*

(ii) *on-site Energy Star appliances or equivalent in common laundry facilities, or washer/dryer hookups in each residential unit;*

(iii) *Energy Star central air-conditioning or the equivalent that will produce comparable energy efficiency or savings;*

(iv) *an outdoor recreational area or garden space;*

(v) *Energy Star dishwashers or the equivalent that will produce the same or comparable energy efficiency or savings in each residential unit and the community kitchen, if any; [and/or]*

(vi) *a computer lab equipped with Energy Star or equivalent computers and equipment, with a minimum of one computer for every 20 residential units.*

A new subdivision (f)(15) of section 2040.3 is adopted to read as follows:

(15) *Historic nature of project (up to 3 points). Scored on whether:*

(i) *the project includes the rehabilitation of a historic building (2 points);*

(ii) *the applicant demonstrates that the project will include a building that will be eligible for, and the applicant will seek, a federal tax credit for the rehabilitation of historic buildings (1 point).*

Subdivision (a) of section 2040.6 is amended to read as follows:

(a) *Information requests. Requests for information made under the Freedom of Information Law, must be in writing, and may be mailed to DHCR's Office of Legal Affairs, 38-40 State Street, Albany, New York 12207, or e-mailed to FOIL@[dhcr.state.ny.us]nysdhcr.gov.*

Subdivision (b)(2)(ii)(b) of section 2040.8 is amended to read as follows:

(ii)(b) *after initial income certifications have been completed for all units in a project, the certification required by this subparagraph shall not be required for projects in which 100 percent of the [if a waiver of the annual income recertification has been obtained for the project from the U.S. Internal Revenue Service (the "IRS") and a copy of the recertification waiver has been attached to the annual certification required by this section. The division shall not provide a statement in support of an owner's application for a recertification waiver to the IRS that each] residential [rental] units are LIHC qualified [in the building was a] low-income units, [under section 42 of the code at the end of the most recent credit period for the building, if the division has] unless: (1) DHCR has determined that the project is not in compliance with the provisions of this low-income housing credit qualified allocation plan, the code or the regulatory agreement required by section 2040.5 of this Part; (2) DHCR has notified the project owner of the event(s) of noncompliance; and (3) the project owner has not documented correction of, or otherwise resolved, the noncompliance to the satisfaction of the division;*

Subdivision (c) of section 2040.14 is amended to read as follows:

(c) *Funding rounds. A notice of credit availability will be issued annually by the DHCR [within six months of] following enactment of statute providing credit allocation authority. Such notice shall remain in effect until such time as the SLIHC credit allocation authority is expended or expired.*

Subdivision (d)(1)(iii) of section 2040.14 is amended to read as follows:

(iii) *the project is part of a comprehensive community revitalization plan which includes the use or reuse of existing buildings, which may include the historic rehabilitation of existing buildings, and addresses employment, educational, cultural [and] or recreational opportunities within the community (5 points);*

Subdivision (d)(4) of section 2040.14 is repealed and a new subdivision (d)(4) is adopted to read as follows:

(4) *Green building (maximum of 8 points).*

Green building consists of three major components: mandatory criteria (required to qualify for points); standard green building criteria (points awarded for compliance); and green measures beyond the standard criteria (additional points awarded for compliance after meeting the standard criteria).

(i) *Mandatory criteria (must satisfy all):*

(a) *submission of a green development plan outlining an integrated design approach for the operation and development of the project;*

(b) *a surface water management plan; and*

(c) *a green building operation plan that includes a manual prescribing proper building maintenance, a handbook and an orientation program for tenants and residents which provides information and training on the proper operation of relevant green features.*

(ii) *Standard green building criteria (up to 6 points total). Scored to the extent the project includes:*

(a) *smart growth principles including location and neighborhood fabric measures (up to 3 points);*

(b) *a Phase I Environmental Site Assessment (1 point);*

(c) *healthy living environment measures, which promote the use of non-toxic materials and improves indoor air quality (up to 3 points).*

(iii) *Green measures beyond the standard criteria (2 points). Scored to the extent the project meets the minimum standard criteria in (ii) above and includes at least one of the following green building measures:*

(a) *project is located on a brownfield, grayfield or adaptive reuse site;*

(b) *installation of an acceptable renewable energy system that will provide at least 10 percent of the project's estimated electricity; or*

(c) *utilization of various building products and techniques beneficial to the environment.*

Subdivision (d)(7) of section 2040.14 is amended to read as follows:

(7) *Fully accessible and adapted, move-in ready units ([6]up to 5 points). Scored on whether:*

(i) *at least 5 percent (rounded up to the next whole number) of the project units are fully accessible and adapted, move-in ready, which includes a roll-in shower, for person(s) who have a mobility impairment and the unit(s) will be marketed to households with at least one member who has a mobility impairment; and at least 2 percent (rounded up to the next whole number) of the project units are fully accessible and adapted, move-in ready for person(s) who have a hearing or vision impairment and the unit(s) will be marketed to households with at least one member who has a hearing or vision impairment ([3] 2 points); or*

(ii) *the percentages of units meeting the requirements of (i) above are equal to or exceed 10 percent and 4 percent (rounded up to the next whole number) respectively (a minimum of two units each)([6]5 points).*

Subdivision (d)(9) of section 2040.14 is amended to read as follows:

(9) *Energy efficiency (5 points). Scored to the extent the applicant demonstrates that, if approved for a credit reservation by the division, [it] the project will be eligible for, will participate in, and will meet the energy efficiency standards of the New York State Energy Research and Development Authority Multifamily Building Performance Program or the New York Energy Star Labeled Homes Program or, [if the project is not eligible to participate in the aforementioned programs,]the applicant demonstrates that, if approved for a credit reservation by the division, the project will meet [comparable]enhanced energy efficiency standards acceptable to the division that provide energy efficiencies and operational cost savings above what is required under section 2040.3(e)(19).*

Subdivision (d)(10) of section 2040.14 is amended to read as follows:

(10) *Persons with special needs (5 points). Scored if the project will give preference in tenant selection to persons with special needs, with priority being given to such persons who have served in the armed forces of the United States for a period of at least 6 months (or any shorter period due to injury incurred in such service) and have been thereafter discharged or released therefrom under conditions other than dishonorable, for at least 15 percent of the DHCR-assisted units and whether the persons with special needs will be served by supportive services as evidenced by a comprehensive service plan and an agreement or commitment in writing with an experienced service provider.*

Subdivision (d)(14) of section 2040.14 is renumbered as subdivision (d)(15) and amended to read as follows:

(14)5 *Project amenities (maximum of 2 points). Scored to the extent the project provides any of the following (1 point each):*

(i) *access to discounted broadband internet service to each residential unit;*

(ii) *on-site Energy Star appliances or equivalent in common laundry facilities, or washer/dryer hookups in each residential unit;*

(iii) *Energy Star central air-conditioning or the equivalent that will produce comparable energy efficiency or savings;*

(iv) *an outdoor recreational area or garden space;*

(v) *Energy Star dishwashers or the equivalent that will produce the same or comparable energy efficiency or savings in each residential unit and the community kitchen, if any; [and/]or*

(vi) *a computer lab equipped with Energy Star or equivalent computers and equipment, with a minimum of one computer for every 20 residential units.*

A new subdivision (d)(14) of section 2040.14 is adopted as follows:

(14) *Historic nature of project (up to 3 points). Scored on whether:*

(i) *the project includes the rehabilitation of a historic building (2 points);*

(ii) *the applicant demonstrates that the project will include a building that will be eligible for, and the applicant will seek, a federal tax credit for the rehabilitation of historic buildings (1 point).*

Final rule as compared with last published rule: Nonsubstantive changes were made in section 2040.3(c), (e)(19), (f)(4), (9) and (12).

Text of rule and any required statements and analyses may be obtained from: Arnon Adler, Division of Housing and Community Renewal, 38-40 State Street, Albany, New York 12207, (518) 486-3305, email: aadler@nysdhcr.gov

Revised Regulatory Impact Statement

1. Statutory Authority:

Executive Order Number 135, dated February 27, 1990 (as continued by Executive Order Number 9, dated June 18, 2008) authorizes the Division of Housing and Community Renewal's ("DHCR") Commissioner to administer New York State's annual allotment of federal low-income housing tax credits ("Credit"). U.S. Internal Revenue Code ("IRC") Section 42(m) requires that Credit be allocated pursuant to a "qualified allocation plan" ("QAP"), which DHCR promulgates as a rule. The 2009-2010 State Budget authorizes DHCR to collect fees for Credit program administration ("LIHC Program").

Public Housing Law Article 2-A (the "Act") created the New York State Low-Income Housing Tax Credit Program ("SLIHC Program"). The Act authorizes DHCR to allocate New York State tax credits to those who invest in eligible housing, promulgate rules necessary to administer the SLIHC Program, and also provides that IRC Section 42 shall apply to the SLIHC Program. 9 NYCRR Sections 2040.1 - 2040.13 provide the framework for LIHC Program administration, and 9 NYCRR Section 2040.14 provides the framework for SLIHC Program administration.

2. Legislative Objectives:

Both the LIHC and SLIHC Programs were enacted to encourage private investment in housing that is affordable to low-income persons. The LIHC Program authorizes states to allocate Credit to owners of low-income housing which meets IRC section 42 requirements.

The most significant difference between the LIHC and SLIHC Programs is that LIHC Program is for housing for households earning up to 60 percent of the area median income ("AMI"), while the SLIHC is for housing for households earning up to 90 percent of AMI.

3. Needs and Benefits:

The changes to the existing plan ("Existing Rule") made by the proposed rule ("Proposed Rule") would amend 9 NYCRR, Part 2040 to:

(1) Add a defined term "historic building" at section 2040.2(k) to clarify the type of structure which qualifies for points under the new "historic nature of project" scoring category at 2040.3(f)(15). The federal Housing and Economic Recovery Act of 2008 amended the IRC, mandating that states' QAPs have this selection criterion. This will provide incentives for projects which include rehabilitation of a historic building and leverage funding through a federal historic tax.

(2) Revise, at section 2040.3(a), "funding rounds" to clarify DHCR's policy for publishing annual notices of credit availability.

(3) Revise, at section 2040.3(c), "processing fees" to increase the application fee from its current level of \$2,000 to \$3,000 while maintaining the current deferral from certain not-for-profit applicants, and to raise the credit allocation fee for successful applicants from six percent of the first year credit allocation to eight percent. This provision will enable DHCR to retain much of its current revenue in administering the Credit Program to counter a reduction in fees related to a decrease in overall credit allocation authority in 2010 from the previous two years.

(4) Revise the citation at section 2040.3(e)(15)(i) to reflect the new ordering of definitions.

(5) Delete current threshold green building requirements at section 2040.3(e)(18) and replace with DHCR's current mandatory green building standards. Also, move other current green building provisions to the energy efficiency threshold requirements section (2040.3(e)(19) of the Proposed Rule) as described in Paragraph 6 below.

(6) Add a new threshold requirement at section 2040.3(e)(19) requiring projects to incorporate energy efficiency standards beyond that required by applicable building codes. This provision provides the flexibility to adjust standards to accommodate constantly evolving industry energy effi-

ciency standards, as well as building code provisions, without future rule revisions. This section also incorporates previous "green building" threshold requirements more appropriate to an energy efficiency category, such as Energy Star or, at a minimum, equivalent energy efficient systems, appliances and lighting fixtures, water-conserving fixtures, and sensors or timers on outdoor lighting. Due to rising energy costs and their impact on project viability and rents, the fact that, over the last two years, most applications incorporated many or all these measures, and that most of these requirements are industry standards, DHCR has determined that these standards should be threshold requirements. DHCR anticipates that either there will continue to be no additional costs incurred, as most projects already incorporate these measures, or that additional costs will be offset by operational cost savings and by the Credit allocated.

(7) Amend the "community revitalization plan" scoring criteria at section 2040.3(f)(1)(iii) replacing the term "and" with "or," to enable projects which are part of such plans to score points if the plan addresses community employment, educational, cultural or recreational opportunities, without addressing all these factors. The amended criteria better measures the need for the type of housing proposed, and recognizes that most locally adopted planning documents do not address all these factors.

(8) Revise the "Green building" scoring criteria at section 2040.3(f)(4) to clarify DHCR's current implementation of this provision, and to reflect a reduction in scoring points from the current total of ten to a maximum of eight points. The revised provision clarifies which green building criteria must be satisfied prior to being evaluated for scoring points, which must be addressed to qualify for six of the 8 points available, and which additional measures will qualify for the remaining two points. The revised criteria also set forth the point values associated with specific criteria. The six point standard building criteria has been modified to allow applicants multiple access to obtaining the points by retaining 2 three point criteria as well as a one point option. A few participants at the April 2009 roundtable discussion held with affordable housing industry representatives believed these criteria adversely impacted the rural projects. This revision shows that both rural and non-rural projects can qualify for points competitively. The two point reduction in scoring points is necessary in order to partially reallocate points to the new scoring criteria "historic nature of project" at section 2040.3(f)(15) in the Proposed Rule. The reduction of points in this category will also serve to reinstate the points for the "long term affordability" scoring criteria at 2040.3(f)(5) (which provides points for projects maintained as qualified low-income housing for periods of more than 30 years) for which DHCR previously proposed a reduction from seven to five points. DHCR is proposing this modification in the Proposed Rule in response to substantive public comment received which opposed the proposed reduction in points at 2040.3(f)(5). DHCR believes that the minimal reduction in points in the "Green building" scoring criteria will not negatively affect the incentive for seeking these scoring points and that the number of projects which will propose green building measures in future application funding rounds will continue to increase.

(9) Amend the "fully accessible and adapted, move-in ready units" scoring criteria at 2040.3(f)(6) to reduce points from six to five. DHCR determined that the reduction will not adversely affect the incentive for projects to include these units for persons with mobility or hearing/vision impairments, or the number of such units proposed. DHCR will reallocate the point to the "historic nature of the project" criterion at 2040.3(f)(16) in the Proposed Rule.

(10) Amend the "energy efficiency" scoring criteria at section 2040.3(f)(9), which provides an incentive to incorporate energy saving measures beyond the threshold requirements of the Rule, by either involving the expertise and financial resources of NYSERDA or meeting other enhanced energy efficiency standards that provide energy efficiencies and operational cost savings without NYSERDA participation. The revised language recognizes that demonstrating eligibility to participate in the NYSERDA Programs or demonstrating that the project will meet other enhanced energy efficiency standards may be costly and need not be fully explored until after the DHCR has approved funding and issues a credit reservation.

(11) Add to the "persons with special needs" scoring criteria at 2040.3(f)(12), a provision that projects qualifying for points under this existing category should provide a first preference for such persons who have served in the armed forces of the United States and meet other noted criteria. This modification is proposed in response to public comment received in regard to the Proposed Rule. This provision does not affect the scoring under these criteria.

(12) Revise the citation at section 2040.3(f)(13)(iii) to reflect the new ordering of definitions.

(13) Amend the "project amenities" scoring criteria at 2040.3(f)(16) (formerly 2040.3(f)(15)) clarifying that each of the six provisions is worth one point and that projects may obtain two points maximum. Essentially unchanged, the amended criteria clarify that: access to discounted internet service must be provided to each apartment; Energy Star, or equivalent,

appliances can be in common laundry facilities or washer/dryer hook-ups in each apartment; Energy Star, or equivalent, dishwashers must be in each apartment and in any community kitchen; and, a resident's computer lab must be equipped with Energy Star, or equivalent, computer equipment, minimum of one computer for every 20 apartments.

(14) Amend 2040.6(a) to include DHCR's new email address for Freedom of Information Law purposes.

(15) Revise section 2040.8(b)(2)(ii)(b) to provide that certifications of tenant income subsequent to initial income certification, will not be required if all the project's units are LIHC qualified low-income units, to comport with the federal Housing and Economic Recovery Act of 2008, which amended the corresponding provision of the IRC.

(16) Delete and replace SLIHC section 2040.14(c) "funding rounds" to mirror the LIHC revision described in paragraph 2 above and 2040.14(d) "project scoring and rating criteria" as described in paragraphs 6 through 11 in order to coordinate, to the extent possible, the scoring mechanism for both the LIHC and SLIHC Programs.

4. Costs:

(1) Costs to State Government.

There will be no costs to state government because of the proposed amendments to the Existing Rule. DHCR will continue to administer the LIHC and SLIHC Programs with existing staff and resources.

(2) Costs to local government.

None.

(3) Cost to private regulated parties.

The changes made by the Proposed Rule should result in no increased costs to regulated parties. Any increase in costs which result from "energy efficiency" requirements will be offset by the Credit allocated to the project, and cost savings.

5. Local Government Mandates:

None.

6. Paperwork:

The rule requires the filing of an application and supporting documentation to establish eligibility for an allocation of the federal tax credits.

7. Duplication:

None.

8. Alternatives:

The alternative to the Proposed Rule is to retain the Existing Rule which does not adequately address DHCR's need to clarify its funding process and scoring criteria, and to revise its scoring criteria to meet new federal requirements. Specifically:

(1) The alternative to defining "historic building" at section 2040.2(k) and adding the "historic nature of project" scoring criteria at section 2040.3(f)(15) of the Proposed Rule is to fail to comply with a 2008 amendment to the IRC which requires this project selection criterion.

(2) The alternative to revising section 2040.3(a) is to retain the existing provision, which does not correctly indicate the timeframe for DHCR's issuance of a notice of credit availability.

(3) The alternative to increasing the processing fees in section 2040.3(c) is to retain the current application and credit allocation fee structure, which would result in an overall decrease in revenue to the State Treasury due to a reduction in the State's overall credit allocation authority at a time when the State can ill afford further budgetary reductions in revenue. There is no practical alternative to correcting section 2040.3(e)(15)(i) to reflect the new order of the definition of "preservation project" at 2040.2(q).

(4) The alternative to replacing section 2040.3(e)(18) is to retain the current text, which does not sufficiently reflect DHCR's current mandatory green building standards and includes provisions more appropriate to new section 2040.3(e)(19) "energy efficiency standards".

(5) The alternative to adding the "energy efficiency" threshold requirements at 2040.3(e)(19) is for the state to fail to incorporate these practices into the Existing Rule, and, as a result, fail to require measures which are needed to ensure affordability, long term viability and energy efficient operation of Credit projects, and conserve energy and water.

(6) The alternative to amending the "community revitalization plan" scoring criteria at section 2040.3(f)(1)(iii) is the current text, which made it virtually impossible for projects to qualify for scoring points. The proposed amendment recognizes that it is sufficient for a project to be part of a comprehensive community revitalization plan which addresses at least one of the community "quality of life" factors referenced in the criteria since most such local plans do not address all of them.

(7) The alternative to revising the "green building" scoring criteria at 2040.3(f)(4) is the current text, which does not clearly denote which mandatory green building criteria must be addressed for projects to qualify for the scoring points and the specific point values associated with the criteria. The language in the Existing Rule required prospective project applicants seeking these scoring points to obtain guidance outside the Rule and raised unwarranted concerns that the criteria adversely affected the competitiveness of rural projects. The alternative to providing multiple options for obtaining the six points under standard green building criteria

is to eliminate the points associated with one of the three criteria in this category, which are all desirable green building goals DHCR wishes to continue to encourage. In addition, the alternative to reducing the overall points available under this criteria is to obtain the points for "historic nature of project" at 2040.3(f)(15) of the Proposed Rule from another scoring provision which, as articulated in public comment, would serve as a detriment to the program and its prospective applicants. As noted directly above, the alternative to reducing the number of scoring points for "fully accessible and adapted, move-in ready units" scoring criteria at 2040.3(f)(6) is to fail to provide a sufficient scoring incentive for the new required scoring criteria at 2040.3(f)(15) in the Proposed Rule.

(8) The alternative to amending the "energy efficiency" scoring criteria at section 2040.3(f)(9) is to retain existing text which requires applicants, some with limited financial resources, to incur substantial costs prior to application, and which also fails to provide applicants seeking these points with the option of energy efficient projects that do not include NYSER-DA's involvement.

(9) The alternative to amending the "persons with special needs" scoring criteria at section 2040.3(f)(12) is the current text which fails to respond to substantive public comment received, since the current text does not reference the need to assist persons who served in the armed forces of the United States who otherwise meet the parameters of this category.

(10) The alternative to amending (section 2040.3(f)(15) of the Existing Rule) the "project amenities" scoring criteria (section 2040.3(f)(16) of the Proposed Rule) is the current text which does not provide clear guidance regarding DHCR's requirements for accessing these points or the point values associated with the criteria.

(11) The alternative to amending section 2040.6(a) is the current text which contains an incorrect DHCR e-mail address for Freedom of Information requests.

(12) The alternative to revising section 2040.8(b)(2)(ii)(b) regarding tenant income certifications is to retain the current text, which would fail to address a recent amendment to the IRC.

(13) The alternative to deleting and replacing section 2040.14(c) "funding rounds" and 2040.14(d) "project scoring and rating criteria" is to retain the current SLIHC funding round and program scoring criteria which would then not track the proposed changes to the LIHC Program, nor the changes required by IRC amendments.

9. Federal Standards:

This Rule does not exceed the minimum standards of the federal government for the LIHC Program or the SLIHC Program.

10. Compliance Schedule:

Not applicable. The rule changes will affect only those who apply to DHCR for allocations of Credit after the amendments to the rule are effective.

Revised Regulatory Flexibility Analysis

The Division of Housing and Community Renewal has found that the proposed amendments to the rule at 9 NYCRR Part 2040 (the "Proposed Rule") will have no negative impact on small businesses. DHCR sought and utilized the advice of persons who represent small businesses in order to ensure that the Proposed Rule would have no negative impact on small businesses. Prior to drafting the Proposed Rule, DHCR held a roundtable discussion with participants from around the State. The invitees included for-profit and not-for-profit housing developers, attorneys and credit syndicators. No participant expressed an opinion indicating that any of the roundtable's discussion topics, which included project-related fees, would adversely affect small businesses. Based upon the roundtable, its prior experience in the allocation of Credit to projects which utilize small business services, and the nature of the amendments, DHCR does not anticipate that the Proposed Rule will have any adverse impact on small businesses or local government.

Revised Rural Area Flexibility Analysis

The Division of Housing and Community Renewal (DHCR) has found that the proposed amendments to the Rule at 9 NYCRR Part 2040 will not impose any adverse economic impact on rural areas or reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. The changes to the existing Rule which would be made by the proposed amendments impose no further requirements in rural areas, will not impose additional compliance costs on persons/entities which are located in rural areas, and will have no other adverse impacts on rural areas. While one change in the existing Rule will require the payment of project-related fees as an additional capital cost on such persons/entities, the cost of such fees are payable from the capital and equity financing received.

Prior to drafting the Proposed Rule, DHCR held a roundtable discussion with members of the affordable housing industry who have been active in the Credit program. The invitees included for-profit and not-for-profit housing developers from regions throughout the State, attorneys and credit syndicators. No invitee expressed an opinion indicating that the

roundtable discussion items, which included the topic of project-related fees, would adversely affect rural areas. DHCR's experience with the Low-Income Housing Credit Program and the nature of the amendments are such that no such impact should be anticipated.

Revised Job Impact Statement

The Division of Housing and Community Renewal has found that the proposed amendments to the Rule at 9 NYCRR Part 2040 will have no adverse impact on jobs and employment opportunities. DHCR's experience with the Low-Income Housing Credit Program and the nature of the amendments are such that no adverse impact should be anticipated. The proposed Rule's retention and improvement of existing requirements and incentives regarding energy conservation, green buildings, the minimization of adverse environmental impacts and the addition of a new incentive for the rehabilitation of historic buildings may result in an increase in jobs in related industries.

Assessment of Public Comment

Section 2040.3(e)(19):

Comments:

It was recommended that high efficiency commercial lighting be permitted for use in residential units, as well as common areas, since such lighting can be both more energy efficient than Energy Star labeled lighting fixtures and less expensive.

A second commentator suggested that the provision be revised to allow for other lighting fixtures which provided for equivalent energy efficiency, stating that the provision as previously proposed was too specific and would be "technology-limiting" in an industry which has been undergoing rapid change and improvement.

Another commentator stated that developers might respond to this requirement by not providing any lighting fixtures at all in bedrooms or living rooms due to the additional cost.

Response:

DHCR agrees with the first two comments and is revising this provision to permit the use of light fixtures which are Energy Star labeled or, at a minimum, provide equivalent energy efficiency. Such wording accommodates the utilization of high efficiency commercial grade lighting fixtures, and other new products which might be developed by this ever-changing industry.

However, DHCR's recent experience in requiring energy efficiency lighting fixtures in residential units does not support the contention that developers will avoid putting such lighting fixtures in living rooms and bedrooms to save money.

Section 2040.3(f)(4):

Comments:

One commentator suggested that the 10 points allotted to this scoring category be reduced and allotted to certain other categories.

Another commentator recommended that DHCR consider direct incentives for projects developed in close proximity to public transit, add the "reuse of existing buildings" as an additional green measure beyond the standard criteria and consider separate green building scoring categories for new construction and rehabilitation/preservation projects due to the likelihood that rehabilitation/preservation projects would not score as well as new construction projects using the same green building scoring items.

Response:

DHCR agrees that the 10 points allotted to this scoring category is more than sufficient in encouraging projects to incorporate green building measures. Therefore, DHCR is reducing this scoring category by two points and reallocating them consistent with other agency priorities.

DHCR does not deem it necessary to revise this scoring category to provide direct incentives for projects developed in close proximity to public transit since they already qualify for scoring points. In addition, DHCR does not believe that a separate green building scoring provision is necessary for rehabilitation/preservation projects, since these projects already qualify for other incentives, including a preservation project set-aside. Similarly, projects supported by a comprehensive community revitalization plan which include the "reuse of existing buildings" already qualifies for up to five scoring points in a different scoring category in the QAP.

Section 2040.3(f)(5):

Comments:

DHCR received comments which objected to the contemplated reduction of the points available under this scoring provision from 7 to 5 points. Alternatively, commentators suggested that DHCR make long term affordability a threshold eligibility requirement.

Response:

DHCR is retaining long term affordability as a scoring category, but will raise its value back to the current level of 7 points.

Section 2040.3(f)(9):

Comments:

Commentators who have developed energy efficient affordable housing

and/or have sought to participate in the aforementioned New York State Energy Research and Development Authority (NYSERDA) programs indicated that they have encountered difficulties with these programs. Specifically, one commentator indicated that NYSEDA funding under the Multifamily Building Performance Program has been indefinitely suspended. In light of this situation, the commentator questioned what “comparable” energy efficiency standards a project would need to meet to qualify for scoring points under this provision.

Another commentator asked what would occur if a project, upon completion, failed to meet the pertinent NYSEDA program standard by some small degree and whether the developer would be deemed by DHCR to be in default of its LIHC regulatory agreement.

Response:

Energy efficient development is crucial to reducing the amount of energy consumed by our housing developments and has the additional effect of lowering the operational costs of these projects. Since 2008, DHCR has recognized the programs administered by NYSEDA as the best means to achieve this goal, especially in light of the funding then available under the programs.

In light of the program funding suspension, and other concerns by participating developers, DHCR agrees it is necessary to make additional clarifications to the proposed QAP to accommodate projects meeting enhanced energy efficiency standards that provide energy efficiencies and operational cost savings above what is required in the QAP’s threshold eligibility requirements.

It is further noted that the current Request for Proposals delineated specific comparable energy efficient strategies to supplement the NYSEDA option. DHCR’s intent is to allow housing developers additional options to achieve the goal of developing energy efficient projects and securing scoring points. These options were also articulated at DHCR’s regional application workshops in November 2009. In addition, DHCR’s regional offices are continuing to provide technical assistance, in conjunction with architectural staff, in regard to the alternate standards.

In reference to the concern about a default under the DHCR LIHC regulatory agreement, DHCR understands that NYSEDA program participation at the outset of project development does not insure a housing development will meet the NYSEDA standard upon completion. Therefore, it is highly unlikely DHCR will determine a project which marginally fails to meet the NYSEDA standard to be in default of its LIHC regulatory agreement. Indeed, in its recent experience with funded projects which proposed to meet the NYSEDA standard and subsequently failed, DHCR did not assess any significant penalties against the development team or deem the project to be in default. Rather, DHCR architectural staff worked jointly with the development teams to identify areas in which some energy efficient measures could still be utilized to the betterment of the project and its ultimate tenants.

Section 2040.3(f)(12):

Comments:

Commentators suggested that DHCR increase the number of points available under this category. Another commentator requested that DHCR document in the QAP that projects compliant with a federal fair housing court order in Westchester County receive points. Commentators also recommended including veterans among the categories of persons served for which projects could qualify for these scoring points.

It was also proposed that DHCR make every effort to assure that in projects located in New York City, such units be targeted to persons with special needs who are homeless or otherwise eligible under the joint state-city New York New York III supportive housing initiative.

Response:

DHCR agrees it is very important to assist veterans with special needs in obtaining affordable housing in recognition of their service to our nation. Therefore, DHCR is revising the persons with special needs scoring provision to add language indicating that projects which qualify for these points will provide a priority for veterans.

In reference to the comment regarding the federal fair housing court order in Westchester County, DHCR will continue to take this request under consideration, but is not prepared to revise the QAP on this basis.

In regard to the recommendation that the QAP address the current availability of scoring points for projects serving households eligible under the joint state-city New York New York III supportive housing initiative, DHCR has determined that such a change is not necessary since the scoring instrument already accommodates such projects.

Section 2040.3(f)(6):

Comments:

One commentator disagreed with the proposed one point overall reduction (from 6 to 5 points) in this category, which DHCR has proposed to partially accommodate the federally mandated scoring incentive for historic rehabilitation projects, due to concern it would decrease the interest of prospective applicants in proposing accessible units.

Another commentator disagreed with the standard of accessibility

required to qualify for points, proposing either that DHCR award points for fully adaptable, rather than fully accessible units, or to provide the points for projects incorporating “Universal Design” features.

A third commentator indicated that some project designs, like that of rehabilitation or historic preservation projects, do not lend themselves well to roll-in showers and suggested DHCR add language permitting a “tub with bench or equivalent” to qualify a project for points.

A fourth commentator stated that too many scoring points are associated with this section and that fully adapting units in advance of tenants renting the units can create difficulties, since individual tenants have more specific needs. It was suggested that units be adapted after project completion, at the cost of the project owner, based on the needs of the new tenant.

Response:

DHCR believes that the provision of 5 points under this category continues to provide a sufficient incentive and reward to prospective applicants seeking to serve tenants with mobility and hearing/vision impairments by providing fully adaptable units. Based on its experience in the two years since this provision was first put forth in the QAP, DHCR has determined that the scoring provision as worded has been successful in serving the needs of such tenants by providing needed fully adaptable units which include a higher level of physical accessibility than may be required by building codes and other regulations. Therefore, DHCR does not wish to adopt a different standard, or provide a more questionable post-construction adaptation approach which it would not be able to adequately regulate, at this time. Also, nothing precludes a project owner from incorporating different adaptability standards, though it might not qualify for scoring points.

Furthermore, DHCR recognizes that this scoring provision may not be suitable for all projects, including some rehabilitation and historic preservation projects. In its provision of technical assistance to applicants, DHCR reminded sponsors that this is an option (not a mandatory requirement) and it that should only be selected if there is a specific need for these dwelling units in the community in which the project is located.

Section 2040.3(f)(15):

Comments:

One commentator expressed concern that providing a scoring incentive for historic rehabilitation will reduce the number of units assisted by the LIHC program since the costs associated with the development of these units is higher than that of other projects.

Response:

DHCR agrees that the rehabilitation of historic projects often has a higher per unit development cost than other types of projects. However, it is noted that these types of projects are eligible for additional equity financing through the provision of federal and/or state historic tax credits, which can assist in meeting the higher cost of these projects without excessive utilization of DHCR’s LIHC program.

In addition, the federal Housing and Economic Recovery Act of 2008 required that state housing credit allocation agencies, such as DHCR, provide a preference for such projects.

Section 2040.3(f)(16):

Comments:

One commentator stated that central air-conditioning does not work in projects serving low-income households since such tenants can ill-afford the higher utility costs associated with central air-conditioning.

Response:

DHCR agrees that energy efficient central air-conditioning may not be advisable in all LIHC projects due to affordability, geography or other concerns. For this reason, since 2008, DHCR has provided this QAP scoring provision as an option which a project may utilize to secure Project Amenities scoring points. Projects need address only two of the six options to secure the maximum of two available points, or one of six to obtain one point.

Comments were also received concerning provisions of the QAP for which no change has been proposed, as well as recommendations for new QAP provisions. Since these comments are not germane to the proposed amendments to the QAP, DHCR will review these recommendations at a later date to determine whether additional amendments may be beneficial in the future.

Insurance Department

EMERGENCY RULE MAKING

Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims

I.D. No. INS-08-10-00011-E

Filing No. 99

Filing Date: 2010-02-10

Effective Date: 2010-02-10

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

Action taken: Amendment of Part 151 (Regulation 119) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1303 and 4117; and Workers' Compensation Law, section 32

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

Specific reasons underlying the finding of necessity: Workers' Compensation Law ("WCL") Section 32 permits the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the Special Disability Fund ("SDF"). Furthermore, no insurer, self-insured employer, or the State Insurance Fund ("SIF") may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. The law mandates the Superintendent to set a reserve standard specific to transactions authorized by WCL Section 32. This regulation establishes the required reserve standards.

Presently, the SDF reimburses carriers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on private insurance carriers, self-insured employers (including political sub-divisions), group self-insurers, and SIF. The combination of increasing requests for reimbursement from the SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

The Legislature enacted Chapter 6 of the Laws of 2007, which amended Section 15(8)(h) of the Workers' Compensation Law, in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amends Section 32(i) of the Workers' Compensation Law to permit the chair of the New York State Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the SDF. Furthermore, Section 32(i)(5) mandates that no carrier, self insured employer, or SIF may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent. This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of any claims.

The Waiver Agreement Management Office (WAMO), acting on behalf of the Workers' Compensation Board, will enter into waiver agreements

with insurers, self-insured employers, and SIF whereby those parties agree to assume the liability for, management, administration or settlement of claims. In consideration of the assumption of those obligations, the insurer, self-insured employer, or SIF will receive a lump-sum payment from WAMO. WAMO will also negotiate and execute other waiver agreements (i.e., the retail/individual waiver agreements) contemplated by the regulation.

The New York State Dormitory Authority will be issuing tax exempt revenue bonds beginning in November, 2009, to fund the waiver agreements to be entered into by WAMO. This regulation must be in place before that time so that insurers (one of the parties to wholesale waiver agreements) will be able to enter into waiver agreements with WAMO. Nor will self-insured employers or the SIF be in a position to execute waiver agreements with WAMO until such time as this regulation is in place.

The rapid depopulation of the SDF through the waiver agreements will lead to a decrease the SDF assessments that New York State insurers and employers must pay. This regulation was previously promulgated on an emergency basis on November 18, 2009. For the reasons stated above, the rule must be kept in effect on an emergency basis for the furtherance of the general welfare.

Subject: Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims.

Purpose: This regulation requires reserves to be established for those claims subject to reimbursement by the Special Disability Fund.

Text of emergency rule: A new subpart 151-4 is added to read as follows:
Section 151-4.1 Preamble.

The Special Disability Fund ("SDF") reimburses carriers and self-insured employers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on insurers writing workers compensation insurance in New York, self-insured employers (including political sub-divisions), group self-insurers, and the State Insurance Fund. The combination of increasing requests for reimbursement from SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

The Legislature enacted Chapter 6 of the Laws of 2007, which amended Workers' Compensation Law Section 15(8)(h), in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amends Workers' Compensation Law section 32(i) to permit the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Workers' Compensation Law section 32(i)(5) mandates that no carrier, self insured employer, or the State Insurance Fund may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. This purpose of this subpart is to ensure that an insurer, self-insured employer, or State Insurance Fund does not over-reserve for claims if it voluntarily assumes the liability for, or management, administration or settlement.

Section 151-4.2 Definitions.

Waiver agreement, in this subpart, means any agreement entered into between an insurer, self-insured employer, or the State Insurance Fund and the New York State Workers' Compensation Board pursuant to Workers' Compensation Law sections 32(i)(2) and (3).

Section 151-4.3 Reserve Amounts.

(a) An insurer other than the State Insurance Fund that enters into a waiver agreement shall establish reserves for those claims in accordance with Insurance Law sections 1303 and 4117(d).

(b) *The State Insurance Fund or a self-insured employer holding reserves that enters into a waiver agreement shall establish reserves for those claims in accordance with the principles set forth in Insurance Law sections 1303 and 4117(d).*

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 May 10, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of Part 151-4 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 119) derives from Sections 201, 301, 1303, and 4117 of the Insurance Law, and Section 32 of the Workers' Compensation Law ("WCL"). These provisions establish the Superintendent's authority to establish the amount of reserves an insurer, self-insured employer, or the State Insurance Fund ("SIF") may hold for claims for which the entity has waived its right to reimbursement from the Special Disability Fund ("SDF"), and for which it has assumed the liability, management, administration, or settlement.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 1303 of the Insurance Law requires every insurer to maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims.

Section 4117(d) of the Insurance Law sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers' compensation insurance.

Section 32 of the Workers' Compensation Law permits the chair of the workers' compensation board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the SDF. Furthermore, no carrier, self insured employer, or the State Insurance Fund ("SIF") may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent.

2. Legislative objectives: The SDF reimburses carriers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on private insurance carriers, self-insured employers (including political sub-divisions), group self-insurers, and SIF. The combination of increasing requests for reimbursement from the SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

As a result, the Legislature enacted Chapter 6 of the Laws of 2007, which amended Section 15(8)(h) of the Workers' Compensation Law, in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amended Section 32(i) of the Workers' Compensation Law to permit the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Section 32(i)(5) mandates that no carrier, self insured employer, or SIF may assume the liability for, management,

administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent. This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of any claims.

3. Needs and benefits: This regulation requires an insurer, self-insured employer, or SIF to establish reserves for those claims subject to reimbursement by the SDF in accordance with Insurance Law Sections 1303 and 4117(d), thereby ensuring that insurers, self-insured employers, or SIF do not over-reserve for claims for which they have directly assumed the liability, management, administration, or settlement. Insurance Law Section 1303 states that all insurers must maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of the statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims. In turn, Insurance Law Section 4117(d) sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers' compensation insurance.

4. Costs: Participation in the program is voluntary. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

5. Local government mandates: The proposed rule does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. Paperwork: This regulation requires no new paperwork. Insurers, self-insured employers and SIF already administer the claims for second injuries. However, by assuming the liability, management, administration, and settlement directly, these insurers, self-insured employers, or SIF would no longer be reimbursed by the SDF, and thereby reduce their paperwork.

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

8. Alternatives: The law mandates the Superintendent to set a reserve standard specific to transactions authorized by WCL Section 32(i)(5). Reserving in accordance with Insurance Law Sections 1303 and 4117(d) will ensure that insurers that assume the liability, management, administration, and settlement of claims for which they were previously reimbursed by the SDF do not over-reserve for those claims. Nor would reserving in accordance with these sections result in inadequate reserves for those claims.

SIF and self-insured insured employers currently are not subject to the standards set forth in Insurance Law Sections 1303 and 4117(d). However, because the Workers' Compensation Law mandates the Superintendent to set reserve standards for those two types of entities, this regulation requires SIF and self-insured employers to hold reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d).

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

10. Compliance schedule: Insurers, self-insured employers, or SIF, if they choose to assume the liability for, or management, administration or settlement of any claims, will be expected to demonstrate compliance with the reserve standards established by this regulation immediately upon entering into a waiver agreement.

Regulatory Flexibility Analysis

1. Small businesses:

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

This regulation applies to all workers' compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund ("SIF"). This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of those claims from the Workers' Compensation Special Disability Fund ("SDF") by requiring those entities to reserve in accordance with Insurance Law Sections 1303 and 4117(d).

The basis for this finding is that this rule is directed at workers' compensation insurers authorized to do business in New York State, none of which falls within the definition of "small business" as found in Section 102(8) of the State Administrative Procedure Act ("SAPA"). The Insurance Department has monitored Annual Statements and Reports on Examination of authorized workers' compensation insurers subject to this

rule, and believes that none of the insurers falls within the definition of "small business", because there are none that are both independently owned and have fewer than one hundred employees. Nor does SIF, which is also effected by the regulation, come within the definition of "small business" found in SAPA Section 102(8).

The prerequisites maintained by the Workers' Compensation Board for an employer to be self-insured make it highly unlikely that any small businesses, as defined by SAPA Section 102(8), are in fact self-insured. All of the currently self-insured employers have high credit scores and payrolls equal to or greater than \$732,000. Moreover, all self-insured employers must post a security deposit with the Workers' Compensation Board of at least \$935,000 or provide a letter of credit for the required amount of security. These qualifications, among others, preclude the overwhelming majority of small employers from becoming self-insured.

In any event, this rule is applicable only if a workers' compensation insurer, self-insured employer, or SIF voluntarily chooses to enter into waiver agreement. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This regulation applies to all workers' compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund ("SIF"). These entities do business throughout New York State, including rural areas as defined under State Administrative Procedure Act ("SAPA") Section 102(10).

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

This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Insurers, self-insured employers, and SIF already administer the claims from a claims management perspective. If anything, they would have a reduction in paperwork because the reimbursement process would no longer be necessary.

3. Costs:

To insurers: Participation in the program is voluntary. If a carrier, self-insured employer or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

4. Minimizing adverse impact:

Participation in the program is voluntary. If a carrier, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

5. Rural area participation:

The legislature in 2007 amended Workers' Compensation Law Section 32(i)(5) was amended to mandate that an insurer, self insured employer, or SIF may not assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. In order for the mechanism contemplated by the statute to operate, the Superintendent must promulgate a regulation establishing reserve standards.

The entities covered by this regulation - workers' compensation insurers authorized to do business in New York State, self-insured employers, and SIF - do business in every county in this state, including rural areas as defined under SAPA Section 102(10). This regulation mandates that insurers should set reserves in accordance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and SIF should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The regulation contains no provisions that create impacts unique to rural areas of the state.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. The rule mandates that insurers must set reserves in accor-

dance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and the State Insurance Fund should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The insurer's existing personnel should be able to perform this task. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This regulation should not have a measurable impact on self-employment opportunities.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minimum Standards for the Form, Content and Sale of Medicare Supplement Insurance

I.D. No. INS-08-10-00002-EP

Filing No. 75

Filing Date: 2010-02-05

Effective Date: 2010-02-05

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

Proposed Action: Addition of Part 58; and amendment of Parts 52, 215, 360 and 361 of Title 11 NYCRR.

Statutory authority: Federal Social Security Act (42 U.S.C. section 1395ss), Insurance Law, sections 201, 301, 3201, 3216, 3217, 3218, 3221, 3231, 3232 and 4235; and art. 43

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

Specific reasons underlying the finding of necessity: The federal Social Security Act (42 U.S.C. § 1395ss) provides for the certification of Medicare supplement health insurance regulatory programs by the U.S. Secretary of Health and Human Services to ensure that state regulatory programs provide for the application and enforcement of standards with respect to Medicare supplement insurance equal to or more stringent than the standards set forth in the National Association of Insurance Commissioners (NAIC) Model Regulation. If the Secretary of Health and Human Services determines that a state's program regulating Medicare supplement insurance policies does not provide for the application of standards at least as stringent as those contained in the NAIC Model Regulation, the regulation of Medicare supplement insurance reverts to the federal Secretary of Health and Human Services.

New York's standards for Medicare supplement insurance are more stringent than the minimums set forth in the NAIC Model Regulation. Since 1993, New York has offered additional consumer protections including, for example, continuous open enrollment and community rating. New York also requires insurers to offer standardized Medicare supplement insurance Plan B in addition to Plan A, which is required by federal law.

The federal Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), however, included a number of changes to the standardized Medicare supplement insurance plans. The MIPPA charged the NAIC - specifically, the Senior Issues Task Force - with the task of updating the standards for Medicare supplement insurance. On September 24, 2008, the NAIC adopted a revised Model Regulation to implement the NAIC Medicare Supplement Insurance Minimum Standards Model Act.

In addition, the federal Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits insurers from discriminating on the basis of genetic information with respect to the issuance, pricing or medical underwriting of medical policies or certificates. GINA prohibits insurers from requesting that an individual or a family member of an individual undergo a genetic test. For purposes of GINA, a "genetic test" is defined as an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detect genotypes, mutations, or chromosomal changes. "Genetic information" is defined to mean, with respect to any individual, information about such individual's genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual. This rulemaking includes provisions to ensure that New York law complies with GINA. Pursuant to federal law, the prohibitions of GINA will be in effect for policies and certificates issued or renewed with an effective date for coverage on or after May 21, 2009.

The NAIC Model Regulation, revised to include the requirements of MIPPA and GINA, was adopted on September 24, 2008. MIPAA requires that each State shall have one year from the date the NAIC adopts the revised Model Regulation to adopt the provisions of GINA and MIPPA. Consequently, New York must take action by September 24, 2009 to ensure that it can continue to regulate Medicare supplement insurance.

The normal regulatory approval process did not allow for final adoption of these regulations prior to September 24, 2009. For this reason, and for the reasons stated above, the immediate adoption of these regulations was necessary for the preservation of the general welfare. These regulations were previously promulgated on an emergency basis on August 10, 2009, and November 9, 2009. The regulations must be kept in effect on an emergency basis until the regulation is formally adopted.

Subject: Minimum standards for the form, content and sale of Medicare supplement insurance.

Purpose: To conform the regulations with the requirements of federal law.

Substance of emergency/proposed rule (Full text is posted at the following State website: <http://www.ins.state.ny.us/>): The federal Social Security Act (42 U.S.C. § 1395ss) provides for the certification of Medicare supplement health insurance regulatory programs by the U.S. Secretary of Health and Human Services to ensure that a state's regulatory program provides for the application and enforcement of standards with respect to Medicare supplement insurance equal to or more stringent than the standards set forth in the National Association of Insurance Commissioners (NAIC) Model Standards. If the Secretary of Health and Human Services determines that a state's program regulating Medicare supplement insurance policies does not provide for the application of standards at least as stringent as those contained in the NAIC Model Regulation, the regulation of Medicare supplement insurance reverts to the federal Secretary of Health and Human Services.

In 1990, the federal Omnibus Budget Reconciliation Act of 1990 (OBRA) (P.L. 101-508) was enacted; establishing uniform requirements to govern Medicare supplement insurance. That federal law charged the NAIC with developing a model for the regulation and standardization of Medicare supplement insurance. The NAIC model (the "Model Regulation") was incorporated by reference into the federal statutory requirements. In 1992, New York amended provisions pertaining to the rules for the regulation of Medicare supplement insurance in 11 NYCRR 52 (Reg. 62) to ensure compliance with federal standards.

The federal Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) (P.L. 110-275), however, included a number of changes to the standardized Medicare supplement insurance plans. The MIPPA charged the NAIC specifically, the Senior Issues Task Force with the task of updating the standards for Medicare supplement insurance. On September 24, 2008, the NAIC adopted a revised Model Regulation to implement the NAIC Medicare Supplement Insurance Minimum Standards Model Act.

In addition, the federal Genetic Information Nondiscrimination Act of 2008 (GINA) (P.L. 110-233) prohibits insurers from discriminating on the basis of genetic information with respect to the issuance, pricing or medical underwriting of medical policies or certificates. GINA prohibits insurers from requesting that an individual or a family member of an individual undergo a genetic test. For purposes of GINA, a "genetic test" is defined as an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detect genotypes, mutations, or chromosomal changes. "Genetic information" is defined to mean, with respect to any individual, information about such individual's genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual.

The Superintendent of Insurance is empowered by the New York Insurance Law to promulgate regulations implementing the standards required by federal law, as well as additional protections and benefits as deemed appropriate.

In addition to requirements established by MIPPA and GINA, for purposes of conciseness and clarity, this rulemaking relocates, without substantive change, existing provisions in New York regulations pertaining to the rules for the regulation of Medicare supplement insurance from 11 NYCRR 52 (Reg. 62), which is a broad regulation addressing all types of accident and health insurance, to new Regulation 193 (11 NYCRR Part 58) addressing only Medicare supplement insurance.

Regulation 193 (11 NYCRR Part 58) consists of six sections addressing the regulation of Medicare supplement insurance.

Section 58.1 is relocated from subdivisions (a)-(c) and (f)-(o) of 11 NYCRR 52.22 (Reg. 62) with the addition of new subdivision (j) included to add the specific protections required by GINA, as specified in the revised NAIC Model Regulation.

Section 58.2 is relocated from subdivisions (d) and (e) of 11 NYCRR 52.22 (Reg. 62) and contains the standards for Medicare supplement insurance and the make-up of benefit plans issued with an effective date for coverage prior to June 1, 2010, which is the date applicable for changes made pursuant to MIPPA.

Section 58.3 is disclosure language relocated from 11 NYCRR 52.54 and 52.63 (Reg. 62) for Medicare supplement insurance plans issued with an effective date for coverage prior to June 1, 2010.

Section 58.4 is a new section conforming with Sections 8.1 and 9.1 of the NAIC Model Regulation to comply with MIPPA. The section describes each benefit of Medicare supplement insurance, and the combinations of the different benefits that comprise each benefit plan (A-D, F, G, K-N) set forth in the NAIC Model Regulation, for benefit plans issued with an effective date for coverage on or after June 1, 2010. The revised Medicare supplement insurance standards, as implemented by the revised NAIC Model Regulation, add a hospice benefit to the core benefit package for all Medicare supplement insurance plans.

Section 58.5 is a new section conforming to Section 17 of the NAIC Model Regulation, and sets forth new disclosure language for the plans issued with an effective date for coverage on or after June 1, 2010.

Section 58.6 is relocated from 11 NYCRR 52.14 (Reg. 62) and contains the standards for Medicare select insurance.

Part 215 (Regulation 34), Part 52 (Regulation 62), Part 360 (Regulation 145), and Part 361 (Regulation 146) of Title 11 NYCRR are amended to conform references to material that was relocated from Part 52 to the new Part 58.

The full text of the regulations may be found at the Department's website (<http://www.ins.state.ny.us/>).

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire May 5, 2010.

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5585, email: amais@ins.state.ny.us

Data, views or arguments may be submitted to: Sara Allen, New York State Insurance Department, One Commerce Plaza, Suite 1909, Albany, NY 12257, (518) 473-7470, email: sallen@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of 11 NYCRR 58 (Regulation No. 193), the Forty-second Amendment to Part 52 of Title 11 NYCRR (Regulation No. 62), the Third Amendment to Part 215 of Title 11 (Regulation No. 34), the Sixth Amendment to Part 361 of Title 11 (Regulation No. 146), and for the Seventh Amendment to Part 360 of Title 11 (Regulation No. 145) derives from the federal Social Security Act (42 U.S.C. section 1395ss) and Insurance Law Sections 201, 301, 3201, 3216, 3217, 3218, 3221, 3231, 3232, and 4235, and Article 43.

The federal Social Security Act (42 U.S.C. § 1395ss) provides for the certification of Medicare supplement health insurance regulatory programs by the U.S. Secretary of Health and Human Services to ensure that a state's regulatory program provides for the application and enforcement of standards with respect to Medicare supplement insurance equal to or more stringent than the standards set forth in the National Association of Insurance Commissioners (NAIC) Model Regulation. If the Secretary of Health and Human Services determines that a state's program regulating Medicare supplement insurance policies does not provide for the application of standards at least as stringent as those contained in the NAIC Model Regulation, then the regulation of Medicare supplement insurance reverts to the federal Secretary of Health and Human Services.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law, and effectuate any power granted to the Superintendent under the Insurance Law.

Section 3201 authorizes the Superintendent to approve accident and health insurance policies for delivery or issuance for delivery in this state.

Section 3216 sets forth the standard provisions in individual accident and health insurance policies.

Section 3217 authorizes the Superintendent to issue regulations to establish minimum standards for the form, content and sale of health insurance.

Section 3218 authorizes the Superintendent to promulgate rules and regulations to establish minimum standards for the form, content and sale of Medicare supplement insurance.

Section 3221 sets forth the standard provisions in group and blanket accident and health insurance policies.

Section 3231 sets forth the requirement that individual and small group health insurance policies and Medicare supplement insurance policies be issued on a community rated and open enrollment basis.

Section 3232 establishes requirements for pre-existing condition provisions in certain health insurance policies.

Section 4235 establishes the types of permissible groups to which a group accident and health policy may be issued.

Article 43 of the Insurance Law sets forth requirements for non-profit medical and dental indemnity corporations and non-profit health or hospital corporations.

2. Legislative objectives: The statutory sections cited above establish a framework for the form, content and sale of Medicare supplement insurance. States must have a regulatory program that provides a minimum level of coverage as established by 42 U.S.C. § 1395ss. If the U.S. Secretary of Health and Human Services determines that a state's program regulating Medicare supplement insurance policies does not provide for the application of standards at least as stringent as those contained in the NAIC Model Regulation, then the regulation of Medicare supplement insurance reverts to the federal Secretary of Health and Human Services. The Superintendent is empowered by state law to promulgate regulations implementing the standards required by federal law, and to provide additional protections and benefits as appropriate.

3. Needs and benefits: In 1990, the federal Omnibus Budget Reconciliation Act of 1990 (OBRA) was enacted establishing uniform requirements to govern Medicare supplement insurance. That federal law charged the NAIC with developing a model for the regulation and standardization of Medicare supplement insurance. The NAIC model (the "Model Regulation") was incorporated by reference into the federal statutory requirements. In 1992, New York amended the provisions regulating Medicare supplement insurance in 11 NYCRR 52 (Reg. 62) to ensure compliance with the federal standards.

The federal Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) required a number of changes to the standardized Medicare supplement insurance plans. The MIPPA charged the NAIC – specifically, the Senior Issues Task Force – with the task of updating the standards for Medicare supplement insurance. On September 24, 2008, the NAIC adopted a revised Model Regulation to implement the NAIC Medicare Supplement Insurance Minimum Standards Model Act.

In addition, the federal Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits insurers from discriminating on the basis of genetic information with respect to the issuance, pricing or medical underwriting of medical policies or certificates. Insurers are also prohibited from requesting that an individual or a family member of an individual undergo a genetic test. For purposes of GINA, a genetic test is defined as an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detect genotypes, mutations, or chromosomal changes. Genetic information is defined to mean, with respect to any individual, information about such individual's genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual. This rulemaking includes provisions to ensure that New York Law complies with GINA. Pursuant to federal law, the prohibitions of GINA are already in effect for policies and certificates that were issued or renewed with an effective date for coverage on or after May 21, 2009.

Federal law requires that states amend their regulatory programs to implement all new federal statutory requirements and applicable changes to the NAIC Model standards or lose their ability to regulate Medicare supplement insurance. The changes required by GINA and MIPPA, as set forth in the NAIC Model Regulation, are the only substantive changes being made to New York's Medicare supplement insurance regulatory program. The regulated parties are the insurers participating in the Medicare supplement insurance market and the parties affected are Medicare eligible consumers in New York. If New York fails to adopt the changes required by federal law, New York will be out of compliance and regulation of Medicare supplement insurance will revert to the federal U.S. Secretary of Health and Human Services. The Secretary will apply the standards of the NAIC Model Regulation, which do not include the additional consumer protections of community rating, continuous open enrollment, and mandated additional plan offerings, as are currently required by New York's existing regulatory program.

In addition to effectuating requirements established by MIPPA and GINA, for purposes of conciseness and clarity, this rulemaking relocates, without substantive change, existing provisions in New York regulations pertaining to the rules for the regulation of Medicare supplement insurance from 11 NYCRR 52 (Reg. 62) to new 11 NYCRR Part 58 (Reg. 193). Regulation 62 is a broad regulation addressing all types of accident and health insurance whereas new Regulation 193 addresses only Medicare supplement insurance. The rulemaking also makes conforming amendments to 11 NYCRR 52 (Regulation No. 62), 11 NYCRR 215 (Regulation No. 34), 11 NYCRR 361 (Regulation No. 146), and 11 NYCRR 360 (Regulation No. 145).

4. Costs: Insurers issuing Medicare supplement insurance in New York have been aware of the new requirements since the 2008 federal incorporation of the revised NAIC Model Regulation. The changes required by GINA and MIPPA, as set forth in the NAIC Model Regulation, are the only substantive changes being made to New York's Medicare supplement insurance regulatory program.

The changes to the benefit structure and the addition and elimination of plans will necessitate changes to Medicare supplement insurance policy and certificate forms and disclosure notices issued by insurers to insureds.

Such forms will require updating to comply with the regulatory changes. Insurers will be making these same changes in all states in which they write Medicare supplement insurance. The insurers in the Medicare supplement insurance market are staffed with existing salaried personnel tasked with compliance. Based upon insurer information, we estimate that each insurer will expend approximately 20 - 25 work hours updating forms at an estimated cost of approximately \$25 - 50 per hour. Using such estimates, the cost to insurers associated with updating forms will be minimal, ranging from \$500 - 1,250 per insurer. There are currently sixteen Medicare supplement insurance insurers in New York. Therefore, the estimated cost statewide to all insurers will be approximately \$8,000 - 20,000.

GINA prohibits an issuer of a Medicare supplement insurance policy from using genetic information to deny, condition the effectiveness of, or discriminate in the pricing of a Medicare supplement insurance policy. New York already requires continuous open enrollment and community rating for all Medicare supplement insurance. Insurers are currently prohibited from using genetic information to deny, condition the effectiveness of, or discriminate in the pricing of a Medicare supplement insurance policy. Thus, there are no costs associated with compliance with the GINA provisions for Medicare supplement insurers.

Costs to the Insurance Department also should be minimal, as existing personnel are available to review any modified filings necessitated by the regulations. These rules impose no compliance costs on state or local governments or health care providers.

5. Local government mandates: These rules do not impose any program, service, duty or responsibility upon a city, town, village, school district or fire district.

6. Paperwork: The regulations impose no new reporting requirements. Other than the provisions included to comply with the federal requirements under MIPPA and GINA, the new Regulation 193 merely carries over existing regulatory provisions, located in various sections of Regulation 62, to provide a consolidated regulation containing the applicable provisions regulating Medicare supplement insurance. Insurers will need to revise policy form filings to comply with the regulation.

7. Duplication: The regulations will not duplicate any existing state or federal rule for insurers that write accident and health insurance, but rather implement and conform to the federal requirements.

8. Alternatives: In order for the State to regulate Medicare supplement insurance, federal law requires that it adopt, at a minimum, the standards set forth in the NAIC Model Regulation. The NAIC Model Regulation was revised in 2008 to include the requirements of two additional federal Acts, MIPPA and GINA. Failure to adopt the revised NAIC Model Regulation standards would result in the regulation of Medicare supplement insurance in New York State reverting to the federal U.S. Secretary of Health and Human Services. The federal minimum standards would then be applicable. Such federal standards do not include the additional consumer protections that New York currently has in place. This result is undesirable for consumers and therefore, is not a viable alternative.

The changes required by GINA and MIPPA, as set forth in the NAIC Model Regulation, are the only substantive changes being made to New York's Medicare supplement insurance regulatory program. However, these changes made numerous revisions to the benefit plan offerings and the benefit structure for policies that become effective on or after June 1, 2010. As such, New York's regulation needs to set forth the separate standards that are applicable to policies that are effective both pre- and post-June 1, 2010. Adding sections to Regulation 62 would have created an unwieldy and confusing set of standards for the regulation of Medicare supplement insurance. For ease of reference for insurers and any interested parties who may refer to the Medicare supplement insurance regulation, various applicable sections of current regulation were pulled out and inserted into the new Regulation 193 rather than adding additional sections to an already voluminous regulation. Regulation 62 is relevant to all types of accident and health insurance, not just Medicare supplement insurance. Therefore, drafting a new regulation was considered to be the best alternative for insurers.

9. Federal standards: The existing New York standards exceed the federal minimum standards set forth in the NAIC Model Regulation, in order to offer longstanding additional protections, not imposed by federal law, for residents of the State. The existing provisions of Regulation 62 (11 NYCRR 52) require insurers (1) to utilize community rating, (2) to offer continuous open enrollment to individuals enrolled in Medicare by reason of age or disability, and (3) mandates that insurers selling Medicare supplement insurance must offer benefit plan B. Federal law specifically permits the state to establish more stringent standards for insurers offering Medicare supplement insurance, and since 1993, New York residents have benefited from the security of these extra protections. With this rulemaking, New York is substantially adopting the federal changes required by MIPPA and GINA while maintaining all of the existing protections currently afforded New York residents.

10. Compliance schedule: The provisions of the regulations took effect upon filing with the Department of State on August 10, 2009 and some insurers have already submitted filings to comply with the regulatory changes. Pursuant to federal law, the prohibitions of GINA are already in effect for policies and certificates that were issued or renewed with an effective date for coverage on or after May 21, 2009. MIPPA applies to policies and certificates issued with an effective date of coverage on or after June 1, 2010.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department believes that these rules will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this belief is that these rules are directed at all insurers that write accident and health insurance and Article 43 corporations, none of which falls within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act. Indeed, the Insurance Department has reviewed filed Reports on Examination and Annual Statements of these entities, and believes that there are none that are both independently owned and that employ fewer than 100 persons. Accordingly, there is no need to prepare any special guidance materials for small businesses with regard to this rule.

2. Local governments:

The regulations do not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at insurers that write accident and health insurance and Article 43 corporations, none of which are local governments.

Rural Area Flexibility Analysis

The Insurance Department finds that these rules do not impose any significant burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas.

The entities covered by these regulations – all insurers that write accident and health insurance and Article 43 corporations – do business in every county in this state, including rural areas as defined under SAPA § 102(10). Insurers issuing Medicare supplement insurance in New York have been aware of the new requirements since the 2008 federal incorporation of the revised NAIC Model Regulation. The changes required by the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) and the Genetic Information Nondiscrimination Act of 2008 (GINA), as set forth in the NAIC Model Regulation, are the only substantive changes being made to New York's Medicare supplement insurance regulatory program.

The changes to the benefit structure, and the addition and elimination of plans, will necessitate changes to the requirements for Medicare supplement insurance applications and disclosure notices. Any additional cost of compliance with MIPPA for insurers and Article 43 corporations should be minimal. The insurers and Article 43 corporations in the Medicare supplement insurance market are staffed with existing salaried personnel tasked with compliance.

GINA prohibits an issuer of a Medicare supplement insurance policy from using genetic information to deny, condition the effectiveness of, or discriminate in the pricing of a Medicare supplement insurance policy. New York already requires continuous open enrollment and community rating for all Medicare supplement insurance. Insurers are currently prohibited from using genetic information to deny, condition the effectiveness of, or discriminate in the pricing of a Medicare supplement insurance policy. Thus, there should be no cost associated with compliance with the GINA provisions.

Job Impact Statement

Adoption of the five consolidated regulations should not adversely impact job or employment opportunities in New York. The consolidated regulations will involve revision of some mandatory practices that insurers must follow in issuing Medicare supplement insurance policies to bring company practices into conformance with the revised NAIC Model Regulation for Medicare supplement insurance, as required by 42 U.S.C. § 1395ss. Such revisions to company practices will not have any negative effect on jobs or employment opportunities.

There is no evidence that these rules would have any adverse impact on self-employment opportunities.

The Insurance Department has no reason to believe that the rules will result in any adverse impacts.

NOTICE OF ADOPTION

Public Retirement Systems - Reporting of Supplementary Data Related to the Reserve Liabilities

I.D. No. INS-51-09-00001-A

Filing No. 95

Filing Date: 2010-02-10

Effective Date: 2010-02-24

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

Action taken: Repeal of Part 135 (Regulation 67) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 307(a); Retirement and Social Security Law, sections 15, 315; Education Law, section 523; Administrative Code of the City of New York, sections 13-183, 13-266, 13-378, 13-562; and the Rules and Regulations of the Retirement Board of the Board of Education of the City of New York, section 25

Subject: Public Retirement Systems - Reporting of Supplementary Data related to the Reserve Liabilities.

Purpose: To eliminate requirements relating to a previous annual statement that no longer is in use.

Text or summary was published in the December 23, 2009 issue of the Register, I.D. No. INS-51-09-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Workplace Safety And Loss Prevention Incentive Program

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

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

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

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

Subject: Workplace Safety And Loss Prevention Incentive Program.

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

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

Section 151-3.1 Preamble.

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

(1) a safety incentive program that conforms to regulations promulgated by the Commissioner of Labor;

(2) a drug and alcohol prevention program that conforms to regulations issued by the Commissioner of Labor, in consultation with the office of alcoholism and substance abuse services; or

(3) a return to work program that conforms to regulations issued by the Commissioner of Labor.

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

(c) The superintendent will review the information submitted by insur-

ers pursuant to this Part to evaluate whether the credit amounts specified in this Part continue to be appropriate and reflective of actual loss and experience and expenses.

Section 151-3.2 Definitions.

In this Part:

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

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

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

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

Section 151-3.3 Employer safety incentive program credits.

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

- (a) four percent in the first full year in which the insured is entitled to a credit; and
- (b) two percent in each consecutive full year thereafter.

Section 151-3.4 Employer drug and alcohol prevention program credits.

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

Section 151-3.5 Employer return to work program credits.

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

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

Section 151-3.6 Deviation from premium credit amount.

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

Section 151-3.7 Credit for Employers with more than one WSLPIP.

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

Section 151-3.8 Amount of credit for a WSLPIP when not implemented for consecutive years.

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

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

Section 151-3.9 Provision of Initial Approval Certificate and Annual Credit Recertification.

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

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

Section 151-3.10 Reporting Requirements.

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

Revised rule compared with proposed rule: Substantial revisions were made in sections 151-3.3, 151-3.4 and 151-3.5.

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

Data, views or arguments may be submitted to: Michael Rasnick, New

York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-7474, email: mrasnick@ins.state.ny.us

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

Revised Regulatory Impact Statement

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

Sections 201 and 301 of the Insurance Law authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law, as well as effectuate any power given to him under the provisions of the Insurance Law to prescribe forms or otherwise make regulations.

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

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

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

3. Needs and benefits: Workers Compensation Law § 134(6)(c) requires the Superintendent to promulgate regulations establishing the premium credits for a safety incentive program, drug and alcohol prevention program, and a return to work program, and to include provision for recertification on an annual basis. This regulation is necessary to establish the premium credit amount, and to require insureds to recertify their eligibility under the programs.

As originally proposed, the regulation would have established for employers implementing a safety incentive program a 4% credit in the first year, a 2% credit in the second year, and a 1% credit in the third year. An employer was to receive a 1% credit for every year thereafter, as long as the employer continued to participate in the program. The fourth year was designated as a "renewal year," whereby the employer was required to renew the credit with the Department of Labor. In every renewal year, an employer was entitled to an additional 1% increase in the credit.

The Department received a number of public comments concerning the credit amounts established by the original regulation. To reduce the complexity of administering the credit amounts, the revised regulation provides fixed premium credit amounts for all three programs in consecutive years after the first full year. The regulation establishes for employers implementing a safety incentive program a 4% credit in the first year and a 2% credit in all consecutive subsequent years in which the employer is eligible to receive a credit.

If an employer ceases to maintain the safety incentive program after participating for one year, but returns to the program within four years, then the employer is entitled to a credit amount equal to the amount it would be entitled to had it never left the program. For example, if an employer maintains a safety incentive program for one year (and receives a 4% credit), but ceases to maintain the program for the following year, then the employer is entitled to a 2% credit (the second-year credit) if the employer returns to the program within four years of ceasing to maintain the program.

However, if the employer ceases to maintain the safety incentive program for more than four years, and subsequently reapplies for a credit,

the employer will be treated as a new entrant into the program. For example, if after the first year, an employer ceases to maintain the safety incentive program, but returns to the program after four or more years, then the employer would be entitled to a 4% credit.

The same example applies to both the drug and alcohol prevention program, and the return to work program, although the credit amounts differ for the drug and alcohol prevention program.

This credit scheme ensures that employers will not, after the first year, cease to maintain the program for a short period, and then re-enter the program with the intention of receiving the larger first-year credit for the safety incentive program and the return to work program.

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

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

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

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

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

As an additional incentive for employers to apply for these credits, the DOL proposed an application fee of \$100, which is discounted to \$50 for employers with annual policy premiums of \$10,000 or less. The discount particularly will help small businesses, as defined by the New York State Administrative Procedure Act (SAPA). The fee is waived if the employer chooses to use DOL staff for the consultation and evaluation. The renewal application fee is set at \$100, and small employers are charged a discounted fee of \$50 for renewals. These application fees are below the expected cost of administering this program. These fees are not imposed pursuant to this regulation but are established under Industrial Code Rule 60.

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

6. Paperwork: This regulation requires workers' compensation insurers to file reports with both the Superintendent of Insurance and the Commissioner of Labor, setting forth the number of employers insured in the previous year that received a credit, and the total credit amount the insurer

granted. In addition, the regulation mandates all workers' compensation insurers to require insureds to submit to the insurer documents for certification and re-certification.

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

8. Alternatives: The Department does not have any statistical data to determine the credit percentages. In order to implement the Workers' Compensation Law's mandate that the Superintendent establish a credit for a safety incentive plan, a drug and alcohol prevention program, and a return to work program, the credit amount in the regulation is intended to be both conservative yet meaningful enough to provide employers an incentive to implement the voluntary programs. When employers implement effective loss control programs--such as safety incentive plans, drug and alcohol prevention programs, or return to work programs--the programs may result in lower loss experience, and thereby lower workers' compensation insurance premiums for employers. If an employer implements all three programs together, then the employer will receive a combined premium credit of 10% in the first year--a significant reduction in workers' compensation premiums.

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

After publication of the original proposal in the State Register on May 20, 2009, the Department received comment letters from the New York Insurance Association, Inc., the American Insurance Association, the Business Counsel of New York State, Inc., and the Property Casualty Insurers Association of America. A full discussion of each of the comments submitted can be found in the "Assessment of the Public Comments for the Amendment of Subpart 151-3", which is being filed along with the revised proposal.

The vast majority of the comments pertained to the amount, calculation, and timing of the credit amounts. The Department recognized that the change in credit amounts between DOL renewal years and non-renewal years created added complexity to the administration of the credits by insurers and insureds. To reduce the complexity of administering the credit amounts, the regulation has been revised to provide fixed premium credit amounts for all three programs in consecutive years after the first full year.

One party commented that, given the inherent difficulty in determining precisely the extent to which a WSLPIP has actually reduced workers' compensation costs, the Superintendent, by regulation, should match the premium credits to the workers' compensation costs reductions. The Department is aware of the actuarial difficulties in determining precisely the size and duration of the premium credits in relation to the actual loss experience of individual employers and groups of employers. The regulation requires workers' compensation insurers to file reports with both the Superintendent, as well as the Commissioner of Labor. The Superintendent will use the data provided by these reports to examine the efficacy of the WSLPIPs, and the appropriateness of the premium credits in relation to loss experience.

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

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

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

Although changes were made to the proposed Second Amendment to 11 NYCRR 151 (Regulation 119), they do not necessitate changes to the Regulatory Flexibility Analysis for Small Business and Local Government, Rural Area Flexibility Analysis, or Job Impact Statement.

Assessment of Public Comment

The Department received comment letters from the New York Insurance Association, Inc., the American Insurance Association, the Business Counsel of New York State, Inc., and the Property Casualty Insurers Association of America.

COMMENT 1: The credit levels may be inadequate to give employers an incentive to participate in the loss prevention programs, and/or to offset the resource commitment required by the proposed program requirements.

RESPONSE: The Department does not have sufficient data to determine the credit levels. However, in order to implement the Workers' Compensa-

tion Law's mandate that the Superintendent establish a credit, the regulation provides for a credit amount that is both conservative yet meaningful enough to provide employers an incentive to implement the voluntary programs. When employers implement effective loss control programs--such as safety incentive plans, drug and alcohol prevention programs, or return to work programs--the programs may result in lower loss experience, and thereby lower workers' compensation insurance premiums for employers through their experience modification factor. This premium reduction, based upon better loss experience, is in addition to the credit provided for by this regulation. If an employer implements all three programs together, then the employer will receive a combined premium credit of 10% in the first year--a significant reduction in workers' compensation premiums.

In an effort to obtain data to refine further the credit amounts, the New York Workers' Compensation Rating Board will be collecting and analyzing data on the Workplace Safety and Loss Prevention Incentive Program ("WSLPIP"). The Superintendent also will review the information submitted by insurers pursuant to the regulation in order to evaluate the appropriateness of the credits and make any necessary modifications.

COMMENT 2: The Superintendent should amend the proposed regulation by lowering the credits, including the ten percent maximum credit in the first year for implementing all three programs, in the first year until it can validate the impact on insured losses. Insurers argued that if an employer's loss is not reduced concomitantly, then that employer will pay a significantly reduced premium. Insurers proposed lowering the maximum, first year credit for the workplace safety and return to work programs by one percent and re-evaluating the amount of all credits after three years.

RESPONSE: The Superintendent, based upon the strength of the loss prevention programs prescribed by the Department of Labor's regulation, believes that the loss prevention programs will lead to improved loss experience for those employers that implement the approved programs. The Superintendent further recognizes the need for premium credits of sufficient size to provide employers with an incentive to undertake the expenses associated with designing and implementing loss prevention programs. However, the Superintendent is required under the law to approve appropriate rates. A ten percent maximum credit for implementing all three programs in the first year is appropriate given the competing concerns and the lack of statistical data. Moreover, the proposed regulation requires the collection and evaluation of statistical data in order to study of the WSLPIP's impact on losses. The Superintendent will monitor the data to determine whether the Department should amend the regulation in future years to reflect the experience as it is developed.

COMMENT 3: Currently, the credit an employer receives in the first year it implements a safety incentive program exceeds the credits that the employer would receive in any subsequent year. Furthermore, the credits vary for each type of program that an employer implements, and vary in every year that the employer maintains the program. Administering credits that vary in amount depending on the program and the years that the employer maintains the program creates complications. The credit should be set at a fixed amount for all programs and all years other than the first year of each program.

RESPONSE: The Superintendent agrees in the minimization of administrative costs where possible. In addition, the Superintendent recognizes that the change in credit amounts between DOL renewal years and non-renewal years creates added complexity to the administration of the credits by insurers and insureds. To reduce the complexity of administering the credit amounts, the Superintendent has amended the regulation to provide fixed premium credit amounts for all three programs in consecutive years after the first full year.

COMMENT 4: Any reduction in credit amount should coincide with the calculation of employers' experience rating and the phase-in of loss experience related for policy years for which an employer has one or more approved WSLPIP programs in place.

RESPONSE: This comment is no longer relevant given the amendments made to the regulation. The credit amounts will remain fixed for all consecutive years following the first full year of a program's approval and implementation.

COMMENT 5: The Superintendent should provide for the coding of credits in a manner that permits insurers to identify accounts for reporting, in order to avoid expensive and time-consuming manual processes.

RESPONSE: The Superintendent will seek an amended unit statistical plan from the New York Compensation Insurance Rating Board that requires the unique coding of the three individual programs. The coding of the individual programs will help to avoid expensive and time-consuming manual processes by the insurers.

COMMENT 6: In order clarify when an insurer should apply and recertify credits, an insurer should receive confirmation that its receipt of the DOL's approval certificates from an employer (as opposed to any notification from the Insurance Department, Department of Labor or

Workers' Compensation Rating Board) is the sole trigger for the initiation and recertification of credits.

RESPONSE: The Department agrees with this comment; the DOL's WSLPIP regulation, see 12 NYCRR Part 60, and this regulation, when read together, provide that notification by an employer of its approved program(s) triggers the credit(s).

COMMENT 7: The regulation provides for a 2% premium credit in a program renewal year, however, since all three of the WSLPIPs only provide for a 1% premium credit in their third consecutive year, it is unclear why the year after the third year has a higher premium credit.

RESPONSE: This comment is no longer relevant given the amendments made to this regulation. The credit amounts will remain fixed for all consecutive years following the first full year of a program's approval and implementation.

COMMENT 8: Given the inherent difficulty in determining precisely the extent to which a WSLPIP has actually reduced workers' compensation costs, the Superintendent, by regulation, should match the premium credits to the workers' compensation costs reductions.

RESPONSE: The Department is aware of the actuarial difficulties in determining precisely the size and duration of the premium credits in relation to the actual loss experience of individual employers and groups of employers. The regulation requires workers' compensation insurers to file reports with both the Superintendent, as well as the Commissioner of Labor. The Superintendent will use the data provided by these reports to examine the efficacy of the WSLPIPs, and the appropriateness of the premium credits in relation to loss experience.

COMMENT 9: The Superintendent of Insurance and the Commissioner of Labor should evaluate the impact of the program after three years to assess the number of employers implementing each type of program, the number of participants and the impact on insured losses.

RESPONSE: The proposed regulation includes a provision that requires a study of the WSLPIP's impact on losses after a specified number of years.

COMMENT 10: The Superintendent should amend the regulation by mandating the lowest credit in the first year and the maximum credit in the third year so that the regulation provides a sliding scale of credits in order to encourage sustained participation. An increasing scale provides additional incentives for employers to sustain the program, and discourages employers from seeking the maximum first year credit and discontinuing the programs after the incentive is lowered.

RESPONSE: A larger credit amount in the first full year of a program, and smaller credits in successive years serves as an inducement to participate in the WSLPIP program, and helps cover the costs associated with designing, obtaining approval for, and implementing, one or more programs. Furthermore, employers will have an incentive to remain in the program without an increasing credit scale because their modification factor will incorporate the better loss experience.

COMMENT 11: From the proposed definition ("year in which an insured employer renews the credit. . ."), it is unclear whether the term "renewal year" means the year in which the employer applies for the renewal, or the year to which the renewal is the first applicable.

RESPONSE: This comment is no longer relevant given the amendments made to this regulation. The credit amounts will remain fixed for all consecutive years following the first full year of a program's approval and implementation.

Department of Labor

NOTICE OF ADOPTION

Public Employees Occupational Safety and Health Standards

I.D. No. LAB-50-09-00001-A

Filing No. 100

Filing Date: 2010-02-09

Effective Date: 2010-02-24

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

Action taken: Addition of section 800.3(dg) to Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a(4)(a)

Subject: Public Employees Occupational Safety and Health Standards.

Purpose: To incorporate by reference updates to OSHA standards into the State Public Employee Occupational Safety and Health Standards.

Text or summary was published in the December 16, 2009 issue of the Register, I.D. No. LAB-50-09-00001-P.

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

Text of rule and any required statements and analyses may be obtained from: Michael Paglialonga, Dept. of Labor, Building 12, State Office Campus, Rm. 509, Albany, NY 12240, (518) 457-1938, email: michael.paglialonga@labor.ny.gov

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Public Employees Occupational Safety and Health Standards

I.D. No. LAB-50-09-00015-A

Filing No. 97

Filing Date: 2010-02-09

Effective Date: 2010-02-24

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

Action taken: Addition of section 800.3(dr) to Title 12 NYCRR.

Statutory authority: Labor Law, section 27-a(4)(a)

Subject: Public Employees Occupational Safety and Health Standards.

Purpose: To incorporate by reference updates to OSHA standards into the State Public Employee Occupational Safety and Health Standards.

Text or summary was published in the December 16, 2009 issue of the Register, I.D. No. LAB-50-09-00015-P.

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

Text of rule and any required statements and analyses may be obtained from: Michael Paglialonga, Department of Labor, Building 12, State Office Campus, Room 509, Albany, NY 12240, (518) 457-1938, email: michael.paglialonga@labor.ny.gov

Assessment of Public Comment

The agency received no public comment.

Office of Mental Health

NOTICE OF ADOPTION

Medical Assistance Payments for Community Rehabilitation Services Within Residential Programs for Adults, Children & Adolescents

I.D. No. OMH-49-09-00004-A

Filing No. 74

Filing Date: 2010-02-04

Effective Date: 2010-02-24

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

Action taken: Amendment of Part 593 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 31.04; and Social Services Law, sections 364 and 364-a

Subject: Medical Assistance Payments for Community Rehabilitation Services within Residential Programs for Adults, Children & Adolescents.

Purpose: To clarify the intent of the regulation regarding service authorization and treatment planning and make technical corrections.

Text of final rule: 1. Subdivision (b) of Section 593.2 of Title 14 NYCRR is amended to read as follows:

(b) Sections 364 and 364-a of the Social Services Law give the Office of Mental Health responsibility for establishing and maintaining standards for medical care and services in facilities under its jurisdiction, in accordance with cooperative arrangements with the Department of [Social Services] *Health*.

2. Subdivision (a) of Section 593.3 of Title 14 NYCRR is amended to read as follows:

(a) This Part applies to any provider of service, licensed pursuant to [Part 586,] Part 594[,] or Part 595 of this Title, which proposes to operate a residential program for adults with mental illness and/or children or adolescents with serious emotional disturbance.

3. Subdivision (b) of Section 593.5 of Title 14 NYCRR is amended to read as follows:

(b) Reimbursement shall be made only for community rehabilitation services provided to individuals who have been authorized in writing [by a physician] *as set forth in section 593.6* to receive community rehabilitation services provided by a licensed residential program. Such individuals must have a severe and persistent mental illness or, for children and adolescents, serious emotional disturbance, as defined by the [commissioner] *Commissioner* in the Office of Mental Health's Annual Statewide Comprehensive Plan for Mental Health Services developed pursuant to Section 5.07 of the Mental Hygiene Law. Community rehabilitation services are delineated in section 593.4(b) and (c) of this Part.

4. Subdivisions (a), (b) and (d) of Section 593.6 of Title 14 NYCRR are amended to read as follows:

(a) In order to receive reimbursement for the provision of community rehabilitation services to an individual, the provider of service must ensure that the individual has been authorized in writing by a physician, prior to or upon admission, to receive services as provided by the program. The written authorization must be retained as a part of the individual's case record. [Individuals whom are residing in a program governed by this Part on April 1, 1992 and have been receiving such services in accordance with an approved service plan, must receive a physician's authorization by July 1, 1992, which shall be considered to be effective April 1, 1992.] The physician's authorization must:

(1) be based upon appropriate clinical information and assessment of the individual. The initial authorization must include a face-to-face assessment;

(2) delineate the maximum duration of the authorization to receive such services; and

(3) specify that the individual is in need of community rehabilitation services as defined in section 593.4(b) of this Part.

(b) *Service authorizations which are renewed must be signed by a physician, physician assistant, or nurse practitioner in psychiatry.* [Physician's] *Service authorizations must be renewed as follows:*

(1) every six months for individuals residing within congregate residences and residential programs for children and adolescents. The reauthorization for a child or adolescent must include a face-to-face contact with the physician, *physician assistant or nurse practitioner in psychiatry who signs and renews the service authorization;*

(2) every 12 months for individuals residing within an apartment program; and

(3) upon transfer to a different category of adult program (i.e., congregate to apartment or apartment to congregate). The authorization renewal must, in the case of a transfer from congregate to apartment, occur upon the expiration date of the current authorization or, in the case of a transfer from apartment to congregate, within six months of admission to the new program or the expiration of the current authorization, whichever comes first.

(d) Such plan shall be developed by the staff of the program, resident and any collateral identified for participation in planning, as appropriate. The service plan must be reviewed and signed by a qualified mental health staff person. The service plan [must be a mutually agreed upon] *development process should facilitate mutual agreement on a planned course of action which, at a minimum, identifies the following:*

(1) statement of service goals and objectives;

(2) identification of the community restorative services to be provided;

(3) proposed time periods; [and]

(4) efforts to coordinate services with other providers[.], *as appropriate; and*

(5) *approval of the resident, as documented by his or her signature (or the signature of the person who has legal authority to consent to health care on behalf of the resident) provided, however, that the lack of such signature shall not constitute noncompliance with this requirement if the reasons for non-participation and/or non-approval by the resident are documented in the progress note.*

5. Subdivision (g) of Section 593.6 of Title 14 NYCRR is repealed.

6. Subdivisions (a) and (b) of Section 593.7 are amended to read as follows:

(a) In order to receive reimbursement for the provision of community rehabilitation services, each individual must have a service plan which documents the delivery of appropriate community rehabilitation services which have been authorized by a physician, *or reauthorized pursuant to subdivision (b) of section 593.6 of this Part.*

(b) Reimbursement will be based upon monthly and half-monthly rates. Such rates shall be paid based upon a minimum number of face-to-face contacts between an eligible resident or a program and a staff person of an approved provider of community rehabilitation services, subject to the following provisions:

(1) A full monthly rate will be paid for services provided to an

eligible resident in residence for at least 21 days in a calendar month, who has received at least four contacts with a staff person of the program. For a family-based treatment program or a teaching family home program, a youth shall have received at least 11 contacts, at least three of which must be provided by authorized program staff other than the professional family or teaching parents. At least four different community rehabilitative services must have been provided.

(2) A half monthly rate will be paid for services provided to an eligible resident in residence for at least 11 days in a calendar month who has received at least two contacts with a staff person of the program. For a family-based treatment program or a teaching family home program, a youth shall have received at least six contacts, at least two of which must be provided by authorized program staff other than the professional family or teaching parents. At least two different community rehabilitation services must have been provided.

(3) Only one contact can be counted each day and each contact shall be at least 15 minutes in duration.

(4) For reimbursement purposes, a contact shall involve the performance of at least one of the services indicated in the resident's current service plan.

(5) A reimbursable contact may occur at or away from the program, except that a reimbursable contact may not occur at the site of a licensed mental health outpatient program as such programs are described in [Parts 585 and] Part 587 of this Title, nor when the otherwise eligible resident is an inpatient of any hospital for any reason or temporarily residing in any other licensed residential facility.

(6) Reimbursement for contacts provided under this program shall not be limited in any way by reimbursement for visits under any outpatient program licensed by the Office of Mental Health on the same day or reimbursement for visits provided by any comprehensive Medicaid case management program approved by the Office of Mental Health.

7. Subdivision (g) of Section 593.8 of Title 14 NYCRR is amended to read as follows:

(g) Notwithstanding the provisions of this section, if a provider of service seeks reimbursement in excess of the limits imposed in section 593.7 of this Part, the provider shall be presumed to have violated the provisions of this Part, whereupon the Office of Mental Health shall notify the Department of [Social Services] Health in order that the Department of [Social Services] Health may exercise its authority to recover such overpayment as may have occurred.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 593.6(d).

Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

Revised Job Impact Statement

A Revised Job Impact Statement is not submitted with this notice because the revisions do not impose additional requirements but merely serve to clarify existing language in subdivision (d) of Section 593.6. Further clarification is provided regarding the development of a resident's service plan and the facilitation of a mutual planned course of action. In addition, to avoid confusion, the agency has clearly stated that the resident's service plan must include approval of the resident, as documented by his or her signature (or the signature of the person who has legal authority to consent to health care on behalf of the resident). In the consensus rulemaking, the term "collateral" was used, and it was later determined that it would be beneficial to state more clearly what the agency meant by that term. Lastly, the revised text further elucidates the agency's requirements in the situation where a resident refuses to sign his/her service plan. There will be no adverse impact on jobs and employment opportunities as a result of this rulemaking or the non-substantive changes incorporated in the revised text.

Assessment of Public Comment

The agency received no public comment.

Office of Mental Retardation and Developmental Disabilities

EMERGENCY RULE MAKING

Amendment of Liability for Services Regulations

I.D. No. MRD-08-10-00005-E

Filing No. 94

Filing Date: 2010-02-08

Effective Date: 2010-02-08

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

Action taken: Amendment of Subpart 635-12 and section 671.7(h) of Title 14 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The reason justifying the emergency adoption of these amendments to Subpart 635-12 and section 671.7(h) is the preservation of the health, safety and general welfare of persons in New York State who are receiving, or wish to receive certain developmental disabilities services provided under the auspices of OMRDD. The emergency amendments delay implementation of the provisions of Subpart 635-12 for certain developmental disabilities services. If OMRDD did not temporarily suspend full implementation of Subpart 635-12, effective February 8, 2010, for the services specified in the emergency amendments, some individuals in need of these services might be unable to access these services or be otherwise adversely affected.

Subject: Amendment of Liability for Services Regulations.

Purpose: To delay implementation of provisions of Subpart 635-12 for certain services.

Text of emergency rule: Subdivision 635-12.1(e) is amended as follows:

(3) Services which an individual was receiving on a regular basis as of February 15, 2009, and receives from a different provider after February 15, 2009, where the individual's receipt of the Services from the different provider is the result of one provider assuming operation or control of the other provider's operations and programs, or is the result of a merger or consolidation of providers [; and].

[(4) HCBS Waiver Respite Services which converted after February 15, 2009 from respite services funded as a type of family support services if:

(i) the individual received the Respite Services funded as a type of family support services on a regular basis as of February 15, 2009; and

(ii) the HCBS Waiver Respite Services are delivered by the same provider.]

Subdivision 635-12.1(g) is amended as follows:

(g) "Services" means ICF/DD Services (Intermediate Care Facilities for Persons with Developmental Disabilities, see Part 681); the following HCBS Waiver Residential Habilitation Services: community (in a community residence), IRA, and family care; and HCBS Waiver Day Habilitation Services. [, Medicaid Service Coordination, Day Treatment Services, and the following HCBS Waiver Services: Residential Habilitation Services (community (in a community residence), IRA, family care, and at home), Day Habilitation Services, Prevocational Services, Supported Employment Services, and Respite Services. Blended and Comprehensive Services which are a combination of the Services listed above are also considered "Services."]

Paragraph 635-12.3(b)(1) is amended as follows:

(1) Prior to the individual receiving Services, the provider shall take [all] such steps to obtain personal and financial information as may be reasonably required to identify liable parties and to ascertain the individual's and any other liable parties' ability to pay for Services or the individual's ability to obtain and maintain Full Medicaid Coverage.

Subparagraph 635-12.3(d)(1)(ii) is amended as follows:

(ii) OMRDD approval for a reduction or waiver of fees is only available when the individual has taken all necessary steps to obtain and maintain Full Medicaid Coverage. [However, OMRDD may approve a reduction or waiver of fees for Medicaid Service Coordination (MSC) for up to 3 months if an individual does not have Full Medicaid Coverage and

MSC is necessary to assist the individual in obtaining Full Medicaid Coverage.]

Paragraph 635-12.4(b)(1) is amended as follows:

(1) Prior to March 15, 2009 the provider shall take [all] *such* steps to obtain personal and financial information concerning individuals without Full Medicaid Coverage as may be reasonably required to identify liable parties and to ascertain the individual's and any other liable parties' ability to pay for Services or the individual's ability to obtain and maintain Full Medicaid Coverage.

Subparagraph 635-12.4(d)(1)(ii) is amended as follows:

(ii) OMRDD approval for a reduction or waiver of fees is only available when the individual has taken all necessary steps to obtain and maintain Full Medicaid Coverage. [However, OMRDD may approve a reduction or waiver of fees for Medicaid Service Coordination (MSC) for up to 3 months if an individual does not have Full Medicaid Coverage and MSC is necessary to assist the individual in obtaining Full Medicaid Coverage.]

Paragraph 635-12.8(a)(5) is deleted as follows:

[(5) Medicaid Service Coordination (MSC). OMRDD may, subject to the availability of state funds, pay a provider for up to 3 months of MSC if:

(i) the individual does not have Full Medicaid Coverage and MSC is necessary to assist the individual in obtaining Full Medicaid Coverage;

(ii) the individual is not paying for MSC and no one else is paying for MSC; and

(iii) the provider is meeting its obligations under this Subpart.]

Subdivisions 635-12.9(e) and (f) are deleted as follows:

[(e) For At Home Residential Habilitation Services, the fee shall equal the Medicaid fee OMRDD established for the At Home Residential Habilitation Services for the dates the Services were provided.]

[(f) For Day Treatment Services, the fee shall equal the Medicaid fee OMRDD established for the day treatment facility for the dates the Services were provided.]

Note: Subdivisions (g) and (h) are renumbered as (e) and (f).

Subdivision 635-12.9(e) is amended as follows:

(e) For an ICF/DD, the fee shall equal the Medicaid rate OMRDD established for the ICF/DD for the dates the Services were provided, *excluding any day program services add-on for education and related services in accordance with Title 8 NYCRR.*

Subdivisions 635-12.9(i) through (m) are deleted as follows:

[(i) For Medicaid Service Coordination, the fee shall equal the payment level applicable to the individual's situation as stated in the Medicaid Service Coordination Vendor Contract between the provider and OMRDD in effect on the dates the Services were provided.]

[(j) For Prevocational Services, the fee shall equal the Medicaid price OMRDD established for the Prevocational Services on the dates the Services were provided.]

[(k) For Supported Employment Services, the fee shall equal the Medicaid fee OMRDD established for the Supported Employment Services for the dates the Services were provided.]

[(l) For Respite Services, the fee shall equal the Medicaid price OMRDD established for the Respite Services for the dates the Services were provided.]

[(m) For Blended or Comprehensive Services, the fee shall equal the price OMRDD established for the Blended or Comprehensive Services for the dates the Services were provided.]

Subdivision 671.7(h) is amended as follows:

(h) Reimbursement for persons ineligible for medical assistance.

(1) In order to receive other reimbursement for community residential habilitation services, the facility must meet the requirements of *Subpart 635-12 of this Title, and* section 671.1(d) of this Part, and ensure that all the requirements of section 671.6 of this part are satisfied.

(2) (Paragraph remains unchanged).

[(3) A person ineligible for medical assistance shall be charged for community residential habilitation services in accordance with a sliding fee scale.]

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 14, 2010.

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

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

Regulatory Impact Statement

1. Statutory authority:

a. The New York State Office of Mental Retardation and Developmental

Disabilities' (OMRDD) statutory responsibility for seeing that persons with mental retardation and developmental disabilities are provided with services, as stated in the New York State Mental Hygiene Law Section 13.07.

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

2. Legislative objectives: These emergency regulations further the legislative objectives embodied in Section 13.07 and 13.09(b) of the Mental Hygiene Law by amending newly promulgated Subpart 635-12 (Liability for Services) by the deletion of specific services. OMRDD determined that individuals in need of those services might have been unable to access the services or might have been otherwise adversely impacted if Subpart 635-12 had become effective without the amendments in this emergency regulation.

3. Needs and benefits: OMRDD filed a notice of adoption which added a new 14 NYCRR Subpart 635-12, Liability for Services, effective February 15, 2009. Subpart 635-12 established the obligations of providers and individuals receiving or requesting services related to liability for services. Generally, the regulations required that individuals obtain and maintain Medicaid which would pay for the services, and, if necessary, apply for enrollment in OMRDD's Home and Community Based Services (HCBS) Waiver, or that the individuals (or other liable parties) pay for the services themselves. The new requirements were applied to a list of specific service types included in the regulation.

Some of the service types included in the new Subpart 635-12 had previously been targeted by a similar OMRDD policy that has been in effect for some time. Compliance by these service types was not at issue.

However, the proposed regulations also included additional service types that had not been subject to the OMRDD policy. Providers of services not subject to the policy, as well as advocates, expressed concern that providers and individuals would not be able to comply with the regulatory requirements within the specified timeframes. The providers cited the workload involved (the number of individuals involved who do not currently have Medicaid and the extent of the efforts necessary for the provider to work with the individuals to obtain Medicaid) as making regulatory compliance difficult.

Beginning April 15, 2009, Subpart 635-12 specified that individuals receiving preexisting services who do not have Medicaid will generally be liable to pay the fee for services. However, providers and advocates were concerned that some Medicaid-eligible individuals would not be able to obtain Medicaid by this time and would therefore be personally liable for the fee. This might cause individuals to discontinue services which are important for their health, safety or welfare. In addition, concerns were raised about applying the regulations to individuals requesting those services, especially those transitioning from supported employment under VESID (Office of Vocational and Educational Supports for Individuals with Disabilities) to OMRDD supported employment and individuals requesting respite services. Application of the regulations to individuals requesting services might have been an impediment to the provision of services to those individuals with additional adverse consequences.

In response to the concerns raised, OMRDD adopted emergency regulations, effective February 15, 2009 to coincide with the effective date of the adoption of the new Subpart 635-12. The current emergency regulations, effective February 8, 2010, continue to exempt certain services from compliance with Subpart 635-12. It is not OMRDD's intention to permanently delete the specified services from the Subpart. OMRDD temporarily suspended the application of Subpart 635-12 to the services in order to give individuals and providers more time to pursue Medicaid and HCBS waiver enrollment and to evaluate the issues presented. OMRDD has proposed regulations to add the specified services effective March 15, 2010 (which will replace the emergency regulations). In response to concerns raised, the proposed regulations include a schedule of compliance activities for the specified services and a limited exception for supported employment services and respite services.

This emergency filing is necessary to continue the suspension until the proposed regulations can be finalized.

The emergency regulation also clarifies that the provider's duty to gather information concerning liable parties and the ability to pay and qualify for Medicaid is limited to what is reasonably necessary to gather this information, not everything that is possible to gather the information. OMRDD made this clarification in response to provider concerns.

This emergency adoption also includes a clarification that the add-on for educational services is to be excluded from the ICF/DD fee that can be charged to individuals and liable parties.

Finally, this emergency adoption includes a conforming amendment to section 671.7(h), making that section consistent with the requirements of Subpart 635-12 for OMRDD payments.

4. Costs:

a. Costs to the Agency and to the State and its local governments:

OMRDD will not incur any new costs as a result of these amendments. OMRDD had originally estimated that full implementation of the Subpart 635-12 regulations would result in a saving to the State of approximately \$17.5 million as services currently funded with 100 percent State monies become funded with 50 percent participation of federal funds and some individuals or liable parties pay the fees established. While the emergency adoption of these amendments may subtract from the full amount of these savings, a reliable estimate of the shortfall is very difficult to quantify. OMRDD is strongly encouraging providers to maintain and even step up efforts to help individuals obtain Medicaid and enroll in the HCBS waiver for the services during the interval that implementation has been delayed. Although Subpart 635-12 will not apply to these services because of these emergency amendments, the State will experience much of the same savings through the compliance of individuals and providers with this request.

There will be no additional costs to local governments as a result of these specific amendments because Chapter 58 of the Laws of 2005 places a cap on the local share of Medicaid costs.

b. Costs to private regulated parties: There are no initial capital investment costs nor initial non-capital expenses. There are no additional costs to individuals and providers associated with implementation and continued compliance with the amendments.

5. Local government mandates: There are no new requirements imposed by the rule on any county, city, town, village; or school, fire, or other special district.

6. Paperwork: There will be no paperwork required as a result of the emergency amendments. The emergency amendments will instead decrease paperwork, since providers will not have to give the required notices to individuals and liable parties for the specified services.

7. Duplication: The emergency amendments do not duplicate any existing State or Federal requirements that are applicable to the above cited services for persons with developmental disabilities.

8. Alternatives: OMRDD had considered delaying the application of Subpart 635-12 for only "preexisting services" (services delivered as of February 15, 2009) of the service types addressed. However, in response to concerns raised concerning "new" services started after February 15, particularly regarding the supported employment transition from VESID to OMRDD services and intermittent respite services, OMRDD decided to delay the application for these services as well as "preexisting services" in the same categories, in order to more fully evaluate the concerns raised with regard to these issues.

9. Federal standards: The proposed regulations do not exceed any applicable federal standards.

10. Compliance schedule: No specific compliance activities are necessary to implement the emergency regulations. On the contrary, the emergency regulations defer the compliance activities necessary to implement Subpart 635-12 for the specified services.

In order to inform providers about the change, OMRDD notified providers in the OMRDD system of its intention to delete the specified services on January 30, 2009, and also announced its intention during a provider association meeting in January. Similar emergency regulations were adopted effective February 15, 2009, May 14, 2009, Aug. 12, 2009, and Nov. 10, 2009. OMRDD received no formal, written, public or provider comment as a result of the emergency adoption of these amendments, and informal reaction was positive.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments: These proposed regulatory amendments will apply to agencies which provide developmental disabilities services under the auspices of OMRDD. While most services are provided by voluntary agencies which employ more than 100 people overall, many of the facilities and services operated by these agencies at discrete sites employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller agencies which employ fewer than 100 employees overall would themselves be classified as small businesses. As of December, 2010, OMRDD estimates that there are approximately 339 provider agencies that would be affected by the emergency amendments.

The amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that adoption of these emergency amendments is necessary for the health, safety and general welfare and that they will have a positive effect on the regulated parties, including small business providers of services, associated with the specific developmental disabilities services for which implementation of Subpart 635-12 is being delayed by these emergency amendments. The emergency amendments will have no effect on local governments.

OMRDD filed a notice of adoption which added a new 14 NYCRR Subpart 635-12, Liability for Services, effective February 15, 2009. Subpart 635-12 established the obligations of providers and individuals receiving or requesting services related to liability for services. Generally, the regulations required that individuals obtain and maintain Medicaid

which would pay for the services, and, if necessary, apply for enrollment in the HCBS Waiver, or that the individuals (or other liable parties) pay for the services themselves. The new requirements were applied to a list of specific service types included in the regulation.

Some of the service types included in the new Subpart 635-12 had previously been targeted by a similar OMRDD policy that has been in effect for some time. Compliance by these service types was not at issue.

However, the regulations also included additional service types that had not been subject to the OMRDD policy. Providers of services not previously subject to the policy, as well as advocates, expressed concern that providers and individuals would not be able to comply with the regulatory requirements within the specified timeframes. The providers cited the workload involved (the number of individuals involved who do not currently have Medicaid and the extent of the efforts necessary for the provider to work with the individuals to obtain Medicaid) as making regulatory compliance difficult.

Beginning April 15, 2009, Subpart 635-12 specified that individuals receiving preexisting services who do not have Medicaid will generally be liable to pay the fee for services. However, providers and advocates were concerned that some Medicaid-eligible individuals would not be able to obtain Medicaid by this time and would therefore be personally liable for the fee. This might cause individuals to discontinue services which are important for their health, safety or welfare. In addition, concerns were raised about applying the regulations to individuals requesting those services, especially those transitioning from supported employment under VESID (Office of Vocational and Educational Supports for Individuals with Disabilities) to OMRDD supported employment and individuals requesting respite services. Application of the regulations to individuals requesting services might have been an impediment to the provision of services to those individuals with additional adverse consequences.

This emergency adoption also includes a clarification that the add-on for educational services is to be excluded from the ICF/DD fee that can be charged to individuals and liable parties.

Finally, this emergency adoption includes a conforming amendment to section 671.7(h), making that section consistent with the requirements of Subpart 635-12 for OMRDD payments.

2. Compliance requirements: In response to the concerns raised, OMRDD promulgated emergency regulations, effective February 15, 2009 to coincide with the effective date of the adoption of the new Subpart 635-12. The emergency amendments suspended the compliance requirements of Subpart 635-12 for certain developmental disabilities services. The present emergency regulations continue this suspension. It is not OMRDD's intention to permanently delete the specified services from the Subpart. OMRDD temporarily suspended the application of Subpart 635-12 to the services in order to give individuals and providers more time to pursue Medicaid and HCBS waiver enrollment and to evaluate the issues presented. OMRDD has proposed regulations to add the specified services effective March 15, 2010 (which will replace the emergency regulations). In response to concerns raised, the proposed regulations include a schedule of compliance activities for the specified services and a limited exception for supported employment services and respite services.

This emergency filing is necessary to continue the suspension until the proposed regulations can be finalized.

3. Professional services: There are no additional professional services required as a result of these amendments and the amendments will not add to the professional service needs of local governments.

4. Compliance costs: There will be no compliance costs for regulated parties or local governments as a result of the emergency amendments.

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

6. Minimizing adverse economic impact: The amendments will not result in any adverse economic impacts for small businesses, local governments and other regulated parties.

7. Small business and local government participation: OMRDD conducted extensive outreach to providers related to the proposed regulations adding the new Subpart 635-12. OMRDD facilitated discussions of the proposed regulations in numerous meetings including the provider associations, the Benefit Development Workgroup which includes regulated parties, and a subcommittee of the Commissioner's Advisory Council. OMRDD also informed all providers of the proposed regulations. The emergency rule responds to concerns raised during these discussions and in written comments addressing the proposed rule making during the comment period for the proposed Subpart 635-12.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis for this rule making is not submitted because the amendments will not impose any adverse impact or significant reporting, record keeping or other compliance requirements on public or private entities in rural areas. As discussed in the Regulatory Impact

Statement, these emergency amendments temporarily delay implementation of the provisions of Subpart 635-12 for certain developmental disabilities services.

Job Impact Statement

A Job Impact Statement for this rule making is not being submitted because it is apparent from the nature and purposes of the amendments that they will not have a substantial impact on jobs and/or employment opportunities. The emergency amendments temporarily delay implementation of Subpart 635-12 for certain developmental disabilities services.

Public Service Commission

NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-29-02-00013-P	July 17, 2002
PSC-09-03-00009-P	March 5, 2003
PSC-36-06-00014-P	September 6, 2006
PSC-30-07-00007-P	July 25, 2007
PSC-05-08-00023-P	January 30, 2008
PSC-05-08-00024-P	January 30, 2008
PSC-14-08-00005-P	April 2, 2008
PSC-17-08-00028-P	April 23, 2008
PSC-19-08-00008-P	May 7, 2008
PSC-22-08-00003-P	May 28, 2008
PSC-28-08-00006-P	July 9, 2008
PSC-35-08-00014-P	August 27, 2008
PSC-36-08-00024-P	September 3, 2008
PSC-40-08-00008-P	October 1, 2008
PSC-43-08-00012-P	October 22, 2008
PSC-44-08-00013-P	October 29, 2008

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

Transfer of Real Property from National Grid to the Town of DeWitt

I.D. No. PSC-08-10-00006-P

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

Proposed Action: The Commission is considering whether to approve, reject or approve with modifications the petition of Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) for authorization to transfer certain real property to the Town of DeWitt, New York.

Statutory authority: Public Service Law, section 70

Subject: Transfer of real property from National Grid to the Town of DeWitt.

Purpose: Consideration of National Grid’s petition for authority to transfer certain real property to the Town of DeWitt.

Substance of proposed rule: On January 29, 2010, Niagara Mohawk Power Corporation, d/b/a National Grid (National Grid) submitted a petition requesting that the Public Service Commission (Commission) authorize National Grid to sell approximately 16.34 acres of real property to the Town of DeWitt, New York for \$52,000. The Town of DeWitt would designate this property as parkland in perpetuity as part of the Butternut Creek Recreation and Nature Area Project. The Commission may approve, reject or approve with modifications National Grid’s petition, and may also consider related matters.

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-0052SP1)

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

Whether to Grant, Deny, or Modify, in Whole or in Part, the Rehearing Petition Filed in Case 06-E-0847

I.D. No. PSC-08-10-00007-P

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

Proposed Action: The Public Service Commission is considering a petition by NorthBay Tenants Association to rehear, vacate, stay or modify the Commission’s order granting permission to submeter electricity at Oceangate, 2730 West 33rd Street, Brooklyn, NY.

Statutory authority: Public Service Law, sections 2, 51, 53 and 66

Subject: Whether to grant, deny, or modify, in whole or in part, the rehearing petition filed in Case 06-E-0847.

Purpose: Whether to grant, deny, or modify, in whole or in part, the rehearing petition filed in Case 06-E-0847.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, a petition filed by NorthBay Tenants Association to rehear, vacate, stay or modify the Commission’s order in Case 06-E-0847 granting permission to submeter electricity at Oceangate, 2730 West 33rd Street, Brooklyn, New York.

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.

(06-E-0847SP2)

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

Energy Cost Adjustment

I.D. No. PSC-08-10-00008-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 adopt, reject, or modify, in whole or in part, a proposal by Orange and Rockland Utilities, Inc. to make tariff revisions to its Schedule P.S.C. No. 2 — Electricity regarding the Energy Cost Adjustment.

Statutory authority: Public Service Law, section 65(1)

Subject: Energy Cost Adjustment.

Purpose: To revise its tariff provisions regarding the Energy Cost Adjustment.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by Orange and Rockland Utilities, Inc. (Orange and Rockland or the Company) to revise its tariff provisions regarding the Energy Cost Adjustment (ECA).

The Company is proposing to eliminate components of the Base ECA that are no longer necessary. In addition, the Company proposes to change the manner in which the Base ECA is assessed on Service Classification No. 25 Standby Customers from a percentage of delivery revenue basis to a per kW of contract demand basis. The Company is also proposing to change the effective date and notice period for future changes to the Base ECA. Annual changes to the Base ECA will be effective on March 1st and such changes will be filed with the Commission on no less than thirty days notice. The proposed filing has an effective date of May 1, 2010.

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-0054SP1)

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

Consolidated Edison of New York, Inc. Energy Efficiency Programs

I.D. No. PSC-08-10-00009-P

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

Proposed Action: The Commission is considering whether to grant or deny in whole or in part, a February 3, 2010 petition for rehearing filed by Consolidated Edison Company of New York, Inc., in Case 08-E-1127.

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

Subject: Consolidated Edison of New York, Inc. energy efficiency programs.

Purpose: To modify approved energy efficiency programs.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, a petition for rehearing submitted February 3, 2010 by Consolidated Edison Company of New York, Inc. (the utility), regarding an Order issued by the Commission on January 4, 2010 in Cases 08-E-1127 et al. In its petition, the utility requests: modifications to the implementation date, energy savings goal and budget for the Appliance Bounty Program; modifications to the implementation date, energy savings goal and budget for the Residential Direct Installation Program; or permission to withdraw either or both programs.

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.

(08-E-1127SP11)

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

Central Hudson Gas and Electric Corporation Energy Efficiency Program

I.D. No. PSC-08-10-00010-P

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

Proposed Action: The Commission is considering whether to grant or deny, in whole or in part a February 3, 2010 petition for rehearing filed by Central Hudson Gas and Electric Corporation in Case 08-E-1135.

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

Subject: Central Hudson Gas and Electric Corporation energy efficiency program.

Purpose: To modify an approved energy efficiency program.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, a petition for rehearing submitted February 3, 2010 by Central Hudson Gas and Electric Corporation (the utility) regarding an Order issued by the Commission on January 4, 2010 in Cases 08-E-1135 et al. In its petition, the utility requests permission to set the start date for the Residential Appliance Recycling Program to April 1, 2010, or alternatively to reduce the 2010 energy savings goal for the program.

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.

(08-E-1135SP2)

**Office of Real Property
Services**

NOTICE OF ADOPTION

Reimbursement of Training Expenses

I.D. No. RPS-39-09-00025-A

Filing No. 98

Filing Date: 2010-02-09

Effective Date: 2010-02-24

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

Action taken: Amendment of Part 188 of Title 9 NYCRR.

Statutory authority: Real Property Tax Law, sections 202(1)(l), 318(4) and 1530(3)(f)

Subject: Reimbursement of training expenses.

Purpose: Revise the continuing education requirements in regard to reimbursement.

Text or summary was published in the September 30, 2009 issue of the Register, I.D. No. RPS-39-09-00025-EP.

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

Text of rule and any required statements and analyses may be obtained from: Philip J. Hawver, Office of Real Property Services, 16 Sheridan Avenue, Albany, New York 12210-2714, (518) 474-8821, email: internet.legal@orps.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Urban Development Corporation

EMERGENCY RULE MAKING

Downstate Revitalization Fund Program

I.D. No. UDC-08-10-00004-E

Filing No. 93

Filing Date: 2010-02-08

Effective Date: 2010-02-08

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

Action taken: Addition of Part 4249 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 2008, ch. 57, Part QQ, section 16-r; L. 1968, ch. 174

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

Specific reasons underlying the finding of necessity: The specific reasons underlying the finding of necessity, above, are as follows: Effective provision of economic development assistance in accordance with the enabling legislation requires the creation of the Rule. Program assistance will address the dangers to public health, safety and welfare by providing financial, project development, or other assistance for the purposes of supporting investment in distressed communities in the downstate region, and in support of such projects that focus on: encouraging business, community and technology-based development and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

Subject: The Downstate Revitalization Fund Program.

Purpose: Provide the basis for administration of The Downstate Revitalization Fund including evaluation criteria and application process.

Text of emergency rule: Part 4249

DOWNSTATE REVITALIZATION FUND PROGRAM

Section 4249.1 General

These regulations set forth the types of available assistance, evaluation criteria, application and project process and related matters for the Downstate Revitalization Fund (the "Program"). The Program was created pursuant to § 16-r of the New York State Urban Development Corporation Act, as added by Chapter 57 of the Laws of 2008 (the "Act") for the purposes of supporting investment in distressed communities in the downstate region and in support of projects that focus on encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

Section 4249.2 Definitions

For purposes of these regulations, the terms below will have the following meanings:

(a) "Corporation" shall mean the New York State Urban Development Corporation doing business as Empire State Development Corporation.

(b) "Distressed communities" shall mean areas as determined by the Corporation meeting criteria indicative of economic distress, including land value, employment rate; rate of employment change; private investment; economic activity, percentages and numbers of low income persons; per capita income and per capita real property wealth; and such other indicators of distress as the Corporation shall determine.

(c) "Downstate" shall mean the geographical area defined by the Corporation. The defined geographical area will be disseminated to eligible parties by the Corporation.

Section 4249.3 Types of Assistance

The Program offers assistance in the form loans and/or grants to for-profit businesses, not-for-profit corporations, public benefit corporations, municipalities, and research and academic institutions, for activities including, but not limited to, the following:

(a) support for projects identified through collaborative efforts as part

of the overall growth strategy for the local economy, including, but not limited, to smart growth and energy efficiency initiative; intellectual capital capacity building;

(b) support for the attraction or expansion of a business including, but not limited to, those primarily engaged in activities identified as a strategic industry and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the general municipal law;

(c) support for land acquisition and/or the construction, acquisition or expansion of buildings, machinery and equipment associated with a project; and

(d) support for projects located in an investment zone as defined by paragraph (i) of subdivision (d) of section 957 of the General Municipal Law.

4249.4 Eligibility

(a) Eligible applicants shall include, but not be limited to, business improvement districts, local development corporations, economic development organizations, for profit businesses, not-for-profit corporations, public benefit corporations, municipalities, counties, research and academic institutions, incubators, technology parks, private firms, regional planning councils, tourist attractions and community facilities.

(b) The Corporation shall be eligible for assistance in the form of loans, grants, or monies contributing to projects for which the Corporation or a subsidiary act as developer.

(1) The Corporation may act as developer in the acquisition, renovation, construction, leasing or sale of development projects authorized pursuant to this Program in order to stimulate private sector investment within the affected community.

(2) In acting as a developer, the Corporation may borrow for purposes of this subdivision for approved projects in which the lender's recourse is solely to the assets of the project, an may make such arrangements and agreements with community-based organizations and local development corporations as may be required to carry out the purposes of this section.

(3) Prior to developing and such project, the Corporation shall secure a firm commitment from entities, independent of the Corporation, for the purchase or lease of such project. Such firm commitment shall be evidenced by a memorandum of understanding or other document describing the intent of the parties.

(4) Projects authorized under this subdivision whether developed by the Corporation or a private developer, must be located in distressed communities, for which there is demonstrated demand within the particular community.

(c) No full-time employee of the state or full-time employee of any agency, department, authority or public benefit corporation (or any subsidiary of a public benefit corporation) of the state shall be eligible to receive assistance under this initiative, nor shall any business, the majority ownership interest of which is beneficially controlled by any such employee, be eligible for assistance under this initiative.

Section 4249.5 Evaluation criteria

(a) The Corporation shall give priority in granting assistance to those projects:

(1) with significant private financing or matching funds through other public entities;

(2) likely to produce a high return on public investment;

(3) with existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties;

(4) deemed likely to increase the community's economic and social viability;

(5) with cost benefit analysis that demonstrates increased economic activity, sustainable job creation and investments;

(6) located in distressed communities;

(7) whose application is submitted by multiple entities, both public and private; or

(8) such other requirements as determined by the Corporation as are necessary to implement the provisions of the Program.

Section 4249.6 Application and Approval Process

(a) The Corporation may, at its discretion and within available appropriations, issue requests for proposals and may at other times accept direct applications for program assistance.

(b) Promptly after receipt of the application, the Corporation shall review the application for eligibility, completeness, and conformance with the applicable requirements of the Act and this Rule. Applications shall be processed in full compliance with the applicable provisions of the Act's 16-r.

(c) If the proposal satisfies the applicable requirements and initiative funding is available, the proposal may be presented to the Corporation's directors for adoption consideration in accordance with applicable law and regulations. The directors normally meet once a month. If the project is approved for funding and if it involves the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of any property, the Corporation will schedule a public hearing in accordance with the Act and will take such further action as may be required by the Act and applicable law and regulations. After approval by the Corporation and a public hearing the project may then be reviewed by the State Public Authorities Control Board ("PACB"), which also generally meets once a month, in accordance with PACB requirements and policies. Following directors' approval, and PACB approval, if required, documentation will be prepared by the Corporation. Notwithstanding the foregoing, no initiative project shall be funded if sufficient initiative monies are not received by the Corporation for such project.

Section 4249.7 Confidentiality

(1) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Corporation, which is submitted by such person or entity to the Corporation in connection with an application for assistance, shall be confidential and exempt from public disclosures.

Section 4249.8 Expenses

(a) An application fee of \$250 must be paid to the Corporation for projects that involve acquisition, construction, reconstruction, rehabilitation alteration or improvement of real property, the financing of machinery and equipment and working capital loans and loan guarantees before final review of an application can be completed. This fee will be refunded in the event the application is withdrawn or rejected.

(b) The Corporation will assess a commitment fee of up to two percent of the amount of any Program loan involving projects for acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property, the financing of machinery and equipment and working capital payable upon acceptance of commitment with up to 1 percent rebated at closing. No portion of the commitment fee will be repaid if the commitment lapses and the project does not close. The Corporation will assess a fee of up to 1 percent, payable at closing, of the amount of any Program grant involving the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property or the financing of machinery and equipment or any loan guarantee.

(c) The applicant will be obligated to pay for expenses incurred by the Corporation in connection with the project, including, but not limited to, expenses related to attorney, appraisals, surveys, title insurance, credit searches, filing fees, public hearing expenses and other requirements deemed appropriate by the Corporation.

Section 4249.9 Affirmative action and non-discrimination

Program applications shall be reviewed by the Corporation's affirmative action department, which shall, in consultation with the applicant and/or proposed recipient of the program assistance and any other relevant involved parties, develop appropriate goals, in compliance with applicable law (including section 2879 of the public authorities law, article fifteen-A of the executive law and section 6254(11) of the unconsolidated laws) and the Corporation's policy, for participation in the proposed project by minority group members and women. Compliance with laws and the Corporation's policy prohibiting discrimination in employment on the basis of age, race, creed, color, national origin, gender, sexual preference, disability or marital status shall be required.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires May 8, 2010.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@empire.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968, as amended (the "Act"), provides, in part, that the corporation shall, assisted by the commissioner of economic development and in consultation with the department of economic development, promulgate rules and regulations in accordance with the state administrative procedure act.

Section 12 of the Act provides that the corporation shall have the right to exercise and perform its powers and functions through one or more subsidiary corporations.

Section 16-r of the Act provides for the creation of the downstate

revitalization fund. The corporation is authorized, within available appropriations, to provide financial, project development, or other assistance from such fund to eligible entities as set forth in this subdivision for the purposes of supporting investment in distressed communities in the downstate region, and in support of such projects that focus on: encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

2. Legislative Objectives: Section 16-r of the Act sets forth the Legislative intent of the Downstate Revitalization Fund to provide financial assistance to eligible entities in New York with particular emphasis on: supporting investment in distressed communities in the downstate region, and in support of projects that focus on encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation, and small business growth.

It further states such activities include but are not limited to: support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including, but not limited to, smart growth and energy efficiency initiatives, intellectual capital capacity building; support for the attraction or expansion of a business including, but not limited to, those primarily engaged in activities identified as a strategic industry and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the general municipal law; support for land acquisition and/or the construction, acquisition or expansion of buildings, machinery, and equipment associated with a project; and support for projects located in an investment zone as defined by paragraph (i) of subdivision (d) of section 957 of the general municipal law.

The Legislative intent of Section 16-r of the Act is to assist business in downstate New York in a time of need and to promote the retention and creation of jobs and investment in the region.

The adoption of 21 NYCRR Part 4249 will further these goals by setting forth the types of available assistance, evaluation criteria, application and project process and related matters for the Downstate Revitalization Fund.

3. Needs and Benefits: Chapter 53 of the Laws of 2008, page 884, lines 5 thru 15 allocated \$35 million to support investment in projects that would promote the revitalization of distressed areas in the downstate region. As envisioned, the program would focus new investments on business, community and technology-based development. While the downstate region has experienced relatively strong growth in recent years, there still remain a significant number of areas that demonstrate high levels of economic distress. As measured by the poverty rate, the Bronx, at over 30%, ranks as the poorest urban county in the U.S. Brooklyn (Kings County) continues to rank among the top ten counties with the highest poverty rates in the country (22.6%). Overall, the poverty rate in New York City is just over 20%. The Community Service Society study, *Poverty in New York City, 2004: Recovery?*, concluded that if the number of New York City residents who live in poverty resided in their own municipality, they would constitute the 5th largest city in the U.S. Beyond the New York metro area in the Hudson Valley, the poverty rate exceeds 9%. Disproportionate levels of unemployment, population and job loss have left significant areas of the downstate region with shrinking revenue bases and opportunities for economic revitalization.

If it is assumed that at least half of the \$35 million allocation to the Fund is used for new capital investment, this would support approximately 160 construction-related jobs, generating an additional \$10 million in personal income in downstate distressed areas. The Corporation used the Implan® regional economic analysis system to model employment and personal income multipliers for construction spending to estimate the direct, indirect and induced jobs related to the Fund amounts assumed to be devoted to capital spending on infrastructure and construction-related activity.

New York State may collect approximately \$0.66 million in personal income tax and sales tax on income spending. To estimate the personal income tax revenues generated by this spending, the Corporation assumed the tax calculation for single or married filing separately on taxable income over \$20,000, using the standard deduction and 6.85% on income over \$20,000. Sales tax was estimated on taxable disposable income earned by wage earners. The Corporation assumed that 75% of gross income is disposable income and 40% of that is taxable.

This level of capital spending (assumed to be primarily on site development, infrastructure, building rehabilitation and new construction) will provide the basis for further investment in a broad range of economic activity.

4. Costs: The Fund as identified in Chapter 53 of the Laws of 2008, page 884, lines 17 thru 27 will be funded through the issuance of Personal Income Tax bonds. In addition to the interest costs, it is expected that fees and costs associated with issuing bonds, including the Corporation's fee, underwriting, banking and legal fees, will be approximately 1.6%.

The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development. Participation is voluntary and would be considered on a case-by-case basis depending on the location of the municipality involved.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule on regulated parties. Standard applications used for most other Corporation assistance will be employed keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients. The rule provides that the Corporation may, however, require applicants to submit materials prior to submission of a formal application to determine if a proposal meets eligible criteria for Fund assistance.

6. Local Government Mandates: The Fund imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district. To the contrary, the Fund offers local governments potentially enhanced resources, either directly or indirectly, to encourage economic and employment opportunities for their citizens. Participation in the program is optional; local governments who do not wish to be considered for funding do not need to apply.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: The Fund proposed regulations provide for a variety of potential program outcomes, by type of assistance, eligible applicants, and eligible uses.

These program criteria were informed through an extensive strategic planning process managed for Downstate ESDC by the management consultant A. T. Kearney. Their report, *Delivering on the Promise of New York State*, developed a strategy for the State to capitalize on its rich and diverse assets to encourage the growth of the Innovation Economy.

The following are three examples of alternatives that were provided during the outreach portion of the rulemaking process. All of the suggestions offered were from members of the small business community and local governments who responded to the Corporations request for input. All of the suggestions were included in the rules and regulations submitted with this Regulatory Impact Statement.

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4249.3, Part (a) provides for "support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives."

2. Regulations should clearly define "distressed communities" using specific, objective criteria.

Section 4249.2, Part (a) defines "Distressed Communities"

3. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4249.6 "Application and approval process" from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

1. Effects of Rule: "Small business" is defined by the State Economic Development law to be an enterprise with 100 or fewer employees. The vast majority - roughly 98 percent - of New York State businesses are small businesses.

We applied this criterion to ESD's models of the Downstate economy to determine how many small businesses could benefit from the Downstate Revitalization Fund. We limited the analysis to industries that are likely to have eligible businesses: manufacturing, transportation and warehousing, information, finance and insurance, professional and technical services, management of companies and enterprises, and arts, entertainment and recreation.

Across these 7 broad sectors our analysis indicates that approximately 115,000 small businesses will be eligible for funding under the Downstate Revitalization Fund.

In addition approximately 2,000 municipalities and local economic development-oriented organizations will be eligible for funding.

2. Compliance Requirements: There are no compliance requirements for small businesses and local governments in these regulations.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: To the extent that there are existing capabilities at the local level to administer projects involving Downstate Revitalization Fund investments, there should be relatively little, if any additional administration costs.

5. Economic and Technological Feasibility: Compliance with these regulations should be economically and technologically feasible for small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide financing for joint discretionary and competitive economic development projects for distressed communities. In addition the rule specifies that project evaluation criteria include significant support from the local business community, local government, community organizations, academic institutions, and other regional parties. Because this program is open to for-profit businesses confidentiality features are included in the application process.

7. Small Business and Local Government Participation: The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also notified.

ESDC received 10 responses to its outreach to interested parties on the proposed regulations. Much of the responses received consisted of general supporting statements for the programs or critique of the enabling legislation.

Listed are several comments received on the proposed rules related to the Downstate Revitalization Fund and our response to the comment.

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ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4249.6 "Application and approval process" from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

4. Regulations should allow for municipal comments when the applicant is not a municipality.

Section 4249.5, Part 3 gives preference to projects with the "existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties."

Rural Area Flexibility Analysis

1. Types and Estimated Numbers of Rural Areas: The ESD Downstate region is almost non-rural character. Of the 44 counties defined as rural by the Executive Law § 481(7), none are in the Downstate region. Of the 9 counties that have certain townships with population densities of 150 persons or less per square mile, only two counties - Dutchess and Orange - are in the Downstate region.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements; no affirmative acts will be needed to comply; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development.

4. Minimizing Adverse Impact: The purpose of the Downstate Revitalization Fund Program is to maximize the economic benefit of new capital investment in distressed areas of the downstate region. The statute stipulates that projects must be located in distressed communities for which there is a demonstrated demand. This suggests that cooperation among state, local, and private development entities will seek to maximize the Program's effectiveness and minimize any negative impacts.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those only in urban areas or only in rural areas, except for the requirement that applicants must be in downstate counties and be in distressed communities. The extent of local government support for a project is a significant criteria for project acceptance. A

public hearing may also be required under the NYS Urban Development Corporation Act. The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also asked for their review and comment.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of Downstate New York through strategic investments to support investments in distressed communities in downstate regions and to support projects that focus on encourage responsible development.

There will be no adverse impact on job opportunities in the state.