

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.

Avenue - Harriman State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us

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

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

Consensus Rule Making Determination

The Department of Correctional Services has determined that no person is likely to object to the proposed action because it merely removes two functions from a correctional facility that are no longer applicable to any person. See SAPA section 102(11)(a).

The proposed rule change amends 7 NYCRR § 100.83, to reflect that Queensboro Correctional Facility no longer serves as a work release or residential treatment facility. It continues to function as a general confinement facility and provides re-entry services for inmates. The Department's authority resides in section 70 of Correction Law, which mandates that each correctional facility must be designated in the rules and regulations of the Department and assigns the Commissioner the duty to classify each facility with respect to the type of security maintained and the function as specified. See Correction Law § 70(6).

Job Impact Statement

A job impact statement is not submitted because the proposed rule making will have no adverse impact on jobs or employment opportunities since it merely removes functions from the correctional facility that no longer apply.

Department of Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Queensboro Correctional Facility

I.D. No. COR-02-10-00010-P

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

Proposed Action: This is a consensus rule making to repeal section 100.83(c)(2) and (3) of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Queensboro Correctional Facility.

Purpose: To repeal paragraphs from the regulation that describe functions that no longer apply to the correctional facility.

Text of proposed rule: Section 100.83. Queensboro Correctional Facility.

a) There shall be in the department an institution to be known as Queensboro Correctional Facility, which shall be located at 47-04 Van Dam Street, Long Island City, County of Queens, New York, and which shall consist of the property under the jurisdiction of the department at that location.

(b) Queensboro Correctional Facility shall be a correctional facility for males 16 years of age or older.

(c) Queensboro Correctional Facility shall be classified as a minimum security correctional facility, to be used for the following functions:

- (1) general confinement facility.[:]
- [(2) work release facility; and]
- [(3) residential treatment facility.]

Text of proposed rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs)

I.D. No. HLT-02-10-00003-P

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

Proposed Action: Amendment of Subpart 6-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 225

Subject: Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs).

Purpose: Mandate required ocean surf beaches to be supervised by a surf lifeguard trained in AED operation and provide and maintain onsite AED.

Text of proposed rule: Subdivision (i) of Section 6-2.2 is added as follows:

(i) *Public Access Defibrillation (PAD) program shall mean a program that complies with Section 3000-b of the Public Health Law, including the availability of an automated external defibrillator, the identification of an emergency health care provider, the development of a collaborative agreement and successful staff completion of training in the operation of an automated external defibrillator.*

* * *

Paragraph (2) of Section 6-2.3(a) is amended as follows:

(2) those, excluding ocean beaches in Nassau County, Suffolk County, and New York City, that are owned and operated by a condominium (i.e., property subject to the Article 9-B of the Real Property Law, also known as the Condominium Act), a property commonly

known as a cooperative, in which the property is owned or leased by a corporation, the stockholders of which are entitled, solely by reason of their ownership of stock in the corporation, and occupy apartments for dwelling purposes, provided an "offering statement" or "prospectus" has been filed with the Department of Law, or an incorporated or unincorporated property association, all of whose members own residential property in a fixed or defined geographical area with deeded rights to use, with similarly situated owners, a defined bathing beach, provided such bathing beach is used exclusively by members of the condominium, cooperative apartment project or corporation or association and their family and friends.

* * *

Subparagraph (i) is added to Section 6-2.17(a)(4) as follows:

(i) At ocean surf beaches, at least one Supervision Level I aquatic supervisory staff possessing a current certificate of training in the operation and use of an automated external defibrillator approved by a nationally-recognized organization or the state emergency medical services council shall be present at all hours of beach operation. Records of the training shall be maintained available for review during inspections.

* * *

Clause (a) is added to Section 6-2.17(b)(1)(ii) as follows:

(a) At ocean surf beaches, at least one automated external defibrillator shall be provided by the operator and maintained on-site. The beach operator shall implement a PAD program as defined in Section 6-2.2(i) of this Subpart and maintain the following records on-site for inspection:

- *A copy of the collaborative agreement between an emergency health care provider and the ocean surf beach operator;*
- *A copy of the notification to the regional emergency medical services council of the existence, location, and type of automated external defibrillator; and*
- *The records of automated external defibrillator maintenance and testing specified by the manufacturer's standards.*

* * *

Subdivision (c) of Section 6-2.17 is amended as follows:

(c) Safety plan. Operators of bathing beaches must develop, update and implement a written beach safety plan, consisting of: procedures for daily bather supervision, injury prevention, reacting to emergencies, injuries and other incidents, providing first-aid and summoning help. *At ocean surf beaches, the safety plan shall be developed in consultation with an individual having adequate ocean surf lifeguarding experience.* The safety plan shall be approved by the permit-issuing official and kept on file at the beach. Approval will be granted when all the components of this section are addressed so as to protect the health and safety of the bathers, and the plan sets forth procedures to insure compliance with this Subpart.

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

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

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

Regulatory Impact Statement

Statutory Authority:

The Public Health Council is authorized by Section 225 (4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC) subject to the approval of the Commissioner of Health. PHL Section 225 (5) (a) provides that the SSC may deal with any matter affecting the security of life and health of the people of the State of New York. In 2008, two amendments (Chapter 500 of the Laws of 2008) were made to PHL Section 225. The first added new Section 225 (5-c), requiring any public or private surf beach or swimming facility be supervised by a surf lifeguard and provide and maintain on-site automated external defibrillator (AED) equipment. Further, at least one lifeguard who has been trained in the operation and use of an AED must be present during all periods of required supervision. The second amendment added

a new Section 225 (5-a) requiring surf lifeguards to supervise surf beaches used for swimming or bathing which are owned or operated by a homeowners association (HOA). HOA facilities, with the exception of those located in Nassau County, are currently exempt from Subpart 6-2 of the SSC. The PHL amendments became effective January 2, 2009 and the chapter law mandates the Department of Health amend the SSC to provide for implementation of the new requirements.

Legislative Objectives:

The legislative objective of Chapter 500 of the Laws of 2008 was to enhance the protection of public health and safety. The proposed amendments to the SSC, Subpart 6-2 Bathing Beaches will further this legislative objective and are required by statute.

Needs and Benefits:

Relating to AED Requirements:

The benefit of AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation improves emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and of a lifeguard trained in its use at a surf beach will decrease delays in AED administration, which was previously dependent on a response from a generally off-site emergency medical services provider.

Relating to the Safety Plan:

Ocean surf beach safety plans are now required to be developed in consultation with an individual with ocean surf beach lifeguarding experience. This requirement is to ensure staff who are knowledgeable in lifeguarding practices and emergency procedures have input in establishing the safety plan.

Related to Surf Lifeguard:

New PHL requirements specify that the SSC must be amended to require all ocean surf beaches operated by a HOA to have qualified surf lifeguards on duty, including HOAs in Suffolk County and New York City (NYC), which are currently exempt from Subpart 6-2. Although this PHL amendment only specifies that surf lifeguards be provided, the SSC is being changed to require all ocean surf beaches owned or operated by HOAs to comply with Subpart 6-2 in its entirety. Compliance with Subpart 6-2 of the SSC is essential to protect the public and protect lifeguards while performing their job duties. Subpart 6-2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk. A requirement for ocean surf beach safety plans to be developed in consultation with an individual with ocean surf beach lifeguarding experience is added to ensure staff who are knowledgeable in lifeguarding practices and emergency procedures have input in establishing the safety plan.

Costs:

Costs to Regulated Parties:

The proposed amendments affect approximately 95 surf beach operations: 60 municipal, 6 HOAs, 3 temporary residences, 25 beach clubs, and 1 community college, in NYC and Nassau and Suffolk Counties. Each of the 95 ocean surf beaches may incur costs associated with purchasing and maintaining AED equipment and establishing a Public Access Defibrillation (PAD) Program at the facility. Some may already have and maintain AEDs but the number, if any, is unknown. The cost of an AED device ranges from \$1,100 to \$3,000. There will be additional expenses related to maintenance and service of the AED. Periodic battery replacement is required (every 3 to 7 years, depending on the AED); replacement batteries average between \$50 and \$400. Some AED units have the option of using rechargeable batteries; costs range from \$415 to \$680 for batteries, including chargers. Replacement of pediatric or adult defibrillation pads is necessary after use, and unused pads must be replaced every 2-5 years depending on the unit. Pad replacement is estimated to be between \$30 and \$100 per set. Alternatively, AEDs can be leased for ap-

proximately \$70 to \$130 per month. Although the law only requires one AED per facility, some beaches may choose to provide more than one AED to facilitate a timely response.

In addition to the cost for purchasing an AED, surf beach operators must develop and implement a PAD program for their facility, which includes obtaining medical direction and program management. Costs for a PAD program, medical direction, and program management are estimated to be between \$500 and \$1500 a year. Municipalities that have physicians serving as health officers may have no additional expenses associated with medical direction. A single PAD program can be utilized for multiple beaches that have the same owner/operator, such as municipally operated beaches, the NYC Parks Department, and Nassau County Parks.

Training and certification in the use of the AED are incorporated in most cardiopulmonary resuscitation (CPR) certification programs and are not expected to add any additional expenses to beaches that are already supervised by lifeguards. CPR/AED training courses range from \$75 to \$110, but may be also included as part of lifeguard training courses. Lifeguards must renew their CPR/AED certification annually; re-certification courses range from \$40 to \$75.

Ocean surf beach safety plans are now required to be developed in consultation with an individual with ocean surf beach lifeguarding experience. This requirement is expected to have negligible impact on expenses because most ocean surf beaches already consult their lifeguards during the safety plan development. Additionally, all ocean surf beaches currently employ ocean surf lifeguards who can consult about the existing safety plan and recommend any necessary improvements and/or modifications. Lifeguard salaries range from \$11 to \$21 dollars per hour. It is anticipated that the consultation should take no more than a few hours. If the consultation is done using existing staff as part of their employment, no additional costs will be incurred.

There are two HOA ocean surf beaches in Suffolk County and one HOA ocean surf beach in NYC previously exempt that will now be regulated under Subpart 6-2. Although previously exempt from Subpart 6-2 of the SSC, the NYC HOA ocean surf beach has been regulated under Article 167 of the NYC Health Code and will have no additional expenses to comply with Subpart 6-2 of the SSC. Costs associated with Subpart 6-2 compliance for the two HOA surf beaches in Suffolk County are as follows:

Surf Lifeguard Training and Salary - Surf lifeguard training is estimated to cost between \$200 and \$500. Certifications are valid for up to three years from the date of issuance. CPR training courses range from \$75 to \$110; however, CPR training may be included in lifeguard training courses. Annual CPR re-certification is required, and is estimated to be between \$40 and \$75. Lifeguard salaries range from \$11 to \$21 dollars per hour. One of the HOA in Suffolk County is known to already supply lifeguards. One lifeguard must be provided for each 50 yards of beach open for swimming. At this time, the length of beach that is used for swimming is unknown; however, beach operators may restrict the area open for swimming to minimize expenses.

Initial Equipment Cost - The cost of equipment, including lifeguard chairs and rescue and first aid equipment, ranges from \$1,470 to \$3,970, for each required lifeguard. It is likely that beaches have some or all of the required equipment already.

Permit Fee - There is an annual permit fee of \$230 to operate a bathing beach in Suffolk County.

Drinking fountains and bathroom facilities - No additional expense is anticipated for these facilities since beach use is restricted to residents, and their living quarters are expected to fulfill these needs.

Costs to the Department of Health:

The cost for routine printing and distribution of the amended code will be the only cost to the State. There will be no cost to State Health Department District Offices as there are no ocean surf beaches within the jurisdiction of any District Office.

Costs to State and Local Government:

The proposed amendments affect approximately 95 beach operations in three local health department jurisdictions: 34 in Nassau County, 52 in Suffolk County, and 9 in NYC. The estimated burden to local health departments is minimal, as the inspection frequency would

not change for NYC and Nassau County, and the number of permitted ocean surf beaches in Suffolk County would increase by 2 to a total of 52 regulated ocean surf beaches. Local governments that operate surf beaches will have the same costs described in the section entitled "Costs to Regulated Parties."

Paperwork/Reporting:

The proposed amendments require the beach operator to have available on-site records of AED program management and use, and copies of certifications in AED training for lifeguards. In addition, operators will need to amend their facility safety plan to reflect the deployment and use of AEDs, and must develop a PAD program. Initiation of the PAD program includes development of a collaborative agreement that is submitted to the appropriate Regional Emergency Medical Services Council (REMSCO). The PAD program specifies requirements for notifying REMSCO of the existence, location, and type of AED; and reporting every AED use.

The two HOA surf beaches in Suffolk County will have additional paperwork and recordkeeping associated with Subpart 6-2 compliance. Annually, each beach operator must apply for and obtain a permit to operate from the Suffolk County Department of Health. Daily logs indicating the number of bathers using the beach, number of lifeguards on duty, weather conditions, water clarity, and reported rescues, injuries, or illnesses must be maintained. In addition, owners/operators are required to report certain injury or illness incidents to the permit-issuing official within 24 hours, and must maintain records of lifeguard certifications and a written safety plan.

Local Government Mandates:

The proposed revisions impose a new responsibility of establishing a PAD program upon 19 municipalities that operate surf beaches. Local health department staff are responsible for enforcing the amendments to the bathing beach regulations as part of their existing program responsibilities.

Duplication:

This regulation does not duplicate any existing federal, state or local regulation.

Alternatives:

Because the PHL amendment required that surf lifeguards be provided at all ocean surf beaches, but did not mandate compliance with Subpart 6-2 of the SSC in its entirety, one alternative considered was to limit the SSC modifications to only mandating that surf lifeguards be provided. This option was rejected to ensure that lifeguards are provided with the necessary safety equipment and safety plans to protect the public and themselves and to maintain consistency with requirements for operation for other surf beaches.

Federal Standards:

At this time, there are no Federal standards pertaining to AEDs or public safety (lifeguards, safety equipment, etc.) at surf beaches.

Compliance Schedule:

These regulations will be effective upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

There are 95 ocean surf bathing beaches in New York City (NYC) and Nassau and Suffolk Counties, all of which will be affected by the proposed rule that will require ocean surf beaches to provide and maintain automated external defibrillator (AED) equipment and a lifeguard trained in its use. Thirty-five (35) of these ocean surf beaches are considered small businesses, and include 25 beach clubs, 3 temporary residences (e.g., hotels and motels), 1 community college, and 6 homeowners associations (HOA). The remaining 60 ocean surf bathing beaches are owned and operated by municipalities.

Ninety-two (92) of the 95 ocean surf beaches are regulated under Subpart 6-2 Bathing Beaches of the State Sanitary Code (SSC), and 1 beach is regulated under Article 167 of the NYC Health Code. The proposed amendment that will require all HOA owned and operated ocean surf beaches to be permitted and regulated under Subpart 6-2 will affect the 2 HOA beaches (small businesses) in Suffolk County that are currently exempt from Subpart 6-2 regulations.

Compliance Requirements:

The proposed amendments require the beach operator to have available on-site records of AED program management and use, and copies of certifications in AED training for lifeguards. In addition, operators will need to amend their facility safety plan to reflect the deployment and use of AEDs, and must develop a PAD program.

The two HOA surf beaches in Suffolk County will have additional paperwork and recordkeeping associated with Subpart 6-2 compliance. Beach operators need to obtain a permit to operate from the Suffolk County Department of Health and report certain injury or illness incidents to the permit-issuing official within 24 hours. Additionally, daily operation reports, records of lifeguard certifications, and a written safety plan must be maintained.

Other Affirmative Acts:

Chapter 500 of the Laws of 2008 was signed on September 4, 2008. This law requires amendments to the SSC to mandate beach operators implement a Public Access Defibrillation (PAD) program in compliance with Section 3000-b of the PHL, including the presence of AED equipment and a surf lifeguard trained in AED use. Additionally, the law requires SSC amendments mandating all HOA ocean surf beaches to be supervised by qualified surf lifeguards. The benefits of these changes are specified below.

Related to AED Requirements:

The benefit of AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation improves emergency response for sudden cardiac arrest. Sudden cardiac arrest is one of the leading causes of death in the United States and the administration of a defibrillator within the first few minutes has been shown to be highly successful in preventing death. The presence of an AED and of a lifeguard trained in its use at a surf beach will decrease delays in AED administration, which was previously dependent on a response from a generally off-site emergency medical services provider.

Relating to the Safety Plan:

Ocean surf beach safety plans are now required to be developed in consultation with an individual with ocean surf beach lifeguarding experience. This requirement is to ensure staff who are knowledgeable in lifeguarding practices and emergency procedures have input in establishing the safety plan.

Related to Surf Lifeguard:

New PHL requirements specify that the SSC must be amended to require all ocean surf beaches operated by a HOA to have qualified surf lifeguards on duty, including HOAs in Suffolk County and New York City (NYC), which are currently exempt from Subpart 6-2. Although this PHL amendment only specifies that surf lifeguards be provided, the SSC is being changed to require all ocean surf beaches owned or operated by HOAs to comply with Subpart 6-2 in its entirety. Compliance with Subpart 6-2 of the SSC is essential to protect the public, protect lifeguards while performing their job duties, and to ensure consistency with requirements for operation for other surf beaches. Subpart 6-2 of the SSC requires rescue and first aid equipment, elevated lifeguard stands, and safety plans, and specifies the number and positioning of lifeguards, which ensure lifeguards are able to protect swimmers and not place their own safety at risk.

Professional Services:

Facilities initiating PAD programs must identify a New York State licensed physician or New York State-based hospital knowledgeable and experienced in emergency cardiac care to serve as the Emergency Health Care Provider (EHCP). The EHCP participates in the collaborative agreement developed by the facility and EHCP.

Compliance Costs:

The proposed amendments affect approximately 95 surf beach operations: 60 municipal, 6 HOA, 3 temporary residences, 25 beach clubs, and 1 community college, in NYC and Nassau and Suffolk Counties. Each of the 95 ocean surf beaches may incur costs associated with purchasing and maintaining AED equipment and establishing a Public Access Defibrillation (PAD) Program at the facility. The cost of an AED device ranges from \$1,100 to \$3,000. There will be additional expenses related to maintenance and service of the AED.

Periodic battery replacement is required (every 3 to 7 years, depending on the AED); replacement batteries average between \$50 and \$680, including charger. Replacement of pediatric or adult defibrillation pads is necessary after use, and unused pads must be replaced every 2-5 years depending on the unit. Pad replacement is estimated to be between \$30 and \$100 per set. Alternatively, AEDs can be leased for approximately \$70 to \$130 per month. Although the law only requires one AED per facility, some beaches may choose to provide more than one AED to facilitate a timely response.

In addition to the cost for purchasing an AED, surf beach operators must develop and implement a PAD program for their facility, which includes obtaining medical direction and program management. Costs for a PAD program, medical direction, and program management are estimated to be between \$500 and \$1500 a year. Municipalities that have physicians serving as health officers may have no additional expenses associated with medical direction. A single PAD program can be utilized for multiple beaches that have the same owner/operator, such as municipally operated beaches, the NYC Parks Department, and Nassau County Parks.

Training and certification in the use of the AED are incorporated in most cardiopulmonary resuscitation (CPR) certification programs and are not expected to add any additional expenses to beaches that are already supervised by lifeguards. CPR/AED training/recertification courses range from \$40 to \$110, but may be also included in lifeguard training courses.

Ocean surf beach safety plans are now required to be developed in consultation with an individual with ocean surf beach lifeguarding experience. This requirement is expected to have negligible impact on expenses because most ocean surf beaches already consult their lifeguards during the safety plan development. If the consultation is done using existing staff as part of their employment, no additional costs will be incurred. If additional consultation is needed, lifeguard salaries range from \$11 to \$21 dollars per hour, and it is anticipated that the consultation should take no more than a few hours.

There are two HOA ocean surf beaches in Suffolk County and one HOA ocean surf beach in NYC previously exempt that will now be regulated under Subpart 6-2. Although previously exempt from Subpart 6-2 of the SSC, the NYC HOA ocean surf beach has been regulated under Article 167 of the NYC Health Code and will have no additional expenses to comply with Subpart 6-2 of the SSC. Costs associated with Subpart 6-2 compliance for the two HOA surf beaches in Suffolk County will not be significant, as both HOAs have indicated that they already employ surf lifeguards and have AED equipment. One of the HOAs will need a new rescue board and rescue can, estimated at \$250 to \$900 and \$35 to \$95, respectively. There is an annual permit fee of \$230.

Economic and Technological Feasibility:

The proposal is technologically feasible because it requires use of existing technology for AED equipment.

The proposal is believed to be economically feasible because it reflects only actual costs related to purchase and maintenance of the AED and related to surf lifeguard requirements necessary for compliance with the PHL. The cost difference between providing surf lifeguards at HOA surf beaches as required by the new PHL amendments and costs of requiring all HOA surf beaches to conform to all Subpart 6-2 is justified in order to protect the public and protect lifeguards while performing their job duties. Additionally, HOA beaches in Nassau County are already required by law to comply with SSC requirements.

Minimizing Adverse Economic Impact:

The proposed amendments are largely dictated by PHL; therefore, the aforementioned costs associated with purchase of AED equipment, training, and PAD program development are necessary to follow this mandate. Training costs may be reduced by having lifeguards take a combined CPR/AED training course for their annual CPR recertification. Municipalities or parks departments that have multiple beach facilities or use AEDs in other settings may be able to receive discounts by purchasing AED units and equipment in bulk and may establish a single EHCP/PAD program.

Granting of variances to surf beaches which allows time for compli-

ance may be considered as an option when related to equipment purchase, etc. Because the PHL amendment requires that surf lifeguards be provided at all ocean surf beaches, but did not mandate compliance with Subpart 6-2 of the SSC in its entirety, one alternative considered was to limit the SSC modifications to only mandating that surf lifeguards be provided. This option was rejected to ensure that lifeguards are provided with the necessary safety equipment and safety plans to protect the public and themselves and to maintain consistency with requirements for operation for other surf beaches.

Small Business and Local Government Participation:

All three LHDs with ocean surf beaches in their jurisdiction have conducted outreach to the affected parties to inform them of the PHL change and future changes to the SSC. Department staff contacted the two HOAs in Suffolk County that were previously not regulated to assess the impact of the rule change. The HOAs reported that expenses associated with complying with Subpart 6-2 of the SSC will have a minimal impact in that, when open, both beaches are already supervised by qualified ocean surf lifeguards and they already provide elevated lifeguard stands, first aid and CPR equipment, and spine boards. One beach reported needing a new rescue board and torpedo buoy (rescue can), while the other stated that they already possess the rescue equipment. Additionally, both HOAs reported having AED equipment, which is positioned or can be summoned to the beach within minutes of an emergency, and that all lifeguards are trained in AED use.

Input was sought from all 19 municipalities impacted by the amendments and resulted in 15 responses. Ten municipalities reported having an AED prior to the 2009 season while 2 obtained AED equipment during the 2009 season. The AED status was not obtained for three municipalities that responded. Thirteen municipalities indicated that it was already standard practice for the safety plan to be prepared in consultation with an individual having surf lifeguard experience and the practice was implemented prior to the 2009 season. Two reported that although the safety plan consultation had not been done, they were not opposed to a new requirement for the consultation and the consultation would be done using existing staff with no or negligible cost to the municipality.

Some outreach has been conducted with lifeguarding staff at municipal facilities. The Suffolk County Department of Health and NYC Department of Health and Mental Hygiene officials were contacted and support the proposed revisions to enforce Subpart 6-2 of the SSC in its entirety at HOAs.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb of the State Administrative Procedure Act. The 95 ocean surf bathing beaches in New York State are located in Nassau and Suffolk Counties and New York City. These jurisdictions are not considered rural areas, as they do not meet the criteria for a rural area under Executive Law Section 481(7), which defines a rural area as either counties within the state having less than 200,000 population, or counties with 200,000 or greater population that contain towns with population densities of 150 persons or less per square mile.

Job Impact Statement

No Job Impact Statement is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will have no substantial adverse impact on jobs and employment opportunities. The amendment may increase employment opportunities, as it now requires all ocean surf beaches owned or operated by a homeowners association in Suffolk County to provide surf lifeguards in accordance with Subpart 6-2 of the State Sanitary Code.

Insurance Department

EMERGENCY RULE MAKING

Valuation of Life Insurance Reserves

I.D. No. INS-02-10-00004-E

Filing No. 1449

Filing Date: 2009-12-29

Effective Date: 2009-12-29

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

Action taken: Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

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

Specific reasons underlying the finding of necessity: This amendment to Regulation No. 147 removes restrictions on the mortality adjustment factors (known as X factors) in the deficiency reserve calculation. The current restrictions on the X factors prevent some insurers from using mortality rates with a slope similar to their expected mortality. The purpose of the X factor in the deficiency reserve calculation is to allow insurers to adjust the valuation mortality assumptions so that the mortality rates better reflect experience mortality rates; removal of current restrictions will allow this to occur. In many cases, this will reduce the amount of deficiency reserves held by an insurer. However, in order to safeguard against inappropriate reserve levels, every insurer using an X factor that is less than 100 percent at any duration for any policy is required by Section 98.4(b)(5) of the Regulation to submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report that complies with the requirements of the Actuarial Standards of Practice.

This amendment also provides clarification in the calculation of the segment length, and addresses whether recalculation is required when valuation mortality changes. Specifically, for companies that are using the 2001 CSO Preferred Structure Mortality Table, there may be instances where the valuation mortality must be changed to meet the requirements of 11 NYCRR 100 (Regulation 179) with respect to the present value of death benefits over certain future periods. In such instances, the segment length would not need to be recalculated for policies issued prior to January 1, 2009.

These standards have already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted these changes for year-end 2009. Since New York has a separate regulation addressing this subject matter, the revised standards are not automatically adopted and need to be adopted via an amendment to Regulation No. 147. Insurers domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes. Adopting these standards will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

Adoption of the proposed amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage

if these amendments are not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the December 31, 2009 annual statement is March 1, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this third amendment to Regulation No. 147 is necessary for the general welfare.

Subject: Valuation of Life Insurance Reserves.

Purpose: Incorporates revisions to National Association of Insurance Commissioners model regulation and actuarial guideline.

Text of emergency rule: Subparagraphs (ii) and (iii) of Section 98.4(b)(5) of this Part are repealed and subparagraphs (iv) through (ix) are renumbered (ii) through (vii).

Section 98.4(b)(5)(v) of this Part is amended to read as follows:

(v) The appointed actuary may decrease X at any valuation date as long as X [does not decrease in any successive policy years and as long as it] continues to meet all the requirements of this paragraph;

New subdivisions (c) and (d) are added to section 98.5 to read as follows:

(c) *For policies subject to a non-elective change in valuation mortality rates because the requirements for continued use of the prior rates were no longer satisfied, the insurer may, but shall not be required to, recalculate the segments.*

(d) *For policies subject to an insurer-election to substitute the 2001 Preferred Class Structure Mortality Table for the 2001 CSO Mortality Table:*

(1) *If the policy was issued on a policy form filed for approval prior to January 1, 2009, the insurer may, but shall not be required to, recalculate the segments; and*

(2) *If the policy was issued on a policy form filed for approval after January 1, 2009, the insurer shall recalculate the segments using the new valuation mortality rates.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the Third Amendment to Regulation No. 147 (11 NYCRR 98) derives from Sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies.

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

Section 1304 of the Insurance Law requires every insurer authorized under this chapter to transact the kinds of insurance specified in paragraph one, two or three of subsection (a) of section one thousand one hundred thirteen of this chapter to maintain reserves necessary on account of such insurer's policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities ("reserves") for all outstanding policies and contracts of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves. Reserving has not historically included lapse as a factor in calculations, because it was not relevant to traditional forms of life insurance contracts, and therefore Section 4217 does not expressly include references to lapses. However, new products have been developed that were not contemplated at the time Section 4217 was written, such that lapses may be relevant in reserve calculations in some cases.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of Section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for Section 4217 to such policies and contracts as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on estimates of future experience, or in the case of any plan of life insurance or annuity that is of such a nature that the minimum reserves cannot be determined by the methods described in Section 4217(c)(6) and Section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and must be computed by a method that is consistent with the principles of Sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract. Section 4240(d)(7) states that the Superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits, or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principle focus of the Insurance Law. One fundamental way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. At the same time, an insurer and its policyholders benefit when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment to Regulation No. 147 is necessary to help ensure the solvency of life insurers doing business in New York. The original version of Regulation No. 147, which incorporated the National Association of Insurance Commissioners

(NAIC) Valuation of Life Insurance Policies model regulation (adopted in 1999), was permanently adopted in 2003. In 2004, the Department and other states became aware that some insurers were creating new products in order to avoid the reserve methodologies described in Regulation No. 147. As a result, the NAIC began developing an Actuarial Guideline in 2004 that addressed the concerns of the Department and other regulators by eliminating any perceived ambiguity in the standards for policies issued July 1, 2005 and later. This revision was adopted by the NAIC in October 2005, and Regulation No. 147 thereafter was amended on an emergency basis to reflect the principles of Section 4217 of the Insurance Law and the NAIC standards for policies issued July 1, 2005 and later. The amendment was permanently adopted effective January 10, 2007.

In September 2006, the NAIC adopted a new version of Actuarial Guideline 38, which included provisions on lapse decrements and a separate asset adequacy analysis requirement for certain universal life with secondary guarantee policies. Regulation 147 was thereafter amended again, and the amendments were adopted on December 26, 2007.

In September 2009, the NAIC adopted revisions to its model regulation related to X factors used for calculating deficiency reserves. The purpose of the X factor in the deficiency reserve calculation is to allow companies to adjust the valuation mortality to mortality that approximates expected company mortality. Specifically, the NAIC's revisions provide that (1) X could not be less than 20%; and (2) X could not decrease in successive policy years. Additionally, the NAIC adopted a new Actuarial Guideline 46, which provides guidance on the interpretation of the calculation of segment length when there is a change in the valuation mortality rates subsequent to issuance of the policy. For policies issued prior to January 1, 2009, the segment length would not need to be recalculated.

The current restrictions on the X factors in Regulation No. 147 prevent some companies from obtaining mortality with a slope similar to their expected mortality. The removal of these restrictions will enable companies to adjust the valuation mortality to mortality that approximates expected company mortality. However, in order to safeguard against inappropriate reserve levels, every insurer using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves.

This amendment to Regulation No. 147 incorporates both the NAIC revisions to the model regulation and the interpretation of the Actuarial Guideline, thus resulting in consistency between the NAIC and New York and promoting regulatory uniformity across the U.S. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the proposed amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if these amendments are not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve

standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The amendment to the regulation imposes no new reporting requirements.

7. Duplication: The regulation does not duplicate any existing law or regulation.

8. Alternatives: The only alternative considered by the Department was to not remove the provisions for the X factors and to not include the guidance included in Actuarial Guideline 46 that were adopted by the NAIC in September 2009. The X factor provisions consisted of removing the requirement that X could not be less than 20% and that X could not decrease in successive policy years. The Actuarial Guideline 46 guidance relates to policies issued prior to January 1, 2009, and does not require the contract segments to be recalculated when the valuation mortality rates change after issuance of the policy.

These items are part of a larger capital and surplus relief plan for insurers. Adopting these standards will allow New York insurers to be subject to the same standards that have already been adopted by the NAIC and which are being implemented in other states. Insurers authorized in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies authorized in states that have adopted these changes and in those circumstances, New York-authorized companies would be at a deficit, from the impression that there is a significant difference in financial stability of New York-authorized insurers and those authorized outside the state.

9. Federal standards: There are no federal standards in this subject area.

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2009. This amendment removes two provisions from the X factors used in calculating deficiency reserves. However, these changes are voluntary, and insurers are not required to make either of these changes. Additionally, these changes would only affect those insurers that use

X factors in calculating deficiency reserves. Since the removal of these provisions were already adopted by the NAIC, insurers that wish to incorporate these changes into their reserve methodology should have adequate time to make these changes.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this amendment 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 finding is that this rule is directed at all insurers and fraternal benefit societies 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. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

2. Local governments:

The amendment 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 number of rural areas: Insurers and fraternal benefit societies covered by the amendment do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: There are no reporting, recordkeeping or other compliance requirements associated with this amendment to the regulation. Entities subject to the regulation will not need to engage professional services to comply with the amendment.

3. Costs: This amendment provides for lower minimum standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: The Department has had numerous discussions with affected insurers and their trade associations, including the Life Insurance Council of New York and American Council of Life Insurers, during the course of the development of a national standard through the National Association of Insurance Commissioners.

Job Impact Statement

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment sets standards for setting life insurance reserves for insurers and fraternal benefit societies. Compliance should not require the employment of additional personnel or outside contractors.

EMERGENCY RULE MAKING

Audited Financial Statements

I.D. No. INS-02-10-00006-E

Filing No. 1450

Filing Date: 2009-12-29

Effective Date: 2009-12-29

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

Action taken: Repeal of Part 89 and addition of new Part 89 (Regulation 118) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 307(b), 1109, 4710(a)(2) and 5904(b)

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

Specific reasons underlying the finding of necessity: In September 2009, the New York State Insurance Department, after several years of working closely with the National Association of Insurance Commissioners ("NAIC"), received its accreditation under the NAIC's Financial Regulations Standards and Accreditation Program ("accreditation program"). This accreditation program is the cornerstone of uniform solvency regulation across the country. By obtaining accreditation, New York was recognized as having demonstrated its continued commitment to the NAIC and state-based regulation of insurers and other regulated entities. The regulatory regime acknowledged through the accreditation program provides substantial protection for the policyholders and for state and local governments that rely on the stability and solvency of insurers that do an insurance business within their borders.

The accreditation program is designed principally to ensure that all regulated insurers are required to maintain financial solvency. Other goals achieved by states that have been approved by the accreditation program are verification that the state conducts effective and efficient financial analysis and examination process, and has in place the appropriate organizational and personnel practices.

The benefits of accreditation for the Insurance Department are many. The chief benefit is that New York's examinations, audits and other reviews of its regulated insurers will be recognized by her sister states so that other states will not subject New York domestic insurers to greater barriers of entry and operation than non-New York insurers. Further, accreditation indicates that the Insurance Department examination and audit operations and controls meet a nationally recognized standard assuring potential policyholders that the prospective insurers meet desirable levels of financial solvency.

Accreditation is not a one-time event. Accredited insurance departments are required to undergo a comprehensive review by an independent review team every five years to ensure departments continue to meet baseline financial solvency oversight standards. Newly accredited insurance departments undergo this review both to obtain the initial approval and, in the case of the New York State Insurance Department, an additional review within two years of accreditation. The accreditation standards require state insurance departments to have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs, and that they have the necessary resources to carry out that authority.

Among the commitments made by the Insurance Department to the NAIC as a condition of New York's approval under the accreditation program is an assurance that an NAIC model audit rule (NAIC model) would be timely adopted to be effective for regulated insurers as of

January 1, 2010. The purpose of the NAIC model is to implement a state statute or regulation that contains a requirement for an annual audit of each domestic insurer by an independent certified public accountant (CPA), based on the June 1998 version of the NAIC's Model Rule Requiring Annual Audited Financial Reports. Further, the NAIC model, once adopted by a state, requires that an insurer comply with certain best practices related to auditor independence, corporate governance and internal controls over financial reporting. The NAIC model reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model closely hews to the audit and controls standards established by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq., and extends that statute's application to regulated companies.

Continuation of accreditation by the NAIC requires New York to adopt specific rules in addition to those already imposed by current 11 NYCRR 89 (Regulation 118). For example, New York must prohibit each CPA from entering into an agreement of indemnity or release from liability, and must require CPA partner rotation in a manner similar to the NAIC's model.

Each of the required elements is contained in the proposed rule, either as a result of the adoption of the standards of the NAIC model or the continuation of the standards contained in present Regulation 118. New York has made every effort to conform the proposed rule to the NAIC model, except where inconsistent with a statutory requirement expressly established by New York law. Furthermore, and critically, the effective date stated in the proposed rule is required to maintain accreditation - January 1, 2010.

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

Subject: Audited Financial Statements.

Purpose: To implement provisions of Ins. Law Sec. 307(b), and add provisions required pursuant to the federal Sarbanes-Oxley Act of 2002.

Substance of emergency rule: Part 89 (Regulation No. 118) consists of 17 sections addressing the regulation of audits conducted by regulated insurers, fraternal benefit societies and managed care organizations (collectively the "companies").

Section 89.0 states that the purpose of the regulation is to apply audit and reporting standards upon each company.

Section 89.1 lists all definitions needed for the application of the regulation.

Section 89.2 contains the requirement that each company file audited financial statements and also directs each company to its correct filing location.

Section 89.3 sets forth the details of the items to be included in each audited financial statement.

Section 89.4 requires each company to notify the superintendent of the identity of its certified independent public accountant ("CPA") and any replacement.

Section 89.5 details the necessary qualifications for a CPA and restrictions upon employment of the same CPA for an extended period.

Section 89.6 provides rules for consolidated or combined audits of groups of companies.

Section 89.7 describes the scope of the audit and report of the CPA.

Section 89.8 requires both the company and its CPA to notify the superintendent upon the occurrence of a material misstatement or adverse financial condition.

Section 89.9 imposes a duty upon each company to report unremediated material weaknesses in its internal control over financial reporting.

Section 89.10 specifies terms to be included in the contract between a company and its CPA.

Section 89.11 requires each company to ensure that work papers of the CPA will be retained for review.

Section 89.12 contains rules for the appointment and duties of each company's audit committee.

Section 89.13 specifies the rules of conduct to be followed by the company with respect to the preparation of reports and documents.

Section 89.14 describes the requirements for management's report

of internal control over financial reporting and incorporates the reports prepared by some of the companies to comply with the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq.

Section 89.15 sets forth special rules needed for Canadian and British insurers.

Section 89.16 contains the effective dates and special rules.

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 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: Sections 201, 301, 307(b), 1109, 4710(a)(2) and 5904(b) of the Insurance Law. These sections establish the superintendent's authority to promulgate regulations governing audited financial statements for authorized insurers as defined by section 107 of the Insurance Law and for fraternal benefit societies and managed care organizations.

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

Insurance Law Section 307(b) requires insurers to file annual financial statements on forms prescribed by the superintendent.

Insurance Law Section 1109 provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Section 4710(a)(2) requires municipal cooperative health benefit plans to file annual financial statements on forms prescribed by the superintendent.

Insurance Law Section 5904(b) requires risk retention groups not chartered and licensed as property/casualty insurers to file a copy of the annual financial statement submitted to the state in which the risk retention group is chartered and licensed.

2. Legislative objectives: 11 NYCRR 89 (Regulation 118) was originally promulgated in 1984 to implement the provisions of Section 307(b) of the Insurance Law. The proposed repeal of the current regulation and promulgation of the new regulation continues to implement the provisions of section 307(b), and add provisions required pursuant to the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. ("SOX").

3. Needs and benefits: SOX imposes a comprehensive regime of audits and internal management controls and reports designed to ensure greater transparency and accountability.

The proposed regulation is closely patterned upon a National Association of Insurance Commissioners model regulation ("NAIC model") that reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model is similar to current Regulation 118 but imposes additional rules patterned on SOX. For example, the NAIC model and proposed regulation both require the regulated insurer to forbid its CPA from entering into an agreement of indemnity or release from liability. The proposed regulation will apply not only to companies already subject to SOX, but also to other companies, such as mutual companies, fraternal benefits societies and managed care organizations, that are presently governed by Regulation 118.

The consequence of adoption of the proposed regulation will be requirements that ensure that regulated companies engage in best practices related to auditor independence, corporate governance and internal controls over financial reporting.

4. Costs: This regulation imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. Costs to be incurred by the parties affected differ depending upon the size of the company and whether that company

is publicly held and thus already required to comply with SOX. Companies regulated by SOX will incur few additional costs. Compliance cost estimates received from a cross-section of affected companies that are not subject to SOX are most often estimated to be minimal or negligible. Of those companies that stated compliance would require additional expenditures, the amounts range from \$25,000 a year to in excess of \$2 million (for one large mutual insurance company).

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Paperwork associated with filings to the superintendent should be minimal. The paperwork associated with the audit and controls regime required by the proposed regulation should also be minimal.

7. Duplication: None.

8. Alternatives: In developing this regulation, the Department obtained industry input and used the model regulation developed by the National Association of Insurance Commissioners (the "NAIC model") to implement SOX to the extent possible. However, the model has been modified as necessary to comply with New York statutes and regulations. The proposed regulation also restricts its application only to those entities over which the Department has jurisdiction unlike the NAIC model, which also contains rules that apply to CPAs.

Several comments received by the Department noted the compliance difficulties faced by foreign companies and United States branches of alien insurers, specifically with respect to the roles to be performed by persons not residing in the United States and for the reporting requirements to be imposed upon an integrated enterprise containing insurers in New York as well as entities with no nexus to New York. In response, the Department modified the regulation to provide detailed rules as to whether members of management may attest to filings, and to establish limited exceptions available only to these entities, as well as another exception available upon evidence of financial or organizational hardship.

One commenter requested that the definition of a managed care organization ("MCO") be restricted to exclude those entities that operate only in New York and that only serve public programs, i.e., Medicaid, Family Health Plus and Child Health Plus. After consideration, the Department narrowed the definition of an MCO to exclude the subset of those entities that do not file financial documents with the Department.

Another commenter objected to restrictions on using the same CPA for SOX audit work and tax return preparation for more than a five-year period for small companies. The exemption from any provision of the proposed regulation available upon proof of financial or organizational hardship now addresses this comment.

Several comments noted that a company may be required to file both SOX reports and the reports required by the NAIC model as adopted by the various states. Companies want to avoid making duplicative filings to those required by the state of domicile. The proposed regulation contemplates accepting the domiciliary state filings as New York filings to the extent that they are substantially similar to those required by the proposed regulation.

Several comments noted differences between the NAIC model and the proposed regulation on filing deadlines, exceptions and the rules governing confidentiality of work papers. Different dates or deadlines are due to restrictions in New York law that requires modification to the NAIC model. Certain automatic exclusions from the NAIC model could not be included in the proposed regulation to the extent that they conflict with New York law. Finally, the confidentiality of commercial information, including work papers, obtained by state and local government is already subject in New York to a comprehensive regime of rules, exceptions and requirements, and thus did not need to be included in the proposed regulation.

9. Federal standards: The federal rules under SOX are extensive. The provisions in the proposed regulation are similar to the comparable federal provisions. The regulation does not conflict with any federal rules.

10. Compliance schedule: The regulation applies to companies for reporting periods beginning on or after January 1, 2010. Provisions of the regulation allow the company time to bring audit systems and controls into compliance without the need to ask for an extension or waiver. This timetable is contemplated by the NAIC model and has been adopted by many, but not all, states. The Department believes it is highly desirable to conform the application date of this proposed regulation to the effective date in other states.

Regulatory Flexibility Analysis

The Insurance Department finds that this regulation would not impose reporting, recordkeeping or other requirements on small businesses since the provisions contained therein apply only to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business in New York State. Inasmuch as most of these companies are not independently owned and operated and employ more than 100 individuals, they do not fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act.

This regulation specifically considers the impact of the requirements contained therein on small businesses by exempting assessment co-operative property/casualty insurance companies having direct premiums written in New York State of less than \$250,000 in any calendar year and having fewer than 500 policyholders at the end of such calendar year from the requirement to file an annual statement. Further, the proposed regulation allows any company, including a small business, to request an exemption from any and all of its requirements upon written application to the superintendent based upon a financial or organizational hardship upon the company.

This regulation contains, as does current Regulation No. 118, minimum requirements that must be included in the contract between a regulated company and the independent certified public accountant ("CPA") retained by the company. Accordingly, CPAs, regardless of whether they are small businesses or not, could be considered affected parties under this regulation. However, the Insurance Department estimates the impact of the continuation of these rules to be minimal, especially since if a CPA agrees to audit a regulated company, the price of the engagement will compensate the CPA for costs incurred. Additionally, CPAs retained by insurers tend to be large limited liability corporations or partnerships that are not small businesses. In any event, a CPA may choose not to audit a company that will require execution of a contract subject to this regulation.

The regulation does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirement on any local government.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Companies affected by the proposed regulation include regulated insurers, fraternal benefit societies, and managed care organizations authorized to do business in New York State. The companies affected by this regulation do business in every county in this state, including "rural areas" as defined under section 102(1) of the State Administrative Procedure Act. Some of the home offices of these companies lie within rural areas. Further, companies may establish new office facilities and/or relocate in the future depending on their requirements and needs.

2. Reporting, recordkeeping and other compliance requirements: Many of the compliance requirements (such as filing due date and record retention period) are consistent with the requirements presently contained in Regulation 118 and should not impose upon any regulated party, regardless of whether they are located in a rural area or not, any additional paperwork, recordkeeping or compliance requirements. The obligations imposed by the proposed regulation with regard to establishment and maintenance of audit controls and standards are either consistent with or less than those required by current Regulation 118 and a federal statute, the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. ("SOX"), that imposes similar rules. If there are failures in the audit and controls process, a company is required to notify the superintendent. The regulation contains automatic exclusions from compliance for certain small companies. Further, any company that faces organizational or financial hardship can seek an exemption from any requirement imposed by the regulation.

The proposed regulation requires a regulated company to perform the audit of its operation and controls with the assistance of a certified independent public accountant (“CPA”). The terms of the employment of the CPA and the period for which work papers and communications are to be retained (contained in 11 NYCRR 243 (“Standards of Record Retention by Insurance Companies”)) are both specified in the proposed regulation. Accordingly, CPAs, regardless of whether they are located in rural areas or not, could be considered affected parties under this regulation. However, the Insurance Department estimates the impact of these rules on CPAs, regardless of whether they are located in rural areas or not, should be negligible, if any at all. Indeed, if a CPA agrees to audit a regulated company, the price of the engagement will compensate the CPA for costs incurred. Additionally, CPAs retained by insurers tend to be large limited liability corporations or partnerships that are not small businesses. In any event, a CPA may choose not to audit a company that will require execution of a contract subject to this regulation.

3. Costs: The proposed regulation implements requirements based on the rules imposed by current Regulation 118 and SOX. The cost of complying with the new requirements will depend on the size of the company and whether the company is already subject to SOX because it is publicly held. Companies regulated by SOX will incur few additional costs beyond those imposed by current Regulation 118 and the federal statute. Compliance cost estimates with respect to the proposed regulation were received from a cross-section of companies that are not subject to SOX. If the company is already required to comply with similar regulations in other states, the additional expense of the New York proposed regulation is estimated to be minimal or negligible. Of those companies that stated compliance would require additional expenditures, the amounts range from \$25,000 a year to in excess of \$2 million\$500,000 (for one very large domestic mutual insurance company).

However, the proposed regulation requires a regulated company to perform the audit of its operation and controls with the assistance of a certified independent public accountant (“CPA”). The terms of the employment of a CPA is specified in the proposed regulation in a manner that is consistent with the current Regulation 118. Further, a CPA can obtain compensation for additional costs as part of the contract entered into with the regulated company. Accordingly, CPAs, regardless of whether they are located in rural areas or not, should not have to incur uncompensated additional costs to comply with the proposed regulation.

4. Minimizing adverse impact: The proposed regulation applies to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business throughout New York State, including rural areas. It does not impose any adverse impacts unique to rural areas.

5. Rural area participation: In developing this regulation, the Department conducted extensive outreach to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business throughout New York State, including those located or domiciled in rural areas.

Job Impact Statement

The Insurance Department finds that this regulation will have no adverse impact on jobs and employment opportunities since, for publicly held companies, its requirements only reflect obligations already contained in the present Regulation 118 and those imposed by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. (“SOX”). For insurers, fraternal benefit societies or managed care organizations not already subject to SOX, the regulation contain minor refinements of those companies’ current obligations under Regulation 118 to establish, maintain and report internal audit and oversight. Compliance may require the employment of additional personnel or outside contractors.

No region in New York should experience an adverse impact on jobs and employment opportunities. This regulation should not have a negative impact on self-employment opportunities.

EMERGENCY RULE MAKING

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-02-10-00007-E

Filing No. 1451

Filing Date: 2009-12-29

Effective Date: 2009-12-29

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

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

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

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

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

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

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

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

The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small,

certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

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

The proposed rule also adopts SSAP #10R, which was adopted by the NAIC on December 8, 2009. SSAP #10R extends the period over which deferred tax assets ("DTAs") are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section 1301(a)(16), to 15%. SSAP #10R will be included in the Accounting Manual.

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

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

New York authorized insurers will be at a competitive disadvantage if SSAP #10R is not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to report a higher admitted asset value, the lower RBC ratios generated by the lower admitted asset value will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon accounting principles in effect on the date of filing. The filing date for the December 31, 2009 annual statement is March 1, 2010. The insurers must be given advance notice of the applicable principles in order to file their reports in an accurate and timely manner.

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

Subject: Financial statement filings and accounting practices and procedures.

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

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

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

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

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

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

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

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

Subdivision (i), which set forth rules different from the rules set forth in

the Accounting Manual for valuing investments in common shares of insurers which are not subsidiaries, has been deleted.

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

Subdivision (k) is relettered (i).

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

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

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

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

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

Subdivision (o) is relettered (l).

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

Subdivision (q) is relettered (m).

Subdivision (r) is relettered (n).

Subdivision (s) is relettered (o).

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

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

Subdivision (v) is relettered (q).

Subdivision (w) is relettered (r).

Subdivision (x) is relettered (s).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 2010.

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

Regulatory Impact Statement

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

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

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

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

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

Insurance Law Article 13 specifies the requirements regarding the treatment of assets and deposits in determining the financial condition of insurers for the purposes of the Insurance Law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Law Article 44 authorizes the superintendent to establish standards governing the fiscal solvency of integrated delivery systems, and requires the filing of financial reports by prepaid health service plans and comprehensive HIV special needs plans.

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

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

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

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

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

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

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

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

The NAIC has most recently adopted a new Accounting Manual as of March 2009. The Accounting Manual represents a codification of statutory accounting principles, presented in the form of the SSAPs. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. Codification provides examiners and analysts with uniform accounting rules against which insurers’ financial statements can be evaluated.

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

surplus (adjusted for certain items) as an admitted asset, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

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

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

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

The proposed rule adopts SSAP #10R. SSAP #10R extends the period over which deferred tax assets ("DTAs") are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section 1301(a)(16), to 15%.⁴ Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs \$465 for a hard copy, or \$395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states' requirements as much as New York's.

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

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

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

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

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

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

The superintendent determined that, as compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

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

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

10. Compliance schedule: Regulated insurers already should be aware of the need to comply with the provisions of the Accounting Manual, since the NAIC issued the most recent version of the accounting Manual in March, 2009. In addition, the NAIC publishes changes to accounting guidance during the interim period before issuance of the new Accounting Manual. Regulated insurers use the Accounting Manuals in preparing their Quarterly Statements and the Annual Statements.

Regulatory Flexibility Analysis

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

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

Rural Area Flexibility Analysis

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

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

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

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

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

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

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

Job Impact Statement

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

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

**EMERGENCY
RULE MAKING**

Recognition of the 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities

I.D. No. INS-02-10-00008-E

Filing No. 1452

Filing Date: 2009-12-29

Effective Date: 2009-12-29

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

Action taken: Amendment of Part 100 (Regulation 179) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240 and 4517, and arts. 24 and 26

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

Specific reasons underlying the finding of necessity: This amendment to Regulation No. 179 extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004 with the superintendent's approval and if certain conditions are met by the insurer related to policies or portions of policies which are coinsured. Previously, this table could only be used for policies issued on or after January 1, 2007. The use of this table allows for the reserves to better match the risks associated with different underwriting classifications.

This standard has already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted this change for year-end 2009. Since New York has a separate regulation addressing this subject matter, the revised standard is not automatically adopted and needs to be adopted via an amendment to Regulation No. 179. Insurers domiciled in states that do not adopt this change by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted this change. Adopting this standard will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

While the anticipated impact of the adoption of this proposed amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis on inforce business for New York authorized life insurers. Additionally, the impact of this change will likely increase over time. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the December 31, 2009 annual statement is March 1, 2010. Insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner.

For all of the reasons stated above, an emergency adoption of this second amendment to Regulation No. 179 is necessary for the general welfare.

Subject: Recognition Of The 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities.

Purpose: This amendment extends the use of the 2001 CSO Preferred Mortality Table to policies issued on or after January 1, 2004.

Text of emergency rule: Paragraph (3) of subdivision (a) of section 100.6 is amended to read as follows:

(3) Part 98.4(b)(5) of this Title: The 2001 CSO Mortality Table is the minimum mortality standard for deficiency reserves. If select mortality rates are used, they may be multiplied by X percent for durations in the first segment, subject to the conditions specified in Parts 98.4(b)(5)(i) - 98.4(b)(5)(ix)(vii) of this Title. In demonstrating compliance with those conditions, the demonstrations may not combine the results of tests that utilize the 1980 CSO Mortality Table with those tests that utilize the 2001 CSO Mortality Table, unless the combination is explicitly required by regulation or necessary to be in compliance with relevant Actuarial Standards of Practice.

Subdivision (a) of section 100.8 is amended to read as follows:

(a) At the election of the insurer, for each calendar year of issue, for any one or more specified plans of insurance and subject to satisfying the conditions stated in section 100.9 of this Part, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum mortality standard for policies issued on or after January 1, 2007. *For policies issued on or after January 1, 2004, and prior to January 1, 2007, the 2001 CSO Preferred Class Structure Mortality Table may be substituted with the prior approval of the superintendent and subject to the conditions of section 100.9 of this Part.* A table from the 2001 CSO Preferred Class Structure Mortality Table used in place of a 2001 CSO Mortality Table, pursuant to the requirements of this Part, will only be treated as part of the 2001 CSO Mortality Table for purposes of reserve valuation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The superintendent's authority for the adoption of 11 NYCRR 100 (Regulation No. 179) derives from sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240, 4517, Article 24, and Article 26 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies.

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

Section 1304 of the Insurance Law requires insurers to maintain reserves for life insurance policies and certificates according to prescribed tables of mortality and rates of interest.

Section 4217(c)(2)(A)(iii) permits, as a minimum standard of valuation for life insurance policies, any ordinary mortality table adopted by the National Association of Insurance Commissioners (NAIC) after 1980, and approved by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the NAIC after 1980, and approved by the superintendent, for use in determining the minimum nonforfeiture standard.

Section 4224(a)(1) prohibits unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for life insurance policies.

Section 4240(d)(7) states the superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section, which covers various issues related to separate accounts of insurance companies, including reserve issues.

Section 4517(c)(2) requires fraternal benefit societies to comply with the minimum valuation standards of section 4217 of the Insurance Law for life insurance certificates issued on or after January 1, 1980.

Article 24 describes unfair methods of competition and unfair and deceptive acts and practices.

Article 26 describes unfair claim settlement practices, other misconduct and discrimination.

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principal focus of the Insurance Law. One fundamental way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. The Insurance Law prescribes the mortality tables and interest rates to be used for calculating such reserves. At the same time, an insurer and its policyholders benefit when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment extends the use of the 2001 CSO Preferred Structure Mortality Table to policies issued on or after January 1, 2004. Use of this table allows for the reserves to better match the risks associated with different underwriting classifications. However, use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. While the anticipated impact of this amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis. Based on a survey conducted by the American Council of Life Insurers, the industry wide impact of allowing the use of this table for policies issued on or after January 1, 2004 is estimated to be a decrease in reserves of approximately \$600 Million - \$1.2 Billion. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the proposed amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases, by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves. Administrative costs to most insurers and fraternal benefits societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been available for use by insurers

since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004, and the use of this table is optional.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this amendment to Regulation No. 179. There are no costs to other government agencies or local governments.

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The current rule imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years.

7. Duplication: The regulation does not duplicate any existing law or regulation.

8. Alternatives: The only alternative considered was to not extend the date of using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004. However, this would result in higher reserve requirements for New York authorized life insurers and fraternal benefit societies on some policies, since this change was adopted by the NAIC in September 2009. This change was discussed during various NAIC conference calls.

This item is part of a larger capital and surplus relief plan for insurers. Adopting this amendment will allow New York insurers to be subject to the same standard that has already been adopted by the NAIC and which is being implemented in other states. Insurers authorized in states that do not adopt this change by December 31, 2009 year-end will be forced to hold higher reserves relative to companies authorized in states that have adopted this change and in those circumstances, New York-authorized companies would be at a disadvantage, from the impression that there is a significant difference in financial stability of New York-authorized insurers and those authorized outside the state.

9. Federal standards: There are no federal standards in the subject area.

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2009. This amendment allows the use of 2001 CSO Preferred Class Structure Mortality Table for policies issued on or after January 1, 2004. Use of the 2001 CSO Preferred Class Structure Mortality Table, however, is not mandatory. Voluntary election of such table is conditional, dependent upon the requirements set forth in the current rule being met by the insurer. The actuarial certification and supporting actuarial report is due annually on March 1. The statistical report required for insurers that use the 2001 CSO Preferred Class Structure Mortality Table is due annually on July 1. Since use of the 2001 CSO Preferred Class Structure Mortality Table was previously in effect and this amendment only extends the date for using the table, insurers should have ample time to meet the reporting requirements.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this amendment 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 finding is that this rule is directed at all life insurers and fraternal benefit societies authorized to do business in New York State, none of which fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies and believes that none of them fall within the definition of "small business", because there

are none which are both independently owned and have under one hundred employees.

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 number of rural areas: Insurers covered by the regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004. The current regulation imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years. Use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. Voluntary election of such table is conditional on the requirements set forth in the prior version of the regulation, which became effective on December 26, 2007, being met by the insurer.

3. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefits societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been able to be used since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004 and the use of this table is optional.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this rule. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: This amendment was discussed during various public NAIC conference calls, and the Department conducted outreach with affected stakeholders, including the Life Insurance Council of New York. Additionally, the American Council of Life Insurers was instrumental in drafting the language for the revised regulation.

Job Impact Statement

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table for use in determining minimum reserve liabilities and nonforfeiture benefits back to policies issued on or after January 1, 2004. Previously, this table could be used for policies issued on or after January 1, 2007. This rule will lower reserve requirements for those insurers that elect to use this table for policies issued on or after January 1, 2004 and therefore decrease the cost of doing business in New York. Compliance should not require the employment of additional personnel or outside contractors.

**EMERGENCY
RULE MAKING**

Workers' Compensation Insurance Assessments

I.D. No. INS-02-10-00009-E

Filing No. 1453

Filing Date: 2009-12-29

Effective Date: 2009-12-29

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

Action taken: Addition of Subpart 151-6 (Regulation 119) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 3451

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

Specific reasons underlying the finding of necessity: Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the Workers' Compensation Board ("WCB") to assess insurers and the State Insurance Fund, for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the Workers' WCB, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the State Insurance Fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

Prior to January 1, 2010, the Workers' Compensation Law required the Workers' Compensation Board to assess insurers on the total "direct premiums" they wrote in the preceding calendar year, whereas the insurers were collecting the assessments from their insureds on the basis of "standard premium," which took into account high deductible policies. As high deductible policies increased in the marketplace, a discrepancy developed between the assessment an insurer collected, and the assessment the insured was required to remit to the Workers' Compensation Board.

Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4) and 151(2)(b) to change the basis upon which the WCB collects the portion of the allocation from each insurer from "direct premiums" to "standard premium" in order to ensure that insurers are not overcharged or under-charged for the assessment, and to ensure that insureds with high deductible policies are charged the appropriate assessment. Effective January 1, 2010, therefore, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the Superintendent of Insurance to define "standard premium," for the purposes of setting the assessments, and to set rules, in consultation with the WCB, and New York Compensation Rating Board, for collecting the assessment from insureds.

Given the effective date of the relevant provision of the law January 1, 2010, and given the need that the assessments be calculated and collected in a timely manner, it is essential that this regulation, which establishes the procedures that implement provisions of the law, be promulgated on an emergency basis.

For the reasons cited above, this regulation is being promulgated on an emergency basis for the benefit of the general welfare.

Subject: Workers' Compensation Insurance Assessments.

Purpose: This regulation is necessary to standardize the basis upon which the workers' compensation assessments are calculated.

Text of emergency rule: A new sub-part 151-6 entitled Workers' Compensation Insurance Assessments is added to read as follows:

Section 151-6.0 Preamble

(a) Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the workers compensation board to assess insurers, and the state insurance fund for the special disability fund, the fund for reopened cases, and the operations of the Board, respectively. First, the assessments are allocated to insurers, self-insurers, group self-insurers, and SIF based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, each pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

(b) Prior to January 1, 2010, each insurer paid a percentage of the allocation based on the total direct written premiums it wrote in the preceding calendar year. However, Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4), and 151(2)(b) to change the basis upon which the board collects the portion of the allocation from each insurer. Thus, effective January 1, 2010, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the superintendent of insurance to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the board, and NYCIRB for collecting the assessment from insureds.

Section 151-6.1 Definitions

As used in this Part:

- (a) Board means the New York workers' compensation board.*
- (b) Insurer means an insurer authorized to write workers' compensation insurance in this state, except for SIF.*
- (c) NYCIRB means the New York workers compensation rating board.*
- (d) SIF means the state insurance fund.*
- (e) Standard Premium means:*

(1) For a non-retrospectively rated policy:

(i) the premium determined on the basis of the insurer's approved rates; as modified by:

- (a) any experience modification or merit rating factor;
- (b) any applicable territory differential premium;
- (c) the minimum premium;
- (d) any construction classification premium adjustment program

credits;

- (e) any credit from return to work or drug and alcohol prevention programs;
- (f) any surcharge or credit from a workplace safety program;
- (g) any credit from an independently-filed insurer specialty program (for example, alternative dispute resolution, drug-free workplace, managed care or preferred provider organization programs);
- (h) any charge for the waiver of subrogation;
- (i) any charge for foreign voluntary coverage; and
- (j) the additional charge for terrorism, and the charge for natural disasters and catastrophic industrial accidents; and

(ii) For purposes of determining standard premium, the insurer's expense constant, including the expense constant in the minimum premium, the insurer's premium discount, and premium credits for participation in any deductible program shall be excluded from the premium base; or

(2) For a retrospectively rated policy, the retrospective premium plus the implied premium discount.

Section 151-6.2 Collection of assessments

Every insurer and SIF shall collect the assessments required by Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) from its policyholders through a surcharge based on premiums in an amount determined by the superintendent in consultation with NYCIRB and the Board.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 28, 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 of Insurance's authority for the promulgation of Part 151-6 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Amendment to Regulation No. 119) derives from Sections 201 and 301 of the Insurance Law, and Sections 15, 25-A, and 151 of the Workers' Compensation Law.

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

Section 15, 25-A, and 151 of the Workers' Compensation Law require the Superintendent to define the "standard premium" upon which assessments are made for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the Workers' Compensation Board. Section 15 of the Workers' Compensation Law further requires workers' compensation insurers to collect the assessments from their policyholders through a surcharge based on premiums in accordance with the rules set forth by the Superintendent, in consultation with the New York workers' compensation rating board, and the chair of the Workers' Compensation Board.

2. Legislative objectives: (a) Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the Workers' Compensation Board to assess insurers writing workers' compensation insurance and the State Insurance Fund, for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the Workers' Compensation Board, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the State Insurance Fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

Prior to January 1, 2010, the Workers' Compensation Law required the Workers' Compensation Board to assess insurers on the total "direct premiums" they wrote in the preceding calendar year, whereas the insurers were collecting the assessments from their insureds on the basis of "standard premium," which took into account high deductible policies. As high deductible policies increased in the marketplace, a discrepancy developed between the assessment an insurer collected, and the assessment the insured was required to remit to the Workers' Compensation Board.

Therefore, Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4) and 151(2)(b) to change the basis upon which the board collects the portion of the allocation from each insurer from "direct premiums" to "standard premium" in order to ensure that insurers are not overcharged or under-charged for

the assessment, and to ensure that insureds with high deductible policies are charged the appropriate assessment. Thus, effective January 1, 2010, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the Superintendent to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the Workers' Compensation Board, and the New York Compensation Rating Board for collecting the assessment from insureds.

3. Needs and benefits: This regulation is necessary, and mandated by the Workers' Compensation Law, in order to standardize the basis upon which the workers' compensation assessments are calculated to eliminate discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers' Compensation Board.

4. Costs: This regulation does not impose any new costs upon insurers. It simply standardizes the basis upon which the workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers' Compensation Board.

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 and the State Insurance Fund already collect and remit assessments to the Workers' Compensation Board. This regulation only standardizes the basis upon which the assessments are calculated, as required by the Workers' Compensation Law.

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

8. Alternatives: No alternatives were considered, because Part QQ requires the Superintendent to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the Workers' Compensation Board and the New York workers' compensation rating board, for collecting the assessment from insureds. Based on discussions with the New York Compensation Rating Board and the Workers' Compensation Board, the Superintendent determined that the term "standard premium" should conform to the definition currently used by insurers, and should ensure that the definition accounts for high deductible policies.

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

10. Compliance schedule: The effective date of the relevant provision of the law is January 1, 2010. The assessments must be calculated and collected as of January 1, 2010.

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, as well as to the State Insurance Fund (SIF). It standardizes the basis upon which the workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers' Compensation Board.

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. 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 come within the definition of "small business" found in section 102(8) of the State Administrative Procedure Act, because SIF is neither independently owned or operated, nor does it employ one hundred or less individuals.

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, as well as to the State Insurance Fund (the "SIF"). These entities do business throughout New York State, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act ("SAPA").

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 and SIF already collect and remit assessments to the Workers' Compensation Board. This regulation only standardizes the basis upon which the assessments are calculated.

3. Costs: This regulation does not impose any new costs upon insurers. It simply standardizes the basis upon which the workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers' Compensation Board, as mandated by the Workers' Compensation Law.

4. Minimizing adverse impact: The regulation does not impose any impact unique to rural areas.

5. Rural area participation: This regulation is required by statute. The entities covered by this regulation - workers' compensation insurers authorized to do business in New York State and the State Insurance Fund - do business in every county in this state, including rural areas as defined under Section 102(10) of SAPA. This regulation standardizes the basis upon which the workers' compensation assessments are calculated.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. The rule merely standardizes the basis upon which workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers' Compensation Board. 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 rule should not have a measurable impact on self-employment opportunities.

NOTICE OF EXPIRATION

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

Credit for Reinsurance from Unauthorized Insurers

I.D. No.	Proposed	Expiration Date
INS-52-08-00008-P	December 24, 2008	December 24, 2009

Long Island Power Authority

NOTICE OF ADOPTION

Energy Efficiency and Renewables Cost Recovery Rate

I.D. No. LPA-34-09-00019-A
Filing Date: 2009-12-29
Effective Date: 2010-01-01

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

Action taken: The Long Island Power Authority adopted revisions to its Tariff for Electric Service to create an energy efficiency and renewables cost recovery rate that will allow LIPA to recoup the costs of its energy efficiency programs and renewables.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Energy efficiency and renewables cost recovery rate.

Purpose: To create an energy efficiency and renewables cost recovery rate.

Text or summary was published in the August 26, 2009 issue of the Register, I.D. No. LPA-34-09-00019-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 McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, New York 11553, (516) 222-7700, email: amccabe@lipower.org

Assessment of Public Comment

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

NOTICE OF ADOPTION

New York State Assessment

I.D. No. LPA-34-09-00020-A
Filing Date: 2009-12-29
Effective Date: 2010-01-01

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

Action taken: The Long Island Power Authority adopted revisions to its Tariff for Electric Service to recover the New York State Assessment imposed by Public Service Law, section 18-a(6).

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: The New York State Assessment.

Purpose: To recover the New York State Assessment.

Text or summary was published in the August 26, 2009 issue of the Register, I.D. No. LPA-34-09-00020-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 McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, New York 11553, (516) 222-7700, email: amccabe@lipower.org

Assessment of Public Comment

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

Power Authority of the State of New York

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

Rates for the Sale of Power and Energy

I.D. No. PAS-02-10-00005-P

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

Proposed Action: Revision in rates for Village of Tupper Lake.

Statutory authority: Public Authorities Law, section 1005

Subject: Rates for the sale of power and energy.

Purpose: Maintain system's fiscal integrity; this increase in rates does not result from Power Authority rate increase to Village.

Text of proposed rule:

VILLAGE OF TUPPER LAKE

Proposed Monthly Rates

	Proposed Rates ¹		
	Year 1	Year 2	Year 3
Residential S.C. 1			
Customer Charge	\$2.98	\$3.12	\$3.26
	Non-Winter (May-October)		
Energy Charge, per kWh	\$.03274	\$.03425	\$.03576
	Winter (November-April)		
Energy Charge, per kWh			
First 1,500 kWh	\$.03274	\$.03425	\$.03576
1,501 – 4,500 kWh	\$.07026	\$.07350	\$.07675
Over 4,500 kWh	\$.10274	\$.10749	\$.11224
Small Commercial S.C. 2			
Customer Charge	\$2.97	\$3.11	\$3.25
	Non-Winter (May-October)		

Energy Charge, per kWh	\$.04108	\$.04298	\$.04488
	Winter (November-April)		
Energy Charge, per kWh	\$.05868	\$.06139	\$.06411
Large Industrial S.C. 3A			
Demand Charge, per kW	\$ 4.50	\$ 4.50	\$ 4.50
Energy Charge, per kWh	\$.03205	\$.03425	\$.03646

¹ Purchased Power Adjustment reflected in proposed rates.

VILLAGE OF TUPPER LAKE

Proposed Monthly Rates

	Proposed Rates ¹		
	Year 1	Year 2	Year 3
Large Industrial S.C. 3B			
Demand Charge, per kW	\$ 4.75	\$ 4.75	\$ 4.75
Energy Charge, per kWh	\$.03459	\$.03706	\$.03953
Large Industrial S.C. 4			
Demand Charge, per kW	\$ 5.50	\$ 5.50	\$ 5.50
Energy Charge, per kWh	\$.03479	\$.03689	\$.03899
Security Lighting S.C. 5 (Charge per Lamp, per month)			
150 High Pressure Sodium	\$ 8.48	\$ 8.87	\$ 9.26
175 Mercury Vapor	\$ 8.48	\$ 8.87	\$ 9.26
250 High Pressure Sodium	\$ 15.17	\$ 15.88	\$ 16.58
400 Mercury Vapor	\$ 15.17	\$ 15.88	\$ 16.58
Facility Charge (per lamp)	\$ 8.48	\$ 8.87	\$ 9.26
Street Lighting S.C. 6			
Facility Charge (per lamp)	\$ 6.22	\$ 6.51	\$ 6.79
Energy Charge, per kWh	\$.01496	\$.01566	\$.01635

¹ Purchased Power Adjustment reflected in proposed rates.

Text of proposed rule and any required statements and analyses may be obtained from: Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, New York 10601, (914) 390-8085, email: frank.m@nypa.gov

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

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

Regulatory Impact Statement, 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.

Public Service Commission

NOTICE OF ADOPTION

Lightened Regulation and Financing of an Electric General Facility

I.D. No. PSC-16-09-00013-A

Filing Date: 2009-12-23

Effective Date: 2009-12-23

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

Action taken: On 12/16/09, the PSC adopted an order approving the Petition of Astoria Generating Company for financing associated with the

construction of a 100 MW electric generating facility and providing for lightened regulation of it as an electric corporation.

Statutory authority: Public Service Law, sections 2(13), 5(1)(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: Lightened regulation and financing of an electric general facility.

Purpose: To approve lightened regulation and financing of an electric general facility.

Substance of final rule: The Commission, on December 16, 2009, adopted an order approving the Petition of Astoria Generating Company for financing associated with the construction of a 100 MW electric generating facility to be located in the Sunset Park industrial area of the Borough of Queens, Kings County and providing for lightened regulation of it as an electric corporation, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(09-E-0250SA1)

NOTICE OF ADOPTION

Denying in Part and Granting in Part, NYSERDA's Petition for Rehearing

I.D. No. PSC-37-09-00010-A

Filing Date: 2009-12-23

Effective Date: 2009-12-23

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

Action taken: On 12/16/09, the PSC adopted an order denying in part and granting in part, the relief New York State Energy Research and Development Authority (NYSERDA) has requested in its Petition for Rehearing dated August 26, 2009.

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

Subject: Denying in part and granting in part, NYSERDA's petition for rehearing.

Purpose: Denying in part and granting in part, NYSERDA's petition for rehearing.

Substance of final rule: The Commission, on December 16, 2009, adopted an order denying in part and granting in part, the relief New York State Energy Research and Development Authority (NYSERDA) has requested in its Petition for Rehearing dated August 26, 2009, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(08-E-1132SA1)

NOTICE OF ADOPTION

Transfer of a Leasehold Interest

I.D. No. PSC-37-09-00014-A

Filing Date: 2009-12-23

Effective Date: 2009-12-23

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

Action taken: On 12/16/09, the PSC adopted an order approving, with modification the Petition of Niagara Mohawk Power Corporation d/b/a National Grid for the transfer of a leasehold interest in the property formerly known as the Texaco Tank Farm located in Bethlehem, NY.

Statutory authority: Public Service Law, section 70

Subject: Transfer of a leasehold interest.

Purpose: To approve the transfer of a leasehold interest.

Substance of final rule: The Commission, on December 16, 2009, adopted an order approving, with modification the Petition of Niagara Mohawk Power Corporation d/b/a National Grid (Company) for the transfer of a leasehold interest in the Company's real property and improvements known as the former Texaco Tank Farm property, located in the City of Bethlehem, New York, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0593SA1)

NOTICE OF ADOPTION

Modification of Customer Satisfaction Survey Instrument, Survey Method and Performance Measurement

I.D. No. PSC-39-09-00014-A

Filing Date: 2009-12-23

Effective Date: 2009-12-23

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

Action taken: On 12/16/09 the PSC adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's petition to make modifications to its Customer Satisfaction Survey.

Statutory authority: Public Service Law, sections 2, 5, 65 and 66

Subject: Modification of customer satisfaction survey instrument, survey method and performance measurement.

Purpose: To adopt the modifications to its Customer Satisfaction Survey.

Substance of final rule: The Commission on December 16, 2009, adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's petition to make modifications to its Customer Satisfaction Survey, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-G-0609SA4)

Department of State

EMERGENCY RULE MAKING

Electrical Bonding of Gas Piping, and Protection of Gas Piping Against Physical Damage

I.D. No. DOS-02-10-00002-E

Filing No. 1447

Filing Date: 2009-12-24

Effective Date: 2009-12-24

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

Action taken: Amendment of sections 1220.1 and 1224.1 of Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

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

Specific reasons underlying the finding of necessity: At its meeting held on September 23, 2009, the State Fire Prevention and Building Code Council determined that adopting this rule on an emergency basis is necessary to preserve public safety by clarifying requirements for electrical bonding of gas piping, clarifying requirements for protection of gas piping against physical damage, and adding new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST), which will increase protection against fires caused by lightning strikes in the vicinity of buildings equipped with CSST gas piping and fires caused by accidental punctures of CSST gas piping.

Subject: Electrical bonding of gas piping, and protection of gas piping against physical damage.

Purpose: To clarify requirements for electrical bonding of gas piping and protection of gas piping against physical damage; and add new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST).

Substance of emergency rule: This rule amends several existing provisions in, and adds several new provisions to, the 2007 edition of the Residential Code of New York State (the "2007 RCNYS"), the publication which is incorporated by reference in 19 NYCRR Part 1220, and the 2007 edition of the Fuel Gas Code of New York State (the "2007 FGCNYS"), the publication which is incorporated by reference in 19 NYCRR Part 1224. The new and amended provisions in the 2007 RCNYS and 2007 FGCNYS:

(1) Clarify the situations in which a gas piping system that contains no corrugated stainless steel tubing ("CSST") will be considered to be "likely to become energized" and, therefore, required to be bonded to an effective ground-fault current path;

(2) Specify that a gas piping system that contains no CSST may be bonded in any manner described in Section E3509.7 of the 2007 RCNYS, in cases where the 2007 RCNYS applies, or in any manner described in Section 250.104(B) of NFPA 70-2005, in cases where the 2007 FGCNYS applies;

(3) Require gas piping systems that contain any CSST to be electrically continuous and bonded to the electrical service grounding electrode system at the point where the gas service enters the building or structure;

(4) Specify standards for the installation and bonding of CSST, including standards for the size of the bonding jumper, standards for bonding clamp, standards for the place and manner of attachment of the bonding clamp, and standards for separation of the CSST from other electrically conductive systems;

(5) Specify standards for protection of piping other than black or galvanized steel from physical damage, including standards for the types of shield plates to be used, standards for determining the location where shield plates are required, and additional standards for protection of piping made of CSST; and

(6) Clarify the situations in which section E3509.7 in the RCNYS (entitled "Bonding other metal piping") will apply.

This rule also provides that the 2005 edition of standard NFPA 70, entitled "National Electrical Code" shall be deemed to be one of the standards incorporated by reference into 19 NYCRR Part 1224.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 23, 2010.

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-6740, email: joseph.ball@dos.state.ny.us

Summary of Regulatory Impact Statement

1. STATUTORY AUTHORITY.

Executive Law section 377(1) authorizes the State Fire Prevention and Building Code Council to periodically amend the provisions of the New York State Uniform Fire Prevention and Building Code (“Uniform Code”).

Executive Law section 378(1) directs that the Uniform Code shall address standards for safety and sanitary conditions.

2. LEGISLATIVE OBJECTIVES.

Executive Law section 371(2) provides that it is the public policy of the State of New York to provide for the promulgation of a uniform code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the state from hazards of fire and inadequate building construction.

The Legislative objectives sought to be achieved by this rule are to provide uniform requirements for the installation of gas piping made of corrugated stainless steel tubing (CSST); to reconcile inconsistencies among the installation instructions provided by CSST manufacturers; to require extra protective measures in all cases where CSST is used; to prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping; to require the use of shield plates whenever gas piping made of any material other than black or galvanized steel is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1.75 inches from the nearest edge of such member; and to provide a basic minimum level of protection to all people of the state from the hazard of fires caused by punctures of gas piping made of material other than black or galvanized steel.

3. NEEDS AND BENEFITS.

CSST piping can be punctured by nails and other fasteners driven into walls containing concealed CSST piping. It can also be punctured when arcing of electrical currents from a nearby lightning strike burns a hole in the wall of the piping.

CSST manufacturers have provided installation instructions that require (1) the use of shield plates and other means of protecting CSST from the puncturing caused by nails and other fasteners driven into walls containing concealed CSST piping and (2) electrical bonding of CSST piping to protect against the puncturing caused by the lightning-induced current and arcing phenomena. However, the manufacturers’ installation instructions are not uniformly consistent with each other.

The Uniform Code currently requires that materials such as CSST piping be installed in accordance with manufacturer’s instructions. The purposes of this rule are to provide uniform requirements for the installation of CSST piping and, by doing so, to reconcile inconsistencies among the installation instructions provided by CSST manufacturers; to require certain extra protective measures which are called for by some, but not all, of such installation instructions; to prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping and which are prohibited by some, but not all, of such installation instructions; and to provide a basic minimum level of protection to all people of the state from the hazard of fires caused by the puncturing of CSST gas piping.

Gas piping made of other materials other than black or galvanized steel (such as copper, brass or aluminum-alloy pipe or copper, brass or aluminum tubing) can also be punctured by nails and other fasteners driven into walls containing concealed gas piping. The Uniform Code currently requires the use of shield plates to protect non-steel gas piping when it is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1 inch from the nearest edge of such member. This rule will require the use of shield plates whenever non-steel gas piping is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1.75 inches from the nearest edge of such member, which will decrease the instances where a nail or other fastener driven into an unprotected member, and penetrating that member by more than 1 inch, will puncture concealed non-steel gas piping.

The report or study that served as a basis for this rule is Corrugated Stainless Steel Tubing for Gas Distribution in Buildings and Concerns Over Lightning Strikes, dated August 2007, published by The NAHB Research Center, Inc., which is summarized as follows: “In the case of proximity lightning, a high voltage can be induced in metallic piping that may cause arcing; and for CSST there is concern that arcing may cause perforation of the CSST wall and therefore cause gas leakage. The fuel gas code, electric code, plumbing code, product standards, and manufacturer installation instructions have different methods of providing dissipation of electrical energy through techniques called bonding and grounding. Since the codes, product standards, and installation requirements are not harmonized, builders and contractors may find differing and possibly conflicting requirements. Generally, the local jurisdiction having authority and code official will rely upon the manufacturer’s installation recommendations in lieu of other requirements.”

This report was used to determine the necessity for and benefits derived from this rule in the following manner: CSST manufacturers have always required that CSST systems be bonded to the electrical system in accordance with the local codes. Based on this report, the bonding methods prescribed within such local codes are minimum requirements and are designed to protect the consumer against ground-faults from the premise wiring system only. The intent of this rule is to harmonize the requirements for bonding of metallic piping while providing protection from proximity lightning strikes.

4. COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule.

The Department of State (“DOS”) estimates the cost of the bonding jumper required in a typical installation to be between \$200 and \$300; the cost of the clamp and 4-inch section of schedule 40 pipe (including the cost of installing the clamp and pipe section) to be \$31; the cost of purchasing and installing the shield plates required in a typical installation to be between \$15.50 and \$77.50; and the cost of the protective metal pipe required in a typical installation to be \$135.50. Based on the foregoing, DOS estimates that the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe in a typical installation will be between \$382 and \$544. However:

(1) The installation instructions provided by each of the major CSST manufacturers already require the use of the same bonding jumper required by this rule; accordingly, with regard to the use of bonding jumper, this rule adds no new requirement and no new cost.

(2) Attaching the bonding jumper to the brass hexagonal nut on the CSST fitting is “unlisted,” and this method of clamping could decrease the effectiveness of the electrical bonding of the CSST gas piping, which would reduce the protection that the bonding requirement is intended to provide. In this context, the extra cost (\$31) is negligible.

(3) The failure to use shield plates and/or protective metal pipe in all situations specified in this rule could increase the chances that non-steel gas piping will be punctured by nails driven into walls that contain concealed gas piping. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

(4) CSST piping, even if not physically constrained, can be punctured by a nail driven by a power nail gun. In light of the almost universal use of power nail guns and other similar devices on construction sites, it is the opinion of DOS that failure to require the use of shield plates and/or protective metal pipe to protect CSST gas piping running parallel to, and within 1.75 inches of, a stud, joist, rafter or other member will increase the chances that such CSST gas piping will be punctured. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

There are no costs to DOS for the implementation of this rule. DOS is not required to develop any additional regulations or develop any programs to implement this rule.

There are no costs to the State of New York or to local governments for the implementation of this rule, except as follows:

First, if the State or any local government constructs a building equipped with non-steel gas piping, or installs any such piping in an existing building, the State or such local government, as the case may be, will be required to bond the piping (in the case of CSST piping) and protect the piping from physical damage in the manner required by this rule.

Second, the authorities responsible for administering and enforcing the Uniform Code will have additional items to verify in the process of reviewing building permit applications, conducting construction inspections, and (where applicable) conducting periodic fire safety and property maintenance inspections. It is anticipated that verifying compliance with this rule will add only a negligible amount to the already existing duties associated with reviewing permit applications and conducting inspections.

5. PAPERWORK.

This rule will not impose any new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

6. LOCAL GOVERNMENT MANDATES.

This rule will not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows:

First, any county, city, town, village, school district, fire district or other special district that constructs a building equipped with n-n-steel gas piping, or installs any such piping in an existing building, will be required to comply with the electrical bonding and physical protection provisions amended and/or added by this rule.

Second, most cities, towns and villages, and some counties, are responsible for administering and enforcing the Uniform Code; since this

rule amends provisions in the Uniform Code, the aforementioned local governments will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code. It is anticipated that verifying compliance with this rule will add only a negligible amount to the already existing duties associated with reviewing permit applications and conducting inspections.

The rule does not otherwise impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

7. DUPLICATION.

The rule does not duplicate any existing Federal or State requirement.

8. ALTERNATIVES.

The alternative of making no change to the Uniform Code provisions relating to electrical bonding and physical protection of gas piping was considered. However, it was determined that the existing provisions of the Uniform Code could be construed as permitting inadequate electrical bonding and inadequate physical shielding of gas piping, particularly in the case of gas piping made of CSST. Therefore, this alternative was rejected.

The alternative of banning the use of CSST was considered. However, the weight of expert opinion appears to be that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that the principal concerns about the use of CSST piping (viz., puncturing of CSST gas piping caused by electrical arcing induced by lightning strikes in the vicinity of buildings equipped with CSST or by nails or other fasteners driven into walls containing concealed CSST gas piping) could be adequately addressed by the increased electrical bonding and physical protection requirements to be added by this rule. Therefore, this alternative was rejected.

9. FEDERAL STANDARDS.

There are no standards of the Federal Government which address the subject matter of the rule.

10. COMPLIANCE SCHEDULE.

Regulated persons will be able to achieve compliance with this rule in the normal course of operations, either as part of the installation or construction of a new building or the renovation of an existing building.

Summary of Regulatory Flexibility Analysis

1. EFFECT OF RULE:

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions add new requirements for installation and electrical bonding of gas piping made from corrugated stainless steel tubing (CSST), and for protection of gas piping made of any material other than black or galvanized steel against physical damage. Specifically, in a case where gas piping made of CSST is installed, this rule will (1) require the electrical bonding of CSST gas piping to the building's grounding electrode system; (2) prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping, such as using the brass hexagonal nut on the CSST fitting as the attachment point for the bonding jumper; and (3) require certain protective measures, such as using strike plates or other protective coverings, in certain situations where CSST gas piping runs parallel to, a stud, joist, rafter or similar member. Additionally, in a case where gas piping made of CSST or any other material other than black or galvanized steel is installed, this rule will require the use of strike plates in situations where the gas piping passes through a stud, joist, rafter or similar member and is within 1.75 inches of the edge of such member (the Uniform Code currently requires the use of strike plates only where the non-steel gas piping is located within 1 inch of the edge of the member). Any small business or local government that constructs a building equipped with gas piping made of CSST (or any other material other than black or galvanized steel), or that installs any such gas piping in an existing building, will be affected by this rule. Small businesses that manufacture, sell or install gas piping, bonding jumpers, bonding clamps, shield plates, and other related equipment may also be affected by this rule.

Since this rule amends provisions in the Uniform Code, each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The Department of State (DOS) estimates that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

2. COMPLIANCE REQUIREMENTS:

No reporting or recordkeeping requirements are imposed upon regulated parties by the rule. Small businesses and local governments subject to the rule will be required to install gas piping in accordance with the rule's provisions. In most cases, the local government responsible for administering and enforcing the Uniform Code will be required to consider the requirements of this rule when reviewing plans and inspecting work.

3. PROFESSIONAL SERVICES:

No professional services will be required to comply with the rule.

4. COMPLIANCE COSTS:

When gas piping made of CSST is installed, this rule will require the use of a bonding jumper, a bonding clamp, and shield plates and/or protective metal pipe. DOS estimates the costs in a typical installation to be:

(1) approximately 30 to 50 feet of bonding jumper, at \$6.00 per foot: \$200 to \$300.

(2) clamp and 4-inch section of schedule 40 pipe (including the cost of installing the clamp and pipe section): \$31.

(3) 1 to 5 shield plates, at a cost (including the cost of installation) of \$15.50 per shield plate: \$15.50 and \$77.50.

(4) approximately 10 linear feet of protective metal pipe (schedule 40 steel or iron pipe), at a cost (including the cost of installation) of \$13.55 per linear foot: \$135.50.

Based on the foregoing, DOS estimates that in the case of a typical installation of gas piping made of CSST, the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe required by this rule will be between \$200 and \$530. However:

(1) The installation instructions provided by each of the major CSST manufacturers already require the use of the same bonding jumper required by this rule; accordingly, with regard to the use of bonding jumper, this rule adds no new requirement and no new cost.

(2) The installation instructions provided by two of the four major CSST manufacturers permit attaching the bonding jumper to the brass hexagonal nut on the CSST fitting, and do not require the clamp and 4-inch section of schedule 40 pipe required by this rule. In the case of installation of CSST piping made by either of the two manufacturers whose installation instructions permit attaching the bonding jumper to the brass hexagonal nut, this rule may be viewed as adding a new requirement (use of the clamp and 4-inch section of schedule 40 pipe) and as adding an additional cost (estimated to be \$31). However, attaching the bonding jumper to the brass hexagonal nut on the CSST fitting is not "listed" and, in the opinion of DOS, this method of clamping could decrease the effectiveness of the electrical bonding of the CSST gas piping which, in turn, could reduce the protection that the bonding requirement is intended to provide. In this context, the extra cost (\$31) is viewed as negligible.

(3) The installation instructions provided by each of the four major CSST manufacturers already require the use of shield plates and/or protective metal pipe in places where CSST piping passes through holes or notches in wood studs, joists or rafters. However, the installation instructions provided by three of the four major manufacturers do not require the use of shield plates and/or protective metal pipe in all situations specified in this rule. In the case of installation of CSST piping made by any of the three manufacturers whose installation instructions do not require the use of shield plates and/or protective metal pipe in all situations specified in this rule, this rule may be viewed as adding a new requirement (the use of shield plates or protective metal pipe in situations where neither method of protection would have been required by the manufacturer's installation instructions) and as adding an additional cost (the cost of installing the additional shield plates or protective metal pipe). Additionally, where gas piping made of CSST or copper, brass or aluminum tubing is installed, this rule will require the use of shield plates where such piping is within 1.75 inches, rather than 1 inch, of the edge of a stud, rafter, joist or other member. However, in the opinion of DOS, the failure to use shield plates and/or protective metal pipe in all situations specified in this rule will increase the chances that gas piping made of CSST, or copper, brass or aluminum tubing will be punctured by nails driven into walls that contain concealed gas piping. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

Any variation in costs of complying with this rule for different types or sizes of small businesses and local governments will be attributable to the size and configuration of the gas piping installed by such entities, and not to nature or type or sizes of such small businesses and local governments. To the extent that larger businesses and larger local governments may tend to own larger buildings, or more than one building, the total costs of compliance would be higher for larger businesses and larger local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

It is economically and technologically feasible for regulated parties to comply with the rule. This rule imposes no substantial capital expenditures. No new technology need be developed for compliance with this rule.

6. MINIMIZING ADVERSE IMPACT:

The economic impact of this rule on small businesses and local governments will be no greater than the economic impact of this rule on other regulated parties, and the ability of small businesses and local governments to comply with the requirements of this rule should be no less than the ability of other regulated parties to comply. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

DOS notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by DOS and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry.

In addition, DOS held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. Participants in the conference calls included members of the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee, representatives of CSST manufacturers, and local government representatives. DOS also participated in several meetings on this topic, including a meeting with local fire official and electrical inspectors held on June 26, 2007 in East Meadow, NY, and a meeting with code officials, plumbing inspectors, a utility company representative and a CSST manufacturer representative held on January 21, 2009 in Hicksville, NY. Finally, speakers provided comments at the Code Council meetings where earlier versions of this rule were considered for adoption by the Code Council as emergency rules. Comments received in the conference calls, meetings, and Code Council meetings described above include:

(1) A comment suggesting that all metal gas piping, and not just CSST piping, should be subject to the bonding requirements. This alternative has not been incorporated into the proposed rule, because the data available at this time do not support the need for more robust bonding of gas piping made of material other than CSST.

(2) A comment suggesting that non-CSST metal piping should be considered to be bonded when it is connected to appliances that are connected to the appliance grounding conductor of the circuit supplying that appliance. This alternative is reflected in the proposed rule. This rule continues the existing rule regarding the circumstances under which non-CSST gas piping is considered to be "bonded."

(3) A comment suggesting changes to the wording of the proposed rule, to clarify its intent. These alternatives have been incorporated, in whole or in substantial part, into the proposed rule.

(4) A comment suggesting that earlier versions of the proposed rule may have confused the concept of bonding with grounding. DOS believes that the current version of the proposed rule eliminates any such confusion.

(5) A comment suggesting that it is inappropriate to attempt to address concerns about lightning damage to CSST by requiring bonding of CSST systems, since that shifts responsibility from CSST manufacturers to electrical inspectors. DOS believes that the weight of expert opinion is that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that given a choice between banning the use of CSST or permitting its use but requiring that it be bonded, the better choice is to permit its use and require that it be bonded. The alternative of banning the use of CSST was considered. However, it was determined that the principal concerns about the use of CSST piping (viz., puncturing of CSST gas piping caused by electrical arcing induced by lightning strikes in the vicinity of buildings equipped with CSST or by nails or other fasteners driven into walls containing concealed CSST gas piping) could be adequately addressed by the increased electrical bonding and physical protection requirements to be added by this rule. Therefore, this alternative was rejected.

DOS has posted the full text of this rule on its website.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions add new requirements for installation and electrical bonding of gas piping made from corrugated stainless steel tubing (CSST), and for protection of gas piping made of CSST, or any material other than black or galvanized steel, against physical damage. Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements.

The rule will add new requirements relating to the installation and electrical bonding of gas piping made of CSST, and new requirements relating to protection of gas piping made of CSST (or any other material other than black or galvanized steel) against physical damage. No professional services are likely to be needed in a rural area in order to comply with such requirements.

3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule.

When gas piping made of CSST is installed, this rule will require the use of a bonding jumper, a bonding clamp, and shield plates and/or protective metal pipe.

The Department of State estimates the cost of the bonding jumper required by this rule in most situations (6 AWG copper wire) to be \$6.00 per foot. In a typical installation, approximately 30 to 50 feet of bonding jumper may be required. Therefore, the Department of State estimates that the cost of bonding jumper required in a typical installation to be between \$200 and \$300.

The Department of State estimates the cost of the clamp and 4" section of schedule 40 pipe, when required by this rule, (including the cost of installing the clamp and pipe section) to be \$31.

The Department of State estimates the cost of the shield plates required by this rule (including the cost of installing the shield plates) to be \$15.50 per shield plate. In a typical installation, approximately 1 to 5 shield plates may be required. Therefore, the Department of State estimates that the cost of shield plates required in a typical installation to be between \$15.50 and \$77.50.

The Department of State estimates the cost of the protective metal pipe (schedule 40 steel or iron pipe) required in certain instances by this rule (including the cost of installation) to be \$13.55 per linear foot. In a typical installation, approximately 10 linear feet of protective metal pipe may be required. Therefore, the Department of State estimates that the cost of protective metal pipe required in a typical installation to be \$130.55.

Based on the foregoing, the Department of State estimates that in the case of a typical installation of gas piping made of CSST, the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe required by this rule will be between \$200 and \$530.

It should be noted, however, that in most cases, the bonding jumper, clamp, and shield plates required by this rule are also required by the CSST manufacturer's installation instructions. Accordingly, these materials would be required even in the absence of this rule, and this rule has little actual impact on the cost of installing CSST piping.

Additionally, in the case of installation of gas piping made of copper, brass or aluminum tubing, this rule may be viewed as adding a new requirement (using shield plates where such tubing is within 1.75 inches, rather than 1 inch, of the edge of a stud, rafter, joist or other member) and as adding an additional cost (the cost of installing shield plates in areas where the tubing is more than 1 inch, but less than 1.75 inches, from the edge of a stud, rafter, joist or other member). As noted above, the Department of State estimates the cost of shield plates required in a typical installation to be between \$15.50 and \$77.50.

Compliance with this rule will occur when gas piping or is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule. Any variation in costs of complying with this rule for different types of public and private entities in rural areas will be attributable to the size and configuration of the gas piping installed by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

4. MINIMIZING ADVERSE IMPACT.

The economic impact of this rule in rural areas will be no greater than the economic impact of this rule in non rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry in all areas of the State, including rural areas.

In addition, the Department of State held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. Participants in the conference calls included members of the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee, representatives of CSST manufacturers, and local government representatives. The Department of State also participated in several meetings on this topic, including a meeting with local fire official and electrical inspectors held on June 26, 2007 in East Meadow, NY, and a meeting with code officials, plumbing inspectors, a utility company representative and a CSST manufacturer representative held on January 21, 2009 in Hicksville, NY. Finally, speakers provided comments at the Code Council meetings where earlier versions of this rule were considered for adoption by the Code Council as emergency rules. Comments received in the conference calls, meetings, and Code Council meetings described above included:

(1) a suggestion that all metal gas piping, and not just CSST piping, should be subject to the bonding requirements, since all metal piping could be susceptible to damage from nearby lightning strikes (this suggestion has been incorporated into the proposed rule);

(2) a suggestion that non-CSST metal piping should be considered to be bonded when it is connected to appliances that are connected to the appliance grounding conductor of the circuit supplying that appliance (this suggestion was not incorporated into the proposed rule);

(3) suggested changes to the wording of the proposed rule, to clarify its intent (these suggestions have been incorporated, in whole or in substantial part, into the proposed rule);

(4) a suggestion that earlier versions of the proposed rule may have confused the concept of bonding with grounding (the Department of State believes that the current version of the proposed rule eliminates any such confusion); and

(5) a suggestion that it is inappropriate to attempt to address concerns about lightning damage to CSST by requiring bonding of CSST systems, since that shifts responsibility from CSST manufacturers to electrical inspectors (the Department of State believes that the weight of expert opinion is that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that given a choice between banning the use of CSST or permitting its use but requiring that it be bonded, the better choice is to permit its use and require that it be bonded).

The Department of State has posted the full text of this rule on the Department's website.

Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

The rule adds new paragraphs (9), (10), (11), and (12) to subdivision (d) of section 1220.1, amends subdivision (b) of section 1224.1, and adds new paragraphs (2), (3), and (4) to subdivision (c) to section 1224.1 of Title 19 NYCRR. New paragraphs (9), (10), (11), and (12) of subdivision (d) of section 1220.1 and new paragraphs (2), (3), and (4) of subdivision (c) of section 1224.1 will clarify requirements in the Uniform Fire Prevention and Building Code ("Uniform Code") relating to electrical bonding of gas piping and protection of gas piping against physical damage, and will add new requirements relating to installation of gas piping made of corrugated stainless steel tubing (CSST).

It is anticipated that builders will be able to comply with the electrical bonding and physical protection requirements, as clarified and added by this rule, by using equipment that is currently available and techniques that are currently known. It is also anticipated that any increase costs of compliance resulting from this rule will be negligible. Therefore, it is anticipated that this rule will have no significant adverse impact on jobs or employment opportunities in the building industry, or in businesses that manufacture or install gas piping, other metal piping, or CSST piping.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Efficient Utilization of Energy Expended in the Construction, Use and Occupancy of Buildings

I.D. No. DOS-02-10-00011-P

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

Proposed Action: Amendment of section 1240.1 of Title 19 NYCRR.

Statutory authority: Energy Law, section 11-103(2)

Subject: Efficient utilization of energy expended in the construction, use and occupancy of buildings.

Purpose: To amend the State Energy Conservation Construction Code to assure that it effectuates the purposes of Energy Law Art 11.

Public hearing(s) will be held at: 10:00 a.m., March 1, 2010 at Department of State, 99 Washington Ave., Conference Rm. 505, Albany, NY; 10:00 a.m., March 2, 2010 at Perry B. Duryea Jr. State Office Building, 250 Veterans Memorial Hwy., Classrooms 2 and 3, Hauppauge, NY; 1:00 p.m., March 3, 2010 at Hughes State Office Building, 333 E. Washington St., Main Hearing Rm. - 1st Fl., Syracuse, NY; 10:00 a.m., March 4, 2010 at Amherst Town Hall, 5583 Main St., Council Chambers-Upper Level, Williamsville, NY.

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

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

Text of proposed rule: Subdivision (a) of section 1240.1 of Title 19 NYCRR is amended to read as follows:

(a) [2007] 2010 ECCCNY. Requirements for the design of building envelopes for adequate thermal resistance and low air leakage and for the design and selection of mechanical, electrical, service water heating and illumination systems and equipment which enables effective use of energy in new building construction are set forth in a publication entitled Energy Conservation Construction Code of New York State, publication date: [August 2007] January 2010, published by the International Code Council, Inc. Copies of said publication (hereinafter referred to as the [2007] 2010 ECCCNY) may be obtained from the publisher at the following address: International Code Council, Inc. 500 New Jersey Avenue, NW, 6th Floor Washington, D.C. 20001

Said publication is available for public inspection and copying at:

New York State, Department of State
Codes Division
99 Washington Avenue
Albany, NY 12231-0001

Paragraph (1) of subdivision (b) of section 1240.1 of Title 19 NYCRR is amended to read as follows:

(1) Certain published standards are denoted in the [2007] 2010 ECCCNY as incorporated by reference into 19 NYCRR Part 1240. Such standards are incorporated by reference into this Part 1240. Such standards are identified in the [2007] 2010 ECCCNY, and the names and addresses of the publishers of such standards from which copies of such standards may be obtained are specified in the [2007] 2010 ECCCNY. Such standards are available for public inspection and copying at the office of the New York State Department of State specified in subdivision (a) of this section.

Paragraph (2) of subdivision (b) of section 1240.1 of Title 19 NYCRR is repealed.

(The following is not part of the Text of the proposed rule and is included herein for information only: The Department of State intends to make a copy of the 2010 edition of the Energy Conservation Construction Code of New York State available for viewing on-line. For further information, please see the website of the Department of State's Division of Code Enforcement and Administration at: <http://www.dos.state.ny.us/code/ls-codes.html>.)

Text of proposed rule and any required statements and analyses may be obtained from: Raymond Andrews, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: raymond.andrews@dos.state.ny.us

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

Public comment will be received until: March 15, 2010

Summary of Regulatory Impact Statement

1. STATUTORY AUTHORITY.

Energy Law section 11-103(2) authorizes the State Fire Prevention and Building Code Council (the "Code Council") to promulgate rules and review and amend the State Energy Conservation Construction Code (the "State Energy Code"), provided that the State Energy Code remains cost effective with respect to building construction. The Energy Law provides that the State Energy Code shall be deemed cost effective if the cost of materials and their installation to meet its standards would be equal to or less than the present value of energy savings that could be expected over a ten year period in a building where such materials are required to be installed.

2. LEGISLATIVE OBJECTIVES.

Article 11 of the Energy Law, entitled State Energy Conservation Construction Code Act, was first adopted by the State Legislature in 1978. The Act was subsequently amended by Chapter 516 of the Laws of 1984 and Chapter 292 of the Laws of 1998. Energy Law section 11-101 directs the adoption of a State Energy Code to protect the health, safety and security of the people of the State and to assure a continuing supply of energy for future generations. It provides that the State Energy Code shall mandate that economically reasonable energy conservation techniques be used in the design and construction of all new public and private buildings in New York. Energy Law section 11-101 further states that adoption of the State Energy Code is in furtherance of the policy set forth in subdivision 2 of Energy Law section 3-101. Subdivision 2 states that it shall be the energy policy of New York to encourage conservation of energy in the construction and operation of new commercial, industrial, and residential buildings, and in the rehabilitation of existing structures, through heating, cooling, ventilation, lighting, insulation and design techniques and the use of energy audits and life-cycle costing analyses.

Energy Law section 11-103(a) requires the State Energy Code to be at least equal to the standards specified in Standard 90.1 of the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. (ASHRAE), entitled Energy Conservation in New Building Design (ASHRAE 90-75, now referred to as Standard 90.1), and to the referenced standards upon which the ASHRAE 90.1 is based. In addition, any portion of the State Energy Code which applies to residential construction is required to be at least equivalent to the requirements set forth in the Public Service Commission opinion PSC 76-16 (C), dated May 15th and 16th, 1977, and appendices thereto. Subdivision 1(b) of Energy Law section 11-103, which was added by Chapter 516, L.1984, provides for limitations on the State Energy Code's application to alterations in existing buildings.

Article 11 of the Energy Law also provides the statutory authority for Chapter 11 of the Residential Code of New York State (Residential Code), which regulates the construction and alteration of detached one- and two-family dwellings and multiple single-family dwellings (townhouses), not more than three stories in height with separate means of egress.

In addition, the American Recovery and Reinvestment Act (ARRA) of 2009 requires: "investment in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits" and "to stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases." Under ARRA, significant additional Federal energy grants are available to States that undertake certain energy-related initiatives, including the adoption of a building energy code for residential buildings that meets or exceeds IECC-2009, or achieves equivalent or greater energy savings, and a building energy code for commercial buildings that meets or exceeds ASHRAE 90.1-2007, or achieves equivalent or greater energy savings.

DOS and the Code Council have now determined that it would further the purposes, objectives and standards of Article 11 of the Energy Law to maintain consistency between the State Energy Code and the two codes identified in ARRA (viz., IECC-2009 and ASHRAE 90.1-2007).

The proposed State Energy Code to be adopted by this rule is based on IECC-2009, with certain New York modifications. DOS has determined (1) that the New York modifications made to IECC-2009 are as restrictive as, or more restrictive than, IECC-2009, (2) that the proposed State Energy Code to be adopted by this rule meets or exceeds IECC-2009, or achieves equivalent or greater energy savings, and (3) accordingly, that the proposed State Energy Code to be adopted by this rule satisfies the requirements of ARRA.

ARRA also provides that States receiving the federal energy grants must implement a plan for achieving compliance with the target energy codes in at least 90 percent of new and renovated residential and commercial building space. In furtherance of the objective of implementing such a plan, the State Energy Code, as amended by this rule, will include the following provision: "It is intended that this code shall apply additions, alterations, renovations and repairs to existing residential building in all cases where the 2009 IECC would apply, and that this code shall apply to additions, alterations, renovations and repairs to existing commercial buildings in all cases where ASHRAE 90.1-2007 would apply." However, it should be noted that section 11-103(1)(b) of the Energy Law currently provides that in the case of a renovation of an existing building, the State Energy Code shall apply "only to that portion of a building subsystem or subsystems which is replaced; provided that fifty percent or more of such building subsystem or subsystems is replaced" and that section 11-104(4) of the Energy Law currently provides that the State Energy Code "shall exempt from such uniform standards and requirements property that is listed on the national register of historic places, property that is listed on the state register of historic places or property that is determined to be eligible for listing on the state register by the commissioner of parks, recreation and historic preservation." To accommodate these existing statutory limitations on applicability of the State Energy Code, and the possibility that these existing statutory limitations on applicability may be amended by legislation adopted after this rule is adopted, the applicability provisions of the State Energy Code, as amended by this rule, will be made subject to statutory limitations on applicability, as in effect at the time of adoption of this rule and as thereafter amended from time to time.

3. NEEDS AND BENEFITS.

By reducing energy demands in a cost effective manner, as required by Energy Law section 11-103, the proposed amendment will restrain the growth in the use of energy New York State will benefit from the consequent reductions of dependence on imported fossil fuels and the reduction in associated emissions produced by their use.

4. COSTS.

a. Costs to Regulated Parties for Implementation of and Compliance with the Rule:

The proposed amendments to the Energy Code are expected to provide overall savings far in excess of first costs via fuel savings.

Further information concerning the costs and savings from significant

provisions of the amendments to the State Energy Code are discussed in the Regulatory Impact Statement.

Regulated parties will incur costs if they wish to obtain copies of the State Energy Code, as amended by this rule making. It is expected that the cost of the amended State Energy Code will be approximately \$34.00 for a soft cover copy.

b. Costs to the Agency, the State and Local Governments for the Implementation and Continuation of the Rule:

It is not anticipated that this rule will place any greater burden on local governments with respect to code enforcement and administration than that which currently exists. It is anticipated that Energy Code books will be purchased for municipalities. Furthermore, the Department of State, Division of Code Enforcement and Administration has a program in place for training local government code enforcement officials. The staff of the Division of Code Enforcement and Administration will undergo training to assist local governments. Plans for widespread training and assistance to Municipalities are in formulation by DOS and NYSERDA.

Further information concerning the costs and savings from significant provisions of the amendments to the State Energy Code are discussed in the full Regulatory Impact Statement.

5. LOCAL GOVERNMENT MANDATES.

Adoption of the proposed rule would not change the basic enforcement and administrative structure of the State Energy Code. Energy Law section 11-107 provides that the Energy Code will be principally administered and enforced by the cities, towns and villages of New York.

Local government will require training in the details of this rule. The DOS Code Division has a program in place for training local government code enforcement officials. Plans for widespread training to Municipalities are in formulation by DOS and NYSERDA.

6. PAPERWORK.

This rule will not impose any additional reporting or recordkeeping requirements. No additional paperwork is anticipated.

7. DUPLICATION.

The proposal does not duplicate, nor is it inconsistent with any existing Federal or State Law.

Pursuant to the U.S. Energy Conservation and Production Act, as amended, the DOE has determined that the 2009 edition of the International Energy Conservation Code and ASHRAE/IESNA 90.1-2007 will improve energy efficiency in residential and commercial building construction, respectively. Each state is required to certify to DOE that its energy code mandates that commercial buildings meet the requirements of ASHRAE/IESNA 90.1.

Energy Law section 11-103(3) provides as follows: "Notwithstanding any other provision of law, the New York State Fire Prevention and Building Code Council in accordance with the mandate under this article (Energy Law Article 11) shall have exclusive authority among state agencies to promulgate a construction code incorporating energy conservation features. Any other code, rule or regulation promulgated or enacted by any other state agency, incorporating specific energy conservation requirements for construction of any building, shall be superseded by the code promulgated pursuant to this section." Consequently, any regulations of other State agencies pertaining to energy conservation have been superseded by the adoption of the State Energy Code.

8. ALTERNATIVES.

It is the policy of DOS to modernize and amend the State Energy Code and Chapter 11 of the Residential Code regularly, so as to maintain consistency with national model codes, to keep energy conservation construction practices in New York State consistent with practice nationally, and to incorporate new technical developments in a timely manner. Consequently, the alternative of maintaining existing provisions of the State Energy Code was rejected.

Further information concerning alternatives considered with regard to significant provisions of the new State Energy Code are discussed following Item 9 of the full Regulatory Impact Statement.

9. FEDERAL STANDARDS.

Title III of the Energy Conservation and Production Act (ECPA), establishes a Building Energy Standards Program [42 U.S.C. 6831-6837]. ECPA provides that when the 1992 Model Energy Code, or any successor to that code, is, the Secretary of the DOE must determine, not later than 12 months after the revision, whether the code would improve energy efficiency in residential buildings and must publish notice of the determination in the Federal Register [42 U.S.C. 6833 (a) (5) (A)]. If the Secretary determines that the revision would improve energy efficiency, each state, not later than two years after the date of the publication of the affirmative determination, is required to certify that it has compared its residential building code regarding energy efficiency to the code and made a determination whether it is appropriate to revise its code to meet or exceed the provisions of the successor code [42 U.S.C. 6833(a) (5) (B)].

DOE has issued a determination that the 2009 edition of the International Energy Conservation Code (IECC) and ASHRAE Standard 90.1-

2007 will improve energy efficiency in residential and commercial buildings. Each state is required to certify to DOE that it has reviewed the provisions of its residential building code regarding energy efficiency and make a determination as to whether it is appropriate for the State to revise its building code to meet or exceed the 2009 IECC. States should then inform the DOE about their decision on updating to the 2009 IECC.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

This rule making will amend the State Energy Conservation Construction Code (the "State Energy Code") to make the State Energy Code (1) a building energy code for residential buildings which is based on the 2009 edition of the International Energy Conservation Code (the "2009 IECC"), a model code developed and published by the International Code Council ("ICC"), and (2) a building energy code for commercial buildings which is based on the 2007 edition of ASHRAE-90.1 (the "2007 ASHRAE 90.1"), a standard published by the American Society Of Heating and Refrigeration and Air Conditioning Engineers. The State Energy Code, which is adopted pursuant to Article 11 of the Energy Law, is applicable in all areas of the State. Therefore, all areas of the State will be affected by this amendment.

Small businesses that construct, own, or operate buildings or structures will be required to comply with the State Energy Code, as amended by this rule making. Businesses that provide services to building owners, such as facility managers, design professionals (e.g., architects and engineers), general and specialty contractors (including home builders), and product suppliers, though not directly regulated by this rule, will be impacted by this rule. It is not possible to calculate the exact number of businesses that will be affected by this rule, but the number is likely to be large. For example, as of January 7, 2008, there were 14,517 active registered architects and as of July 2, 2007, there were 24,760 active registered engineers in New York State.

Similarly, all local governments that construct, own, or operate buildings or structures will be required to comply with the State Energy Code, as amended by this rule making. In that respect, all or most of the local governments in this State will be affected by this rule making. However, the impact of this rule making on local governments, in their capacity as building owners and operators, will be essentially identical to the impact of this rule making on all other parties, public or private, that own or operate buildings.

This rule making will have an additional impact on most cities, towns and villages in this State: Energy Law section 11-107 provides that the administration and enforcement of the State Energy Code within any municipality shall be the responsibility of the governmental entity responsible for administration and enforcement of the building construction code or the fire prevention and building construction code applicable within the municipality. Executive Law section 381 provides that every city, town, and village of the State shall administer and enforce the Uniform Fire Prevention and Building Code within their boundaries except in limited specified circumstances. Consequently, most cities, towns and villages in the State are currently responsible for the administration and enforcement of the current State Energy Code within their boundaries, and will remain responsible for administering and enforcing the State Energy Code as amended by this rule making.

2. COMPLIANCE REQUIREMENTS:

Construction documents are currently submitted when a building permit is requested. The energy compliance aspect is part of the construction documents. The State Energy Code, as amended by this rule making, will not change this procedure.

Energy calculations may also currently be requested by code enforcement officers. This will remain under the State Energy Code, as amended by this rule making.

This rule will not change local government's responsibility for administering and enforcing the State Energy Code. These requirements are referenced in Section 11-107 of the Energy Law. The administration and enforcement of the provisions of the State Energy Code within any municipality shall be the responsibility of that governmental entity which is responsible for the administration and enforcement of the provisions of the building code. The code shall be administered and enforced in the manner prescribed by applicable local law or ordinance or the procedures adopted pursuant to section three hundred eighty-one of the executive law for the administration and enforcement of the state uniform fire prevention and building code.

Local governments currently maintain inspection records. This will continue under the State Energy Code, as amended by this rule making.

3. PROFESSIONAL SERVICES:

Regulated parties will continue to rely upon design, construction and energy conservation professionals to properly advise them of the requirements of the State Energy Code as amended by this rule making. Building owners typically rely on professionals for their expertise in building and energy conservation regulations.

4. COMPLIANCE COSTS:

It is anticipated that regulated parties will recognize energy conservation savings as a result of this rule making.

Section 11-103 of the Energy Law authorizes the State Fire Prevention and Building Code Council to review and amend the State Energy Code through rules and regulations, provided that the code remains cost effective with respect to building construction in the State. Energy Law section 11-102(2) provides that "the (State Energy Code) shall be deemed cost effective if the cost of materials and their installation to meet its standards would be equal to or less than the present value of energy savings that could be expected over a ten year period in the building in which such materials are installed."

There will be no initial costs incurred by local government for implementation of rule.

Indirectly impacted parties, such as architects, engineers, designers, contractors, and builders, will need to receive training. Initial training costs in the range of \$150 to \$200 per person, based upon a class size of 20 to 25 persons, is anticipated. It is customary for registered design professionals and construction personnel to receive continuing education throughout their careers. Thus, this rule will not place an additional burden on indirectly impacted parties in any greater proportion than which is already incurred by the existing rule. Furthermore, in New York State, architects are required by the Education Law to receive continuing education in order to maintain an active registration to practice.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

This rule will offer regulated parties a broad range of compliance options. The Code provisions are performance based, and thus, will allow regulated parties the opportunity to select the most cost-effective alternative for compliance.

Regulatory change, like technological innovation, is constant in the construction industry. Regulated parties as well as those who provide services to them (i.e. architects, engineers, designers, contractors, and builders) are accustomed to such change. This rule making is expected to encourage innovation in the construction industry, and provide small businesses more opportunity to grow.

Several training resources are available both within and outside the state to assist impacted parties master the proposed new provisions of the State Energy Conservation Construction Code. These include trainers affiliated with the ICC and other specialized training professionals. Other competent entrepreneurs will undoubtedly be encouraged to join the market to meet the demand for this specialized training. The staff of the Division of Code Enforcement and Administration will provide training for local officials to administer and enforce the code.

6. MINIMIZING ADVERSE EFFECTS:

This rule change will impact all types of small businesses.

The Department of State - Division of Code Enforcement and Administration will provide training for the new Energy Code for local government enforcement personnel in the state.

Some training and education to architects and engineers will be provided by the Department of State and NYSEDA. Computer software will continue to be available to assist regulated parties.

In order to assure a continuing supply of energy for future generations and since the health, safety and security of the people of the state are clearly at issue, exemption from coverage by the rule was not considered an option for minimizing the impact on local government and/or small business.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

To assist the State Fire Prevention and Building Code Council in the development of this proposed rule making, a technical subcommittee was established to review the 2006/2007 edition of the International Energy Conservation Construction Code, and to make recommendations for modifications. (The 2006/2007 edition of the International Energy Conservation Construction Code contains many provisions which are identical or substantially similar to those found in the 2009 IECC.) The International Energy Conservation Code technical subcommittee had participants from rural areas. Meetings of the subcommittee were open to the public and public participation was encouraged.

Meetings throughout the rule making process have included regulated parties and code enforcement personnel of local governments throughout New York State. Technical subcommittee meetings were open to the public and agendas and meeting minutes posted on the Department of State website. Proposed New York modifications made by the various Technical Subcommittees were posted on the Department of State website for public inspection. Public hearings will be held after a notice of proposed rulemaking has been published in the State Register in accordance with the provisions of the State Administrative Procedure Act.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule making will amend the State Energy Conservation Construc-

tion Code (the "State Energy Code") to make the State Energy Code (1) a building energy code for residential buildings which is based on the 2009 edition of the International Energy Conservation Code (the "2009 IECC"), a model code developed and published by the International Code Council ("ICC"), and (2) a building energy code for commercial buildings which is based on the 2007 edition of ASHRAE-90.1 (the "2007 ASHRAE 90.1"), a standard published by the American Society Of Heating and Refrigeration and Air Conditioning Engineers. The State Energy Code, which is adopted pursuant to Article 11 of the Energy Law, is applicable in all areas of the State. Therefore, all areas of the State, including all rural areas, will be affected by this rule making.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES.

Construction documents are currently submitted when a building permit is requested. The energy compliance aspect is part of the construction documents. The State Energy Code, as amended by this rule making, will not change this procedure. Energy calculations may also currently be requested by code enforcement officers. This will remain under the amended State Energy Code.

Energy Law section 11-107 provides that the administration and enforcement of the provisions of the State Energy Code within any municipality shall be the responsibility of that governmental entity which is responsible for the administration and enforcement of the provisions of the building construction code or the fire prevention and building construction code applicable within such municipality. Executive Law section 381 provides that every city, town, and village of the State shall administer and enforce the State Uniform Fire Prevention and Building Code (the Uniform Code) within their boundaries except in limited specified circumstances. Consequently, most cities, towns and villages in the State are currently responsible for the administration and enforcement of the current State Energy Code within their boundaries, and will remain responsible for administering and enforcing the State Energy Code as amended by this rule making.

Local governments currently maintain inspection records. This will continue under the State Energy Code as amended by this rule making.

Regulated parties will continue to rely upon design, construction and energy conservation professionals to properly advise them of the requirements of the State Energy Code. Building owners typically rely on professionals for their expertise in building and energy conservation regulations.

3. COSTS.

The proposed rule making is intended to decrease energy use within New York State and increase energy savings to the consumer. The economic impact of the State Energy Code, as amended by this rule making, is expected to be beneficial rather than adverse. In any event, any economic impact associated with this rule making will not affect rural areas in a manner different from the rule's effect upon urban and suburban areas of the state.

4. MINIMIZING ADVERSE IMPACT.

This rule is performance based and requires that uniform standards be met for all areas of the state. It is anticipated that the impact on rural areas will be minimal.

This rule will require compliance and reporting requirements similar to those currently in place.

In order to assure a continuing supply of energy for future generations, and since the health, safety and security of the people of the state are clearly at issue, exemption from coverage by the rule was not considered an option for minimizing the impact on rural areas.

5. RURAL AREA PARTICIPATION.

To assist the State Fire Prevention and Building Code Council in the development of this proposed rule making, a technical subcommittee was established to review the 2006/2007 edition of the International Energy Conservation Construction Code, and to make recommendations for modifications. (The 2006/2007 edition of the International Energy Conservation Construction Code contains many provisions which are identical or substantially similar to those found in the 2009 IECC.) The International Energy Conservation Code technical subcommittee had participants from rural areas. Meetings of the subcommittee were open to the public and public participation was encouraged.

Meetings throughout the rule making process have included regulated parties and code enforcement personnel of local governments throughout New York State. Technical subcommittee meetings were open to the public and agendas and meeting minutes posted on the Department of State website. Proposed New York modifications made by the various Technical Subcommittees were posted on the Department of State website for public inspection. Public hearings will be held after a notice of proposed rulemaking has been published in the State Register in accordance with the provisions of the State Administrative Procedure Act.

Job Impact Statement

The Department of State has determined that it is apparent from the nature and purpose of the proposed rule making that it will not have a substantial

adverse impact on jobs and employment opportunities. The rule making will amend the State Energy Conservation Construction Code (the "State Energy Code") to make the State Energy Code (1) a building energy code for residential buildings which is based on the 2009 edition of the International Energy Conservation Code (the "2009 IECC"), a model code developed and published by the International Code Council ("ICC"), and (2) a building energy code for commercial buildings which is based on the 2007 edition of ASHRAE-90.1 (the "2007 ASHRAE 90.1"), a standard published by the American Society Of Heating and Refrigeration and Air Conditioning Engineers. Both the 2009 IECC and the 2007 ASHRAE 90.1 incorporate more current technology in the area of energy conservation. In addition, as a performance-based, rather than a prescriptive, code, the 2009 IECC provides for alternative methods of achieving code compliance, thereby allowing regulated parties to choose the most cost effective method. As a consequence, the Department of State and the State Fire Prevention and Building Code Council conclude that regulations based upon the 2009 IECC and the 2007 ASHRAE 90.1 will provide a greater incentive for the construction of new buildings and the rehabilitation of existing buildings than exists with the current State Energy Code. Therefore, this amendment will not have a substantial adverse impact on jobs and employment opportunities within New York. In fact, the proposed amendment may result in an increase in employment opportunities for those involved in testing and inspecting buildings for compliance with the building air sealing requirements of the amended State Energy Code.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Standards for the Construction and Maintenance of Buildings and Structures and for Protection from the Hazards of Fire and Inadequate Building Construction

I.D. No. DOS-02-10-00012-P

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

Proposed Action: Repeal of Parts 1220-1228 and addition of new Parts 1220-1228 to Title 19 NYCRR.

Statutory authority: Executive Law, section 377

Subject: Standards for the construction and maintenance of buildings and structures and for protection from the hazards of fire and inadequate building construction.

Purpose: To amend the State Uniform Fire Prevention and Building Code to assure that it effectuates the purposes of Executive Law Art 18.

Public hearing(s) will be held at: 10:00 a.m., March 1, 2010 at Department of State, 99 Washington Ave., Conference Rm. 505, Albany, NY; 10:00 a.m., March 2, 2010 at Perry B. Duryea Jr. State Office Building, 250 Veterans Memorial Hwy., Classrooms 2 and 3, Hauppauge, NY; 1:00 p.m., March 3, 2010 at Hughes State Office Building, 333 E. Washington St., Main Hearing Rm. - 1st Fl., Syracuse, NY; 10:00 a.m., March 4, 2010 at Amherst Town Hall, 5583 Main St., Council Chambers - Upper Level, Williamsville, 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: http://www.dos.state.ny.us/proposed_regs/index.html): Section 377 of the Executive Law directs the State Fire Prevention and Building Code Council (the "Code Council") to review the entire New York State Uniform Fire Prevention and Building Code (the "Uniform Code") from time to time to assure that it effectuates the purposes of the Law, and authorizes the Code Council to amend the Uniform Code from time to time to achieve that end. The rule making would repeal the existing version of the Uniform Code (which is now found in 19 NYCRR Parts 1220 to 1227, inclusive, and in the publications incorporated by reference therein) and replace it with a new version of the Uniform Code, to be contained in new 19 NYCRR Parts 1220 to 1227, inclusive, and the new publications to be incorporated therein by reference.

The new version of the Uniform Code will include eight components: the Residential Code, the Building Code, the Fire Code, the Plumbing Code, the Mechanical Code, the Fuel Gas Code, the Property Maintenance Code, and the Existing Building Code.

The Residential Code addresses one-and two-family dwellings and townhouses not more than three stories in height with a separate means of egress and their accessory structures.

The Building Code establishes life safety construction requirements for assembly, business, educational, factory industrial, high hazard, institutional, mercantile, multi-family residential, storage and utility and miscellaneous buildings.

The Fire Code provides requirements for life safety and property protection from the hazards of fire, explosion or dangerous conditions in new and existing buildings.

The Plumbing Code, Mechanical Code and Fuel Gas Code addresses the erection, installation, alteration, repairs, relocation, replacement, addition to, use or maintenance of plumbing systems, mechanical systems and fuel gas systems.

The Property Maintenance Code provides minimum requirements to safeguard public safety, health and general welfare insofar as they are affected by the occupancy and maintenance of structures and premises.

The Existing Building Code provides minimum requirements to safeguard public safety, health and general welfare insofar as they are affected by the repair, alteration, change of occupancy, addition and relocations of existing buildings.

The full text of the proposed rule is posted at the following website:

http://www.dos.state.ny.us/proposed_regs/index.html

The Department of State intends to make copies of the January 2010 editions of the Residential Code of New York State, Building Code of New York State, Plumbing Code of New York State, Mechanical Code of New York State, Fuel Gas Code of New York State, Fire Code of New York State, Property Maintenance Code of New York State, and Existing Building Code of New York State available for viewing on-line. For further information, please see the website of the Department of State's Division of Code Enforcement and Administration at: <http://www.dos.state.ny.us/code/lc-codes.html>.

Text of proposed rule and any required statements and analyses may be obtained from: Raymond Andrews, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: raymond.andrews@dos.state.ny.us

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

Public comment will be received until: March 15, 2010.

Summary of Regulatory Impact Statement

1. STATUTORY AUTHORITY

Article 18 of the Executive Law, entitled the New York State Uniform Fire Prevention and Building Code Act, establishes the State Fire Prevention and Building Code Council (hereinafter "Code Council") and authorizes such council to formulate a code to be known as the Uniform Fire Prevention and Building Code (hereinafter "Uniform Code"). Executive Law section 377 directs that the Uniform Code shall provide reasonably uniform standards and requirements for construction and construction materials for public and private buildings, including factory manufactured homes, consonant with accepted standards of engineering and fire prevention practices.

Executive Law section 378 provides that the Uniform Code shall address certain specified subjects. The subjects are listed in the full Regulatory Statement.

Subdivision 1 of Executive Law section 377 specifically states that the Code Council may amend particular provisions of the Uniform Code and shall periodically review the entire code to assure that it effectuates the purposes of Article 18 of the Executive Law. This rule making would repeal the existing text of the Uniform Code which is based on the International Code Council's (ICC) 2003 codes, and replace it with new text which is based upon the 2006 International Code, eight individual codes developed and published by the International Code Council (ICC), a national building officials' organization. Although the existing text of the Uniform Code is to be repealed, much of the new code text will essentially be a recodification of current Uniform Code provisions but with appropriate modification to accommodate advances in construction technology.

2. LEGISLATIVE OBJECTIVES

When the State Legislature adopted Article 18 of the Executive Law in 1981, it declared in Subdivision 2 of Executive Law section 371 that it shall be the public policy of the State of New York to provide for promulgation of a Uniform Code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the State from the hazards of fire and inadequate building construction. The Code Council was assigned the task of formulating the Uniform Fire Prevention and Building Code which took effect January 1, 1984. However, in the years following 1984, the Uniform Code did not keep pace with the evolving technology of fire prevention and building construction. Furthermore, as the rest of the nation moved to using a nationally accepted set of model codes, New York continued to maintain the separate identity of its building and fire prevention code until January

of 2003, when it repealed its entire code and replaced it with text based primarily on the 2000 edition of the International Codes.

The Uniform Code adopted in 2003 was based on International Codes, and represented the first major revision of the Uniform Code since its inception in January 1984. The Uniform Code was revised again in 2007. The 2007 revision was based primarily on the 2003 edition of the International Codes. This rule making would revise the Uniform Code once again, and replace the current version of the Uniform Code with a new version based primarily on the 2006 edition of the International Codes. The Code Council has concluded that this rule making would further the purposes, objectives and standards of Article 18.

By repealing the existing text of the Uniform Code and replacing it with an update based primarily upon newer versions of model codes developed and published by the International Code Council (ICC), the Code Council seeks to better effectuate the purposes, objectives, and standards set forth in Article 18 of the Executive Law.

3. NEEDS AND BENEFITS

The purpose of this rule making is to adopt new provisions for the Uniform Fire Prevention and Building Code. This change is necessary if New York State is to remain competitive with the rest of the nation in matters involving building construction while at the same time providing an adequate level of safety to its residents. It is also necessary if New York State wishes to keep pace with evolving technology concerning fire prevention and building construction and to have a building and fire prevention code which is consistent with nationally accepted model codes.

Following Item #3 in the full Regulatory Impact Statement, the Needs and Benefits of significant provisions of the Uniform Code are discussed.

4. COSTS

a. COST TO REGULATED PARTIES FOR THE IMPLEMENTATION OF, AND CONTINUING COMPLIANCE WITH, THE PROPOSED RULE.

Further information concerning the costs of significant provisions of the Uniform Fire Prevention and Building Code are discussed in the full Regulatory Impact Statement. The new provisions of the Uniform Code are expected to reduce some building and development costs and increase others. In general, the costs will not be greatly different from the current codes. This rule reflects performance based regulatory requirements providing regulated parties more alternatives to protect the occupants and users of buildings while at the same time fulfilling programmatic space needs with the most cost effective solution.

b. COSTS TO THE AGENCY, THE STATE AND LOCAL GOVERNMENTS FOR THE IMPLEMENTATION OF, AND CONTINUED ADMINISTRATION OF, OF THE RULE.

The Department of State, State agencies that administer and enforce the Uniform Code, State agencies that own or construct buildings, and local governments that administer and enforce the Uniform Code will be required to obtain copies of the new code books. It is anticipated that the set of code books will cost between \$350 and \$450. Smaller agencies and local governments typically require only one set of code books. Larger local governments may require multiple sets. For example, the town of Amherst and city of Syracuse both have approximately twenty-eight sets of code books for their staff. Approximately 4,000 code enforcement officials in 1,600 municipalities will be affected by a new version of the Uniform Code (the City of New York will not be affected by this rule because they use their own building construction code but do use the New York State Energy Conservation Construction Code).

Further information concerning costs and savings of the most significant of the new provisions of the Uniform Code are discussed following Item 3 of the full Regulatory Impact Statement.

5. LOCAL GOVERNMENT MANDATES

This rule making will not impose any program, service, duty or responsibility specifically upon counties, cities, towns, villages, school districts, fire districts or other special districts. If any of these governmental entities were to undertake the construction of a building or structure, however, the construction process would be subject to the provisions of the Uniform Code, as amended by this rule. Similarly, existing buildings and structures owned or under the control of local government entities are potentially subject to maintenance and fire prevention provisions of the Uniform Code, as amended by this rule.

6. PAPERWORK

This rule will not impose any additional reporting or recordkeeping requirements. No additional paperwork is anticipated.

7. DUPLICATION

The New York State Uniform Fire Prevention and Building Code provides standards for the construction and maintenance of buildings and structures and for the protection of buildings and structures and their occupants from the hazards of fire. These are matters for which the federal government does not impose comprehensive requirements. The federal government has addressed the topic of accessible and usable facilities for the physically disabled, however, through adoption of the Americans with

Disabilities Act (ADA) and the Fair Housing Act. The new text proposed for the Uniform Code also requires accessibility to buildings and structures for the physically disabled. Although the existence of federal and state standards may raise issues of overlap or conflict, no such overlap or conflict exists with this proposed rule.

Several State agencies have promulgated regulations which impose requirements upon buildings or structures which house activities which are licensed or regulated by the particular agency. Such regulations may impose an additional layer of regulation upon the construction, maintenance, or use of certain categories of buildings. These other regulations, however, are focused upon activities or occupants regulated or protected by the particular State agency and have been promulgated pursuant to statutory authority other than Article 18 of the Executive Law.

8. ALTERNATIVES

It is the policy of the Department of State to modernize and amend the Uniform Fire Prevention and Building Code, so as to maintain consistency with the national model codes, to keep building practices in New York State consistent with practice nationally, and to incorporate new technical developments in a timely manner. Consequently, the alternative of maintaining existing provisions of the Uniform Code was rejected.

To assist the Code Council, technical subcommittees were established to review the ICC Codes and make recommendations to the Code Council to ensure that the new provisions of the Uniform Code would remain appropriate and addresses developing design and construction issues and needs in New York State.

All subcommittees found it was necessary to recommend changes to the 2006 ICC family of codes. Significant provisions of the proposed new Uniform Fire Prevention and Building Code are discussed with reference to Needs and Benefits, Costs, and Alternatives following Item #10 of this Revised Regulatory Impact Statement.

Numerous hearings and public hearings took place throughout New York State in anticipation of the formal initiation of the rule making process. These meetings are listed in the full Regulatory Impact Statement.

9. FEDERAL STANDARDS

The federal government has adopted the Americans with Disabilities Act (ADA) which requires certain facilities to be accessible and usable by the physically disabled. The new text proposed for the Uniform Code also includes provisions which require buildings and structures to be accessible and usable by the physically disabled. The proposed rule would exceed the minimum standards established by the federal government.

10. COMPLIANCE SCHEDULE

The target date for publishing a notice of adoption for this rule making is mid 2010. It is the intention of the Code Council to establish a transition period to begin with publication of the notice of adoption. During this period, regulated parties will have the option of construction in compliance with either the current code provisions or the newly adopted provisions.

The delay of the effective date of the new Uniform Code provisions until after adoption, and the option of compliance with either the existing or the proposed Code during that period, ensure that regulated parties will be able to achieve compliance with the rule on the date it is adopted.

Regulatory Flexibility Analysis

1. EFFECT OF RULE.

This rule would amend the Uniform Fire Prevention and Building Code ("Uniform Code"). The current version of the Uniform Code, which went into effect on January 1, 2008, is based upon the 2003 editions of certain model codes developed by the International Code Council (ICC). If adopted, this rule would repeal the existing version of the Uniform Code and add a new version of the Uniform Code based upon the 2006 editions of corresponding model codes developed by the ICC.

The Uniform Code is applicable in all areas of the State with the exception of the City of New York where State buildings and structures must conform to the Uniform Code. Therefore, all areas of the State except the City of New York will be affected by this rule making, and the rule has the potential to affect all small businesses.

Small businesses that construct, own, or operate buildings or structures will be required to comply with this rule. Businesses that provide services to building owners, such as facility managers, design professionals (e.g., architects and engineers), general and specialty contractors (including home builders), and product suppliers, though not directly regulated by this rule, will be impacted by this rule. It is not possible to calculate the exact number of businesses that will be affected by this rule, but the number is likely to be large. For example, as of April 1, 2008, there were 14,877 active registered architects and 24,507 active registered engineers in New York State.

This rule making will not impose any duty or responsibility specifically upon local governments except insofar as a particular local government is responsible for the construction or operation of a building which is subject to the provisions of the Uniform Code. In that instance, a local government is in no different situation than that of any building owner or responsible party, public or private. In this respect, adoption of this rule making will affect all cities, towns, and villages of the State.

In addition, Executive Law section 381 provides that every city, town, and village of the State shall administer and enforce the Uniform Fire Prevention and Building Code within its boundaries, except in limited specified circumstances. Consequently, in most instances, the individual cities, towns and villages of the State are responsible for enforcement of the Uniform Code within their boundaries, and will be responsible for enforcing the new Uniform Code provisions proposed for adoption by this rule making.

2. COMPLIANCE REQUIREMENTS.

This rule making will not change local government's responsibility for administering and enforcing the Uniform Code. There will be no change in requirements for local governments concerning reporting, recordkeeping, and other compliance requirements, or professional services.

3. PROFESSIONAL SERVICES.

Regulated parties will continue to rely upon design and construction professionals to advise them of the requirements of the Uniform Code. Building owners typically rely on these design and construction professionals for their expertise in building regulations.

4. COMPLIANCE COSTS.

It is anticipated that regulated parties may realize savings in construction costs as a result of this rule making depending on the project. Indirectly impacted parties, such as architects, engineers, designers, contractors and builders, may incur the cost of the training necessary to familiarize themselves with the new and changed Uniform Code provisions. The Department of State estimates that, given a typical class size of 20 to 25 persons, the training costs will range from \$150 to \$200 per person for each part (i.e. building code, fire code, residential code, etc.) of the Uniform Code. However, it is a customary practice for registered design professionals and construction personnel to receive continuing education throughout their careers. In New York State, architects are required by the Education Law to receive continuing education in order to maintain an active registration to practice the profession. Many designers, however, may choose not to take specific courses on this new code. Others may choose to take the free Department of State training courses on the new code, depending on availability.

Cities, towns, villages and counties that administer and enforce the Uniform Code will be required to provide training in the new and changed provisions of the Uniform Code to their code enforcement personnel. However, code enforcement personnel are already required by existing law (and not by reason of this rule making) to receive 24 hours of in-service training each year, and it is anticipated that the training required to familiarize code enforcement personnel with the new and changed provisions of the Uniform Code to be implemented by this rule will be accomplished within the already required annual in-service training.

Many regulated parties and indirectly impacted parties will be required to purchase an updated set of code books. The Department of State estimates that a full set of new code books (including all eight volumes) will cost between \$350 and \$450.

Cities, towns, villages and counties that administer and enforce the Uniform Code will be required to obtain copies of the new code books. Smaller local governments typically require only one set of code books. Larger local governments may require multiple sets. For example, the town of Amherst and city of Syracuse both have approximately twenty eight sets of code books for their staff. Approximately 4,000 code enforcement officials in 1,600 municipalities will be affected by a new version of the Uniform Code (the City of New York will not be affected by this rule because they use their own building construction code but do use the New York State Energy Conservation Construction Code).

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY.

The new code provisions proposed for adoption by this rule making will continue to provide regulated parties with a broad range of compliance options. These provisions are performance based and therefore provide an opportunity to select the most cost effective alternative for compliance.

Regulatory change, like technological innovation, is constant in the construction industry. Regulated parties as well as those who provide services to them (i.e. architects, engineers, designers, contractors, and builders) are accustomed to such change. This rule making is expected to encourage innovation in the construction industry and to provide increased opportunities for small businesses to grow.

As this adoption consists primarily of an updating of the International Codes (with some New York modifications), the changes resulting from this adoption will be significantly less than the changes that occurred in 2002, when the New York State Uniform Fire Prevention and Building Code that existed since 1984 was entirely replaced, for the first time, with the International Code-based codes. This is also the second update from the initial change to model-based codes. Regulated parties are now more familiar with these codes making a transition to a new update much easier.

Several training resources are available for impacted parties to learn the proposed new provisions of the Uniform Code. These include trainers af-

filiated with the ICC and other specialized training professionals. Other entrepreneurs will undoubtedly be encouraged to join the market to meet the demand for this specialized training. The staff of the Division of Code Enforcement and Administration of the Department of State will provide training for local government enforcement personnel. Again, when class size permits, courses are open to design professionals and contractors. From time to time, Department of State also offers specific courses to these groups relating to new code requirements.

6. MINIMIZING ADVERSE IMPACT.

The Department of State, Division of Code Enforcement and Administration will provide training on the new provisions of the Uniform Code for all local government code enforcement personnel in the State. Executive Law section 381 provides that local governments which do not wish to enforce the Uniform Code may relinquish that responsibility to the county in which they are located. In turn, a county may relinquish enforcement responsibility to the Department of State. As the health, safety, and security of the people of the State are at issue, exemption from coverage by the rule was not considered an option for minimizing the impact on local governments and/or small businesses.

One critical factor in adopting the ICC codes by New York State in 2002 was the fact that these codes are updated on a three-year cycle to keep up with industry practice and technical and life-safety evolution.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION.

To assist in the development of this proposed rule making, the Code Council established technical subcommittees to review the individual ICC codes and to make recommendations for modifications that would insure that the new text of the Uniform Code would address current design and construction issues and needs.

The subcommittees consisted of a broad range of members including building and fire code officials representing local governments and individuals representing various interests such as architecture, engineering, construction, small business, historic preservation as well as the needs of the disabled. The members comprising these committees also represented a diversity of geographic locations throughout New York State. Their knowledge and expertise in their particular fields and their varied backgrounds provided a broad range of perspectives. Meetings throughout the rule making process have included regulated parties and code enforcement personnel of local governments throughout New York State. Technical subcommittee meetings were open to the public and agendas and meeting minutes posted on the DOS website. Proposed New York modifications made by the various Technical Subcommittees were posted on the DOS website for public inspection. Code update presentations by DOS staff were made to various groups:

- December 8, 2006 - Developer Council Meeting of the New York State Builders Association meeting and conference, New York City
- January 28-30, 2007 - Niagara Frontier Building Officials Annual Education Conference, Amherst, New York
- March 15, 2007 - New York Codes Coalition, Albany, New York
- March 19, 2007 - Finger Lakes Building Officials Education Conference, Rochester, New York
- May 3, 2007 - Empire State Codes Summit, Bolton Landing, New York
- May 10, 2007 - Washington County Board of Supervisors, Fort Edward, New York
- June 15, 2007 - Capital District, New York State Building Officials Education Conference, Schenectady, New York
- August 23, 2007 - AIA code update to 140 design proposals, Albany, New York
- September 11, 2007 - New York State Building Officials Annual Education Conference, Poughkeepsie, New York
- October 6, 2007 - Concrete Masonry Institute, Syracuse, New York
- October 10, 2007 - Plumbing Contractors and Code Enforcement Officials, Islip, New York
- October 29, 2007 - New York State Health Department, Latham, New York
- November 6, 2007 - Professional Engineers, Syracuse, New York
- June 6, 2008 - Professional Engineer Society Annual State Convention, Syracuse, New York

Public hearings will be held after a notice of proposed rule making has been published in the State Register in accordance with the provisions of the State Administrative Procedure Act.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

This rule making will repeal the existing text of the State Uniform Fire Prevention and Building Code (the "Uniform Code"), which is based on the 2003 edition of eight model codes developed by the International Code Council (ICC), and replace it with text based on the 2006 editions of corresponding model codes developed by the ICC. The Uniform Code is applicable in all areas of the State with the exception of the City of New

York. Therefore, all rural areas of the State will be affected by this rule making.

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

Regulated parties will continue to rely upon design and construction professionals to advise them of the requirements of the Uniform Code. Building owners typically rely on these design and construction professionals for their expertise in building regulations.

3. COSTS:

The new provisions of the Uniform Code are expected to reduce some building and development costs and increase others. In general, the costs will not be greatly different from the current codes. The new provisions respond to updates in the building and fire safety industry. The costs are expected to occur in rural communities as well as urban and suburban areas of the State.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is performance based and requires uniform standards for building construction and fire prevention in all areas of the State with the exception of New York City, where State buildings and structures must conform to the Uniform Code. The proposed rule will require compliance and reporting requirements similar to those required by the current provisions of the Uniform Code. As the health, safety and welfare of the people of New York are at issue, exemption from coverage by the rule was not considered an option for minimizing impact on rural areas.

5. RURAL AREA PARTICIPATION:

The technical subcommittees involved in the development of this rule making included members from rural areas. Meetings of the subcommittees were open to the public and public participation was encouraged. Technical subcommittee meetings were open to the public and agendas and meeting minutes were posted on the Department of State website. Proposed New York State modifications made by the various Technical Subcommittees were posted on the DOS website for public inspection. Code update presentations by Department of State staff were made to various groups:

- December 8, 2006 B Developer Council Meeting of the New York State Builders Association meeting and conference, New York City
- January 28-30, 2007 B Niagara Frontier Building Officials Annual Education Conference, Amherst, New York
- March 15, 2007 B New York Codes Coalition, Albany, New York
- March 19, 2007 B Finger Lakes Building Officials Education Conference, Rochester, New York
- May 3, 2007 B Empire State Codes Summit, Bolton Landing, New York
- May 10, 2007 B Washington County Board of Supervisors, Fort Edward, New York
- June 15, 2007 B Capital District, New York State Building Officials Education Conference, Schenectady, New York
- August 23, 2007 B AIA code update to 140 design proposals, Albany, New York
- September 11, 2007 B New York State Building Officials Annual Education Conference, Poughkeepsie, New York
- October 6, 2007 B Concrete Masonry Institute, Syracuse, New York
- October 10, 2007 B Plumbing Contractors and Code Enforcement Officials, Islip, New York
- October 29, 2007 B New York State Health Department, Latham, New York
- November 6, 2007 B Professional Engineers, Syracuse, New York
- June 6, 2008 B Professional Engineer Society Annual State Convention, Syracuse, New York

Public hearings will be held after a notice of proposed rule making has been published in the State Register in accordance with the provisions of the State Administrative Procedure Act.

Job Impact Statement

The Department of State has determined that it is apparent from the nature and purpose of the proposed rule making that it will not have a substantial adverse impact on jobs and employment opportunities.

This rule making will repeal the current version of the State Uniform Fire Prevention and Building Code (the AUniform Code@), and add a new version of the Uniform Code. The current version of the Uniform Code, which is found in 19 NYCRR Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226 and 1227 and the publications incorporated by reference therein, went into effect January 1, 2008 and is based on the 2003 editions of the International Residential Code, International Building Code, International Plumbing Code, International Mechanical Code, International Fuel Gas Code, International Fire Code, International Property Maintenance Code, and International Existing Building Code, as developed by the International Code Council (ICC). The new version of the Uniform Code will be based on the 2006 editions of corresponding international codes as developed by the ICC.

The International Codes incorporate the most current technology in the

areas of building construction and fire prevention. To maintain this currency, the International Codes are updated every three years. As a consequence, the Department of State concludes that this update, which is based upon the newer (2006) versions of the International Codes, will provide a greater incentive to construction of new buildings and rehabilitation of existing buildings than exists with the current Uniform Code. Therefore, this rule making will not have a substantial adverse impact on jobs and employment opportunities within New York.

Workers' Compensation Board

EMERGENCY RULE MAKING

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

I.D. No. WCB-02-10-00001-E

Filing No. 1446

Filing Date: 2009-12-23

Effective Date: 2009-12-23

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 13 and 13-o

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

Specific reasons underlying the finding of necessity: This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claimants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and there reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

Subject: Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

Purpose: To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable

to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payer.

Section 440.3 provides that a carrier or self-insured employer may designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances under which an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets for that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjust-

ments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 22, 2010.

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

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to voluntarily decide to designate a pharmacy or pharmacy network and require claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. All regulated parties will incur some cost to purchase the Red Book by Thomson Media. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days as required by statute. This section describes how carriers and self-insured employers which decide to require the use of a designated network will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation with other forms. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies

will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement the savings afforded to carriers and self-insured employers will be substantially the same for local governments. If a local government decides to mandate the use of a designated network it will incur some costs from providing the required notice.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to use the Red Book by Thomson Media to determine the average wholesale price (AWP) in order to reimburse pharmacies, pharmacy benefit managers and third-party payers. In addition, self-insured local governments must file objections to prescription drug bills if they object to any such bills. This process is required by WCL § 13(i)(1)-(2). This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures

necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small businesses and local governments by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement and a single source for the AWP. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements:

Self-insured municipal employers and self-insured non-municipal employers will be required to use the most current version of the Red Book published by Thomson Media to determine the average wholesale price of a prescription. In addition they are required by statute to file objections to prescription drug bills within a forty five day time period if they object to bills; otherwise they will be liable to pay the bills if the objection is not timely filed. If the carrier or self-insured employer decides to require the use of a pharmacy network, notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. The regulated parties will need to purchase the Red Book from Thomson Media, which is available in a book format from multiple sellers for approximately \$55.00 and can be purchased in an electronic format directly from Thomson. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that chooses to utilize a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is the source for average whole sale prices and it can be obtained for approximately \$55.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as

average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to use the most current version of the Red Book published by Thomson Media to determine the average wholesale price of a prescription. They will also need to file objections to prescription drug bills within a forty five day time period or they will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. The regulated parties will need to purchase the Red Book from Thomson Media, which is available in a book format from multiple sellers for approximately \$55.00 and can be purchased in an electronic format directly from Thomson. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government from imposition of new fee schedules and payment procedures. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or

durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements. By choosing one source for the AWP disputes about the correct AWP are greatly reduced.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.