

# RULE MAKING ACTIVITIES

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

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

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

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## Office of Alcoholism and Substance Abuse Services

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### EMERGENCY RULE MAKING

#### Administration of “Other Approved Agents” Such as Buprenorphine and the Ability to Also Prescribe Buprenorphine to Treat Addicts

**I.D. No.** ASA-01-10-00002-E

**Filing No.** 1383

**Filing Date:** 2009-12-18

**Effective Date:** 2009-12-18

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

**Action taken:** Amendment of Part 828 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07(b), (e), 19.21(b), 19.40, 32.01, 32.05(b) and 32.07(a), (b)

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

**Specific reasons underlying the finding of necessity:** The proper administration, prescription and availability of buprenorphine along with the ability to administer any other approved agents to treat opioid addiction are necessary to ensure that those persons suffering from addiction can get the most advanced and most appropriate treatment for their disease.

**Subject:** Administration of “other approved agents” such as Buprenorphine and the ability to also prescribe Buprenorphine to treat addicts.

**Purpose:** To ensure that all persons will have equal access to the appropriate “approved agent” to treat their opioid addiction.

**Text of emergency rule:** § 828.1 Definitions.

(a) Methadone program means a substance abuse program using methadone *or other approved agents*, and offering a range of treatment protocols and services for the rehabilitation of persons dependent on opium, morphine, heroin or any derivative or synthetic drug of that group.

(1) Methadone maintenance means a treatment *protocol* using methadone or any of its derivatives, *or other approved agents*, administered, *and for purposes of prescribing Buprenorphine*, over a period of time to relieve withdrawal symptoms, reduce craving and permit normal functioning so that, in combination with rehabilitative services, patients can develop productive life styles.

(i) Methadone to abstinence means a treatment *protocol* using methadone, *or other approved agents*, administered, *and for purposes of prescribing Buprenorphine*, for a period exceeding 21 days, as part of a planned course of treatment involving reduction in dosage to the point of abstinence followed by drug-free treatment.

(ii) Methadone maintenance aftercare means a planned course of treatment for methadone, *or other approved agents* maintenance patients, directed toward the achievement of abstinence and, through the aid of supportive counseling, the continuance of a drug-free life style.

(2) Methadone detoxification means a treatment *protocol* using methadone, or any of its derivatives, *or other approved agents*, administered, *and for purposes of prescribing Buprenorphine*, in decreasing doses over a limited period of time for the purpose of detoxification from opiates.

(b) Methadone clinic means a single location at which a methadone program provides methadone, *or other approved agent* and rehabilitative services to patients.

**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 17, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Deborah Egel, OASAS, 1450 Western Ave., Albany, NY 12203, (518) 457-2312, email: DeborahEgel@oasas.state.ny.us

#### Regulatory Impact Statement

Part 828: Requirements for the operation of chemotherapy substance abuse programs will be amended to revise the definitions of methadone to include other approved agents to be administered or prescribed instead of, or in addition to, methadone.

##### 1. Statutory authority

Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services (“the Commissioner”) to ensure that persons who abuse or are dependent on alcohol and/or substances and their families are provided with care and treatment which is effective and of high quality.

Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

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

Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue a single operating certificate for the provision of chemical dependence services.

Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32.

Section 32.07(a) of the Mental Hygiene Law gives the Commissioner the power to adopt regulations to effectuate the provisions and purposes of Article 32.

Section 32.09 of the Mental Hygiene Law gives the Commissioner the authority to issue operating certificates to providers of chemical dependence services.

## 2. Legislative objectives

Chapter 558 of the Laws of 1999 requires the promulgation of rules and regulations to regulate and ensure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, and those who are at risk of becoming chemical abusers. The amendment of Part 828 will allow methadone clinics to dispense, administer or prescribe buprenorphine to clients of the clinic as an alternative to methadone, thereby reducing the number of persons dependent on street drugs or illegally obtained prescription opioids.

## 3. Needs and benefits

The use of additional agents to treat opioid addiction will decrease the number of addicted persons using street drugs such as heroin or illegally obtained prescription opioids. The need for additional and varied treatment methodologies to treat opioid addiction is apparent, and the benefit to the service to be able to offer choices to their patients is that they may be able to keep more people on a "maintenance" program than if they have only one option.

## 4. Costs:

## a. Costs to regulated parties.

There may be a change in the reporting requirements or the documentation requirements which may have a fiscal impact on regulated parties.

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

The state and local impact of the amendment of 828 will be minimal if at all. There is a difference between the reimbursement rates for methadone and buprenorphine. The weekly rates for buprenorphine are between \$170.78 and \$259.78, depending on the dose, and for methadone the weekly reimbursement rate is \$136.05. Therefore, it may cost the state, federal or local governments more money to provide buprenorphine. However, the number of persons receiving buprenorphine may not rise because the dispensing or prescribing of this approved agent is completely voluntary.

## 5. Local government mandates

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

## 6. Paperwork

The proposed rule does not impose additional paperwork requirements.

## 7. Duplication

The proposed rule does not duplicate of other state or federal regulations.

## 8. Alternatives

The only alternative to the proposed regulation is to continue to use only methadone in clinics regulated under Part 828.

## 9. Federal standards

The Centers for Substance Abuse Treatment (CSAT) federal regulations preserve States' authority to regulate Opioid Treatment Programs (OTP) and states are authorized to promulgate appropriate additional regulations. Federal regulations for dispensing or prescribing Buprenorphine in opioid treatment programs are more restrictive than minimal federal regulations for dispensing for physician based practices. In support of reducing opioid dependence, it is demonstrated that there are numerous benefits, including improved retention in treatment for patients, making OTP's more attractive to new patients, and giving patients more control over their treatment experience. In addition, patient quality of life may be improved through the reduction in daily attendance at an OTP clinic.

## 10. Compliance schedule

It is expected that full implementation of these Part 828 amendments shall become effective immediately.

**Regulatory Flexibility Analysis**

**Effect of the Rule:** The proposed emergency revision to Part 828 will impact certified and/or funded providers. It is expected that the emergency revision will require providers to amend some of their policies and procedures in their treatment modality. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking medication assisted treatment for opioid addiction due to more treatment options. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts may see a nominal increase in cost due to the weekly buprenorphine rate but this should be offset by better patient outcomes.

**Compliance Requirements:** It is expected that there will be no significant changes in compliance requirements. Since providers are already required to provide utilization review, it is not expected that this regulation, will have additional costs.

**Professional Services:** While it is expected that programs may require additional professional services when they choose to administer buprenorphine during the induction phase this will last only a few days. In addition, providers will now have the option of prescribing instead of administering.

**Compliance Costs:** Some programs may need to formally train staff to understand the pharmacology of buprenorphine.

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

**Minimizing Adverse Impact:** This is an emergency adoption, no public comment is required, however, the subject matter experts within our agency, including the Medical Director, have concluded that, in line with federal standards, the addition of buprenorphine through emergency regulation is necessary for the health, safety and welfare of the public. Any impact this rule may have on small businesses and the administration of State or local governments and agencies will either be a positive or the nominal costs associated with compliance are small and will be absorbed into the already existing economic structure. The positive impact for our patients and our health care system outweigh any potential minimal costs.

**Small Business and Local Government Participation:** This is an emergency adoption, therefore even though there have been informal conversations with persons affected by this regulation and the subject matter experts within the agency have decided that this emergency is necessary to protect the health, safety and welfare of the public, a formal outreach to the business community was not performed. Small businesses should not be affected by this change, and local governments running methadone clinics are not required to provide buprenorphine.

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

The implementation of emergency regulation Part 828 will have a minimal impact on jobs in that it may require some additional staffing, particularly during induction, if OTP's choose to administer Buprenorphine. This regulation will not adversely impact jobs outside of the agency.

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## Banking Department

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### EMERGENCY RULE MAKING

#### Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

**I.D. No.** BNK-01-10-00003-E

**Filing No.** 1384

**Filing Date:** 2009-12-17

**Effective Date:** 2009-12-22

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

**Action taken:** Addition of Part 418 and Supervisory Procedures MB109 and 110 to Title 3 NYCRR.

**Statutory authority:** Banking Law, art. 12-D

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

**Specific reasons underlying the finding of necessity:** Chapter 472 of the Laws of 2008, which requires mortgage loan servicers to be registered with the Superintendent, goes into effect on July 1, 2009. These regulations implement the registration requirement. It is therefore necessary that servicers be informed of the details of the registration process sufficiently far in advance to permit applications for registrations to be prepared, submitted and reviewed by the effective date.

**Subject:** Registration and financial responsibility requirements for mortgage loan servicers.

**Purpose:** To implement provisions of Subprime Lending Reform Law (ch. 472, L.2008).

**Substance of emergency rule:** Section 418.1 summarizes the scope and application of Part 418. It notes that Sections 418.2 to 418.11 implement

the requirement in Article 12-D of the Banking Law that certain mortgage loan servicers ("servicers") be registered with the Superintendent of Banks, while Sections 418.12 to 418.15 set forth financial responsibility requirements that are applicable to both registered and exempt servicers. [Section 418.16 sets forth the transitional rules.]

Section 418.2 implements the provisions in Section 590(2)(b-1) of the Banking Law requiring registration of servicers and exempting mortgage bankers, mortgage brokers, and most banking and insurance companies, as well as their employees. The Superintendent is authorized to approve other exemptions.

Section 418.3 contains a number of definitions of terms that are used in Part 418, including "Mortgage loan", "Mortgage loan servicer" and "Exempted Person".

Section 418.4 describes the requirements for applying for registration as a servicer.

Section 418.5 describes the requirements for a servicer applying to open a branch office.

Section 418.6 covers the fees for application for registration as a servicer, including processing fees for applications and fingerprint processing fees.

Section 418.7 sets forth the findings that the Superintendent must make to register a servicer and the procedures to be followed upon approval of an application for registration. It also sets forth the grounds upon which the Superintendent may refuse to register an applicant and the procedure for giving notice of a denial.

Section 418.8 defines what constitutes a "change of control" of a servicer, sets forth the requirements for prior approval of a change of control, the application procedure for such approval and the standards for approval. The section also requires servicers to notify the Superintendent of changes in their directors or executive officers.

Section 418.9 sets forth the grounds for revocation of a servicer registration and authorizes the Superintendent, for good cause or where there is substantial risk of public harm, to suspend a registration for 90 days without a hearing. The section also provides for termination of a servicer registration upon non-payment of the required assessment. The Superintendent can also suspend a registration when a servicer fails to file a required report, when its surety bond is cancelled, or when it is the subject of a bankruptcy filing. If the registrant does not cure the deficiencies in 90 days, its registration terminates. The section further provides that in all other cases, suspension or revocation of a registration requires notice and a hearing.

The section also covers the power of the Superintendent to extend a suspension and the right of a registrant to surrender its registration, as well as the effect of revocation, termination, suspension or surrender of a registration on the obligations of the registrant. It provides that registrations will remain in effect until surrendered, revoked, terminated or suspended.

Section 418.10 describes the power of the Superintendent to impose fines and penalties on registered servicers.

Section 418.11 sets forth the requirement that applicants demonstrate five years of servicing experience as well as suitable character and fitness.

Section 418.12 covers the financial responsibility and other requirements that apply to applicants for servicer registration and to registered servicers. The financial responsibility requirements include (1) a required net worth of at least 1% of total loans serviced, with a minimum of \$250,000; (2) a ratio of net worth to total New York mortgage loans serviced of at least 5%; (3) a corporate surety bond of at least \$250,000 and a Fidelity and E&O bond in an amount that is based on the volume of New York mortgage loans serviced, with a minimum of \$300,000.

The Superintendent is empowered to waive, reduce or modify the financial responsibility requirements for certain servicers who service not more than 12 mortgage loans or an aggregate amount of loans not exceeding \$5,000,000, whichever is less.

Section 418.13 applies similar financial responsibility requirements to "Exempted Persons" who are not subject to the requirement to register as servicers. Such persons include mortgage bankers, mortgage brokers and most banking institutions and insurance companies.

Section 418.14 exempts from the otherwise applicable net worth and Fidelity and E&O bond requirements entities subject to comparable requirements in connection with servicing mortgage loans for federal instrumentalities, and exempts from the otherwise applicable net worth requirement entities that are subject to the capital requirements applicable to insured depository institutions and that are considered at least adequately capitalized.

Section 418.15 covers the utilization of the proceeds of a servicer's surety bond in the event of the surrender or termination of its registration.

Section 418.16 provides a transitional period for registration of mortgage loan servicers. A servicer doing business in this state on June 30, 2009 which files an application for MLS registration by July 31, 2009 will be deemed in compliance with the registration requirement until notified that its application has been denied.

Section 109.1 defines a number of terms that are used in the Supervisory Procedure.

Section 109.2 contains a general description of the process for registering as a mortgage loan servicer ("servicer") and contains information about where the necessary forms and instructions may be found.

Section 109.3 lists the documents to be included in an application for servicer registration, including the required fees. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent can require additional information or an in person conference, and that the applicant can submit additional pertinent information.

Section 109.4 describes the information and documents required to be submitted as part of an application for registration as a servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, and other documents, such as fingerprint cards and background reports.

Section 110.1 defines a number of terms that are used in the Supervisory Procedure.

Section 110.2 contains a general description of the process for applying for approval of a change of control of a mortgage loan servicer ("servicer") and contains information about where the necessary forms and instructions may be found.

Section 110.3 lists the documents to be included in an application for approval of a change of control of a servicer, including the required fees. It sets forth the time within which the Superintendent must approve or disapprove an application. It also sets forth the execution and attestation requirements for applications. The section makes clear that the Superintendent can require additional information or an in person conference, and that the applicant can submit additional pertinent information. Last, the section lists the types of changes in a servicer's operations resulting from a change of control which should be notified to the Banking Department.

Section 110.4 describes the information and documents required to be submitted as part of an application for approval of a change of control of servicer. This includes various items of information about the applicant and its regulatory history, if any, information demonstrating continuing compliance with the applicable financial responsibility and experience requirements, information about the organizational structure of the applicant, a description of the acquisition and other documents regarding the applicant, such as fingerprint cards and background reports.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires March 16, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, Secretary of the Banking Board, New York State Banking Department, One State Street, New York, NY 10004-1417, (212) 709-1658, email: sam.abram@banking.state.ny.us

#### **Regulatory Impact Statement**

##### 1. Statutory authority.

Article 12-D of the Banking Law, as amended by the Legislature in the Subprime Lending Reform Law (Ch. 472, Laws of 2008, hereinafter, the "Subprime Law"), creates a framework for the regulation of mortgage loan servicers. Mortgage loan servicers (MLS) are individuals or entities which engage in the business of servicing mortgage loans for residential real property located in New York. That legislation also authorizes the adoption of regulations implementing its provisions. (See, e.g., Banking Law Sections 590(2) (b-1) and 595-b.)

Subsection (1) of Section 590 of the Banking Law was amended by the Subprime Law to add the definitions of "mortgage loan servicer" and "servicing mortgage loans". (Section 590(1)(h) and Section 590(1)(i).)

A new paragraph (b-1) was added to Subdivision (2) of Section 590 of the Banking Law. This new paragraph prohibits a person or entity from engaging in the business of servicing mortgage loans without first being registered with the Superintendent. The registration requirements do not apply to an "exempt organization," licensed mortgage banker or registered mortgage broker.

This new paragraph also authorizes the Superintendent to refuse to register an MLS on the same grounds as he or she may refuse to register a mortgage broker under Banking Law Section 592-a(2).

Subsection (3) of Section 590 was amended by the Subprime Law to clarify the power of the banking board to promulgate rules and regulations and to extend the rulemaking authority regarding regulations for the protection of consumers and regulations to define improper or fraudulent business practices to cover mortgage loan servicers, as well as mortgage bankers, mortgage brokers and exempt organizations.

New Paragraph (d) was added to Subsection (5) of Section 590 by the Subprime Law and requires mortgage loan servicers to engage in the servicing business in conformity with the Banking Law, such rules and regulations as may be promulgated by the Banking Board or prescribed by the Superintendent, and all applicable federal laws, rules and regulations.

New Subsection (1) of Section 595-b was added by the Subprime Law and requires the Superintendent to promulgate regulations and policies governing the grounds to impose a fine or penalty with respect to the activities of a mortgage loan servicer. Also, the Subprime Law amends the penalty provision of Subdivision (1) of Section 598 to apply to mortgage loan servicers as well as to other entities.

New Subdivision (2) of Section 595-b was added by the Subprime Law and authorizes the Superintendent to prescribe regulations relating to disclosure to borrowers of interest rate resets, requirements for providing payoff statements, and governing the timing of crediting of payments made by the borrower.

Section 596 was amended by the Subprime Law to extend the Superintendent's examination authority over licensees and registrants to cover mortgage loan servicers. The provisions of Banking Law Section 36(10) making examination reports confidential are also extended to cover mortgage loan servicers.

Similarly, the books and records requirements in Section 597 covering licensees, registrants and exempt organizations were amended by the Subprime Law to cover servicers and a provision was added authorizing the Superintendent to require that servicers file annual reports or other regular or special reports.

The power of the Superintendent to require regulated entities to appear and explain apparent violations of law and regulations was extended by the Subprime Law to cover mortgage loan servicers (Subdivision (1) of Section 39), as was the power to order the discontinuance of unauthorized or unsafe practices (Subdivision (2) of Section 39) and to order that accounts be kept in a prescribed manner (Subdivision (5) of Section 39).

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent's power to impose monetary penalties for violations of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

The fee amounts for MLS registration applications and for MLS branch applications are established in accordance with Banking Law Section 18-a.

#### 2. Legislative objectives.

The Subprime Bill is intended to address various problems related to residential mortgage loans in this State. The Subprime Law reflects the view of the Legislature that consumers would be better protected by the supervision of mortgage loan servicing. Even though mortgage loan servicers perform a central function in the mortgage industry, there has heretofore been no general regulation of servicers by the state or the Federal government.

The Subprime Law requires that entities be registered with the Superintendent in order to engage in the business of servicing mortgage loans in this state. The new law further requires mortgage loan servicers to engage in the business of servicing mortgage loans in conformity with the rules and regulations promulgated by the Banking Board and the Superintendent.

The mortgage servicing statute has two main components: (i) the first component addresses the registration requirement for persons engaged in the business of servicing mortgage loans; and (ii) the second authorizes the Banking Board and the superintendent to promulgate appropriate rules and regulations for the regulation of servicers in this state.

The regulations implement the first component of the mortgage servicing statute - the registration of mortgage servicers. (See Sections 418.4 to 418.7.) In doing so, the rule utilizes the authority provided to the Superintendent to set standards for the registration of such entities. For example, the rule requires that a potential loan servicer would have to provide, under Sections 418.10 and 418.11 to 418.14 of the proposed regulations, evidence of their character and fitness to engage in the servicing business and demonstrate to the Superintendent their financial responsibility. The rule also utilizes the authority provided by the Legislature to revoke, suspend or otherwise terminate a registration or to fine or penalize a registered mortgage loan servicer.

Consistent with this requirement, the rule authorizes the Superintendent to refuse to register an applicant if he/she shall find that the applicant lacks the requisite character and fitness, or any person who is a director, officer, partner, agent, employee, substantial stockholder of the applicant has been convicted of certain felonies. These are the same standards as are applicable to mortgage bankers and mortgage brokers in New York. (See Section 418.7.)

Further, in carrying out the Legislature's mandate to regulate the mortgage servicing business, Section 418.8 sets out certain application requirements for prior approval of a change in control of a registered mortgage loan servicer and notification requirements for changes in the entity's executive officers and directors. Collectively, these various provisions implement the intent of the Legislature to register and supervise mortgage loan servicers.

#### 3. Needs and benefits.

Governor Paterson reported in early 2008 that there were more than 52,000 foreclosure actions filed in 2007, or approximately 1,000 per week.

That number increased in 2008, averaging approximately 1,100 per week in the first quarter. This is a crisis and the problems that have affected so many have been found to affect not only the origination of residential mortgage loans, but also their servicing and foreclosure. The Subprime Law adopted a multifaceted approach to the problem. It affected a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

Currently, the Department regulates the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also may act as agents for owners of mortgages in negotiations relating to modifications. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

Further, unlike in the case of a mortgage broker or a mortgage lender, borrowers cannot "shop around" for loan servicers, and generally have no input in deciding what company services their loans. The absence of the ability to select a servicer obviously raises concerns over the character and viability of these entities given the central part of they play in the mortgage industry. There also is evidence that some servicers may have provided poor customer service. Specific examples of these activities include: pyramiding late fees; misapplying escrow payments; imposing illegal prepayment penalties; not providing timely and clear information to borrowers; and erroneously force-placing insurance when borrowers already have insurance. While establishing minimum standards for the business conduct of servicers will be the subject of another regulation currently being developed by the Department, Section 418.2 makes it clear that persons exempted by from the registration requirement must notify the Department that they are servicing loans and must otherwise comply with the regulations.

As noted above, the proposed regulation relates to the first component of the mortgage servicing statute - the registration of mortgage loan servicers. It is intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers.

Further, consumers in this state will also benefit under these proposed regulations because in the event there is an allegation that a mortgage servicer is involved in wrongdoing and the Superintendent finds that there is good cause, or that there is a substantial risk of public harm, he or she can suspend such mortgage servicer for 90 days without a hearing. And in other cases, he or she can suspend or revoke such mortgage servicer's registration after notice and a hearing. Also, the requirement that servicers meet minimum financial standards and have performance and other bonds will act to ensure that consumers are protected.

As noted above, the MLS regulations are being divided into two parts in order to facilitate meeting the statutory requirement that all MLSs be registered by July 1, 2009. The Department will separately propose regulations dealing with business conduct and consumer protection requirements for MLSs.

All Exempt Organizations, mortgage bankers and mortgage brokers that perform mortgage loan servicing with respect to New York mortgages must notify the Superintendent that they do so, and will be required to comply with the conduct of business and consumer protection rules applicable to MLSs.

#### 4. Costs.

The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The amount of the application fee for MLS registration and for an MLS branch application is \$3,000.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System are set by that body. MLSs will also incur administrative costs associated with preparing applications for registration.

The ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, and, through the timely response to consumers' inquiries, should assist in decreasing the number of foreclosures in this state.

The regulations will not result in any fiscal implications to the State. The Banking Department is funded by the regulated financial services industry. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out this regulatory responsibility.

#### 5. Local government mandates.

None.

#### 6. Paperwork.

An application process is being established for potential mortgage loan servicers to apply for registration electronically through the National Mortgage Licensing System and Registry (NMLSR) - a national system, which currently facilitates the application process for mortgage brokers, bankers and loan originators.

Therefore, the application process would be virtually paperless; however, a limited number of documents, including fingerprints where necessary, would have to be submitted to the Department in paper form.

The specific procedures that are to be followed in order to apply for registration as a mortgage loan servicer are detailed in Supervisory Procedure MB 109.

#### 7. Duplication.

The proposed regulation does not duplicate, overlap or conflict with any other regulations.

Currently, the mortgage servicing industry is required to meet specific financial net worth requirements and to maintain certain surety bonds in order to service mortgage loans for federal instrumentalities. Those requirements have been considered and in drafting these proposed regulations an exemption was created under Section 418.13, from the otherwise applicable net worth and Fidelity and E&O bond requirements, for entities subject to comparable requirements in connection with servicing mortgage loans for federal instrumentalities, and entities that are subject to the capital requirements applicable to insured depository institutions and are considered adequately capitalized.

#### 8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to register mortgage loan servicers while at the same time avoiding overly complex and restrictive rules that would have imposed unnecessary burdens on the industry. The Department is not aware of any alternative that is available to the instant regulations. The Department also has been cognizant of the possible burdens of this regulation, and it has accordingly concluded that an exemption from the registration requirement for persons or entities that are involved in a de minimis amount of servicing would address the intent of the statute without imposing undue burdens those persons or entities.

The procedure for suspending servicers that violate certain financial responsibility or customer protection requirements, which provides a 90-day period for corrective action, during which there can be an investigation and hearing on the existence of other violations, provides flexibility to the process of enforcing compliance with the statutory requirements.

#### 9. Federal standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies. However, although not a registration process, in order for any mortgage loan servicer to service loans on behalf of certain federal instrumentalities such servicers have to demonstrate that they have specific amounts of net worth and have in place Fidelity and E&O bonds.

These regulations exceed those minimum standards, in that, a mortgage loan servicer will now have to demonstrate character and general fitness in order to be registered as a mortgage loan servicer. In light of the important role of a servicer - collecting consumers' money and acting as agents for mortgagees in foreclosure transactions - the Department believes that it is imperative that servicers be required to meet this heightened standard.

#### 10. Compliance schedule.

The emergency regulations will become effective on September 23, 2009. Substantially similar emergency regulations have been in effect since July 1, 2009.

The Department expects to approve or deny applications within 90 days of the Department's receipt (through NMLSR) of a completed application.

A transitional period is provided for mortgage loan servicers which were doing business in this state on June 30, 2009 and which filed an application for registration by July 31, 2009. Such servicers will be deemed in compliance with the registration requirement until notified by the Superintendent that their application has been denied.

### **Regulatory Flexibility Analysis**

#### 1. Effect of the Rule:

The emergency rule will not have any impact on local governments. It is estimated that there are approximately 120 mortgage loan servicers in the state which are not mortgage bankers, mortgage brokers or exempt organizations, and which are therefore required to register under the Subprime Lending Reform Law (Ch. 472, Laws of 2008) (the "Subprime Law"). Of these, it is estimated that a very few of the remaining entities will be deemed to be small businesses.

#### 2. Compliance Requirements:

The provisions of the Subprime Law relating to mortgage loan servicers has two main components: it requires the registration by the Banking Department of servicers who are not mortgage bankers, mortgage brokers or exempt organizations (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the

effective administration of the provisions of the Subprime Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Subprime Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. The emergency MLS Registration Regulations here adopted implement that statutory requirement by providing a procedure whereby MLSs can apply to be registered and standards and procedures for the Department to approve or deny such applications. The emergency regulations also set forth financial responsibility standards applicable to applicants for MLS registration, registered MLSs and servicers which are exempted from the registration requirement.

Additionally, the regulations set forth standards and procedures for Department action on applications for approval of change of control of an MLS. Finally, the emergency regulations set forth standards and procedures for, suspension, revocation, expiration, termination and surrender of MLS registrations, as well as for the imposition of fines and penalties on MLSs.

#### 3. Professional Services:

None.

#### 4. Compliance Costs:

Applicants for mortgage loan servicer registration will incur administrative costs associated with preparing applications for registration. Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations. Registration fees of \$3000, plus fees for fingerprint processing and participation in the National Mortgage Licensing System and Registry (NMLS) will be required of non-exempt servicers.

#### 5. Economic and Technological Feasibility:

The emergency rule-making should impose no adverse economic or technological burden on mortgage loan servicers who are small businesses. The NMLS is now available. This technology will benefit registrants by saving time and paperwork in submitting applications, and will assist the Department by enabling immediate tracking, monitoring and searching of registration information; thereby protecting consumers.

#### 6. Minimizing Adverse Impacts:

The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLS, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

As noted above, most servicers are not small businesses. Of the remaining servicers which are small businesses subject to the registration requirements of the regulation, a number are expected to be exempt from most of the financial responsibility requirements because they service mortgages for FNMA, GNMA, VA or other federal instrumentalities and comply with net worth and E&O bond requirements of those entities.

As regards servicers that are small businesses and not otherwise exempted, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

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

Industry representatives have participated in outreach programs during the month of April. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

### **Rural Area Flexibility Analysis**

Types and Estimated Numbers. The New York State Banking Department anticipates that approximately 120 mortgage loan servicers may apply to become registered in 2009. It is expected that a very few of these entities will be operating in rural areas of New York State and would be impacted by the emergency regulation.

Compliance Requirements. Mortgage loan servicers in rural areas which are not mortgage bankers, mortgage brokers or exempt organizations must be registered with the Superintendent to engage in the business of mortgage loan servicing. An application process will be established requiring a MLS to apply for registration electronically and to submit additional background information and fingerprints to the Mortgage Banking Division of the Banking Department.

MLSs are required to meet certain financial responsibility requirements based on their level of business. The regulations authorize the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of MLSs which service not more than 12 mortgage loans or more than \$5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Su-

perintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden which those requirements might otherwise impose on entities operating in rural areas.

**Costs.** The mortgage business will experience some increased costs as a result of the fees associated with MLS registration. The application fee for MLS registration will be \$3,000. The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry ("NMLSR") are set by that body. Applicants for mortgage loan servicer registration will also incur administrative costs associated with preparing applications for registration.

Applicants, registered MLSs and mortgage loan servicers exempted from the registration requirement may incur costs in complying with the financial responsibility regulations.

**Minimizing Adverse Impacts.** The regulations minimize the costs and burdens of the registration process by utilizing the internet-based NMLSR, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses an on-line application form for servicer registration. A common form will be accepted by New York and the other participating states.

Of the servicers which operate in rural areas, it is believed that most are mortgage bankers, mortgage brokers or exempt organizations. Of the remainder, a number are expected to be exempt from most of the financial responsibility requirements because they service mortgages for FNMA, GNMA, FHLMC, VA or other federal instrumentalities and comply with net worth and E&O bond requirements of those entities.

As regards servicers that operate in rural areas and are not otherwise exempted, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

**Rural Area Participation.** Industry representatives have participated in outreach programs during the month of April. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

#### **Job Impact Statement**

Article 12-D of the Banking Law, as amended by the Subprime Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. This emergency regulation sets forth the application, exemption and approval procedures for registration as a Mortgage Loan servicer (MLS), as well as financial responsibility requirements for applicants, registrants and exempted persons. The regulation also establishes requirements with respect to changes of officers, directors and/or control of MLSs and provisions with respect to suspension, revocation, termination, expiration and surrender of MLS registrations.

The requirement to comply with the emergency regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. Many of the larger entities engaged in the mortgage loan servicing business are already subject to oversight by the Banking Department and exempt from the new registration requirement. Many of the remaining servicers, while subject to the registration requirement, already service mortgages for FNMA, GNMA or VA and are thus expected to be exempt from the financial responsibility requirements in the regulation. Additionally, the regulations give the Superintendent the authority to reduce, waive or modify the financial responsibility requirements for entities that do a de minimis amount of servicing.

The registration process itself should not have an adverse effect on employment. The regulations require the use of the internet-based National Mortgage Licensing System and Registry, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for servicer registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory registration requirement rather than the provisions of the emergency regulations.

## EMERGENCY RULE MAKING

### License, Financial Responsibility, Education and Test Requirements for Mortgage Loan Originators

**I.D. No.** BNK-01-10-00006-E

**Filing No.** 1391

**Filing Date:** 2009-12-18

**Effective Date:** 2009-12-18

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

**Action taken:** Amendment of Part 420 and Supervisory Procedure MB 107; and repeal of Supervisory Procedure MB 108 of Title 3 NYCRR.

**Statutory authority:** Banking Law, arts. 12-D and 12-E

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

**Specific reasons underlying the finding of necessity:** Article 12-E of the Banking Law provides for the regulation of mortgage loan originators (MLOs). Article 12-E was recently amended in order to conform the regulation of MLOs in New York to new federal legislation (Title V of the Housing and Economic Recovery Act of 2008, known as the "SAFE Act").

The SAFE Act authorized the federal Department of Housing and Urban Development ("HUD") to assume the regulation of MLOs in any state that did not enact acceptable implementing legislation by August 1, 2009. In response, the Legislature enacted revised Article 12-E.

The emergency rulemaking revises the existing MLO regulations, which implement the prior version of Article 12-E, to conform to the changes in the statute.

Under the new legislation, MLOs, including those already engaged in the business of originating mortgage loans, must complete new education, testing and bonding requirements prior to licensure. Meeting these requirements will likely entail significant time and effort on the part of individuals subject to the revised law and regulations.

Emergency adoption of the revised regulations is necessary in order to afford such individuals sufficient advance notice of the new substantive rules and licensing procedures for MLOs that they will have an adequate opportunity to comply with the new licensing requirements and in order to protect against federal preemption of the regulation of MLOs in New York.

**Subject:** License, financial responsibility, education and test requirements for mortgage loan originators.

**Purpose:** To require that individuals engaging in mortgage loan origination activities must be licensed by the Superintendent of Banks.

**Substance of emergency rule:** Section 420.1 summarizes the scope and application of Part 420. It notes that all individuals unless exempt must be licensed under Article 12-E to engage in mortgage loan originator ("MLO") activities. It also sets forth the basic authority of the Superintendent to revoke or suspend a license.

Section 420.2 sets out the exemptions available to individuals from the general license requirements. Specifically, the proposed regulation includes a number of exemptions, including exemptions for individuals who work for banking institutions as mortgage loan originators and individuals who arrange mortgage loans for family members. Also, individuals who work for mortgage loan servicers and negotiate loan modifications are only subject to the license requirement if required by HUD. The Superintendent is authorized to approve other exemptions for good cause.

Section 420.3 contains a number of definitions of terms that are used in Part 420. These include definitions for "mortgage loan originator," "originating entity," "residential mortgage loan" and "loan processor or underwriter".

Section 420.4 describes the applications procedures for applying for a license as an MLO. It also provides important transitional rules for individuals already engaging in mortgage loan origination activities pursuant to the authority of the prior version of Article 12-E or, in the case of individuals engaged in the origination of manufactured homes, not previously subject to regulation by the Department.

Section 420.5 describes the circumstances in which originating entities may employ or contract with MLOs to engage in mortgage loan origination activities during the application process.

Section 420.6 sets forth the steps the Superintendent must take upon determining to approve or disapprove an application for an MLO license.

Section 420.7 describes the circumstances when an MLO license is inactive and how an MLO may maintain his or her license during such periods.

Section 420.8 sets forth the circumstances when an MLO license may be suspended or terminated. Specifically, the proposed regulation provides that an MLO license shall terminate if the annual license renewal fee has not been paid or the requisite number of continuing education credits have not been taken. The Superintendent also may issue an order suspending an MLO license if the licensee does not file required reports or maintain a bond. The license of an MLO that has been suspended pursuant to this authority shall automatically terminate by operation of law after 90 days unless the licensee has cured all deficiencies within this time period.

Section 420.9 sets forth the process for the annual renewal of an MLO license.

Section 420.10 sets forth the process by which an MLO may surrender his or her license.

Section 420.11 sets forth the pre-licensing educational requirements applicable to applicants seeking an MLO license. Twenty hours of educational courses are required, including courses related to federal law and state law issues.

Section 420.12 sets out the requirement that pre-licensing education and continuing education courses and education course providers must be approved by the Nationwide Mortgage Licensing System and Registry (the "NMLS"). This represents a change from the prior law pursuant to which the Superintendent issued such approvals.

Section 420.13 sets forth the pre-licensing testing requirements for applicants for an MLO license. It also sets out the test location requirements and the minimum passing grades to obtain a license.

Section 420.14 sets out the continuing education requirements applicable to MLOs seeking to renew their licenses.

Section 420.15 sets out the new requirements that MLOs have a surety bonds in place as a condition to being licensed under Article 12-E. It also sets out the minimum amounts of such bonds.

Section 420.16 requires the Superintendent to make reports to the NMLS annually regarding violations by, and enforcement actions against, MLOs. It also provides a mechanism for MLOs to challenge the content of such reports.

Section 420.17 sets forth the process for calculating and collecting fees applicable to MLO licensing.

Sections 420.18 and 420.19 set forth the various duties of MLOs and originating entities. Section 420.20 also describes conduct prohibited for MLOs and loan originators.

Finally, Section 420.21 describes the administrative action and penalties that the Superintendent may take against an MLO for violations of law or regulation.

**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 17, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, New York State Banking Department, One State Street, New York, NY 10004-1417, (212) 709-1658, email: sam.abram@banking.state.ny.us

#### **Regulatory Impact Statement**

##### 1. Statutory authority.

Revised Article 12-E of the Banking Law became effective on July 11, 2009 when Governor Paterson signed into law Chapter 123 of the Laws of 2009. The revised version of Article 12-E is modeled on the provisions of Title V of the federal Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act (the "SAFE Act") pertaining to the regulation of mortgage loan originators. Hence, the licensing and regulation of mortgage loan regulators in New York now closely tracks the federal standard.

Current Part 420 of the Superintendent's Regulations, implementing the prior version of Article 12-E, was adopted on an emergency basis in December of 2008. Since the new version of Article 12-E is already effective, it is necessary to revise Part 420 and adopt the revised version on an emergency basis. An earlier draft of this regulation was published on the Department's website on August 27, 2009. To date, the Department has received two sets of comments, and these have been incorporated into the current version of the revised regulation as appropriate.

New Section 599-a of the Banking Law sets forth the legislative purpose of new Article 12-E. It notes that the new Article is intended to enhance consumer protection, reduce fraud and ensure the public welfare. It also notes that the new regulatory scheme is to be consistent with the SAFE Act.

Section 599-b sets forth the definitions used in the new Article. Defined terms include: mortgage loan originator ("MLO"); mortgage loan processor -- an individual who may not need to be licensed; residential mortgage loans -- loans for which an MLO must be licensed; residential real property; and the Nationwide Mortgage Licensing System and Registry (the "NMLS").

Section 599-c sets forth the requirements for being licensed as an MLO, the effective date for licensing and exemptions from the licensing requirements. Exemptions include ones for individuals who work for insured financial institutions, licensed attorneys who negotiate the terms of a loan for a client as an ancillary to the attorney's representation of the client, and, unless required to be licensed by the U.S. Department of Housing and Urban Development ("HUD"), certain individuals employed by a mortgage loan servicer.

Section 599-d sets out the process for obtaining an MLO license. It also sets out the Department's authority for imposing fees, the authority of the NMLS to collect such fees, the ability of the Superintendent to modify the requirements of Article 12-E in order to ensure compliance with the SAFE Act, the requirement that filings be made electronically and required background information from all applicants.

Section 599-e sets for the findings that the Superintendent must make before a license is issued. These include a finding that the applicant not have any felony convictions within seven years or any fraud convictions at any time, that the applicant demonstrate acceptable character and fitness, educational and testing criteria and a bonding requirement. An MLO also must be affiliated with an originating entity -- a licensed mortgage banker or registered mortgage broker (or other licensed entity in the case of individuals originating manufactured homes) -- or working for mortgage loan servicers.

Section 599-f sets out the pre-licensing education requirements, and Section 599-g sets forth the pre-licensing testing requirements. Section 599-h imposes a reporting requirement on entities employing MLOs. Such entities must make annual filings through the NMLS.

Section 599-i sets forth the annual license renewal requirements for MLOs. In addition to continuing to satisfy the initial requirements for licensing, MLOs must satisfy annual continuing educational requirements and must have paid all fees. Failure to meet these requirements shall result in the automatic termination of an MLO's license. The statute also provides for a licensee going into inactive status, provided the individual continues to pay all applicable fees and to take required education courses.

Section 599-j sets forth the continuing education requirements for MLOs, and Section 599-k sets forth the requirements for a surety bond. Section 599-l requires the Superintendent to report through the NMLS at least annually on all violations of Article 12-E and all enforcement actions. MLOs may challenge the information contained in such reports. Section 599-m sets forth the records and reports that originating entities must maintain or make on MLOs employed by, or working for, such entities. This section also requires the Superintendent to maintain on the internet a list of all MLOs licensed by the Department and requires reporting to the Department by MLOs.

Section 599-n sets forth the enforcement authority of the Superintendent. In addition to "for good cause" suspension authority, the Superintendent may revoke a license for stated reasons (after a hearing), and the Superintendent may suspend a license if a required surety bond is allowed to lapse or thirty days after a required report is not filed. This section also sets out the requirements for surrendering a license and the implications of any surrender, revocation, termination or suspension of a license.

Section 599-o sets forth the authority of the Superintendent to adopt rules and regulations implementing Article 12-E, including the authority to adopt expedited review and licensing procedures for individuals previously authorized under the prior version of Article 12-E to act as MLOs. It also authorizes the Superintendent to investigate licensees and the entities with which they are associated.

Section 599-p requires that the unique identifier of every originator be clearly shown on certain documents. Section 599-q provides certain confidentiality protections for information provided to the Superintendent by an MLO, notwithstanding the sharing of such information with other regulatory bodies.

##### 2. Legislative objectives.

As noted, new Article 12-E was intended to conform New York Law to federal law and to enhance the regulation of MLOs operating in this state. These objectives have taken on increased urgency with the problems evidenced in the mortgage banking industry over the last two years.

The regulations implement this statute. New Part 420 differs from the prior version in a number of respects. The following is a summary of the major changes from the previous regulation:

1. The definition of a mortgage loan originator is broadened to include any individual who takes a mortgage application or offers or negotiates the terms of the mortgage with a consumer.

2. Individuals who originate loans on manufactured homes will be subject to the regulation for the first time.

3. If licensing of individuals who work for mortgage loan servicers and who engage in loan modification activities is required by the U.S. Department of Housing and Urban Development, such individuals may be subject to the licensing requirements of the new law and to the new regulation.

4. Individuals who have applied for "authorization" under the prior version of Article 12-E and Part 420 have a simplified process for becoming licensed and may continue to originate loans until they are licensed under the revised regulation or their applications are denied.

5. Individuals with a felony conviction within the last seven years or a felony conviction for fraud at any time are now prohibited from being licensed as MLOs in New York State.

6. Individuals must satisfy new pre-license education and testing requirements. There also are new bonding requirements and continuing education requirements.

7. A license automatically terminates if the licensee does not pay his or her annual license renewal fee or take the requisite amount of continuing education credits. The authority of the Superintendent to suspend an individual for good cause also has been clarified.

When Part 420 was originally adopted on an emergency basis, the Superintendent also adopted Supervisory Procedures MB 107 and MB 108. Supervisory Procedure MB107 deals with applications to become an MLO. It has been updated in line with the revisions to Article 12-E and Part 420.

Supervisory Procedure MB 108, relating to the approval of education providers and courses, was originally adopted because the prior version of Article 12-E required the Superintendent to approve both courses and providers. This activity has been transferred to the NMLS under new Article 12-E. Accordingly, Supervisory Procedure MB 108 is being rescinded.

### 3. Needs and benefits.

The SAFE Act is intended to impose a nationwide standard for MLO regulation; new Article 12-E constitutes New York's effort to adopt a regulatory regime consistent with this uniform standard. This regulation is needed to implement revised Article 12-E and is necessary to address problems that have surfaced over the last several years in the mortgage industry.

As has now been recognized at the federal level in the SAFE Act, increased oversight of mortgage loan originators is necessary to curb disreputable and deceptive business practices by MLOs. Individuals engaging in abusive practices have avoided detection by moving from company to company and in some instances, from state to state. The licensing of MLOs will greatly assist the Department in its efforts to oversee the mortgage industry and protect consumers. The regulation will enable the Department to identify, track and hold accountable those individuals who engage in abusive practices, and ensure continuing education for all MLOs that are licensed by the Department.

These regulatory requirements will improve accountability among mortgage industry professionals, protect and promote the integrity of the mortgage industry, and improve the quality of service, thereby helping to restore consumer confidence.

If New York did not adopt the new federal standards for MLO regulation or failed to implement its requirements, the SAFE Act requires that HUD assume the licensing of MLOs in New York State. This would result in ceding an important responsibility and element of state sovereignty to the federal government.

### 4. Costs.

MLOs are already experiencing increased costs as a result of the fees and continuing education requirements associated with the prior version of Article 12-E. These costs will continue under the new law and regulations.

The amount of the fingerprint fee is set by the State Division of Criminal Justice Services and the processing fees of the National Mortgage Licensing System and Registry are set by that body.

The ability by the Department to regulate MLOs is expected to substantially decrease losses to consumers and the mortgage industry, as well as to assist in decreasing the number of foreclosures in the State and the associated direct and indirect costs of such foreclosures. It is expected also to reduce consumer complaints regarding MLO conduct.

The regulations will not result in any fiscal implications to the State. The Banking Department is funded by the regulated financial services industry. Fees charged to the industry will be adjusted periodically to cover Department expenses incurred in carrying out this regulatory responsibility.

### 5. Local government mandates.

None.

### 6. Paperwork.

An application process has been established for MLOs electronically through the NMLS. Over time, the application process is expected to become virtually paperless; accordingly, while a limited number of documents, including fingerprints where necessary, currently have to be submitted to the Department in paper form, these requirements should diminish with the passage of time.

The specific procedures that are to be followed in order to apply for licensing as a mortgage loan originator are detailed in revised Supervisory Procedure MB 107.

### 7. Duplication.

The revised regulation does not duplicate, overlap or conflict with any other regulations.

### 8. Alternatives.

The purpose of the regulation is to carry out the statutory mandate to license and regulate MLOs in a manner consistent with the SAFE Act. As noted above, the alternative would be to cede this responsibility to the federal government. By enacting revised Article 12-E, the Legislature has indicated its desire to retain this responsibility at the state level.

### 9. Federal standards.

Currently, mortgage loan originators are required under the SAFE Act to be licensed under requirements nearly identical to those set forth in new Article 12-E.

### 10. Compliance schedule.

New Article 12-E became effective on July 11, 2009.

A transitional period is provided for mortgage loan originators who, as of July 11, 2009, were authorized to act as MLOs or had filed applications to be so authorized. Such MLOs may continue to engage in MLO activities, provided they submit any additional, updated information required by the Superintendent. The transitional period runs until January 1, 2011, in the case of authorized persons, and until July 31, 2010, in the case of applicants (unless their applications are denied or withdrawn as of an earlier date). Applicants are required to complete their applications considerably in advance of these dates under the regulations in order to allow the Department to complete their processing.

### *Regulatory Flexibility Analysis*

#### 1. Effect of the Rule:

The revised regulation will not have any impact on local governments. However, many of the originating entities who employ or are affiliated with mortgage loan originators are mortgage bankers or mortgage brokers who are considered small businesses. In excess of 2,700 of these businesses are licensed or registered by the Department.

#### 2. Compliance Requirements:

The revised regulation reflects the changes made in revised Article 12-E of the Banking Law. The small businesses that MLOs are employed by or affiliated with will be required to ensure that all MLOs employed by them have been duly licensed, report four times a year on the MLOs newly employed by them or dismissed for actual or alleged violations, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. In addition to these requirements, originating entities will be required to assign MLOs to registered locations and to ensure that an MLO's unique identifier is recorded on each mortgage application he or she originates.

#### 3. Professional Services:

None.

#### 4. Compliance Costs:

As under the existing Part 420, some mortgage entities may choose to pay for costs associated with initial licensing and annual license renewal for their MLOs and with continuing education requirements, but are not required to do so. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education are expected to be minimal.

#### 5. Economic and Technological Feasibility:

The rule-making should impose no adverse economic or technological burden on small businesses that MLOs are employed by or affiliated with.

#### 6. Minimizing Adverse Impacts:

The industry, and specifically small businesses who are licensed and registered mortgage businesses, supported passage of the previous Banking Law Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulations. In addition, these businesses were involved in a policy dialogue with the Department during rule development. In order to minimize any potential adverse economic impact of the rulemaking, outreach was conducted with associations representing the industries that would be affected thereby (mortgage bankers, and mortgage brokers).

The revised regulation implements changes in Article 12-E of the Banking Law. An earlier draft of the revised regulation was published on the Department's website on August 27, 2009. Changes incorporating the comments have been made in the regulation where appropriate.

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

See response to Item 6 above.

### *Rural Area Flexibility Analysis*

Types and Estimated Numbers. The New York State Banking Department currently licenses over 1,800 mortgage bankers and brokers, of which over 1,200 are located in the state. It has received almost 15,000 ap-

plications from MLOs under the present regulations and anticipates receiving approximately 2,700 applications from individuals who were previously exempted but will be required to be licensed under the revised regulations. Many of these entities and MLOs will be operating in rural areas of New York State and would be impacted by the regulation. If individuals who originate mobile home loans are required to be licensed, a relatively small number of additional applications is anticipated.

Compliance Requirements. Mortgage loan originators in rural areas must be licensed by the Superintendent to engage in the business of mortgage loan origination. The application process established by the regulations requires an MLO to apply for a license electronically and to submit additional background information to the Mortgage Banking Division of the Banking Department. This additional information consists of fingerprints, a recent credit report, supplementary background information and an attestation as to the truthfulness of the applicant's statements. Mortgage brokers and bankers are required to ensure that all MLOs employed by them have been duly licensed, report four times a year on the MLOs newly employed by them or dismissed for cause, determine that each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. The Department believes that this rule will not impose a burdensome set of requirements on entities operating in rural areas.

Costs. Some mortgage businesses in rural areas may choose to pay the increased costs associated with the continuing education requirements and the fees associated with licensing and annual renewal of their MLOs, but are not required to do so. The regulation sets forth a background investigation fee of \$125.00, an initial license processing fee of \$50.00 and an annual license renewal fee of \$50.00. There will also be a fee for the processing of fingerprints and fees to cover the cost of third party processing of the application. The latter two fees will be posted on the Department's website. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education courses are expected to be minimal. The cost of continuing education is estimated to be approximately \$500 every two years. The Department's increased effectiveness in fighting mortgage fraud and predatory lending will lower costs related to litigation and will decrease losses to consumers and the mortgage industry by hundreds of millions of dollars.

Minimizing Adverse Impacts. The industry supported passage of the prior Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addition, the industry was involved in a dialogue with the Department during rule development.

The revised regulations implement revised Article 12-E of the Banking Law, which in turn closely tracks the provisions of Title V of the federal Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act (the "SAFE Act"). Hence, the licensing and regulation of mortgage loan originators in New York now closely tracks the federal standard. If New York did not adopt this standard, the SAFE Act requires that the federal Department of Housing and Urban Development assume the licensing of MLOs in New York State.

Rural Area Participation. Representatives of various entities, including mortgage bankers and brokers conducting business in rural areas and entities that conduct mortgage originating in rural areas, participated in outreach meetings that were conducted during the process of drafting the prior Article 12-E and the implementing regulations. As noted above, the revised statute and regulations closely track the provisions of the federal SAFE Act.

#### **Job Impact Statement**

Revised Article 12-E of the Banking Law, effective on July 11, 2009, replaces the prior version of Article 12-E with respect to the licensing and regulation of mortgage loan servicers. This proposed regulation sets forth the application, exemption and approval procedures for licensing registration as a Mortgage Loan Originator (MLO), as well as financial responsibility requirements for individuals engaging in MLO activities. The proposed regulation also provides transition rules for individuals who engaged in MLO activities under the prior version of the article to become licensed under the new statute.

The requirement to comply with the proposed regulations is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. This is because individuals were already subject to regulation under the prior version of Article 12-E of the Banking Law. New Article 12-E and Part 420 are intended to conform the regulation of MLOs to the requirements of federal law. Absent action by New York to conform this regulation to federal requirements, federal law authorized the Department of Housing and Urban Affairs to take control of the regulation of MLOs in New York State.

As with their predecessors, the new statute and proposed regulations require the use of the internet-based National Mortgage Licensing System and Registry (NMLS), developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for MLO registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory licensing requirement rather than the provisions of the proposed regulations.

Supervisory Procedure 108 relates to the approval by the Superintendent of educational courses and course providers for MLOs. Under revised Article 12-E, this function has been transferred to the NMLS. Moreover, educational requirements have been increased under the new law and proposed regulation by the Superintendent.

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## Office of Children and Family Services

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### EMERGENCY RULE MAKING

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

**I.D. No.** CFS-01-10-00008-E

**Filing No.** 1429

**Filing Date:** 2009-12-21

**Effective Date:** 2009-12-21

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

**Action taken:** Amendment of sections 421.24(c)(19), 428.3(b)(2)(iii) and (iv), 428.5(c)(6) and (10)(viii), 430.11(c)(1) and (2) and 430.12(c); and addition of sections 428.3(b)(2)(v), 430.11(c)(2)(ix) and (4), 430.12(c)(4) and (j) to Title 18 NYCRR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1)(i) Standard. Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents, or to which the child will be discharged. It shall be deemed inappropriate to place a child in a setting which conforms with this standard only if the child's service needs can only be met in another available setting at the same or lesser level of care. *The placement of the child into foster care must take into account the appropriateness of the child's existing educational setting and the proximity of such setting to the child's placement location. When is it in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities to ensure that the child remains in such school. When it is not in the best interests of the foster child to continue to be enrolled in the same school in which the child was enrolled when placed into foster care, the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child is placed in order that the foster child is provided with immediate and appropriate enrollment in a new school; and the agency with case management, case planning or casework responsibility for the foster child must coordinate with applicable local school authorities where the foster child previously attended in order that all of the applicable school records of the child are provided to the new school.*

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

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

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

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

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

(4) *Within 30 days after the removal of a child from the custody of*

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

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

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

(ii) Documentation. *The progress notes for each school age child in foster care must reflect either the education program in which the foster child is presently enrolled or is enrolling; or the date the foster child completed his or her compulsory education; or where the child is not capable of attending school on a full-time basis, what the medical condition is and why such condition prevents full-time attendance. The social services district must update the progress notes on an annual basis to reflect why such medical condition continues to prevent the foster child's full-time attendance in an education program. On an annual basis, by the first day of each October, the education module in CONNECTIONS must be updated with education information about each school age foster child in the form and manner as required by the Office.*

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

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

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

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt 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 20, 2010.

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

**Regulatory Impact Statement****1. Statutory authority**

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

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

**2. Legislative objectives**

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

**3. Needs and benefits**

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

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

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

The regulations also support the preparation of the foster child to transition out of foster care. One of the fundamental needs of any child is his or her education. The regulations clarify that each foster child of school age must either be enrolled in an appropriate educational setting, unless the child is incapable of attending school, or has completed his or her secondary education. The regulations impose a similar requirement in regard to a child who is in receipt of an adoption subsidy and is of school age.

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

**4. Costs**

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

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

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.19(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained in the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

**5. Local government mandates**

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

Social services districts are obligated pursuant to section 409-e of the SSL and OCFS regulations 18 NYCRR Part 428 and 430.12 to develop for each foster child a family assessment and service plan that addresses the needs of the child, including those related to education and the preparation of the child for discharge from foster care. These standards also presently require that foster children over the age of 10 be invited to participate in such planning.

**6. Paperwork**

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

**7. Duplication**

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

**8. Alternative approaches**

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

**9. Federal standards**

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

**10. Compliance schedule**

Compliance with the regulations would take effect upon adoption.

**Regulatory Flexibility Analysis****1. Effect on Small Businesses and Local Governments**

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

**2. Compliance Requirements**

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

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise due diligence in identifying and notifying relatives of the child, including all grandparents and other relatives identified by the child's parents, that the child was removed, the options available to the relatives to become the child's foster parent or to otherwise care for the child and any option that may be lost by the failure of the relatives to respond to such notification in a timely manner. Notification must be made earlier than 30 days of re-

removal if directed by the court. Notification is not required in regard to relatives who have a history of family or domestic violence.

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

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

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

### 3. Professional Services

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

### 4. Compliance Costs

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

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

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

### 5. Economic and Technological Feasibility

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

### 6. Minimizing Adverse Impact

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

### 7. Small Business and Local Government Participation

By letter dated, December 5, 2008, OCFS informed the commissioner of each of the local department of social services in the State of New York of the amendments to OCFS regulations that are necessitated by the federal Fostering Connections to Success and Increasing Adoptions Act of 2008. The letter included a brief summary of the new regulatory requirements. In addition, it informed local commissioners of the requirements enacted by the federal legislation that are already in effect in New York and that will not require any further regulatory amendments. OCFS advised the lo-

cal commissioners that OCFS will provide any clarification received from the federal Department of Health and Human Services on these requirements. A copy of the OCFS regulations was provided along with a contact person if the local commissioners or their staff had any questions.

### Rural Area Flexibility Analysis

#### 1. Types and estimated number of rural areas

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

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

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

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

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

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

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

### 3. Costs

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

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

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation

provided by the adoptive parent can be maintained by the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to CONNECTIONS. The requirements associated with documenting information in the child's uniform case record progress notes can be supported in CONNECTIONS.

4. Minimizing adverse impact

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

5. Rural area participation

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

**Job Impact Statement**

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

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## State Commission of Correction

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### NOTICE OF ADOPTION

**Inmate Institutional Fund Accounts**

**I.D. No.** CMC-31-09-00005-A

**Filing No.** 1387

**Filing Date:** 2009-12-18

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of Part 7016 of Title 9 NYCRR.

**Statutory authority:** Correction Law, section 45(6) and (15)

**Subject:** Inmate institutional fund accounts.

**Purpose:** To allow for automated and electronic deposits to inmate institutional fund accounts in county correctional facilities.

**Text or summary was published** in the August 5, 2009 issue of the Register, I.D. No. CMC-31-09-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Brian M. Callahan, Associate Attorney, New York State Commission of Correction, 80 Wolf Road, 4th Floor, Albany, New York 12205, (518) 485-2346, email: Brian.Callahan@scoc.state.ny.us

**Assessment of Public Comment**

The State Commission of Correction (hereinafter "Commission") received formal comment from Thomas A. Mitchell, Counsel of the New York State Sheriffs' Association, Inc. (hereinafter "NYSSA"), and Florence A. Hutner, Deputy Commissioner for Legal Matters/General Counsel of the New York City Department of Correction (hereinafter "DOC").

NYSSA commented that the regulatory addition would prove helpful to inmates and their families, and would assist Sheriffs to more efficiently manage inmate accounts. Further, NYSSA expressed that the addition would likely reduce the burdens on county government by decreasing the handling of cash and result in an easier accounting of funds available to inmates for commissary purchases. The Commission agrees, as the stated benefits were the primary purpose of the addition.

DOC opined that the five (\$5.00) dollar service fee limit set forth in the regulatory addition was "unreasonably low," could not "accommodate the market in New York City," and would "essentially prevent the vendors who currently make electronic deposits available to family and friends of NYC DOC inmates from continuing to provide those services." Currently, three vendors provide inmate fund account deposit services to

DOC, and the service fees associate therewith range, depending on the type and size of the transaction, from \$2.95-\$20.00. "Depending on the vendor and the nature of the transaction, the fee for a \$50 transaction averages below \$7.50." Additionally, DOC noted that, in addition to using deposited funds for commissary purchases, inmates of the DOC are able to post bail using such funds deposited by family and friends, a practice which has increased "self-bails" by 34% since the inception of such service. Considering the aforementioned, DOC requested that the Commission either significantly increase the maximum service fee limit, or exempt all cities over a million people from this provision.

The Commission maintains its position that, as initially proposed, a maximum service fee of \$5.00 is more than fair and sufficient to provide the services contemplated by this regulatory addition, and any more would prove excessive. As set forth in DOC's comments, vendors are currently providing such services, depending on the amount of the transaction, for a minimum of \$2.95-\$3.95. Given that overheads associated with providing such services are essentially identical regardless of the transaction amount, the Commission believes that vendors will be able and willing to lower their service fee for larger transactions to meet the requirements of this regulatory addition. Further, and without a justifiable basis to warrant a distinction from other local correctional facilities, the Commission declines to provide a regulatory exception for cities over a million people.

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## Department of Correctional Services

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

**Designation and Classification of Correctional Facilities**

**I.D. No.** COR-01-10-00001-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 100.126 and add section 100.99 to Title 7 NYCRR.

**Statutory authority:** Correction Law, section 70

**Subject:** Designation and Classification of Correctional Facilities.

**Purpose:** To repeal a regulation that is no longer necessary and to classify and designate an established correctional facility.

**Text of proposed rule:** The Department of Correctional Services repeals and reserves section 100.126 of 7 NYCRR and adds a new section 100.99 to 7 NYCRR as indicated below:

*Section 100.99 Hale Creek Correctional Facility.*

(a) There shall be in the department an institution to be known as the Hale Creek Correctional Facility, which shall be located in the Town of Johnstown, Fulton County, New York.

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

(c) Hale Creek shall be classified as a medium security facility to be used as an alcohol and substance abuse treatment annex for the purpose of providing alcohol and substance abuse treatment, and as a general confinement 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 Avenue - Building 2 - State Campus, 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 changes the designation of a correctional facility from section 100.126 to section 100.99 of 7 NYCRR and repeals a regulatory provision which is no longer applicable to any person. See SAPA section 102(11)(a).

Section 100.126 of 7 NYCRR designates certain correctional facilities as alcohol and substance abuse treatment correctional annexes which no longer exist in this section except for Hale Creek Correctional Facility. It has been determined by the Department to add a new section 100.99 to 7

NYCRR specifically for Hale Creek Correctional Facility resulting in section 100.126 being redundant and no longer necessary. Accordingly, the Department is concurrently adding a new section 100.99 to 7 NYCRR while repealing section 100.126, both of which describe the designation and classification of Hale Creek Correctional Facility. These actions do not change the form or function of Hale Creek Correctional Facility, therefore the rule makings have also been determined by the Department to be non-controversial (SAPA 102(11)(c)).

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 these proposed rules will have no adverse impact on jobs or employment opportunities since it merely changes the designation of a correctional facility from section 100.126 to section 100.99 of 7 NYCRR.

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

#### **Edgecombe Correctional Facility**

**I.D. No.** COR-01-10-00011-P

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

**Proposed Action:** This is a consensus rule making to amend section 100.96 of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 70

**Subject:** Edgecombe Correctional Facility.

**Purpose:** To remove a function from the facility regulation that no longer applies and to update the facility name.

**Text of proposed rule:** The Department of Correctional Services amends section 100.96 and repeals and reserves section 100.96(c)(1) of 7 NYCRR as indicated below:

Section 100.96. Edgecombe *Residential Treatment* [Correctional] Facility.

(a) There shall be in the department a facility to be known as Edgecombe *Residential Treatment* [Correctional] Facility, which shall be located in the borough of Manhattan, City and State of New York, and which shall consist of the property under the jurisdiction of the department on the land and building at 611 Edgecombe Avenue, New York, NY 10032.

(b) Edgecombe *Residential Treatment* [Correctional] Facility shall be a correctional facility for males 16 years of age or older.

(c) Edgecombe *Residential Treatment* [Correctional] Facility shall be classified as a minimum security correctional facility, to be used for the following functions:

- (1) work release facility;
- (2) residential treatment facility; and
- (3) general confinement 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, Building 2 - State Campus, 1220 Washington Avenue, 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 a function from a correctional facility that is no longer applicable to any person. See SAPA section 102(11)(a). The rule making is also technical in nature in that it is merely updating the facility name to reflect its current function. See SAPA section 102(11)(c).

The proposed rule change amends 7 NYCRR § 100.96, to reflect that Edgecombe Correctional Facility no longer serves as a work release facility. It continues to function as a general confinement and residential treatment facility. 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 these proposed rules will have no adverse impact on jobs or employment opportunities since it

merely removes a function from the correctional facility that no longer applies.

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## **Education Department**

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### **EMERGENCY RULE MAKING**

#### **Definition of Unprofessional Conduct and the Licensure Requirements for Certified Public Accountants and Public Accountants**

**I.D. No.** EDU-26-09-00003-E

**Filing No.** 1435

**Filing Date:** 2009-12-22

**Effective Date:** 2009-12-22

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

**Action taken:** Amendment of sections 29.10 and 52.13; repeal of Part 70; and addition of new Part 70 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 2207 (not subdivided), 6501 (not subdivided), 6504 (not subdivided), 6506(1)(2) and (6), 6507(2)(a)(3)(4)(a), 6508(1), 7401, 7401-a, 7402, 7404, 7406, 7406-a, 7408, 7409 and 7410; and L. 2008, ch. 651

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to revise the Rules of the Board of Regents and the Regulations of the Commissioner of Education in response to public comment received after publication of the proposed rule in the State Register. The proposed amendment implements the requirements of Chapter 651 of the Laws of 2008, which, among other things, expands the scope of practice of public accountancy; recognizes certain foreign education as an alternative to meeting the education requirements for licensure as a certified public accountant; allows the issuance of a foreign limited permit to applicants with professional qualifications determined to be significantly comparable to the licensure requirements of certified public accountants in New York State; authorizes the issuance of temporary permits to CPAs licensed in another state that the Board of Regents has determined to have significantly comparable CPA licensure requirements; permits out-of-state licensed CPAs to provide non-attest services in this State without a temporary practice permit in certain circumstances; amends the continuing professional education requirements for certified public accountants; and expands registration requirements for accounting firms.

The proposed amendment was adopted as an emergency rule at the June 2009 Regents meeting of the Board of Regents, effective July 26, 2009. A Notice of Proposed Rule Making was published in the State Register on July 1, 2009. The proposed amendment was adopted as a second emergency rule at the September Regents meeting to ensure that the emergency rule adopted at the June 2009 Regents meeting, remained continuously in effect until the effective date of its adoption as a permanent rule to avoid disruption of the implementation of Chapter 651 of the Laws of 2008.

In response to public comment received after publication of the Notice of Proposed Rule Making in the State Register, revisions were made to the proposed rule. The revised rule corrects certain deficiencies and clarifies certain provisions in the rule, in response to public comment. Therefore, a third emergency action is necessary for the preservation of the general welfare in order to immediately adopt clarifying and corrective revisions to the rule in response to public comment and to otherwise ensure that the emergency revised rule, which implements the requirements of Chapter 651 of the Laws of 2008, is enacted to avoid disruption in the practice of public accountancy.

**Subject:** Definition of unprofessional conduct and the licensure requirements for certified public accountants and public accountants.

**Purpose:** To implement Chapter 651 of the Laws of 2008.

**Substance of emergency rule:** The Commissioner of Education proposes to amend section 29.10 of the Rules of the Board of Regents and section 52.13 of the Regulations of the Commissioner of Education and repeal and add a new Part 70 to the Regulations of the Commissioner of Education, relating to the education, examination and experience requirements for licensure of certified public accountants; endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited

permits or temporary practice permits; registration of accounting firms; continuing education requirements and the definition of unprofessional conduct. The following is a summary of the proposed amendment:

A new paragraph 13 is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents to define as unprofessional conduct in the practice of public accountancy a licensee's failure to meet certain competency requirements when supervising attest or compilation services or signing or authorizing someone to sign an accountant's report on financial statements. Required competencies include at least 1,000 hours of experience in the preparation or review of financial statements or reports on financial statements within the last five years; at least 40 hours of continuing education in the area of accounting, auditing or attest during the three years immediately prior to the performance of such services; and maintaining the level of education, experience and professional conduct required by generally accepted accounting standards.

A new paragraph (14) is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents defining as unprofessional conduct a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy or uses the title "certified public accountant" or the designation "CPA" or the title "public accountant" or the designation "PA". Any certified public accountant or public accountant licensed in New York State who is not practicing public accountancy pursuant to Education Law section 7401 and does not use the title "certified public accountant" or the designation "CPA" or the title "public accountant" or designation "PA" may request an inactive status from the Department and will not be required to register with the Department.

A new subdivision (h) is added to section 29.10 of the Rules of the Board of Regents, defining as unprofessional conduct any willful or grossly negligent failure to comply with substantial provisions of Federal, State or local laws, rules or regulations governing the practice of public accountancy by a CPA licensed in another state or any firm that employs such CPA to perform non-attest services pursuant to Education Law section 7406-a.

A new subdivision (i) is added to section 29.10 of the Rules of the Board of Regents to amend the definition of unprofessional conduct to prohibit a licensee or the public accounting firm employing such licensee to directly or indirectly, offer, give, solicit, or receive or agree to receive, a commission for the referral of any product or service to a client if the licensee is performing: attest services; compilation services when the licensee expects, or reasonably might expect that a third party will rely upon the financial statements and the licensee's compilation report does not disclose a lack of independence; an examination of prospective financial information; and/or any other service that may require a licensee to utilize independent judgment. This subdivision does not prohibit the receipt of a payment by a licensee or firm for the purchase of a public accounting practice or retirement payments paid to individuals presently or formerly engaged in the practice of public accountancy or payments to their heirs or estates. The prohibitions apply during the period in which the licensee is engaged to perform any of the services defined in the subdivision and the period covered by any financial, accounting or related statements involved in such services. A licensee providing services other than those described in this subdivision may accept a commission for recommending products or services of a third party to a client, provided that the licensee discloses the receipt of the commission to the client. The provisions of this subdivision do not apply to licensees who perform accounting, management advisory, financial advisory, consulting or tax services for an entity that is not required to register with the department under Education Law section 7408.

Paragraph (1) of subdivision (b) of section 52.13 of the Regulations of the Commissioner of Education is amended to define specific curricular content in the professional accounting content area that is required for licensure and those subjects that may be taken to fulfill the credit hour requirement in this area for licensure. This paragraph is also amended to eliminate the requirement for mandatory subjects in the general business content area and replaces these requirements with a list of content areas that may be used to meet the credit hour requirement in this area for licensure.

Section 70.1 of the Regulations of the Commissioner of Education defines the practice of public accountancy and defines the professional skills and competencies used by a licensee when he/she performs accounting, management advisory, financial advisory, and tax services.

Section 70.2 defines the professional study requirements for licensure and requires an applicant to submit evidence of completion of a baccalaureate or higher degree in accountancy that is either registered with the Department; accredited by an acceptable accrediting body; or a degree that the Department has determined to be the substantial equivalent of a registered or accredited program. An applicant who applies for licensure on or after August 1, 2009 must have satisfactorily completed a curriculum of at least 150 semester hours in a program described above unless the

applicant was licensed in another state prior to August 1, 2009, in which case, they may meet the education requirements through completion of at least 120 semesters in a program described above. An applicant who applies to the Department for licensure prior to August 1, 2009 is required to have satisfactorily completed a curriculum of at least 120 semester hours in a program prescribed in this section prior to August 1, 2009 and have submitted the required application forms for licensure to the Department prior to August 1, 2009. In lieu of meeting these education requirements and any experience requirements, the applicant may meet the following requirement: at least 15 years of full-time experience in the practice of public accountancy satisfactory to the State Board.

A new section 70.3 broadens acceptable experience for licensure to include providing any type of service or advice involving the use of accounting, attest, compilation, management advisory, financial advisory, tax or consulting skills under the direct supervision of a certified public accountant licensed in the United States or a public accountant licensed in New York. Two years of acceptable experience are required for applicants who meet the education requirement through completion of 120 semester hours and one year of acceptable experience is required for applicants who complete the education requirement through completion of 150 semester hours. Experience may be gained through employment in public practice, government, private industry or educational institutions. An applicant is required to obtain the necessary experience within 10 years of having passed the licensing examination or they will be required to complete continuing professional education, in an amount determined by the State Board for Public Accountancy.

A new section 70.4 defines the content, passing score and retention of credit criteria for the licensing examination. The proposed amendment provides students with the opportunity to apply for admission to the Uniform CPA Examination upon completion of 120 semester hours of professional study in a regionally accredited college or university which shall include at least one course in each of the mandatory professional accountancy content areas: financial accounting, cost or managerial accounting, taxation, and auditing and attestation services.

A new section 70.5 provides that a license as a certified public accountant in New York may be issued to an applicant licensed in another state or foreign country if the applicant has met licensure requirements significantly comparable to New York. An applicant licensed by a state with significantly comparable licensure requirements, meaning those states recognized by the Department to have significantly comparable requirements, is eligible for a license through endorsement. If the applicant was licensed in a state that did not have significantly comparable licensure requirements, the individual's credentials will be evaluated to determine if his or her credentials are significantly comparable to New York's requirements. In either case, the applicant shall demonstrate four years of professional experience in public accounting in the last 10 years immediately preceding the application for licensure by endorsement.

This section also permits licensure by endorsement of a foreign applicant with an acceptable license, certificate or degree from a foreign country with significantly comparable licensure requirements provided that the applicants meets certain requirements.

Section 70.6 authorizes the Department to issue a two-year limited permit to practice public accountancy in this State to a foreign credentialed accountant if the applicant meets certain requirements described in the proposed amendment. The regulation requires a \$250 fee for issuance of the limited permit.

Section 70.7 authorizes CPAs licensed in another state, with a principal place of business in another state, to apply for a temporary practice permit in order to provide attest and compilation services in New York. The temporary practice permit is valid for up to 180 days during a twelve-month period and would be renewable no more than three times. The proposed regulations also require the submission of application materials and the payment of a \$125 application fee and renewal fee.

Section 70.8 requires all firms, including sole proprietorships, partnerships, LLPs, LLCs, and PCs, to maintain a registration with the Department if the firm is performing attest or compilation services or using the title "CPA" or "CPA firm" or the title "PA" or "PA firm". Firms performing only non-attest services described in Education Law § 7401(3) are not required to, but may, register with the Department.

Section 70.9 implements statutory changes, deletes prior exemptions from mandatory continuing education for individuals who work in private industry or government and specifies that all registered CPAs and PAs are required to pay a \$50 continuing education fee. Any licensee who does not engage in professional practice as defined in § 7401 may file a written request for an exemption from mandatory continuing education.

The proposed amendment also implements a statutory change in the tracking year for continuing education credit from a September 1 - August 31 year to a January 1 - December 31 year. The proposed amendment also allow licensees to meet their continuing education requirement by completing either 40 credits in any combination of the following subject

areas: accounting, attest, auditing, taxation, advisory services, specialized knowledge and applications related to specialized industries, and such other areas appropriately related to the practice of accounting as may be acceptable to the Department or by completing 24 credits concentrated in any one subject area. Before this change, licensees were required to complete 40 credits in a combination of the following areas: accounting, auditing or taxation, or 24 credits concentrated, in either accounting, auditing or taxation.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-09-00003-P, Issue of July 1, 2009. The emergency rule will expire February 19, 2010.

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

Section 6501 of the Education Law provides that in order for an applicant to qualify for a professional license, the requirements prescribed in the article for each particular profession must be met.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules in the supervision of the practice of the professions.

Subdivision (2) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules relating to pre-professional, professional other educational qualifications required for licensure in the professions.

Subdivision (6) of section 6506 of the Education Law authorizes the Board of Regents to endorse a license issued by a licensing board of another state or country.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (3) of section 6507 of the Education Law authorizes the State Education Department, assisted by the board for each profession, to establish standards for pre-professional and professional education, experience and licensing examinations as required to implement the article governing each profession, review qualifications in connection with licensing requirements and provide for licensing examinations and re-examinations.

Paragraph (a) of subdivision (4) of section 6507 of the Education Law authorizes the State Education Department to register or approve educational programs designed for the purpose of providing professional preparation which meet standards established by the Department.

Subdivision (1) of section 6508 of the Education Law authorizes the Board of Regents to appoint a State Board for Public Accountancy for the purpose of assisting the Board of Regents and the State Education Department on matters of professional licensing, practice, and conduct.

Chapter 651 of the Laws of 2008 amended sections 7401, 7402, 7404, 7406, 7407, 7408 and 7409 of the Education Law and adds new sections 7401-a and 7406-a and 7410 to the Education Law.

Section 7401 of the Education Law defines the practice of public accountancy.

Section 7401-a defines attest, certified public accountant or CPA, compilation, firm, principal place of business, public accountant or PA and State.

Section 7402 of the Education Law provides that only an individual licensed or otherwise authorized to practice shall practice public accountancy or use the title certified public accountant or public accountant.

Section 7403 of the Education Law establishes and defines the duties and responsibilities of the State Board for Public Accountancy.

Section 7404 of the Education Law defines the requirements for licensure as a certified public accountant.

Section 7406 of the Education Law authorizes the State Education Department to issue a limited permit to certain applicants licensed by another state which the Board of Regents has determined to have significantly comparable certified public accountant licensure requirements and to issue temporary permits to certified public accountants licensed by another state which the Board of Regents has determined to have significantly comparable licensure requirements, or whose individual licensure qualifications are verified by the Department to be significantly comparable to New York State's requirements. Temporary permits allow the holder

to practice in New York State for an aggregate total of 180 days during a twelve month period beginning on the effective date of the permit.

Section 7406-a of the Education Law authorizes certified public accountants, licensed by another state and in good standing, to perform non-attest services in New York without a license or temporary practice permit and provides that certified public accountants performing such services agree to be subject to the disciplinary authority of the Board of Regents.

Section 7407 of the Education Law provides individual and corporate exemptions to the provisions of Article 149.

Section 7408 of the Education Law establishes a registration requirement for public accounting firms that perform attest and/or compilation services and professional services that are incident to attest and/or compilation services or that use the title CPA or CPA firm or the title PA or PA firm, including authorizing the Board of Regents to establish a registration process for public accounting firms. This section also restricts the use of certain titles and designations by non-licensed accountants and establishes reporting requirements for non-licensed accountants issuing financial statements.

Section 7409 of the Education Law establishes mandatory continuing education requirements for certified public accountants and public accountants and authorizes the Board of Regents to establish a registration process for continuing education sponsors.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendments to the Rules of the Board of Regents and to the Regulations of the Commissioner of Education are necessary to implement Chapter 651 of the Laws of 2008, which becomes effective on July 26, 2009.

##### 3. NEEDS AND BENEFITS:

The proposed amendment is needed to implement Chapter 651 of the Laws of 2008. This legislation enhances public protection by ensuring that certified public accountants (CPAs) and public accountants (PAs) are professionally accountable for all of the business functions they currently perform by clarifying and expanding the statutorily regulated scope of practice. The law expands the scope of practice to include the types of services that involve the use of professional skills and competencies in matters related to accounting concepts, the recording of financial data or information, and the preparation or presentation of financial statements, including but not limited to management advisory, financial advisory, and tax preparation and advisory services. The proposed amendment would enhance public protection by requiring all licensees and firms to be registered with the Department when providing attest and compilation services; providing for temporary practice permits when out-of-state licensed CPAs perform attest and compilation services in New York and providing an exemption from participation in continuing professional education only for licensees who are not engaged in the practice of public accountancy.

Public protection is also enhanced by providing greater clarity regarding the issuance of foreign limited permits and requiring participation in mandatory continuing education for all CPAs, even if employed in private industry, government or academia and changes the requirement for complying with mandatory continuing education from a registration year to a calendar year. The law expands the recognized areas of continuing education study to those that contribute to professional practice and growth in professional knowledge, professional competence and ethics.

The existing law was also amended to specifically allow out-of-state licensed CPAs to perform non-attest services such as accounting, management advisory, financial advisory, and tax in New York without a temporary practice permit. As a condition of practicing in New York under this provision, the CPA and the firm that employs him or her agrees to be subject to the disciplinary authority of the Board of Regents.

The expanded definition of the scope of practice includes non-attest services provided by a licensed CPA or PA to one's employer not otherwise required to register with the Department. CPAs and PAs working for business corporations may be employed in positions that result in the payment of commissions or referral fees. The Rules of the Board of Regents need to be amended to clearly define unprofessional conduct for those instances when the acceptance of a commission or referral fee would impair a licensee's independence to perform attest and compilation services.

##### 4. COSTS:

(a) Cost to State government: None.

(b) Cost to local government: There are no additional costs to local government.

(c) Cost to private regulated parties: The proposed amendment does not impose any costs beyond those imposed by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is: (1) \$50 for each office of the firm located in New York or \$50 for the firm if the firm has no offices located in New York and (2) \$10 for the sole proprietor or each general partner of a

partnership or partner of a limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is located in New York or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this Part and for each certified public accountant or public accountant licensed in New York that signs or authorizes someone to sign an engagement on behalf of a New York client but whose principal place of business is not located in New York State.

There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404 any licensee who is required to register triennially with the Department at the beginning of each triennial registration period.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to the registration and use of a professional title or designation by certified public accountants (CPAs) and public accountants (PAs); to the performance of non-attest services by out-of-state licensed CPAs; the receipt of commissions and referral fees by CPAs and PAs; the registration of curricula in public accountancy programs. The amendment does not impose any programs, service, duty, or responsibility upon local governments.

#### 6. PAPERWORK:

The proposed amendment requires public accounting firms that are established for the business purpose of lawfully engaging in the practice of public accountancy pursuant to Education Law section 7401(1) and (2) or that uses the title "CPA" or "CPA firm" or the title "PA" or "PA firm" to register with the Department.

The proposed amendment also requires that any licensee that may accept a commission for recommending the products or services of a third party to the client to disclose the receipt of the commission to the client by way of a written disclosure statement to describe the product or service recommended the amount of the commission.

The proposed amendment also requires applicants seeking a limited permit or temporary permit to submit an application form to the Department.

#### 7. DUPLICATION:

The proposed amendment does not duplicate any other existing State or Federal requirements, except as discussed below in the Federal Standards section.

#### 8. ALTERNATIVES:

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

#### 9. FEDERAL STANDARDS:

There are no Federal standards that relate to the registration of public accounting firms and/or the use of a professional title or designation by certified public accountants (CPAs) and public accountants (PAs); to the performance of non-attest services by out-of-state licensed CPAs or to the licensure requirements of CPAs and PAs.

However, the Sarbanes-Oxley Act of 2002 does address commission and referral fees for audit partners in public accounting firms.

Section 210-2.01(c)(8) of the Code of Federal Regulations provides, in pertinent part, as follows:

(8) Compensation. An accountant is not independent of an audit client if, at any point during the audit and professional engagement period, any audit partner earns or receives compensation based on the audit partner procuring engagements with that audit client to provide any products or services other than audit, review or attest services. Any accounting firm with fewer than ten partners and fewer than five audit clients that are issuers (as defined in section 10A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(f))) shall be exempt from the requirement stated in the previous sentence.

The proposed amendment prohibits licensed public accountants and certified public accountants from receiving a commission or referral fee for the product or service of a third party to a client when performing services that require a licensee's independent judgment. The proposed amendment is more restrictive than the federal law. The federal law only applies to a small segment of the engagements performed by CPAs and PAs employed by publicly traded companies and it only prohibits audit partners from receiving a commission fee, as opposed to the proposed amendment which prohibits all licensees performing certain audit and attest services from receiving commissions. The proposed amendment is needed to ensure public protection by maintaining the independent judgment of licensees when performing certain engagements that require independence.

#### 10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its effective date.

No additional period of time is necessary to enable regulated parties to comply with the regulation.

#### Regulatory Flexibility Analysis

##### (a) Small Businesses:

##### 1. EFFECT OF RULE:

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants (CPAs) and public accountants (PAs) and to add provisions relating to the endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits and temporary practice permits, and to amend the definition of unprofessional conduct for CPAs and PAs licensed in New York State.

It is estimated that approximately 2,000 individuals apply for licensure as CPAs each year. As of January 2009, there are approximately 27,300 registered CPAs in New York, 160 registered PAs in New York, and 3,200 registered public accounting firms in New York State. Demographic information provided by the national membership organization of CPAs indicates that approximately 42% of its membership is employed in public accounting and approximately 48.5% of its members are employed in small firms with nine or fewer owners. Based on these statistics, approximately 5,500 CPAs and PAs are likely to be employed by approximately 1,550 small firms.

##### 2. COMPLIANCE REQUIREMENTS:

The purpose of the proposed amendment is to establish in the definition of unprofessional conduct in the practice of public accountancy: (1) a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy pursuant to Education Law section 7401 or uses the title "certified public accountant" or the designation "CPA" or the title "public accountant" or the designation "PA"; (2) any willful violation of any State, federal or local law by out-of-state licensed CPA performing non-attest services; and (3) a licensee's failure to meet certain competency requirements when a licensed CPA or PA supervises and signs or authorizes someone to sign the accountant's report on financial statements; and defines those instances when a licensed CPA or PA may accept a commission or referral fee and establishes disclosure requirements when such a fee is received.

The proposed amendment also amends the education, examination and experience requirements for licensure as a CPA in New York; the continuing education requirements for CPAs in New York; the registration process for public accounting firms and establishes, with limited exceptions; a process to issue limited permits to foreign credentialed accountants and temporary practice permits to CPAs licensed and in good standing in another state; and amends the process used to issue a license as a CPA to an individual licensed as a CPA in another state or a foreign country who substantially meets New York's licensure requirements.

##### 3. PROFESSIONAL SERVICES:

The proposed regulation will not require any licensee or firm to hire any professional services to comply, including those that are considered "Small Businesses".

##### 4. COMPLIANCE COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is: (1) \$50 for each office of the firm located in New York State or \$50 for the firm if the firm has no offices located in New York and (2) \$10 for the sole proprietor or each general partner of a partnership or partner of a limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is located in New York or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this Part and for each certified public accountant or public accountant licensed in New York that signs or authorizes someone to sign an engagement on behalf of a New York client but whose principal place of business is not located in New York State.

There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law Section 7404.

##### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed regulation will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and is economically feasible. See above "Compliance Costs" for the economic impact of the regulation.

##### 6. MINIMIZING ADVERSE IMPACT:

The Department believes that the requirements should apply to all firms, regardless of size, to ensure a uniformly high standard of professional practice in the practice of public accountancy. It is not unusual for small entities, including firms, not-for-profit organizations and local governments to contract with small accounting firms for audit services. Failure to apply the provisions of these regulations on a uniform basis could harm these small entities and the public by allowing small CPA firms to provide a lower standard of professional services than larger CPA firms.

#### 7. SMALL BUSINESS PARTICIPATION:

The State Board for Public Accountancy, which includes members who have experience in a small business environment, assisted in the development of the proposed regulation. In addition, the State Education Department provided the New York State Society of Certified Public Accountants, which includes members who own and operate small businesses, with draft regulatory language concerning the proposed regulation and engaged in an ongoing conversation with this organization to ensure that their comments were addressed.

#### (b) Local Governments:

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants and public accountants and add provisions relating to endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits, and to amend the definition of unprofessional conduct for certified public accountants and public accountants licensed in New York State. Because it is evident from the nature of the proposed rule that it does not affect local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly a regulatory flexibility analysis for local governments is not required and one has not been prepared.

#### *Rural Area Flexibility Analysis*

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

The proposed amendment will affect individuals who apply for licensure as certified public accountants (CPA), including those that are located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. Each year about 1,750 individuals apply for licensure as a CPA. The Department estimates that about eight percent or about 140 of these individuals come from a rural county of New York State.

The proposed amendment also affects licensed CPAs and PAs who practice in a rural county in New York. As of January 13, 2009, the Department's records indicate that 2,206 licensed CPAs and 9 licensed PAs come from a rural county of New York State. In addition, the Department estimates that approximately 260 public accounting firms are located in a rural county in New York State.

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

The purpose of the proposed amendment is to establish in the definition of unprofessional conduct in the practice of public accountancy: (1) a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy pursuant to Education Law section 7401 or uses the title "certified public accountant" or the designation "CPA" or the title "public accountant" or the designation "PA"; (2) any willful violation of any State, federal or local law by out-of-state licensed CPA performing non-attest services; and (3) a licensee's failure to meet certain competency requirements when a licensed CPA or PA supervises and signs or authorizes someone to sign the accountant's report on financial statements; and defines those instances when a licensed CPA or PA may accept a commission or referral fee and establishes disclosure requirements when such a fee is received.

The proposed amendment also amends the education, examination and experience requirements for licensure as a CPA in New York; the continuing education requirements for CPAs in New York; the registration process for public accounting firms and establishes, with limited exceptions; a process to issue limited permits to foreign credentialed accountants and temporary practice permits to CPAs licensed and in good standing in another state; and amends the process used to issue a license as a CPA to an individual licensed as a CPA in another state or a foreign country who substantially meets New York's licensure requirements.

The proposed amendment does not require any licensee or firm to hire any professional services to comply.

#### 3. COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is: (1) \$50 for each office of the firm located in New York State or \$50 for the firm if the firm has no offices located in New York and (2) \$10 for the sole proprietor or each general partner of a partnership or partner of a limited liability partnership,

member of a limited liability company or shareholder of a professional service corporation whose principal place of business is located in New York or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this Part and for each certified public accountant or public accountant licensed in New York that signs or authorizes someone to sign an engagement on behalf of a New York client but whose principal place of business is not located in New York State.

There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; a \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404.

#### 4. MINIMIZING ADVERSE IMPACT:

The Department believes that these requirements should apply to all licensees and firms, regardless of whether or not they are located in a rural area, to ensure a uniform standard of professional practice in the practice of public accountancy. Failure to apply the provisions of these regulations on a uniform basis could harm the public by allowing certain CPA firms and licensees to provide a lower standard of professional services than other licensees or firms.

#### 5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments from the State Board for Public Accountancy and the Society of Certified Public Accountants, which includes members located in all areas of New York State, including rural areas of the State.

#### *Job Impact Statement*

The purpose of the proposed amendment is to implement Chapter 651 of the Laws of 2008 by establishing education, examination and experience requirements for licensure of certified public accountants (CPAs) and public accountants (PAs) and add provisions relating to endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits, and to amend the definition of unprofessional conduct for CPAs and PAs licensed in New York State.

Because it is evident from the nature of the rule that it could only have a positive impact or no impact on jobs and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

#### *Assessment of Public Comment*

Since publication of a Notice of Revised Rule Making on October 21, 2009, the State Education Department received the following comments on the proposed rule.

1. COMMENT: One comment suggests that the definition of skills and competencies (1) "is confusing to the profession, which classifies professional services by reference to professional standards rather than a list of activities"; (2) "includes a great number of activities that are not at the core of the practice of accountancy" which could "create an expectation that every CPA is expert in, or otherwise specially qualified to perform, any and all of the listed tasks-which is simply not the case"; and (3) "does not track the statute". The commenter also believes that the Department's approach in the proposed Revised Rules is contrary to public policy because many of the tasks described in the definition are those that may be performed by small business owners, consultants, investment advisors, and so forth. When performed by a practicing CPA, these tasks should be performed with a certain level of skill and professionalism-a level that is more often than not set forth in a professional standard related to that task-and the failure to do so is properly a matter for discipline. However, the effect of the regulation is a definition that extends beyond practicing CPAs.

RESPONSE: The Department disagrees with this comment. Section 7401(3) of the Education Law, as amended by Chapter 651 of the Laws of 2008, defines the scope of practice for public accountancy to include offering to perform or performing services including but not limited to accounting, management advisory, financial advisory, and certain tax services, involving the use of professional skills or competencies of the licensed accountant as described by the Board of Regents. The proposed amendment tracks the statute by implementing the statutory requirement to define the professional skills or competencies that a licensed accountant must utilize when performing these services. The skills and competencies described in the proposed amendment do not change the scope of practice of public accountancy; rather, they reflect the special training that a public accountant or certified public accountant brings to the performance of accounting, management advisory, financial advisory, and certain tax services. The proposed amendment does not prescribe skills and competencies for unlicensed individuals.

2. COMMENT: One comment suggests that the Department amend the regulation to define skills and competencies in terms of the AICPA professional standards.

RESPONSE: The Department disagrees with this suggestion. The professional standards referred to in the comment letter are promulgated by the profession's national membership association and apply to licensees providing professional services to the public through public accounting firms. These standards do not apply to licensees employed in private industry, government or academia. Therefore, it would be inappropriate to extend the requirements of the professional practice standards referenced in the comment letter to licensees employed outside of public accounting firms. Moreover, section 7401(3) of the Education Law, as amended by Chapter 651 of the Laws of 2008, requires the Board of Regents to describe skills and competencies for licensees performing certain services, not professional standards.

3. COMMENT: One comment suggests that the definition of skills and competencies is written too broadly because it includes skills and competencies that could be used by non-licensed individuals. The comment further suggests that the definition of skills and competencies is having, and will continue to have, a significant negative effect on the profession when combined with the Department's rules for licensure relinquishment and inactive licensure. The comment suggests that the because the definition of practicing public accountancy is so broad, a CPA will find it extremely difficult to achieve inactive status and they will be subject to continuing professional education requirements and other oversight by the Department. The comment further suggest that the definition of skills and competencies should be defined in terms of professional standards to which CPAs must adhere when they are providing services as a CPA and that when an individual decides that he or she no longer wants to be a CPA, the individual should be permitted to take inactive status, surrender his or her license or use a "CPA Retired" designation, or any combination thereof.

RESPONSE: As required by section 7401(3) of the Education Law, the proposed amendment describes the skills and competencies of a licensed accountant providing these services. If an individual is authorized to provide accounting, management advisory, financial advisory, and tax services without being licensed in accordance with the exemption set forth in Education Law section 7407(g), such individual is not required to be licensed even if he or she is using some of the skills and competencies described in the proposed amendment. In addition, if a licensed CPA decides that she or he no longer want to be a CPA and he or she is no longer performing services within the scope of practice of public accountancy and does not use the title "certified public accountant" or the designation "CPA" or the title "public accountant" or designation "PA", the individual may request an inactive status and will not be required to register with the Department.

4. COMMENT: One comment indicates that requiring an individual practicing with a temporary practice permit to identify his or her state of principal place of business in parentheses following his or her title or designation will be burdensome in practice. The comment suggests that it would be preferable to revise the regulation to define as professional misconduct an affirmative and intentional misrepresentation of licensure status.

RESPONSE: The requirement for an individual practicing with a temporary practice permit to identify his or her state of principal place of business in parentheses following his or her title or designation only applies when the individual uses the title "certified public accountant" or "public accountant". Therefore, the Department does not believe this requirement is overly burdensome. Moreover, the Department believes that it is in the public interest for a client to be informed that the individual it hired to perform professional services may have a principal place of business outside of New York State. The natural assumption of a client will be that the individual is licensed in New York. The Department believes that requiring the public to proactively inquire of a CPA's or PA's state of licensure in order to meet the threshold of unprofessional conduct is not in the public interest.

5. COMMENT: One comment suggests that the standards for endorsement of an out-of-state CPA license be changed from requiring an applicant to demonstrate that he or she has qualifications that are significantly comparable to New York's standards and that he or she has four years of professional service in the practice of public accountancy within the 10 years immediately preceding application for licensure by endorsement to a standard that requires the applicant to meet either but not both endorsement requirements.

RESPONSE: The Department disagrees with this comment. There are two pathways for obtaining licensure as a public accountant in New York State. An individual may either: (1) meet the New York standards for education, examination and experience for licensure or (2) qualify for licensure through endorsement which requires the applicant to have met significantly comparable standards. Under the proposed amendment, an applicant seeking licensure through endorsement of an out-of-state CPA license must present satisfactory evidence of at least four years of professional experience in the practice of public accountancy following initial

licensure and within the ten years immediately preceding an application for licensure. The Department believes that the experience requirement is necessary to protect the public and the majority of states with an endorsement pathway require an applicant to demonstrate at least four years of professional experience for licensure through endorsement of an out-of-state license. The applicant always has the option of meeting New York's standards for education, examination and experience for licensure without seeking licensure through endorsement. The proposed amendment merely streamlines the endorsement process while maintaining public protection.

6. COMMENT: One comment urges the Department not to take the position that an individual may never apply for a new temporary practice permit once it has been issued.

RESPONSE: Section 7406(2)(e), as added by Chapter 651 of the Laws of 2008, provides that no more than one temporary practice permit may be issued to any individual applicant, provided that each permit may be renewed by the Department up to three times. The law does not provide for issuance of a second temporary practice permit to an individual.

7. COMMENT: One comment urges the Department to remove from the registration fee calculation for firms the fee for partners who obtain a temporary practice permit in New York. The comment suggests the proposed amendment creates a significant compliance regime to monitor and track compliance with the temporary practice permit provisions and the per capita firm fee could simply be assessed on the temporary permit directly simplifying the administration of the fee.

RESPONSE: The Department disagrees with the suggestion that partners, owners or shareholders practicing in New York under a temporary practice permit be exempted from the fee calculation. The new accountancy law requires any firm that is offering to perform or performing attest and/or compilation services, or that, incident to such services, is offering to perform or performing professional services for clients, in any or all matters relating to accounting concepts and to the recording, presentation, or certification of financial information or data, or uses the title "CPA" or "CPA firm" or the title "PA" or "PA firm" to register with the department. Removing partners, shareholders or owners authorized to practice with a temporary practice permit from the fee calculation could result in some out-of-state firms paying a discounted fee compared to a New York State firm to conduct business in New York.

8. COMMENT: Several comments urge the Board of Regents to exempt retired CPAs serving on boards or committees for not-for-profit organizations and for-profit organizations from the registration and continuing education requirements prescribed in the proposed amendment. These comments suggest that requiring retired CPAs to meet the registration and continuing education requirements will discourage retired CPA from serving on audit, budget and finance committees and smaller not-for-profit organizations are the ones that can use the talents of retired CPAs.

RESPONSE: The current policy on retired CPAs is under review and any revisions that need to be made to such policy will be made in guidance. No regulatory changes are needed to address this issue.

## EMERGENCY RULE MAKING

### Standing Committees of the Board of Regents

I.D. No. EDU-51-09-00023-E

Filing No. 1437

Filing Date: 2009-12-22

Effective Date: 2009-12-22

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

**Action taken:** Amendment of section 3.2 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 207 (not subdivided)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is needed to clarify in the Regents Rules that a Chancellor Emeritus, who is also a current member of the Board of Regents, is an ex officio member of each standing committee of the Board of Regents.

The Board of Regents has determined that this provision is appropriate and necessary to assist the Board of Regents to effectively meet its responsibilities to govern the University of the State of New York, determine the educational policies of the State and oversee the State Education Department.

Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular adoption, after publication of a Notice of Proposed Rule Making in the State Register and expiration of the 45-day public comment period prescribed in the State

Administrative Procedure Act, is at the March 8-9, 2010 meeting of the Board of Regents. If adopted at the March Regents meeting, the earliest the amendment could become effective is March 31, 2010. However, in addition to the March 8-9, 2010 meeting, Regents meetings are also scheduled for January 11-12, 2010 and February 8-9, 2010.

The proposed amendment is being adopted as an emergency rule upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to clarify the ex officio membership of a Chancellor Emeritus on the standing committees of the Board of Regents, so that the sitting Chancellor Emeritus may immediately assume his privileges and duties with respect thereto, and thereby assist the Board of Regents to efficiently and effectively meet its statutory responsibilities.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at their March 8-9, 2010 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by the State Administrative Procedure Act.

**Subject:** Standing Committees of the Board of Regents.

**Purpose:** To provide for the ex-officio membership of a Chancellor Emeritus on Regents standing committees.

**Text of emergency rule:** Subdivision (b) of section 3.2 of the Rules of the Board of Regents is amended, effective December 22, 2009, as follows:

(b) The chancellor, [and] the vice chancellor, and any chancellor emeritus who is also a current member of the Board of Regents shall be ex officio members of each standing committee.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-51-09-00023-P, Issue of December 23, 2009. The emergency rule will expire March 21, 2010.

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

##### 2. LEGISLATIVE OBJECTIVES:

Consistent with the above authority, the proposed amendment provides for membership of a Chancellor Emeritus on Standing Committees of the Board of Regents, which will assist the Board in meeting its statutory responsibility to determine the educational policies of the State and to carry out the laws and policies of the State relating to education.

##### 3. NEEDS AND BENEFITS:

The proposed amendment is needed to clarify in the Regents Rules that a Chancellor Emeritus, who is also a current member of the Board of Regents, is an ex officio member of each standing committee of the Board of Regents. The Board of Regents has determined that this provision is appropriate and necessary to assist the Board of Regents to effectively meet its responsibilities to govern the University of the State of New York, determine the educational policies of the State and oversee the State Education Department.

##### 4. COSTS:

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

The proposed amendment relates to the internal organization of the Board of Regents and merely provides for membership of a Chancellor Emeritus on each Standing Committee of the Board of Regents, and will not impose any costs on State and local government, private regulated parties or the State Education Department.

##### 5. LOCAL GOVERNMENT MANDATES:

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

##### 6. PAPERWORK:

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

##### 7. DUPLICATION:

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

##### 8. ALTERNATIVES:

There are no significant alternatives and none were considered.

##### 9. FEDERAL STANDARDS:

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

##### 10. COMPLIANCE SCHEDULE:

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

##### Regulatory Flexibility Analysis

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

##### Rural Area Flexibility Analysis

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

##### Job Impact Statement

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

## NOTICE OF ADOPTION

### Definition of Unprofessional Conduct and the Licensure Requirements for Certified Public Accountants and Public Accountants

**I.D. No.** EDU-26-09-00003-A

**Filing No.** 1434

**Filing Date:** 2009-12-22

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of sections 29.10 and 52.13; repeal of Part 70; and addition of new Part 70 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 6501 (not subdivided), 6504 (not subdivided), 6506(1)(2) and (6), 6507(2)(a)(3)(4)(a), 6508(1), 7401, 7401-a, 7402, 7404, 7406, 7406-a, 7408, 7409 and 7410; and L. 2008, ch. 651

**Subject:** Definition of unprofessional conduct and the licensure requirements for certified public accountants and public accountants.

**Purpose:** To implement Chapter 651 of the Laws of 2008.

**Substance of final rule:** The Commissioner of Education proposes to amend section 29.10 of the Rules of the Board of Regents and section 52.13 of the Regulations of the Commissioner of Education and repeal and add a new Part 70 to the Regulations of the Commissioner of Education, relating to the education, examination and experience requirements for licensure of certified public accountants; endorsement of out-of-state licenses or foreign licenses; the issuance of foreign limited permits or temporary practice permits; registration of accounting firms; continuing education requirements and the definition of unprofessional conduct. The following is a summary of the proposed amendment:

A new paragraph 13 is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents to define as unprofessional conduct in the practice of public accountancy a licensee's failure to meet certain competency requirements when supervising attest or compilation services or signing or authorizing someone to sign an accountant's report on financial statements. Required competencies for the supervision of compilation services shall include at least 40 hours of continuing education in the area of accounting, auditing or attest during the three years im-

mediately prior to the performance of such services; and maintaining the level of education, experience and professional conduct required by generally accepted accounting standards. A licensee who supervises attest services shall also be required to have at least 1,000 hours of experience in the preparation or review of financial statements or reports on financial statements within the last five years or a peer review satisfactory to the department.

A new paragraph (14) is added to subdivision (a) of section 29.10 of the Rules of the Board of Regents defining as unprofessional conduct a licensee's failure to maintain an active registration with the Department when a licensee engages in the practice of public accountancy or uses the title "certified public accountant" or the designation "CPA" or the title "public accountant" or the designation "PA". Any certified public accountant or public accountant licensed in New York State who is not practicing public accountancy in this State pursuant to Education Law section 7401 and does not use the title "certified public accountant" or the designation "CPA" or the title "public accountant" or designation "PA" may request an inactive status from the Department and will not be required to register with the Department.

A new subdivision (h) is added to section 29.10 of the Rules of the Board of Regents, defining as unprofessional conduct any willful or grossly negligent failure to comply with substantial provisions of Federal, State or local laws, rules or regulations governing the practice of public accountancy by a CPA licensed in another state who is performing non-attest services or any firm that employs such CPA to perform non-attest services pursuant to Education Law section 7406-a and the failure of such licensee to identify his or her state of principal place of business in parentheses following his or her designation.

A new subdivision (i) is added to section 29.10 of the Rules of the Board of Regents to amend the definition of unprofessional conduct to prohibit a licensee or the public accounting firm employing such licensee to directly or indirectly, offer, give, solicit, or receive or agree to receive, a commission for the referral of any product or service to a client if the licensee is performing: attest services; compilation services when the licensee expects, or reasonably might expect that a third party will rely upon the financial statements and the licensee's compilation report does not disclose a lack of independence; an examination of prospective financial information; and/or any other attest service. The prohibitions apply during the period in which the licensee is engaged to perform any of the services defined in the subdivision and the period covered by any financial, accounting or related statements involved in such services. A licensee providing services other than those described in this subdivision may accept a commission for recommending products or services of a third party to a client, provided that the licensee discloses the receipt of the commission to the client prior to the performance of such service. The provisions of this subdivision do not apply to licensees who perform accounting, management advisory, financial advisory, consulting or tax services for an entity that is not required to register with the department under Education Law section 7408.

Paragraph (1) of subdivision (b) of section 52.13 of the Regulations of the Commissioner of Education is amended to define specific curricular content in the professional accounting content area that is required for licensure and those subjects that may be taken to fulfill the credit hour requirement in this area for licensure. This paragraph is also amended to eliminate the requirement for mandatory subjects in the general business content area and replaces these requirements with a list of content areas that may be used to meet the credit hour requirement in this area for licensure.

Section 70.1 of the Regulations of the Commissioner of Education defines the practice of public accountancy and defines the professional skills and competencies used by a licensee when he/she performs accounting, management advisory, financial advisory, and tax services.

Section 70.2 defines the professional study requirements for licensure and requires an applicant to submit evidence of completion of a baccalaureate or higher degree in accountancy that is either registered with the Department; accredited by an acceptable accrediting body; or a degree that the Department has determined to be the substantial equivalent of a registered or accredited program. An applicant who applies for licensure on or after August 1, 2009 must have satisfactorily completed a curriculum of at least 150 semester hours in a program described above unless the applicant was licensed in another state prior to August 1, 2009, in which case, they may meet the education requirements through completion of at least 120 semesters in a program described above. An applicant who applies to the Department for licensure prior to August 1, 2009 is required to have satisfactorily completed a curriculum of at least 120 semester hours in a program prescribed in this section prior to August 1, 2009 and have submitted the required application forms for licensure to the Department prior to August 1, 2009. In lieu of meeting these education requirements and any experience requirements, the applicant may meet the following requirement: at least 15 years of full-time experience in the practice of public accountancy satisfactory to the State Board.

A new section 70.3 broadens acceptable experience for licensure to include providing any type of service or advice involving the use of accounting, attest, compilation, management advisory, financial advisory, tax or consulting skills under the direct supervision of a certified public accountant licensed in the United States or a public accountant licensed in New York. Two years of acceptable experience are required for applicants who meet the education requirement through completion of 120 semester hours and one year of acceptable experience is required for applicants who complete the education requirement through completion of 150 semester hours. Experience may be gained through employment in public practice, government, private industry or educational institutions. An applicant is required to obtain the necessary experience within 10 years of having passed the licensing examination or they will be required to complete continuing professional education, in an amount determined by the State Board for Public Accountancy.

A new section 70.4 defines the content, passing score and retention of credit criteria for the licensing examination. The proposed amendment provides students with the opportunity to apply for admission to the Uniform CPA Examination upon completion of 120 semester hours of professional study in a regionally accredited college or university which shall include at least one course in each of the mandatory professional accountancy content areas: financial accounting, cost or managerial accounting, taxation, and auditing and attestation services.

A new section 70.5 provides that a licensee as a certified public accountant in New York may be issued to an applicant licensed in another state or foreign country if the applicant has met licensure requirements significantly comparable to New York. An applicant licensed by a state with significantly comparable licensure requirements, meaning those states recognized by the Department to have significantly comparable requirements, is eligible for a license through endorsement. If the applicant was licensed in a state that did not have significantly comparable licensing requirements, the individual's credentials will be evaluated to determine if his or her credentials are significantly comparable to New York's requirements. In either case, the applicant shall demonstrate four years of professional experience in public accounting in the last 10 years immediately preceding the application for licensure by endorsement.

This section also permits licensure by endorsement of a foreign applicant with an acceptable license, certificate or degree from a foreign country with significantly comparable licensure requirements provided that the applicant meets certain requirements.

Section 70.6 authorizes the Department to issue a two-year limited permit to practice public accountancy in this State to a foreign credentialed accountant if the applicant meets certain requirements described in the proposed amendment. The regulation requires a \$250 fee for issuance of the limited permit.

Section 70.7 authorizes CPAs licensed in another state, with a principal place of business in another state, to apply for a temporary practice permit in order to provide attest and compilation services in New York. The temporary practice permit is valid for up to 180 days during a twelve-month period and would be renewable no more than three times. The proposed regulations also require the submission of application materials and the payment of a \$125 application fee and renewal fee.

Section 70.8 requires all firms, including sole proprietorships, partnerships, LLPs, LLCs, and PCs, to maintain a registration with the Department if the firm is performing attest or compilation services or using the title "CPA" or "CPA firm" or the title "PA" or "PA firm". Firms performing only non-attest services described in Education Law § 7401(3) are not required to, but may, register with the Department.

Section 70.9 implements statutory changes, deletes prior exemptions from mandatory continuing education for individuals who work in private industry or government and specifies that all registered CPAs and PAs are required to pay a \$50 continuing education fee. Any licensee who does not engage in professional practice as defined in § 7401 may file a written request for an exemption from mandatory continuing education.

The proposed amendment also implements a statutory change in the tracking year for continuing education credit from a September 1 - August 31 year to a January 1 - December 31 year. The proposed amendment also allow licensees to meet their continuing education requirement by completing either 40 credits in any combination of the following subject areas: accounting, attest, auditing, taxation, advisory services, specialized knowledge and applications related to specialized industries, and such other areas appropriately related to the practice of accounting as may be acceptable to the Department or by completing 24 credits concentrated in any one subject area. Before this change, licensees were required to complete 40 credits in a combination of the following areas: accounting, auditing or taxation, or 24 credits concentrated, in either accounting, auditing or taxation.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 29.10(a)(13), (h) and (i), 70.1(c)(1), 70.8(c)(6) and (10).

*Revised rule making(s) were previously published in the State Register on October 21, 2009.*

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

#### **Revised Regulatory Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on July 1, 2009, the following substantial revisions were made to the proposed rule:

Section 29.10(a)(13) has been modified based upon public comment to allow certified public accountants or public accountants licensed prior to July 26, 2009 to meet the competency provisions by January 1, 2011, instead of July 26, 2009, to provide them with a sufficient amount of time to meet these requirements. The competency requirement was further revised to eliminate the 1,000 hour experience requirement for licensees performing only compilation services. These licensees, however, will be required to meet the 40 hour continuing education requirement and maintain the level of education, experience and professional conduct required by generally accepted profession standards relating to the compilation standards performed. Changes were also made to the competency requirements for licensees performing attest services to provide an alternative to the requirement that such licensees have 1,000 hours of experience providing attest services within the previous five years. The proposed amendment now permits licensees performing attest services to satisfy the competency requirement by having either at least 1,000 hours of attest experience within the previous five years or through employment by a registered firm that has undergone a peer review satisfactory to the Department which indicates that the firm has received a rating of pass or pass with deficiencies.

Section 29.10(h) is amended to include in the definition of unprofessional conduct the failure of any individual licensed as a certified public accountant in another state, who is performing non-attest services and uses the title "certified public accountant" or the designation "CPA" to identify his or her state of principal place of business in parentheses following his or her title or designation.

Section 29.10(i) has been revised to change the definition of commission to mean any compensation, including a referral fee, paid by a third party to the licensee or the public accounting firm that employs such licensee, for recommending or referring any product or service to be supplied by another person. This section has also been revised to prohibit a licensee or a public accounting firm employing such licensee to offer, give, solicit or receive or agree to receive a commission for the referral of any product or service to a client if the licensee is performing an audit, compilation, examination and/or any other attest service instead of a service that may require a licensee to utilize independent judgment. This section is further revised to require a licensee who is not performing these services, to disclose the receipt of a commission to the client prior to the performance of such service.

Section 70.1(c)(1) is amended to revise the professional skills and competencies for accounting, management advisory, financial advisory and tax services to not include the application of auditing procedures.

Section 70.8(c)(6) is amended to require a firm to include in its application for registration an affirmation by the firm that any certified public accountant or public accountant that it employs whose principal place of business is New York or who is otherwise authorized to practice in New York and who is responsible for supervising attest or compilation services or sign or authorize someone to sign the accountant's report on financial statements on behalf of the firm meet the competency requirements set forth in paragraph (13) of subdivision (a) of section 29.10.

Section 70.8(c)(10) amends the firm registration fee to require \$50 for each office of the firm located in New York State or \$50 for the firm if the firm has no offices located in New York and \$10 for the sole proprietor or each general partner of a partnership or partner of a limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is located in New York or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this Part and for each certified public accountant or public accountant licensed in New York that signs or authorizes someone to sign an engagement on behalf of a New York client but whose principal place of business is not located in New York State.

The above revisions require revisions to the Costs section in the previously published Regulatory Impact Statement as follows:

#### 4. COSTS:

- (a) Cost to State government: None.
- (b) Cost to local government: There are no additional costs to local government.
- (c) Cost to private regulated parties: The proposed amendment does not

impose any costs beyond those imposed by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is: (1) \$50 for each office of the firm located in New York or \$50 for the firm if the firm has no offices located in New York and (2) \$10 for the sole proprietor or each general partner of a partnership or partner of a limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is located in New York or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this Part and for each certified public accountant or public accountant licensed in New York that signs or authorizes someone to sign an engagement on behalf of a New York client but whose principal place of business is not located in New York State.

There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404 any licensee who is required to register triennially with the Department at the beginning of each triennial registration period.

#### **Revised Regulatory Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on July 1, 2009, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement herewith.

The above revisions to the proposed rule require that the Compliance Cost section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

#### 4. COMPLIANCE COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is: (1) \$50 for each office of the firm located in New York State or \$50 for the firm if the firm has no offices located in New York and (2) \$10 for the sole proprietor or each general partner of a partnership or partner of a limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is located in New York or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this Part and for each certified public accountant or public accountant licensed in New York that signs or authorizes someone to sign an engagement on behalf of a New York client but whose principal place of business is not located in New York State.

There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit and on those licensees who must participate in mandatory continuing education. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law Section 7404.

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

Since publication of a Notice of Proposed Rule Making in the State Register on July 1, 2009, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule require that the Costs section of the previously published Rural Area Flexibility Analysis be revised to read as follows:

#### 3. COSTS:

The proposed amendment does not impose any costs beyond those authorized by statute. Chapter 651 of the Laws of 2008 authorizes the Department to collect fees for firm registration, a mandatory continuing education fee and fees for limited permits and temporary practice permits.

The fee for a firm registration is: (1) \$50 for each office of the firm located in New York State or \$50 for the firm if the firm has no offices located in New York and (2) \$10 for the sole proprietor or each general partner of a partnership or partner of a limited liability partnership, member of a limited liability company or shareholder of a professional service corporation whose principal place of business is located in New York or who is otherwise authorized to practice in New York through a temporary practice permit issued pursuant to section 70.7 of this Part and for each certified public accountant or public accountant licensed in New York that signs or authorizes someone to sign an engagement on behalf of a New York client but whose principal place of business is not located in New York State.

There is also a \$250 fee for individuals applying for limited permits or a renewal of limited permits; a \$125 fee for individuals applying for a temporary practice permit or a renewal of such permit. The proposed amendment also requires a mandatory continuing education fee of fifty dollars (\$50) to be collected from a licensee in addition to the triennial registration fee required by Education Law section 7404.

#### **Revised Job Impact Statement**

Since publication of the Notice of Proposed Rule Making in the State Register on July 1, 2009, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The proposed rule, as so revised, relates to the practice of public accountancy. The revised rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the revised rule that it will have no impact on jobs or employment opportunities, no further measures were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

Since publication of a Notice of Revised Rule Making on October 21, 2009, the State Education Department received the following comments on the proposed rule.

1. COMMENT: One comment suggests that the definition of skills and competencies (1) "is confusing to the profession, which classifies professional services by reference to professional standards rather than a list of activities"; (2) "includes a great number of activities that are not at the core of the practice of accountancy" which could "create an expectation that every CPA is expert in, or otherwise specially qualified to perform, any and all of the listed tasks-which is simply not the case"; and (3) "does not track the statute". The commenter also believes that the Department's approach in the proposed Revised Rules is contrary to public policy because many of the tasks described in the definition are those that may be performed by small business owners, consultants, investment advisors, and so forth. When performed by a practicing CPA, these tasks should be performed with a certain level of skill and professionalism-a level that is more often than not set forth in a professional standard related to that task-and the failure to do so is properly a matter for discipline. However, the effect of the regulation is a definition that extends beyond practicing CPAs.

RESPONSE: The Department disagrees with this comment. Section 7401(3) of the Education Law, as amended by Chapter 651 of the Laws of 2008, defines the scope of practice for public accountancy to include offering to perform or performing services including but not limited to accounting, management advisory, financial advisory, and certain tax services, involving the use of professional skills or competencies of the licensed accountant as described by the Board of Regents. The proposed amendment tracks the statute by implementing the statutory requirement to define the professional skills or competencies that a licensed accountant must utilize when performing these services. The skills and competencies described in the proposed amendment do not change the scope of practice of public accountancy; rather, they reflect the special training that a public accountant or certified public accountant brings to the performance of accounting, management advisory, financial advisory, and certain tax services. The proposed amendment does not prescribe skills and competencies for unlicensed individuals.

2. COMMENT: One comment suggests that the Department amend the regulation to define skills and competencies in terms of the AICPA professional standards.

RESPONSE: The Department disagrees with this suggestion. The professional standards referred to in the comment letter are promulgated by the profession's national membership association and apply to licensees providing professional services to the public through public accounting firms. These standards do not apply to licensees employed in private industry, government or academia. Therefore, it would be inappropriate to extend the requirements of the professional practice standards referenced in the comment letter to licensees employed outside of public accounting firms. Moreover, section 7401(3) of the Education Law, as amended by Chapter 651 of the Laws of 2008, requires the Board of Regents to describe skills and competencies for licensees performing certain services, not professional standards.

3. COMMENT: One comment suggests that the definition of skills and competencies is written too broadly because it includes skills and competencies that could be used by non-licensed individuals. The comment further suggests that the definition of skills and competencies is having, and will continue to have, a significant negative effect on the profession when combined with the Department's rules for licensure relinquishment and inactive licensure. The comment suggests that because the definition of practicing public accountancy is so broad, a CPA will find it extremely difficult to achieve inactive status and they will be subject to continuing professional education requirements and other oversight by the Department. The comment further suggest that the defini-

tion of skills and competencies should be defined in terms of professional standards to which CPAs must adhere when they are providing services as a CPA and that when an individual decides that he or she no longer wants to be a CPA, the individual should be permitted to take inactive status, surrender his or her license or use a "CPA Retired" designation, or any combination thereof.

RESPONSE: As required by section 7401(3) of the Education Law, the proposed amendment describes the skills and competencies of a licensed accountant providing these services. If an individual is authorized to provide accounting, management advisory, financial advisory, and tax services without being licensed in accordance with the exemption set forth in Education Law section 7407(g), such individual is not required to be licensed even if he or she is using some of the skills and competencies described in the proposed amendment. In addition, if a licensed CPA decides that she or he no longer want to be a CPA and he or she is no longer performing services within the scope of practice of public accountancy and does not use the title "certified public accountant" or the designation "CPA" or the title "public accountant" or designation "PA", the individual may request an inactive status and will not be required to register with the Department.

4. COMMENT: One comment indicates that requiring an individual practicing with a temporary practice permit to identify his or her state of principal place of business in parentheses following his or her title or designation will be burdensome in practice. The comment suggests that it would be preferable to revise the regulation to define as professional misconduct an affirmative and intentional misrepresentation of licensure status.

RESPONSE: The requirement for an individual practicing with a temporary practice permit to identify his or her state of principal place of business in parentheses following his or her title or designation only applies when the individual uses the title "certified public accountant" or "public accountant". Therefore, the Department does not believe this requirement is overly burdensome. Moreover, the Department believes that it is in the public interest for a client to be informed that the individual it hired to perform professional services may have a principal place of business outside of New York State. The natural assumption of a client will be that the individual is licensed in New York. The Department believes that requiring the public to proactively inquire of a CPA's or PA's state of licensure in order to meet the threshold of unprofessional conduct is not in the public interest.

5. COMMENT: One comment suggests that the standards for endorsement of an out-of-state CPA license be changed from requiring an applicant to demonstrate that he or she has qualifications that are significantly comparable to New York's standards and that he or she has four years of professional service in the practice of public accountancy within the 10 years immediately preceding application for licensure by endorsement to a standard that requires the applicant to meet either but not both endorsement requirements.

RESPONSE: The Department disagrees with this comment. There are two pathways for obtaining licensure as a public accountant in New York State. An individual may either: (1) meet the New York standards for education, examination and experience for licensure or (2) qualify for licensure through endorsement which requires the applicant to have met significantly comparable standards. Under the proposed amendment, an applicant seeking licensure through endorsement of an out-of-state CPA license must present satisfactory evidence of at least four years of professional experience in the practice of public accountancy following initial licensure and within the ten years immediately preceding an application for licensure. The Department believes that the experience requirement is necessary to protect the public and the majority of states with an endorsement pathway require an applicant to demonstrate at least four years of professional experience for licensure through endorsement of an out-of-state license. The applicant always has the option of meeting New York's standards for education, examination and experience for licensure without seeking licensure through endorsement. The proposed amendment merely streamlines the endorsement process while maintaining public protection.

6. COMMENT: One comment urges the Department not to take the position that an individual may never apply for a new temporary practice permit once it has been issued.

RESPONSE: Section 7406(2)(e), as added by Chapter 651 of the Laws of 2008, provides that no more than one temporary practice permit may be issued to any individual applicant, provided that each permit may be renewed by the Department up to three times. The law does not provide for issuance of a second temporary practice permit to an individual.

7. COMMENT: One comment urges the Department to remove from the registration fee calculation for firms the fee for partners who obtain a temporary practice permit in New York. The comment suggests the proposed amendment creates a significant compliance regime to monitor and track compliance with the temporary practice permit provisions and the per capita firm fee could simply be assessed on the temporary permit directly simplifying the administration of the fee.

RESPONSE: The Department disagrees with the suggestion that partners, owners or shareholders practicing in New York under a temporary practice permit be exempted from the fee calculation. The new accountancy law requires any firm that is offering to perform or performing attest and/or compilation services, or that, incident to such services, is offering to perform or performing professional services for clients, in any or all matters relating to accounting concepts and to the recording, presentation, or certification of financial information or data, or uses the title "CPA" or "CPA firm" or the title "PA" or "PA firm" to register with the department. Removing partners, shareholders or owners authorized to practice with a temporary practice permit from the fee calculation could result in some out-of-state firms paying a discounted fee compared to a New York State firm to conduct business in New York.

8. COMMENT: Several comments urge the Board of Regents to exempt retired CPAs serving on boards or committees for not-for-profit organizations and for-profit organizations from the registration and continuing education requirements prescribed in the proposed amendment. These comments suggest that requiring retired CPAs to meet the registration and continuing education requirements will discourage retired CPA from serving on audit, budget and finance committees and smaller not-for-profit organizations are the ones that can use the talents of retired CPAs.

RESPONSE: The current policy on retired CPAs is under review and any revisions that need to be made to such policy will be made in guidance. No regulatory changes are needed to address this issue.

## NOTICE OF ADOPTION

### Teachers' Certificates and Teaching Practice

**I.D. No.** EDU-39-09-00022-A

**Filing No.** 1441

**Filing Date:** 2009-12-22

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of sections 80-1.2, 80-1.6, 80-2.2, 80-2.9, 80-3.6, 80-4.3, 80-5.6, 80-5.7 and 80-5.9 of Title 8 NYCRR.

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

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

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

**Text or summary was published** in the September 30, 2009 issue of the Register, I.D. No. EDU-39-09-00022-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

## NOTICE OF ADOPTION

### Diploma Requirements for Students with Disabilities

**I.D. No.** EDU-39-09-00023-A

**Filing No.** 1438

**Filing Date:** 2009-12-22

**Effective Date:** 2010-01-07

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

**Action taken:** Amendment of section 100.5 of Title 8 NYCRR.

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

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

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

**Text or summary was published** in the September 30, 2009 issue of the Register, I.D. No. EDU-39-09-00023-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave, Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

### Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on September 30, 2009, the State Education Department (SED) received the following comments on the proposed amendment. Other comments received are unrelated to the proposed rule and are not included in the Assessment of Public Comment.

#### COMMENT:

Of the 75 comments received, over 93 percent supported the proposed amendment to extend the existing Regents Competency Test (RCT) safety net for an additional year. Reasons for support included: the safety net levels the playing field for all students; the safety net allows students with disabilities the opportunity to meet New York State (NYS) learning standards and successfully graduate; safety net provisions have led to an increase in the proportion of students with disabilities earning local and Regents diplomas and a reduction of individualized education program (IEP) diploma recipients; the safety net results in a meaningful diploma that allows students with disabilities to graduate with their peers and access post-secondary opportunities; eliminating the safety net would limit the options of students with disabilities since IEP certificates are not widely accepted by employers, colleges, the military and some vocational training programs; the RCTs are invaluable to students who understand content area material but have difficulty with the reading level of Regents exams; there are students who can complete the same course of study but are unable to fulfill the requirements for a Regents diploma even with extensive accommodations and specially designed instruction; not all kids fit into the "box" of a Regents' exam curriculum; the local diploma represents a bridge between the IEP and Regents diplomas that is logical, reasonable, appropriate and proven effective; the local diploma option allows students with academic limitations in one or more subjects to achieve beyond an IEP diploma; failure to extend the safety net would be a step backward relative to issues of equity for students with disabilities; without an extension, NYS's drop out rate would likely increase or plateau; with no safety net/local diploma option, more students may be tracked toward an IEP diploma and the number of students graduating with an IEP diploma would increase; without the safety net provisions, there will be an increased need for remedial support to assist students in meeting the Regents exam requirements; and it will cost the state more to design programs to support students who do not graduate over the course of their lifetime.

#### DEPARTMENT RESPONSE:

The comments are supportive in nature and no response is necessary.

#### COMMENT:

Individuals that supported extending the safety net an additional year also made a number of recommendations regarding graduation requirements. RCTs are lower level assessments not aligned with the NYS learning standards and should be replaced with an alternate assessment using modified academic achievement standards, as permitted by federal accountability requirements, which provides a better measure of student performance consistent with the standards. Extend the RCT safety net but immediately engage in the development of a long range solution to the issue. Use the one year extension to expand graduation pathways for students with disabilities. Allow districts more flexibility to meet students' unique needs and encourage local district decision-making rather than mandating uniformity. Strengthen general education for all students by providing schools with flexibility to engage students in rigorous and relevant curriculum enabling multiple pathways to meet graduation requirements. Develop diplomas and/or credentials that reflect achievement and are accepted universally by colleges and employers. Develop a local/vocational diploma option for students with different abilities to prepare them for life and career while developing practical, relevant knowledge and skills in core academic areas.

#### DEPARTMENT RESPONSE:

These comments will be taken into consideration as the Regents continue their discussion during the 2009-10 school year of critical policy issues concerning graduation requirements, including alternative proposals for the RCT safety net and whether SED should pursue development of an alternative exiting credential that specifically documents a student's academic and career skills.

#### COMMENT:

Use of the RCTs should be extended indefinitely or not expire at all. Make the safety net permanent. Consider extending the safety net longer than one year to give the Regents and SED time to: develop an alternative to the Regents and IEP diploma options; analyze the policy issues concerning graduation rates and the implications for students with disabilities; allow for a proper gradual phase-out in high school; and assess the implementation of the Response to Intervention process in schools.

## DEPARTMENT RESPONSE:

These comments will be taken into consideration as the Regents continue their discussion during the 2009-10 school year of critical policy issues concerning graduation requirements, including alternative proposals for the safety net. While the proposed amendment would only extend the RCT safety net for one additional year, the Regents could adopt a longer extension of the safety net at a later date.

## COMMENT:

A few commenters opposed the extension of the current safety net indicating that: the RCTs do not provide true assessment of student achievement; the RCTs have not been upgraded, and are not aligned with curriculum and instruction; the tests are sealed and do not allow teachers and students to determine areas of remediation; past tests are not publicly available to allow a meaningful review program; component retesting of the RCTs is not available; and there is no appeal process for the RCTs. Graduation rate data from the past 13 years, while the safety net has been in place, demonstrate a need for revision not extension, as there has been no significant progress for students with disabilities, English language learners (ELL), Black and Latino students; and the significant gaps between the graduation rates of white students without disabilities and those of Black, Latino, ELL and students with disabilities subgroups raises the need for a safety net for all students. Instead of extending the safety net commenters recommended: creating a Regents diploma based on Career and Development Occupational studies with multiple pathways to make it accessible for all students; using only the current Regents exams as an assessment tool, but in the long term, recommended that SED consider limiting the number of Regents exams required for a local diploma; using a minimum combined score or average of all Regents examinations, and using a minimum combined score or average graduation requirement to include class attendance, course work and Regents examination scores; using "portfolio review" as an authentic method of assessment; revising graduation requirements/diploma options to ensure universal, accessible, unified and safe graduation requirements for all students; and developing alternative pathways to graduation for students who have the required credits and course sequences but are unable to pass all the Regents exams.

## DEPARTMENT RESPONSE:

Extending the RCT safety net for an additional year will allow the Regents and SED enough time to fully analyze all of the policy issues concerning graduation rates, including additional policy implications for students with disabilities. The Regents will be discussing alternative proposals for the RCT safety net for adoption prior to the end of the 2009-10 school year.

## COMMENT:

The RCT safety net for a local diploma option should be made available to all students in grades 9-12, as students that are unable to satisfy the demands of a Regents diploma may end up dropping out or pursuing a high school equivalency diploma. Not allowing general education students to work towards a local diploma is unacceptable and discriminatory. The legality of having a safety net only for students with disabilities is questioned since the proposed extension will result in two NYS diplomas only for students with disabilities, which would be discriminatory identification markers for potential employers, colleges and the military. Unless the safety net includes all students, the local diploma will be as meaningless as an IEP diploma.

## DEPARTMENT RESPONSE:

The proposed amendment extends the RCT safety net only for students with disabilities. However, these comments will be taken into consideration as the Regents continue their discussion during the 2009-10 school year of critical policy issues concerning graduation requirements, including whether or not to continue the phase-out of the local diploma for general education students and alternative proposals for the safety net.

## COMMENT:

If the safety net is eliminated, SED will need to rethink cohort requirements for students with disabilities and increase the acceptable number of students earning an IEP diploma.

## DEPARTMENT RESPONSE:

This comment will be taken into consideration as the Regents continue their discussion during the 2009-10 school year of critical policy issues concerning graduation requirements, including the alternative proposals for the safety net. However, the current cohort definition is consistent with federal requirements.

## COMMENT:

Clarify if SED is still planning on terminating the RCT and, if so, when the RCT will no longer be accepted by students with disabilities and the date for its termination.

## DEPARTMENT RESPONSE:

SED is proposing to extend the RCT safety net for an additional year to make it available to students with disabilities entering grade 9 in the 2010-11 school year. The Regents will be discussing alternative proposals for the safety net for adoption prior to the end of the 2009-10 school year.

## COMMENT:

Work with stakeholders to develop a new diploma system which offer diplomas/credentials that reflect achievement and are accepted by colleges and employers. Use parent centers to educate parents on the graduation requirements and to collect input from stakeholders.

## DEPARTMENT RESPONSE:

SED takes the input of stakeholders very seriously in its policy making process and these comments will be taken into consideration as the Regents continue their discussion during the 2009-10 school year of critical policy issues concerning graduation requirements.

## COMMENT:

State mandates regarding services to students with disabilities far exceed federal requirements (e.g. class size mandates) and should be more closely aligned with federal law and regulation.

## DEPARTMENT RESPONSE:

The comments are beyond the scope of the proposed regulations.

## COMMENT:

Recommend that the State develop alternate assessments for students with severe orthopedic and communication disorders.

## DEPARTMENT RESPONSE:

The comment is beyond the scope of the proposed regulations.

## COMMENT:

Conduct independent research to determine the impact of NYS' two track education system on students over the past 13 years and possible educational recovery programs that could be developed for those that were not successful, and the long-term impact cost-benefit of extended high school to 5 of 6 years.

## DEPARTMENT RESPONSE:

The comment is beyond the scope of the proposed regulations.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Continuing Education and Limited Permits for Dentistry

I.D. No. EDU-01-10-00009-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 61.15(c)(1)(v) and addition of section 61.18(d) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6604-a(6) and 6605(5)

**Subject:** Continuing education and limited permits for dentistry.

**Purpose:** To implement the provisions of Chapter 436 of the Laws of 2009.

**Text of proposed rule:** 1. Subparagraph (v) of paragraph (1) of subdivision (c) of section 61.15 of the Regulations of the Commissioner of Education is amended, effective May 12, 2010, as follows:

(v) (a)[During] *No later than the end of the first registration period for a licensed dentist beginning on or after January 1, 2008 in which completion of acceptable formal continuing education is required, a licensed dentist shall be required to have completed on a one-time basis, as part of the mandatory hours of acceptable continuing education required in this paragraph, no fewer than three hours in a course approved by the department in dental jurisprudence and ethics, which shall include the laws, rules, regulations and ethical principles relating to the practice of dentistry in New York State.*

(b) *A postgraduate dental student enrolled in a New York state dental residency program in accordance with section 61.18 of this Part may satisfy the requirements of this subparagraph by taking an approved dental jurisprudence and ethics course during the period of his or her dental residency prior to initial licensure.*

2. Section 61.18 of the Regulations of the Commissioner of Education is amended, effective May 12, 2010, by the addition of a new subdivision (d) to read as follows:

(d) *In accordance with subdivision (5) of section 6605 of the Education Law, not later than 60 days after entry into an acceptable residency program, and annually thereafter for the duration of such residency program, the dental resident shall register on a form acceptable to the department and pay to the department a residency registration fee in the amount prescribed for limited permit fees in subdivision (4) of section 6605 of the Education Law.*

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

**Data, views or arguments may be submitted to:** Frank Munoz, Deputy

Commissioner for the Professions, NYS Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 486-1765, email: [fmunoz@mail.nysed.gov](mailto:fmunoz@mail.nysed.gov)

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

#### **Regulatory Impact Statement**

##### 1. STATUTORY AUTHORITY:

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

Section 6504 of the Education Law provides that admission to the professions shall be supervised by the Board of Regents, and administered by the Education Department, assisted by a state board for each profession.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (6) of section 6604-a of the Education Law requires that each licensed dentist complete a course in dental ethics and jurisprudence on a one-time basis, no later than the end of the first registration period in which continuing education is required, and provides that postgraduate dental students may take this course during the period of their dental residency prior to licensure.

Subdivision (5) of section 6605 of the Education Law provides that dental school graduates who meet the education requirement for licensure and who are employed in approved residency programs shall be deemed exempt from licensure and shall not be required to obtain a limited permit to practice dentistry, but shall be required to register on a form acceptable to the Commissioner and pay a fee not to exceed the fee specified in statute for a limited permit.

##### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment implements the aforementioned statutes by permitting a postgraduate dental student enrolled in an approved residency program to take the mandatory course in dental jurisprudence and ethics during their residency program, prior to licensure. The proposed amendment also requires dental residents to register with the Department no later than 60 days after entry into an approved residency program and pay a fee in the amount currently required for a limited permit.

##### 3. NEEDS AND BENEFITS:

Existing regulations governing the ethics and jurisprudence component of mandatory continuing education for licensed dentists requires that this course be taken during the first registration period in which completion of formal education is required, which occurs after a dentist is licensed. The proposed amendment implements section 6604-a, as amended by Chapter 436 of the Laws of 2009, by permitting a postgraduate dental student enrolled in an approved residency program to take the dental jurisprudence and ethics course during their residency program, prior to licensure.

Existing regulations that describe the residency requirement for dental licensure make no provision for the registration of residents, or the payment of a residency fee. The proposed regulation implements section 6605(5) of the Education Law, as amended by Chapter 436 of the Laws of 2009, by requiring dental residents in an approved residency program to register with the Department and pay a registration fee equal to the amount now charged for a limited permit.

##### 4. COSTS:

(a) Cost to State government: None.

(b) Cost to local government: None.

(c) Cost to private regulated parties: As authorized by Chapter 436 of the Laws of 2009, the proposed amendment establishes a dental residency registration fee equal to the limited permit fee (currently \$105). Because dental residents will not longer have to pay the limited permit fee, they will not be required to pay any more than they currently pay.

(d) Costs to the regulatory agency: As stated in "Costs to State Government," the proposed amendment does not impose additional costs on the State Education Department.

##### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility upon local governments.

##### 6. PAPERWORK:

The proposed amendment conforms the Commissioner's Regulations to recently amended statutes and does not impose any additional paperwork requirements.

##### 7. DUPLICATION:

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

##### 8. ALTERNATIVES:

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

##### 9. FEDERAL STANDARDS:

There are no Federal standards regarding continuing education requirements for licensed dentists or the registration of dental residents.

##### 10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

#### **Regulatory Flexibility Analysis**

The proposed amendment relates to the ethics and jurisprudence component of the mandatory continuing education required of licensed dentists, and the registration of dental residents. The purpose of the proposed amendments is to conform regulations of the Commissioner of Education to statutory changes made by Chapter 436 of the Laws of 2009, which authorizes the ethics and jurisprudence component of mandatory continuing education requirements for dentists to be taken by a dental school graduate during an approved dental residency program, and requires dental residents to register with the Department and pay a residency registration fee.

Because it is evident from the nature of the proposed amendment that it will have no affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

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

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

The proposed amendment applies to all licensed dentists and dental residents who live in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment does not impose reporting, recordkeeping or other compliance requirements that are not mandated by statute. Professional services will not be needed in rural areas to comply with the proposed amendments.

##### 3. COSTS:

As authorized by Chapter 436 of the Laws of 2009, the proposed amendment establishes an annual dental residency registration fee equal to the limited permit fee (currently \$105). Because dental residents will not longer have to pay the limited permit fee, they will not be required to pay any more than they currently pay.

##### 4. MINIMIZING ADVERSE IMPACT:

In order to implement statutory requirements, the proposed amendment makes changes to the Commissioner's Regulations regarding the ethics and jurisprudence component of the mandatory continuing education requirement for dentists, and the registration of dental residents. The proposed amendment does not impose any additional compliance requirements, local government mandates or costs on licensed dentists or dental residents in rural areas, other than the cost referenced above.

##### 5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments on the proposed amendments from the New York State Dental Association and

the State Board for Dentistry, which includes members who live and work in all areas of New York State, including rural areas of the State.

**Job Impact Statement**

The proposed amendments relate to the ethics and jurisprudence component of the continuing education required of licensed dentists, and the registration of dental residents. The purpose of the proposed amendments is to conform regulations of the Commissioner of Education to statutory changes made by Chapter 436 of the Laws of 2009, which authorizes the ethics and jurisprudence component of mandatory continuing education requirements for dentists to be taken by a dental school graduate during an approved dental residency program, and requires the dental residents to register with the Department and pay a residency registration fee.

Because it is evident from the nature of the proposed amendments that they will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one was not prepared.

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## State Board of Elections

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### NOTICE OF ADOPTION

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

**I.D. No.** SBE-39-09-00024-A

**Filing No.** 1385

**Filing Date:** 2009-12-16

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of section 6209.2(a)(8) of Title 9 NYCRR.

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

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

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

**Text or summary was published** in the September 30, 2009 issue of the Register, I.D. No. SBE-39-09-00024-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

**Allow Fishing at DEC Boat Launching Facilities; Increase Opportunities and Ease Conditions for the Use of Bait Fish**

**I.D. No.** ENV-33-09-00005-A

**Filing No.** 1442

**Filing Date:** 2009-12-22

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of sections 19.2, 35.3, 35.4, 59.1 and 190.24 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 3-0301, 9-0105, 11-0303, 11-0305, 11-1301, 11-1303, 11-0317, 11-1316 and 11-0325

**Subject:** Allow fishing at DEC boat launching facilities; increase opportunities and ease conditions for the use of bait fish.

**Purpose:** Increase opportunities for fishing at DEC boat launch sites; increase opportunities and ease conditions for the use of bait.

**Text or summary was published** in the August 19, 2009 issue of the Register, I.D. No. ENV-33-09-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Shaun Keeler, N. Y. S. Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8928, email: sxkeeler@gw.dec.state.ny.us

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

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

Because no substantive changes were made in the final rule, the originally published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis, Job Impact Statement does not need to be revised.

**Assessment of Public Comment**

Very limited comments were received. No comments were received pertaining to the proposed changes to Parts 19, 59 and 190; and only a few comments were received on Part 35 which extends the time period that required receipts for bait fish are valid and purchased bait fish can be possessed. While this extension from 7 to 10 days better accommodates anglers, the few comments received suggested extending the time period even further.

**Comment:** The current 7 day length of time for which bait fish are considered certified from which they are purchased should be extended beyond the proposed 10 days, to 14 days, as this would allow anglers with at least two weekends for using their bait fish.

**Response:** The proposed extension can allow anglers two weekends for using their bait, depending on when the bait is purchased. Restricting the number of days will reduce the risk of people using a receipt to transport uncertified bait. Ten days is judged to be adequate as far as providing enough time to use leftover bait fish on another fishing trip while keeping the risk of using a receipt to transport uncertified bait fish low.

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## Department of Health

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### EMERGENCY RULE MAKING

**Ocean Surf Bathing Beaches and Automated External Defibrillators (AEDs)**

**I.D. No.** HLT-01-10-00012-E

**Filing No.** 1440

**Filing Date:** 2009-12-22

**Effective Date:** 2009-12-22

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

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

**Statutory authority:** Public Health Law, section 225

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

**Specific reasons underlying the finding of necessity:** Chapter 500 of the Laws of 2008 was signed on September 4, 2008. This law requires amendments to the State Sanitary Code (SSC) to mandate automated external defibrillator (AED) equipment and at least one lifeguard trained in AED use, and for all HOA ocean surf beaches to be supervised by qualified surf lifeguards. The Public Health Law (PHL) amendments became effective January 2, 2009 and the chapter law mandates the Department of Health amend the SSC on or before the effective date to provide for implementation of the new requirements. Enacting this regulation as an emergency

pending routine rulemaking will protect swimmers during the spring and early summer bathing seasons.

Requiring AED equipment and at least one lifeguard trained in the use of an AED at surf beaches during all hours of operation enable better 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 lifeguard trained in its use at a surf beach can decrease delays in AED administration, which was previously dependent on off-site Emergency Medical Services response.

The PHL specifies 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. These requirements are necessary to ensure lifeguards are able to protect swimmers and not place their own safety at risk during rescue activities.

**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 emergency 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.

**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 21, 2010.

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

**Regulatory Impact Statement**

Statutory Authority:

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.

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 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 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 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.

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 bathhouse facilities** – No additional expense is anticipated for these facilities since beach use is restricted to residents, and their living quarters are expected 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 submit-

ted 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 record keeping 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 60 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 Considered:**

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 filing with the Secretary of State.

#### **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. 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 record keeping 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.

**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.

**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. 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.

**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. 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 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 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.

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 bathhouse facilities** – No additional expense is anticipated for these facilities since beach use is restricted to residents, and their living quarters are expected fulfill these needs.

**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 re-certification. 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. Municipalities that have physicians serving as health officers may have no additional expenses associated with an EHCP. In addition, a single EHCP/PAD program can be utilized for multiple beaches that have the same owner/operator, such as a municipality (e.g. the NYC Park Department, Nassau County).

Granting of variances to surf beaches which allows time for compliance 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 Participation 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 HOA 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.

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.

**NOTICE OF ADOPTION****WIC Vendor Minimum Stocking Requirements**

**I.D. No.** HLT-40-09-00003-A

**Filing No.** 1439

**Filing Date:** 2009-12-22

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of section 60-1.13 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2500

**Subject:** WIC Vendor Minimum Stocking Requirements.

**Purpose:** Amends vendor applicant enrollment criteria relative to stocking minimum quantities of WIC acceptable foods.

**Text or summary was published** in the October 7, 2009 issue of the Register, I.D. No. HLT-40-09-00003-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**PROPOSED RULE MAKING  
HEARING(S) SCHEDULED****Early Intervention Program**

**I.D. No.** HLT-01-10-00023-P

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

**Proposed Action:** Amendment of Subpart 69-4 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2540-2559-b

**Subject:** Early Intervention Program.

**Purpose:** To make several changes to the standards for the provision of services in the Early Intervention Program.

**Public hearing(s) will be held at:** 10:00 a.m., Feb. 1, 2010 at Albany, NY; 10:00 a.m., Feb. 8, 2010 at New York City, NY; and 9:30 a.m. to 3:30 p.m., Feb. 22, 2010 at Monroe Community Hospital, Brass Chandelier Rm., 435 E. Henrietta Rd., Rochester, NY 14620.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.nyhealth.gov](http://www.nyhealth.gov)):** A new subdivision (2)(iii) is added to section 69-4.1(l) creating a definition of "applied behavioral analysis."

Subdivision (l) of section 69-4.1 is repealed and a new section is created and renumbered to be (m) to clarify several aspects of the duration of eligibility for children potentially eligible for the preschool special education program to conform with amendments to Public Health Law and Education Law enacted in 2003. This section is amended to clarify that "eligible child" also includes any infant or toddler with a disability who is an Indian child residing on a reservation located in the State, a homeless child or a ward of the State. These changes are needed to conform with amendments to the federal Individuals with Disabilities Education Act of 2004. Section 69-4.1(ak) is amended to revise the list of qualified personnel to reflect changes that have been made to teacher certifications and professional licenses. Board certified behavior analysts and board certified assistant behavior analysts are added to the list of qualified personnel, as well as optometrists with a designation of Fellows of the College of Optometrists in Vision Development or optometrists certified as low vision specialists by the New York Optometric Association. Applied Behavioral Analysis (ABA) intervention program aides are created in a new section 69-4.9a and added here to the list of qualified personnel.

Subdivision 69-4.3(b)(1) is amended to add that race and ethnicity can be included in a referral without parent consent to conform with federal requirements. Subdivision 69-4.3(c) is amended to add facsimile and secure web transmission to the list of ways referrals can be made. Subdivision 69-4.3(f) is amended to clarify certain items on the list of criteria that define children to be at risk of having a disability, including adding the presence of a genetic syndrome, modifying the definition of elevated blood levels, and adding indicated cases of child maltreatment.

A new section 69-4.3a is created establishing initial and continuing eligibility criteria for the program. For children with a delay only in the communication domain, the criteria are a score of 2.0 standard deviations below the mean in the area of communication. If no test is appropriate for the child, a delay in the area of communication is determined by qualitative criteria in clinical practice guidelines issued by the Department. Subdivision (b) of section 69-4.3a allows early intervention officials to require a determination be made of the child's continuing eligibility if substantial progress has been made. Continuing eligibility will be established by a multidisciplinary evaluation and can include: a delay consistent with the criteria for initial eligibility, a delay in one or more domains such that the child is not within the normal range expected for his or her age, a score of 1.0 standard deviation below the mean in one or more domain or the continuing presence of a diagnosed condition with a high probability of delay.

Section 69-4.5 is repealed and a new section 69-4.5 is created to establish enhanced standards for the approval of providers, including a requirement that agencies enroll as Medicaid providers and that they submit consolidated fiscal reports to the Department. For individual providers who are able to deliver services as independent contractors in the program, a minimum amount of past experience is required serving children under five years of age. Agency providers are required to submit a quality assurance plan for each service offered; employ a program director and a minimum of two qualified personnel; and employ professionals to oversee the quality assurance plan. Providers also must provide documentation from a municipality or agency that it intends to contract with the applicant. Subsection 69-4.5(b) establishes criteria for the approval of agencies allowed to provide ABA intervention programs using paraprofessional aides. Subdivision 69-4.5(c) requires that an agency's approval in the program shall terminate upon the transfer of ten percent or more of an interest in the agency within the last five years. The new agency is required to apply for approval at least ninety days prior to transfer if it wishes to provide services in the program after such transfer. Subdivision 69-4.5(d) requires providers to communicate with parents and other service providers. Subdivision 69-4.5(e) requires providers to comply with marketing standards issued by the Department. Subdivision 69-4.5(f) requires approved individuals to notify the Department within two business days if his or her license is suspended, revoked, limited or annulled. Subdivision (g) requires providers to comply with State and Federal non-discrimination provisions. Subdivision 69-4.5(l) requires providers who intend to cease providing services to submit written notice and a plan for transition of children not less than 90 days prior and to collaborate to ensure a smooth transition of eligible children.

A new section 69-4.5a is added relating to proceedings involving the approval of providers. Subdivision (a) provides that approval of providers may be revoked, suspended, limited or annulled if the provider no longer meets one of the criteria for approval or reapproval; does not have current licensure, registration or certification; falsely represented or omits material in an application; has been excluded or suspended from any medical insurance program; has been the subject of actions taken against the provider by another State agency; has been convicted in an administrative or criminal proceeding; fails to provide access to facilities, child records, or other documents; fails to submit corrective action plans; fails to pay recoupment due, or implement any actions required on the basis of an

audit; fails to pay fines or penalties assessed by the Department; has placed children, parents, or staff in danger; or has submitted improper or fraudulent claims.

Subdivision (b) of section 69-4.5a gives providers the right to a hearing prior to actions being taken by the Department. Subdivision (c) provides that the Department may take a summary action prior to granting an opportunity to be heard for one hundred twenty days following a finding that the health or safety of a child, parents or staff of the agency or municipality is in imminent risk of danger. The provider is then granted an opportunity to be heard to contest the Department's findings.

A new subdivision (d) is added to section 69-4.6 requiring parents to provide information for claiming to third party payors in conformance with amendments enacted to Public Health Law.

Subdivision (a)(6)(i) of section 69-4.8 is repealed and replaced with a new subdivision that requires evaluators to use standardized instruments from a list of preferred tools developed by the Department. Evaluators are required to provide written justification if an instrument is used that is not on the list.

Section 69-4.9 is repealed and replaced with a new section 69-4.9. Subdivisions (b) and (c) clarify that municipalities and providers are required to comply with the Department's health and safety standards. Subdivision (e) requires providers to notify parents, service coordinators, and early intervention officials at least twenty-four hours prior to any inability to deliver a service due to illness, emergencies, hazardous weather or other circumstances. Providers also are required to notify parents, service coordinators and early intervention officials five days prior to any scheduled absences due to vacation, professional activities, or other circumstances, and at least thirty days prior to the date on which the provider intends to cease providing services to a child altogether. Subdivision (g) prohibits the use of aversives in the program, a definition of aversive interventions is included, and it is clarified that behavior management techniques are allowed to prevent a child from seriously injuring him/herself or others.

A new section 69-4.9a is added that creates standards for the use ABA paraprofessionals in the program. Subdivision (a)(1) requires agencies approved to deliver ABA intervention programs to coordinate all services in a child's IFSP. Subdivision (a)(2) requires agencies to assign each child to a team consisting of a supervisor, ABA intervention program aides and other qualified personnel. Subdivision (a)(3) requires ABA agencies to employ supervisory personnel and ABA intervention program aides to implement ABA intervention plans, and subdivision (a)(4) allows them to either employ or contract with other qualified personnel to participate in delivery of ABA intervention plans or deliver other services in a child's IFSP. Subdivision (a)(5) requires the use of systematic measurement and data collection to monitor child progress. Subdivision (a)(6) requires ABA agencies to maintain and implement policies and procedures for the delivery of ABA intervention. Subdivision (a)(7) requires ABA agencies to ensure the training of supervisory personnel and ABA intervention program aides. Subdivisions (b) and (c) establish the minimum requirements and responsibilities for supervisors of ABA intervention program aides, respectively. The supervision of ABA behavior intervention program aides must include a minimum of six hours per month in the first three months of employment, and a minimum of four hours per month thereafter, of direct on-site observation; and a minimum of two hours per month of indirect supervision. Supervisors are required to convene a minimum of two team meetings per month with all personnel delivering services to the child. Subdivision (d) and (e) establishes the minimum qualifications and allowable activities for ABA intervention program aides. Subdivision (f) establishes the requirements for other employed or contracted qualified personnel providing other services in a child's IFSP as part of an ABA program.

A new subdivision (a)(2)(ii)(a) is added to section 69-4.11 to allow early intervention officials to participate in IFSP meetings by phone. A new subdivision (a)(5)(i) is added to require that notice to parents of an IFSP meeting include that parents furnish social security numbers to facilitate claiming to third party payors. A new subdivision (a)(6)(i) is added to clarify that if parents refuse to provide social security numbers, services must still be provided. Subdivision (a)(10)(v) is amended to clarify the intent for frequency, intensity, length, duration, location and the method of delivering services. Subdivision (a)(10)(vi) is amended to clarify the requirements for the IFSP when services will not be provided in a natural environment. Subdivision (a)(10)(xiii) is amended to modify the requirements for the IFSP for transition of children out of the program who are potentially eligible for preschool special education. Subdivision (b) is amended to allow six month IFSP reviews to occur via conference call or record review; and to allow early intervention officials to require an additional evaluation be performed to assess the need for an increase in the frequency or duration of services.

Subdivision (a)(1)(i) of section 69-4.12 is amended and a new subdivision (a)(4)(x) is created to add verification of correction of non-compliance

to the list of monitoring procedures consistent with new federal requirements.

Subdivisions (i)(4), and (i)(6) through (i)(10) of section 69-4.17 are repealed. Subdivision (i)(5) is renumbered to be (i)(4) and a new subdivision (i)(5) is added to clarify the requirements for complaint investigations performed by the Department.

A new section 69-4.17a is added clarifying the requirements for the content and retention of child records consistent with a guidance document previously issued by the Department. Subdivision (a) and (b) establish the requirements for municipalities and providers, respectively. Subdivision (c) establishes requirements for maintaining original signed and dated session notes.

Subdivision (b) of section 69-4.20 is amended to modify the timeline for notification to school districts of a child potentially eligible for preschool and to drop a requirement that parent's consent to notification and instead provide parents the opportunity to "opt-out" by providing their objection. This modification is needed to comply with an opinion from the U.S. Department of Education that requiring parents to affirmatively consent is in conflict with federal regulations. This subdivision is further modified to clarify that parents may decline transition conferences.

Subdivision (c)(1) of section 69-4.30 is amended to delete the requirement that early intervention officials notify the Department of additional screenings provided. A new subdivision (c)(13) is added establishing a price for services provided by an ABA intervention program aide to be billed in 60 minute increments.

**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, Corning Tower, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

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

**Public comment will be received until:** 60 days after publication of this notice.

#### **Regulatory Impact Statement**

Statutory Authority:

The early intervention program is established in Title II-A of Article 25 of public health law and Part C of the Individuals with Disabilities Education Act (IDEA). Section 2550 of the NYSPHL sets forth the responsibilities of the department of health as the lead agency responsible for the general supervision of programs and activities receiving assistance under Title II-A, and the monitoring of programs and activities used by the state to carry out the title, whether or not such programs or activities are receiving assistance made available under the title, to ensure the state complies with provisions of the title.

Section 2550 further requires the commissioner to promote the availability of qualified personnel to provide evaluations and early intervention services to eligible children and their families.

Section 2551 requires the establishment of coordinated standards and procedures for early intervention services and evaluations, child find system and public awareness program, and programs and services operating under the approval of any state early intervention service agency, including the department.

Section 2551 further requires as a condition of approval that evaluators and providers of early intervention services can be required to participate in the medical assistance program; and, permits coordinated standards and procedures to identify circumstances and procedures under which an evaluator or provider may be disqualified under title II-A.

Section 2559-B authorizes the commissioner to adopt regulations necessary to carry out the provisions of the program.

Legislative Objectives:

The legislative objects of Title II-A of article 25, as articulated in chapter 428 of the laws of 1992, are to establish a coordinated, comprehensive array of services, recognizing the essential role of families in meeting the developmental needs of their infants and toddlers; enhance the development of infants and toddlers with disabilities; enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities; minimize the possibility that such infants and toddlers will be placed in institutions; enhance the capacity of state and local agencies and service providers to identify, evaluate, and meet the needs of historically underserved populations; and, reduce the costs to society by minimizing the need for special education services after infants and toddlers with disabilities become eligible for services under Part B of IDEA.

**Needs and Benefits:**

The service delivery system has now been in full operation for more than sixteen years. The size and scope of the program has significantly increased, in terms of the number of approved providers (from approximately 400 to more than over 3,000), annual enrollment (from less than 9,000 children and families to over 70,000), and combined State, local, and Medicaid program expenditures (from approximately \$20 million to \$700 million). The State currently provides services to over 4% of the population.

Revisions to 10 NYCRR 69-4 are needed to improve the State's capacity to ensure that early intervention services are delivered in a cost-effective manner, improve program quality and accountability, assure adequate capacity to deliver early intervention services to eligible children and their families, and conserve resources by ensuring that only those children whose development is compromised are eligible to participate in the early intervention program.

The proposed regulations will enhance program accountability by enhancing existing approval criteria for providers. In addition, the regulations clarify and articulate requirements for providers, thereby improving the quality and consistency of early intervention services delivered to infants and toddlers with special needs. The proposed regulations amend section 69-4.11, to clarify that early intervention officials may participate in IFSP meetings via conference calls, and IFSP reviews may include a telephone or video conference call or record review and correspondence. These proposed amendments will improve the timeliness of IFSP evaluations and reviews, and will reduce the burden and cost to localities in administering the program.

Amendments to section 69-4.8 will require evaluators to use standardized developmental assessment instruments, where appropriate for the child, from a list of instruments issued by the department. Evaluators will be required to justify why such instruments are not appropriate for the child or if an instrument is not available for the child, if the evaluator does not utilize an instrument on the department's list. This new requirement will improve the quality and consistency of multidisciplinary evaluations to determine children's eligibility, enhance provider accountability for the evaluation process, and improve the department's ability to monitor the quality of evaluations.

A major contributor to program growth has been the population of children experiencing delays solely in the area of communication and specifically speech-language development (representing approximately 30% of children receiving early intervention services). Wide variation is known to exist in normal speech-language development, and research has demonstrated that some children who appear to be experiencing delays will achieve normal development without intervention. The definition of developmental delay in current regulation is insufficient to ensure that only those children who require intervention to address communication delays are eligible to receive early intervention services.

The number of children receiving early intervention services diagnosed with an autism spectrum disorder has also increased dramatically during the past decade (from less than 100 children during the first three years of program implementation to nearly 4,000 in the 2007-08 program year). In calendar year 2007, nearly \$100 million in State, local, and Medicaid funds were expended to deliver services to infants and toddlers with this disability. Substantial research exists demonstrating the effectiveness of behavioral interventions using applied behavior analysis (ABA) in treating and improving the developmental outcomes for children with this condition, as articulated and recommended by an expert panel of clinicians, researchers, and parent consumers convened by the department to develop its clinical practice guideline on this condition, using AHRQ methodology. Research has further demonstrated that ABA behavior intervention programs can be delivered in a high quality manner using supervised intervention program aides. Regulatory authority is also needed to permit the department, with the approval of the division of budget, to set an hourly rate for reimbursement of services delivered by ABA intervention program aides, to ensure these services are cost-effective.

Amendments to 10 NYCRR 69-4 are proposed to ensure regulations are in conformance with statutory requirements added in 2003, including revisions to age-eligibility for the program, collection of in-

surance information and social security numbers solely for the purpose of program administration, and procedures for IFSP reviews conducted prior to the required six month review period.

Amendments are also proposed for conformance with the IDEA Improvement Act of 2004, including expansion of the definition of eligible child to include homeless children, Indian children residing on reservations geographically located in the State, and children who are wards of the state; add a definition of transition services; clarify that early intervention services should be evidence-based where possible; and clarify requirements for appropriate settings for early intervention services. In addition to conformance with the IDEA Improvement Act of 2004, the proposed regulations will bring the State into compliance with federal requirements for transmittal by state lead agencies of registry information to local school districts for children potentially eligible to transition to preschool special education services under Part B of IDEA without parental consent, or articulate the State's policy which allows parents to "opt out" of such notification of the school district of their child's potential transition.

**Costs:****Costs to Regulated Parties:**

The proposed rules are expected to result in only minimal increased costs to regulated parties. In large part, the proposed rules conform to existing requirements in state and federal statutes governing the early intervention program or with administrative standards and procedures issued by the department and in effect for the program. Approved early intervention agency providers may incur additional administrative costs upon application for re-approval to comply with new organizational requirements, including the requirement for a program director and staff responsible for quality assurance and supervision. The proposed rules add a new requirement for providers to submit information on revenues and expenses upon request, but no more frequently than annually, on a form developed by the department. These data will provide the department with enhanced capacity to analyze and track costs incurred by providers in delivering early intervention services and complying with program requirements.

Costs to the Agency, the State and Local Governments for the Implementation of and Continuing Compliance with the Rule:

The proposed rules will result in no costs for the agency or state and local governments for implementation and continuing compliance with the rules. Certain provisions included in the proposed rules are expected to yield a cost savings to state and local governments (\$7.4 million in state and \$7.6 million in local savings for modification of eligibility criteria for children with delay only in communication development; \$5 million in state and \$5.1 million in local savings for the new requirement for evaluators to use state-identified evaluation instruments; and \$7.9 and \$8.1 million in savings for the establishment of standards and rates to allow for the use of ABA intervention program aides).

The cost analysis is based on a comparison of existing rules, statutes, and administrative requirements for the early intervention program with the proposed new rules. Cost savings estimates are derived from actual program expenditure data for early intervention services and evaluations available from department child and claiming data sets for the program, including the Medicaid management information system.

**Local Government Mandates:**

The proposed rules do not impose any new duty upon any county, city, town, village, school district, fire district, or other special district. The proposed rule to allow early intervention officials to participate in IFSP meetings by telephone conference call, and allow IFSP reviews to be conducted via conference calls or record review, will reduce the administrative burden on municipal agencies responsible for local administration of the program.

**Paperwork:**

The proposed rules will add new reporting requirements for providers to submit information on revenues and expenses on forms to be developed by the department upon request but no more frequently than annually. The proposed rule will add a new requirement for approved providers to submit applications for re-approval by the department on a periodic basis.

**Duplication:**

The proposed rules do not duplicate, overlap, or conflict with relevant rules and other legal requirements of the state and federal government and in fact will conform part 10 NYCRR part 69-4 to recent changes in state and federal statutes applicable to the program.

**Alternatives:**

The department considered the following alternatives proposed by the Early Intervention Coordinating Council at its December 4, 2009 meeting: (1) the department should clarify that the proposed standards in new section 69-4.9a for delivery of ABA intervention programs apply only to those agencies which use ABA intervention program aides; (2) the proposed rule amending section 69-4.6, requiring initial and ongoing service coordinators to obtain insurance information from parents should be revised to require service coordinators to request, not obtain, such information; and (3) section 69-4.6 should be further amended to require that parents be notified of the potential negative implications of use of insurance coverage for reimbursement of early intervention services when such policies are not subject to state insurance law and encouraged to directly ascertain the status of their policy from their insurer. The department clarified in the proposed rules that the new section 69-4.9a will apply only to agencies that use ABA intervention program aides. No revisions were made to amendments proposed to section 69-4.6 for consistency with statute and because sections 69-4.7 and 69-4.17 of existing regulations address parent notification regarding use of insurance.

**Federal Standards:**

The proposed rules do not exceed any minimum standards of the federal government and will bring the state into compliance with federal standards.

**Compliance Schedule:**

Regulated parties will be able to comply with the proposed rules upon the effective date of the rule. The department anticipates that cost reporting requirements will be implemented in 2010 and provider reapproval will be initiated in 2011.

**Regulatory Flexibility Analysis****Effect of Rule:**

The proposed rules will affect approximately 700 agency and 2,000 individual qualified personnel who are approved and under contract with municipal governments to deliver early intervention services. Approved agencies are incorporated entities, sole proprietorships, partnerships, and state operated facilities. Qualified personnel are individuals approved by the department in accordance with 10 NYCRR 69-4 to provide services in the Early Intervention Program and who have appropriate licensure, certification, or registration in the area in which they are providing services (including allied health professionals, physicians, special educators, psychologists, and vision specialists). The proposed rules also apply to 57 county public agencies (primarily local health units) and the New York City Department of Mental Health and Hygiene, all of which have responsibility for the local administration of the program.

**Compliance Requirements:**

The proposed rules will add new reporting requirements for providers to submit information on revenues and expenses on forms to be developed by the department upon request. The proposed rule will enhance current approval criteria and also add a new requirement for approved providers to submit applications for re-approval by the department on a periodic basis. Enhanced criteria include New York State Department of Health (Department) review of the character and competence of owners and officers of the agency applicant. The proposed rule will add new reporting requirements, including detailed information regarding employees and contractors. Providers seeking approval to deliver ABA behavior intervention program using ABA intervention program aides will be required to submit a separate application that details its policies and procedures for delivery of these programs.

**Professional Services:**

Some early intervention agency and individual providers may require professional accounting services to comply with proposed new cost reporting requirements.

**Compliance Costs:**

There are no initial capital costs that will be incurred by a regulated business or industry or local government for compliance with the proposed rules.

**Economic and Technological Feasibility:**

There are no economically or technologically challenging aspects to the requirements of the proposed rulemaking that do not already exist in current requirements for the EIP. There may be a cost benefit to some providers in new authority to use ABA intervention program aides in supporting the delivery of intensive behavioral intervention programs. The proposed rulemaking is expected to result in cost savings for local governments. For these reasons, the Department concludes that the proposed regulations will be economically and technologically feasible for small business and local governments.

**Minimizing Adverse Impact:**

There will be no adverse impact of the proposed rulemaking on small businesses or local governments. The proposed rulemaking in large part brings existing rules for the early intervention program into compliance with state and federal statute and administrative standards and procedures currently in effect. New requirements related to eligibility, the evaluation process, and establishment of standards and rates for the use of ABA intervention program aides are expected to result in significant savings for local governments.

**Small Business and Local Government Participation:**

A copy of this notice of proposed rulemaking will be posted on the department's webpage for the early intervention program. Participants in the early intervention program list serve will receive automatic electronic notification of this posting. The proposed rulemaking was presented and discussed with members of the Governor-appointed Early Intervention Coordinating Council, which includes parents, providers, and local early intervention government officials at their quarterly meeting on December 4, 2009. This EICC meeting was webcast, and posted on the Department's website for viewing by interested parties and the general public. The webcast will be available on the Department's website for sixty days.

**Rural Area Flexibility Analysis****Types and Estimated Numbers of Rural Areas:**

This proposed rulemaking applies to all municipalities, provider and families in the Early Intervention Program, including all rural areas of the state.

**Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:**

Municipalities and providers in the Early Intervention Program will be required to comply with a new section 69-4.17a of Subpart 69-4 entitled Content and Retention of Child Records. These do not, however, represent new requirements in the program. These requirements mirror those that were established in New York State Department of Health (DOH) guidance document issued in 2003 entitled Guidance on Early Intervention Program Records.

Professional services are not likely to be required to comply with the proposals in this rule.

**Costs:**

Municipalities in rural areas are estimated to fiscally benefit from the proposed rulemaking as a result of three components: the proposal to revise the eligibility criteria for children found eligible in the program with only a delay in the communication domain; the proposal to require evaluators to use assessment methods from a preferred list of tools; and the proposal to establish ABA intervention program aides to provide services.

Some small businesses may have a negligible cost to comply with enhanced standards for providers including the requirement to enroll in the Medicaid program.

**Minimizing Adverse Impact:**

It is not anticipated that the proposed rulemaking will result in adverse impact in rural areas. It is likely that the proposal to allow ABA intervention program aides to deliver ABA therapy in the Early Intervention Program may differentially benefit rural areas which have an especially difficult time maintaining adequate capacity.

**Rural Area Participation:**

A copy of this notice of proposed rulemaking will be posted on the DOH web site and submitted to the electronic mail listserv for the Early Intervention Program. These notices will invite public comments on the proposal and include instructions for anyone interested in submitting comments, including public and private entities in rural areas.

Public hearings will be held in New York City, Albany and Rochester. In addition, on December 4, 2009, the proposed regulations were discussed as part of a meeting of the Early Intervention Coordinating Council. The meeting was broadcast via the web and is available for viewing on the DOH web site for 60 days following the meeting.

**Job Impact Statement****Nature of Impact:**

Three aspects of the proposed revisions to Part 69 have the potential to have an impact on jobs and employment opportunities. The proposal to allow paraprofessionals to deliver Applied Behavioral Analysis (ABA) to children in the Early Intervention Program with an autism spectrum disorder (ASD) or other appropriate condition will likely create additional job opportunities across the state. The proposed expansion of the list of qualified personnel who can deliver services in the program also will likely create additional jobs. Finally, the proposed enhanced standards for providers in the program has the potential to change the way that agency and individual providers are formulated in the program, but it is not likely to result in a substantive decrease in jobs or employment opportunities.

The Department proposes to establish standards for behavioral aides, approval of providers, and paraprofessional reimbursement rates for delivery of intensive behavioral intervention services to children with autism spectrum disorders. This change is in response to the growing population of children with ASD in New York State. The number of children in the program with ASD has increased to nearly 4,000 in the 2007-08 program year, double the number of five years ago. Evidence indicates that the earlier children are diagnosed with ASD and can begin intensive intervention services, the better their chances for minimizing the symptoms and their impact on their lives.

In 2007, \$100 million was expended for services to children with ASD in the program. The Department's evidence-based clinical practice guideline on ASD recommends ABA intervention programs for children with ASD at an average intensity of 20 hours per week (depending on the child's age, ability to tolerate the intervention, and other factors). Currently, these intervention programs are provided using licensed, registered, or certified professionals, when research shows these intervention programs can be successfully delivered using supervised and trained paraprofessional behavioral aides. In addition to cost savings, implementation of State standards for delivery of behavioral intervention programs will enhance the quality and availability of this intervention to children with ASD and other severe disabilities for which the treatment has been shown to be effective.

The list of qualified personnel in the program is proposed to expand to include board certified behavior analysts, board certified assistant behavior analysts, and ABA intervention program aides as part of the ABA proposal previously described. In addition, it is proposed that optometrists and vision rehabilitation therapists be added to the list of qualified personnel to meet the need for services to children with vision impairments. These proposed changes will also have a positive impact on jobs and employment opportunities.

Finally, numerous additional enhanced standards are proposed for providers in the program, including new requirements that agencies enroll in the Medicaid program, and that individuals have a minimum number of hours of experience in the program before being able to be approved to serve as an independent contractor in the program. This last change is being made to assure that children receive services from professionals with an adequate level of experience serving young children. Individuals who lack the minimum level of experience are allowed to provide services to children in the program as employees of approved agencies rather than independent contractors, since this setting can better assure adequate oversight and mentoring while a new professional gains experience. These requirements may result in

a shift in the relationship between agencies and some therapists to an employment rather than contracting model, but it should not result in a decline in jobs or employment opportunities.

**Categories and Numbers Affected:**

Currently, there are 22,402 approved providers in the program with approximately 2,000 of these agencies and the rest individual therapists. The individuals impacted include, but are not limited to speech language pathologists, physical and occupational therapists, and special education teachers with various certifications. The type of business entities includes a mix of business corporations, professional corporations, professional limited liability corporations and not-for-profit organizations. The number of individuals providing services in the program will likely increase as a result of the expansion of qualified personnel described above.

**Regions of Adverse Impact:**

This proposal will not disproportionately impact any region of the state.

**Minimizing Adverse Impact:**

These proposed revisions will likely create additional jobs and employment opportunities in New York State.

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## Insurance Department

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### EMERGENCY RULE MAKING

**Flexible Rating for Nonbusiness Automobile Insurance Policies****I.D. No.** INS-33-09-00007-E**Filing No.** 1390**Filing Date:** 2009-12-17**Effective Date:** 2009-12-17

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

**Action taken:** Repeal of Part 163 and addition of new Part 163 (Regulation 153) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2350 and art. 23

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

**Specific reasons underlying the finding of necessity:** This regulation was previously promulgated on an emergency basis on December 24, 2008, March 16, 2009, June 9, 2009, September 3, 2009 and October 28, 2009. The emergency regulation will expire on December 28, 2009. Regulation No. 153 needs to remain effective for the general welfare.

Chapter 136 of the Laws of 2008, which became effective on January 1, 2009, enacts a new Section 2350 of the Insurance Law, which replaces the prior approval system, in effect since 2001 for nonbusiness motor vehicle insurance rates, with a flexible rating (flex-rating) system. Section 2350 requires the superintendent to promulgate rules and regulations implementing the new flexible rating system. Since insurers are authorized to use the new flexible rating system as of the effective date of the new law, January 1, 2009, it is essential that this regulation be promulgated on an emergency basis in order to have procedures in place that implement the provisions of the law. It also is essential that insurers be made aware of the rules and standards governing the notice requirements as soon as possible.

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

**Subject:** Flexible Rating for Nonbusiness Automobile Insurance Policies.

**Purpose:** This rule re-establishes flexible rating for nonbusiness automobile insurance policies required by section 2350 of the Ins. Law.

**Text of emergency rule:** A new Part 163 is added to read as follows:

*§ 163.0 Preamble.*

*On June 30, 2008, the Governor signed Chapter 136 of the Laws of 2008 into law to enhance competition in the nonbusiness motor vehicle market, by adding a new Insurance Law section 2350. Chapter 136 replaces the prior approval system, in effect since 2001 for nonbusiness motor vehicle insurance rates, with a flexible rating (flex-rating) system. The new system, which takes effect on January 1, 2009, is a blend of prior approval and competitive rating. The system allows periodic overall average*

rate changes up to five percent on a file and use basis, and requires the superintendent's prior approval of overall average rate increases above five percent in any twelve-month period. The new section 2350 requires the superintendent to promulgate rules and regulations implementing the new flex-rating system.

§ 163.1 Definitions.

For the purpose of this Part, the following definitions shall apply:

(a) Base rate means the dollar charge for a given coverage for one car year prior to the application of rating factors.

(b) Car year means insuring a motor vehicle for one year.

(c) Coverage means the following motor vehicle insurance coverages:

(1) no-fault (personal injury protection), residual bodily injury liability, property damage liability, statutory uninsured motorists, supplementary uninsured/underinsured motorists, comprehensive, and collision; and

(2) any other motor vehicle coverage.

(d) Current average rate for a given coverage means the weighted average of an insurer's latest filed base rates modified by the applicable rating factors for each motor vehicle for the given coverage with the weights proportional to the latest available number of car years associated with each rating factor, or any materially equivalent calculation.

(e) Current overall average rate means:

(1) the weighted average of the current average rate for:

(i) all coverages listed in paragraph (1) of subdivision (a) of this section; and

(ii) any other motor vehicle coverages not listed in paragraph (1) of subdivision (a) of this section, if the insurer proposes a change in the rate for that coverage, with the weights proportional to the latest available number of car years for the respective coverages; or

(2) any materially equivalent calculation.

(f) Effective date means the date a revised set of base rates or rating factors shall apply to all existing nonbusiness automobile insurance policies as such policies are renewed. If a filing only applies to new business, then the effective date means the date that an insurer may first write new business.

(g) File and use means the process by which an insurer files with the superintendent a proposed overall average rate change that is within the flex-band, and then uses the proposed overall average rate change without having to obtain the superintendent's prior approval.

(h) Flexibility band or flex-band means the range of overall average rate increase or decrease (up to +5%) within which an insurer may change its motor vehicle insurance rates without having to obtain the superintendent's prior approval.

(i) Motor vehicle has the meaning set forth in section 5102(f) of the Insurance Law.

(j) Nonbusiness automobile insurance policy means a contract of insurance covering losses or liabilities arising out of the ownership, operation or use of a motor vehicle that is predominately used for nonbusiness purposes, when a natural person is the named insured.

(k) Proposed average rate for a given coverage means the weighted average of an insurer's proposed base rates modified by the applicable rating factors for each motor vehicle for the given coverage with the weights proportional to the latest available number of car years associated with each rating factor, or any materially equivalent calculation.

(l) Proposed overall average rate means:

(1) the weighted average of the proposed average rate for:

(i) each coverage listed in paragraph (1) of subdivision (a) of this section regardless of whether the insurer is filing a change for that coverage; and

(ii) any other motor vehicle coverages not listed in paragraph (1) of subdivision (a) of this section if the insurer proposes a change in the rate for that coverage, with the weights proportional to the latest available number of car years for the respective coverages; or

(2) any materially equivalent calculation.

(m) Proposed overall average rate change means the percentage difference between the proposed overall average rate and the current overall average rate. For example, if the proposed overall average rate is \$1,200 and the current overall average rate is \$1,000, then the proposed overall average rate change is 20%  $\left(\frac{1,200}{1,000} - 1\right) \times 100$ .

(n) Rating factors means the various elements that are applied or added to the base rates to obtain the actual nonbusiness automobile insurance policy premiums. These include classification factors based on the age, sex, and marital status of the insured, territorial rating factors, merit rating factors based on the driving record of the insured, increased limit factors, motor vehicle symbol and model year rating factors, and multi-tier rating factors.

§ 163.2 Rules and standards governing proposed file and use overall average rate changes for nonbusiness automobile insurance policies.

(a) An insurer may implement a proposed overall average rate increase on a file and use basis provided that the change is within the five percent

flex-band. If the proposed overall average rate increase exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change.

(b) During any twelve-month period, an insurer may implement no more than two overall average rate increases on a file and use basis provided that the cumulative effect of the increases shall be within the five percent flex-band. If a proposed overall average rate increase combined with a prior rate increase implemented within a twelve-month period of the proposed effective date of the request exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change. The cumulative effect of two or more rate changes in a twelve-month period is derived in a multiplicative manner. For example, if an insurer implements on a file and use basis a +2.9% overall average rate increase effective February 1, 2009 and a +2% overall average rate increase effective August 1, 2009, then the insurer may not implement another file and use overall average rate increase before February 1, 2010. However, at such time, the insurer may implement an overall average rate increase up to a maximum of +2.9%.

(c) An insurer may implement an overall average rate decrease on a file and use basis up to a maximum of five percent at any one time from the overall average rate currently in effect.

(d) Notwithstanding any provision of this Part, an insurer shall not implement an overall average rate increase on a file and use basis subsequent to an overall average rate increase greater than the five percent flex-band that the superintendent has already prior approved in the twelve-month period immediately preceding the effective date of the proposed increase.

§ 163.3 Rules and standards governing changes in rating factors.

(a) An insurer may adjust its rating factors as part of a file and use change. The insurer shall incorporate the rate impact of these adjustments in the overall average rate change. These changes shall be consistent with the rate change limitations for individual insureds contained in section 163.4 of this Part.

(b) An insurer may adjust its rating factors in separate and distinct filings independent of an overall average rate change. If these filings have no overall average rate impact, then the insurer may implement them on a file and use basis and the insurer shall not be precluded from implementing a file and use change for an overall average rate increase within the time periods specified in section 163.2(b) of this Part. For example, the introduction of a physical damage coverage's model year rating factor for a new model year that is consistent with an existing model year rating rule is not subject to prior approval. These filings shall be consistent with the rate change limitations for individual insureds contained in section 163.4 of this Part.

§ 163.4 Rules and standards governing nonbusiness automobile insurance policy premium change limitations for individual insureds as a consequence of file and use filings.

(a) In any twelve-month period, the total premium on any nonbusiness automobile insurance policy shall not change by more than 30% as a consequence of file and use filings. An insurer shall meet this requirement by adjusting the base rates or rating factors in the file and use filing. An insurer shall not cap an individual insured's premium as a final step. If a filing produces an annual total premium change on an insurance policy that exceeds the 30% maximum, then the filing shall be subject to the superintendent's prior approval.

(b) Changes in the premium of a nonbusiness automobile insurance policy as a consequence of changes in an insured's rating characteristics or changes in the coverages or the amounts of coverage being purchased shall not be considered within the calculation of the individual insured premium limitation contained in subdivision (a) of this section. For example, if an insured has an accident during the prior year and incurs a 25% surcharge or uptier, then this 25% surcharge/uptier shall not be considered within the individual premium limitation. Similarly, if a change in the age of an insured results in the application of a different classification factor, the rate effect attributable to that classification change shall also not be considered within the individual premium limitation.

§ 163.5 Support for filings submitted on a file and use basis.

An insurer shall include support for all proposed changes specified in each filing submitted on a file and use basis. The support shall include the specific reasons for the proposed changes, and any other material information required by section 2304 of the Insurance Law (e.g., the underlying data upon which the change is based). Filings submitted on a file and use basis shall be subject to the superintendent's review in accordance with Article 23 of the Insurance Law.

§ 163.6 Support for filings subject to prior approval.

(a) An insurer shall include support for all proposed changes specified in each filing subject to the superintendent's prior approval. The support shall include the specific reasons for the proposed changes, and any other material information as required by section 2304 of the Insurance Law.

(b) Subject to all other requirements of this Part and article 23 of the

*Insurance Law, an insurer may adjust rating factors associated with territories or classifications as part of its file and use filing, provided that there are no changes to the underlying definitions which remain subject to the superintendent's prior approval pursuant to article 23 of the Insurance Law. Examples of rating classifications include discounts, surcharges, merit rating plans or multi-tier programs.*

*(c) If any one element of a filing is subject to prior approval, then the entire filing shall be subject to prior approval.*

**§ 163.7 Notification to insureds of rate changes.**

*(a) An insurer shall mail or deliver to every named insured affected by a rate increase due to a flex-band rate filing, at least 30 but not more than 60 days in advance of the end of the policy period, a notice of its intention to change the insured's rate. The notice shall set forth the specific reason or reasons for the rate change.*

*(b) An insurer shall not implement a rate increase due to a flex-band rate filing unless the insurer has mailed or delivered to the named insured affected by the rate increase the notice required by subdivision (a) of this section.*

*(c) An insurer shall submit a flex-band rate filing to the superintendent in a timely manner. An insurer shall not submit a flex-band rate filing to the superintendent after insureds have received notification pursuant to subdivision (a) of this section.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. INS-33-09-00007-P, Issue of August 19, 2009. The emergency rule will expire February 14, 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: Sections 201, 301, and Article 23 of the Insurance Law (most specifically, section 2350).

These sections establish the superintendent's authority to promulgate regulations establishing standards for flexible rating systems providing nonbusiness automobile insurance policies. 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.

Article 23 promotes the public welfare by regulating insurance rates to the end that they not be excessive, inadequate or unfairly discriminatory, to promote price competition and competitive behavior among insurers. Chapter 136 of the Laws of 2008 adds a new section 2350 to the Insurance Law, which reintroduces flexible rating for nonbusiness automobile insurance rates.

2. Legislative objectives: The stated purpose of Article 23 of the Insurance Law is to ensure the availability and reliability of insurance, and to promote public welfare, by regulating insurance rates to assure that they are not excessive, inadequate or unfairly discriminatory and are responsive to competitive market conditions. Chapter 136 of the Laws of 2008 reestablished flexible rating for nonbusiness automobile insurance. It should strengthen the high level of competition that already exists in this market. The nonbusiness automobile market can benefit from the additional competitive impetus of a flexible rating system.

3. Needs and benefits: Flexible rating, which is a hybrid system borrowing elements from open competition and prior approval, has been applicable to commercial risk, professional liability and public entity insurance since 1986. In those markets, flexible rating has proved successful in restoring stability, promoting fair competition, and providing a firm foundation for long-term thinking and strategic planning, not only on the part of the insurance industry, but for the benefit of businesses and consumers that must rely upon, and budget for, insurance protection.

The above benefits are pertinent to the application of flex rating for the nonbusiness automobile market. Competition and market forces have always been strong determinants of rates for nonbusiness automobile coverages, and flex rating should strengthen the high level of competition that already exists in this market.

Chapter 113 of the Laws of 1995 first introduced flex rating to nonbusiness automobile insurance effective July 1, 1995 until it expired on August 2, 2001 and was replaced by prior approval requirements. However, section 13 of Chapter 136 of the Laws of 2008 adds a new section 2350 to the Insurance Law, which reintroduces flexible rating for nonbusiness automobile insurance rates. It permits insurers to place nonbusiness automobile insurance rates in effect without the superintendent's prior approval, provided that the overall average rate level does not result in an increase above five percent from the insurer's prior rate level in effect during the preceding 12 months. Section 2350 also limits the overall average rate level decreases without prior approval up to five percent from the insurer's current rate level regardless of when it went into effect. The prior

regulation, which implemented the former flex rating system, is hereby being repealed pursuant to this new Part 163 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 153). In accordance with section 2350(c), Insurance Department Regulation No. 153 (11 NYCRR 163) is being promulgated to provide guidance to insurers in implementing the new law's requirements.

4. Costs: This rule imposes no compliance costs on state or local governments. There are no additional costs incurred by the Insurance Department. For regulated parties, the costs of submitting a flexible rate filing should be no different than the costs of submitting a rate filing under the prior law. Since insurers will be able to implement flexible rate changes without having to wait for the Insurance Department's formal approval, they will be able to respond more quickly to competitive forces in the marketplace. However, there is an additional requirement to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. Compliance with this notice requirement of premium increases pursuant to the flexible rating regulation will have a minimal cost, since the notice language may be included along with the renewal policy information sent to insureds. In any event, the notice requirement is imposed by the statute, not the regulation.

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

6. Paperwork: While the paperwork associated with the submission and monitoring of a flexible rate filing is essentially the same as that associated with private passenger automobile insurance rate filings under the prior law, there is an additional requirement imposed by the statute to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. This notice language may be included along with the renewal policy information sent to insureds.

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

8. Alternatives: The Department performed outreach with three property/casualty insurer trade organizations (individually "insurer trade organization") and two property/casualty insurance agents and brokers trade organizations (individually "agents and brokers trade organization") and received comments from four out of the five organizations.

a. The legislative intent was for any rate change that results in an overall rate increase above 5% during a 12-month period to require prior approval. The alternative approach would be not to consider any rate increase that exceeds the 5% overall flex band limit that has been prior approved during the same 12-month period. While this approach would require newer data to support any flex rate filing made subsequent to a prior approved rate filing, it still seems to be clearly against the legislative intent to keep significant automobile rate increases occurring within a 12-month period to be subject to prior approval. For example, if an insurer received approval for a rate increase of 7% effective February 1, 2009, the insurer may not implement an additional increase to be effective before February 1, 2010 on a flexible rating basis.

b. The Department considered reducing the limitation from the prior regulation standard of a 30% maximum individual premium change as a consequence of file and use filings to 25%, with the understanding that such maximum policyholder change bears some relationship to the overall flex band (which has decreased from 7% in the prior flex rating statute to 5% in the new statute). However, in consideration of comments received, the Department agreed that the maximum individual premium change is not truly relevant to the overall average rate change resulting from a flexible rate filing made by an insurer. It is quite common for rate filings with little or no overall rate effect to still produce significant individual policyholder impacts.

c. An insurer trade organization objected to the provision of Section 163.4, which precludes an insurer from capping an individual insured's premium to comply with the maximum individual premium change provision. This organization asserted that "capping" is a method that is considered acceptable in other states to achieve that result as opposed to making adjustments to base rates and factors for an entire class of policyholders. However, it has long been the Department's view that the capping of individual policy premiums is unfairly discriminatory to new policyholders with the same characteristics as current policyholders whose rates have been capped and therefore contrary to Article 23.

d. An insurer trade organization inquired as to whether the cumulative effect of two flexible rate increases would be measured, by simple addition or by multiplication. In response to this comment, further clarification has been added to Section 163.2 of this regulation, stating that the cumulative effect is determined in a multiplicative manner and an example has been included.

e. Two insurer trade organizations commented that the regulation fails to specify the instances under which the superintendent may order an insurer to make a change in its rates filed under file and use basis.

However, section 2320 of the Insurance Law provides procedures that must be followed by the superintendent and insurers in addressing issues related to rate filings that are not subject to prior approval. Thus, no change to the proposal was made in response to this comment.

f. An insurer trade organization and an agents and brokers trade organization suggested that the Department clarify that the maximum permitted increase for an individual insured's premium should be applied to the full coverage or total premium of a nonbusiness automobile insurance policy. Consequently, the Department modified section 163.4(a) of the regulation to clarify that the provision applies to an insured's total policy premium and not to a specific coverage.

g. Two insurer trade organizations and an agents and brokers trade organization requested a definition of the term "predominantly" with regard to the definition of "nonbusiness automobile insurance policy" and a revision to the definition of the term "effective date" with regard to new business and renewals. However, the term "predominantly" is not unique to the flexible rating statute, and is used elsewhere in the Insurance Law, such as section 3425. In addition, the term "predominantly" has been previously clarified through opinions of the Department's Office of General Counsel. Thus, the Department made no changes to the regulation in response to this comment. The Department considered the request for revision of the definition of the term "effective date" but determined that the current definition, contained in section 163.1 of the regulation, was appropriate.

h. An agents and brokers trade organization inquired if an insurer may increase the premium on a six month policy at each policy renewal. However, article 23 of the Insurance Law requires an insurer to use the rates in effect upon renewal of each policy, regardless of the rate filing system used to make the rate filing (i.e., regardless of whether the filing was made as file and use or in accordance with prior approval). Thus, the Department made no changes to the regulation in response to this comment.

i. An insurer trade organization commented on the fact that the regulation would allow an insurer to file multiple file and use rate reductions while being limited to only two file and use increases within any 12-month period. The flexible rating statute provides for a maximum of two file and use overall average rate increases within any 12-month period, up to an overall maximum increase of 5%. The statute does not, however, provide any restrictions on the number of file and use overall average rate decreases, provided that the overall average rate decrease does not exceed the 5% flex-band from the rate currently in effect. All rate filings must include support for the proposed changes as required by Article 23 of the Insurance Law, as the Department will monitor the cumulative effect of the decreases to ensure that the rates are not inadequate or otherwise in violation of the Insurance Law.

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

10. Compliance schedule: Insurers should be able to comply with the requirements of this rule as soon as they are effective.

#### **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. The basis for this finding is that this rule is directed at property/casualty insurance companies licensed 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 property/casualty 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.

##### **2. Local governments:**

The rule does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at property/casualty insurance companies, none of which are local governments.

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

1. Types and estimated numbers of rural areas: This regulation applies to all property/casualty insurance companies licensed to write insurance in New York State (specifically, those writing automobile insurance). Property/casualty insurance companies do business throughout New York State, including rural areas as defined under State Administrative Procedure Act Section 102(10).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private

entities in rural areas. This regulation re-establishes flexible rating for nonbusiness automobile insurance policies, as required by section 2350 of the Insurance Law. While the paperwork associated with the submission and monitoring of a flexible rate filing is essentially the same as that associated with private passenger automobile insurance rate filings under the prior law, there is an additional requirement imposed by the statute to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. This notice language may be included together with the renewal policy information that is sent to insureds.

3. Costs: The costs to regulated parties of submitting a flexible rate filing should be no different than the costs for submitting a rate filing under the prior law. Since insurers will be able to implement flexible rate changes without having to wait for the Insurance Department's formal approval, they will be able to respond more quickly to competitive forces in the marketplace. However, there is an additional requirement to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. Compliance with this notice requirement of premium increases pursuant to the flexible rating regulation will have a minimal cost, since the notice language may be included along with the renewal policy information sent to insureds. In any event, the notice requirement is imposed by the statute, not the regulation.

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.

#### **Job Impact Statement**

The Insurance Department finds that this rule will have no adverse impact on jobs and employment opportunities. It merely implements section 2350 of the Insurance Law, which directs the superintendent to establish standards for flexible rating systems providing nonbusiness automobile insurance policies. The number of insurance company personnel necessary to submit a flexible rating filing should be no different than submitting a rate filing under the prior law.

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

The Department received comments from: a property/casualty insurance trade association composed of more than 1,000 member property/casualty insurance companies (PCIAA), a property/casualty insurance trade organization concentrated only on New York (PCNYIA) and a property/casualty insurance trade organization composed of more than 1,400 members (NAMIC).

All three trade organizations commented on Section 163.2(d) of the proposed regulation, which states "[N]otwithstanding any provision of this Part, an insurer shall not implement an overall average rate increase on a file and use basis subsequent to an overall average rate increase greater than the five percent flex-band that the superintendent has already prior-approved in the twelve-month period immediately preceding the effective date of the proposed increase." The trade organizations contend that this section is contrary to the statutory language in New York Ins. Law Section 2350, which establishes flex-rating for noncommercial automobile insurance. PCIAA also asserted that the regulation is inconsistent with the Department's application of flex rating in the past.

NAMIC further commented that Section 163.2 may hinder the statute's effectiveness in promoting competition. The second sentence of Section 163.2(b) reads, "If a proposed overall average rate increase combined with a prior rate increase implemented within a twelve-month period of the proposed effective date of the request exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change." NAMIC asserts that this provision goes beyond the intent and language of the statute in limiting insurers' ability to make rate changes without prior approval.

After reviewing the comments, the Department determined that the regulation should not be modified. The insurer trade organizations' alternative proposal would disregard any rate increase that had been prior approved during the same 12-month period in determining the 5% overall flex band limitation. While an insurer under this alternative approach would still have to support its flex-rate filing with new data subsequent to a prior approved rate filing, significant automobile rate increases occurring within a 12-month period would be exempt from prior approval. As previously stated in the Department's Regulatory Impact Statement, the Legislature intended that an insurer seeking a rate change resulting in an overall rate increase above 5% during a 12-month period must first obtain the Superintendent's prior approval.

The regulation's approach is not unduly burdensome on insurers. In fact, under the regulation, an insurer may file for a rate increase on a prior approval basis at any time subject to the Insurance Department's review of such increase.

Moreover, although the repealed regulation did take the approach suggested by the industry, the approach in the current regulation is consistent with 11 NYCRR161 (Regulation 129), entitled "Flexible-Rating System; Rating Plans; Tort Reform Refiling Requirements", which governs flex-

ible rating for most property/casualty commercial lines of insurance. Section 161.5(g) states "Following a rate change which required and received prior approval, no further rate change in the same direction within an applicable flex-band can be made by the insurer with respect to that market for a 12-month period after the effective date of such approval. If, notwithstanding this limitation, an insurer determines that it requires such a further rate change, it may seek the superintendent's prior approval." The approach in Part 161 has been successful and has provided both stability as well as flexibility in the commercial lines market, and should do the same for the personal lines automobile insurance market.

Therefore, the rule is being adopted as proposed.

## EMERGENCY RULE MAKING

### Workers' Compensation Insurance - Independent Livery Driver Benefit Fund

**I.D. No.** INS-01-10-00005-E

**Filing No.** 1388

**Filing Date:** 2009-12-17

**Effective Date:** 2009-12-17

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

**Action taken:** Addition of Subpart 151-5 (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:** Chapter 392 of the Laws of 2008, parts of which became effective immediately, with other parts becoming effective on January 1, 2009 and January 1, 2010, enacts a new Article 6-G of the Executive Law, a new Section 18-c of the Workers Compensation Law, and a new Section 3451 of the Insurance Law. Article 6-G authorizes the creation of a new Independent Livery Driver Benefit Fund (the "Fund") to provide coverage to livery drivers dispatched by independent livery bases that are members of the Fund. Section 18-c sets forth criteria for the designation of a livery base as an independent livery base. Although the State Insurance Fund is authorized under Article 6-G to provide the insurance afforded therein, Section 3451 of the Insurance Law authorizes the Superintendent of Insurance to promulgate rules and regulations permitting insurers authorized to write workers' compensation and employers' liability insurance to provide coverage to the new independent livery driver benefit fund ("Fund").

Insurers authorized to write workers' compensation and employers' liability insurance have expressed interest in writing policies of insurance affording coverage to the Fund. Providing the Fund with alternative choices may lower the costs that will be borne for the coverage and can provide other benefits to the Fund. Given the effective date of the relevant provision of the law, January 1, 2010, and the need to have rates and forms approved in advance of that date, 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 preservation of the general welfare.

**Subject:** Workers' Compensation Insurance - Independent Livery Driver Benefit Fund.

**Purpose:** Authorizes workers' compensation and employers' liability insurers to provide coverage authorized by Executive Law Article 6-G.

**Text of emergency rule:** A new subpart 151-5 is added to read as follows:  
*Section 151-5.0 Purpose.*

*The purpose of this sub-part is to authorize workers' compensation and employers' liability insurers to provide coverage as afforded under Executive Law Article 6-G.*

*Section 151-5.1 Authorization of workers' compensation insurers' to write insurance pursuant to Executive Law Article 6-G*

*(a) Pursuant to Insurance Law § 3451, insurance companies authorized to write workers' compensation insurance and employers' liability insurance, as defined in Insurance Law section 1113(a)(15), are hereby authorized to write policies of insurance affording coverage in accordance with Executive Law Article 6-G.*

*(b) No policy or certificate thereunder providing for coverage pursuant to Executive Law Article 6-G shall be issued or issued for delivery in this State unless the forms have been filed with, and approved by, the superintendent in accordance with Insurance Law Article 23.*

*(c) No policy or certificate thereunder providing for coverage pursuant to Executive Law Article 6-G shall be issued or issued for delivery in this*

*State unless the rates have been filed with the superintendent for prior approval in accordance with Article 23 of the Insurance Law and subpart 151-1 of this Part.*

*(d) Every policy and certificate thereunder providing for coverage pursuant to Executive Law Article 6-G issued or issued for delivery in this State shall provide coverage in accordance with the provisions of Executive Law Article 6-G.*

*(e) The policy shall be issued on a group basis to the independent livery driver benefit fund and shall provide coverage to livery drivers dispatched by independent livery bases that are members of the independent livery driver benefit fund established pursuant to Executive Law Article 6-G.*

*(f) A certificate issued under the group master policy shall be provided to each member independent livery base and contain all material terms and conditions of coverage with respect to a livery driver, unless the group master policy is incorporated by reference, and in which event, a copy of the master policy shall accompany the certificate or shall be promptly provided to a member independent livery base upon request.*

*(g) An insurer issuing or renewing the group policy shall maintain separate statistics tracking group loss and expense experience for the group program.*

*(h) Coverage pursuant to Executive Law Article 6-G shall be subject to mandatory arbitration of controversies between insurers, pursuant to the provisions of section 5105 of the Insurance Law and section 65-4.11 of subpart 65-4 of this Title (Regulation 68-D).*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire March 16, 2010.

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

#### Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of Part 151-5 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 119) derives from Sections 201, 301, and 3451 of the Insurance Law, and Executive Law Article 6-G.

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

Section 3451 of the Insurance Law (L.2008, c. 392, § 12), permits the Superintendent to promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G.

Executive Law Article 6-G establishes clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases, and establishes the independent livery driver benefit fund ("the Fund") to provide independent contractor livery drivers workers' compensation benefits in certain circumstances where No-Fault automobile insurance does not provide sufficient coverage. Article 6-G permits the Fund to purchase insurance from the State Insurance Fund ("SIF") or, if the Superintendent authorizes it by regulation, from an insurer licensed to write workers' compensation or employers' liability insurance.

2. Legislative objectives: Chapter 392 of the Laws of 2008 enacted Executive Law Article 6-G, establishing clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases, and establishing the Fund to provide independent contractor livery drivers workers' compensation with benefits in certain circumstances where No-Fault automobile insurance does not provide sufficient coverage.

The law also permits the Superintendent to promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G.

3. Needs and benefits: Pursuant to Insurance Law § 3451, the Superintendent may promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G. This regulation will ensure that the Fund will have a choice of procuring coverage from either SIF or an authorized insurer, which may provide savings to the Fund, and ultimately the livery bases that pay for the coverage.

4. Costs: This rule authorizes workers' compensation and employees' liability insurers to provide coverage to the Fund for livery drivers dispatched out of independent livery bases pursuant to Insurance Law § 3451 and Executive Law Article 6-G. An insurer may, but is not required to, offer to provide coverage to the Fund.

5. Local government mandates: This rule imposes no impact on local governments.

6. Paperwork: This rule imposes no new paperwork on affected parties. An insurer would have to file rates and forms subject to the Superintendent's approval as it would for any other workers' compensation coverage.

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

8. Alternatives: The only alternative was for the Superintendent not to authorize insurers to provide coverage to the Fund. In that case, only SIF would have been able to provide coverage. This regulation allows insurers to compete for the business of the Fund and may reduce the costs of insurance as a result.

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

10. Compliance schedule: The rule does not impose a compliance schedule.

#### **Regulatory Flexibility Analysis**

##### **1. Small businesses:**

The 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. The 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" set forth in Section 102(8) of the State Administrative Procedure Act ("SAPA"). The Insurance Department has monitored Annual Statements and Reports on Examination of authorized workers' compensation insurers subject to this rule, and believes that none of the insurers falls within the definition of "small business", because there are none that are both independently owned and have fewer than one hundred employees.

Pursuant to Insurance Law § 3451, the Superintendent may promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G. This regulation authorizes a workers' compensation and employees' liability insurer to provide coverage of the independent livery driver benefit fund ("the Fund") for livery drivers dispatched out of independent livery bases pursuant to Insurance Law Section 3451 and Executive Law Article 6-G. This will give the Fund a choice of procuring coverage from either the State Insurance Fund or an insurer. Since livery bases pay for the coverage, this regulation may ultimately benefit them if the costs of insurance are reduced as a result.

##### **2. Local governments:**

The rule imposes no impact on local governments.

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

Chapter 392 of the Laws of 2008 enacted Executive Law Article 6-G, establishing clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases, and creating the independent livery driver benefit fund ("the Fund") to provide independent contractor livery drivers workers' compensation with benefits in certain circumstances where No-Fault automobile insurance does not provide sufficient coverage.

The law also permits the Superintendent to promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G. This rule authorizes workers' compensation and employers' liability insurers to provide coverage as afforded under Executive Law Article 6-G.

Neither New York City, Nassau County nor Westchester County are rural areas.

The rule contains no provisions that create impacts unique to rural areas of the state.

#### **Job Impact Statement**

This rule will not adversely impact job or employment opportunities in New York. The rule authorizes workers' compensation and employers' liability insurers to provide coverage as afforded under Executive Law Article 6-G. Participation by insurers is voluntary. For those insurers that choose to offer coverage, existing personnel should be able to perform this task.

There should be no region in New York that would experience an adverse impact on jobs and employment opportunities. This regulation should not have any impact on self-employment opportunities.

### **NOTICE OF ADOPTION**

#### **Flexible Rating for Nonbusiness Automobile Insurance Policies**

**I.D. No.** INS-33-09-00007-A

**Filing No.** 1432

**Filing Date:** 2009-12-21

**Effective Date:** 2010-01-06

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

**Action taken:** Addition of Part 163 (Regulation 153) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2350 and art. 23

**Subject:** Flexible Rating for Nonbusiness Automobile Insurance Policies.

**Purpose:** This rule re-establishes flexible rating for nonbusiness automobile insurance policies required by section 2350 of the Insurance Law.

**Text or summary was published** in the August 19, 2009 issue of the Register, I.D. No. INS-33-09-00007-P.

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

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

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

The Department received comments from a property/casualty insurance trade association composed of more than 1,000 member property/casualty insurance companies (PCIAA), a property/casualty insurance trade organization concentrated only on New York (PCNYIA) and a property/casualty insurance trade organization composed of more than 1,400 members (NAMIC).

All three trade organizations commented on Section 163.2(d) of the proposed regulation, which provides "[N]otwithstanding any provision of this Part, an insurer shall not implement an overall average rate increase on a file and use basis subsequent to an overall average rate increase greater than the five percent flex-band that the superintendent has already prior-approved in the twelve-month period immediately preceding the effective date of the proposed increase." The trade organizations contend that this section is contrary to the statutory language in New York Insurance Law Section 2350, which establishes flex-rating for noncommercial automobile insurance. PCIAA also asserted that the regulation is inconsistent with the Department's application of flex rating in the past.

NAMIC further commented that Section 163.2 may hinder the statute's effectiveness in promoting competition. The second sentence of Section 163.2(b) reads, "If a proposed overall average rate increase combined with a prior rate increase implemented within a twelve-month period of the proposed effective date of the request exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change." NAMIC asserts that this provision goes beyond the intent and language of the statute in limiting insurers' ability to make rate changes without prior approval.

After reviewing the comments, the Department determined that the regulation should not be modified. The insurer trade organizations' alternative proposal would disregard any rate increase that had been prior approved during the same 12-month period in determining the 5% overall flex band limitation. While an insurer under this alternative approach would still have to support its flex-rate filing with new data subsequent to a prior approved rate filing, significant automobile rate increases occurring within a 12-month period would be exempt from prior approval. As previously stated in the Department's Regulatory Impact Statement, the Legislature intended that an insurer seeking a rate change resulting in an overall rate increase above 5% during a 12-month period must first obtain the Superintendent's prior approval.

The regulation's approach is not unduly burdensome on insurers. In fact, under the regulation, an insurer may file for a rate increase on a prior approval basis at any time subject to the Insurance Department's review of such increase.

Moreover, although the repealed regulation did take the approach suggested by the industry, the approach in the current regulation is consistent with 11 NYCRR161 (Regulation 129), entitled "Flexible-Rating System; Rating Plans; Tort Reform Refiling Requirements", which governs flexible rating for most property/casualty commercial lines of insurance. Section 161.5(g) states "Following a rate change which required and received prior approval, no further rate change in the same direction within an applicable flex-band can be made by the insurer with respect to that market for a 12-month period after the effective date of such approval. If, notwithstanding this limitation, an insurer determines that it requires such a further rate change, it may seek the superintendent's prior approval." The approach in Part 161 has been successful and has provided both stability as well as flexibility in the commercial lines market, and should do the same for the personal lines automobile insurance market.

Therefore, the rule is being adopted as proposed.

## Department of Labor

### NOTICE OF ADOPTION

#### Making Adjustments to the Regulations Dealing with the State Minimum Wage as Required by the Increase in the Federal Minimum Wage that Took Effect 7/24/09 and Adjusting Various Wage Allowances in the Same Proportion as this Minimum Wage Increase

**I.D. No.** LAB-44-09-00019-A

**Filing No.** 1433

**Filing Date:** 2009-12-22

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of Parts 137, 138, 141, 142, 143 and 190 of Title 12 NYCRR.

**Statutory authority:** Labor Law, art. 19, sections 652(2) and 673(1)

**Subject:** Making adjustments to the regulations dealing with the State Minimum Wage as required by the increase in the federal minimum wage that took effect 7/24/09 and adjusting various wage allowances in the same proportion as this minimum wage increase.

**Purpose:** To bring the State minimum wage into compliance with the Federal minimum wage, that took effect 7/24/2009.

**Text or summary was published in** the November 4, 2009 issue of the Register, I.D. No. LAB-44-09-00019-EP.

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

**Text of rule and any required statements and analyses may be obtained from:** Jeffrey G. Shapiro, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: bcejjs@labor.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

## Office of Mental Health

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

#### Operation of Residential Programs for Adults

**I.D. No.** OMH-01-10-00004-P

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

**Proposed Action:** This is a consensus rule making to amend Part 595 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 31.04

**Subject:** Operation of Residential Programs for Adults.

**Purpose:** To correct an inaccurate reference within current regulation.

**Text of proposed rule:** Subdivision (b) of Section 595.2 of Title 14 NYCRR is amended to read as follows:

(b) Sections 31.05, 31.07, 31.09, 31.13 and 31.19 of the Mental Hygiene Law authorize the commissioner or his or her representative to examine and inspect programs to determine their suitability and proper operation. Sections [31.15] 31.16 and 31.17 of the Mental Hygiene Law authorize the commissioner to suspect, revoke or limit any operating certificate.

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

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

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

**Consensus Rule Making Determination**

This rulemaking is filed as a Consensus rule on the grounds that its purpose is to make a technical correction and is non-controversial. No

person is likely to object to this rulemaking since it merely corrects an erroneous reference to a section in the Mental Hygiene Law.

Current regulations refer to Sections 31.15 and 31.17 of the Mental Hygiene Law as providing authorization to the Commissioner of Mental Health with regard to suspension, revocation or limitation of an operating certificate. Section 31.15 is incorrectly identified, as it was repealed on October 5, 1999, by Section 15 of Chapter 558 of the Laws of 1999. The correct section concerning suspension, revocation, or limitation of an operating certificate and imposition of fines by the Commissioner of Mental Health is Section 31.16 of the Mental Hygiene Law.

Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction.

**Job Impact Statement**

A job impact statement is not included in this filing as it is apparent from the nature of the consensus rulemaking that there will be no impact on jobs or employment opportunities. The rulemaking merely corrects an inaccurate reference within current regulation.

## Office of Mental Retardation and Developmental Disabilities

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

#### Appeals Process for Certain Disqualified Individuals with Developmental Disabilities Who Wish to Purchase or Possess a Firearm

**I.D. No.** MRD-01-10-00007-EP

**Filing No.** 1392

**Filing Date:** 2009-12-17

**Effective Date:** 2009-12-17

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

**Proposed Action:** Addition of Part 643 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 13.09(b) and (f)

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

**Specific reasons underlying the finding of necessity:** The NICS Improvement Amendments Act of 2007 (Public Law 110-180, Section 105, enacted on January 8, 2008) requires that states have a relief from disabilities program that meets the requirements of the Act. In order to apply for the grant funding provided for under the NICS Improvement Amendments Act of 2007, the U.S. Department of Justice has required that all states must certify by June 22, 2009, that the state has implemented a relief from disabilities program. OMRDD filed emergency regulations on that date which are now expiring. New emergency regulations are necessary to continue the relief for disabilities program until such point that permanent regulations can be adopted.

The receipt of the grant money will enable New York State to more expeditiously perform the administrative functions necessary to assemble relevant records and transmit information about disqualified individuals to NICS. These disqualified individuals are then added to the list of persons who are not able to legally purchase or possess firearms anywhere in the United States. The underlying assumption of the NICS Improvement Amendments Act of 2007 is that keeping firearms out of the hands of these potentially dangerous individuals prevents violence and enhances the public health, safety and welfare.

**Subject:** Appeals process for certain disqualified individuals with developmental disabilities who wish to purchase or possess a firearm.

**Purpose:** To establish a process so a person who is disqualified from being able to purchase a firearm can appeal the disqualification.

**Text of emergency/proposed rule:** • 14 NYCRR is amended by the addition of a new Part 643 as follows:

PART 643

CERTIFICATE OF RELIEF FROM DISABILITIES (PROHIBITIONS)  
RELATED TO FIREARMS POSSESSION

(Statutory authority: Mental Hygiene Law Sections 13.09(b) and 13.09(f))

**Section 643.1 Background and intent.**

(a) The federal Brady Handgun Violence Prevention Act of 1993 ("Brady Act"), as amended, among other provisions, prohibits any person from selling or otherwise disposing of any firearm or ammunition to any person who has been involuntarily "committed to a mental institution" (18 U.S.C. Section 922 (d)(4)) and further prohibits any person who has been involuntarily "committed to a mental institution" from shipping or transporting in interstate or foreign commerce, or possessing in or affecting commerce, any firearm or ammunition; or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce (18 U.S.C. Section 922 (g)(4)).

(b) Under the federal NICS Improvement Amendments Act of 2007, Public Law 110-180, Section 105, the Brady Act (18 U.S.C. Sec. 922 et seq.) was amended to mandate that states must report certain persons disqualified from receiving or possessing firearms to the National Instant Criminal Background Check System (NICS). Upon being contacted by a federal firearm licensee prior to transferring a firearm to an unlicensed person, NICS will provide information on whether a person is prohibited from receiving or possessing a firearm under state or federal law. NICS contains records concerning certain events, such as criminal convictions and mental health adjudications and findings that may disqualify a person from purchasing a firearm. The 2007 amendments also require the establishment of a "certificate of relief from disabilities" process on both the federal and state levels to permit a person who has been or may be disqualified from possessing a firearm pursuant to 18 U.S.C. Sections 922 (d)(4) and (g)(4) to petition for relief from that disability.

(c) Section 13.09(f) of the Mental Hygiene Law authorizes the Office of Mental Retardation and Developmental Disabilities (OMRDD), in cooperation with the NYS Unified Court System and other state agencies, to collect, retain, modify or transmit data or records for inclusion in NICS for the purpose of responding to NICS queries regarding attempts to purchase or otherwise take possession of firearms, as defined in 18 U.S.C. 921(a)(3). The records which OMRDD is authorized by law to collect, retain, modify, or transmit, include information identifying persons who have been involuntarily committed to an OMRDD facility pursuant to Article 15 of the Mental Hygiene Law, Article 730 or Section 330.20 of the Criminal Procedure Law, or Sections 322.2 or 353.4 of the Family Court Act. In accordance with the above-referenced federal law, Mental Hygiene Law Section 13.09(f) also requires OMRDD to promulgate regulations establishing a "certificate of relief from disabilities" process for those persons whose records were provided to the Division of Criminal Justice Services or the Federal Bureau of Investigation by OMRDD pursuant to Mental Hygiene Law Section 13.09(f), and who have been or may be disqualified from purchasing and/or possessing a firearm pursuant to 18 U.S.C. Sections 922 (d)(4) and (g)(4).

(d) The purpose of these regulations is to establish the required administrative "certificate of relief from disabilities" process for persons whose records were submitted to NICS by OMRDD in accordance with Section 13.09(f) of the Mental Hygiene Law. Such relief will be based on a determination of whether the person's record and reputation are such that he/she will not be likely to act in a manner dangerous to public safety and where granting the relief would not be contrary to the public interest.

**Section 643.2 Applicability.**

This Part applies to any person who has been or may be disqualified from possessing a firearm pursuant to 18 USC Sections 922 (d)(4) and (g)(4), due to being involuntarily committed to an OMRDD facility pursuant to Article 15 of the Mental Hygiene Law, or Article 730 or Section 330.20 of the Criminal Procedure Law, or Sections 322.2 or 353.4 of the Family Court Act and whose records were submitted to NICS by OMRDD in accordance with Section 13.09(f) of the Mental Hygiene Law.

**Section 643.3 Process.**

**(a) Request for relief.**

(1) An individual who has been or may be disqualified from attempting to purchase or otherwise possess a firearm in accordance with the provisions of Section 13.09(f) of the Mental Hygiene Law and whose records were submitted to NICS by OMRDD, may request administrative review by OMRDD to have his or her civil rights restored for such limited purpose.

(2) A request for relief shall be made on forms developed by OMRDD, which shall be available on OMRDD's public web site. At a minimum, the forms shall require the applicant to answer all of the following questions under penalty of perjury:

(i) Is the applicant under indictment for, or ever been convicted of, a crime punishable by imprisonment for more than one year?

(ii) Is the applicant a fugitive from justice?

(iii) Is the applicant an unlawful user of, or is addicted to, any controlled substance?

(iv) Has the applicant been adjudicated as having a mental disability or committed to a mental institution, including but not limited to involuntary commitment to an OMRDD facility (pursuant to Article 15 of the Mental Hygiene Law, or Article 730 or Section 330.20 of the Criminal Procedure Law, or Sections 322.2 or 353.4 of the Family Court Act)? (Note: "adjudicated as having a mental disability" has the same meaning as the term "adjudicated as a mental defective" is defined in 27 C.F.R. 478.11. "Committed to a mental institution" has the same meaning as the term is defined in the cited federal regulation.)

(v) Is the applicant an illegal alien, or has he/she been admitted to the United States under a nonimmigrant visa?

(vi) Was the applicant discharged from the U.S. Armed Forces under dishonorable conditions?

(vii) Has the applicant renounced U.S. citizenship?

(viii) Is the applicant subject or ever been subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child?

(ix) Has the applicant been convicted in any court of a misdemeanor crime of domestic violence?

(3) In addition to the forms provided, the applicant shall be required to submit further information in support of the request for relief. The information must include, but is not limited to:

(i) true and certified copies of medical/clinical records detailing the applicant's psychiatric and/or intellectual or developmental disability history, which shall include records pertaining to the involuntary commitment to an OMRDD facility, which is the subject of the request for relief;

(ii) true and certified copies of medical/clinical records from all of the applicant's current treatment and service providers, if the applicant is receiving treatment or services;

(iii) a true and certified copy of all criminal history information maintained on file at the New York State Division of Criminal Justice Services and the Federal Bureau of Investigation pertaining to the applicant, or a copy of a response from such Division and Bureau indicating that there is no criminal history information on file;

(iv) notarized letters of reference from current and past employers, family members or personal friends, which may include affidavits from character witnesses or the applicant, or other character evidence;

(v) any further information pertinent to the determination specifically requested by OMRDD. Such documents requested by OMRDD shall be certified copies of original documents.

(4) The applicant must provide a psychiatric evaluation performed no earlier than 90 calendar days from the date the request for relief was submitted to OMRDD, conducted by a qualified psychiatrist as defined in Section 9.01 of the Mental Hygiene Law. The evaluation must include an opinion, and a basis for that opinion, as to whether or not the applicant's record and reputation are such that the applicant will or will not be likely to act in a manner dangerous to public safety and whether or not the granting of the relief to allow for firearms possession would be contrary to the public interest.

(5) The applicant must also provide an evaluation by a licensed psychologist which includes current IQ and adaptive behavior assessment.

(6) OMRDD reserves the right to request that the applicant undergo a clinical evaluation and risk assessment as determined by the Commissioner or his/her designee(s). The evaluation must be performed 45 calendar days from the date OMRDD requests the evaluation, unless OMRDD allows an extension of time.

(7) The request for relief must include a valid authorization form permitting OMRDD to obtain and/or review health and other information from any health, mental health, alcohol/substance abuse providers, or providers of services for persons with developmental disabilities with respect to care and services provided prior to the date of the application, for the purposes of reviewing the application for relief. Such authorization must comply with applicable federal or state laws governing the privacy of health information, including but not limited to, as relevant, 45 CFR Parts 160 and 164, 42 CFR Part 2, Public Health Law Section 17 and Article 27-F, and Mental Hygiene Law Section 33.13.

(8) It is the responsibility of the applicant to ensure that all required information accompanies the request for relief at the time it is submitted to OMRDD. Unless specifically requested by OMRDD, information provided after receipt by OMRDD of the initial request for relief will not be considered. Information specifically requested by OMRDD must be received by OMRDD within 60 days of the date requested in order for it to be considered. Failure to meet this time frame will result in a denial of the certificate of relief.

*(b) Scope of review.*

(1) *The Commissioner or his/her designee(s) shall perform an administrative review of the request for relief, which shall include a review of all information submitted by the applicant in accordance with subdivision (a) of this Section. The person(s) who conducts the review will not be the individual(s) who gathered the information for the administrative request for relief.*

(2) *Failure of the applicant to provide required or requested information may be the sole basis for denial of the certificate of relief.*

(3) *The scope of the review shall be to determine whether the applicant will not be likely to act in a manner dangerous to public safety and granting the relief will not be contrary to the public interest.*

*(c) Decision.*

(1) *After review of the application in accordance with subdivision (b) of this section, the Commissioner or his/her designee(s) shall prepare a written determination, which shall include:*

*(i) a summary of the information utilized in reaching the decision;*

*(ii) a summary of the applicant's criminal history (if any);*

*(iii) a summary of the psychiatric evaluation prepared to support the request for relief (if any);*

*(iv) a summary of the applicant's mental health and intellectual/developmental disabilities history;*

*(v) a summary of the circumstances surrounding the firearms disability imposed by 18 USC Sections 922(d)(4) and (g)(4);*

*(vi) an opinion as to whether or not the applicant's record and reputation are such that the applicant will or will not be likely to act in a manner dangerous to public safety and whether or not the granting of the relief would be contrary to the public interest; and*

*(vii) a determination as to whether or not the relief is granted.*

(2) *OMRDD shall provide a copy of the written determination to the applicant without undue delay. In addition to a copy of the written determination:*

*(i) if the relief is granted:*

*(a) the applicant must be provided with written notice that while the certificate of relief removes the disability from Federal firearms prohibitions (disabilities) imposed under 18 U.S.C. Sections 922(d)(4) and (g)(4), the determination does not otherwise qualify the applicant to purchase or possess a firearm, and does not fulfill the requirements of the background check pursuant to the Brady Handgun Violence Prevention Act of 1993 (Pub. L. 103-159), as amended; and*

*(b) OMRDD must notify NICS that the certificate of relief has been granted; or*

*(ii) if the relief is denied:*

*(a) the applicant must be notified of the right to have the decision reviewed in accordance with applicable State law; and*

*(b) OMRDD must further advise that the applicant cannot apply again for a request for relief until a year after the date of the written determination to deny the relief requested.*

*Section 643.4 Records.*

*OMRDD, on being made aware that the basis under which a record was made available by OMRDD to NICS does not apply or no longer applies, shall, as soon as practicable:*

*(a) update, correct, modify or remove the record from any database that the Federal or State government maintains and makes available to NICS, consistent with the rules pertaining to that database; and*

*(b) notify the United States Attorney General that such basis no longer applies so that the record system in which the record is maintained is kept up to date.*

***This notice is intended:*** to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire March 16, 2010.

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

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

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

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

***Regulatory Impact Statement******1. Statutory authority:***

a. Subdivision (b) of Section 13.09 of the Mental Hygiene Law grants

the Commissioner of the Office of Mental Retardation and Developmental Disabilities the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction.

b. Subdivision (f) of Section 13.09 of the Mental Hygiene Law (added by Chapter 491 of the Laws of 2008) requires the Commissioner of the Office of Mental Retardation and Developmental Disabilities to adopt regulations to establish the relief from disabilities program.

2. **Legislative objectives:** The regulations which are required by New York State Mental Hygiene Law further the legislative objectives embodied in subdivisions 13.09(b) and 13.09(f) of the New York State Mental Hygiene Law by establishing a process within OMRDD so that a person who is disqualified from being able to purchase a firearm can appeal the disqualification. This is in accordance with the statutory mandate in Chapter 491 of the Laws of 2008, which added MHL 13.09(f). This provision was enacted in order to bring New York State into compliance with Section 105 of the federal NICS Improvement Amendments Act of 2007 (Public Law 110-180), which amended the federal Brady Handgun Violence Prevention Act of 1993 (18 U.S.C. Section 922 et seq.) and specifically required states to establish a relief from disabilities program.

3. **Needs and benefits:** Pursuant to federal and state law, OMRDD is required to submit information about individuals who have been involuntarily committed to an OMRDD facility to the National Instant Criminal Background Check System (NICS). These individuals will be disqualified (prohibited) from purchasing or possessing a firearm. Federal and state law also requires that OMRDD promulgate regulations to establish a process for these individuals to appeal this disqualification.

The implementation of this administrative "certificate of relief from disabilities" process is required under state law. The process established by these regulations applies to individuals who have been involuntarily committed to an OMRDD facility and whose names were provided by OMRDD to NICS. These individuals can petition for relief from disabilities by demonstrating that their gun ownership would not be dangerous to public safety or contrary to public interest through the provision of the required information and documentation to OMRDD.

Failure to implement this administrative "certificate of relief from disabilities" process could result in loss of federal funds.

***4. Costs:***

(a) **Cost to regulated persons:** Individuals who are disqualified can choose to apply to OMRDD if they want to be able to purchase or possess a firearm. These costs are therefore OPTIONAL. The regulations require applicants to submit the results of an evaluation by a psychologist and a psychiatrist. OMRDD estimates that if the individuals privately pay for these evaluations they will cost approximately \$800 - \$1,200 for the psychologist and approximately \$300 for the psychiatrist. Obtaining the required criminal history information will cost \$50 for the NYS Division of Criminal Justice Services check and \$18 for the Federal Bureau of Investigation check. The individual may also incur costs which are difficult to quantify in obtaining required medical records and records from treatment and service providers.

(b) **Cost to State and local government:** There will be no new costs incurred by the State and local government as a result of the emergency/proposed regulations. OMRDD anticipates that few, if any, individuals will apply for relief from disabilities under these regulations, and will process any applications received within existing resources.

NICS includes a provision for future funding cuts to the states unless the states implemented the NICS requirements, including the appeals process, in a satisfactory manner. If OMRDD did not promulgate regulations establishing a certificate of relief from disabilities program, New York State risks the loss of this federal funding.

In addition, DCJS received \$922k in federal grant funding to implement NICS which will also be at risk if OMRDD fails to implement these regulations.

5. **Paperwork:** As noted above, disqualified individuals can choose to apply to OMRDD and therefore the associated paperwork is OPTIONAL. The applicant is required to complete a form developed by OMRDD and submit a variety of records and documents. These include copies of medical/clinical records pertaining to the involuntary commitment to an OMRDD facility, copies of medical/clinical records from all of the applicant's current treatment and service providers, copies of all criminal history information maintained on file at the New York State Division of Criminal Justice Services and Federal Bureau of Investigation, notarized letters of recommendation, and copies of any further information requested by OMRDD.

6. **Local government mandates:** This regulatory amendment will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

7. **Duplication:** There are no duplicate, overlapping or conflicting mandates which may affect this rule.

8. **Alternative approaches:** The emergency/proposed regulation requires that the applicant submit a recent psychiatric evaluation which includes an

opinion whether the applicant will or will not be likely to act in a manner dangerous to public safety. OMRDD considered whether to make the submission of this evaluation optional since it may be a significant cost to the applicant. However, OMRDD determined that it would be unable to make a determination without such an evaluation and that, with rare exceptions, such evaluations would not otherwise be already available.

9. Federal standards: The regulatory amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Compliance was required by emergency regulations effective June 22, 2009, September 19, 2009 and December 17, 2009. No new compliance activities are necessary.

#### **Regulatory Flexibility Analysis**

The rulemaking serves to establish a "certificate of relief from disabilities" process as required under the federal NICS Improvement Amendments Act of 2007 and Public Law 110-180, Section 105, which amended the federal Brady Handgun Violence Prevention Act of 1993. There will be no adverse economic impact on small businesses or local governments; therefore, a regulatory flexibility analysis is not submitted with this notice.

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

A Rural Area Flexibility Analysis for the proposed amendments has not been submitted. OMRDD has determined that the amendments will not impose any adverse impact, reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. The amendments establish a process so a person who is disqualified from being able to purchase a firearm can appeal the disqualification.

#### **Job Impact Statement**

A Job Impact Statement is not submitted because the amendment will not present an adverse impact on existing jobs or employment opportunities. The amendments establish a process so a person who is disqualified from being able to purchase a firearm can appeal the disqualification.

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## Department of Motor Vehicles

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

#### **Oneida County Motor Vehicle Use Tax**

**I.D. No.** MTV-01-10-00021-P

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

**Proposed Action:** This is a consensus rule making to amend section 29.12(gg) of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a) and 401(6)(d)(ii); and Tax Law, section 1202(c)

**Subject:** Oneida County motor vehicle use tax.

**Purpose:** To impose an Oneida County motor vehicle use tax.

**Text of proposed rule:** Section 29.12 is amended by adding a new subdivision (gg) to read as follows:

(gg) *Oneida County. The Oneida County Legislature adopted a local law on November 25, 2009, to establish an Oneida County Motor Vehicle Use Tax. The County Executive of Oneida County entered into an agreement with the Commissioner of Motor Vehicles for the collection of the tax in accordance with the provisions of this Part, for the collection of such tax on original registrations made on and after April 1, 2010 and upon the renewal of registrations expiring on and after June 1, 2010. The Commissioner of Finance is the appropriate fiscal officer, except that the County Attorney is the appropriate legal officer of Oneida County referred to in this Part. The tax due on passenger motor vehicles for which the registration fee is established in paragraph (a) of subdivision (6) of Section 401 of the Vehicle and Traffic Law shall be \$5.00 per annum on such motor vehicles weighing 3,500 lbs. or less and \$10.00 per annum for such motor vehicles weighing in excess of 3,500 lbs. The tax due on trucks, buses and other commercial motor vehicles for which the registration fee is established in subdivision (7) of Section 401 of the Vehicle and Traffic Law used principally in connection with a business carried on within Oneida County, except for vehicles used in connection with the operation of a farm by the owner or tenant thereof shall be \$10.00 per annum.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Monica J. Staats, Department of Motor Vehicles, 6 Empire State Plaza, Room 526, Albany, NY 12228, (518) 474-0871, email: monica.staats@dmv.state.ny.us

**Data, views or arguments may be submitted to:** Ida L. Traschen, Department of Motor Vehicles, 6 Empire State Plaza, Room 526, Albany, NY 12228, (518) 474-0871, email: monica.staats@dmv.state.ny.us

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

#### **Consensus Rule Making Determination**

This proposed regulation would create a new 15 NYCRR Part 29.12(ff) to provide for the collection of an Oneida County motor vehicle use tax by the Department of Motor Vehicles. Pursuant to the authority contained in Tax Law section 1202(c) and Vehicle and Traffic Law section 401(6)(d)(ii), the Commissioner must collect a motor vehicle use tax if a county has enacted a local law requiring the collection of such tax.

On November 25, 2009, the Oneida County Legislature enacted a local law requiring that a motor vehicle use tax be imposed on passenger and commercial vehicles. Pursuant to this local law, the Commissioner is required to collect the tax on behalf of the county and transmit the revenue to the County, minus the administrative costs required to process the tax. The tax is five dollars per annum on a passenger vehicle weighing 3,500 pounds or less, ten dollars per annum on a passenger vehicle weighing more than 3,500 pounds, and ten dollars per annum on all commercial vehicles. There are certain exempt vehicles, such as vehicles used by non-profit religious, charitable, or educational organizations, and vehicles used only in connection with the operation of a farm by the owner or tenant of the farm.

This is a consensus rule because the Commissioner has no discretion about whether to collect the tax, i.e., it must be collected per the mandate of the Oneida County local law. The merits of the tax may have been debated before the Oneida County Legislature, but are no longer the subject of debate—it is now the law. DMV is merely carrying out the will expressed by the County Legislature.

#### **Job Impact Statement**

A Job Impact Statement is not submitted with this rulemaking, because it will not have any impact on job creation or development in New York State.

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## Office of Parks, Recreation and Historic Preservation

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### NOTICE OF ADOPTION

#### **Snowmobile Accident Reports**

**I.D. No.** PKR-42-09-00002-A

**Filing No.** 1445

**Filing Date:** 2009-12-23

**Effective Date:** 2010-01-06

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

**Action taken:** Amendment of sections 453.1 and 457.1 of Title 9 NYCRR.

**Statutory authority:** Parks, Recreation and Historic Preservation Law, section 3.09(8) and Subtitle D

**Subject:** Snowmobile accident reports.

**Purpose:** To clarify definitions and update the threshold to \$1,000 for reporting property damage from snowmobile accidents.

**Text or summary was published** in the October 21, 2009 issue of the Register, I.D. No. PKR-42-09-00002-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Kathleen L. Martens, Associate Counsel, Office of Parks, Recreation and Historic Preservation, Empire State Plaza, Agency Building 1, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

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

The agency received no public comment.

## Power Authority of the State of New York

### NOTICE OF ADOPTION

#### Rates for the Sale of Power and Energy

**I.D. No.** PAS-42-09-00001-A

**Filing Date:** 2009-12-22

**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:** Decrease in rates for sale of firm power and related tariff changes applicable to governmental customers located in Westchester County.

**Statutory authority:** Public Authorities Law, section 1005(6)

**Subject:** Rates for the sale of power and energy.

**Purpose:** To recover the Authority's cost of providing firm power and energy services.

**Text or summary was published** in the October 21, 2009 issue of the Register, I.D. No. PAS-42-09-00001-P.

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

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

#### **Revised Regulatory Impact Statement**

A revised regulatory impact statement 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.

#### **Revised Regulatory Flexibility Analysis**

A revised regulatory flexibility analysis 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.

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

A revised rural area flexibility analysis 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.

#### **Revised Job Impact Statement**

A revised job impact statement 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.

#### **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.

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

#### Rates for the Sale of Power and Energy

**I.D. No.** PAS-01-10-00010-P

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

**Proposed Action:** Update the service tariffs (ST-1, ST-1S, ST-35, ST-50 and ST50-A) applicable to the Power Authority's Energy Cost Savings Benefit (ECSB) Programs customers.

**Statutory authority:** Public Authorities Law, section 1005; and Economic Development Law, sections 183 and 187

**Subject:** Rates for the sale of power and energy.

**Purpose:** Update ECSB Programs customers' service tariffs to streamline them/include additional required information.

**Substance of proposed rule:** Pursuant to the New York Public Authorities Law, Section 1005 and the New York Economic Development Law, Sections 183 and 187, the Power Authority of the State of New York (the "Authority") proposes to amend the Authority's current production ser-

vice tariffs applicable to customers under the Energy Cost Savings Benefit Program.

The Authority proposes to reformat the service tariffs for easier reading and improved organization, include certain standard provisions now applicable to all Authority service tariffs and add abbreviations and terms.

Written comments on the proposed tariffs will be accepted through Monday, February 22, 2010, at the address below.

**For further information, contact:** POWER AUTHORITY OF THE STATE OF NEW YORK, Karen Delince, Corporate Secretary, 123 Main St., 11-P, White Plains, NY 10601, (914) 390-8085, (914) 390-8040 (fax), secretarys.office@nypa.gov

**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: secretarys.office@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.

## Division of Probation and Correctional Alternatives

### NOTICE OF ADOPTION

#### Graduated Sanctions and Violations of Probation

**I.D. No.** PRO-37-09-00004-A

**Filing No.** 1443

**Filing Date:** 2009-12-22

**Effective Date:** 2010-03-01

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

**Action taken:** Repeal of Part 352 and addition of new Part 352 to Title 9 NYCRR.

**Statutory authority:** Executive Law, art. 12, section 243

**Subject:** Graduated Sanctions and Violations of Probation.

**Purpose:** Ensure a more swift, certain and timely response to violative behavior to promote greater accountability and public safety.

**Substance of final rule:** This proposed rule revision which repeals 9 NYCRR Part 352 and adds a new Part 352, is the primary work of the Division of Probation and Correctional Alternatives (DPCA) Violations of Probation Rule Revision Workgroup. It integrates current best supervision practices with respect to the handling of violations of probation involving criminal or family court probationers who are not in compliance with their court-ordered conditions of probation. DPCA's recommended regulatory changes revive many principles and procedures contained in a prior violation rule, in effect from 1982 to 1998, because the Workgroup believed numerous features were reflective of good probation practice and ensure greater consistency throughout the state. Other changes better clarify certain points and provide greater detail as to regulatory expectations to safeguard the public and/or victims, ensure offender accountability, and promote greater utilization of graduated sanctions where appropriate. Below is a summary highlighting noteworthy changes.

#### Section 352.1 Definitions

A new definitions section has been added to foster better understanding as to key operational concepts: absconder; court notification report; declaration of delinquency; graduated sanctions; reasonable cause (with relative to a person has violated a condition of probation; revocation; violation of probation; violation of probation petition and report, and warrant.

#### Section 352.2 Objective

A new objective section has been added to clarify that the overall intent of the revised rule is multifaceted. Its aim is 1) to promote public safety and offender accountability through prompt and decisive action on the part of probation departments; 2) adopt uniform procedures to direct probation response to non-compliant behavior, and facilitate uniform decision-making, and 3) prioritize the use of graduated sanctions as appropriate and where available.

## Section 352.3 Applicability

A new section clarifies the rule's applicability to probation violations in both family and criminal courts.

## Section 352.4 Graduated and alternative sanctions

Although this is a new section, many of its provisions exist in the current rule (Section 352.1), albeit, with less specificity.

(a) Similar to the current rule Section 352.1(a), this section requires local directors to establish written policies and procedures for determining the appropriate actions to take with respect to non-compliance with probation conditions. However, these local policies must provide for:

1. newly articulated considerations such as the probationer's history of compliance, gravity of the non-compliant behaviors, dangerousness to self/others, and the presence of victims;

2. newly articulated consideration as to which sanctions might achieve compliance without the need for formal court intervention;

3. similar in concept to current rule Section 352.1(d), the new rule requires the consideration of graduated sanctions with respect to violative behavior;

4. continuation of the current rule Section 352.1(e) requirement that, when a formal Violation Proceeding is being commenced, consideration be given to the viability of continuing the probation sentence with or without modification or extending the probation term. When revocation is being recommended, the department must consider proposing, where applicable, a split sentence.

Section 352.5 Procedures for non-compliant behaviors and/or technical violations in criminal courts and for all violations of probation in family courts

This is a significant new regulatory section that provides defined procedures for responding to non-compliant probationer behaviors while at the same time affording considerable local flexibility.

(a) Procedures for responding to such non-compliant behaviors are as follows:

## 1. Investigating the alleged non-compliance

i. when a probation officer has reasonable cause to believe a probationer has not complied with the conditions, s/he must commence an investigation;

ii. the investigation shall determine the facts and seriousness of the non-compliance.

2. The facts of the investigation shall be presented to the immediate supervisor;

3. With supervisory approval and pursuant to local policy, one of the following actions is to be taken:

i. Administrative Review. When local policy indicates that court involvement is not necessary, a meeting is held with the probation officer, the offender, and the supervisor/director to discuss the non-compliant behaviors and the probationer's progress in achieving the goals of the case plan;

ii. Judicial Reprimand and/or Modification of conditions. After an Administrative Review, the department may request a court hearing for the purposes of modifying the conditions of probation or judicial reprimand;

iii. If a conclusion is reached that a formal Violation of Probation hearing is appropriate, the Violation of Probation Petition and Report is to be prepared by the Probation Officer, approved by the supervisor and forwarded to the court with a request for a Declaration of Delinquency. The report shall be accompanied by a request for a Notice to Appear or a warrant for arrest of the probationer.

(b) Procedures for technical violations in cases of absconders are as follows:

1. A Violation of Probation Petition and Report with requests that a Declaration of Delinquency and warrant for arrest be filed to ensure greater offender accountability.

2. The probation department shall make reasonable efforts, consistent with local resources, to work with law enforcement agencies to address probation violations and warrants.

Section 352.6 Procedures for new offense violations for criminal supervision cases

This is a new regulatory section which incorporates appropriate steps to undertake and amplify procedures with respect to violations involving new criminal offenses.

(a) Procedures upon a probationer's arrest for a new offense prior to conviction are as follows:

## 1. Investigating the alleged non-compliance

i. when a probation officer has knowledge of a probationer's arrest, s/he must commence an investigation;

ii. The investigation shall determine the facts and seriousness of the alleged offense

2. The results of the investigation shall be presented to the immediate supervisor.

3. With supervisory approval, one of the following actions is to be taken

based upon the nature of the alleged offense and the potential threat of probationer to self or community:

i. Arrest for a violation-level offense. Where any such alleged offense(s) occurred, no action shall be required, unless provided for in local policy, until such time as there is a conviction in which event, other provisions apply.

ii. Arrest for a crime. Where any alleged crime(s) occurred, the probation officer must notify the proper court(s) and provide a brief description of the alleged crime(s) and the status of the case, no later than seven business days upon learning of an arrest from any source. Information shall be recorded in either a Court Notification Report or Violation of Probation Petition and Report. Either report may request issuance of a Notice to Appear to secure the probationer's appearance before the court. However, where the latter report is filed, it shall be accompanied by a request for a Declaration of Delinquency and either a request for a Notice to Appear or a request for a warrant.

iii. Clarified is the department's responsibility to continue to notify the court of relevant changes in the status of the case.

(b) Procedures upon conviction of a new offense are as follows:

## 1. Investigating the alleged non-compliance

i. when a probation officer has knowledge of a probationer's conviction of an offense(s) which occurred during the period of probation supervision, he/she must commence an investigation;

ii. the investigation shall determine all relevant facts concerning the new conviction unless this information has been obtained in a prior investigation.

2. The facts of the investigation shall be presented to the immediate supervisor or other probation official;

3. Upon conclusion of the investigation and notification, the probation officer shall file either a Court Notification Report or a Violation of Probation Petition and Report within seven business days of the probation department's knowledge of the conviction.

i. Where the conviction is for a violation-level offense, a Court Notification Report may be filed. A copy of this report shall be retained in the official case record.

ii. Where a Violation of Probation Petition and Report is filed, it shall satisfy the requirement for court notification. Such a report shall be accompanied by a request for a Declaration of Delinquency, if not already granted and either a request for a Notice to Appear or a request for a warrant.

4. In lieu of a recommendation for formal court action, the probation officer, with supervisory approval, may initiate departmental administrative procedures. If issues presented by the conviction can be administratively resolved, the court shall be apprised of the action taken, with a recommendation to the court to allow the probation department to adjust the case administratively.

Section 352.7 Issuance and management of probation warrants and notices to appear

This new regulatory section requires local written policies and procedures which provide greater specificity governing issuance and management of probation warrants than contained in existing DPCA peace officer regulatory provisions (9 NYCRR Section 355.3(d)) and requires that such policies and procedures address notices to appear. Specifically, it requires that such policies and procedures govern the following:

1. circumstances to be considered relative to recommendations of Notices to Appear and warrants,

2. timely preparation and delivery to the appropriate court and where necessary, follow-up communication and documentation of the court's response to such requests,

3. Where the probation department is the holder of warrants involving probationer rearrests:

i. a process that ensures chronological tracking of all warrants from the request, through issuance, receipt at the department, entry into the State's Wanted/Missing Persons file system, intradepartmental chain of responsibility, execution, and as appropriate cancellation. Clarified is that such procedures comply with electronic posting of warrants required by the Division of Criminal Justice Services and issued by the National Crime Information Center;

ii. a process that ensures timely entry of warrants and removal of warrants in compliance with electronic posting requirements and updating of information in DPCA's Integrated Probation Registrant System.

4. Where other law enforcement agencies enter and hold warrants for arrest of probationers, the written policy must clearly delineate the department's responsibility as to issuance, tracking, execution, and cancellation of warrants for arrest. Such policy shall not inhibit the entering/holding agency's ability to comply with aforementioned electronic posting regulations

## Section 352.8 Supervision during a violation proceeding

This new regulatory section clarifies existing law that requires probation supervision to be continued while a Violation of Probation proceed-

ing is pending before the sentencing/dispositional court, as there has been confusion regarding the role of probation during these proceedings, especially when a Declaration of Delinquency has been issued by the court.

Section 352.9 Notification of court upon probationer's failure to complete alcohol or substance abuse treatment program

Although a new separate regulatory section, it reflects existing regulatory language (Section 352.1(c)) which is based upon statutory language found in Executive Law Section 257(4-a). To optimize compliance, DPCA has retained regulatory language in this area which requires prompt probation officer notification to the director of probation where a probationer ceases participation or is terminated from an alcohol or substance abuse program and subsequent probation director notification to the court within ninety days where such probationer does not resume participation in a program approved by the director.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 352.1(a), (i), 352.4(a), (3), (4), 352.6(3)(ii), (b) and 352.7(a)(1).

**Text of rule and any required statements and analyses may be obtained from:** Linda J. Valenti, NYS Division of Probation and Correctional Alternatives, 80 Wolf Road - Suite 501, Albany, New York 12205, (518) 485-2394, email: linda.valenti@dpc.state.ny.us

#### **Summary of Revised Regulatory Impact Statement**

In the Statutory authority section, the Division of Probation and Correctional Alternatives (DPCA) cites Executive Law Section 243 as the statutory authority behind our agency promulgating a regulation in the area of violations of probation and graduated sanctions.

The Legislative objectives section expresses that these amendments are consistent with legislative intent that the State Director of Probation and Correctional Alternatives adopt regulations relating to critical probation functions and promote professional standards governing administration of probation services to ensure offender accountability and advance public/victim safety. Further detail is provided as to the rationale behind these regulatory changes.

The Needs and benefits section summarizes the needs served and benefits achieved by the proposed regulatory changes including but not limited to clarifying departmental responsibilities, implementing more standardized practices, incorporating model probation practices, and ensuring greater efficiency and consistency through specific requirements and general guidance. It highlights certain procedural requirements. Its aim is 1) to promote public safety and offender accountability through prompt and decisive action on the part of probation departments; 2) adopt uniform procedures to control probation response to non-compliant behavior, and facilitate uniform decision-making, and 3) prioritize the use of graduated sanctions as appropriate and where available.

In the Costs section, DPCA conveys that we do not foresee these reforms will lead to significant additional costs to local probation departments or DPCA. The reasoning behind our agency position is set forth.

Under the Local government mandates section, DPCA discusses certain aspects of the existing violation rule and the proposed rule in terms of any additional requirements and explains our justification as to particular new requirements. Additionally, this section explains that proposed changes provide local departments some flexibility and allow departments to create specific procedures that are narrowly tailored to their needs.

The Paperwork section explains that no additional State forms will be required by the proposed regulatory amendments. It further points out that the particular violation reports that the rule refers to are used currently by probation departments. This section also observes that existing DPCA rules require written policies and procedures in the area governing graduated sanctions and warrants, and the proposed changes will require probation departments to review and update such written procedures.

The Duplication section reiterates that the proposed rule does not conflict with any State or federal statute/regulation.

The Alternatives section sets forth why no rule in this area is not a viable option and the reasoning behind strengthening the existing violation of probation rule. Additionally, this section provides details as to DPCA's formation of a workgroup of state and local probation professionals, that the agency circulated two drafts to all probation departments to maximize professional input, and our efforts and responses to issues raised by the New York City Department of Probation (NYCDOP) and the Council of Probation Administrators (COPA) throughout the rule making process. Such efforts included satisfactorily working out certain regulatory language to address issues with respect to absconders, providing greater flexibility where appropriate, and more recent communication and discussion with both during and after the public comment period, which led to some additional technical changes, non-substantive in nature, to clarify and address mutual concerns.

The Federal standards section states that there are no federal standards governing the probation violation process.

Lastly, the Compliance schedule section concludes that DPCA believes

that these regulatory changes will not prove difficult to achieve and that the regulatory amendments will be effective on March 1, 2010.

#### **Revised Regulatory Flexibility Analysis**

1. Effect of the Rule: No small business record keeping requirements, needed professional services, or compliance requirements will be imposed on small businesses, but the proposed rule does have a direct impact on local governments. There are 58 local probation departments in New York State and this rule applies to all of them.

2. Compliance Requirements: The proposed rule strengthens procedural requirements and improves probation practices. It should not impose significant additional requirements for local probation departments because many of these requirements already exist in law and regulations. For example, Executive Law Section 257(4-a) requires probation to notify the court under specific circumstances when a probationer ceases to participate or is unsuccessfully terminated from an alcohol or substance abuse program. Criminal Procedure Law Section 410.50 requires probation to supervise a defendant throughout the period of supervision. Current DPCA peace officer regulations require probation directors to have peace officer policies as to entry and cancellation of warrants and reciprocal notification. DPCA's existing violation rule requires, unless the court directs otherwise, court notification of conviction of a crime, significant violation, or absconder status within seven (7) business days of knowledge of such information. This rule additionally requires probation to have local written procedures as to the handling of new offense and technical violations and court notification of alleged violations and these procedures must include graduated sanctions. Further, prior to recommending a revocation of probation, such sanctions must be considered.

Also, many of the proposals are best practices and most local departments are currently implementing these practices. For example, many routinely investigate non-compliant behavior and/or any arrest to determine whether there is an alleged violation of probation, timely request declaration of delinquencies and warrants, and have implemented a graduated sanctions approach to the department's handling of non-compliant behavior prior to recommending formal court response to violations of probation. There are no current reporting requirements to the Division of Probation and Correctional Alternatives (DPCA) associated with this new rule. While the proposed rule specifies certain circumstances under which a Court Notification Report or Violation of Probation Petition and Report shall be issued and when a request for a Declaration of Delinquency, Notice to Appear, or a warrant for arrest shall be made, it also provides local departments some flexibility in this area.

Although one already existing form (Declaration of Delinquency) is expected to be completed more frequently, over 50 of the 58 local probation departments use software assisted caseload management systems that automatically create and fill-in the form using information from the case database. While this new rule requires that written local policies and procedures be adopted in the area of graduated sanctions and the issuance and management of warrants for the arrest of probationers and notices to appear, all departments already have written policies pursuant to existing DPCA regulatory requirements. New language in the area of probation supervision and the response to probationers' failure to abide by court-ordered conditions of probation are normal business activities.

3. Professional Services: No professional services are required to comply with the rule.

4. Compliance Costs: DPCA does not foresee these reforms leading to significant additional costs. The majority of local probation departments have institutionalized most of the features of our prior rule (repealed in 1998) in their local violation policies and procedures. Many of our proposed changes restore these practices to regulation. As to any anticipated costs of in-service training of staff, DPCA believes that orientation can be readily accomplished through written memoranda and supervisory oversight. Other procedural changes where necessary may require internal re-examination of probation professional job responsibilities and revision of existing violation and peace officer policies. This should be able to be accomplished without additional staff resources and through reassignment of certain staff to ensure rule compliance.

DPCA does not foresee that these regulatory reforms will lead to staffing increases or additional costs to local probation departments. Any minimal costs including staff time to revise any local procedures in this area are outweighed by the significant benefits of greater offender accountability and increased public/victim safety interests.

5. Economic and Technological Feasibility: Caseload management technology, while not required, would enhance data collection and tracking. As part of DPCA's efforts to streamline recordkeeping, avoid duplication and achieve cost savings, DPCA has supported the deployment of web-based case management software known as Caseload Explorer. Approximately 44 of the 58 local probation departments utilize or intend to utilize this software in the near future. Additionally, 13 other probation departments use similar software to achieve record-keeping cost efficiencies. These computer software systems facilitate timely generation

of forms and reports, improve access to probationer specific case information and status, and assist in the department's management of warrants. The one remaining probation department is rural and its caseloads are extremely small. It uses a manual case management system and should not incur costs in connection with these regulatory revisions. This rule can be implemented using existing technology that all 58 local probation departments already have as all probation departments have access to and are required to input certain probationer specific information, including information regarding violations, into a statewide database referred to as the Integrated Probation Registrant System (I-PRS). This system is hosted by the New York State Division of Criminal Justice Services. Although the localities incur an expense for maintaining internet connectivity with this service there is no other usage costs and the proposed rule will have no impact on connectivity costs. All but one department have elected to purchase software assisted case management systems (such as Caseload Explorer) which assists with day-to-day department operations. Approximately 47 departments will have the capacity for their local case management system to electronically interface with the statewide I-PRS and automatically update I-PRS with probationer specific information. This will eliminate the double entry of data currently performed by these departments. Non-Caseload Explorer departments may elect, at local costs, to revise their software to take advantage of this DPCA supported interface or they may elect to purchase Caseload Explorer which will have that data exchange capability.

6. **Minimizing Adverse Impact:** DPCA prepared this new rule with the participation of local probation professionals throughout the state and circulated two drafts with opportunity for comment. Some of the recommended changes approved to minimize adverse impact were replacement of "48-hour" language regarding warrant issuance or cancellation to "comply with NCIC requirements" and elimination of the requirement for local directors to establish written procedural agreements with law enforcement agencies and courts regarding the handling of warrants. Additionally to address earlier NYC concerns, DPCA eliminated certain language with respect to follow up action as to absconders that its department found problematic and at that time reached agreement with NYC and COPA on replacement language that now establishes that each probation department shall make reasonable efforts, consistent with local resources, to work with law enforcement agencies to address probation violations and warrants. It is recognized that this new language takes into consideration the availability of local resources and provides sufficient flexibility in this area for departments so as not to prove burdensome. Due to subsequent change in leadership with both entities, further comments were received by both. A December 2009 meeting with their representatives led to DPCA making non-substantive technical amendments which addressed all of COPA's issues and several of NYC. However, DPCA finds the remaining NYC issues are not in the best interest of the field of probation, not consistent with law or good probation practice, and/or do not advance public/victim safety or offender accountability.

7. **Small Business and Local Government Participation:** DPCA created a workgroup to initially draft a revised violation rule. This workgroup was comprised of representatives from departments across the state and various levels of staffing including: director, deputy director, supervisor, and senior probation officer and specifically representation from various size probation departments, including NYC. DPCA circulated two refined drafts to the members of the State Probation Commission, all probation directors/commissioners, the Council of Probation Administrators (COPA)--the statewide professional association of probation administrators which in turn, assigned it to a specific committee for review. DPCA incorporated numerous suggestions and sought to clarify several additional issues raised, providing flexibility in certain instances. DPCA communicated verbally and in writing with both entities and shared recent communication with NYC with all probation departments. Recently, DPCA met with both COPA and NYC representatives to discuss further issues raised. Throughout the process additional refinements were made to address certain COPA and NYC concerns. Consensus has been reached by COPA on content. Further, the State Probation Commission previously met and endorsed proposed regulatory changes.

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

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

Forty of the 57 local probation departments outside of New York City are located in rural areas and will be affected by the rule amendments.

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

The proposed rule strengthens procedural requirements and improves probation practice, yet should not impose significant additional local probation costs. There are no current reporting requirements to the Division of Probation and Correctional Alternatives (DPCA) associated with this new rule. While the new rule specifies certain circumstances under which a Court Notification Report or Violation of Probation Petition and Report shall be issued and when a request for a Declaration of Delin-

quency, Notice to Appear, or a warrant for arrest shall be made, it also provides some flexibility in this area. Our proposed revisions are consistent with good professional practice and have been widely accepted by probation departments across the state, including rural areas.

Although one already existing form (Declaration of Delinquency) is expected to be completed more frequently, over 50 departments use software assisted caseload management systems that automatically create and fill-in the form using information from the case database. While this new rule requires more specific written local policies and procedures be adopted in the area of graduated sanctions and the issuance and management of warrants for the arrest of probationers and notices to appear, DPCA's existing rule already requires language as to graduated sanctions be included in local procedures. Further, DPCA's existing Peace Officer Rule, 9 NYCRR Part 355, already contains language as to local peace officer policies and procedures and requires among other provisions, reciprocal notification and cancellation of violation of probation warrants. The peace officer rule provides the more general framework in the area of warrants and the proposed rule addresses this with more specificity to ensure uniform practice as to the violation and warrant process. New language in the area of probation supervision and the response to probationers' failure to abide by court-ordered conditions of probation are normal business activities.

##### 3. Costs:

As part of DPCA's efforts to streamline recordkeeping, avoid duplication and achieve cost savings, DPCA has supported the deployment of web-based case management software known as Caseload Explorer. Approximately forty-four probation departments utilize or intend to utilize this software in the near future and many rural counties benefit from this software. Additionally, thirteen other probation departments use similar software to achieve record-keeping cost efficiencies. The one remaining probation department is rural and caseloads are extremely small. It uses a manual case management system and should not incur costs in connection with these regulatory revisions.

All probation departments have access to and are required to input certain probationer specific information, including information regarding violations, into a statewide database referred to as the Integrated Probation Registrant System (I-PRS). This system is hosted by the New York State Division of Criminal Justice Services. Although the localities incur an expense for maintaining internet connectivity with this service there are no other usage costs and the proposed rule will have no impact on connectivity costs. All but one department have elected to purchase a software assisted case management system (such as Caseload Explorer) which assists with day-to-day department operations. Approximately 47 departments will have the capacity for their local case management system to electronically interface with the statewide I-PRS and automatically update I-PRS with probationer specific information. This will eliminate the double entry of data currently performed by these departments. Non-Caseload Explorer departments may elect, at local costs, to revise their software to take advantage of this DPCA supported interface or they may elect to purchase Caseload Explorer which will have that data exchange capability.

These changes denote specific requirements of effective probation supervision and the response to probationer failure to abide by court-ordered conditions. Any anticipated costs of training staff can be readily accomplished through memoranda, in-service training sessions, and supervision. Other procedural changes may require internal re-examination of probation professional job responsibilities and revision of existing violation and peace officer policies. This should be able to be accomplished without additional staff resources and through reassignment of certain staff to ensure rule compliance. DPCA does not foresee that these regulatory reforms will lead to staffing increases or additional costs to rural probation departments. Clearly, any minimal costs incurred, including staff time to revise any local procedures in this area, will be strongly outweighed by the significant benefits of increased public safety interests and offender accountability measures in rural communities.

##### 4. Minimizing adverse impact:

DPCA does not anticipate that these regulatory amendments will have any adverse impact on rural areas.

##### 5. Rural area participation:

These revisions were developed by a DPCA working committee comprised of agency staff and representatives from eight local probation departments including all geographic regions of the state. Rural departments and officers involving various levels of probation staff, including directors, deputy directors, probation supervisors, and senior probation officers were part of this committee. Several of the rural probation departments that were part of DPCA's Warrant and Violation Workgroup provided positive feedback on prior drafts. DPCA circulated drafts to all probation directors/commissioners, the members of the State Probation Commission, and the Council of Probation Administrators (COPA)--the statewide professional association of probation administrators. COPA also

referred our proposed rule to its Program and Research Committee (PARC), which includes representatives from rural communities for review. DPCA has discussed earlier proposed regulatory changes with COPA's Executive Committee, which includes a cross-section of urban, rural, and suburban jurisdictions and COPA twice assigned this proposed rule to an internal committee for review comprised of a cross-section of urban, rural and suburban jurisdictions. DPCA recently met with COPA to discuss remaining issues of a technical nature and the final version incorporates their suggestions.

The proposed regulatory amendments incorporate many verbal and written suggestions from probation professionals, including rural entities, across the state to address problems and situations which probation departments encounter when responding to non-compliant behaviors. The proposed rule has been embraced by the overwhelming majority of probation departments, which welcome the return of procedural specificity that existed in prior rule. DPCA heard from many probation professionals that this rule is not a significant departure from what departments have instituted in their practices. In general, DPCA did not find significant differences between urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

#### **Revised Job Impact Statement**

A job impact statement is not being submitted with these proposed regulations because it will have no adverse effect on private or public jobs or employment opportunities. The revisions are procedural in nature. They update violation of probation procedures to ensure appropriate investigative activities as well as supervisory and/or court notification occurs where there is probationer noncompliance.

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

The Division of Probation and Correctional Alternatives (DPCA) received an original and a revised written comment relative to the proposed regulatory revision to Part 352 governing graduated sanctions and violations of probation during the official public comment period from the New York City Department of Probation (NYCDOP). Subsequently, DPCA received another revised comment from NYCDOP and a written request by the Council of Probation Administrators (COPA) to extend the time period to provide their organization additional time to respond. NYCDOP also sought to extend the comment period. This was unanticipated as DPCA had formed a Rule Workgroup comprised of a cross section of probation departments which included COPA and NYCDOP representatives, conducted 60 and 45-day informal reviews with directors and because DPCA previously reached agreement with NYCDOP and COPA on the proposed rule which was submitted. However, a recent leadership change with respect to both had occurred. The State Director of Probation and Correctional Alternatives responded in writing to NYCDOP in detail as to their issues and shared our comments with all probation departments. Thereafter, DPCA received a COPA written response as to some remaining issues that were technical in nature. DPCA held a December 1, 2009 meeting with COPA and NYCDOP representatives to openly discuss the proposed rule and rationale and more fully hear and consider their respective views. Prior to this meeting, the State Director verbally communicated with approximately forty (40) probation directors and received unanimous positive feedback and as DPCA Counsel, I separately spoke to Albany County and St. Lawrence County Probation Directors to gain insight as to their professional views on proposed rule content and any suggested recommendations. Additionally, DPCA received favorable written communication from the Tioga County Probation Department, Onondaga County Probation Department, and Rockland County Probation Department that our proposed rule was reasonable with only one technical suggestion sought by Rockland to clarify particular absconder language. All comments were carefully weighed and the December meeting proved beneficial in mutually working out minor amendments which would clarify and/or address certain COPA and NYCDOP issues. A summary of issues by Rule sections and agreed upon amendments made follow:

In Rule Section 352.1 DPCA agreed to modify the "absconder" definition as there was concern as it being overbroad. DPCA incorporated COPA language "with the intent to evade supervision" to better clarify our original regulatory intent. DPCA further added a new "warrant" definition to avoid any uncertainty on NYCDOP's part that this regulatory term refers to a violation of probation or probation warrant heretofore reflected in law and that both terms are synonymous with one another. In Rule Section 352.4 DPCA agreed to remove the word "any" with respect to probation director's establishing a written policy and procedure with respect to non-compliance with probation because of concern raised that a local probation director would have to create a policy and procedure for every contingency. Clearly, that was neither DPCA's nor the Rule's Workgroup's intent. DPCA also agreed to remove the sentence that "[T]he use of these graduated sanctions shall be prescribed in local policy in such a manner as to ensure they are applied fairly, and consistently, soon after the non-compliant behaviors, proportionately to the severity of the non-

compliant behavior and in a predictable manner" after more fully hearing their concerns as to potential difficulty in quantifying performance measures in this area. Moreover, as written local policy and procedures with respect to graduated sanctions are continued and specific regulatory criteria and procedures are delineated in more detail, DPCA believes that such will facilitate uniform decision-making without the need of this sentence. Additionally, DPCA did agree to re-examine reference to violations of probation with respect to graduated sanctions and streamlined language in this area to be more consistent with our intent and avoid redundancy in other provisions.

In Rule Section 352.6 DPCA modified language as to what triggers notifying the court with respect to an arrest involving a crime, due to some expressing concern with the language "upon learning of an arrest from any source" being too problematic. Substituted language now requires notification "upon learning and confirming that an arrest has been made". Additionally for similar reasons, DPCA removed the word "any" relative to probation providing court notification of relevant changes in the status of the case. Lastly, in Rule Section 352.7 DPCA simplified language as to local policies with respect to warrants and notices to appear to be clearer as to our intent and avoid potential confusion.

A productive dialogue as to these and other issues raised by COPA, and DPCA's position and agreement as to interpretation with respect to Declaration of Delinquency (DOD), warrants, significant violation, reasonable efforts, has resulted in COPA being satisfied with final rule content. As Albany and St. Lawrence County Probation Departments verbally raised similar issues, their issues likewise appear addressed.

There were certain additional objections raised by NYCDOP which DPCA discounts as being unnecessary, unreasonable, and not in the best interest of public/victim safety nor reflective of good probation practice or pertinent law. It should be noted that in months preceding the proposed rule submission, the Workgroup weighed NYC issues and DPCA twice responded in writing in March and October 2008 to their same objections and subsequently NYCDOP verbally withdrew its objections. DPCA again responded in November 2009 after receiving their last written communication to these and additional comments from their new Acting Director. However, the following is a brief synopsis of other remaining issues raised and DPCA's response:

DPCA disagrees with NYCDOP's rationale which led to its request to eliminate establishment of written policies and procedures in this area including those addressing when other law enforcement agencies hold or enter warrants for the arrest of probationers, and those delineating the department's responsibility as to the issuance, tracking, execution, and cancellation of warrants. DPCA does not view such policies as "unnecessary", "burdensome" or "impractical". Their stance also ignores its supervisory responsibility over NYC probationers until expiration or termination of their sentence/disposition and other statutory and regulatory provisions. Our regulatory language is consistent with DPCA's existing Peace Officer regulatory provisions, 9 NYCRR § 355.3(d), which require that departments have written policies and procedures with respect to warrants which include reciprocal notification of issuance, execution and cancellation of violation of probation warrants to and from the department and the local law enforcement agency. Regulatory language which requires departments to have written policies describing how warrants are processed and which parties are responsible for certain actions is appropriate and necessary to clarify professional responsibilities, avoid confusion among staff, ensure reciprocal notification occurs on a timely basis, probation staff adherence to regulatory requirements and any other local decision-making in this area and to avoid potential allegations as to inconsistency and arbitrary and/or discriminatory treatment of similar cases. DPCA has provided considerable flexibility to probation departments in terms of their respective policies and significantly has not heard objection from any other probation department as to its content. Written policies and procedures promote a professional response and help better coordinate service delivery and avoid unintended results caused by omissions. NYCDOP's specific request that certain other regulatory language be eliminated as to issuance, tracking of and DCJS notification of warrants is misplaced as it solely refers to when probation departments are the "holder of warrants for the arrest of probationers". As NYCDOP does not hold such warrants, it is not applicable to them. However, their claim that NYCDOP absconders are the responsibility of the NYC Police Department are inconsistent with law and their supervisory responsibility and does not absolve them of having critical policies and procedures. Notably, DPCA's aforementioned existing Peace Officer regulatory provisions require that departments have written peace officer policies and procedures with respect to arrests and warrants and sets forth specific parameters, including among other things "when and under what conditions such officers may carry out arrest, search and seizure functions and execute warrants", with respect to "reciprocal notification of issuance, execution and cancellation of violation of probation warrants to and from the department and the local law enforcement agency involved in the execution of the

warrant; and (2) the entrance and cancellation of all violation of probation warrants into the Division of Probation and Correctional Alternatives registrant system computer file and the Division of Criminal Justice Services wanted/missing person file”, and “documentation from the probation officer regarding the circumstances surrounding the execution of an arrest, a warrant . . .” (see Rule § 355.3(a) (3), (d), and (e)). Criminal Procedure Law § 410.40(2) also clearly recognizes the court “may issue a warrant to a police officer or to an appropriate peace officer” and later in the same statutory section, it twice refers to where “the warrant is addressed to a police officer or appropriate probation officer certified as a peace officer. . .” DPCA recognizes that many probation departments have arrangements with other law enforcement agencies to execute or assist probation officers execute probation warrants, but probation departments may not refuse to execute a probation warrant addressed to their probation department. Significantly, DPCA has a warrant enforcement activity which is required in order for any jurisdiction to receive payment under our agency Enhanced Supervision of Sex Offender (ESSO) contracts. Probation directors have a legal responsibility to ensure that peace officer policies are in conformity with state law and DPCA regulations. Overall, the proposed rule revision with respect to tracking of warrants expands upon this peace officer policy regulatory requirement in order to ensure greater accountability and promote safety, thereby avoiding tragic consequences which have occurred in the recent past. Probation departments as the supervisory agency still must maintain proper procedures with respect to warrants and cannot absolve themselves of responsibility in this area.

NYCDOP’s objection as to DPCA’s regulatory language recognizing that a violation of probation can be prepared for the purpose of recommending that a court impose graduated sanctions is unfounded. DPCA’s current rule in this area, specifically Rule § 352.1(d), requires that a probation department have violation of probation procedures which provide for graduated sanctions. DPCA has maintained the flexibility of probation departments to utilize certain graduated sanctions; however, we are constrained by state law to empower probation directors to impose all graduated sanctions, such as a split sentence of probation or modification of probation conditions. NYCDOP also commented that “corresponding time frames, should be left to the discretion of the local probation agencies”. Our regulatory provision in this area makes no specific reference to timeframes. However, as swift and certain response to violative behavior is a critical monitoring strategy which is supported by research and probation professionals throughout the nation, DPCA has reinforced in other provisions of this proposed rule specific necessary timeframes with respect to handling of particular alleged non-compliant behavior, and there is flexibility for probation departments in their respective policies to impose certain other timeframes relative to other actions.

NYDOP also continues to raise past objections with court notification claiming that it is both duplicative and impractical and that most judges do not want such information, despite the fact the department admitted in writing that it “hand-delivers arrest notifications to the judges in New York City...” and it has never provided documentation to DPCA of judicial support of their position. Requiring probation departments notify Judges of misdemeanor and felony re-arrests of probationers is an important and reasonable expectation and one that directly impacts offender accountability. Our Workgroup recommended and DPCA concurred that such notification can greatly assist probation in scheduling future court appearances as appropriate and facilitating a prompt judicial response to modify conditions, and issue a DOD and/or warrant. Further, DPCA acknowledges that judicial interest in learning of the rearrests of persons they sentence to probation supervision was often repeated by the representative Judges participating on the recent Office of Court Administration Task Force on the Future of Probation. DPCA believes that the reported and unsubstantiated desires of some members of the judiciary as represented by the NYCDOP, should not determine a statewide probation practice, especially because the overwhelming majority of probation directors recognize judicial notification of particular probationer non-compliance and such re-arrests are essential to offender accountability and in the larger sense, community safety.

DPCA is troubled with NYCDOP’s renewal of a past objection that requires the probation officer to investigate any arrest and provide supervisory notification as being “not practical on administrative caseloads which account for 65% of New York City probationers” and their claim that it would be an “unfunded mandate”. Our Rule Workgroup had NYCDOP executive and legal representation and it was openly discussed the importance of such actions are critical to the responsibility of probation departments. NYCDOP’s stance was viewed inconsistent with the probation department’s supervisory responsibility to monitor the terms and conditions of individuals released to probation supervision. Probation departments cannot absolve themselves of any responsibility to investigate the arrests of any probationers in an administrative caseload. To take no action upon knowledge of arrests would expose a department to potential liability especially with respect to negligence. DPCA has retained

considerable discretion within probation as to ultimate handling of new arrests, yet views it as essential that a probation officer investigate any arrest and bring it to the attention to his/her supervisor or other probation official so that appropriate follow-up action occurs consistent with state law, regulation, and local policies and procedures. Further, DPCA believes there is an inconsistency, as NYCDOP reportedly does provide some notification to the court of arrests of a probationer, but claims it does not notify supervisory staff.

NYCDOP also renews a past objection to notifying the court within 7 business days of the department receiving knowledge of a probationer’s conviction for a new offense and requests elimination of this requirement because of its belief that “[N]either probation departments nor the courts need to be unduly burdened by this needless requirement” and that it “undermines the purposes and efficacy of graduated sanctions and the utility of Administrative hearings.”. Notably, DPCA’s existing Violations of Probation rule for ten years has required that, in the absence of court direction, that court notification occur upon a probation department’s knowledge of conviction of a crime within such time period. NYC has never requested a DPCA waiver claiming that this requirement was burdensome and has admitted that electronic notification occurs. Further, not all graduated sanctions can occur without judicial intervention (see Criminal Procedure Law § § 410.20 and 410.70(5)). DPCA does provide considerable flexibility as to whether a violation of probation will be instituted when a conviction occurs and recognizes the utilization of graduated sanctions. DPCA has previously relayed that “.... The proposed rule does not exclude use of Administrative Hearings; in fact, it embraces and encourages their use. However, acts leading to criminal convictions while under probation supervision are clearly actions that violate a basic condition of probation. DPCA and the Workgroup have taken the position that, ultimately, the sentencing court decides if a behavior violates the intent of the court order. However, the court cannot make such a determination if it is not given the information.” Court notification is appropriate to protect the interests of the public and victims, hold offenders accountable and safeguard the interests of probation departments. Court notification can greatly assist probation in scheduling future court appearances with the court as appropriate and facilitating a prompt judicial response to modify conditions, and issue a DOD and/or warrant. DPCA surmised that “failure to notify the sentencing court of actions the department has taken to sanction a repeat offender would seem to denigrate the authority and responsibility of the court”. Remarkably, NYCDOP also now contends that our proposed rule relative to absconders does not define “reasonable efforts” or “consistent with local resources”, despite the fact that DPCA previously received agreement from NYCDOP and COPA that this language was preferable and would provide greater flexibility in this area and acknowledges resource limitations. In our December meeting and discussion on this point, COPA appeared satisfied with this terminology and with our stance not to define such language. As this language has overwhelming support from probation departments and the field of probation and in light of DPCA’s concerted effort to reach general consensus, our agency does not believe it is necessary to make further modification in this area.

NYCDOP’s latest written request which recommends that DPCA withdraw this proposed rule would negate the work of numerous probation professionals who have tirelessly sought to improve the rule to better safeguard the public, victims, and achieve greater offender accountability and achieve greater consistency so as to minimize disparate practices. As to NYCDOP’s concerns as to whether this proposed rule comports with Governor David A. Paterson’s Executive Order No. 17, DPCA has complied with its provisions. Executive Order 17 is intended to address and prevent the furtherance of unfunded mandates being placed on localities, particularly in view of the current fiscal situation. This executive order is not intended to prevent the State and localities from implementing public health or public safety initiatives which serve to protect the lives and welfare of New Yorkers. Accordingly, DPCA has worked closely over the last six months with the Deputy Secretary for Public Safety, the Governor’s Counsel, the Governor’s Office of Regulatory Reform and the Office of Taxpayer Accountability in fully meeting the requirements of this order.

In summary, there was overwhelming support to strengthen the current rule in this area and provide for more consistency in practice across the state. Significantly, the proposed rule revisions has updated DPCA’s current rule to carefully balance probation management flexibility with the overarching need for greater offender and service accountability and promoting public and victim safety. DPCA has received resounding favorable support from the field of probation in New York State that this revised rule was manageable and consistent with good professional practice. DPCA and the Workgroup which helped develop this proposed rule carefully reviewed comments received and made numerous revisions to provide greater local flexibility and reflect sound management operations in this area. DPCA further collaborated in incorporating minor technical amendments, non-substantive in nature, recently suggested by COPA and

some probation departments, including NYCDOP to improve the rule's content and facilitate compliance. As to NYCDOP concerns with certain regulatory content, there remains some fundamental differences which DPCA as the state oversight agency of probation services differs with, and which we have not endorsed as it would be antithetical to the objectives of the rule and would undermine community corrections. A well-reasoned waiver request to DPCA is a regulatory avenue that can be explored and would be available for any probation department to pursue should greater flexibility be sought and justified and DPCA ultimately determines that the interests of public safety are not compromised. Lastly, Chapter 652 of the Laws of 2008 was a departmental legislative proposal of DPCA which received support from probation departments, including NYCDOP because of its emphasis on a swift and certain response to violative behavior and ensuring that court's take a more expedient and proactive role in addressing violations of probation. This new law took effect November 1, 2009 and was designed to increase offender accountability and judicial responsibility by establishing statutory timeframes for Judges to respond to Probation Declarations of Delinquency and where appropriate, issue warrants (72 hours) and in convening Probation Violation Hearings (10 business days). Probation Departments throughout New York State, including the NYCDOP supported this landmark new law. It is consistent with this new law to have sound and reasonable state probation regulatory provisions which promote minimum standards as to violations of probation throughout the state. This proposed rule is a critical component to this Chapter and will positively strengthen probation and change how many probationers and the public perceive probation supervision.

## Public Service Commission

### NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-26-09-00011-P	July 1, 2009

### NOTICE OF ADOPTION

#### Water Rates and Charges

**I.D. No.** PSC-48-08-00019-A

**Filing Date:** 2009-12-21

**Effective Date:** 2009-12-21

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 Greentree Water Company, Inc.'s tariff revisions to P.S.C. No. 1—Water, effective December 28, 2009, to provide additional annual revenues of \$5,918 or 16.19%.

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

**Subject:** Water rates and charges.

**Purpose:** To approve additional annual revenues of \$5,918 or 16.19%, effective 12/28/09.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Greentree Water Company, Inc.'s tariff revisions to P.S.C. No. 1 – Water, effective December 28, 2009, to provide additional annual revenues of \$5,918 or 16.19%, 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-W-1292SA1)

### NOTICE OF ADOPTION

#### Major Gas Rate Filing

**I.D. No.** PSC-16-09-00008-A

**Filing Date:** 2009-12-18

**Effective Date:** 2009-12-18

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 the terms and conditions of a joint proposal and implemented a three-year rate plan for St. Lawrence Gas Company, Inc.

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

**Subject:** Major gas rate filing.

**Purpose:** To adopt the terms of a joint proposal for a three-year rate plan.

**Substance of final rule:** The Commission, on December 16, 2009, adopted the terms and conditions of a joint proposal and implemented a three-year rate plan for St. Lawrence Gas Company, Inc., 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-G-1392SA1)

### NOTICE OF ADOPTION

#### Development Planning for Consolidated Edison Company of New York, Inc.'s Hudson Avenue Generating Facility

**I.D. No.** PSC-17-09-00016-A

**Filing Date:** 2009-12-17

**Effective Date:** 2009-12-17

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 that will not require Consolidated Edison Company of New York, Inc. to pursue a cogeneration option, & that further cogeneration proposals are considered and to examine measures to reduce the need for steam generation.

**Statutory authority:** Public Service Law, sections 79, 80 and 81

**Subject:** Development planning for Consolidated Edison Company of New York, Inc.'s Hudson Avenue generating facility.

**Purpose:** To analyze the policy implications of options for redevelopment of Consolidated Edison's Hudson Avenue generating facility.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order that will not require Consolidated Edison Company of New York, Inc. (Con Edison) to pursue a cogeneration option, and that further cogeneration proposals may be considered under certain specified conditions, and to examine measures to reduce the need for steam generation at Con Edison's Hudson Avenue facility and other steam generation facilities in order to reduce capital costs and other impacts on steam rates, 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-S-0029SA2)

**NOTICE OF ADOPTION****Major Electric Rate Filing****I.D. No.** PSC-24-09-00007-A**Filing Date:** 2009-12-16**Effective Date:** 2009-12-16

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 terms and conditions of an unopposed Joint Proposal filed on September 9, 2009 by the City of Plattsburgh Municipal Lighting Department Staff and the Department of Public Service Staff.

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

**Subject:** Major electric rate filing.

**Purpose:** To approve the terms and conditions of a Joint Proposal.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving the terms and conditions of an unopposed Joint Proposal filed on September 9, 2009 by the City of Plattsburgh Municipal Lighting Department Staff and Department of Public Service Staff allowing for an increase in annual revenues, 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-1227SA1)

**NOTICE OF ADOPTION****Water Rates, Charges and Regulations****I.D. No.** PSC-27-09-00020-A**Filing Date:** 2009-12-17**Effective Date:** 2009-12-17

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 authorizing Birch Hill Water Company, Inc. to file a standard electronic tariff schedule P.S.C. No. 1—Water, effective January 1, 2010.

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

**Subject:** Water rates, charges and regulations.

**Purpose:** To approve the customer quarterly flat rate and the replenishable surcharge statement.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order authorizing Birch Hill Water Company, Inc. to a standard electronic tariff schedule, P.S.C. No. 1—Water (Leaves 1 through 12), to become effective January 1, 2010 and Escrow Account Statement No. 1, Leaf 12 should contain a quarterly flat rate for water service of \$225 customer, 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-W-0402SA1)

**NOTICE OF ADOPTION****Water Rates and Charges****I.D. No.** PSC-27-09-00021-A**Filing Date:** 2009-12-22**Effective Date:** 2009-12-22

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 Callicoon Water Company, Inc.'s tariff revisions to P.S.C. No. 5—Water, effective January 1, 2010, to provide additional annual revenues of \$9,753 or 10.53%.

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

**Subject:** Water rates and charges.

**Purpose:** To approve additional annual revenues of \$9,753 or 10.53%, effective 1/1/10.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving The Callicoon Water Company, Inc.'s tariff revisions to P.S.C. No. 5 – Water, effective January 1, 2010, to provide additional annual revenues of \$9,753 or 10.53%, 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-W-0496SA1)

**NOTICE OF ADOPTION****Abandonment of the Shelter Valley Water Works and Cancelling Its Tariff****I.D. No.** PSC-30-09-00011-A**Filing Date:** 2009-12-18**Effective Date:** 2009-12-18

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 removing Shelter Valley Water Works from the list of water companies subject to the jurisdiction of the Commission and cancelling its tariff schedule.

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

**Subject:** Abandonment of the Shelter Valley Water Works and cancelling its tariff.

**Purpose:** To approve the abandonment of the Shelter Valley Water Works and cancelling its tariff.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order removing Shelter Valley Water Works from the list of water companies subject to the jurisdiction of the Commission and cancelling its tariff schedule, 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.

(03-W-0754SA2)

## NOTICE OF ADOPTION

## Competitive Transition Charges

I.D. No. PSC-34-09-00014-A

Filing Date: 2009-12-21

Effective Date: 2009-12-21

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 modifications, Niagara Mohawk Power Corporation d/b/a National Grid's amendments to Schedule P.S.C. No. 214—Electricity and P.S.C. No. 220—Electricity.

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

**Subject:** Competitive Transition Charges.

**Purpose:** To approve with modifications amendments to Schedule P.S.C. No. 214 and P.S.C. No. 220—Electricity, eff. 1/1/10 and 1/1/11.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving, with modifications, Niagara Mohawk Power Corporation d/b/a National Grid's (Company) amendments to Schedule P.S.C. No. 214 and P.S.C. No. 220 - Electricity, effective January 1, 2010 and January 1, 2011, to proposed delivery rates and Competitive Transition Charges for the Company's electric and street lighting tariffs, 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.

(01-M-0075SA44)

## NOTICE OF ADOPTION

## Partial Waiver of Section 609.4(b)(7) Pertaining to Certain Final Termination Language in Final Disconnection Notices

I.D. No. PSC-36-09-00005-A

Filing Date: 2009-12-16

Effective Date: 2009-12-16

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 Verizon New York Inc. for a partial waiver of section 609.4(b)(7) pertaining to certain final termination language in final disconnection notices.

**Statutory authority:** Public Service Law, section 94

**Subject:** Partial waiver of section 609.4(b)(7) pertaining to certain final termination language in final disconnection notices.

**Purpose:** To approve the partial waiver of section 609.4(b)(7) pertaining to certain final termination language in final disconnection notices.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving the petition of Verizon New York Inc. for a partial waiver of § 609.4(b)(7) pertaining to certain final termination language in final disconnection notices, 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-C-0551SA1)

## NOTICE OF ADOPTION

## Utility Austerity Filings

I.D. No. PSC-39-09-00016-A

Filing Date: 2009-12-22

Effective Date: 2009-12-22

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 authorizing National Fuel Gas Distribution Company (NFG) to provide a one-time bill credit totaling \$5.219 million to customers in January 2010 bills.

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

**Subject:** Utility austerity filings.

**Purpose:** To approve NFG a one-time bill credit to customers.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order authorizing National Fuel Gas Distribution Company to provide a one-time bill credit totaling \$5.219 million to customers in January 2010 bills, 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-M-0435SA1)

## NOTICE OF ADOPTION

## Transfer of Industrial Water Supply System

I.D. No. PSC-39-09-00019-A

Filing Date: 2009-12-22

Effective Date: 2009-12-22

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 Eastman Kodak Company to transfer its industrial water supply system to the Monroe County Water Authority.

**Statutory authority:** Public Service Law, section 89-h

**Subject:** Transfer of industrial water supply system.

**Purpose:** To approve the transfer of industrial water supply system.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving the petition of Eastman Kodak Company to transfer its industrial water supply system to the Monroe County Water Authority, 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-M-0659SA1)

## NOTICE OF ADOPTION

## Waiver of Tariff Provisions

I.D. No. PSC-39-09-00021-A

Filing Date: 2009-12-18

Effective Date: 2009-12-18

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 amended Petition of Saratoga Water Services, Inc. and Luther Forest Technology Campus - Economic Development Corporation for a waiver of tariff provisions referencing 16 NYCRR Parts 501 and 502.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 89-b

**Subject:** Waiver of tariff provisions.

**Purpose:** To approve a waiver of tariff provisions referencing 16 NYCRR Parts 501 and 502.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving the amended Petition of Saratoga Water Services, Inc. and Luther Forest Technology Campus - Economic Development Corporation for a waiver of tariff provisions referencing 16 NYCRR Parts 501 and 502, 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-W-0505SA1)

## NOTICE OF ADOPTION

## Revenue Decoupling Mechanism in KEDNY's Service Territory

I.D. No. PSC-41-09-00009-A

Filing Date: 2009-12-22

Effective Date: 2009-12-22

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 concerning proposed Revenue Decoupling Mechanism for Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's (KEDNY).

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

**Subject:** Revenue decoupling mechanism in KEDNY's service territory.

**Purpose:** To approve, subject to limited caveats and understandings the proposed Revenue Decoupling Mechanism.

**Substance of final rule:** The Commission on December 16, 2009, adopted the terms of a Joint Proposal executed and supported by the Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY), KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI), and Department of Public Service Staff, subject to limited caveats and understandings concerning proposed Revenue Decoupling Mechanism, 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.

(06-G-1185SA9)

## NOTICE OF ADOPTION

## National Grid's 2010 Economic Development Plan

I.D. No. PSC-41-09-00010-A

Filing Date: 2009-12-21

Effective Date: 2009-12-21

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 (National Grid) August 31, 2009 filing for a \$9 million Economic Development Plan for 2010.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2) and (3), 66(1), (3), (5), (10), (12) and (12-b)

**Subject:** National Grid's 2010 Economic Development Plan.

**Purpose:** To approve National Grid's 2010 Economic Development Plan.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's Economic Development Plan for 2010, 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.

(01-M-0075SA46)

## NOTICE OF ADOPTION

## Revenue Decoupling Mechanism in KEDLI's Service Territory

I.D. No. PSC-41-09-00011-A

Filing Date: 2009-12-22

Effective Date: 2009-12-22

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 concerning proposed Revenue Decoupling Mechanism for KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island's (KEDLI).

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

**Subject:** Revenue decoupling mechanism in KEDLI's service territory.

**Purpose:** To approve, subject to limited caveats and understandings the proposed Revenue Decoupling Mechanism.

**Substance of final rule:** The Commission on December 16, 2009, adopted the terms of a Joint Proposal executed and supported by the Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (KEDNY), KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (KEDLI), and Department of Public Service Staff, subject to limited caveats and understandings concerning proposed Revenue Decoupling Mechanism, 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.

(06-G-1186SA6)

## NOTICE OF ADOPTION

**Water Rates and Charges****I.D. No.** PSC-42-09-00004-A**Filing Date:** 2009-12-22**Effective Date:** 2009-12-22

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 Aqua New York of Sea Cliff, Inc.'s request to implement a quarterly surcharge of \$9.23 per metered customer, effective January 1, 2010.

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

**Subject:** Water rates and charges.

**Purpose:** To approve a quarterly surcharge of \$9.23 per metered customer.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Aqua New York of Sea Cliff, Inc.'s request to implement a quarterly surcharge of \$9.23 per metered customer, effective January 1, 2010, 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.

(07-W-0177SA2)

## NOTICE OF ADOPTION

**Approve Amendments to PSC No. 8—Electricity, Effective January 1, 2010****I.D. No.** PSC-42-09-00005-A**Filing Date:** 2009-12-16**Effective Date:** 2009-12-16

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 Village of Freeport's amendments to Schedule P.S.C. No. 8—Electricity, effective January 1, 2010, to address installed capacity revenue issues.

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

**Subject:** Approve amendments to PSC No. 8—Electricity, effective January 1, 2010.

**Purpose:** To approve amendments to PSC No. 8—Electricity, effective January 1, 2010.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Village of Freeport's amendments to Schedule P.S.C. No. 8—Electricity, effective January 1, 2010, to address installed capacity revenue issues, 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-0711SA1)

## NOTICE OF ADOPTION

**Annual Reconciliation Filings by Sixteen New York Local Gas Distribution Companies and Two Municipalities****I.D. No.** PSC-42-09-00007-A**Filing Date:** 2009-12-17**Effective Date:** 2009-12-17

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 in part and denying in part, annual reconciliation filings by sixteen New York local gas distribution companies and two municipalities.

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

**Subject:** Annual reconciliation filings by sixteen New York local gas distribution companies and two municipalities.

**Purpose:** To approve in part & deny in part the annual reconciliation filings.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving in part and denying in part, annual reconciliation filings by sixteen New York local gas distribution companies and two municipalities, 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-G-0669SA1)

## NOTICE OF ADOPTION

**Water Rates and Charges****I.D. No.** PSC-43-09-00019-A**Filing Date:** 2009-12-21**Effective Date:** 2009-12-21

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 Knolls Water Co., Inc.'s tariff revisions to P.S.C. No. 3—Water, effective January 1, 2010, to increase its restoration of service charges.

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

**Subject:** Water rates and charges.

**Purpose:** To approve the restoration of service charges.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Knolls Water Co., Inc.'s tariff revisions to P.S.C. No. 3 – Water, effective January 1, 2010, to increase its restoration of service charges, 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-W-0714SA1)

## NOTICE OF ADOPTION

## Water Rates and Charges

I.D. No. PSC-43-09-00020-A

Filing Date: 2009-12-18

Effective Date: 2009-12-18

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 Arbor Hills Waterworks, Inc.'s tariff revisions to P.S.C. No. 3—Water, effective January 1, 2010, to increase its restoration of service charges.

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

**Subject:** Water rates and charges.

**Purpose:** To approve an increase in the restoration of service charges.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Arbor Hills Waterworks, Inc.'s tariff revisions to P.S.C. No. 3 – Water, effective January 1, 2010, to increase its restoration of service charges, 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-W-0712SA1)

## NOTICE OF ADOPTION

## Water Rates and Charges

I.D. No. PSC-43-09-00021-A

Filing Date: 2009-12-16

Effective Date: 2009-12-16

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 Boniville Water Company's tariff revisions to P.S.C. No. 4—Water, effective January 1, 2010, to increase its restoration of service charge.

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

**Subject:** Water rates and charges.

**Purpose:** To approve the increase in the Company's restoration of service charge.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Boniville Water Company's tariff revisions to P.S.C. No. 4—Water, effective January 1, 2010, to increase its restoration of service charge, 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-W-0713SA1)

## NOTICE OF ADOPTION

## Water Rates and Charges

I.D. No. PSC-43-09-00022-A

Filing Date: 2009-12-17

Effective Date: 2009-12-17

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 Hudson Valley Water Companies, Inc.'s tariff revisions to P.S.C. No. 2—Water, effective January 1, 2010, to establish a \$22,000 replenishable escrow account.

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

**Subject:** Water rates and charges.

**Purpose:** To approve a replenishable escrow account.

**Substance of final rule:** The Commission, on December 16, 2009, adopted an order approving Hudson Valley Water Companies, Inc.'s tariff revisions to P.S.C. No. 2—Water, effective January 1, 2010, to establish a replenishable escrow account with a maximum balance of \$22,000, 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-W-0744SA1)

PROPOSED RULE MAKING  
HEARING(S) SCHEDULED

## Amendment to 16 NYCRR Part 7

I.D. No. PSC-01-10-00020-P

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

**Proposed Action:** This is a consensus rule making to amend section 7.2(a); repeal section 7.3; and add new section 7.3 to Title 16 NYCRR.

**Statutory authority:** Public Service Law, sections 4(1) and 20(1); and Environmental Conservation Law, section 8-0113(3)

**Subject:** Amendment to 16 NYCRR Part 7.

**Purpose:** To consider proposed amendments to 16 NYCRR Part 7.

**Public hearing(s) will be held at:** 10:00 a.m., Feb. 24, 2010 at Department of Public Service, 3rd Fl. Hearing Rm., 3 Empire State Plaza, Albany, 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:** § 7.2 Types of actions.

(a) Type I actions (which are more likely to require the preparation of environmental impact statements than unlisted actions) are listed in 6 NYCRR [617.12] 617.4. Type II actions (which have been determined not to have a significant adverse effect on the environment) are listed in 6 NYCRR [617.13] 617.5 and in the following subdivision. Neither new programs nor major changes in priorities with respect to policies, regulations and procedures are included.

§ 7.3 Environmental review procedures.

(a) When the Commission is the lead agency and has accepted a draft Environmental Impact Statement, the State Environmental Quality Review Act (SEQRA) process will run concurrently with other procedures relating to the review and approval of the action.

(b) The Commission or a presiding officer may vary the time periods established in the regulations implementing SEQRA contained in 6 NYCRR Part 617 for the preparation and review of SEQRA documents, and for the conduct of public hearings, in order to coordinate the environmental review process with other procedures relating to the review and approval of actions. Such time changes will not impose unreasonable delay and will be no less protective of environmental values, public participation and agency and judicial review than the procedures contained in 6 NYCRR Part 617.

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

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

#### Consensus Rule Making Determination

The proposed rule is considered to be a consensus rule because the changes are technical in nature and they are believed to be non-controversial since they will align the Commission's regulations more closely with regulations of the Department of Environmental Conservation that implant the State Environmental Quality Review Act, so as to be consistent with § 8-0109(5) and 8-0113(3) of Environmental Conservation Law. Therefore, no objections to the proposed amendments are anticipated.

#### Job Impact Statement

It is believed this rule will not have any impact on jobs and employment opportunities because it simply involves a change in the Commission's rules and procedure regarding the environmental review of certain applications. The substance of the review remains unchanged.

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

#### Minor Rate Filing

**I.D. No.** PSC-01-10-00013-P

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

**Proposed Action:** The Commission is considering a proposed filing by the Village of Brocton to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 1 — Electricity.

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

**Subject:** Minor Rate Filing.

**Purpose:** To increase annual electric revenues by approximately \$94,603 or 12.5%.

**Substance of proposed rule:** The Commission is considering a proposal filed by the Village of Brocton which would increase its annual electric revenues by about \$94,603 or 12.5%. The proposed filing has an effective date of May 1, 2010.

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

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

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

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

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

(09-E-0845SP1)

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

#### Demand Response Initiatives

**I.D. No.** PSC-01-10-00014-P

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

**Proposed Action:** The Commission is considering a proposed filing by Consolidated Edison Company of New York, Inc. to make various changes in the rates, charges, rules and regulations contained in its Schedules for Electric Service.

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

**Subject:** Demand Response Initiatives.

**Purpose:** To propose a cost recovery mechanism for New York Power Authority customers.

**Substance of proposed rule:** The Commission is considering a proposal filed by Consolidated Edison Company of New York, Inc. (Con Edison) for approval of the allocation of total demand response (DR) program costs between Con Edison customers (full service and retail access), PASNY and EDDS delivery service in proportion to their respective forecasted Rate Year delivery revenues and the application of the demand management program charge. The Commission may approve in whole or in part, modify or reject Con Edison's proposal.

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

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

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

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

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

(09-E-0115SP5)

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

#### Minor Rate Filing

**I.D. No.** PSC-01-10-00015-P

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

**Proposed Action:** The Commission is considering a proposed filing by the Jamestown Board of Public Utilities to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 6 — Electricity.

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

**Subject:** Minor Rate Filing.

**Purpose:** To increase annual electric revenues by approximately \$947,297 or 2.5%.

**Substance of proposed rule:** The Commission is considering a proposal filed by the Jamestown Board of Public Utilities (Jamestown) which would increase its annual electric revenues by about \$947,297 or 2.5%. The proposed filing has an effective date of May 1, 2010. The Commission may adopt in whole or in part, modify or reject Jamestown's proposal.

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

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

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

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

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

(09-E-0862SP1)

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

**The New York State Reliability Council's Revisions to Its Rules and Measurements**

**I.D. No.** PSC-01-10-00016-P

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

**Proposed Action:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 26 of the NYSRC's Reliability Rules.

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

**Subject:** The New York State Reliability Council's revisions to its rules and measurements.

**Purpose:** To adopt revisions to various rules and measurements of the New York State Reliability Council.

**Substance of proposed rule:** The Public Service Commission (PSC) is considering whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 26 of the NYSRC's Reliability Rules, which were filed with the PSC on December 18, 2009.

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

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

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

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

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

(05-E-1180SP9)

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

**Transfer of Water Supply Assets**

**I.D. No.** PSC-01-10-00017-P

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

**Proposed Action:** The PSC is considering a Joint Petition by Pinebrook Water Co., Inc. and the Town of Hyde Park for approval to transfer its assets serving Pinebrook Estates Subdivision to the Town of Hyde Park, Dutchess County.

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

**Subject:** Transfer of water supply assets.

**Purpose:** Transfer the water supply assets of Pinebrook Water Co., Inc. serving Pinebrook Estates Subdivision to the Town of Hyde Park.

**Text of proposed rule:** Pinebrook Water Co., Inc. (Pinebrook or the company) provides metered water service to approximately 133 customers in the Pinebrook Estates subdivision in the Town of Hyde Park, Dutchess County. On December 3, 2009, the company and the Town of Hyde Park

filed a joint petition requesting Commission approval of the transfer of all of the water supply assets serving the Pinebrook Estates Subdivision to the Town of Hyde Park. Additionally, the company is also seeking approval for the dissolution of the company and authorization to file a Certificate of Dissolution with the New York Department of State, pursuant to Public Service Law § 108. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(09-W-0840SP1)

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

**Whether to Permit the Use of Itron Solid State Electric Meter Line for Use in Residential and Commercial Accounts**

**I.D. No.** PSC-01-10-00018-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by Itron Incorporated for the approval to use the Itron Centron Open Way solid state electric meter line.

**Statutory authority:** Public Service Law, section 67(1)

**Subject:** Whether to permit the use of Itron solid state electric meter line for use in residential and commercial accounts.

**Purpose:** Pursuant to 16 NYCRR Part 93, is necessary to permit electric utilities in New York State to use the Itron Open Way meter.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Itron Incorporated, to use the Centron Open Way solid-state electric meter in residential and commercial accounts.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 10007, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)

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

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

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

(09-E-0860SP1)

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

**Joint Proposal Regarding Examination of Electric Capital Expenditures**

**I.D. No.** PSC-01-10-00019-P

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

**Proposed Action:** The Commission is considering whether to adopt, reject, or modify, in whole or in part, a joint proposal regarding the examination of Consolidated Edison Company of New York, Inc.'s electric capital expenditures in excess of those reflected in rates.

**Statutory authority:** Public Service Law, sections 65(1), 66(1), (4), (5), (9), (10), (11), (19) and 113

**Subject:** Joint proposal regarding examination of electric capital expenditures.

**Purpose:** To examine and make a determination regarding a joint proposal concerning electric capital expenditures.

**Substance of proposed rule:** In the Commission's March 25, 2008 Rate Order regarding Consolidated Edison Company of New York, Inc.'s (Con Edison or the Company) electric business, the Commission directed Staff of the Department of Public Service to conduct an investigation into the capital expenditures for the rate years 2005-2008 and into the Company's budget creation and construction program management during this period. The Commission also determined that the revenue requirements associated with the capital expenditures in excess of those allowed in the rate years 2005-2008 be recovered through an adjustment clause mechanism and subject to refund. The Commission may adopt, reject, or modify, in whole or in part, such proposal.

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

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

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

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

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

(07-E-0523SP8)

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## Office of Real Property Services

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### EMERGENCY RULE MAKING

#### Reimbursement of Training Expenses

**I.D. No.** RPS-39-09-00025-E

**Filing No.** 1436

**Filing Date:** 2009-12-22

**Effective Date:** 2009-12-22

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

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

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

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

**Specific reasons underlying the finding of necessity:** These amendments are intended to assure that training reimbursement funds are effectively managed in a time of fiscal crisis. As required by the Real Property Tax Law, there has been established in rules (9 NYCRR 188) programs of certification for assessors and directors of county real property tax service agencies and continuing education programs for county directors and sole elected and appointed assessors. Travel and other actual and necessary expenses incurred by these local officials in satisfying these requirements are a charge against the State (RPTL, §§ 318[4], 1530[3][f]). Funds for this reimbursement are contained in an annual appropriation. The 2009-2010 budget contains an appropriation of \$690,000.

At present officials can "bank" three years worth of continuing educa-

tion credit for future use in satisfying the annual requirement of 24 credit hours. They are also able to receive reimbursement for attending an approved conference even if they receive no continuing education credit at that conference. Given the current budgetary situation, a change in this process is necessary to assure that reimbursement is paid in a manner that is more consistent with the legislative intent. Under this proposal, assessors and directors will be limited in the "banking" of continuing education credit to twenty-four credit hours, i.e., one year's worth of credits.

We recognize that there is a need for some flexibility in planning to attend training. However, allowing the accumulation of credits to satisfy requirements three years in the future, at the state's expense, is not defensible in the current fiscal situation. In addition, assessors and directors would no longer be able to attend an approved conference at the State's expense without receiving continuing education credit. This largess is no longer acceptable in the current fiscal situation.

**Subject:** Reimbursement of training expenses.

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

**Text of emergency rule:** Section 1. Subdivision a of section 188-2.8 of Title 9 is amended to read as follows:

(a) Each appointed and sole elected assessor must comply with the applicable continuing education requirement set forth herein. All other elected assessors may voluntarily participate in the continuing education program but are subject to the same requirements for all purposes.

(1) Within one year of attaining certification as a State Certified Assessor each appointed or sole elected assessor must successfully complete the introduction to mass appraisal component if the introduction to mass appraisal component was not elected for certification.

(2) Each appointed or sole elected assessor must successfully complete an average of 24 continuing education credits every year. Continuing education credit means the number of contact hours awarded for attendance at approved courses, conferences, and seminars. Continuing education credits are awarded on [a] an hour for hour basis in full hour amounts only. If an assessor successfully completes more than 24 continuing education credits in one year, as many as [72] 24 of the excess credits may be applied toward the requirement for the following [three years] year.

(3) The continuing education requirement commences upon the following date:

(i) For a certified assessor or certified acting assessor, the requirement commences upon the October 1st next succeeding the date such certification was issued.

(ii) For a certified assessor who is subsequently appointed, the requirement commences upon the October 1st next succeeding the date of such appointment.

(iii) For an assessor certified as a candidate for assessor prior to his or her appointment pursuant to Subpart 188-3 of this Part and appointed prior to the expiration of his or her certificate, the requirement commences upon the October 1st next succeeding the date of appointment.

(4) If an assessor exceeds the number of required credits set forth in this section, ORPS shall grant retroactive continuing education credit to meet prior requirements, but in no case shall such credit be used to cover more than one year.

Section 2. Subdivision d of section 188-2.9 is repealed and subdivisions e, f and g are relettered d, e and f respectively.

Section 3. A new subdivision g is added to section 188-2.9 to read as follows:

(g) For reimbursement of expenses for training attended on or after October 1, 2009, any assessor who has more than 24 excess credits on that date shall apply 24 credits to satisfying the continuing education requirement in 2009-10 and any additional remaining credits to satisfying the continuing education in 2010-11. Any remaining credits shall be applied to satisfying the continuing education requirement in 2011-12.

Section 4. Paragraph one of subdivision a of section 188-4.8 is amended to read as follows:

(1) A county director must successfully complete an average of 24 continuing education credits every year. Continuing education credit means the number of contact hours awarded for attendance at approved courses, conferences, and seminars. Continuing education credits are awarded on [a] an hour for hour basis in full hour amounts only. If a county director successfully completes more than 24 continuing education credits in one year, as many as [72] 24 of the excess credits may be applied toward the requirement for the following [three years] year.

Section 5. Subdivisions b and c of section 188-4.9 are amended to read as follows:

(b) [Travel and other actual and necessary expenses incurred by a county director or a person appointed county director for a forthcoming term while attending training at one county director conference per State fiscal year shall be a State charge upon audit by the State Comptroller,

provided that the county director or county director appointee has successfully completed the components set forth in section 188-2.6(b)(1) through (7) of this Part of the basic course of training for assessors and introduction to farm appraisal if one or more assessing units in the county meet the criteria set forth in section 188-2.8(b)(8) of this Part.

(c) Reimbursement shall be in the same manner and to the same extent as provided in section 188-2.9 of this Part.

(c) For the reimbursement of expenses for training attended on or after October 1, 2009, any director who has more than 24 excess credits on that date shall apply 24 credits to satisfying the continuing education requirement in 2009-10 and any additional remaining credits to satisfying the continuing education in 2010-11. Any remaining credits shall be applied to satisfying the continuing education requirement in 2011-12.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. RPS-39-09-00025-EP, Issue of September 30, 2009. The emergency rule will expire February 19, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Philip J. Hawver, Office of Real Property Services, 16 Sheridan Avenue, Albany, New York 12210-2714, (518) 474-8821, email: internet.legal@orps.state.ny.us

#### Regulatory Impact Statement

1. Statutory Authority: Section 202(1)(l) of the Real Property Tax Law (RPTL) authorizes the State Board of Real Property Services to adopt such rules "as may be necessary for the exercise of its powers and the performance of its duties."

As required by the Real Property Tax Law, there has been established in rules (9 NYCRR 188) programs of certification for assessors and directors of county real property tax service agencies and continuing education programs for county directors and sole elected and appointed assessors. Travel and other actual and necessary expenses incurred by these local officials in satisfying these requirements are a charge against the State (RPTL, §§ 318[4], 1530[3] [f]). Funds for this reimbursement are contained in an annual appropriation.

2. Legislative Objectives: Real Property Tax Law, § 318(4) provides, in relevant part, that: "the travel and other actual and necessary expenses incurred by an appointed or elected assessor, . . . , in satisfactorily completing courses of training as required by this title or as approved by the state board, including continuing education courses prescribed by the state board which are satisfactorily completed by any elected assessor, shall be a state charge upon audit by the comptroller." The statutory provision authorizes the payment of certain enumerated reasonable and necessary expenses but any such costs and expenses beyond this stated mandate cannot be justified, especially during the current severe economic downturn. Essentially, these amendments are intended to assure that training reimbursement funds are effectively managed in a time of fiscal crisis.

3. Needs and Benefits: These amendments are intended to assure that training reimbursement funds are effectively managed in a time of fiscal crisis. A single annual appropriation is available to reimburse local officials for expenses in obtaining basic certification and pursuing continuing education. These amendments only affect the latter program. At present officials can "bank" three years worth of continuing education credit for future use in satisfying the annual requirement of 24 credit hours. They are also able to receive reimbursement for attending an approved conference even if they receive no continuing education credit at that conference.

Given the current budgetary situation, a change in this process is necessary to assure that reimbursement is paid in a manner that is more consistent with the legislative intent. Under these amendments, assessors and directors will be limited in the "banking" of continuing education credit to twenty-four credit hours, i.e., one year's worth of credits. The State Board recognizes that there is a need for some flexibility in planning to attend training. However, allowing the accumulation of credits to satisfy requirements three years in the future, at the State's expense, is not defensible in the current fiscal situation.

In addition, assessors and directors would no longer be able to attend an approved conference at the state's expense without receiving continuing education credit. This largess is no longer acceptable in the current fiscal situation. Finally, the amendments also contain minor, non-substantive changes to the assessor continuing education provisions. These amendments become effective on October 1, 2009, allowing reimbursement for training scheduled for the summer and early fall of 2009.

#### 4. Costs:

(a) To State Government. The 2009-2010 budget contains an appropriation of \$690,000. "The appropriation of \$690,000 in the 2009-10 budget is to cover basic training for NYC assessors and basic and continuing education for assessors and county directors of real property tax services throughout the State."

These amendments will insure the efficient expenditure of State funds

and the availability of those funds to reimburse local officials for expenses in attaining certification. The amendments are expected to reduce State expenditures by \$150,000 to \$200,000 annually. The full benefit of this reduction will not be seen during the 2009-2010 State fiscal year because the amendments become effective midway through on October 1, 2009.

Staff has determined that there are approximately 215 assessors and county directors who would be ineligible to attend continuing education training and receive reimbursement for that training during the 2009-2010 education year (begins October 1, 2009) under the proposed rules. These individuals have already received credit and reimbursement for continuing education training that meets their training requirements 2-3 years in advance. The estimate of approximately \$150,000-\$200,000 in savings in the first year is based on no reimbursement being available to this group.

(b) To local governments: None in 2009. Some local governments may decide to reimburse assessors or directors for some or all of the estimated \$150,000-\$200,000 that these amendments will save.

(c) To private regulated parties: None. There are no private regulated parties in this program.

(d) Basis of cost estimates - paid expenses and current training needs.

5. Local Government Mandates: None.

6. Paperwork: None.

7. Duplication: There are no conflicting State or Federal requirements.

8. Alternatives: There were careful discussions and consideration of other potential modifications to the reimbursement procedures, such as curtailing reimbursement to a greater degree or allowing a more generous benefit, but ultimately it was decided that proposed amendments were the optimum alternative.

9. Federal Standards: There are no Federal regulations concerning this subject.

10. Compliance Schedule: The amendments will take effect upon the publication of the adoption of the rule in the State Register.

#### Regulatory Flexibility Analysis

The amendments proposed would generally not impose any adverse economic conditions or any reporting, recordkeeping or other compliance requirements on small businesses.

However, to the extent certain local governments decide to reimburse local officials with respect to the cost of training no longer reimbursed by the State, such municipalities may incur additional costs.

#### Rural Area Flexibility Analysis

Many of the assessors impacted by this proposal reside and are employed in rural areas of the State. However the proposal would generally pertain only to a single assessor in such a municipality, which in effect means that any economic impact would be minimal.

To the extent certain rural local governments decide to reimburse local officials with respect to the cost of training no longer reimbursed by the State, such municipalities may incur additional costs.

#### Job Impact Statement

A job impact statement is not required for this rule making because the amendments only concern local officials whose offices are mandated by statute. The proposal has no effect on job opportunities in the private or public sector.

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## Workers' Compensation Board

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### EMERGENCY RULE MAKING

#### Independent Livery Driver Benefit Fund

I.D. No. WCB-01-10-00022-E

Filing No. 1444

Filing Date: 2009-12-22

Effective Date: 2009-12-22

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

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

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

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

**Specific reasons underlying the finding of necessity:** Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when

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

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

Workers' Compensation Law (WCL) § 18-c (5) provides that a livery base that is not a member of the ILDBF is deemed the employer of any livery driver it dispatches for purposes of the WCL. This means that a livery base that does not join the ILDBF must purchase and maintain a full workers' compensation insurance policy covering all drivers that it dispatches. The cost to a livery base for a full workers' compensation policy is approximately \$1,400.00 per car. A base that dispatches 25 cars will be required to pay approximately \$35,000 in premium for the drivers plus premium for any other employees.

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

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

This rule must be adopted on an emergency basis to ensure that livery bases can submit the required affirmation and join the ILDBF. Without the rule livery bases would be required to obtain a full workers' compensation policy which they cannot afford.

**Subject:** Independent Livery Driver Benefit Fund.

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

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

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

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

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

Section 309.2 provides rules for who may be members of the ILDBF and how membership is terminated. Subdivision (a) of this section states that only livery bases designated by the Workers' Compensation Board (Board) may join the ILDBF. Subdivision (b) of this section provides that a livery base will only be designated by the Board as an independent livery base if it submits the affirmation required by WCL § 18-c (2) attesting that the base meets the criteria set forth in subdivision (c) of § 309.2 and if it

provides written notice in the stated time periods of any inaccuracies in or changes to the information in the affirmation. Subdivision (c) of this section requires a livery base to meet the following criteria:

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

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

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

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

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

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

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

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

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

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

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

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

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

age weekly wage of \$250. The presumptive wage may be rebutted by the submittal of competent evidence. Further the presumptive wage will increase each year on July 1st by the percentage increase in the New York State Average Weekly Wage.

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

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt 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 21, 2010.

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

#### Summary of Regulatory Impact Statement

1. Statutory authority: Chapter 392 of the Laws of 2008 amended the Executive Law and WCL to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage.

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

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

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

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

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

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

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

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

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

After consulting with the livery industry and the appropriate TLCs, it

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

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

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

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

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

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

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

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

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

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

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

6. Paperwork: This rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit

written notice of any inaccuracies or changes in the information in the affirmation. If a livery base wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC.

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

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

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

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

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

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

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

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

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

#### **Regulatory Flexibility Analysis**

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

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

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

Livery drivers or their dependents must provide written notice to the

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

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

4. Compliance costs: The proposed rule will impose minimal costs on small businesses. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. WCL § 18-c (2) (a) requires livery bases, including those that are small businesses, to submit an affirmation sworn under penalty of perjury in order to be designated as an independent livery base. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur the cost of postage if the notice is sent through the U. S. Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. The cost will be for postage for the notice to the three entities. Livery bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

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

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

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

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

6. Minimizing adverse impact: The rule was drafted to ensure that livery bases would be able to join the ILDBF and livery drivers could access benefits when injured or killed within the provisions of Executive Law § 160-ddd. To minimize adverse impact on both the livery bases and drivers the regulation does not modify the definition of "covered services." It was suggested that "covered services" be defined to require the independent livery base that dispatched the injured livery driver to provide documentation of the dispatch and sworn testimony and limit it to a rea-

sonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term. The definition of “covered services” for the ILDBF is almost the same as the definition for that same term for the Black Car Fund. The Appellate Division, Third Department in *Aminov v. N.Y. Black Car Operators Injury Comp. Fund*, 2 A.D.3d 1007 (3d Dept. 2003) specifically found that the time waiting for a dispatch is covered. Therefore, modifying the definition as suggested would not be appropriate. Further defining “reasonable time” as twenty minutes has no reasonable basis.

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

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

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

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

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

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

#### ***Job Impact Statement***

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