

RULE MAKING ACTIVITIES

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

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

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

Office of Children and Family Services

EMERGENCY RULE MAKING

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

I.D. No. CFS-30-10-00001-E

Filing No. 714

Filing Date: 2010-07-08

Effective Date: 2010-07-11

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 5, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

Chapter 436 of the Laws of 1997 transferred certain functions, powers, duties and obligations of the former Department of Social Services and all of the functions, powers, duties and obligations of the former Division for Youth to OCFS.

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

2. Legislative objectives:

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

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

3. Needs and benefits:

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

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

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

4. Costs:

The regulations are necessary to comply with the enactment of

Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

5. Local government mandates:

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

6. Paperwork:

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

7. Duplication:

The regulations do not duplicate other State requirements.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business and local governments:

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

2. Reporting, recordkeeping and compliance requirements:

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

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

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

3. Professional services:

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

4. Compliance costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

7. Small business and local government participation:

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

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

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

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

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

3. Costs:

The regulations are necessary to comply with the enactment of Chapter 323 of the Laws of 2008. The actual fiscal impact to OCFS is \$397,000 for six positions and associated non-personal service expenses, as that is the amount of the budget request to support the six positions that was actually received by OCFS. The budget request included an additional \$161,000 to support fringe benefit and indirect costs, but OCFS did not receive those funds.

4. Minimizing adverse impact:

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

5. Rural area participation:

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

Job Impact Statement

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

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mandatory Quality Review Program in Public Accountancy

I.D. No. EDU-30-10-00003-P

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

Proposed Action: Amendment of section 70.10 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6501 (not subdivided), 6504 (not subdivided), 6506(6) and 7410

Subject: Mandatory quality review program in public accountancy.

Purpose: To implement section 7410 of the Education Law by establishing a mandatory quality review program for public accountancy.

Substance of proposed rule (Full text is posted at the following State website: www.op.nysed.gov): The Commissioner of Education proposes to add a new section 70.10 to the Regulations of the Commissioner of Education, relating to establishing a mandatory quality review program in public accountancy. The following is a summary of the proposed amendment:

Subdivision (a) of section 70.10 of the Regulations of the Commissioner of Education establishes a mandatory quality review program requiring all applicants seeking a firm registration or renewal of a registration, other than a sole proprietorship or firms with two or fewer professionals, to participate in a quality review of the firm's attest services no more frequently than once every three years.

Subdivision (b) of section 70.10 of the Regulations of the Commissioner of Education defines terms used in section 70.10 including accounting professional, quality review report, review, review team, reviewer, sponsoring organization and team captain.

Subdivision (c) of section 70.10 of the Regulations of the Commissioner of Education indicates those firms that must participate in a quality review. This subdivision also requires any firm not required to participate in mandatory quality review to annually submit a written notification of exemption to the Department. Any firm that begins providing attest services or otherwise becomes subject to mandatory participation in the quality review program is required to notify the Department of its change in status within 30 days and to provide the Department with evidence that it has enrolled in an acceptable quality review program within one year of the earlier of the firm's initial registration or the firm's initial performance of services requiring a quality review. Such firms must have a quality review performed within 18 months of the date the services were first provided.

Subdivision (d) of section 70.10 of the Regulations of the Commissioner of Education establishes a Quality Review Oversight Committee (QROC) to oversee the mandatory quality review program. The QROC will consist of five members who must be New York licensed CPAs and hold a current registration with the Department. Members will serve five year terms except those first appointed will serve staggered terms so that an equal number of terms terminate annually. Responsibilities of the QROC include: receiving and approving quality review plans of entities

seeking to be sponsoring organizations; monitoring sponsoring organizations to determine that each sponsoring organization is providing an acceptable level of oversight over reviewers, review teams and firms participating in the quality review program; inform the Department of issues and /or problems relating to the quality review program; annually report to the Department that the sponsoring organization holds qualifications necessary to continue as an approved sponsoring organization; annually assess the effectiveness of the quality review program; annually report on any recommended modifications to the quality review program; review each quality review report submitted by a firm to determine that the firm is complying with applicable professional standards and ensure that any documents received from a firm or reviewer, sponsoring organization or entity administering peer review outside the state of New York shall be confidential and not constitute a public record and shall not be subject to disclosure under article six and six-A of the Public Officers Law.

Subdivision (e) of section 70.10 of the Regulations of the Commissioner of Education defines the approval process for sponsoring organizations. Sponsoring organizations must submit a plan of administration that establishes committees and provides assurances that sufficient professional staff exist for the operation of the quality review program; provide assurances that the sponsoring organization will notify firms and reviewers of the latest developments in quality review standards and the most common deficiencies in quality reviews conducted by the sponsoring organization; establish procedures to resolve any disagreement between the firm and the reviewer that may arise out of the performance of a quality review; acknowledge that the sponsoring organization is subject to evaluation and periodic review; establish procedures to evaluate and document performance of each reviewer and to disqualify a reviewer who does not meet the standards for quality review; establish procedures to ensure that the sponsoring organization submits timely reports to the QROC; establish procedures to maintain the confidentiality of documents received from the firm or reviewer unless any such document is admitted into evidence in a hearing held by the Department; and provide annual reports to the QROC on the results of the quality review program, including number of reviews conducted; the number of firms complying with the quality review standards, the number of firms having some deficiencies, the number of firms not in compliance with the quality review standards.

Subdivision (f) of section 70.10 of the Regulations of the Commissioner of Education defines the process to be followed to approve and assign team captains and review teams. The sponsoring organization must provide a list of reviewers to the Department and from that list the Department must develop a roster of approved reviewers. Sponsoring organizations must perform procedures to test that review team members, including the team captain are licensed or otherwise authorized to practice in any state and that the review team and team captain meet a minimum set of competencies to commence a quality review. Competencies include specified experience performing attest services, participation in acceptable training, and knowledge of professional standards, rules and regulations appropriate to the industries included in the review.

Subdivision (g) of section 70.10 of the Regulations of the Commissioner of Education provides that the Department may upon notice and with the opportunity to be heard, remove a reviewer and/or review team member from the roster of approved reviewers for failure to meet the requirements of subdivision (f) or for having been subject to disciplinary action.

Subdivision (h) of section 70.10 of the Regulations of the Commissioner of Education provides that a firm which has received a report that the firm has failed to design a system of quality control over its attest services or that receives a quality review report indicating that the firm has failed to perform and report on engagements in conformity with applicable standards in material respects may be referred by the QROC for disciplinary action under Education Law section 6510.

Subdivision (i) of section 70.10 of the Regulations of the Commissioner of Education defines the standards for quality reviews. In addition to setting the standards of quality reviews, this subdivision requires that for any firm undergoing a review of its system of quality control, the review team shall review the firm's continuing education records on a sample basis and consider whether the records demonstrate that the licensee who supervised the services meets the competency requirements set forth in professional standards for such services, and in paragraph 13 of subdivision (a) of section 29.10 of the Rules of the Board of Regents.

Subdivision (j) of section 70.10 of the Regulations of the Commissioner of Education defines the requirements for access to the results of quality reviews by the department. Any firm required to participate in the program shall submit to the department: a quality review report, the firm's letter of response, an acceptance letter from a sponsoring organization, a letter(s) signed by the firm accepting the documents and a letter from the sponsoring organization notifying the reviewed firm that required actions have been appropriately completed. The quality review report, the reviewed firm's letter of response and acceptance of the quality review

report by the sponsoring organization must be made available to the department via a secure website within 30 days of the date of the acceptance letter. If applicable, a letter signed by the reviewed firm accepting the quality review documents with the understanding that the firm agrees to take any actions required by the reviewer must be made available to the department within 30 days of the date the firm signs such letter. If applicable, the letter from the sponsoring organization notifying the reviewed firm that required actions have been appropriately completed must be made available to the department within 30 days to the date of the letter from the sponsoring organization. If the sponsoring organization cannot provide access to the quality review documents via a website, the firm shall provide copies of the quality review documents by mail or facsimile within 10 days of receipt of the applicable documents. Copies of equivalent quality review reports submitted in accordance with subdivision (m) must be made available to the department via a website provided by the entity administering the quality review. If it cannot be provided via a website, the firm shall provide copies by mail or facsimile.

Subdivision (k) of section 70.10 of the Regulations of the Commissioner of Education requires each reviewer and sponsoring organization, as applicable, to maintain documentation necessary to establish that each review conformed to the review standards of the relevant review program, including the review work papers, copies of the review report, and any correspondence indicating the firm's concurrence, non-concurrence, and any proposed remedial actions and related implementation. These documents must be retained by the reviewer for a period of time corresponding to the retention period of the sponsoring organization, and must be available to the Quality Review Oversight Committee. In no event, shall the retention period be less than 120 days from the date of acceptance of the review by the sponsoring organization.

Subdivision (l) of section 70.10 of the Regulations of the Commissioner of Education requires any firm that undergoes an inspection conducted by the Public Company Accounting Oversight Board ("PCAOB") as required under the Sarbanes-Oxley Act of 2002 to submit to the Department a copy of the public version of its most recent inspection report within ten days of a receipt of the notice of completion from the PCAOB.

Subdivision (m) of section 70.10 of the Regulations of the Commissioner of Education establishes that the Department, at its discretion, may accept a review report from a firm which the Department deems to be the substantial equivalent of a quality review report issued under this section. A review report will be deemed substantially equivalent provided such reviews are conducted and reported on in accordance with the quality review standards set forth in subdivision (i) of this section. Peer reviews administered by entities located outside the state of New York acceptable to the Department and any affiliated administering entities may be accepted as substantially equivalent of a quality review report issued under this section.

Text of proposed rule and any required statements and analyses may be obtained from: Christine Moore, New York State Education Department, Office of Counsel, 89 Washington Avenue, Room 144, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

Data, views or arguments may be submitted to: Daniel Dustin, Executive Secretary for Public Accountancy, New York State Education Department, 89 Washington Avenue, 2nd Floor, Albany, New York 12257, (518) 474-3817, email: opopr@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 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.

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.

Section 7410 of the Education Law, as added by Chapter 651 of the Laws of 2008, establishes a mandatory quality review requirement for the renewal of public accounting firm registrations and requires the Commissioner to promulgate regulations specifying how quality reviews are to be conducted.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment to the Regulations of the Commissioner of Education is necessary to implement the requirements of section 7410 of the Education Law, which becomes effective on January 1, 2012. The

purpose of the new law is to establish a mandatory quality review program to enhance the protection of clients and the general public by requiring certain public accounting firms to undergo a quality review of the firm's attest services as a condition to renewal of their registration, as specified in the Commissioner's regulations.

3. NEEDS AND BENEFITS:

Section 7410 of the Education Law requires all firms, as a condition of renewal of their registrations, to undergo a quality review of the firms' attest services as a condition to renewal of their registration, in a manner specified in the Regulations of the Commissioner. Sole proprietorships and firms with two or fewer accounting professionals are exempt from quality review; however, such firms may voluntarily participate in the quality review program.

The quality review process must include a verification that individuals in the firm who are responsible for supervising attest services or who sign or authorize someone to sign the accountant's report on the financial statements meet competency requirements set out in professional standards for such services and in the Regulations of the Commissioner of Education.

In addition, the new law requires the Commissioner's regulation to include reasonable provisions for compliance by an applicant for firm registration showing that the firm has undergone a quality review in the last three years or a peer review in another state that is the satisfactory equivalent; require that organizations that administer quality review programs be subject to evaluations by the Department or its designee to periodically assess the effectiveness of the quality review program; and require that quality reviews be conducted by reviewers acceptable to the Department in accordance with Commissioner's regulations. In addition, the Commissioner of Education is authorized to require firms undergoing quality review and organizations administering quality review programs to timely submit quality review reports to the State Board for Public Accountancy. Reports submitted must be maintained as confidential in accordance with state law, unless the report is admitted into evidence in a hearing held by the Department.

Any firm, including a sole proprietorship or a firm with two or fewer accounting professionals, that performs attest services for any New York state or municipal entity performing a governmental or proprietary function for New York State or performs attest services specifically required pursuant to New York State law must undergo an external peer review in accordance with Government Auditing Standards issued by the Comptroller General of the United States.

4. COSTS:

(a) Cost to State government: There are no additional costs beyond those imposed by statute.

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

(c) Cost to private regulated parties: There are no costs to private regulated parties beyond those imposed by statute.

(d) Costs to the regulatory agency: As stated above in "Costs to State Government," the proposed amendment will not impose any additional costs on SED beyond those imposed by statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment relates to the mandatory quality review of a public accounting firm's attest practice. The amendment does not impose any programs, service, duty, or responsibility upon local governments.

6. PAPERWORK:

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 use the title "CPA" or "CPA firm" or the title "PA" or "PA firm" are required to register with the Department. As a condition of registration, Education Law section 7410 requires all firms, except sole proprietorships and firms with two or fewer professionals, as a condition of renewal of their registrations, to undergo a quality review of the firms' attest services conducted in a manner specified in the Regulations of the Commissioner. Any firm, including a sole proprietorship or a firm with two or fewer accounting professionals, that performs attest services for any New York State or municipal entity or performs attest services specifically required pursuant to New York State law must undergo an external peer review in accordance with Government Auditing Standards issued by the Comptroller General of the United States. Any firm registered with the department that is not required to participate in the program shall submit an annual written notification of the basis for such non-participation, as part of the firm's submission of its annual report.

Any firm that begins providing attest services or otherwise becomes subject to mandatory participation in the quality review program shall notify the department of its change in status within 30 days and provide the Department with evidence of enrollment in an acceptable program.

Sponsoring organizations must provide annual reports to the Quality Review Oversight Committee on the results of the organization's quality review program, including information on completed reviews, including the most common deficiencies noted by reviewers, the number of reviews

conducted, the number of firms found to be performing and reporting in compliance with applicable professional standards, the number of firms found to have some deficiencies in complying with applicable professional standards and the number of firms found not to be in compliance with applicable professional standards. Each sponsoring organization shall also provide a list of reviewers to the Department.

Any firm required to participate in the program shall submit the following documents to the department: a quality review report issued by an approved reviewer; the firm's letter of response; an acceptance letter from the sponsoring organization; a letter signed by the firm accepting the documents with the understanding that the firm agrees to take any actions required by the reviewer; and a letter from the sponsoring organization notifying the reviewed firm that required actions have been appropriately completed.

The proposed amendment requires each reviewer and sponsoring organization to maintain all documentation necessary to establish that each review conformed to the review standards of the relevant review program, including the review working papers, copies of the review report, and any correspondence indicating the public accounting firm's concurrence or non-concurrence and any proposed remedial actions and any related implementation. These documents must be retained by the reviewer for a period of time corresponding to the retention period established by an entity approved by the Department to oversee and facilitate quality reviews, and shall be made available upon request of the Department. In no event shall the retention period be less than 120 days from the date of acceptance of the review by the approved entity.

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:

The federal Sarbanes-Oxley Act of 2002 (Act) requires all public accounting firms that audit publicly traded companies to register with the Public Company Accounting Oversight Board (PCAOB) and undergo an inspection performed by the PCAOB to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the rules of the PCAOB, the rules of the U.S. Securities & Exchange Commission, and professional standards, in connection with the public accountancy firm's performance of audits, issuance of audit reports, and related matters involving publicly traded companies.

The proposed regulations require public accounting firms registered with the PCAOB to provide the Department with a copy of the public version of the public accounting firm's inspection report.

Government Audit Standards issued by the Comptroller General of the United States require each public accounting firm that performs audits or attestation engagements in accordance with generally accepted government auditing standards to establish a system of quality control that is designed to provide the audit organization with reasonable assurance that the public accounting firm and its personnel comply with professional standards and applicable legal and regulatory requirements, and have an external peer review at least once every 3 years.

Education Law section 7410 requires those firms, including sole proprietorships and firms with two or fewer professionals, that perform attest services for any New York State or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office, or other governmental entity performing a governmental or proprietary function for New York State or any one or more municipalities thereof, or performs attest services specifically required to be performed pursuant to New York State law, to undergo an external peer review in conformity with the requirements pursuant to the government auditing standards issued by the Comptroller General of the United States.

10. COMPLIANCE SCHEDULE:

Chapter 651 of the Laws of 2008, requires that the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of section 7410 of Education Law to be made and completed by the Commissioner of Education on or before January 1, 2011. The proposed amendment becomes effective on November 3, 2010. 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 a mandatory quality review program in New York State. It is estimated that there are approximately 3,200 registered public accounting firms in New York State. A majority of these public accounting firms are small businesses, with 100 or fewer employees.

2. COMPLIANCE REQUIREMENTS:

Section 7410 of the Education Law requires all firms, as a condition of renewal of their registrations, to undergo a quality review of the firms' attest services conducted in a manner specified in the Regulations of the Commissioner. Sole proprietorships and firms with two or fewer accounting professionals are exempt from quality review; however, such firms may voluntarily participate in the quality review program.

The quality review process must verify that individuals in the firm who are responsible for supervising attest services or who sign or authorize someone to sign the accountant's report on the financial statements meet the competency requirements set out in professional standards and in the Regulations of the Commissioner of Education. In addition, the quality review program must include reasonable provisions for compliance by an applicant for firm registration showing that the firm has undergone a quality review in the last three years or a peer review in another state that is the satisfactory equivalent; require that organizations that administer quality review programs be subject to evaluations by the Department or its designee to periodically assess the effectiveness of the quality review program; and require that quality reviews be conducted by reviewers acceptable to the Department in accordance with Commissioner's regulations. In addition, the Commissioner of Education is authorized to require firms undergoing quality review and organizations administering quality review programs to timely submit quality review reports to the State Board for Public Accountancy. Reports submitted must be maintained as confidential in accordance with state law, unless the report is admitted into evidence in a hearing held by the Department.

Any firm, including a sole proprietorship or a firm with two or fewer accounting professionals, that performs attest services for any New York state or municipal entity or performs attest services specifically required pursuant to New York State law must undergo an external peer review in accordance with Government Auditing Standards issued by the Comptroller General of the United States.

3. PROFESSIONAL SERVICES:

The proposed regulation will require public accounting firms, except sole proprietorships and firms with two or fewer professionals, to hire an independent reviewer or review team to conduct a quality review of the accounting firm's quality controls over its attest services. Any public accounting firm, including sole proprietorships and firms with two or fewer accounting professionals, that performs attest services for any New York state or municipal entity or performs attest services specifically required pursuant to New York State law must undergo an external peer review. Public accounting firms, including those public accounting firms that are considered "small businesses" are subject to this provision.

4. COMPLIANCE COSTS:

The proposed amendment implements Chapter 651 of the Laws of 2008, which imposes costs on private regulated parties by requiring these parties to hire an independent reviewer and/or review team to conduct a quality review in accordance with the statute.

The fee paid by a registered public accounting firm to an independent reviewer or review team for a quality review varies depending on the size of the firm and the complexity of the attest engagements subject to quality review. A sole proprietorship or a small firm that performs a limited number of attest engagements may undergo an engagement review that costs approximately \$700 or more depending on the complexity of the public accounting firm's practice. A large multi-state or international firm could pay tens of thousands of dollars to undergo a quality review. It is estimated that approximately 85% of registered New York State public accounting firms voluntarily participate in and pay a fee associated with an existing peer review program established by a national professional accountancy organization that is substantially equivalent to the proposed quality review program. No additional fees associated with performing a quality review are anticipated for those firms that participate in the voluntary peer review process.

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 proposed amendment implements the requirements of section 7410 of the Education Law, which provides an exception to the mandatory quality review provisions for sole proprietorships and firms with two or fewer professionals. However, this exemption does not apply to firms that performs attest services for any New York State or municipal entity or performs attest services specifically required pursuant to New York State law.

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 Ac-

countants and the American Institute of Certified Public Accountants, both of which includes members who own and operate small businesses, with draft regulatory language concerning the proposed regulation and engaged in an ongoing conversation with these organizations 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 a mandatory quality control program for registered public accounting firms. 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 an estimated 260 public accounting firms that are located in a rural county in New York State.

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

Section 7410 of the Education Law requires all firms, as a condition of renewal of their registrations, to undergo a quality review of the firms' attest services conducted in a manner specified in the Regulations of the Commissioner. Sole proprietorships and firms with two or fewer accounting professionals are exempt from quality review; however, such firms may voluntarily participate in the quality review program.

The quality review process must verify that individuals in the firm who are responsible for supervising attest services or who sign or authorize someone to sign the accountant's report on the financial statements meet the competency requirements set out in professional standards and in the Regulations of the Commissioner of Education. In addition, the quality review program must include reasonable provisions for compliance by an applicant for firm registration showing that the firm has undergone a quality review in the last three years or a peer review in another state that is the satisfactory equivalent; require that organizations that administer quality review programs be subject to evaluations by the Department or its designee to periodically assess the effectiveness of the quality review program; and require that quality reviews be conducted by reviewers acceptable to the Department in accordance with Commissioner's regulations. In addition, the Commissioner of Education is authorized to require firms undergoing quality review and organizations administering quality review programs to timely submit quality review reports to the State Board for Public Accountancy. Reports submitted must be maintained as confidential in accordance with state law, unless the report is admitted into evidence in a hearing held by the Department.

Any firm, including a sole proprietorship or a firm with two or fewer accounting professionals, that performs attest services for any New York state or municipal entity or performs attest services specifically required pursuant to New York State law must undergo an external peer review in accordance with Government Auditing Standards issued by the Comptroller General of the United States.

3. COSTS:

The proposed amendment implements the requirements of Chapter 651 of the Laws of 2008, which imposes costs on private regulated parties by requiring them to hire an independent reviewer and/or review team to conduct a quality review in accordance with the statute.

The fee paid by a registered public accounting firm to an independent reviewer or review team for a quality review varies depending on the size of the firm and the complexity of the attest engagements subject to quality review. A sole proprietorship or small firm that performs a limited number of attest engagements may undergo an engagement review that costs approximately \$700 or more depending on the complexity of the public accounting firm's practice. A large multi-state or international firm could pay tens of thousands of dollars to undergo a quality review. It is estimated that approximately 85% of registered New York State public accounting firms voluntarily participate in and pay a fee associated with an existing peer review program established by a national professional accountancy organization that is substantially equivalent to the proposed quality review program. No additional fees associated with performing a quality review are anticipated for those firms that currently participate in the voluntary peer review process.

4. MINIMIZING ADVERSE IMPACT:

Education Law section 7410 provides an exception to the mandatory quality review provisions for sole proprietorships and firms with two or fewer professionals. This exemption does not apply to firms that performs attest services for any New York state or municipal entity or performs attest services specifically required pursuant to New York State law.

5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments from the State Board for Public Accountancy, the New York State Society of Certified Public Accountants and the American Institute of Certified Public Ac-

countants, 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 establish the requirements for the mandatory quality review program for public accountancy in order to implement section 6410 of the Education Law, as added by Chapter 651 of the Laws of 2008. Because it is evident from the nature of the proposed regulation that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Trapping

I.D. No. ENV-12-10-00016-A

Filing No. 736

Filing Date: 2010-07-13

Effective Date: 2010-07-28

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

Action taken: Amendment of sections 6.2 and 6.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-1101 and 11-1103

Subject: Trapping.

Purpose: To update and improve trapping regulations.

Text of final rule: Title 6 of NYCRR, section 6.2, entitled “Mink, muskrat, raccoon, opossum, weasel, red fox, gray fox, skunk, coyote, fisher, bobcat and pine marten trapping seasons and bag limits,” is amended as follows:

Repeal existing paragraph 6.2(a)(2) and adopt new paragraph 6.2(a)(2) to read as follows:

(2) *Raccoon, red fox, gray fox, skunk, coyote, opossum and weasel.*

<p>“Open season” November 1st to February 25th, except closed for coyote October 25th to December 10th December 11th to February 15th October 25th to February 15th</p>	<p>“Wildlife management units” 1A, 1C and 2A 5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K and 6N. 5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K and 6N. Body-gripping traps set on land may not be set with bait or lure. All other WMUs</p>
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Repeal existing paragraph 6.2(a)(5) and adopt new paragraph 6.2(a)(5) to read as follows:

(5) *Pine marten.*

<p>“Open season” October 25th to December 10th Closed</p>	<p>“Wildlife management units” 5C, 5F, 5G, 5H, 5J, 6F and 6J All other WMUs</p>
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Title 6 of NYCRR, section 6.3, entitled “General regulations for trapping beaver, otter, mink, muskrat, raccoon, opossum, weasel, red fox, gray fox, skunk, coyote, fisher, bobcat and pine marten,” is amended as follows:

Repeal existing paragraph 6.3(a)(4) and adopt new paragraph 6.3(a)(4) as follows:

(4) *Trap check.*

(i) *Traps set for taking wildlife in the Southern Zone, as defined in*

Environmental Conservation Law section 11-0103, must be visited once in each 24 hours.

(ii) *Traps set for taking wildlife in the Northern Zone, as defined in Environmental Conservation Law section 11-0103, must be visited as follows:*

<p>“Trap check interval” Visited once in each 48 hour period Visited once in each 48 hour period Visited once in each 48 hour period Visited once in each 24 hour period</p>	<p>“Wildlife management units” 5C, 5F, 5G, 5H, 5J, 6F, 6J and 6N 5A, 6A, 6C, 6G, 6H and 6K for traps set in water during the open season for beaver, otter, mink and muskrat. 5A, 6A, 6C, 6G, 6H and 6K for body-gripping traps set on land. 5A, 6A, 6C, 6G, 6H and 6K for restraining traps as defined in subdivision (i) of section 6.3 of this part.</p>
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Repeal existing paragraph 6.3(a)(7) and adopt new paragraph 6.3(a)(7) as follows:

(7) *It is unlawful for any person to disturb a beaver den or house (an aggregate of sticks and mud, either free-standing in water or connected to a bank) at any time. This restriction does not apply to holes in a bank without a den or house. It is unlawful for any person to trap on a beaver dam or within 15 feet thereof, measured at ice or water level, except under the following conditions:*

(i) *During an open otter season.*

(ii) *During a closed otter season when using one of the following traps:*

- (a) *body-gripping trap that measures less than 5.5 inches;*
- (b) *foot encapsulating trap, as defined in subdivision (i) of section 6.3 of this part;*
- (c) *leg-gripping trap (or “foothold trap”) that measures 4.75 inches or less;*
- (d) *cage or box trap, as defined in subdivision (i) of section 6.3 of this part;*

A new paragraph 6.3(a)(17) is added to read as follows:

(17) *“Use of carcasses.” Any carcass, as defined in subdivision (i) of section 6.3 of this part, used as bait and placed or used in conjunction with a leg-gripping trap (“foothold trap”) shall be completely covered at the time the trap is set or visited. Coverings shall include but not be limited to brush; branches; leaves; soil; snow; water; or enclosures constructed of wood, metal, wire, plastic or natural materials; and must completely cover the carcass so that it is not visible from directly above.*

Repeal existing subdivision 6.3(b) and adopt new subdivision 6.3(b) to read as follows:

(b) *“Pine marten permit.”*

(1) *No person shall trap pine marten unless he or she possesses a revocable pine marten permit.*

(2) *An application for a pine marten permit may be obtained from the department’s Ray Brook or Warrensburg offices, or from the department’s web site.*

(3) *The holder of a pine marten permit must comply with all conditions stated on that permit.*

(4) *Only fur-bearer possession tags stamped with the word “marten” may be used to tag pine marten in accordance with the procedure provided for in subdivision (c) of this section.*

Repeal existing subdivision 6.3(e) and adopt new subdivision 6.3(e) to read as follows:

(e) *“Possession of dead animals or their parts.”*

(1) *The carcasses, flesh, organs, glands, head, hide, feet, fur or parts thereof of red fox, gray fox, mink, beaver, muskrat, opossum, raccoon, skunk, weasel, bobcat, fisher, river otter, pine marten, and coyote legally taken may be possessed, transported and bought and sold without restriction.*

(2) *Small game found dead on a public highway during an open season and in a wildlife management unit with an open season may be possessed, transported, bought, and sold by an individual licensed to hunt or trap each respective animal. The tagging and sealing requirements described in subdivision 6.3 (c) of this section are applicable.*

Adopt new subdivision 6.3(i) to read as follows:

(i) *“Definitions.” For the purposes of implementing Title 11 of Article 11 of the Fish and Wildlife Law, and part 6 of this subchapter, these terms have the following meanings:*

(1) *Public highway. The traveled portion of a public highway. Culverts, drainage ditches, and the area under bridges are not considered the traveled portion of a public highway.*

(2) *Carcass. The body or parts thereof, meat, organs or viscera of an*

animal, including fish. Feathers (including feathers with attached skin or entire bird wings), hair (with or without skin or hide), and bones that include no attached meat, organs or viscera, are excluded from this definition.

(3) *Suspension.* This term applies to animals fully suspended in the air by means of the trap anchoring system (typically a chain, cable or wire). It does not apply to traps set in water or to traps that are directly and firmly attached to an elevated structure, such as a tree.

(4) *Restraining trap.* A device used to capture and restrain a mammal. These traps include leg-gripping traps ("foothold traps"), foot encapsulating traps, and cage or box traps.

(5) *Foot encapsulating trap.* A trap with the following mechanical attributes: The triggering and restraining mechanisms are enclosed within a housing; the triggering and restraining mechanisms are only accessible through a single opening when set; the opening does not exceed 2 inches in diameter; and the trap has a swivel mounted anchoring system.

(6) *Cage or box trap.* A type of restraining trap that fully encloses a captured animal within wood, wire, plastic, or metal.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 6.3(a), (e) and (i).

Text of rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8885, email: wildliferegs@gw.dec.state.ny.us

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

Revised Regulatory Impact Statement

1. Statutory authority:

Section 11-0303 Environmental Conservation Law (ECL) addresses the general purposes and policies of the Department of Environmental Conservation (department) in managing fish and wildlife resources. Sections 11-1101 and 11-1103 of the ECL authorize the department to regulate the taking, possession and disposition of beaver, fisher, otter, bobcat, coyote, fox, raccoon, opossum, weasel, skunk, muskrat, pine marten and mink ("furbearers").

2. Legislative objectives:

The legislative objective behind the statutory provisions listed above is to authorize the department to establish the methods by which furbearers may be taken by trapping.

3. Needs and benefits:

The department proposes new regulations to improve the trapping and management of furbearers in New York State. Each element of the proposal is explained below:

Regulate the use of carcasses used as bait

The department proposes to regulate the use of carcasses used as bait to attract furbearing animals to foothold traps. Trappers using foothold traps would be required to cover a carcass so that birds of prey could not see the carcass from directly above.

Birds of prey may be attracted to carcasses that are used to bring furbearing animals close to traps set on the ground. This raises the chances that an owl, hawk, or eagle may be accidentally caught in traps. The use of carcasses to attract furbearing animals is a common practice, especially to lure coyotes, bobcat, fisher, or marten to areas where foothold traps are used. This proposal does not prohibit this practice, but simply requires trappers to fully cover the carcass so that it is not visible from directly above to birds of prey. In practice, this means that the carcass would need to be covered with branches, leaves, snow, water, other natural materials, or human-constructed containers. The trapper would be required to ensure that any carcass used as bait is covered at the time the trap is set or checked. Because birds of prey rely primarily on their sense of vision, while furbearers rely heavily on locating food by scent, the proposed requirement to cover carcasses is expected to be effective at preventing incidental captures of birds of prey while having minimal impacts on the success of efforts to trap legal furbearers.

Reform trap check regulation in the Northern Zone for land sets

The department proposes to establish a uniform 48 hour trap check requirement for body-gripping traps set on land in the entire Northern Zone. (These traps work by killing an animal, typically within 3-5 minutes.) Already, the trap check requirement is 48 hours in much of the Adirondacks and Tug Hill region. This proposal would extend the 48 hour trap check requirement to an additional six wildlife management units (WMUs) primarily in Region 6, but for body-gripping traps only.

The ECL requires a 24 hour trap check in all areas of the Southern Zone. In the Northern Zone, a 48 hour trap check is allowed but the department has regulatory authority to also establish a shorter trap check in all or parts of the Northern Zone. Currently, a 48 hour trap check is allowed for traps set in water throughout the Northern Zone. For traps set on land, a 48 hour trap check is allowed in 8 WMUs. (This was done primarily in recognition

of the remote nature of trapping in the central Adirondacks.) This proposal extends the 48 trap check requirement to an additional 6 WMUs, primarily in Region 6 (and also a part of Clinton County), but only for body-gripping traps. By design, body-gripping traps are designed to catch and kill an animal quickly, typically within 3-5 minutes. Therefore, from an animal welfare perspective there is no difference whether these traps are checked at a 24 hour or 48 hour interval. Allowing the longer interval will accommodate trappers who run long "trap lines" and enable them to save fuel and time when checking their traps.

Reform regulation on trapping near a beaver dam during a closed otter season (statewide)

The department proposes to allow the use of selective traps on or near beaver dams during a closed otter season on a statewide basis. The current regulations prohibit the placement of any traps on or within 15 feet of a beaver dam, regardless of the species being sought, during a closed trapping season for otter. This regulation was enacted to afford protection to otter from being caught incidentally in traps set for other species, primarily beaver. Specifically, the department proposes to allow the use of the following traps on or within 15 feet of a beaver dam during a closed otter season: body-gripping traps that measure less than 5.5 inches; foot encapsulating traps with an opening that measures 2 inches or less; foothold traps that measure 4.75 inches or less; and cage or box traps. The proposal would maintain the protection of otter while providing a liberalization that would benefit trappers seeking other species including muskrat, mink, raccoon, and fox.

Extend land trapping in the Northern Zone

The department proposes to allow Northern Zone trappers to trap for all land species (e.g., foxes, coyotes, raccoon) except bobcat, fisher, and American marten until February 15th. (The season currently closes on December 10th.) To lower the chances that fisher or marten may be caught during the closed season, trappers would not be allowed to use body-gripping traps on land during the lengthened trapping season unless the traps are set without lures or baits.

Currently, land trapping seasons in much of the Northern Zone allow for the taking of bobcat, fisher, and marten from October 25th through December 10th. During this period trappers may also harvest other furbearers, including raccoon, red fox, gray fox, skunk, coyote, opossum, and weasel. Trappers may continue to harvest these other furbearers in WMUs 6A, 6C, 6G, 6H, and 6K through February 15th. The department proposes to extend land trapping seasons for these furbearers (excluding bobcat, fisher, and marten) in those WMUs where the season currently closes on December 10th. This extension would allow for the trapping of raccoon, red fox, gray fox, skunk, coyote, opossum, and weasel in WMUs 5A, 5C, 5F, 5G, 5H, 5J, 6F, 6J, and 6N from October 25th through February 15th resulting in a consistent season for these furbearers within the entire Northern Zone. During the lengthened trapping season in these WMUs, body-gripping traps would not be allowed to further protect fisher and pine marten.

Expand marten trapping to new WMUs

The department proposes to open four new WMUs to marten trapping (currently three WMUs are open to marten trapping). Also, the regulations pertaining to the issuance of a marten trapping permit would be simplified.

In 1978, and after a 42-year closure, New York reopened the trapping season for American (pine) martens in a 500-mi² area of the High Peaks region of the Adirondacks. Since that time the department has incrementally increased the area where trappers can legally harvest martens; currently the open trapping area consists of approximately 6,000-mi² in WMUs 5F, 5H, and 6J (i.e., central Adirondacks). An increase in the open trapping area over the past 32 years has been justified based on an expanding marten population into its historic Adirondack range. This population expansion has been documented by incidental captures by trappers targeting fishers and other furbearers, as well as observations of biologists, Environmental Conservation Officers, and Forest Rangers. Therefore, the department proposes to expand the open trapping area for martens to include WMU 5C, 5G, 5J, and 6F in addition to the existing open area of WMU 5F, 5H, and 6J. This expansion would result in an additional area of approximately 4,300-mi² where martens could be trapped. All other existing regulations for the taking of marten would remain in effect, ensuring effective harvest and population monitoring of this species. Due to a conservative marten trapping season and limited access to much of this region, the division expects that expanding the open trapping area would not negatively affect New York's marten population.

Possession of dead furbearing animals found on public highways

The department proposes to allow trappers and small game hunters to transport, possess, sell, or buy dead furbearers found on the highway. The regulation would allow licensed trappers or small game hunters to keep furbearing animals if found in a location and during a time when the respective trapping or small game hunting season is already open. For example, in an area with an open fisher trapping season, a licensed trapper would be able to possess a fisher found dead on a public highway.

This proposal would allow the lawful possession of road-killed animals if they are collected by a licensed individual, and the respective trapping or small game hunting season is open. (Small game hunters are allowed to hunt bobcats, coyotes, foxes, and raccoons.) This would eliminate the waste of perfectly good pelts, and in the case of certain species (e.g., bobcat, fisher, marten, otter) enable the easier collection of biological information on animals that otherwise would not be examined. For species that require pelt seals, trappers and small game hunters would still be required to get a pelt seal for the continued legal possession of road-killed animals. Thus, the department will be able to collect more information on the population status of these species than is currently available.

Definition of terms

Several terms used in the Environmental Conservation Law should be defined to provide clarity for both trappers and enforcement personnel. The department proposes to define the term "public highway" to clearly include the traveled portion of the highway; to define "carcass" to provide for the enforcement of the new regulation on the restriction on the use of carcasses; to define the term "suspension" so that the prohibition on setting traps in a manner that suspends an animal is clear; and several modern traps are defined so that they are clearly allowed for use wherever foothold traps are lawful.

4. Costs:

None, other than the administrative costs associated with notifying trappers of the changes, and the costs associated with enforcing new regulations.

5. Local government mandates:

This rulemaking does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork:

The proposed rules do not impose additional reporting requirements upon the regulated public (trappers).

7. Duplication:

There are no other local, state or federal regulations concerning the taking of furbearing animals.

8. Alternatives:

With the exception of the proposal to regulate the use of carcasses near traps, the proposals generally liberalize trapping opportunities or simplify trapping regulations. In the case of the proposal to regulate the use of carcasses to avoid the capture of birds of prey, the department could step up our efforts to further educate the public about the need to take measures to protect these species. However, reasonable outreach efforts have already occurred and given the serious consequences associated with capturing, injuring, or killing birds of prey, a regulatory approach with the associated enforcement capacity should now be implemented.

9. Federal standards:

There are no federal government standards.

10. Compliance schedule:

Trappers will be required to comply with the new rule as soon as it takes effect.

Revised Regulatory Flexibility Analysis

The purpose of this rule making is to amend trapping regulations to improve trapping and furbearer management programs in New York State. Small businesses or local governments will not be directly affected by the proposed rule making because it applies only to individual persons who are licensed to trap in New York State. Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rulemaking may increase the number of participants or the frequency of participation in trapping. Some small businesses currently benefit from trapping because trappers spend money on goods and services, and thus an increase in trapper participation could lead to positive economic benefits for such businesses. However, this rule will not impose any new reporting, record-keeping or other compliance requirements on small businesses or local governments. For the above reasons, the department has concluded that this rulemaking does not require a formal Regulatory Flexibility Analysis.

Revised Rural Area Flexibility Analysis

The purpose of this rule making is to amend trapping regulations to improve trapping and furbearer management programs in New York State. Trappers will not have to comply with any new or additional reporting or record-keeping requirements, and no professional services will be needed for people living in rural areas (or elsewhere) to comply with the proposed rule. Furthermore, this rule making is not expected to have any adverse economic impacts on any public or private entities in rural areas of New York State. For these reasons, the department has concluded that this rulemaking does not require a formal Rural Area Flexibility Analysis.

Revised Job Impact Statement

The purpose of this rule making is to amend trapping regulations to improve trapping and furbearer management programs in New York State.

Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rulemaking may slightly increase the number of participants or the frequency of participation in trapping statewide. Trapping does not often involve professional guide services or other employment opportunities, and relatively few jobs exist as a direct result of trapping. The department expects that the net impact on jobs or employment opportunities to be negligible.

For all of the above reasons, the department anticipates that this rulemaking will have no impact on jobs and employment opportunities. Therefore, the department has concluded that a job impact statement is not required.

Assessment of Public Comment

The department received comments on the proposal. The comments and the responses follow:

Comment:

Small body-gripping traps used on land during the extended trapping period in the Northern Zone should be allowed.

Response:

The final rule removes the requirement to use only restraining traps in the Northern Zone from December 11-February 15. The use of body-gripping traps with bait or lure will be prohibited to protect fisher and marten.

Comment:

Additional opportunity for land trapping in the Northern Zone is welcomed, and may provide for management of furbearer populations.

Response:

The department concurs.

Comment:

Trappers should not be required to "ensure that any carcass used as bait is covered at all times," because trappers are unable to control acts of nature that may uncover the carcass. The proposal already requires that the carcass must be covered at the time the trap is set or visited.

Response:

The department concurs and the final regulation has been amended to remove this statement.

Comment:

The department's regulation on the use of carcasses should require that traps be placed in enclosures that will exclude birds.

Response:

This is not practical since foothold traps are typically set in a manner that takes advantage of the investigative behavior of furbearers. The use of an enclosure would preclude effective trapping. The new regulation requires that carcasses be covered so that birds of prey are not attracted to these locations.

Comment:

The department should clarify the requirements for tagging, transportation, buying and selling of any animal collected by a licensed hunter or trapper on a roadway.

Response:

The final regulation clearly allows the transportation, buying, and selling of these animals without restriction.

Comment:

In the definition of "carcass," the word "meat" should be removed. A dried wing, hair or piece of bone contains small amounts of meat that are useful as attractants for some furbearers.

Response:

The definition of "carcass" was rewritten to clearly allow the use of visual attractants. To avoid a law enforcement loophole, the department has retained the word "meat." This means that a portion of a carcass could not be used unless it was covered. It also means that bones may have no attached meat to avoid the chances that a bird of prey may be caught. The department will issue guidance for trappers on the new restrictions, including clarification that small amounts of dried muscle is not a violation.

Comment:

Additional opportunity for trapping marten will provide for improved monitoring of this species.

Response:

The department concurs.

Comment:

A 48 hour trap check in the Northern Zone for body-gripping traps set on land will allow additional opportunity and provide better management of furbearers.

Response:

The department concurs.

Comment:

Trapping near beaver dams is welcome because they are a focal point for many furbearers. DEC should modify the proposal to allow the use of cable restraints for nuisance beaver; and allow the use of modified body-gripping traps.

Response:

The use of cable restraints for catching nuisance beaver is authorized by a different law (Title 5 of the Fish and Wildlife Law), and they can only be used in conjunction with permits issued under 11-0521 to resolve wildlife nuisance or damage. The purpose of the proposal is to liberalize trapping on and near beaver dams to increase trapping success for raccoons, foxes, and coyotes. River otter may still be vulnerable to capture, and the use of large body-gripping traps raises the chances that an otter may be killed. The department has not made the change recommended in this comment.

Comment:

DEC should drop the proposal to allow trapping close to muskrat houses. This change will not make it easier for young trappers to trap muskrats because muskrat lodges are in deep water; trappers will not be challenged; muskrats may be overharvested; future restrictions on muskrat harvest should not include reducing the length of the season; DEC should instead open trapping seasons on a weekend when the young people can go afield; and the change would increase the chances that birds would be caught in traps. The proposal is not needed to aid young trappers to more easily catch muskrat. The proposed change will also increase the chances that a bird may be captured. It may also increase the chance that an otter would be captured in areas where otter trapping is not allowed.

Response:

The department has dropped the proposal to change the muskrat trapping regulation, and the notice of adoption exclude the change that would have allowed trapping within 5 feet of a muskrat lodge.

Comment:

The department's pine marten permits should remain free.

Response:

The department concurs.

Comment:

The proposed change to allow trapping within 15 feet of a beaver dam will result in the capture of otter in areas closed to otter trapping. The small foothold traps that would be permitted also can catch river otter, and some people may have a hard time releasing captured otter.

Response:

The use of small foothold traps is appropriate and the capture of river otter will be minimized by the use of these traps and other selective devices. Also, the release of live river otter is not an unreasonable task for most trappers.

Comment:

The definition of the term "suspension" should accommodate the use of body-gripping traps.

Response:

The department concurs; this will be explained in the annual Hunting and Trapping Law and Regulations Guide ("Guide").

Comment:

The fisher and marten trapping season should start and end later allowing trappers to take these furbearers when they are prime.

Response:

The department has collaborated with Cornell University to develop a furbearer management system, including examining the adjustment of season lengths and timing for fisher (and subsequently marten). Results of this research are not yet available and therefore, the department does not plan to change the trapping season dates for these two species at this time.

Comment:

The proposal to allow the possession of road-killed wildlife is sound, however, the department should clarify that animals may also be transported, bought, and sold as if they were part of the legal take of each respective species. The department should also ensure that both beaver and coyote may be kept, even though they may not be pelt-sealed. Also, it should be clear that any furbearer with an open season in a location where it is found dead on a highway may be kept.

Response:

The department concurs, and the final regulation has been modified to clarify these points.

Comment:

Cable restraints should be included in the definition of a restraining trap.

Response:

The proposal amends regulations pertaining to trapping pursuant to a trapping license and the authorities contained in Title 11 of the Fish and Wildlife Law ("Trapping"). The use of cable restraints is authorized by Title 5 of that law (section 11-0521) for use in conjunction with permits issued to resolve wildlife nuisance or damage and the department administers those laws separately from Title 11; the definitions included in this rulemaking apply only to Title 11 and its implementing regulations. Therefore, cable restraints have not been added to the definition of a restraining trap.

Comment:

The department should clarify what items may be used as visual attractants.

Response:

The definition of "carcass" has been modified to clearly identify visual attractants that may be used to attract furbearers. However, while it is not feasible to list all potential visual attractants, the annual Guide will be used to explain any subsequent questions posed by trappers about the interpretation and enforcement of the new regulation.

Comment:

The fisher season should be extended because their range and populations are expanding.

Response:

The department did not address the length of fisher trapping seasons in this proposal. Fisher are monitored and their populations are increasing, however, the department is not prepared to propose additional trapping opportunity at this time.

Comment:

The department should be clear about setting traps near muskrat lodges. In particular, it is not clear whether a trap may be set in front of a muskrat den.

Response:

The department has dropped the proposal to allow trapping within five feet of a muskrat lodge.

Comment:

To ensure selective trapping, the use of fish or muskrat carcasses should not be allowed.

Response:

The new regulation on the use of "exposed carcasses" prohibits the use of all exposed carcasses, including fish or muskrat carcasses. They will need to be covered at the time the trap is checked. These requirements will be clarified in the annual Guide.

Comment:

The set back distance for trapping near muskrat houses should be three feet, not five.

Response:

The department has dropped the proposal to allow muskrat trapping within five feet of a muskrat lodge.

Comment:

The department should allow bobcat trapping during the extended trapping period in the Northern Zone.

Response:

The department does not have adequate information to justify additional trapping of bobcat in the Northern Zone.

Comment:

The department should use the term "foothold trap" instead of "leghold trap" in all its regulations.

Response:

The term "foothold trap" is accurate because anatomically, the foot of an animal is held in foothold traps, not the leg. However, the Environmental Conservation Law currently uses the term "leg-gripping" so it is necessary to retain the use of this term in the supporting regulations. The department's proposal includes a definition of restraining traps, including the use of the term "foothold trap."

Comment:

The department should support the use of cable restraints for trapping beaver.

Response:

Cable restraints are very effective and humane for trapping beaver, and may be used under a special permit issued to address wildlife nuisance or damage. However, the department does not have the authority to allow their use during a regular trapping season, but supports legislative proposals to authorize the use of cable restraints for trapping beaver during trapping seasons.

Comment:

The changes to the trap check regulations are sensible. The department should support allowing a 48 hour check for traps set in water throughout the state.

Response:

The department concurs.

Comment:

The restriction on the use of carcasses should be changed so that a trap could be set beyond 20 or 30 feet from an exposed carcass.

Response:

The department considered establishing a set-back distance for setting traps near exposed carcasses, but decided that a requirement that all carcasses be covered would be easier to enforce, and more understandable.

Comment:

The definition of suspension should ensure that body-gripping traps may be used on running poles.

Response:

The Guide will clarify that these are allowed.

Comment:

The restriction on the use of carcasses should include a size description of bait.

Response:

There is no intention to allow the use of a piece of meat of any size to attract furbearers, unless that meat is covered. For example, a "chunk" of beaver meat, with or without the associated bones, may be used to attract a coyote or fisher, but if left uncovered, the meat could attract a bird of prey. Therefore, the wording of the final language has been amended to clarify that pieces of meat also need to be covered.

Comment:

The department's regulations are far too complicated, and make it difficult to lawfully trap.

Response:

The department generally agrees that uniform and simple regulations enhance compliance and enforcement. In fact, this rulemaking includes several changes intended to reduce complexity while not jeopardizing responsible management of furbearer populations. However, some degree of complexity is necessary to strike a balance between allowing opportunity on species able to withstand harvest pressures in at least some of their range while ensuring that adequate protection is afforded to those species or parts of the state where more liberal opportunity is not sustainable.

NOTICE OF ADOPTION

Chronic Wasting Disease

I.D. No. ENV-15-10-00007-A

Filing No. 735

Filing Date: 2010-07-13

Effective Date: 2010-07-28

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

Action taken: Amendment of Part 189 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301 and 11-0325

Subject: Chronic wasting disease.

Purpose: To update chronic wasting disease regulations.

Text or summary was published in the April 14, 2010 issue of the Register, I.D. No. ENV-15-10-00007-P.

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

Text of rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: wildliferegs@gw.dec.state.ny.us

Additional matter required by statute: A negative declaration has been prepared pursuant to Article 8 of the Environmental Conservation Law and is on file with the Department of Environmental Conservation.

Assessment of Public Comment

The department received comments from four persons on the proposed rule.

Three people commented that the changes will save money and convenience for both the state and for the public. The department concurs with these comments. One person expressed concern that the department continue to carefully monitor chronic wasting disease to contain any future outbreaks. The department agrees and intends to continue sampling deer in all areas of the state to ensure early detection of any new cases of chronic wasting disease, including in the former containment area. The department also received support for the addition of moose as one of the species regulated by the chronic wasting disease regulations.

The department has adopted the regulation as originally proposed.

Department of Health

NOTICE OF ADOPTION

Circulating Nurse Required

I.D. No. HLT-09-10-00006-A

Filing No. 720

Filing Date: 2010-07-13

Effective Date: 2010-07-28

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

Action taken: Amendment of section 405.12 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2800, 2803(2) and 2805-s

Subject: Circulating Nurse Required.

Purpose: To require Registered Nurses (RNs) to be assigned and physically present in the operating room when surgery is being performed.

Text or summary was published in the March 3, 2010 issue of the Register, I.D. No. HLT-09-10-00006-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.

Division of Human Rights

NOTICE OF ADOPTION

Payment of Civil Fines and Penalties

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

Filing No. 719

Filing Date: 2010-07-12

Effective Date: 2010-07-28

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

Action taken: Addition of section 466.12 to Title 9 NYCRR.

Statutory authority: Executive Law, section 297.4(c)

Subject: Payment of civil fines and penalties.

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

Text or summary was published in the April 28, 2010 issue of the Register, I.D. No. HRT-17-10-00002-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Labor

EMERGENCY RULE MAKING

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

I.D. No. LAB-30-10-00002-E

Filing No. 715

Filing Date: 2010-07-09

Effective Date: 2010-07-09

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

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

Statutory authority: Labor Law, section 21

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

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

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

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

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

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

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

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

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

Subpart 177.4, entitled "Nurse Coverage Plans," provides that health care employers are required to prepare and implement a "Nurse Coverage Plan" within ninety days of the effective date of this part and also sets forth the requirements for such a plan.

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 6, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

Section 21 of the Labor Law provides the Commissioner with authority to issue regulations governing any provision of the Labor Law as she finds

necessary and proper. This rule is proposed pursuant to Section 167 of the Labor Law enacted by chapter 493 of the Laws of 2008. The effective date of the law is July 1, 2009.

2. Legislative objectives:

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

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

3. Needs and benefits:

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

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

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

4. Costs:

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

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

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

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

5. Paperwork:

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

6. Local government mandates:

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

7. Duplication:

This rule does not duplicate any state or federal regulations.

8. Alternatives:

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

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

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

The Department also received a comment from employee representatives about requiring the filing of all Nurse Coverage Plans with the Commissioner of Labor. The Department considered such a filing requirement but decided it was unnecessary since the Commissioner will request such Plans once a complaint has been received about an employer. Moreover, since employees or their representatives are entitled to receive the Plan on request or otherwise have access to the plan, they can take immediate steps to ensure that the Plan has been prepared and notify the Commissioner if it has not.

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

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

9. Federal standards:

There are no federal standards with like requirements.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

This rule will apply to all health care employers which include any indi-

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

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

3. Professional services:

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

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

4. Compliance costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. At the time this legislation was before the Governor for action, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs - attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime - will be offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the one year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

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

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

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

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

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

7. Small business and local government participation:

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

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

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

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

3. Costs:

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

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

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

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

4. Minimizing adverse impact:

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

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

5. Rural area participation:

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

Job Impact Statement

Health care employers covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. At the time Section 167 of the Labor Law (the statutory authority for this rule) was before the Governor for signature, the Division of the Budget estimated compliance would cost approximately \$13 million in its first year, which was attributable to the hiring of per diem nurses to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime. Accordingly, this rule would not have a substantial adverse impact on jobs; in fact it will create more jobs.

**NOTICE OF EMERGENCY
ADOPTION
AND REVISED RULE MAKING
NO HEARING(S) SCHEDULED**

New York State Worker Adjustment and Retraining Notification Act (WARN)

I.D. No. LAB-09-10-00005-ERP

Filing No. 716

Filing Date: 2010-07-09

Effective Date: 2010-07-09

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

Action Taken: Addition of Part 921 to Title 12 NYCRR.

Statutory authority: Labor Law, section 860-f

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

Specific reasons underlying the finding of necessity: The effective date of the regulations coincides with the effective date of their authorizing legislation, the New York Worker Adjustment and Retraining Notification (WARN) Act, a new law that becomes effective February 1, 2009. The Act governs the provision of notice to certain employees who will lose employment through plant closings, mass layoffs, or reductions in work hours. The purpose of the authorizing statute is to ensure that the employees are aware of future actions that will affect their employment so that they can take steps to secure new employment, be retrained for more readily available work, and otherwise make arrangements to provide for their needs and those of their families when their employment ends. The law is also intended to ensure the ability of the Department of Labor and its partner, the Workforce Investment Board, to provide Rapid Response services to the affected employees prior to their employment loss. These services include providing employees with information regarding unemployment insurance, job training, and reemployment services. These regulations fill in gaps found in the law in order to more fully inform employees of their obligations and workers of their rights under the law.

The emergency promulgation of these regulations is necessitated by the dramatic job losses currently being suffered within the state and the need to ensure that the notice requirements detailed in the regulation are available to protect workers affected by such job losses and return them quickly to work. Between April 2008 (the start of the economic downturn in New York State) and May 2010, New York State's private sector job count (seasonally adjusted) decreased by 288,000, or 3.9 percent, to 7,025,300. The statewide total nonfarm job count (includes both private and public sectors) decreased over the same period by 270,500, or 3.1 percent, to 8,557,800 in May 2010. New York State's unemployment rate (seasonally adjusted) climbed from 4.8 percent in April 2008 to 8.3 percent in May 2010. Over the same time period, New York City's rate increased from 4.7 percent to 9.6 percent. The number of unemployed state residents increased from 461,100 in April 2008 to 806,600 in May 2010.

The impact of these job losses on workers, their families, and their communities can be staggering, more so if workers are unaware that plant closings and layoffs are coming. The state WARN Act is designed to give workers time to avoid long periods of unemployment by affording them time to search for new work, retrain for more secure long-term employment, and take advantage of reemployment services which will ensure a quick return to work after their former employment ends. The proposed rules will ensure timely notice to the Department and early intervention of Rapid Response teams in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Such activities also avoid or shorten periods of unemployment, thereby reducing employer charges associated with the receipt of unemployment insurance by their former employees. On the other hand, employees need to know of the availability of unemployment insurance benefits following these employment losses since the program is designed to provide an economic safety net to the workers and their families. All efforts that will quickly transition workers into new employment when their former jobs end, or that ensure some continued income during unemployment, will allow workers to continue to make needed purchases such as housing, food, heat and other utilities and to maintain the payment of school and property taxes that support their local community.

Enacting emergency regulations, which will immediately clarify the scope, timing, and content of the notice requirements, supports the goals set forth above and protects the general welfare of the state.

Subject: New York State Worker Adjustment and Retraining Notification Act (WARN).

Purpose: To provide government enforcement and more advance notice to a larger number of workers than under the Federal WARN law.

Substance of emergency/revised rule: The proposed rule creates a new section of regulations designated as 12 NYCRR Part 921 entitled "New York State Worker Adjustment and Retraining Notification Act" created under Chapter 475 of the Laws of 2008. This Act requires employers of fifty (50) or more employees to provide at least ninety (90) days notice to affected employees and representatives of affected employees, the New York State Department of Labor, and local workforce partners before ordering a plant closing, mass layoff, reduction in work hours that falls within the employment losses covered by the law. At least twenty-five (25) employees must be affected for the notice requirement to be triggered. The rule contains exceptions to the notice requirement for certain employ-

ers who are making good faith efforts to avoid employment losses and have reasonable expectation that these efforts will successfully forestall the plant closing, mass layoff, or reduction in work hours.

Many employers in the State are already subject to the federal WARN Act (29 USC §§ 2101 – 2109 and 20 CFR 639.3). The State WARN Act expands the notice requirements to a larger group of employers and, concomitantly, extends its protections to more employees. The State Act also gives the Commissioner of Labor the authority to enforce the law on behalf of affected employees who did not receive appropriate notice of a plant closing, mass layoff, or covered reduction in work hours from their employer in violation of the law. Labor Law § 860-f(1) states that the Commissioner of Labor "shall prescribe such rules as may be necessary to carry out this article."

Subpart 921-1, entitled "Purpose and Definitions" sets forth the purpose and defines the terms used in the part. Section 921-1.1(d) defines "employer" as "any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees within New York State, excluding part-time employees, or fifty (50) or more employees within the state that work in aggregate at least 2,000 hours per week." Section 921-1.1(a) defines "affected employee" as "an employee who may reasonably be expected to experience an employment loss as the result of a proposed plant closing, mass layoff, relocation, or covered reduction in hours by the employer." The definition of affected employee in section 921-1.1(a) has been expanded to exclude an officer, director or shareholder. Further, the definition of employer has been expanded to clarify that the number of employees is to be measured for the purpose of establishing coverage on the date that notice was first required to be given.

Subpart 921-2, entitled "Notice," requires covered employers to provide notice to affected employees at least 90 calendar days prior to an event that triggers the notice requirement. This section enumerates the factors that trigger the notice requirement. It further spells out the contents of the notice, how notice is to be served and who must receive notice. Further, we have revised the standard statement that must be given to each employee in their WARN Notice to reflect the fact that not all employers give notice when required by law. Some, especially in the financial services arena, give notice on the date of layoff along with the requisite sixty days pay.

Subpart 921-3, entitled "Extension or Postponement of Mass Layoff Period" requires an employer to give additional notice if the triggering event is extended or postponed. Section 921-3.1 states that an "employer that previously announced and carried out a short-term layoff of six (6) months or less which is being extended beyond six (6) months due to business circumstances (e.g., unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff must give notice required under the Act and this Part as soon as it becomes reasonably foreseeable that an extension is required." Section 921-3.2 states that "if, after notice has been given, an employer decides to postpone a plant closing, mass layoff, or covered reduction in work hours for less than ninety (90) days, additional notice shall be given as soon as possible after the decision to postpone." This subpart also prohibits "rolling notice". Also, if, after notice has been given, the employer determines that it will continue operations and that the plant closing, mass layoff, relocation, or reduction in work hours will not occur, the rule now requires employers to provide a notice of rescission. This notice must be given to all affected employees as soon as possible after the employer determines it will continue operations. Information regarding employees who must receive this notice would be in the employer's possession as information regarding the affected employees would have already been compiled by the employer when the initial WARN notice was given.

Subpart 921-4, entitled "Transfers," states that "notice is not required when an employer offers to transfer an employee to a different site of employment within a reasonable commuting distance with no more than a six (6)-month break in employment, regardless of whether the employee accepts such employment, or when an employer offers to transfer the employee to any other site of employment regardless of distance with no more than a six (6)-month break in employment and the employee accepts within thirty (30) days of the offer or of the closing or layoff, whichever is later."

Subpart 921-5, entitled “Temporary Employment,” states that “notice is not required if the closing is of a temporary facility, or if the closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking.” This subpart also makes clear that the employer must demonstrate that the employee understood the job was temporary either from having received notice or industry practice.

Subpart 921-6, entitled “Exceptions,” provides exceptions to the 90-day notice period for which the employer bears the burden of proof. This subpart includes exceptions for faltering companies, unforeseeable business circumstances, natural disasters, strikes or lockouts, and economic strikers. The employer is responsible for providing documentation in support any claimed exception.

Subpart 921-7, entitled “Enforcement by the Commissioner of Labor,” describes the administrative procedure followed by the Department when a WARN violation is suspected or alleged. Section 921-7.2 states that an employer who fails to give notice, as required, is subject to a civil penalty of \$500 for each day of the employer’s violation. Paying employees their regular wages and benefits over the period of a violation that exceeds three weeks does not exempt the employer from the civil penalty. Section 921-7.3 states that an employer who fails to give notice is liable to each employee for back pay and the value of any benefits to which the employee would have been entitled. Further this subpart provides for an administrative appeal to the Commissioner and then an appeal under Article 79 of the CPLR.

Subpart 921-8, entitled “Confidentiality of Information Obtained by the Commissioner of Labor,” requires that information obtained by the Commissioner through the administration of this Act be maintained as confidential and not be published or open to public inspection.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on March 3, 2010, I.D. No. LAB-09-10-00005-EP. The emergency rule will expire September 6, 2010.

Emergency rule compared with proposed rule: Substantial revisions were made in sections 921-1.1(a), (e)(7)(iii), (f)(1)(ii), (iv), (v), 921-2.3(b)(5), (c)(7), 921-3.1, 921-3.2(a), 921-3.3, 921-6.1, 921-7.2(a) and 921-7.4(a).

Text of rule and any required statements and analyses may be obtained from: Maria Colavito, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 508, Albany, New York 12240, (518) 458-4380, email: nysdol@labor.ny.gov

Data, views or arguments may be submitted to: Kevin E. Jones, Esq., New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, New York 12240, (518) 457-4380, email: nysdol@labor.ny.gov

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

Summary of Revised Regulatory Impact Statement

1. Statutory authority:

Labor Law § 860 as added by Chapter 475 of the Laws of 2008 sets forth the requirements of the State Worker Adjustment and Retraining Notification Act. Section 860-f states that the Commissioner of Labor shall prescribe rules necessary to carry out Article 25-A of the Labor Law.

The Department previously published a Notice of Proposed Rule-making on February 18, 2009 and extended several times, which added a new Part 921 to 12 NYCRR entitled the New York State Worker Adjustment and Retraining Notification Requirements. The previously published proposed rulemaking prescribed rules to carry out Article 25-A of the Labor Law. The current proposed rulemaking incorporates much of the prior proposed rulemaking with revisions made based upon comments received from various interested parties.

2. Legislative objectives:

Article 25-A establishes the New York State Worker Adjustment and Retraining Notification (WARN) Act intended to provide more advance notice to a larger number of workers who are laid off from their jobs than under the federal WARN law. Under the State WARN Act, companies with at least 50 employees must provide at least 90 days’ notice to affected employees and their representatives, the New

York Department of Labor, and the local Workforce Investment Board(s) where the requisite number of employees will suffer an employment loss. This notice allows the Department to provide workers reemployment and retraining services in advance of their employment loss. This early intervention will reduce or avoid periods of unemployment, ensure that workers are aware of job placement and retraining services, and, if attempts to transition workers into new employment are unsuccessful, make them aware of the availability of unemployment insurance benefits as an economic safety net for them and their families. Under the Act, the Commissioner of Labor is required to enforce the law by recovering back wages and the value of the cost of any benefits to which the employee would have been entitled and by imposing penalties against such employers.

3. Needs and benefits:

Workers whose employment is affected as a result of plant closings, mass layoffs or significant reduction of hours require early and adequate notice to find new employment and prepare for their future. As the downturn in the economy increasingly impacts companies large and small, larger numbers of workers are impacted by such events. At the time of this writing, New York State’s seasonally adjusted unemployment rate fell over the month from 8.8 percent in February to 8.6 percent in March 2010, matching a 26-year high. The number of unemployed state residents increased from 832,200 to 868,600 over the same period.

Certain job sectors in the state, such as manufacturing, continue to decline, signaling a growing need to retrain workers exiting jobs in this sector. All in all, the current economic climate makes it essential to provide the Department with early access to workers who will be losing employment so that they can receive information and assistance that will return them to work as soon as possible following their job loss. During 2009, the Department received 400 WARN notices involving approximately 41,000 employees. Many of these workers would not have received notice under the federal WARN Act which only applies to larger employers in the state.

Early intervention to assist workers with obtaining new jobs or to help them enroll in training programs is also essential to avoiding the economic impact of large-scale employment losses on workers, their families, and their communities. Large-scale job losses addressed by the state law impact employee spending and lead to the general decline of the local economy. This affects businesses that serve the workforce, adversely impacts local sales and property taxes, housing values, and the like. Early intervention leading to reemployment also reduces dependence upon unemployment insurance benefits for laid-off workers. Although such benefits are a critical economic safety net for workers and their families, reemployment is always preferable and provides greater income to workers. Reemployment reduces UI charges to individual employers and also UI benefit costs. Reduction of UI benefit costs is particularly beneficial to the State at this point in time since the State’s UI Trust Fund has a deficit balance which is expected to last for several years.

Finally, the state Act and regulations also meet a significant need by providing workers with an effective mechanism to seek redress for employer violations of the notice requirements. Currently, the federal WARN law requires aggrieved employees to bring private lawsuits to sue for redress, a remedy that has been infrequently used over the years. The State WARN Act and these regulations give the Commissioner of Labor the authority to recover back wages and benefits on behalf of such workers and to impose civil penalties against employers who fail to provide the required WARN notice.

Since the WARN Act took effect February 1, 2009, the Department has issued four (4) Notices of Violation and collected \$7,500 in penalties. A number of employers also extended their notice period or voluntarily paid back wages and benefits to employees upon being notified of a potential violation by the Commissioner. There are approximately twenty (20) WARN investigations currently underway.

4. Costs:

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. To begin, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations

referenced in the rule. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. In order to further clarify when a WARN notice is required, we have added language from the federal regulations to make it clear that we make such determinations based upon the workers employed on the day that that notice was due. However, these employers will not be impacted by the rule unless they engage in an employment loss that meets the triggers set forth in the Act and the rule. Additionally, the rule requires employers to provide a notice of rescission to all affected employees if it is determined that the covered event will not occur. While there is a cost associated with providing this notice if applicable, employers are able to provide this notice via electronic mail or by inserting this notice into envelopes containing paychecks or direct deposit statements. Both of these methods will result in minimal costs to the employer. As noted elsewhere in this document, employers with 100 or more employees are already required to provide WARN notice for covered employment losses.

For those employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The rule minimizes costs by permitting delivery of the notice with employee paychecks or direct deposit statements or by employer-sponsored electronic mail. First class mail delivery costs would still be minimal as the notice is a one or two page document. Moreover, for those employers already required to provide notice under the federal WARN Act, additional costs will be limited to those associated with providing notice to more employees. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as all information required under the rule is included. Additionally, we have changed the standard statement that must be given to each employee in their WARN Notice to reflect the fact that not all employers give notice prior to the date when the notice is due. Some, especially in the financial services arena, give notice on the date of layoff along with the requisite sixty days pay. Further, as set forth above, if an employer is required to serve a notice of rescission, costs can be minimized by serving this notice on the employees via electronic mail or by inserting the notice in envelopes containing paychecks or direct deposit statements. Both of these methods would ensure that the employer does not incur additional postage costs when informing employees that the covered employment loss will no longer occur.

Apart from employee notice, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are required. Where an employer has given notice of a mass layoff and extends the duration of that layoff, or where an employer has given notice of an employment loss and postpones or rescinds that action, that employer must give notice of the extension, postponement or rescission as soon as possible. Finally, an employer who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required notice, must still provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services with the final paycheck or through a separate notice provided at the time of termination. The rule specifically provides the content of the notice for the convenience of regulated parties.

The State WARN Act does allow for certain exceptions to the 90 day notice requirement. Employers who wish to assert an exception to the notice requirement must provide the Commissioner evidence establishing entitlement to such exception. Such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations or be readily available, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay, and other damages, as well as costs associated with their defense. During the first year of its enforcement of the rule, the Department has assessed penalties in only a handful of cases; in most situations, employers who failed to provide notice have either

extended the notice period voluntarily to come into compliance or have paid back wages and benefits due under the rule to employees.

5. Paperwork:

The Department's enforcement will require paperwork associated with investigations and, where necessary, hearings to determine violations and to impose appropriate penalties.

Employers charged with violating the law will have to document their entitlement to exemptions from the notice provisions. In the event of appeals, there will be additional paperwork for the Department and employers to reproduce the hearing record and prepare necessary court filings.

6. Local government mandates:

The state WARN Act and the proposed rule do not apply to state, local, or tribal governmental entities except under circumstances where such otherwise exempt entities are engaging in commercial operations, as already provided in federal WARN regulations.

7. Duplication:

There is no duplication of existing state rules or regulations. There is some overlap of the proposed rule with federal WARN regulations. The Department has drafted the state regulations to be consistent with federal rules to the extent possible, while still meeting the spirit and intent of the more stringent state law.

The Department's procedural rules for other Departmental hearings under 12 NYCRR Part 701 will be used for any administrative hearings conducted under the WARN Act, thereby avoiding duplication in this regard.

8. Alternatives:

The Department has considered a number of alternatives to various provisions of the proposed rule and, where possible, has selected those that will minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations. For example, rather than requiring a separate state and federal notice for employers subject to both notice requirements, the Department allows a single notice to be used so long as it contains all the information required under state regulation. The Department also chose optional methods of delivery of the notice including enclosing notice with employee paychecks or direct deposit slips to avoid costs associated with separate delivery. Notice may also be provided by electronic mail (e-mail), if certain requirements are met.

The Department also considered alternatives regarding the scope of employee notice under the proposed rule. The Department believes it is critical that the notice contain information which employees can use to hasten their return to work following termination of employment. While the Federal WARN rules encourage, but do not require the inclusion of useful information on dislocated worker assistance programs, the Department chose to require the notices to contain information on the potential availability of unemployment insurance and reemployment services. By providing the actual language which employers can use to satisfy this requirement, the Department minimized the impact of the requirement on the regulated community.

The Department recognized that, in computing the average regular rate of compensation, salary and commission employees may not work on a regular schedule. Instead of using the number of days worked to calculate the average regular rate of compensation, the number of days the salary or commission employee was in active employment status will be used. Otherwise, the average regular rate of compensation may be unrepresentative of the actual rate of compensation.

The Department also considered creating a separate enforcement procedure for the state WARN Act, but instead decided to utilize the administrative procedure currently in place for other administrative hearings conducted by the Department.

9. Federal standards:

Federal standards implementing the federal WARN law exist and are found at 29 USC §§ 2101 - 2109 and 20 CFR 639. However, consistent with a less stringent federal law, such regulations provide a shorter period of notice, cover fewer employers, and do not permit administrative enforcement of the law. Since the Commissioner of

Labor is required to enforce the Act, additional provisions not contained in the federal WARN regulations were included to ensure that information regarding notice requirements, investigations, and determinations in the state regulations sufficiently inform all affected parties of their rights and obligations and ensure a fair and thorough determination of violations based on the requirements of the Act.

10. Compliance schedule:

The Act took effect February 1, 2009.

Revised Regulatory Flexibility Analysis

1. Effect of rule:

The New York State Worker Adjustment and Retraining Notification (WARN) Act (Chapter of the Laws of 2008, effective February 1, 2009) requires businesses in New York with 50 or more employees to provide notice at least 90 days prior to a plant closing, mass layoff, relocation or covered reduction in work hours where at least 25 of the employees will experience an employment loss from such event. The State WARN notice must be given to the affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where the employment losses occur.

During the 2008-09 fiscal year, the State received 381 Notices covering 45,480 employees. During the 2009-10 fiscal year, the State received 407 Notices covering 35,112 employees. The vast majority of these notices came from small businesses.

All small businesses that meet the triggering requirements of the WARN Act are required to comply with its requirements regardless of the type of business in which they are engaged. State, local, and tribal governments are not subject to the requirements of the rule.

2. Compliance requirements:

Employers of 50 or more employees, other than part-time employees, will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice.

Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records help employers calculate the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff, relocation or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Additionally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open. Employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice.

In cases involving employers with approximately fifty full time employees, the initial question is does the employer meet the definition of Employer under the act, thereby triggering coverage. In order to further clarify this matter, we have added language from the federal regulations that makes it clear that we look the business as it exists on the day that that notice was due for purposes of counting the number of employees.

Finally if, after notice has been given, the employer determines that it will continue operations and that the plant closing, mass layoff,

relocation or reduction in work hours will not occur, employers are required to provide a notice of rescission. This notice must be given to all affected employees as soon as possible after the employer determines it will continue operations and may be served in the same manner as the WARN notice as set forth in the rule.

3. Professional services:

Small businesses covered by this rule are not expected to require professional services to comply with the rule. As noted above, state, local, and tribal governments are not subject to the requirements of the rule.

All information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice for employers use in the rule to minimize the impact of the requirement on the employers.

Any employer who is cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

4. Compliance costs:

The adoption of the regulations is expected to result in minimal initial capital costs to small businesses. Small businesses that trigger the WARN Act requirements will be required to file a WARN notice with the required parties; costs associated with providing the notice will depend upon the number of employees affected and the means of delivery selected by the employer. The rule permits delivery of the notice to be included with employee pay or direct deposit statements or by electronic mail. Notice may also be personally delivered to individual employees at the workplace. Should employers choose to send the notice via first class mail, postage costs would still be minimal as the notice should be no more than a one or two page document.

Apart from employee notice, which must be provided individually to all affected employees, notices to the Department of Labor, employee representatives, and local Workforce Investment Boards are required. Again, postage costs associated with such delivery should be nominal. In some circumstances, employees suffering an employment loss may be represented by different unions. In those cases, notices would be required to be sent to each of the different unions. In rare circumstances where places of employment are served by multiple Workforce Investment Boards, more than one notice may be required. Costs associated with the service of a notice of rescission, if applicable, would be the same as costs associated with service of the original WARN notice as the acceptable forms of delivery of the notices are the same. The rule does allow for this notice to be distributed via electronic mail. If the employer chooses this delivery option the cost to the employer should be negligible.

In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones or rescinds that action for which notice was given, that employer must give notice of the extension, postponement, or rescission as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. Because such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, there should be minimal compliance costs. Should other evidence have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation the costs should be minimal as this information should already be in the employer's possession or readily available to the employer.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated

with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination. Paying employees their regular wages and benefits over the period of the violation, exceeding three weeks, does not exempt the employer from penalties.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, relocations or covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

5. Economic and technological feasibility:

The adoption of these emergency regulations is not expected to create an undue burden on small businesses. Consistent with current federal WARN regulations, notice must be provided using a method that ensures the timely receipt of notice by the required parties, such as first class mail or personal delivery. The rules permit notice to be provided to affected employees along with paychecks or direct deposit receipts and by electronic mail (e-mail). The burden of proof is on the employer to show that each employee received the e-mail. The employee e-mail addresses must be addresses provided to the employees by the employer and used in the conduct of business. The e-mail notice must be identified as "urgent."

6. Minimizing adverse impact:

As previously indicated, state, local, and tribal governments are not subject to the requirements of the rule.

The proposed rule is being promulgated in response to dozens of requests received from employers, their attorneys, workers, and worker representatives seeking clarification and guidance on the scope and requirements of the state WARN statute. The Department has sought to minimize adverse impact upon the regulated community by including provisions in the rule that address the issues and concerns raised in these inquiries. These provisions allow employers to better understand their obligations under the law, and inform employees of their rights under the law. This proposal is intended to assist employers to avoid violations while ensuring that workers receive the notice that will provide them with an opportunity to plan for their futures and support their families following employment termination.

The Department has taken a number of steps to minimize the adverse impact of the rule on all covered small business employers. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. For those employers who are subject to state and federal notice requirements, the Department will allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. Where the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, the rule contains the actual language to be used by employers for this purpose. The rule allows delivery of the notice along with paychecks or direct deposit slips should the employer choose to do so, in order to avoid costs associated with separate delivery.

One of the main goals of the WARN Act is to require small and medium-sized businesses in the state to provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to such companies' New York workforce. Accordingly, while the federal regulations count workers based at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered, the state WARN Act does not.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice

must be able to demonstrate such efforts to the satisfaction of the Department.

7. Small business and local government participation:

The state WARN Act and the proposed rule does not apply to state, local, or tribal governments.

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the Association of Corporate Counsel. Many individuals attending these meetings likely represent small businesses impacted by the rule. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. All of these activities prompted numerous contacts from businesses, corporate counsel, and worker representatives identifying areas of the statute which they felt required clarification in the regulations. The Department has attempted to address all these requests for clarification in the rule.

The Department also intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor for distribution to their constituency. These information activities will be in addition to the formal publication of the proposed rule in the State Register.

Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Employers of fifty (50) or more employees in the state who engage in plant closings, mass layoffs, relocations or reductions in work hours covered under the Act and the rule must provide notice of such employment losses under both the statute and the rule to employees, their representatives, the Commissioner of Labor and the Local Workforce Investment Board. Such employers are located throughout the state, including all of the State's rural areas.

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

Covered employers located in rural areas that are engaging in an action constituting an employment loss under the rule will be required to issue notices of such employment loss to the mandatory parties identified in the rule. In order to do so, they will not be required to undertake any additional reporting or record keeping requirements. We have changed the standard statement that must be given to each employee in their WARN Notice to reflect the fact that not all employers give notice prior to the date when the termination takes place. Some, especially in the financial services arena, give notice on the date of layoff along with the requisite sixty days pay.

Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state and federal laws relating to the payment of wages, workers' compensation coverage, and tax withholdings. These records identify all persons employed by the employer and allow employers to calculate the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. In order to further clarify when a WARN notice is required, we have added language from the federal regulations that make it clear that we make such determinations based upon the workers employed on the day that that notice was due.

Information regarding employees who will be affected by a plant closing, mass layoff, relocation or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Additionally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open. Provisions

of the WARN Act protect the confidentiality of such information shared with the Commissioner, eliminating employer concerns regarding disclosure of proprietary or financial information that could be damaging to the employer if generally known.

Also, if, after notice has been given, the employer determines that it will continue operations and that the plant closing, mass layoff, relocation, or reduction in work hours will not occur, the rule now requires employers to provide a notice of rescission. This notice must be given to all affected employees as soon as possible after the employer determines it will continue operations. Information regarding employees who must receive this notice would be in the employer's possession as information regarding the affected employees would have already been compiled by the employer when the initial WARN notice was given.

Rural area employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, affected employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. In an effort to assist employers with meeting this requirement, the Department has included the content of this notice in the rule.

Any employer who is cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

3. Costs:

It is impossible to predict the potential initial capital or annual costs of the rule on regulated parties in rural areas with any certainty. As noted elsewhere in this rulemaking, employers with 100 or more employees are already required to provide WARN notice for covered employment losses under the federal WARN Act. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. Some of these employers will undoubtedly be located in rural areas. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, relocation, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those rural employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to affected employees and allowing notification to affected employees by electronic mail. Additionally, the requirements regarding service of a notice of rescission, if applicable, allow employers to include this notice with paychecks and direct deposit statements or via electronic mail, which will keep costs at a minimum. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment

Boards) are typically required. The only exceptions to this would involve limited circumstances in which employees may be represented by different unions, or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation or covered reduction in work hours and postpones or rescinds that action for which notice was given, that employer must also give notice of the extension, postponement or rescission as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence showing that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of a unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination. Paying employees their regular wages and benefits over the period of the violation, exceeding three weeks, does not exempt the employer from penalties.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, relocations, covered reductions in work hours or covered reductions in pay but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

To the extent that early intervention and reemployment services offered by the Department through its Rapid Response activities reduce the number of workers who will ultimately claim unemployment insurance benefits as a result of the adverse employment action, covered employers will see UI charges decrease as a result of the rule.

Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required 90-day notice, must provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate paper or electronic mail notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

4. Minimizing adverse impact:

The proposed rule is being promulgated in response to additional requests received from employers and their representatives seeking clarification and guidance on the scope and requirements of the statute creating the state WARN program. Employers that meet the triggering requirements of the state WARN Act are not exempted from coverage due to their location in a rural area. However, the Department has taken steps to minimize the adverse impact on all employers whenever feasible by including language in the rule that addresses the issues and concerns raised in these inquiries.

Wherever feasible and desirable, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. The Department will allow a single notice form to be used to satisfy both the state and federal notice requirements so long as the form contains all the information elements required under the state regulation. The Department has also drafted language to be included in the notice informing employees of the availability of Departmental programs and benefits as a service to employers. Service of notice is permitted along with paychecks, direct deposit slips, or via electronic mail should the employer choose to do so in order to avoid costs associated with separate delivery.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses in rural areas so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their rural area communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and depend upon employed residents to financially support local business and governmental services.

5. Rural area participation:

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the State Association of Corporate Counsel. Individuals attending these events likely represent some clients located in rural areas. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. These efforts resulted in the Department receiving dozens of phone calls and written requests for clarification of various aspects of the law from all over the state. The Department has attempted to address all these requests for clarification in the emergency rule.

The Department intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor in all areas of the state, including rural areas, for their comment and distribution to their constituency, including those located in rural areas. These information activities will be in addition to the formal publication of the rule in the State Register.

Revised Job Impact Statement

No job impact statement is submitted with this notice because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities. Rather, this rule requires notice to be provided to employees and other parties 90 days prior to covered plant closings, mass layoffs, relocations, reductions in work hours and at sites of employment subject to the rule.

Assessment of Public Comment

The agency received no public comment.

Division of the Lottery

EMERGENCY RULE MAKING

Operation of the LOTTO Game and the New York Lottery Subscription Program

I.D. No. LTR-30-10-00004-E

Filing No. 732

Filing Date: 2010-07-13

Effective Date: 2010-07-13

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

Action taken: Repeal of sections 2804.14, 2804.15 and Part 2817; and addition of new sections 2804.14, 2804.15 and Part 2817 to Title 21 NYCRR.

Statutory authority: Tax Law, sections 1601, 1604 and 1612

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

Specific reasons underlying the finding of necessity: Emergency adoption of the new LOTTO regulations is necessary to counteract the budgetary crisis currently facing the State of New York. Governor Paterson discussed the severity of this crisis in his January 7, 2009 State of the State address:

New York faces an historic economic challenge, the gravest in nearly a century. For several months, events have shaken us to the core. Bank closures, job losses and stock market meltdowns have destabilized the foundations of our economy. Since January 2008, two million Americans have lost their jobs. During this recession, an estimated 225,000 New Yorkers will be laid off. Many others have lost their homes. The pillars of Wall Street have crumbled. The global economy is reeling. Trillions of dollars of wealth have vanished.

We still do not know the extent of the economic chaos that awaits us. We do know that this may be the worst economic contraction since the Great Depression. New York entered recession in August. Wall Street was hit the hardest. At least 60,000 jobs will be lost in the financial services sector, which is devastating to our state budget. Financial services provide 20% of state government revenues, so this year's budget will be exceptionally difficult.

Let me be clear - our state faces historic challenges. Our economy is damaged, our confidence is shaken, and the economic obstacles we face seem overwhelming. . . These problems may last for many more months or even years.

Since his State of the State address, the Governor has continued to underscore the importance of reversing New York State's ominous fiscal situation.

The New York Lottery (the "Lottery") has the unique ability to generate revenue for the State quickly and at a critical time when additional revenue is essential. By offering a new version of the LOTTO game, the Lottery will reverse a downward trend in LOTTO sales and increase revenue earned for education in New York State.

The new regulations allow the Lottery to address the continuing decline in LOTTO sales. Over the course of State Fiscal Years 2004-05 through 2007-08, LOTTO sales decreased by an average of 10.4% annually. LOTTO sales declined to only \$208,400,000 in the fiscal year ending on March 31, 2008 compared to earlier levels of over \$356,000,000 a year. If the 10.4% annual decline in LOTTO sales continues through the fiscal year ending March 31, 2012, sales for that year will total only \$134,420,000. The aid to education from this game will also drop from an estimated \$109,858,000 in FY 2007-08 to only \$70,860,000 in FY 2011-12, which is a difference of almost forty million dollars that will need to be subsidized from the General Fund. LOTTO sales even further declined in FY 2008-09 at a rate of 14.6% compared to the previous fiscal year. If this amplified downward trend continues, the consequential decline in aid to education will be even more significant than what is currently projected.

The declining sales of the LOTTO game must be addressed immediately to not only maintain current revenue earned for education, but to generate additional money for the State. The new game rules are intended to re-ignite interest in the game by providing for a more attractive prize structure with better odds of winning top prizes. Marketing research and consumer surveys indicate that interest in the new LOTTO game is high, which suggests that the State is likely to realize indispensable budgetary relief in the form of increased revenue for education earned through improved LOTTO sales.

In an effort to make the LOTTO game more attractive, the Lottery has further revised the LOTTO game rules to permit multiple variations of the game and to allow flexibility for the Lottery to adjust the game or games based on market trends. The ability to respond to the player market will also provide the Lottery with the opportunity to increase ticket sales for the LOTTO game or games and ultimately generate more revenue to the State for aid to education.

Due to the unprecedented need for revenue at this time, the Lottery and the State cannot afford to delay relaunch of the LOTTO game until completion of a normal rulemaking process under the State

Administrative Procedure Act. Therefore, the new LOTTO regulations must first be implemented through Emergency Adoption.

Subject: Operation of the LOTTO game and the New York Lottery subscription program.

Purpose: To revise the rules of the LOTTO game and related subscription provisions.

Substance of emergency rule: The amendments revise the regulations for the operation of the LOTTO game. Due to the prolonged decline in popularity of the Lottery's former flagship game, the Lottery is relaunching LOTTO to make it more appealing to consumers, which should ultimately generate more revenue to the State for aid to education.

The revised game rules provide for a more attractive prize structure for players and are intended to re-ignite interest in the game. The first prize for the game shall be \$1,000,000 paid as a lump sum. There will be approximately three times as many top prizes as under the existing LOTTO game. The first prize will not be a shared prize unless a certain maximum number of game panels match the applicable numbers for a particular drawing. The revised regulations also address the second prize category through the fourth prize category.

Definitions are revised to accommodate the new design while also providing that certain specific game rules shall be publicly announced by the Lottery. The definition of the LOTTO game was revised to permit the Lottery to change the name of the game or to offer two or more versions of the LOTTO game with different fields of numbers and prize structures.

The LOTTO regulations are amended to permit minor changes in the game structure if marketing evidence suggests that alteration may result in greater interest in the game and increased revenue for the State. Game details not specified in the regulations will be communicated to players via the Lottery's official website, on which the Lottery will designate the odds of winning, the prize structure, including fixed prize amounts, and details about any additional version of the LOTTO game. The Lottery will also announce details regarding LOTTO in advertisements, news releases, play slips, brochures located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to the game will not necessarily require amendment of the regulations. This ensures that the Lottery will be able to offer the best possible game, which will appeal to more customers and maximize revenue for aid to education in New York State.

The regulations relating to subscriptions are also amended to comply with revisions to the LOTTO game. The revised subscription regulations generally describe subscription costs and subscription application requirements. In addition to LOTTO, these regulations apply to any other game that the Lottery has or may have available under the subscription program.

Technical amendments are also made throughout the proposed regulations.

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 October 10, 2010.

Text of rule and any required statements and analyses may be obtained from: Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, P.O. Box 7500, Schenectady, New York 12301, (518) 388-3408, email: nylrules@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory authority: The new regulations for the New York Lottery's subscription program and the LOTTO game are proposed pursuant to Tax Law, Sections 1601, 1604 and 1612.

Tax Law § 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to establish a lottery operated by the State, the net proceeds of which are applied exclusively for aid to education. Tax Law § 1604 authorizes the Division of the Lottery (the Lottery) "to promulgate rules and regulations governing the establishment and operation thereof." Tax Law § 1612(a)(4) specifies the percentages for disposition of LOTTO sales revenues and describes the game as, "'Lotto', offered no more than once daily, a discrete game in which all participants select a specific subset of numbers to match a specific subset of numbers, as prescribed by rules and regulations promulgated and adopted by the division, from a larger specific field of numbers, as also prescribed by such rules and regulations."

2. Legislative objectives: The purpose of operating Lottery games is to generate earnings for the support of education in the State. Repeal and replacement of these regulations will improve the Lottery's ability to generate earnings for education by increasing consumer interest in LOTTO games.

3. Needs and benefits: The LOTTO game has sustained competitive pressure from large jackpot lottery games, which has produced a decline in LOTTO revenues and a loss of player interest. A comparison of LOTTO revenues for 2004-05 to revenues for 2008-09 shows an annual decline of 12.9%. For the fiscal year ending on March 31, 2009, revenues declined to only \$178,100,000 from earlier levels of over \$356,000,000 a year. If the 12.9% annual decline in revenues continues through the fiscal year ending March 31, 2012, revenues for that year will total only \$117,900,000. The aid to education from this game will also drop from an estimated \$93,900,000 in FY 2008-09 to only \$62,200,000 in the fiscal year ending on March 31, 2012.

Repeal and replacement of the LOTTO regulations will allow the Lottery to reverse this trend and continue its effort to keep and enlarge its market share of players (from within New York State and those visiting New York State from other states) who play lottery games. The new regulations allow the Lottery to offer additional versions of the LOTTO game. Pursuant to the new regulations, including an emergency regulation adopted on July 31, 2009, the Lottery has, as of September 15, 2009, introduced a variation of the LOTTO game called Sweet Million with more attractive odds of winning intended to generate renewed interest in LOTTO games. Because the new variation of the LOTTO game has more favorable odds of winning a first prize, revenues are expected to increase.

Marketing research and consumer surveys indicate that interest in the new variation of the LOTTO game is high. Players are motivated by "better odds," and many think the new game is a great value. Research reveals that players find the improved odds of winning when compared to the current LOTTO game to be the single most exciting aspect of the new game. Survey participants also responded favorably to first prize being paid as a lump sum. Of those surveyed, 86% prefer jackpot winnings to be paid all at once in cash as opposed to installments. This evidence suggests that New Yorkers are intrigued by the new game, and the State is likely to realize a tangible benefit in the form of increased earnings for education.

4. Costs:

a. Costs to regulated parties for the implementation and continuing compliance with the rule: None.

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs; since current funds reserved for administrative expenses of operating lottery games are expected to be sufficient to support the new variation of the LOTTO game, including advertising expenses, point of sale material production costs, and the cost of printing play slips for the new game. The new variation of the LOTTO game will generate more earnings for aid to education, which will far exceed the minimal expenses necessary to operate the new game. More aid to education from the Lottery will have a positive effect on the State because less funds will then be required from other General Fund resources to aid education. Furthermore, if less funds are required from other General Fund resources to aid education, local governments will benefit because increased funding for local schools from Lottery earnings will ease local tax burdens. Local retailers will earn higher commissions as ticket sales increase, which may result in more employment opportunities.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the Lottery's experience in operating State Lottery games for more than 40 years.

5. Local government mandates: None. No local government is authorized or required to do any act, apply any effort, expend any funds, or use any other resources in connection with the operation of the LOTTO game or LOTTO game variations. All necessary actions will be carried out by the Lottery or licensed Lottery retailers who will be completely responsible for all aspects of game operations at the local retail level. The Lottery has no authority and no need to impose any mandate on any local government. Consequently, no provision of the rule imposes any burden on any local government in the State.

6. Paperwork: There are no changes in paperwork requirements. Game information will be issued by the New York Lottery for public convenience on the Lottery's website and through point of sale advertising materials at retailer locations.

7. Duplication: None.

8. Alternatives: The revised LOTTO regulations permit minor changes in the structure of any variation of the LOTTO game if marketing evidence suggests that alteration may result in greater interest in that game and increased revenue for the State. Specific game details not specified in the regulations will be communicated to players via the Lottery's official website, on which the Lottery will designate the odds of winning, the prize structure, including fixed prize amounts, and details about any additional version of the LOTTO game. The Lottery will also announce details of LOTTO games in mass media advertisements, news releases, play slips, point of sale materials located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to any variation of the LOTTO game will not require amendment of the regulations. This will ensure that the Lottery will be able to offer the best possible game or games, which will appeal to more customers and result in maximum sales and revenue for aid to education in New York State.

The alternative to amending the LOTTO regulations is to not address the declining revenues for the existing LOTTO game and forfeit the investment already made by the Lottery in the game. The annual LOTTO sales decline of 12.9% will likely continue, and the State will lose millions of dollars in revenue. The failure to proceed will also result in lost aid to education that is anticipated to be earned following introduction of a new variation of the LOTTO game.

9. Federal standards: None.

10. Compliance schedule: None.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

This rulemaking does not require a Regulatory Flexibility Analysis or a Rural Area Flexibility Analysis. There will be no adverse impact on rural areas, small business or local governments.

The proposed amendments to the LOTTO game and subscription regulations will not impose any adverse economic or reporting, recordkeeping or other compliance requirements on small businesses or local governments. Small businesses will not have any additional recordkeeping requirements as a result of the amendments. Additionally, the proposed amendments are anticipated to have a positive effect on the revenue of small businesses that sell lottery tickets as more players will be interested in the game, which will increase sales commissions paid to retailers. Local governments are not regulated by the New York Lottery or its subscription regulations, nor are any economic or recordkeeping requirements imposed on local governments as a result of the amendments.

Job Impact Statement

The proposed repeal and replacement of 21 NYCRR sections 2804.14 and 2804.15 and Part 2817 does not require a Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State. The repeal and replacement of the regulations is sought to relaunch the New York Lottery's LOTTO game to generate more revenue for the State for aid to education.

The revisions may have a positive effect on jobs or employment opportunities as a result of an increase in LOTTO ticket sales, which would increase sales commissions paid to Lottery retailers.

Office of Mental Retardation and Developmental Disabilities

NOTICE OF ADOPTION

Community Residence Service Delivery and Documentation Requirements

I.D. No. MRD-20-10-00017-A

Filing No. 734

Filing Date: 2010-07-13

Effective Date: 2010-08-01

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

Action taken: Amendment of Parts 671 and 686 of Title 14 NYCRR.

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

Subject: Community residence service delivery and documentation requirements.

Purpose: To revise requirements for the delivery and documentation of residential habilitation services in community residences.

Text or summary was published in the May 19, 2010 issue of the Register, I.D. No. MRD-20-10-00017-P.

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

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Motor Vehicles

NOTICE OF ADOPTION

Driver Education Courses

I.D. No. MTV-19-10-00009-A

Filing No. 733

Filing Date: 2010-07-13

Effective Date: 2010-07-28

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

Action taken: Amendment of section 2.1 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 507(1)

Subject: Driver education courses.

Purpose: Makes minor changes to the rule regarding application for a driving school instructor.

Text or summary was published in the May 12, 2010 issue of the Register, I.D. No. MTV-19-10-00009-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Division of Parole

NOTICE OF ADOPTION

The Placement of Level 2 and Level 3 Sex Offenders in the Community Upon Their Release from State Prison

I.D. No. PAR-28-09-00005-A

Filing No. 712

Filing Date: 2010-07-07

Effective Date: 2010-07-28

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

Action taken: Addition of section 8002.7 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 259(2) and 259(5); and L. 2008, ch. 569

Subject: The placement of Level 2 and Level 3 sex offenders in the community upon their release from State prison.

Purpose: To provide guidance to Division of Parole staff for the placement of Level 2 and Level 3 sex offenders in the community.

Text or summary was published in the July 15, 2009 issue of the Register, I.D. No. PAR-28-09-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Terrence X. Tracy, Counsel, New York State Division of Parole, 97 Central Avenue, Albany, New York 12206, (518) 473-5671, email: tracy@parole.state.ny.us

Assessment of Public Comment

In response to the Notice of Proposed Rule Making published in the July 15, 2009 edition of the State Register, the New York State Division of Parole ("DOP") received one comment.

Comment: The DOP received a comment regarding the consideration to be afforded to any orders of protection that may exist that would affect individuals in the community upon the release of level 2 or level 3 sex offenders.

Response: Pursuant to Executive Law § 259-a(1) and (2), the DOP is required to obtain and maintain any orders of protection regarding individuals who will be or are under this agency's jurisdiction. Moreover, the DOP has a comprehensive domestic violence policy and procedure that requires the acquisition, consideration and enforcement of orders of protection by DOP staff when determining the appropriateness of an offender's residence in the community, as well as establishing the conditions of their release. As the objective of Chapter 568 of the Laws of 2008 was to require the DOP to consider the concentration of registered sex offenders in a particular community against the statutory criteria set forth in Executive Law § 259(5) when assessing the suitability and appropriateness of a level 2 or level 3 sex offender's residence in that community, the DOP has determined that the language of this regulation as set forth in the July 15, 2009 State Register meets this objective. The DOP is confident that in instances where orders of protection affect to any degree an offender who is subject to this agency's jurisdiction, its current policies and procedures will ensure that such orders are considered and enforced by its officers when setting the conditions of supervision and assessing the suitability of the offender's residence upon their release from State prison and throughout the continuum of their parole, conditional release or post-release supervision.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Energy Efficiency Programs for Residential Utility Customers

I.D. No. PSC-30-10-00005-P

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

Proposed Action: The Commission is considering a proposal submitted July 9, 2010 by New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation for two electric and gas energy efficiency programs for their residential customers.

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

Subject: Energy efficiency programs for residential utility customers.

Purpose: To encourage cost-effective electric and gas energy conservation in the State.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, two residential energy efficiency programs proposed by New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation on July 9, 2010. The first program is entitled "Home Energy Reports Demonstration Program" and would promote reduced electric and gas energy consumption by residential electric and gas customers of the aforesaid utilities by informing customers about the potential and means to reduce their energy usage. The second program is entitled "Appliance Bounty and Energy Star Room A/C Program" and would encourage residential electric customers to remove and recycle inefficient electric appliances and would promote the installation of efficient window and wall air conditioners. The program proposals were submitted as a part of the Commission's Energy Efficiency Portfolio Standard proceeding in Cases 07-M-0548 and 09-G-0363.

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.

(07-M-0548SP24)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Telecommunications Service Quality and Related Reporting Requirements for Verizon, New York, Inc.

I.D. No. PSC-30-10-00006-P

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

Proposed Action: The Commission is considering a revised Service Quality Improvement Plan by Verizon New York Inc. (Verizon) and its request to reduce service quality reporting requirements.

Statutory authority: Public Service Law, sections 94(2), 91(1) and 98

Subject: Telecommunications service quality and related reporting requirements for Verizon, New York, Inc.

Purpose: To review Verizon's service quality and service quality reporting requirements.

Substance of proposed rule: Verizon New York, Inc. (Verizon) is seeking approval of its revised 2010 Service Quality Improvement Plan (SQIP),

issued In compliance with the Commission's June 22, 2010 Order in Case 10-C-0202. The revised SQIP reflects the Commission's proposed: (1) revisions to the Department's Uniform Measurement Guidelines (Guidelines); (2) definition for "core customers" in need of regulatory protection and, (3) goal of ensuring that the revised SQIP meets the Commission's out-of-service performance threshold (20%) by the end of 2010 for these "core customers." For "core customers", defined as [1] those that do not have competitive alternatives, [2] customers subscribing to Lifeline service, or [3] customers who are characterized as having special needs, Verizon proposes that it not be required to report its performance for the missed installation appointments, percent installations completed within five days, and answer time for non-repair metrics. Verizon also proposes that the application of the Out-of-Service Over 24Hours metric be modified such that it measures Verizon's ability to clear out-of-service conditions by the end of the day following the one in which a trouble is reported instead of within 24 hours of the time that the trouble is reported by the customer. For customers other than core customers, Verizon's proposes to report only its Customer Trouble Report Rate performance and not be subject to reporting performance on other service quality metrics. The Commission is considering whether to grant or deny, in whole or in part, approval of Verizon's revised SQIP and associated proposals.

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

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

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

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

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

(10-C-0202SP1)

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

Whether to Permit the Use of the Mercury Instruments SIP-CB for Use in Commercial and Industrial Gas Meter Applications

I.D. No. PSC-30-10-00007-P

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

Proposed Action: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by Consolidated Edison Company of New York, Inc. for the approval to use the Mercury instruments SIP-CB Data Logger.

Statutory authority: Public Service Law, section 67(1)

Subject: Whether to permit the use of the Mercury Instruments SIP-CB for use in commercial and industrial gas meter applications.

Purpose: To permit gas utilities in New York State to use the Mercury instruments SIP-CB Data Logger.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, the petition filed by Consolidated Edison Company of New York, Inc. to use the Mercury Instruments SIP-CB (Survey Instrument Point – Cellular/Battery) Data Logger to collect and transmit pulse output data from commercial and industrial natural gas meter applications.

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

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

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

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

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

(10-G-0315SP1)

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

Customer Obligations

I.D. No. PSC-30-10-00008-P

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

Proposed Action: The Commission is considering a proposed tariff filing by The Brooklyn Union Gas Company d/b/a National Grid to make various changes in rates, charges, rules and regulations contained in its Schedule for Gas Service, PSC No. 12 — Gas.

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

Subject: Customer Obligations.

Purpose: To add and clarify the requirements and obligations of customers.

Substance of proposed rule: The Commission is considering a tariff filing by The Brooklyn Union Gas Company d/b/a National Grid (Brooklyn Union) to amend its tariff to add and clarify the requirements and obligations of its customers. The proposed filing has an effective date of October 1, 2010. The Commission may adopt, reject, or modify, in whole or in part, Brooklyn Union'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.

(10-G-0329SP1)

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

Customer Obligations

I.D. No. PSC-30-10-00009-P

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

Proposed Action: The Commission is considering a proposed tariff filing by KeySpan Gas East Corporation d/b/a National Grid to make various changes in rates, charges, rules and regulations contained in its Schedule for Gas Service, PSC No. 1 — Gas.

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

Subject: Customer Obligations.

Purpose: To add and clarify the requirements and obligations of customers.

Substance of proposed rule: The Commission is considering a tariff filing by KeySpan Gas East Corporation d/b/a National Grid (KeySpan) to amend its tariff to add and clarify the requirements and obligations of its customers. The proposed filing has an effective date of October 1, 2010. The Commission may adopt, reject, or modify, in whole or in part, KeySpan'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.

(10-G-0330SP1)