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.

Banking Department

EMERGENCY RULE MAKING

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. BNK-26-10-00009-E
Filing No. 622
Filing Date: 2010-06-08
Effective Date: 2010-06-13

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

Action taken: Addition of Part 418 and Supervisory Procedures MB 109 and 110 to Title 3 NYCRR.

Statutory authority: Banking Law, art. 12-D

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

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

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

Purpose: To require that persons or entities which service mortgage loans on residential real property on or after July 1, 2009 be registered with the Superintendent of Banks.

Substance of emergency rule: Section 418.1 summarizes the scope and application of Part 418. It notes that Sections 418.2 to 418.11 implement the requirement in Article 12-D of the Banking Law that certain mortgage loan servicers (''servicers'') be registered with the Superintendent of Banks, while Sections 418.12 to 418.15 set forth financial responsibility requirements that are applicable to both registered and exempt servicers. [Section 418.16 sets forth the transitional rules.]

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 418.13 applies similar financial responsibility requirements to

''Exempted Persons'' who are not subject to the requirement to register as servicers. Such persons include mortgage bankers, mortgage brokers and most banking institutions and insurance companies.

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires September 5, 2010.

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

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Legislative Objectives.

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

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

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

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

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

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

3. Needs and Benefits.

Governor Paterson reported in early 2008 that there were more than 52,000 foreclosure actions filed in 2007, or approximately 1,000 per week. That number increased in 2008, averaging approximately 1,100 per week in the first quarter. This is a crisis and the problems that have affected so many have been found to affect not only the origination of residential mortgage loans, but also their servicing and foreclosure. The Subprime Law adopted a multifaceted approach to the problem. It affected a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loans servicers.

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

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

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

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

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

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

4. Costs.

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

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

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

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

5. Local Government Mandates.

None.

6. Paperwork.

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

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

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

7. Duplication.

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

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

8. Alternatives.

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

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

9. Federal Standards.

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

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

10. Compliance Schedule.

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

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

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

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

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

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

7. Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

Types and Estimated Numbers.

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

Compliance Requirements.

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

MLSs are required to meet certain financial responsibility requirements based on their level of business. The regulations authorize the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of MLSs which service not more than 12 mortgage loans or more than $5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden which those requirements might otherwise impose on entities operating in rural areas.

Costs.

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

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

Minimizing Adverse Impacts.

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

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

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

Rural Area Participation.

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

Job Impact Statement

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

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

responsibility requirements for entities that do a de minimis amount of servicing.

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

EMERGENCY RULE MAKING

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

I.D. No. BNK-26-10-00010-E

Filing No. 623

Filing Date: 2010-06-08

Effective Date: 2010-06-13

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

Action taken: Repeal of Part 420 and Supervisory Procedures MB 107 and MB 108; addition of new Part 420 and Supervisory Procedure MB 107 to Title 3 NYCRR.

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

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

Specific reasons underlying the finding of necessity:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 107.1 contains definitions of defined terms used in the Supervisory Procedure. Importantly, it defines the National Mortgage Licensing System (NMLS), the web-based system with which the Superintendent has entered into a written contract to process applications for initial licensing and applications for annual license renewal for MLOs.

Section 107.2 contains general information about applications for initial licensing and annual license renewal as an MLO. It states that a sample of the application form (which must be completed online) may be found on the Department's website and includes the address where certain information required in connection with the application for licensing must be mailed.

Section 107.3 describes the parts of an application for initial licensing. The application includes (1) the application form, (2) fingerprint cards, (3) the fees, (4) applicant's credit report, (5) an affidavit subscribed under penalty of perjury in the form prescribed by the Superintendent, and (6) any other information that may be required by the Superintendent. It also describes the procedure when the Superintendent determines that the information provided by the application is not complete.

Section 107.4 describes the required submissions for annual license renewal of an MLO.

Section 107.5 covers inactive status.

Section 107.6 provides information on places where applicants may obtain additional instructions and assistance on the Department's website, by email, by mail, and by telephone.

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 September 5, 2010.

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

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Legislative Objectives.

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

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

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

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

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

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

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

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

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

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

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

3. Needs and benefits.

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

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

These regulatory requirements will improve accountability among mortgage industry professionals, protect and promote the integrity of the

mortgage industry, and improve the quality of service, thereby helping to restore consumer confidence.

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

4. Costs.

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

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

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

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

5. Local Government Mandates.

None.

6. Paperwork.

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

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

7. Duplication.

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

8. Alternatives.

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

9. Federal Standards.

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

10. Compliance Schedule.

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

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

7. Small Business and Local Government Participation:

See response to Item 6 above.

Rural Area Flexibility Analysis

Types and Estimated Numbers. The New York State Banking Department currently licenses over 1,800 mortgage bankers and brokers, of which over 1,200 are located in the state. It has received almost 15,000 applications from MLOs under the present regulations and anticipates receiving approximately 2,700 applications from individuals who were previously exempted but will be required to be licensed under the revised regulations. Many of these entities and MLOs will be operating in rural areas of New York State and would be impacted by the regulation. If individuals who originate mobile home loans are required to be licensed, a relatively small number of additional applications is anticipated.

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

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

Minimizing Adverse Impacts. The industry supported passage of the prior Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addi-

tion, the industry was involved in a dialogue with the Department during rule development.

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

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

Job Impact Statement

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

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

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

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

Office of Children and Family Services

EMERGENCY RULE MAKING

Child Care Market Rate and Stimulus Regulations

I.D. No. CFS-21-10-00006-E

Filing No. 615

Filing Date: 2010-06-09

Effective Date: 2010-06-09

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

Action taken: Amendment of sections 404.5, 415.2 and 415.9 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(3)(f) and 410; and title 5-C

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 families and children receiving subsidized child care in New York State. First, these regulations address the expanded need for child care services by families affected by the extensive loss of jobs and employment opportunities as a result in the economic downturn of the State and national economy. With the simultaneous severe downturn of the credit, housing, job and stock markets and expected unusually slow recovery of each, OCFS expects the need for child care services for those battling the economic depression to only continue to grow for the foreseeable future. Further, without this action OCFS believes that the consequences for those battling the economic depression will only deepen, and only lead to an even slower recovery for the affected families and, as a result, the State economy.

OCFS also believes that by implementing these regulations, it will allow social services districts to meet some of the expanding need for child care services by families imperiled by the economic depression, which will hopefully allow those families to maintain or gain much needed services, training or employment. To be effective, and in order to best serve the families in the State that need child care services, OCFS must act quickly and without delay. Any delay in action may only exacerbate the financial crisis facing many families that need child care services in the State. Faced with this stark consequence, OCFS decided it had to act on an emergency basis, to get the needed child care services to those in the affected communities as soon as possible

Second, it is also necessary to adopt these regulations on an emergency basis because Federal statute, section 658E(c)(4)(A) of the Social Security Act, and federal regulation, 45 CFR 98.43(a), require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure equal access for eligible children. The market rates that are being replaced are based on a survey conducted in 2007 and as a result, continuing to maintain the existing rates could result in subsidized families losing equal access for eligible children to child care arrangements or being unable to find appropriate child care.

In addition, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. The current State Plan in effect covers the period October 1, 2009 through September 30, 2011. The federal Administration for Children and Families has indicated that the New York State Child Care and Development Fund (CCDF) Plan would not have been approved unless the child care market rates were adjusted, based upon a market rate survey, and were effective on October 1, 2009. Unless new market rates become effective on that date and remain in effect for the remainder of the State Plan period, the State's ability to use federal funds under CCDF and to transfer Temporary Assistance to Needy Families funds into CCDF for child care subsidies would be jeopardized.

Subject: Child Care Market Rate and Stimulus Regulations.

Purpose: To revise the market rates and address the expanded need for child care services caused by the economic downturn.

Text of emergency rule: Subparagraphs (xviii) and (xix) of subparagraph (6) of paragraph (b) of section 404.5 of Title 18 are amended, and a new subparagraph (xx) is added to such paragraph, to read as follows:

(xviii) veterans' assistance payments made to or on behalf of certain Vietnam veterans' natural adult or minor children for any disability resulting from spina bifida suffered by such children; [and]

(xix) veterans' assistance payments made for covered birth defects to or on behalf of the adult or minor children of women Vietnam veterans in service in the Republic of Vietnam during the period beginning on February 28, 1961 and ending on May 7, 1975. Covered birth defects means any birth defect identified by the Veterans' Administration as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period on February 28, 1961 and ending on May 7, 1975, and that has resulted or may result in permanent physical or mental disability[.]*; and*

(xx) one-time $250 payments made under the American Recovery and Reinvestment Act of 2009 to Social Security, Supplemental Security Income (SSI), Railroad Retirement Benefits and Veterans Disability Compensation or Pension Benefits recipients for 10 months from the date the payment was received, including the month payment was received.

A new subparagraph (c) of subparagraph (vii) of subparagraph (3) of paragraph (a) of section 415.2 of Title 18 is added to read as follows:

(c) a program to train workers in an employment field that currently is or is likely to be in demand in the near future, if the caretaker documents that he or she is a dislocated worker and is currently registered in such a program, provided that child care services are only used for the portion of the day the caretaker is able to document is directly related to the caretaker engaging in such a program. For the purposes of this provision, a dislocated worker is any person who: has been terminated or laid off from employment; has received a notice of termination or layoff from

employment that will occur within six months of such notice; or was self-employed but is unemployed as a result of general economic conditions in the community in which the individual resides or because of natural disasters.

Subparagraph (1) of paragraph (j) of section 415.9 of Title 18 is amended and reads as follows:

(1) Effective [May 15, 2009] *October 1, 2009*, the following are the local market rates for each social services district set forth by the type of provider, the age of the child and the amount of time the child care services are provided per week.

Subparagraph (2) of paragraph (j) of section 415.9 of Title 18 is renumbered as subparagraph (3) and a new subparagraph (2) is added to read as follows:

(2) Upon the effective date of these regulations, there will be two market rates for the legally-exempt family child care and in-home child care categories, a standard market rate and an enhanced market rate. The standard market rate for legally-exempt family child care and in-home child care categories will be 65 percent of the applicable registered family day care market rate. The enhanced market rate for legally-exempt family child care and in-home child care categories will be 70 percent of the applicable registered family day care market rate. The enhanced market rate will apply to those caregivers of legally-exempt family child care and in-home child care who have provided notice to, and have been verified by, the applicable legally-exempt caregiver enrollment agency or by the district for those portions of the district that are not covered by a legally-exempt caregiver enrollment agency, as having completed ten or more hours of training annually in the areas set forth in section 390-a(3)(b) of the social services law. A social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement. The standard market rate will apply to all other caregivers of legally-exempt family child care and in-home child care.

Re-numbered subparagraph (3) of paragraph (j) of section 415.9 of Title 18 is amended and reads as follows:

[(2)] *(3)* The market rates are established in five groupings of social services districts. [Except for districts noted as an exception in the market rate schedule,] [t]*T*he rates established for a group apply to all districts in the designated group. The district groupings are as follows:

CHILD CARE MARKET RATES

Market rates are established in five groupings of social services districts as follows:

Group 1: Nassau, Putnam, Rockland, Suffolk, Westchester

Group 2: Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins, Warren

Group 3: Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, Yates

Group 4: Albany, Dutchess, Orange, Ulster

Group 5: Bronx, Kings, New York, Queens, Richmond

GROUP 1 COUNTIES:

Nassau, Putnam, Rockland, Suffolk, and Westchester

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$330	$304	$265	$265
DAILY	$59	$52	$42	$40
PART-DAY	$39	$35	$28	$27
HOURLY	$9.32	$9.00	$8.56	$9.16

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$270	$263	$250	$250
DAILY	$48	$41	$40	$37
PART-DAY	$32	$27	$27	$25
HOURLY	$10.00	$10.00	$9.00	$9.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$275	$275	$265	$257
DAILY	$50	$50	$50	$50
PART-DAY	$33	$33	$33	$33
HOURLY	$9.88	$9.13	$9.13	$8.00

(Group 1 Counties)

SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$0	$0	$0	$265
DAILY	$0	$0	$0	$40
PART-DAY	$0	$0	$0	$27
HOURLY	$0	$0	$0	$9.16

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$176	$171	$163	$163
DAILY	$31	$27	$26	$24
PART-DAY	$21	$18	$17	$16
HOURLY	$6.50	$6.50	$5.85	$5.85

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$189	$184	$175	$175
DAILY	$34	$29	$28	$26
PART-DAY	$23	$19	$19	$17
HOURLY	$7.00	$7.00	$6.30	$6.30

GROUP 2 COUNTIES:

Columbia, Erie, Monroe, Onondaga, Ontario, Rensselaer, Saratoga, Schenectady, Tompkins and Warren

DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$226	$215	$196	$190
DAILY	$48	$45	$40	$35
PART-DAY	$32	$30	$27	$23
HOURLY	$8.00	$8.36	$8.00	$8.00

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$170	$161	$152	$150
DAILY	$35	$32	$30	$30
PART-DAY	$23	$21	$20	$20
HOURLY	$5.00	$5.37	$5.00	$5.75

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$180	$175	$175	$160
DAILY	$36	$35	$35	$34
PART-DAY	$24	$23	$23	$23
HOURLY	$5.79	$5.83	$5.93	$7.00

(Group 2 Counties)
SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$0	$0	$0	$190
DAILY	$0	$0	$0	$35
PART-DAY	$0	$0	$0	$23
HOURLY	$0	$0	$0	$8.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$111	$105	$99	$98
DAILY	$23	$21	$20	$20
PART-DAY	$15	$14	$13	$13
HOURLY	$3.25	$3.49	$3.25	$3.74

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$119	$113	$106	$105
DAILY	$25	$22	$21	$21
PART-DAY	$17	$15	$14	$14
HOURLY	$3.50	$3.76	$3.50	$4.03

GROUP 3 COUNTIES:
Allegany, Broome, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oneida, Orleans, Oswego, Otsego, Schoharie, Schuyler, Seneca, St. Lawrence, Steuben, Sullivan, Tioga, Washington, Wayne, Wyoming, and Yates
DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$180	$171	$160	$150
DAILY	$40	$37	$34	$31
PART-DAY	$27	$25	$23	$21
HOURLY	$6.50	$6.50	$6.50	$6.25

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$140	$139	$135	$130
DAILY	$30	$30	$30	$30
PART-DAY	$20	$20	$20	$20
HOURLY	$4.00	$3.88	$3.50	$4.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$150	$145	$140	$140
DAILY	$33	$31	$30	$30
PART-DAY	$22	$21	$20	$20
HOURLY	$4.00	$4.00	$4.00	$5.00

(Group 3 Counties)
SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$0	$0	$0	$150
DAILY	$0	$0	$0	$31
PART-DAY	$0	$0	$0	$21
HOURLY	$0	$0	$0	$6.25

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$91	$90	$88	$85
DAILY	$20	$20	$20	$20
PART-DAY	$13	$13	$13	$13
HOURLY	$2.60	$2.52	$2.28	$2.60

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$98	$97	$95	$91
DAILY	$21	$21	$21	$21
PART-DAY	$14	$14	$14	$14
HOURLY	$2.80	$2.72	$2.45	$2.80

GROUP 4 COUNTIES:
Albany, Dutchess, Orange, and Ulster
DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$241	$223	$205	$200
DAILY	$50	$48	$43	$37
PART-DAY	$33	$32	$29	$25
HOURLY	$8.24	$7.90	$7.62	$7.00

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$200	$191	$185	$185
DAILY	$44	$40	$38	$38
PART-DAY	$29	$27	$25	$25
HOURLY	$7.00	$6.13	$6.00	$7.00

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$220	$200	$195	$195
DAILY	$45	$45	$40	$40
PART-DAY	$30	$30	$27	$27

HOURLY	$8.00	$7.22	$8.00	$7.25

(Group 4 Counties)
SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$0	$0	$0	$200
DAILY	$0	$0	$0	$37
PART-DAY	$0	$0	$0	$25
HOURLY	$0	$0	$0	$7.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$130	$124	$120	$120
DAILY	$29	$26	$25	$25
PART-DAY	$19	$17	$17	$17
HOURLY	$4.55	$3.98	$3.90	$4.55

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$140	$134	$130	$130
DAILY	$31	$28	$27	$27
PART-DAY	$21	$19	$18	$18
HOURLY	$4.90	$4.29	$4.20	$4.90

GROUP 5 COUNTIES:
Bronx, Kings, New York, Queens, and Richmond
DAY CARE CENTER

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$338	$255	$217	$195
DAILY	$53	$47	$40	$35
PART-DAY	$35	$31	$27	$23
HOURLY	$16.09	$17.00	$15.70	$10.00

REGISTERED FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$160	$150	$150	$150
DAILY	$30	$30	$32	$30
PART-DAY	$20	$20	$21	$20
HOURLY	$16.00	$11.11	$13.20	$13.06

GROUP FAMILY DAY CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$194	$181	$175	$160
DAILY	$35	$33	$31	$32
PART-DAY	$23	$22	$21	$21
HOURLY	$18.14	$15.65	$12.83	$18.00

(Group 5 Counties)
SCHOOL AGE CHILD CARE

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$0	$0	$0	$195
DAILY	$0	$0	$0	$35
PART-DAY	$0	$0	$0	$23
HOURLY	$0	$0	$0	$10.00

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *STANDARD RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$104	$98	$98	$98
DAILY	$20	$20	$21	$20
PART-DAY	$13	$13	$14	$13
HOURLY	$10.40	$7.22	$8.58	$8.49

LEGALLY-EXEMPT FAMILY CHILD CARE AND IN-HOME CHILD CARE *ENHANCED RATE*

AGE OF CHILD

	Under 1½	1½–2	3–5	6–12
WEEKLY	$112	$105	$105	$105
DAILY	$21	$21	$22	$21
PART-DAY	$14	$14	$15	$14
HOURLY	$11.20	$7.78	$9.24	$9.14

SPECIAL NEEDS CHILD CARE

The rate of payment for child care services provided to a child determined to have special needs is the actual cost of care up to the statewide limit of the highest weekly, daily, part-day or hourly market rate for child care services in the State, as applicable, based on the amount of time the child care services are provided per week regardless of the type of child care provider used or the age of the child.

The highest full time market rate in the State is:

WEEKLY	$338
DAILY	$59
PART-DAY	$39
HOURLY	$18.14

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. CFS-21-10-00006-P, Issue of May 26, 2010. The emergency rule will expire September 6, 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, N.Y. 12144, (518) 473-7793

Regulatory Impact Statement

1. Statutory authority:

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

Section 34(3)(f) of SSL authorizes the Commissioner to establish regulations for the administration of public assistance and care within the State.

Section 410 of the SSL authorizes a social services official of a county, city or town to provide day care for children at public expense and authorizes the Office to establish criteria for when such day care is to be provided.

Title 5-C (sections 410-u through 410-z) of the SSL governs the New York State Child Care Block Grant. It includes provisions regarding the use of funds by social services districts, the types of families eligible for services, the amount of local funds that must be spent on child care services, and reporting requirements. OCFS is required to specify certain NYSCCBG requirements in regulation.

Section 410-x(4) of the SSL requires the Office to establish, in regulation, the applicable market-related payment rates that will establish the ceilings for State and federal reimbursement for payments made under the New York Child Care Block Grant.

Federal statute, 42 USC 9858(c)(4)(A), and federal regulation, 45 CFR 98.43(a), also require that the State establish payment rates for federally-funded child care subsidies that are sufficient to ensure equal access to care that is provided to children whose parents/caretakers are not eligible to receive assistance under federal or state programs. Additionally, federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund.

2. Legislative objectives:

The legislative intent of the child care subsidy program is to assist low income families in meeting their child care costs in programs that provide for the health and safety of their children. The legislative intent is to have child care subsidy payment rates that reflect market conditions and that are adequate to enable subsidized families to access child care services comparable to other families not in receipt of a child care subsidy.

The regulations support the legislative objectives underlying Sections 332-a, 334, 335 and 410 and Title 5-C of the SSL to provide child care services to public assistance recipients and low income families when necessary to promote self-sufficiency and protect children. In addition, the regulations provide social services districts with greater local flexibility to provide child care services in the manner that best meets the needs of their local communities.

3. Needs and benefits:

The State is required under the Federal Child Care and Development Fund to adjust child care payment rates with each new State Plan based on a current survey of providers. The current State Plan covers the period October 1, 2007 through September 30, 2009 and the proposed State Plan for the period October 1, 2009 through September 30, 2011 has been submitted for approval by the federal government. A current survey of providers was conducted in April and May of 2009. These regulations are needed to adjust existing rates that were established based on a survey done in 2007. Adjustments to the child care market rates reflect both increases and decreases in the five groupings of counties.

Decreases in the child care market rates reflect the market place and provide comparable access to those families in receipt of a child care subsidy as compared with families that do not receive a child care subsidy, which is required by federal and State laws.

In addition, this regulatory package includes the three provisions from the previous market rate stimulus regulatory package that was filed previously on an emergency basis on May 15, 2009 and was re-filed on August 13, 2009. The revised market rates that were in effect since August 13, 2009 are superseded by this filing.

The first provision is the exclusion of the one time payment of $250 under the American Recovery and Reinvestment Act of 2009 when determining the eligibility for social services programs. These regulations address the federal requirement that one time payments disbursed under the American Recovery and Reinvestment Act of 2009 to recipients of Social Security, Supplemental Security Income (SSI), Railroad Retirement Benefits and Veterans Disability Compensation or Pension Benefits be excluded as income for determining eligibility for any programs in receipt of federal funds.

Second, social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment.

Third, some districts have indicated that, in these difficult economic times, more families could be served without a negative impact on family access to child care if the enhanced child care market rate for legally-exempt family and in-home child care providers was lowered. Currently, there are two child care market rates established for legally-exempt family and in-home child care providers. One, the enhanced market rate, based on a 75 percent differential applied to the child care market rates established for registered family day care. The 75 percent reflects an incentive to legally exempt providers to pursue a minimum of ten hours of approved training. Two, the standard market rate, based on a 65 percent differential applied to the child care market rates established for registered family day care. The 65 percent applies to legally-exempt family and in-home child care providers that have not obtained ten hours of training annually. These regulations propose to establish the enhanced market rate for legally-exempt family and in-home providers at a 70 percent differential applied to the child care market rates established for registered family day care. Additionally, the regulation allows local social services districts, which so choose in their Child and Family Services Plans, to increase the enhanced market rate to up to 75 percent of the applicable registered family day care market rate. Further, a social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement.

4. Costs:

Under section 410-v(2) of the SSL, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; and, districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the New York State Child Care Block Grant, and is limited on an annual basis to each district's New York State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2009-2010, social services districts received their allocations of $736,036,409 in federal and State funds under the New York State Child Care Block Grant. This funding represented an increase of $11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the adjusted market rates. Further, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations. In addition, social services districts may use block grant funds to serve the optional category of eligible individuals set forth in these regulations. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

5. Local government mandates:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the applicable market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. Payment adjustments will have to be made, as appropriate.

Social services districts will also be required to amend their existing Child and Family Services Plan to select the expanded categories of eligible families to include the parent/caretaker that is a dislocated worker participating in a training program in a employment field that currently is or is likely to be in demand in the near future, if social services districts so desire. In addition, social services districts would also be required to amend their existing Child and Family Services Plans to increase the enhanced market rate for legally-exempt providers of family child care or in-home child care to 75 percent of the registered family child care rate, if social services districts so desire.

6. Paperwork:

Social services districts will need to process any required payment adjustments after conducting the necessary case reviews.

7. Duplication:

The new requirements do not duplicate any existing State or federal requirements.

8. Alternatives:

The adjustments in rates set forth in the regulations are required to implement the federal and State statutory and regulatory mandates; there are no other alternatives because every other alternative would violate federal and State statutory and regulatory mandates.

There are also no other viable alternatives to the child care stimulus provisions included in this regulatory filing. The only alternative to those provisions would be to not expand the delivery of child care services to needy families. This would adversely impact federal and State initiatives to support needy families affected by the recession and to stimulate the economy.

9. Federal standards:

The regulations are consistent with applicable federal regulations. 45 CFR 98.43(a) and (b)(2) and (3) require that the State establish payment rates that are sufficient to ensure equal access to comparable care received by unsubsidized families, based on a survey of providers and consistent with the parental choice provisions in 45 CFR 98.30.

10. Compliance schedule:

These provisions must be implemented effective on October 1, 2009.

Regulatory Flexibility Analysis

1. Effect on small businesses and local governments:

The adjustments to the child care market rates will affect the 58 social services districts. There is a potential effect on over 20,000 licensed and registered child care providers and an estimated 56,000 informal providers

that may provide child care services to families receiving a child care subsidy.

2. Compliance requirements:

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the applicable market rates. Districts will need to review cases to determine whether the payments reflect the actual cost of care up to applicable market rates. Payment adjustments will have to be made, as appropriate.

Social services districts will also be required to amend their existing Child and Family Services Plans to select the expanded categories of eligible families to include the parent/caretaker that is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. In addition, social services districts would also be required to amend their its existing Child and Family Services Plan to increase the enhanced market rate for legally-exempt providers of family child care or in-home child care to 75 percent of the registered family child care rate, if social services districts so desire.

3. Professional srvices:

Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

4. Compliance costs:

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

Under the State Budget for SFY 2009-10, social services districts received their allocations of $736,036,409 in federal and State funds under the New York State Child Care Block Grant, an increase of $11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

Social services districts will be required to provide the subsidies on behalf of the parent for subsidized child care services to legally-exempt family child care and in-home child providers who have completed ten hours of training annually, as approved by the legally-exempt caregiver enrollment agency, at the enhanced rate of seventy percent (70%) of the family child care rate. Districts do have the option to pay seventy five percent (75%) of the family child care rate for the enhanced market rate to legally-exempt family child care and in-home care approved by the legally-exempt caregiver enrollment agency, if the district selects this option in its Children and Family Services Plan. In addition, a social services district has the option, if it so chooses in the child care portion of its child and family services plan, to increase the enhanced market rate for eligible legally-exempt family child care and in-home child care categories to up to 75 percent of the applicable registered family day care market rate: (i) for all such providers; (ii) for those providers who were receiving the enhanced rate on the date of the regulations but only for the remainder of their current one-year enrollment period; or (iii) for those providers who were receiving the enhanced rate on the date of the regulations for the remainder of the time they remain enrolled and continue to meet the ten hour annual training requirement. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

The exclusion of the one time payment of $250 under the American Recovery and Reinvestment Act of 2009 related to the determination of eligibility for social services programs, which receive federal funds, will not require any additional compliance costs to implement.

Social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment. Social services districts may use the already allocated block grant funds to serve this optional category of families, if social services districts so desire.

5. Economic and technological feasibility:

The child care providers and social services districts affected by the regulations have the economic and technological ability to comply with the regulations.

6. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers and with standard statistical methodology to minimize adverse impact. The Office applied standard statistical methods to choose a sample of approximately 5,020 licensed and registered child care providers so that it was representative throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care that were reported in the survey within the counties. Adjustments to the child care market rates reflect the market place and provide access comparable to those families not receiving a child care subsidy.

The regulations recognize that there may be differences in the needs among districts. To the extent allowed by statute, the regulations provide districts with flexibility in designing their child care subsidy programs in a manner that will best meet the needs of their communities.

7. Small business and local government participation:

In accordance with federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had the resources available to assist providers in other languages, if needed. Rate data was collected from almost 5,020 providers and that information formed the basis for the updated market rates.

The regulatory changes were discussed with a workgroup of local districts, including rural districts, for advice on potential impact.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The regulations will affect the 44 social services districts located in rural areas of the State and the child care providers located in those districts.

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

The regulations will not result in any new reporting or recordkeeping requirements for social services districts.

Social services districts will be required to make payments for subsidized child care services based on the actual cost of care up to the new market rates. Districts will need to review cases to determine if the payments reflect the actual cost of care up to the appropriate market rate. Neither social services districts nor child care providers should have to hire additional professional staff in order to implement these regulations.

The exclusion of the one time payment of $250 under the American Recovery and Reinvestment Act of 2009 to the determination of eligibility for social services programs, which receive federal funds, will not place any additional compliance requirements on social services districts.

Social services districts that choose to serve the optional eligibility categories of families to serve families where the parent/caretaker is a dislocated worker participating in a program to train workers in an employment field that is currently or is likely to be in demand in the near future will be required to amend the district's current Child and Family Services Plan.

A district will be required to provide subsidies on behalf of the parents for subsidized child care services to legally-exempt family child care and in-home child providers who have completed ten hours of training annually, as long as such providers are approved by the appropriate legally-exempt caregiver enrollment agencies, for the enhanced rate; or by the district for those portions of the district that are not covered by a legally-exempt caregiver enrollment agency, at the rate of seventy percent (70%) of the family child care rate. A district has the option to pay seventy five percent (75%) of the family child care rate for the enhanced market rate to legally-exempt family child care and in-home care approved by an enrollment agency, if the district selects this option in its Child and Family Services Plan.

3. Costs:

Under the State Budget for SFY 2009-2010, social services districts received their allocations of $736,036,409 in federal and State funds under the New York State Child Care Block Grant, an increase of $11.9 million from the base amount allocated to districts for SFY 2008-09. These increases in funding are available to cover any increased payments by social services districts due to the implementation of the new market rates. In addition, social services districts have the option to transfer a portion of their Flexible Fund for Family Services allocations to the New York State Child Care Block Grant to supplement their Block Grant allocations.

Under section 410-v(2) of the Social Services Law, the State is responsible for reimbursing social services districts for 75 percent of the costs of providing subsidized child care services to public assistance

recipients; districts are responsible for the other 25 percent of such costs. In addition, the State is responsible for reimbursing districts for 100 percent of the costs of providing child care services to other eligible low-income families. The State reimbursement for these child care services is made from the State and/or federal funds allocated to the State Child Care Block Grant, and is limited on an annual basis to each district's State Child Care Block Grant allocation for that year.

The exclusion of the one time payment of $250 under the American Recovery and Reinvestment Act of 2009 to the determination of eligibility for social services programs, which receive federal funds, will not require add any additional compliance costs to implement. In addition, social services districts may use block grant funds to serve the optional category of eligible individuals set forth in these regulations. Social services districts may also use block grant funds allocated to them to increase the enhanced rate from 70 percent up to 75 percent, if social services districts select this option.

4. Minimizing adverse impact:

The market rates were developed in accordance with federal guidelines for conducting a survey of child care providers and with standard statistical methodology to minimize adverse impact. The Office applied standard statistical methods to choose a sample of approximately 5,020 licensed and registered child care providers so that it was representative throughout the State. The rates were analyzed to establish the market rates at the 75th percentile of the amounts charged in accordance with guidelines issued in the Child Care and Development Fund Final Rule. The market rates are clustered into five distinct groupings of counties based on similarities in rates among the counties in each group. As a result, the rates established for counties are based on the actual costs of care that were reported in the survey within the counties. Adjustments to the child care market rates reflect the market place and provide access comparable to those families not receiving a child care subsidy.

Adjustments to the child care market rates reflect both increases and decreases in the five groupings of counties. Decreases in the child care market rates reflect the market place and provides access comparable to those families not receiving a child care subsidy to that received by families that do not receive a child care subsidy as required by federal and State laws. The adjustments in the rates will enable districts to provide temporary assistance recipients and low-income families receiving subsidized child care services with access to additional child care providers. This will assist these districts to enable more temporary assistance and low-income families to work, thereby reducing the number of families in need of temporary assistance. It also should assist the districts in meeting their federal participation rates for Temporary Assistance (TA) recipients because there should be a reduction in the number of TA recipients who are excused from work activities due to a lack of child care.

The market rates for legally-exempt family child care and in-home child care were established based on a 65 percent differential applied to the market rates established for family day care. This differential reflects the higher costs associated with meeting the higher regulatory standards to become a registered family day care provider. The enhanced market rate for legally-exempt family and in-home child care providers is based on a 70 percent differential applied to the child care market rates established for registered family day care. The 70 percent reflects an incentive to legally exempt providers to pursue a minimum of ten hours of approved training. Additionally, the regulation allows local social services districts, which so choose in their Child and Family Services Plans, to increase the enhanced market rate to up to 75 percent of the applicable registered family day care market rate.

The regulations recognize that there may be differences in the needs among districts. To the extent allowed by statute, the regulations provide districts with flexibility in designing their child care subsidy programs in a manner that will best meet the needs of their communities. Social services districts have the option to serve families in which the parent/caretaker is a dislocated worker and is participating in a training program in an employment field that currently is or is likely to be in demand in the near future. Social services districts may choose to serve these families to provide safe, affordable child care to enable these parents/caretakers to be trained in various skills and rejoin the workforce in new employment.

5. Rural area participation:

Federal regulation 45 CFR 98.43(b)(2) requires that payment rates be based on a local market survey conducted no earlier than two years prior to the effective date of the currently approved State plan for the Child Care and Development Fund. In accordance with the federal regulatory requirements, OCFS conducted a telephone survey of a sample of regulated providers. The sample drawn was representative of the regions across the State and, therefore, providers located in rural areas were appropriately represented in the survey. Prior to conducting the telephone survey, a letter was sent to all regulated child care providers to inform them that they might be included among the sample of providers called to participate in the market rate survey. A copy of the questions was also sent so that providers could prepare responses. A market research firm conducted the telephone survey in English and in Spanish, as needed, and had resources available to assist providers in other languages, if needed. Rate data was collected from almost 5,020 providers and that information formed the basis for the updated market rates.

The regulatory changes were also discussed with a workgroup of local districts, including rural districts, for advice on potential impact.

Job Impact Statement

Section 201-a of the State Administrative Procedures Act requires a job impact statement to be filed if proposed regulations will have an adverse impact on jobs and employment opportunities in the State.

Adjustments to the child care market rates reflect both increases and decreases. Decreases in the child care market rates reflect the market place and OCFS believes that they are not substantial enough to cause the loss of jobs in child care programs.

Education Department

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Museum Collections Management Policies

I.D. No. EDU-26-10-00002-EP
Filing No. 618
Filing Date: 2010-06-11
Effective Date: 2010-06-11

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

Proposed Action: Amendment of section 3.27 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 215(not subdivided), 216(not subdivided), 217(not subdivided), 233-aa(1), (2) and (5); and L. 2008, ch. 220

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

(1) the item or material is not relevant to the mission of the institution;

(2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;

(3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or

(4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

In the current financial downturn, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. Currently, some 37 institutions in New York in 2006 reported deficits of $100,000 or more. The Department is concerned that, in the absence of an express prohibition in Regents rule

section 3.27, museums and historical societies in financial distress will deaccession items or materials for purposes of paying their outstanding debt. Consistent with generally accepted professional and ethical standards within the museum and historical society communities, the proposed amendment would expressly prohibit proceeds from deaccessioning from being used for the payment of outstanding debt or capital expenses. The proposed amendment would also restrict when an institution may deaccession its collections to the instances listed in (1) through (4) above. This specific language was added in response to museums which sought clarity on what constitutes proper and acceptable grounds for deaccessioning.

The proposed amendment was adopted as an emergency rule at the December 2008 Regents meeting, and readopted as an emergency rule at the March, April, June, July, October and December 2009 and the February and March 2010 Regents meetings. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on January 7, 2009. Notices of Revised Rule Making were published in the State Register on August 26, 2009 and January 20, 2010. The Notice of Emergency Adoption and Proposed Rule Making expired on April 7, 2010. A new Notice of Emergency Adoption and Proposed Rule Making is being published in the June 30, 2010 State Register with this Statement.

The proposed amendment is consistent with generally accepted professional and ethical standards within the museum and historical society communities. State Education Department staff continue to work with the Legislature and with museum constituents to develop revised standards for museum deaccessioning. The Department participated in a January 14, 2010, roundtable discussion in New York City organized by the New York State Assembly. However, a consensus has not been reached with respect to the revised standards, and the Department believes it is necessary to continue the emergency rule that has remained in effect since December 19, 2008.

The emergency rule adopted at the March Regents meeting is only effective for 60 days and will expire on June 12, 2010. If the rule were to lapse, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. To avoid the adverse effects of a lapse in the emergency rule, another emergency action is necessary at the February Regents meeting to readopt the rule, effective June 13, 2010 so that it may remain continuously in effect until it can be adopted and made effective as a permanent rule.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to protect the public's interest in collections held by a museum or historical society by enumerating the specific criteria under which an institution may deaccession an item or material in its collection, remove the option allowing an institution to designate a structure as a collections item but keep intact any such designation made by vote of a board of trustees prior to December 19, 2008, and specify that no proceeds from deaccessioning may be used for capital expenses, except to preserve, protect or care for an historic building previously designated as part of the institution's collection, as above. Emergency action is also necessary to ensure that the emergency rule remains continuously in effect until it can be adopted and made effective as a permanent rule.

It is anticipated that the emergency rule will be presented for permanent adoption at a subsequent Regents meeting, after publication of a new Notice of Proposed Rule Making in the State Register and expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act.

Subject: Museum collections management policies.

Purpose: To clarify restrictions on the deaccessioning of items and materials in collections held by museums and historical societies.

Text of emergency/proposed rule: 1. Paragraph (7) of subdivision (a) of section 3.27 of the Rules of the Board of Regents is amended, effective June 13, 2010, to read as follows, provided that such amendment shall expire and be deemed repealed August 9, 2010:

(7) Collection means one or more original tangible objects, artifacts, records or specimens, including art generated by video, computer or similar means of projection and display, that have intrinsic historical, artistic, cultural, scientific, natural history or other value that share like characteristics or a common base of association and are accessioned; for purposes of this section, historic structures owned by an institution shall be considered as part of a collection *only* when so designated by the *board of trustees of the* institution *by vote conducted on or before December 19, 2008*;

2. Paragraphs (6) and (7) of subdivision (c) of section 3.27 of the Rules of the Board of Regents are amended, effective June 13, 2010, to read as follows, provided that such amendment shall expire and be deemed repealed August 9, 2010:

(6) Collections Care and Management. The institution shall:

(i) own, maintain and/or exhibit original tangible objects, artifacts, records, specimens, buildings, archeological remains, properties, lands and/or other tangible and intrinsically valuable resources that are appropriate to its mission;

(ii) ensure that the acquisition and deaccessioning of its collection is consistent with its corporate purposes and mission statement*, including that deaccessioning of items or material in its collection is limited to the circumstances prescribed in paragraph (7) of this subdivision*;

(iii) have a written collections management policy providing clear standards to guide institutional decisions regarding the collection, that is in regular use, available to the public upon request, filed with the commissioner for inspection by anyone wishing to examine it; and which, at a minimum, satisfactorily addresses the following subject areas:

(a) acquisition. The criteria and processes used for determining what items are added to the collections;

(b) loans. The criteria and processes used for borrowing items owned by other institutions and individuals, and for lending items from the collections;

(c) preservation. A statement of intent to ensure the adequate care and preservation of collections;

(d) access. A statement indicating intent to allow reasonable access to the collections by persons with legitimate reasons to access them; and

(e) deaccession. The criteria and process (including levels of permission) used for determining what items are to be removed from the collections, *which shall be consistent with paragraph (7) of this subdivision,* and a statement limiting the use of any funds derived therefrom in accordance with subparagraph [(vii)] (*vi*) of this paragraph;

(iv) ensure that collections or any individual part thereof and the proceeds derived therefrom shall not be used as collateral for a loan;

(v) ensure that collections shall not be capitalized; and

(vi) ensure that proceeds derived from the deaccessioning of any property from the institution's collection be restricted in a separate fund to be used only for the acquisition, preservation, protection or care of collections. In no event shall proceeds derived from the deaccessioning of any property from the collection be used for operating expenses*, for the payment of outstanding debt, or for capital expenses other than such expenses incurred to preserve, protect or care for an historic building which has been designated part of its collections in accordance with paragraph (7) of subdivision (a) of this section,* or for any purposes other than the acquisition, preservation, protection or care of collections.

(7) *Deaccessioning of collections. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:*

(i) the item or material is not relevant to the mission of the institution;

(ii) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;

(iii) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or

(iv) the institution is unable to conserve the item or material in a responsible manner.

(8) Education and Interpretation. The institution shall offer programmatic accommodation for individuals with disabilities to the extent required by law.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire August 9, 2010.

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

Data, views or arguments may be submitted to: Jeffrey W. Cannell, Deputy Comm. for Cultural Education, State Education Department, Cultural Education Center, Room 10A33, Albany, NY 12230, (518) 474-5976

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Education Law section 207 empowers the Board of Regents and the Commissioner of Education to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the State Education Department by law.

Education Law section 215 authorizes the Regents, the Commissioner,

or their representatives, to visit, examine and inspect education corporations and other institutions admitted to the University of the State of New York, as defined in Education Law section 214, and to require, as often as desired, duly verified reports giving such information and in such form as they shall prescribe.

Education Law section 216 authorizes the Board of Regents to incorporate educational institutions, including museums and other institutions for the promotion of science, literature, art, history or other department of knowledge, with such powers, privileges and duties, and subject to such limitations and restrictions, as they Regents may prescribe.

Education Law section 217 empowers the Board of Regents to grant a provisional charter to an institution, which shall be replaced by an absolute charter when the conditions for such absolute charter have been fully met.

Education Law section 233-aa, as added by Chapter 220 of the Laws of 2008, enacts provisions governing the ownership and management of properties owned by or lent to museums, requires that the acquisition of property by a museum pursuant to section 233-aa must be consistent with the mission of the museum, and specifies that proceeds derived from the sale of any property title to which was acquired by a museum pursuant to section 233-aa shall be used only for the acquisition of property for the museum's collection or for the preservation, protection, and care of the collection and shall not be used to defray ongoing operating expenses of the museum.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the statutes by clarifying criteria regarding the deaccessioning of items and materials in the collections of chartered museums or historical societies, consistent with generally accepted professional and ethical standards within the museum and historical society communities.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

(1) the item or material is not relevant to the mission of the institution;

(2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;

(3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or

(4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

4. COSTS:

(a) Costs to the State: None.

(b) Costs to local governments: None.

(c) Costs to private, regulated parties: None.

(d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any costs on such institutions, the State, local governments or the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to museums and historical societies with collections chartered by the Board of Regents, and does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

6. PAPERWORK:

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any additional paperwork requirements on such institutions.

7. DUPLICATION:

The proposed amendment duplicates no existing state or federal requirements.

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

There are no applicable federal standards regarding the chartering and registration of museums and historical societies by the Board of Regents.

10. COMPLIANCE SCHEDULE:

The proposed amendment clarifies criteria regarding the deaccessioning of items and materials in the collections of chartered museums or historical societies, consistent with generally accepted professional and ethical standards within the museum and historical society communities. It is anticipated that regulated parties can achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

The proposed amendment applies to museums and historical societies authorized to hold collections chartered by the Board of Regents and does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse financial impact, on small businesses or local governments. Because it is evident from the nature of the rules that it does not affect small businesses or local governments, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will apply to all of the 644 museums and 884 historical societies in New York State (source: New York State Museum chartering database as of November 2008), including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 persons per square mile or less.

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

The purpose of the proposed amendment is to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

(1) the item or material is not relevant to the mission of the institution;

(2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;

(3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or

(4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

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

3. COMPLIANCE COSTS:

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any costs on such institutions, the State, local governments or the State Education Department.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies. The proposed amendment clarifies restrictions on

when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, consistent with generally accepted professional and ethical standards within the museum and historical society communities, and does not impose any additional compliance requirements or costs on such institutions. Since these requirements must have State-wide application in order to ensure uniform, consistent practices relating to museum and historical society collections management, it is not feasible to impose a lesser standard on, or otherwise exempt, institutions located in rural areas.

5. RURAL AREA PARTICIPATION:

The State Education Department consulted with the Museum Association of New York in the development of the proposed amendment.

In addition, the Department asked its museum and historical society constituents to comment on the proposed amendment through announcements on web sites, and copies sent to listservs and electronic mailing lists. All areas of the state, including rural areas, received the announcements.

Job Impact Statement

The proposed amendment applies to museums and historical societies with collections, chartered by the Board of Regents and will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Special Act School Districts

I.D. No. EDU-26-10-00006-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 105.3 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1), (2) and (20), 308 (not subdivided) and 309 (not subdivided); and L. 2004, chs. 628 and 629

Subject: Special Act School Districts.

Purpose: To prescribe requirements for appointment of public members to boards of education of special act school districts.

Text of proposed rule: Section 105.3 of the Regulations of the Commissioner of Education is amended, effective October 6, 2010, as follows:

§ 105.3 Appointment of public members.

(a) . . .

(b) The full term of office of a public member shall be 4 [school] years, [provided that the public members initially appointed in the 2005-06 school year shall be appointed for the balance of the term commencing on July 1, 2005 and ending on June 30, 2009, and provided further that after such initial appointments,] *commencing and ending on such dates as determined by the Commissioner, provided that* the term of public members may be changed in accordance with subdivision 3 of section 2105 of the Education Law upon at least sixty days advance notice to the Commissioner.

(c) In the event a public member vacates his or her office during its term pursuant to section 2112 of the Education Law, the Commissioner may appoint an eligible person in the manner prescribed in this section for the remaining balance of the term of office*,* or [may fill such position by appointment] for a full term [commencing on July 1 next succeeding the date on which the vacancy occurred] *commencing and ending on such dates as determined by the Commissioner*.

(d) . . .

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

Data, views or arguments may be submitted to: John B. King, Jr. Senior Deputy Commissioner P-12, State Education Department, State Education Building, Room 125, 89 Washington Ave., Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Education Law section 207 authorizes the Regents and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and authorizes the Commissioner to enforce laws relating to the educational system and to execute the Regents' educational policies. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Education Law section 308 authorizes the Commissioner to enforce and give effect to any provision in the Education Law or in any other general or special law pertaining to the school system of the State or any rule or direction of the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of education.

Chapter 628 of the Laws of 2004, as amended by Chapter 629 of the Laws of 2004, requires the Commissioner of Education to appoint, pursuant to regulations promulgated by the Commissioner, two public members to the board of education of each special act school district for four-year terms, from candidates that submit a letter of intent to the Department.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement Chapters 628 and 629 of the Laws of 2004. Consistent with Chapters 628 and 629 of the Laws of 2004, the proposed amendment provides for the appointment of qualified public members to boards of education of each special act school district to ensure public accountability for educational services and use of public funds.

NEEDS AND BENEFITS:

Commissioner's Regulations § 105.3(b) generally provides for uniform, consecutive 4-year terms for all public members that commence on the first day of a school year (July 1st) and end on the last day of the fourth school year thereafter (June 30th). However, because of the unavailability of persons willing to serve at the prescribed times, it was not possible for the Commissioner to appoint public members in accordance with the current language in the regulation. The proposed amendment will provide more flexibility for the appointment of public members based upon their availability to serve.

COSTS:

(a) Costs to the State: none.

(b) Costs to local government: none.

(c) Cost to private regulated parties: none.

(d) Cost to regulating agency for implementation and continued administration of this rule: the proposed amendment is necessary to implement Chapters 628 and 629 of the Laws of 2004 and will not impose any costs beyond those inherent in such statutes. It is anticipated that any implementation costs will be absorbed using existing staff and resources.

LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility on school districts or other local governments. Consistent with Chapters 628 and 629 of the Laws of 2004, the proposed amendment establishes requirements for the appointment by the Commissioner of two public members to the board of education of each special act school district. The proposed amendment will provide more flexibility for the appointment of public members based upon their availability to serve.

PAPERWORK:

The proposed amendment does not impose any additional paperwork or reporting requirements.

DUPLICATION:

The proposed amendment does not duplicate existing State or federal requirements and is necessary to implement Chapters 628 and 629 of the Laws of 2004.

ALTERNATIVES:

There were no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that regulated parties can achieve compliance with the proposed rule by its effective date. The proposed amendment will provide more flexibility for the appointment of public members based upon their availability to serve.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment establishes procedures for the appointment

of public members to the boards of education of special act school districts pursuant to Chapters 628 and 629 of the Laws of 2004, and will not impose any adverse economic impact, reporting, recordkeeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

EFFECT OF RULE:

The proposed amendment applies to each of the special act school districts in the State. There are currently thirteen special act school districts.

COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any compliance requirements on school districts or other local governments. Consistent with Chapters 628 and 629 of the Laws of 2004, the proposed amendment establishes requirements for the appointment by the Commissioner of two public members to the board of education of each special act school district. The proposed amendment will provide more flexibility for the appointment of public members based upon their availability to serve.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment will not impose any additional costs on local governments.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZING ADVERSE IMPACT:

Consistent with Chapters 628 and 629 of the Laws of 2004, the proposed rule establishes requirements for the appointment by the Commissioner of two public members to the board of education of each special act school district, including eligibility requirements, appointment procedures, term lengths and procedures to fill vacancies. Commissioner's Regulations § 105.3(b) generally provides for uniform, consecutive 4-year terms for all public members that commence on the first day of a school year (July 1st) and end on the last day of the fourth school year thereafter (June 30th). However, because of the unavailability of persons willing to serve at the prescribed times, it was not possible for the Commissioner to appoint public members in accordance with the current language in the regulation. The proposed amendment will provide more flexibility for the appointment of public members based upon their availability to serve.

LOCAL GOVERNMENT PARTICIPATION:

The State Education Department provided copies of a draft regulation for review and comment to District Superintendents with special act school districts, the superintendents of the special act school districts, the New York School Boards Association and teachers unions representing teaching staff employed by special act school districts. The proposed amendment incorporates revisions to the draft regulation made in response to comments received by the Department.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to each of the special act school districts in the State. There are currently thirteen special act school districts, four of which are located in rural areas.

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

The proposed amendment does not impose any compliance requirements on school districts or other local governments in rural areas. Consistent with Chapters 628 and 629 of the Laws of 2004, the proposed amendment establishes requirements for the appointment by the Commissioner of two public members to the board of education of each special act school district. The proposed amendment will provide more flexibility for the appointment of public members based upon their availability to serve.

The proposed amendment does not impose any additional professional services requirements on local governments in rural areas.

COSTS:

The proposed amendment will not impose any additional costs on local governments in rural areas.

MINIMIZING ADVERSE IMPACT:

Consistent with Chapters 628 and 629 of the Laws of 2004, the proposed rule establishes requirements for the appointment by the Commissioner of two public members to the board of education of each special act school district, including eligibility requirements, appointment procedures, term lengths and procedures to fill vacancies. Commissioner's Regulations § 105.3(b) generally provides for uniform, consecutive 4-year terms for all public members that commence on the first day of a school year (July 1st) and end on the last day of the fourth school year thereafter (June 30th). However, because of the unavailability of persons willing to serve at the prescribed times, it was not possible for the Commissioner to appoint public members in accordance with the current language in the regulation. The proposed amendment will provide more flexibility for the appointment of public members based upon their availability to serve.

RURAL AREA PARTICIPATION:

The State Education Department provided copies of a draft regulation for review and comment to District Superintendents with special act school districts, the superintendents of the special act school districts (including those in rural areas), the New York School Boards Association and teachers unions representing teaching staff employed by special act school districts. The proposed amendment incorporates revisions to the draft regulation made in response to comments received by the Department.

Job Impact Statement

The proposed rule establishes procedures for the appointment of public members to the boards of education of special act school districts pursuant to Chapters 628 and 629 of the Laws of 2004, and will not have a substantial adverse impact on jobs and employment opportunities. Because it is evident from the nature of the rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Limited Permits and Experience, Supervision, and Endorsement Requirements for Licensure as a LCSW in New York

I.D. No. EDU-26-10-00007-P

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

Proposed Action: Amendment of sections 74.3, 74.4, 74.5, 74.6 and 74.7; and addition of section 74.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 212(3), 6501 (not subdivided), 6504 (not subdivided), 6506(6), 6507(2)(a), 6508(1), 7704(2)(c), 7705(1) and 7706(1) through (5)

Subject: Limited permits and experience, supervision, and endorsement requirements for licensure as a LCSW in New York.

Purpose: To expedite the processing of applications for licensure & to provide clarity regarding acceptable supervised experience.

Substance of proposed rule (Full text is posted at the following State website:www.op.nysed.gov): The Commissioner of Education proposes to promulgate regulations, relating to licensure as a licensed master social worker (LMSW) and a licensed clinical social worker (LCSW), limited permits for applicants in these professions, the practice of clinical social work by a LMSW under supervision, the requirements for insurance reimbursement pursuant to the Insurance Law, the supervised practice of licensed master social work by certain social workers, and the endorsement of a license as a LCSW in another jurisdiction for practice in New York State. The following is a summary of the substance of the regulations.

Supervised experience for licensure as a LCSW

Section 74.3(a) requires an applicant to complete three years of full-time, supervised experience in diagnosis, psychotherapy and assessment-based treatment planning, or the part-time equivalent, over a period of at least 36 months and not more than six years, in accordance with the requirements of section 74.6. The full-time experience shall consist of not less than 2,000 client contact hours.

Section 74.3(a)(1) requires that experience completed in New York must be completed as a Licensed Master Social Worker (LMSW) or permit holder, except in limited circumstances, and provides that experience in another jurisdiction may be accepted if completed in an authorized setting under a qualified supervisor, as determined by the department.

Section 74.3(a)(2) requires an applicant to complete the experience in an acceptable setting, as defined in subdivision (a) of section 74.6.

Section 74(a)(3) requires an applicant to complete the experience under a qualified supervisor, as defined in paragraph (2) of subdivision (c) of section 74.6.

Section 74.3(a)(4) requires the supervisor to retain records of the applicant's supervised experience and to submit documentation of the supervised experience on forms prescribed by the department. The department may request clarification of the supervisor's qualifications or the authority of the setting to provide professional services. If the supervisor is deceased or not available, a licensed colleague may submit verification of the applicant's experience.

Limited Permit for LMSW and LCSW applicant

Section 74.4(a)(1) is amended to clarify that the applicant for a permit

to practice licensed master social work must meet the moral character and education requirements to be eligible for a permit.

Section 74.4(a)(2) is amended to clarify that the permit is issued for a specific setting, as defined in subdivision (a) of section 74.6.

Section 74.4(a)(3) is amended to clarify that the supervisor shall be responsible for appropriate oversight of services provided by the permit holder and no supervisor shall supervise more than five permit holders at one time.

Section 74.4(b)(1) is amended to clarify that the applicant for a permit to practice licensed clinical social work must meet the moral character requirements, in addition to clinical education and supervised experience requirements, to be eligible for a permit.

Section 74.4(b)(2) is amended to clarify that the permit is issued for a specific setting, as defined in subdivision (a) of section 74.6, and may not be issued for a private practice owned or operated by the applicant.

Section 74.4(b)(3) is amended to clarify that the supervision of a LCSW permit holder must meet the requirements in subdivision (c) of section 74.6. In addition, the supervisor shall be responsible for appropriate oversight of services provided by the permit holder and no supervisor shall supervise more than five permit holders at one time.

Authorization qualifying certain LCSW for insurance reimbursement

Section 74.5(a) is amended to increase the application fee from $85 to $100 and to clarify that a licensed clinical social worker must meet the requirements in section 3221(l)(4)(d) or 4303(n) of the Insurance Law to qualify for insurance reimbursement.

Section 74.5(c) is amended to clarify that the LCSW must complete 2,400 client contact hours of psychotherapy experience over a period of not less than three years. The amendment requires the experience to be after licensure as a LCSW and requires no less than 400 client contact hours in any one year for the experience to be acceptable.

Section 74.5(c)(1) defines an acceptable setting for experience toward the psychotherapy privilege, which may include a private practice owned or operated by the applicant, who is licensed as a LCSW and authorized to practice psychotherapy.

Section 74.5(c)(2) requires the LCSW to submit for review and approval by the State Board for Social Work a plan for supervised experience that meets the requirements for the privilege. The plan shall be submitted to the State Board for Social Work before the applicant starts the experience for the privilege. Section 74.5(c)(2)(i) requires the plan to specify individual or group consultation of no less than two hours a month or enrollment in a program authorized to provide psychotherapy that is offered by an institution of higher education or a psychotherapy institute chartered by the Board of Regents. The amendment eliminates peer supervision for the privilege.

The amendment to 74.5(c)(2)(ii) clarifies that a qualified supervisor includes a LCSW who holds the privilege or the equivalent as determined by the department, a licensed psychologist competent in psychotherapy, or a licensed physician who is qualified to practice psychiatry, as determined by the department.

Supervision of certain qualified individuals providing clinical social work services

Section 74.6 is amended to clarify the supervision required for a LMSW or other qualified individual to practice clinical social work under supervision, in a setting acceptable to the Department.

Section 74.6(a)(i) defines an acceptable setting for the supervised practice of licensed clinical social work as including a professional business entity authorized to provide services in licensed clinical social work, a sole proprietorship or professional partnership owned by licensees who provide services that are within the scope of practice of licensed clinical social work, a hospital or clinic authorized under the Public Health law, a program or facility authorized under the Mental Hygiene law, a program or facility authorized under federal law or an entity defined as exempt or otherwise authorized to provide services that are within the scope of licensed clinical social work.

Section 74.6(a)(2) defines a qualified individual authorized to provide licensed clinical social work services under supervision as a LMSW, an individual with a limited permit to practice licensed clinical social work in New York, or an individual otherwise authorized to provide clinical social work services in a setting acceptable to the department and under appropriate supervision.

Section 74.6(b) allows a qualified individual to submit to the State Board for Social Work a plan for supervised experience in New York toward licensure as a LCSW for review and approval. The plan shall include a copy of documentation establishing that the agency or setting is an acceptable setting, as defined in section 74.6(a); a copy of the license of the qualified supervisor, as defined in section 74.6(c); a plan for supervision of the qualified individual accompanied by an attestation by the supervisor that he or she is responsible for services provided by the qualified individual; and, if a third-party is supervising the qualified individual, an affirmation from a designated representative of the setting that the setting is authorized to provide clinical social work services and the setting will ensure appropriate supervision of the qualified individual who is providing such services.

Section 74.6(c) is amended to clarify the supervision of a qualified individual seeking licensure as a LCSW to include at least 100 hours of in-person individual or group supervision, distributed appropriately over the period of the supervised experience. In addition, the qualified individual shall be under the general supervision of a qualified supervisor who shall review the qualified individual's diagnosis and treatment of each client, discuss the cases, provide oversight to the qualified individual in developing skills as a licensed clinical social worker, and regularly review and evaluate the professional work of the qualified individual.

There are no changes to section 74.6(c)(2), which requires the supervisor to be licensed and registered as a licensed clinical social worker, licensed psychologist or physician who is competent as a psychiatrist, in the determination of the department.

Section 74.6(d) defines the supervision of a LMSW who is providing clinical social work services under supervision but who is not using the experience to satisfy the experience requirements for licensure as a LCSW.

Section 74.6(d)(1) defines the supervision to be contact between the LMSW and supervisor during which the LMSW apprises the supervisor of the diagnosis and treatment of each client; the LMSW's cases are discussed; the supervisor provides the LMSW with oversight and guidance in diagnosing and treatment clients; the supervisor regularly reviews and evaluates the professional work of the LMSW; and the supervisor provides at least two hours per month of in-person individual or group clinical supervision.

Section 74.6(d)(2) requires the supervisor to meet the definition of a qualified supervisor in section 74.6(c)(2).

Section 74.6(e) requires the supervisor to maintain records of client contact hours in diagnosis, psychotherapy and assessment-based treatment planning and supervision hours provided to the qualified individual and to produce a log of hours, if requested.

Supervision of certain social workers providing licensed master social work services

The title of section 74.7 is amended and section 74.7 is amended to authorize a person with a bachelor of social work or master of social work degree, acceptable to the department, to perform activities and services within the scope of practice of a licensed master social worker as defined in paragraphs (a) and (b) of subdivision (1) of section 7701 of the Education Law, under the supervision of a LMSW or LCSW. The amendment clarifies that nothing in this section authorizes the use of the title ''LMSW'' or ''LCSW'' or the practice of licensed clinical social work, as defined in the Education Law.

Endorsement of certain LCSW applicants

A new section 74.9 is added to the Regulations of the Commissioner of Education to establish requirements for endorsement of a license to practice licensed clinical social work issued by another jurisdiction. The applicant must demonstrate licensure in good standing as a LCSW in another jurisdiction(s) and at least 10 years of practice in the 15 years preceding the application, submit the application and fee established in law for licensure and initial registration, and complete coursework in the identification and reporting of suspected child abuse or neglect.

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

Data, views or arguments may be submitted to: David Hamilton, New York State Education Department, 89 Washington Avenue, Albany, New York 12234, (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.

Subdivision (3) of section 212 of the Education Law authorizes the Commissioner of Education to charge a fee for permits in regulation.

Section 6501 of the Education Law provides that, to qualify for admission to a profession, an applicant must meet requirements prescribed in the article of the Education Law that pertains to the particular profession.

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

Paragraph (6) of section 6506 of the Education Law authorizes the Board of Regents to indorse a license issued by a licensing board of another state or country upon the applicant fulfilling the requirements.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations relating to the professions.

Subdivision (1) of section 6508 of the Education Law authorizes the state boards for the professions to assist the Regents and the Department in matters of professional licensure and practice.

Paragraph (c) of subdivision (2) of section 7704 of the Education Law establishes the experiences requirements for licensure as a clinical social worker.

Section 7705 of the Education Law authorizes the department to issue a limited permit for a period of not more than twelve months to practice licensed clinical social work or licensed master social work to an applicant who has met all requirements for licensure except those relating to the examination and provided that the individual is under the general supervision of a licensed master social work or a licensed clinical social worker.

Subdivision (2) of Section 7706 of the Education Law provides that nothing shall prevent an individual possessing a baccalaureate of social work degree or its equivalent from performing social work services under supervision by a licensed master social worker or a licensed clinical social worker, in accordance with the Commissioner's regulations.

Subdivision (3) of section 7706 of the Education Law provides that nothing shall prevent a licensed master social worker from performing clinical social work services in a facility setting and under supervision in accordance with the Commissioner's regulations.

Subparagraphs (A) and (D) of paragraph (4) of subsection (l) of section 3221 of the Insurance Law and subsections (i) and (n) of section 4303 of the Insurance Law authorize licensed clinical social workers with satisfactory experience to qualify for reimbursements under certain group health insurance policies for psychotherapy services, in accordance with the Commissioner's regulations.

2. LEGISLATIVE OBJECTIVES:

The proposed regulation carries out the intent of these sections of the Education Law by clarifying existing experience and limited permit requirements for licensure as a licensed master social worker and licensed clinical social worker, by clarifying experience requirements for the insurance privilege available to certain LCSWs, and by establishing requirements for the endorsement of a license issued in another jurisdiction.

3. NEEDS AND BENEFITS:

Section 7704(2) of the Education Law requires an applicant seeking licensure as a LCSW to complete three years of full-time supervised post-graduate clinical social work experience in diagnosis, psychotherapy and assessment-based treatment planning, or its part-time equivalent obtained over a period of not more than six years. The law does not require the applicant to complete any other social work experience, although the practice of licensed clinical social work includes other activities, including case management, advocacy, and testing. Such activities are not acceptable toward completion of the experience requirement under the current law. The proposed amendments to the regulations require an applicant to complete 2,000 client contact hours in diagnosis, psychotherapy, and assessment-based treatment planning over a period of not less than 36 months and not more than 72 months under a qualified supervisor. While this is a 30 percent reduction from the current requirement of 2,880 client contact hours over the same period of time, it is still among the highest requirements for clinical hours in the U.S., and the Department believes 2,000 client contact hours provides sufficient experience to ensure client protection once the applicant is licensed.

The proposed amendment to section 74.3 of the Commissioner's regulations clarifies the experience requirements for licensure as a LCSW in New York. The amendments require an applicant for licensure to complete the required experience as a LMSW or permit holder in New York, except in certain limited circumstances. For experience completed in another jurisdiction, the experience must be obtained after the applicant completes his or her master's degree. The amendment requires the applicant to complete the experience in an acceptable setting under a qualified supervisor, as defined in section 74.6 of the Commissioner's regulations. The proposed amendment requires the supervisor to maintain records of the applicant's client contact hours and supervision and to submit verification of the client contact hours and supervision on forms prescribed by the Commissioner.

The proposed amendment also amends section 74.4 of the Commissioner's regulations to clarify that limited permit applicants must be of good moral character and that the permit may only be issued for work in an authorized setting under a qualified supervisor. In addition, the amendment strengthens the requirement that the supervisor is responsible for the services provided by the permit holder and limits a licensee to supervising no more than five permit holders at any one time. Since the permit holder is only authorized to practice under supervision, this restriction is appropriate for public protection and consistent with the requirements in other professions. A LMSW or LCSW permit holder who is practicing clinical social work under supervision must be under general supervision as defined in the proposed amendment.

Currently, section 74.5 of the Commissioner's regulations establishes the fee and experience requirements for a LCSW to qualify for the insurance privilege established in section 3221(l)(4)(D) or 4303(n) of the Insurance Law. The proposed amendments increase the application fee from $85 to $100 and continue the requirement that the applicant complete 2,400 client contact hours of psychotherapy. However, the current regulations allow experience completed before licensure to be submitted and this amendment clarifies the intent of the law that experience must be after licensure as an LCSW over a period of not less than three years. Under the proposed amendment, the applicant would have to have no less than 400 client contact hours in any one year in order to qualify for the privilege. In order to clarify the process of meeting the requirements in Insurance Law, the proposed amendment also defines an acceptable setting for the practice of licensed clinical social work and requires a LCSW to submit for approval by the State Board for Social Work a plan for appropriate supervision. The amendment also defines acceptable supervision for the privilege as two or more hours per month of individual or group consultation or enrollment in a program in psychotherapy offered by an institution of higher education or by a psychotherapy institute chartered by the Board of Regents. This amendment eliminates peer supervision, which is not authorized by the Insurance Law, and clarifies the pathway to the insurance privilege.

The proposed amendments to section 74.6 of the Commissioner's regulations establish the supervision requirements for a licensed master social worker providing clinical social work services. A LMSW who has submitted an application for licensure as a LCSW must maintain registration as a LMSW in New York and may only practice under supervision until licensed as a LCSW. The amendments clarify what constitutes an acceptable setting for the practice of clinical social work and require the supervisor to provide at least 100 hours of individual or group supervision to the LMSW, distributed appropriately over a period of at least 36 months. The LMSW would also be able to submit a plan for supervised experience toward licensure as a LCSW, for review and approval by the State Board for Social Work. By obtaining such approval prior to starting a position, an applicant would be able to avoid working for three years in a position which cannot be accepted toward meeting the experience requirements for licensure as a LCSW because the setting or supervisor was not authorized by law and/or regulation. The State Board's review and approval of the voluntary plan would both protect the public and provide assurances to the LMSW that the setting and supervisor are authorized to engage in the practice of clinical social work in New York. Since a LMSW may provide diagnosis, psychotherapy and assessment-based treatment planning under supervision without seeking licensure as an LCSW, the amendment requires such a LMSW to receive at least two hours per month of in-person individual or group clinical supervision.

Section 7706(2) of the Education Law provides an exemption from licensure for an individual with a bachelor's degree in social work, if the person is under the general supervision of a LMSW or LCSW and engages in non-supervisory and non-clinical activities only. The proposed amendments to section 74.7 of the Commissioner's regulations provide standards for an individual with a BSW or MSW degree to provide licensed master social work services, under supervision. In order to clarify the boundaries of practice, the amendment clearly states that the individual may not provide administrative supervision or engage in the practice of licensed clinical social work or use the title ''LMSW'' or ''LCSW.''

The proposed amendment adds a new section 74.9 to allow the Department to endorse for practice in New York the license of an LCSW licensed in another jurisdiction. The applicant would have to have at least 10 years of licensed practice during the 15 years immediately preceding the application for licensure in New York. In addition, the applicant must demonstrate: licensure as a LCSW on the basis of an a master's degree in social work from an acceptable school, post-degree supervised clinical experience, and the passage of a clinical examination in social work acceptable to the department. The applicant must also be of good character, complete coursework in the identification and reporting of suspected child abuse, and submit the application for licensure and fee established in law and regulation.

4. COSTS:

(a) Costs to State government: The proposed regulations will not impose any additional cost on State government, including the State Education Department, over and above the costs imposed by Article 154 of the Education Law for administering these professions.

(b) Cost to local government: The proposed amendment establishes requirements for licensure as a licensed master social worker or licensed clinical social worker. The regulation will not impose additional costs on local government.

(c) Cost to private regulated parties: The proposed regulation will increase the cost of the application for the insurance privilege available to certain licensed clinical social workers from $85 to $100. The proposed regulation will not impose any other costs on applicants for the licenses over and above those imposed by Article 154 of the Education Law. The proposed regulation simply clarifies the standards for acceptable experi-

ence and the issuance of limited permits, and provides an option for endorsement of a professional license for certain applicants seeking licensure in New York.

(d) Cost to the regulatory agency: As stated above in Costs to State government, the proposed regulation does not impose costs on the State Education Department beyond those imposed by statute.

5. LOCAL GOVERNMENT MANDATES:

The proposed regulation implements the requirements of Article 154 of the Education Law by establishing experience and supervision requirements that individuals must meet to be licensed as a licensed master social worker and licensed clinical social worker. Therefore, the proposed regulation does not impose any program, service, duty or responsibility upon local governments.

6. PAPERWORK:

Applicants seeking licensure as a licensed clinical social worker will be required to submit to the department verification of their supervised experience to meet the licensure requirement. The applicant's licensed supervisor(s) will also be required to maintain documentation of the applicant's supervised practice and hours of supervision and will be responsible for submitting a copy of such documentation to the Department upon its request. Applicants seeking authorization for insurance reimbursement and individuals seeking licensure as a clinical social work will also be required to submit for review and approval by the State Board for Social Work, a plan for supervised experience before the applicant commences its supervised experience requirement.

7. DUPLICATION:

The proposed regulation does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

There was discussion about changing requirements for licensure and practice through an amendment to Article 154 of the Education Law, but it was determined that the changes included in the proposed regulations are within the authority of the State Education Department and that the promulgation of such regulations would be the more efficient way to achieve the clarifications necessary to ensure an adequate supply of qualified licensed master social workers and licensed clinical social workers.

9. FEDERAL STANDARDS:

There are no Federal standards for the licensure of master social workers and clinical social workers, the subject of the proposed amendment.

10. COMPLIANCE SCHEDULE:

Applicants for licensure or certification must comply with the regulation on the stated effective date.

Regulatory Flexibility Analysis

The purpose of the proposed amendment is to clarify existing requirements for limited permits for licensed master social workers (LMSW) and licensed clinical social workers (LCSW) and the experience and supervision requirements for licensure as a LCSW in New York and for the insurance privilege available to certain LCSWs. The proposed amendment will expedite the processing of applications for licensure as a LCSW in New York State, provide clarity regarding acceptable supervised experience for licensure as a LCSW to ensure public protection, and establish requirements for the endorsement of certain out-of-state licensed clinical social workers. The proposed amendment affects individuals seeking licensure as a LMSW or LCSW or applying for the insurance privilege, and will have no effect on small businesses and does not regulate local governments.

The amendment will not impose any adverse economic impact, recordkeeping, reporting, or other compliance requirements on small businesses or local governments. Because it is evident from the nature of the regulation that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to applicants seeking licensure as a licensed master social worker (''LMSW'') or licensed clinical social worker (''LCSW'') in New York State. The proposed amendment seeks to change New York State licensure requirements to conform to current practice in these professions, to expand opportunities for applicants to meet the experience requirement under qualified supervisors, and allow for the endorsement of licenses issued in other jurisdictions for qualified licensed clinical social workers seeking to become licensed in New York State. Applicants for licensure in these fields include individuals located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

Section 7704(2) of the Education Law requires an applicant seeking licensure as a LCSW to complete three years of full-time supervised postgraduate clinical social work experience in diagnosis, psychotherapy and assessment-based treatment planning, or its part-time equivalent obtained over a period of not more than six years. The law does not require the applicant to complete any other social work experience, although the practice of licensed clinical social work includes other activities, including case management, advocacy, and testing. Such activities are not acceptable toward completion of the experience requirement under the current law. The proposed amendments to the regulations require an applicant to complete 2,000 client contact hours in diagnosis, psychotherapy, and assessment-based treatment planning over a period of not less than 36 months and not more than 72 months under a qualified supervisor. While this is a 30 percent reduction from the current requirement for 2,880 client contact hours over the same period of time, it is still among the highest requirements for clinical hours in the U.S., and the Department believes 2,000 client contact hours provides sufficient experience to ensure client protection once the applicant is licensed.

The proposed amendment to section 74.3 of the Commissioner's regulations clarifies the experience requirements for licensure as a LCSW in New York. The amendments require an applicant for licensure to complete the required experience as a LMSW or permit holder in New York, except in certain limited circumstances. For experience completed in another jurisdiction, the experience must be obtained after the applicant completes their master's degree. The amendment requires the applicant to complete the experience in an acceptable setting under a qualified supervisor, as defined in section 74.6 of the Commissioner's regulations. The proposed amendment requires the supervisor to maintain records of the applicant's client contact hours and supervision and to submit verification of the client contact hours and supervision on forms prescribed by the Commissioner.

The proposed amendment also amends section 74.4 of the Commissioner's regulations to clarify that limited permit applicants must be of good moral character and that the permit may only be issued for work in an authorized setting under a qualified supervisor. In addition, the amendment strengthens the requirement that the supervisor is responsible for the services provided by the permit holder and limits a licensee to supervising no more than five permit holders at any one time. Since the permit holder is only authorized to practice under supervision, this restriction is appropriate for public protection and consistent with the requirements in other professions. A LMSW or LCSW permit holder who is practicing clinical social work under supervision must be under general supervision as defined in the proposed amendment.

Currently, section 74.5 of the Commissioner's regulations establishes the fee and experience requirements for a LCSW to qualify for the insurance privilege established in section 3221(l)(4)(D) or 4303(n) of the Insurance Law. The proposed amendments increase the application fee from $85 to $100 and continue the requirement that the applicant complete 2,400 client contact hours of psychotherapy. The proposal also specifies that experience must be after licensure as an LCSW over a period of not less than three years. Under the proposed amendment, the applicant would have to have no less than 400 client contact hours in any one year in order to qualify for the privilege. In order to clarify the process of meeting the requirements in Insurance Law, the proposed amendment also defines an acceptable setting for the practice of licensed clinical social work and requires a LCSW to submit for approval by the State Board for Social Work a plan for appropriate supervision. The amendment also defines acceptable supervision for the privilege as two or more hours per month of individual or group consultation or enrollment in a program in psychotherapy offered by an institution of higher education or by a psychotherapy institute chartered by the Board of Regents. This amendment eliminates peer supervision, which is not authorized by the Insurance Law, and clarifies the pathway to the insurance privilege.

The proposed amendments to section 74.6 of the Regulations of the Commissioner of Education establish the supervision requirements for a licensed master social worker providing clinical social work services. A LMSW who has submitted an application for licensure as a LCSW must maintain registration as a LMSW in New York and may only practice under supervision until licensed as a LCSW. The amendments clarify what constitutes an acceptable setting for the practice of clinical social work and require the supervisor to provide at least 100 hours of individual or group supervision to the LMSW, distributed appropriately over a period of at least 36 months. The LMSW would also be able to submit a plan for supervised experience toward licensure as a LCSW, for review and approval by the State Board for Social Work. By obtaining such approval prior to starting a position, an applicant would be able to avoid working for three years in a position which cannot be accepted toward meeting the experience requirements for licensure as a LCSW because the setting or supervisor was not authorized by law and/or regulation. The State Board's review and approval of the voluntary plan would both protect the public and provide assurances to the LMSW that the setting and supervisor are authorized to engage in the practice of clinical social work in New York. Since a LMSW may provide diagnosis, psychotherapy and assessment-

based treatment planning under supervision without seeking licensure as an LCSW, the amendment requires such a LMSW to receive at least two hours per month of in-person individual or group clinical supervision.

Section 7706(2) of the Education Law provides an exemption from licensure for an individual with a bachelor's degree in social work, if the person is under the general supervision of a LMSW or LCSW and engages in non-supervisory and non-clinical activities only. The proposed amendments to section 74.7 of the Commissioner's regulations provide standards for an individual with a BSW or MSW degree to provide licensed master social work services, under supervision. In order to clarify the boundaries of practice, the amendment clearly states that the individual may not provide administrative supervision or engage in the practice of licensed clinical social work or use the title ''LMSW'' or ''LCSW.''

The proposed amendment adds a new section 74.9 to allow the Department to endorse for practice in New York the license of a LCSW licensed in another jurisdiction. The applicant would have to have at least 10 years of licensed practice during the 15 years immediately preceding the application for licensure in New York. In addition, the applicant must demonstrate: licensure as a LCSW on the basis of an a master's degree in social work from an acceptable school, post-degree supervised clinical experience, and the passage of a clinical examination in social work acceptable to the department. The applicant must also be of good character, complete coursework in the identification and reporting of suspected child abuse, and submit the application for licensure and fee established in law and regulation.

3. COSTS:

The proposed amendment increases the fee for licensed clinical social workers seeking authorization to qualify for insurance reimbursement from $85 to $100.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment revises the experience and limited permit provisions and establishes new endorsement requirements for the licensure of clinical social workers in New York State. These requirements are in place to ensure competency of licensed professionals and thereby safeguard the public.

Due to the nature of the proposed amendment, the State Education Department does not believe it to be warranted to establish different requirements for institutions located in rural areas.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the State Board for Social Work and from statewide professional associations whose memberships include individuals who live or work in rural areas.

Job Impact Statement

The purpose of the proposed amendment is to clarify existing requirements for limited permits for licensed master social workers (LMSW) and licensed clinical social workers (LCSW) and experience and supervision requirements for licensure as a LCSW in New York and for the insurance privilege available to certain LCSWs. The proposed amendment will expedite the processing of applications for licensure as a LCSW in New York State, will provide clarity regarding acceptable supervised experience for licensure as a LCSW and for the insurance privilege to ensure public protection, and will establish requirements for the endorsement of certain out-of-state licensed clinical social workers.

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.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

School and School District Accountability

I.D. No. EDU-26-10-00008-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 100.2(p)(1) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), 305(1), (2) and (20), 309 (not subdivided) and 3713(1) and (2)

Subject: School and School District Accountability

Purpose: To conform the Commissioner's Regulations with New York's approved amended NCLB accountability plan.

Text of proposed rule: Subparagraph (i) of paragraph (1) of subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective October 6, 2010 as follows:

(i) Accountability groups shall mean, for each public school, school district and charter school, those groups of students for each grade level or annual high school cohort, as described in paragraph (16) of this subdivision comprised of: all students; students from major racial and ethnic groups, as set forth in subparagraph (bb)(2)(v) of this section; students with disabilities, as defined in section 200.1 of this Title*, including, beginning with the 2009-2010 school year, students no longer identified as students with disabilities but who had been so identified during the preceding one or two school years*; students with limited English proficiency, as defined in Part 154 of this Title, including, beginning with the 2006-2007 school year, a student previously identified as a limited English proficient student during the preceding one or two school years; and economically disadvantaged students, as identified pursuant to section 1113(a)(5) of the NCLB, 20 U.S.C. section 6316(a)(5) (Public Law, section 107-110, section 1113(a)(5), 115 STAT, 1469; Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402-9328; 2002; available at the Office of Counsel, State Education Building, Room 148, Albany, NY 12234). The school district accountability groups for each grade level will include all students enrolled in a public school in the district or placed out of the district for educational services by the district committee on special education or a district official.

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

Data, views or arguments may be submitted to: John B. King, Jr., Senior Deputy Commissioner P-12, Office of Elementary, Middle, Secondary and Continuing Ed., State Education Building, Room 125, 89 Washington Ave., Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

Education Law section 207 empowers the Regents and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department.

Education Law section 210 authorizes the Regents to register domestic and foreign institutions in terms of New York standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in the State.

Education Law section 215 provides the Commissioner with the authority to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

Education Law section 305(1) and (2) provide that the Commissioner, as chief executive officer of the State system of education, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or any statute relating to education, and shall be responsible for executing all educational policies determined by the Regents. Section 305(20) provides that the Commissioner shall have and execute such further powers and duties as he shall be charged with by the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3713(1) and (2) authorizes the State and school districts to accept federal law making appropriations for educational purposes and authorizes the Commissioner to cooperate with federal agencies to implement such law.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes, and is necessary to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the federal No Child Left Behind Act of 2001 (NCLB), Public Law section 107-110, relating to academic standards and school/district accountability.

NEEDS AND BENEFITS:

Commissioner's Regulations section 100.2(p)(1)(i) has been amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the NCLB relating to academic

standards and school and school district accountability. The State and local educational agencies (LEAs) are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State Plan, that the state has developed and is implementing a single, statewide accountability system to ensure that all LEAs, public elementary schools and public high schools make adequate yearly progress (AYP). Each state must implement a set of yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards.

On June 9, 2010, Thelma Melendez de Santa Ana, Assistant Secretary of the Office of Elementary and Secondary Education of the United States Department of Education (USDE), informed Commissioner Steiner that USDE had approved New York's request to amend its State accountability plan to include in the students with disabilities subgroup, students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress.

The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year, and will make the accountability rules for former students with disabilties consistent with rules currently applied to former limited English proficient students.

COSTS:

Cost to the State: None.

Costs to local government: None.

Cost to private regulated parties: None.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress. The proposed amendment will not impose any costs on the State, the State Education Department or LEAs beyond those imposed by State and federal statutes.

LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress.

PAPERWORK:

The proposed amendment does not impose any additional reporting, forms or other paperwork requirements. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress.

DUPLICATION:

The proposed amendment does not duplicate, overlap or conflict with State and federal rules or requirements. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress.

ALTERNATIVES:

There were no significant alternatives to the proposed amendment and none were considered. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year, and will make the accountability rules for former students with disabilities consistent with rules currently applied to former limited English proficient students.

FEDERAL STANDARDS:

The proposed amendment does not exceed any minimum standards of the federal government for the same or similar subject areas. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress.

COMPLIANCE SCHEDULE:

The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funding under Title I of the ESEA, as amended.

It is anticipated that regulated parties may achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the United State Department of Education, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year. The proposed amendment applies to school districts and charter schools.

The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed amendment applies to school districts and charter schools.

COMPLIANCE REQUIREMENTS:

The proposed amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year, and will make the accountability rules for former students with disabilities consistent with rules currently applied to former limited English proficient students.

PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts or charter schools.

COMPLIANCE COSTS:

The proposed amendment will not impose any costs on the State, the State Education Department or LEAs beyond those imposed by State and federal statutes. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements on school districts and charter schools. Economic feasibility is addressed under the Compliance Costs section above.

MINIMIZING ADVERSE IMPACT:

Commissioner's Regulations section 100.2(p)(1)(i) has been amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the NCLB relating to academic standards and school and school district accountability. The State and lo-

cal educational agencies (LEAs) are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State Plan, that the state has developed and is implementing a single, statewide accountability system to ensure that all LEAs, public elementary schools and public high schools make adequate yearly progress (AYP). Each state must implement a set of yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards.

The proposed amendment will not impose any additional program, service, duty, responsibility or costs beyond those imposed by State and federal statutes. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year, and will make the accountability rules for former students with disabilities consistent with rules currently applied to former limited English proficient students.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment have been solicited from school districts through the offices of the district superintendents of each supervisory district in the State. In addition, copies of the proposed amendment have been provided to each charter school to give them an opportunity to participate in this proposed rule making. Copies of the proposed amendment have also been provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to school districts and charter schools, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the United States Department of Education (USDE), to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress (AYP). Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year, and will make the accountability rules for former students with disabilities consistent with rules currently applied to former limited English proficient students.

The proposed amendment does not impose any additional professional services requirements on school districts or charter schools.

COSTS:

The proposed amendment will not impose any costs on the State, the State Education Department or local educational agencies (LEAs) beyond those imposed by State and federal statutes.

The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating AYP.

MINIMIZING ADVERSE IMPACT:

Commissioner's Regulations section 100.2(p)(1)(i) has been amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the No Child Left Behind Act of 2001 (NCLB) relating to academic standards and school and school district accountability. The State and LEAs are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended.

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State Plan, that the state has developed and is implementing a single, statewide accountability system to ensure that all LEAs, public elementary schools and public high schools make AYP. Each state must implement a set of yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards.

The proposed amendment will not impose any additional program, service, duty, responsibility or costs beyond those imposed by State and federal statutes. The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year, and will make the accountability rules for former students with disabilities consistent with rules currently applied to former limited English proficient students. Because these Federal and State requirements are uniformly applicable State-wide to school districts and charter schools, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

RURAL AREA PARTICIPATION:

Comments on the proposed amendment have been solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. In addition, copies of the proposed amendment will be provided to each charter school. Copies of the proposed amendment have also been provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the United State Department of Education, to allow inclusion in the students with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year.

The proposed amendment applies to school districts, boards of cooperative educational services (BOCES) and charter schools. Local educational agencies, including school districts, BOCES and charter schools, are required to comply with the requirements of the NCLB as a condition to their receipt of federal funding under Title I of the Elementary and Secondary Education Act of 1965, as amended.

The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

NOTICE OF ADOPTION

Portland Cement Plants and Glass Plants

I.D. No. ENV-51-09-00009-A

Filing No. 620

Filing Date: 2010-06-11

Effective Date: 30 days after filing

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

Action taken: Amendment of Parts 200 and 220 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305 and 19-0311

Subject: Portland Cement Plants and Glass Plants.

Purpose: To reduce nitrogen oxide emissions from portland cement kilns and glass furnaces.

Substance of final rule: The proposed Part 200 amendments will add definitions for continuous emissions monitoring system (CEMS) certification protocol and continuous emissions monitoring system (CEMS) plan. These definitions are being included under Part 200 for consistency due to their use in multiple regulations. The proposed revisions will also add references in section 200.9, Table 1.

Current Part 220 will be divided into two sub-parts: 220-1 for portland cement plants; and 220-2 for glass manufacturing plants.

The proposed Subpart 220-1 revisions will include the removal of a definition, the addition of several new definitions, and revisions to the reasonably available control technology (RACT) requirements for emissions of oxides of nitrogen (NO_x).

Section 220.1 will become section 220-1.1 and will be revised to remove the definition of 'RACT' and 'Upset Condition'. Also, the revisions will add definitions for clinker, portland cement kiln, and portland cement plant.

Sections 220.2 through 220.5 will become sections 220-1.2 through 220-1.5. These sections contain existing requirements for particulate emissions from existing, new, and modified kilns and clinker coolers, opacity limits for portland cement processes, and particulate emissions from dust dumps.

Section 220.6 will become section 220-1.6 and the existing NO_x RACT requirements will be replaced with new NO_x RACT requirements. The proposed revisions require a portland cement kiln owner or operator to perform a facility specific RACT analysis for emissions of NO_x from the kiln that proposes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the proposed RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department by December 1, 2010. RACT, as approved by the Department, must be implemented by July 1, 2012. Approved RACT determinations will be submitted by the Department to the United States Environmental Protection Agency (EPA) for approval as separate State Implementation Plan (SIP) revisions. The proposed revisions include a kiln shut down option. The owner or operator of a portland cement kiln may opt to comply with the RACT requirements by shutting down the kiln. An owner or operator choosing this option shall submit an application for a federally enforceable permit modification by December 1, 2010 wherein the owner or operator commits to permanently shut down the furnace by July 1, 2012.

Section 220.7 will be deleted.

Section 220.8 will become section 220-1.7 and will be revised to require NO_x emissions from portland cement kilns to be continuously monitored. The proposed revisions include specific continuous emissions monitoring, reporting, and recordkeeping requirements.

Proposed Subpart 220-2 is new. This subpart will require NO_x RACT for glass furnaces at glass plants. The requirements of this Subpart apply to any glass plant that is a major facility of NO_x emissions. Definitions of glass melting furnace, glass plants, and glass produced or glass production are included in section 220-2.2.

In section 220-2.3 NO_x RACT requirements are proposed. The proposed revisions require a glass melting furnace owner or operator to perform a facility specific RACT analysis for emissions of NO_x from the furnace that proposes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department by December 1, 2010. RACT, as approved by the Department, must be implemented by July 1, 2012. Approved RACT determinations will be submitted by the Department to the United States Environmental Protection Agency (EPA) for approval as separate State Implementation Plan (SIP) revisions. The proposed revisions include a glass melting furnace shut down option. The owner or operator of a glass melting furnace may opt to comply with the RACT requirements by shutting down the furnace. An owner or operator choosing this option shall submit an application for a federally enforceable permit modification by December 1, 2010 wherein the owner or operator commits to permanently shut down the furnace by July 1, 2012.

The section 220-2.4 proposed revisions require NO_x emissions from glass melting furnaces to be continuously monitored. The proposed revisions include specific continuous emissions monitoring, reporting, and recordkeeping requirements.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 200.9, 220-1, 220-1.1(b), 220-1.6(b), (b)(1), (c), 220-1.7, 220-1.7(c), (d)(4), (5), 220-2.2(b)(1), 220-2.3(a), (a)(1), (b), 220-2.4(b), (c)(1), (4) and (5).

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

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

Summary of Revised Regulatory Impact Statement

INTRODUCTION

The New York State Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Parts 200, General Provisions, and 220, Portland Cement Plants. The current Part 220 will be divided into two sub-parts: 220-1 for portland cement plants; and 220-2 for glass manufacturing plants. In addition to other requirements, the existing regulation imposes Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO_x) from portland cement kilns. The Department is proposing to revise Part 220 to require updated NO_x RACT for cement kilns at portland cement plants, and to require NO_x RACT for glass furnaces at glass plants. The proposed revisions will apply to major facilities only. Major facilities are those that have a potential to emit NO_x emissions that exceed 100 tons/yr (upstate) and 25 tons/yr (downstate). In addition to the proposed revisions to Part 220, the Department is also proposing to revise to Part 200 by adding two new definitions; continuous emissions monitoring system (CEMS) certification protocol, and CEMS plan.

NO_x RACT limits are a component of the State Implementation Plan (SIP) for New York State (NYS) directed at attainment of the 1997 ozone national ambient air quality standard (NAAQS) and are expected to be part of the SIP that will be submitted with respect to the 2008 ozone NAAQS.[1] This is a requirement flowing from the State's obligations under the Federal Clean Air Act (CAA). This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

The Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform a facility specific RACT analysis for emissions of NO_x that proposes a NO_x RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the proposed NO_x RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. In terms of pollution reductions, the intent of the revisions to Part 220 is to establish NO_x RACT emission limits at each facility based upon a current RACT evaluation.

STATUTORY AUTHORITY

CAA Requirements Concerning RACT for NO_x Emissions for Purposes of the 1997 Ozone NAAQS

NYS is included in the Northeast Ozone Transport Region (OTR) established under CAA Section 184(a), and is a member of the Ozone Transport Commission (OTC) formed pursuant to CAA Sections 184(a) and 176A(b)(1). Under CAA Section 182(f), States must apply the same requirements to major stationary sources of NO_x as are applied to major stationary sources of volatile organic compounds (VOCs) in ozone NAAQS nonattainment areas.[2] Among these requirements is the imposition of NO_x RACT statewide in the OTR under CAA Sections 182(b)(2)(C).

The NYS Legislature has accorded the Department the primary authority to formulate and implement the SIP. The provisions of State law treated below, taken together, clearly empower the Department to promulgate and implement the proposed rule provisions as SIP revisions.

Environmental Conservation Law (ECL) section 1-0101 declares it to be the policy of NYS to conserve, improve and protect its natural resources and environment and control air pollution in order to enhance the health, safety and welfare of the people of NYS and their overall economic and social well being.

ECL section 19-0103 declares that it is the policy of NYS to maintain a reasonable degree of purity of air resources, which shall be consistent with the public health and welfare and the public enjoyment thereof, and the industrial development of the State, and to that end to require the use of all available practical and reasonable methods to prevent and control air pollution in the State.

ECL section 19-0105 declares that it is the purpose of Article 19 of the ECL to safeguard the air resources of NYS under a program which is consistent with the policy expressed in Section 19-0103 and in accordance with other provisions of Article 19.

ECL section 19-0301 declares that the Department has the power to

promulgate regulations for preventing, controlling or prohibiting air pollution and shall include in such regulations provisions prescribing the degree of air pollution that may be emitted to the air by any source in any area of the State.

ECL section 19-0303 provides that the terms of any air pollution control regulation promulgated by the Department may differentiate between particular types and conditions of air pollution and air contamination sources.

ECL section 19-0305 authorizes the Commissioner to enforce the codes, rules and regulations established in accordance with Article 19.

ECL section 19-0311 directs the Department to establish an operating permit program for sources subject to Title V of the CAA.

LEGISLATIVE OBJECTIVES

The legislative objectives underlying the above-referenced statutory authority are essentially directed toward protecting public health and the environment. By promulgating and implementing the proposed revisions to Part 220, the Department will be amending a regulation to impose more stringent emission limits on major stationary sources of NO_x that contribute to local and regional nonattainment of the 1997 and 2008 ozone NAAQS.

NEEDS AND BENEFITS

Ozone - Causes and Effects

There are two types of ozone, stratospheric and ground level ozone. Ozone in the stratosphere is naturally occurring and is desirable because it shields the earth from harmful ultraviolet rays from the sun which may cause skin cancer. In contrast, ground level ozone or smog, which results from the mixing of VOCs and NO_x on hot sunny summer days, can harm humans and plants. The primary ozone NAAQS was established by EPA at a level that is requisite to protect the public health. In the northeastern United States, the ozone nonattainment problem is pervasive as concentrations of ozone often exceed the level of the NAAQS by mid-afternoon on a summer day. The contiguous metropolitan areas of Washington, D.C., Baltimore, Philadelphia, New York, and Hartford are designated ozone nonattainment areas.

In July 2006, EPA recognized a number of epidemiological and controlled human exposure studies that suggest that asthmatic individuals are at greater risk for a variety of ozone-related effects including increased respiratory symptoms, increased medication usage, increased doctors visits, emergency department visits, and hospital admissions; provide highly suggestive evidence that short-term ambient ozone exposure contributes to mortality; and report health effects at ozone concentrations lower than the level of the current standards, as low as 0.04 parts per million (ppm) for some highly sensitive individuals. 'See Fact Sheet: Review of National Ambient Air Quality Standards for Ozone Second Draft Staff Paper, Human Exposure and Risk Assessments and First Draft Environmental Report', U.S. Environmental Protection Agency, July 2006.

Nonattainment Area Designations and Classifications for the 1997 and 2008 ozone NAAQS

EPA promulgated nonattainment area designations for the 1997 ozone NAAQS during April 2004. 'See Air Quality Designations and Classifications for the 8-Hour Ozone NAAQS', 69 Fed. Reg. 23,858 (April 30, 2004) (codified at 40 CFR Sections 81.300-356) (the Designations Rule).

Under the Designations Rule, the following areas in NYS were designated as nonattainment: Jefferson County; Poughkeepsie (encompassing Dutchess, Putnam, and Orange counties); NYC metro area (encompassing Bronx, Kings, Nassau, New York, Queens, Richmond, Rockland, Suffolk, and Westchester counties); Albany-Schenectady-Troy (encompassing Albany, Greene, Montgomery, Rensselaer, Saratoga, Schenectady, and Schoharie counties); Essex County (the portion of Whiteface Mountain above 1,900 feet in elevation); Jamestown (Chautauqua County); and Rochester (encompassing Genesee, Livingston, Monroe, Ontario, Orleans, and Wayne counties).

On March 12, 2009, the Department recommended that the NYC metro area, Poughkeepsie-Newburgh-Kingston, Albany-Schenectady-Troy-Glens Falls, Rochester, Buffalo-Niagara Falls and Jamestown areas be designated nonattainment for the 2008 ozone NAAQS of 0.075 parts per million.[3] Ozone pollution is and will likely remain a pervasive problem in much of NYS, particularly in the major population centers.

Measures Taken to Reduce Ozone

The Department has promulgated several NO_x RACT regulations that apply to various other source categories throughout NYS. These categories include stationary combustion installations (6 NYCRR Subpart 227-2), iron and steel process sources (6 NYCRR Part 216), coke oven batteries (6 NYCRR Part 214), and general process NO_x sources (6 NYCRR Part 212). All of these regulations will assist in bringing all areas in the State into attainment with the NAAQS for ozone. The compilation of these control programs constitutes the NO_x portion of the ozone NAAQS nonattainment SIP for NYS.

The proposed revisions to reduce NO_x emissions from portland cement plants and glass plants is an outgrowth of ongoing efforts by the OTC to reduce ground-level ozone. At the June 7, 2006 OTC Annual Meeting, OTC member states adopted Resolution 06-02 which set forth guidelines for emission reduction strategies for six (6) source sectors, including portland cement plants and glass manufacturing plants. The Department is proposing these revisions to require NO_x controls for portland cement plants and glass manufacturing plants consistent with the guidelines developed by the OTC and reported in the February 28, 2007 OTC Technical Support Document (TSD) entitled 'Identification and Evaluation of Candidate Control Measures'. The OTC TSD was prepared by MACTEC Federal Programs, Inc. (MACTEC).

The proposed rule revisions will affect three cement plants and four glass plants in NYS. The Department projects that the actual NO_x emission reductions resulting from the proposal will be approximately 3,400 tons per year or 9.3 tons per day.

The Clean Air Interstate Rule (CAIR) is not NO_x RACT

The Department promulgated the CAIR regulations for emissions of NO_x (6 NYCRR Part 243) on October 19, 2007. Part 243 (the NO_x CAIR regulation) is an annual NO_x budget program. The CAIR regulation is intended to address the ozone transport issue over a large interstate area. The regulation does not require control technologies be applied to existing facilities, or even an evaluation of reasonably available controls, and is not designed to aid in attaining the ozone standards in local ozone nonattainment areas. Therefore, the Department maintains that compliance with CAIR does not constitute compliance with NO_x RACT.

The Best Available Retrofit Technology (BART) Rule

In 1999, EPA promulgated regulations to address a type of visibility impairment known as regional haze. EPA is requiring that States develop and submit regional haze SIPs that include source-specific BART determinations, compliance schedules, and implementation of BART controls by December 17, 2012.

In a separate rulemaking effort, the Department is proposing to determine the appropriate NO_x, sulfur dioxide (SO_2), and particulate matter less than ten microns (PM10) BART emission controls for sources that cause or contribute to the impairment of visibility in Class I areas. The Department has identified three portland cement plants and one glass plant that may be subject to BART. It is the Department's intention to coordinate the review of NO_x RACT and BART NO_x controls to assure that implementation of the two programs do not interfere with each other and to maximize the extent that these programs complement each other. The Department will work with the facilities to see that duplication of effort is minimized or, if possible, eliminated.

COSTS

Costs to Regulated Parties and Consumers

The proposed NO_x RACT revisions to Part 220 do not identify specific NO_x RACT emission limits for affected facilities. Affected facilities will be required to evaluate control strategies based upon their economic and technical feasibility, and submit a RACT analysis for review and approval by the Department. A NO_x RACT compliance standard will be established for each individual source based upon the control options that are reasonably available for that source. The determination of the facility specific NO_x RACT standard will be determined consistent with the Department's guidance document, Air Guide 20 (AG-20). In AG-20 the Department established the cost that defines the upper economic limit of implementing NO_x RACT, currently in the range of $5,000 to $5,500 per ton reduced.

The costs associated with the proposed revisions at a particular facility will be greatly influenced by site specific factors and are expected to be similar to the cost estimates developed by the OTC. Below are the cost effectiveness estimates for the portland cement and glass manufacturing NO_x control strategies that were developed by the OTC and reported in the OTC TSD:

Portland Cement Plants: $1,000 - $2,500 per ton reduced

Glass Manufacturing Plants: $1,300 - $2,600 per ton reduced

Based on the OTC cost effectiveness estimates and the projected emission reductions, the Department estimates the total cost to industry as follows:

Portland Cement Plants: $3,100,000 - $7,750,000

Glass Manufacturing Plants: $390,000 - $780,000

Affected facilities that currently do not utilize CEMS to monitor their NO_x emissions will experience additional costs associated with the purchase, installation, and operation of a NO_x CEMS. These costs are expected to vary from facility to facility and are not part of the RACT analysis.

Costs to State and Local Governments

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. State and local entities will not be affected by the proposed regulation. There are no government owned portland cement plants or glass plants.

Costs to the Regulating Agency

The authority and responsibility for implementing Part 220 lies solely with the Department. The proposed rule revisions have been developed to minimize the administrative cost burden to the Department.

LOCAL GOVERNMENT MANDATES

This is not a mandate on local governments. Local entities will not be affected by the proposed regulation and consequently have no compliance obligations.

PAPERWORK

The proposed revisions to Part 220 will create additional paperwork for the affected facilities. Affected facilities will be required to perform a RACT analysis, prepare a CEMS certification protocol and a monitoring plan, and submit an application to modify their Title V permit to incorporate the newly applicable requirements. Additionally, affected facilities will be required submit test protocols and test reports. However, all of the affected facilities are currently regulated under the Title V program and are already required to submit a test protocol, perform an emissions compliance test, and submit a test report at least once during the term of their permit.

DUPLICATION

Aside from the BART rulemaking discussed above, the proposed revisions to Part 220 do not duplicate, overlap, or conflict with any other State or federal requirements.

ALTERNATIVES

The following alternative has been evaluated to address the goals set forth above:

Take no action: The ''take no action'' alternative is not acceptable because failure to adopt this regulation will seriously impede NYS's ability to attain the ozone NAAQS. The proposed revisions to Part 220, in combination with the implementation of other regulations (concerning NO_x RACT limits for stationary combustion installations, and asphalt plants), will help New York State achieve compliance with the 1997 ozone NAAQS.

FEDERAL STANDARDS

The proposed rule does not exceed any minimum federal standards.

COMPLIANCE SCHEDULE

The Department proposes to promulgate the revisions to Part 220 by December 2009. Subject facilities will be required to submit a RACT analysis and an application for a permit or permit modification by no later than December 1, 2010. The RACT analysis will determine RACT for emissions of NO_x, establish a NO_x RACT emission limit(s), and identify the procedures and monitoring equipment to be used to demonstrate compliance with the NO_x RACT emission limit(s). RACT, as approved by the Department, must be implemented by July 1, 2012.

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[1] On July 18, 1997, EPA promulgated primary and secondary ozone NAAQS of 0.08 parts per million (ppm) (the 8-hour ozone NAAQS). 'See National Ambient Air Quality Rule for Ozone', 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 CFR section 50.10). The standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.08 ppm. When the standard rounding conventions are used, this standard is measured as 0.084 ppm.

[2] Within the OTR, any source that emits or has the potential to emit at least 50 tons per year of VOCs is considered a ''major stationary source'' and is subject to the requirements that are applicable to major stationary sources in moderate nonattainment areas under CAA section 184(b)(2). However, under CAA section 302, and section 182(c), (d), and (e), the emission thresholds for major stationary sources of NO_x in the OTC vary from 100 to 10 tons per year depending on the area's designation and classification. For portions of the OTR that are designated as attainment or unclassifiable, or classified as moderate nonattainment, a major stationary source of NO_x is one that emits more than 100 tons of NO_x per year; in portions of the OTC classified a serious nonattainment the emissions threshold is 50 tons of NO_x per year.

[3] March 12, 2009 letter from Mr. J. Jared Snyder Assistant Commissioner, Office of Air Resources, Climate Change, & Energy to Mr. George Pavlou, Acting Administrator, EPA Region 2.

Revised Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200 and 220. The Department is proposing to revise Part 220 to require updated Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO_x) for cement kilns at portland cement plants, and to require NO_x RACT for glass furnaces at glass plants. The Department is also proposing to add two new definitions to Part 200; continuous emissions monitoring system (CEMS) certification protocol, and CEMS plan. The proposed rulemaking will apply statewide. Small businesses are those that are independently owned, located within New York State (NYS), and that employ 100 or fewer persons. This is a requirement flowing from the State's obligations under the Clean Air Act. This is not a mandate on small businesses or local governments. It applies to any entity that owns or operates a subject source.

COMPLIANCE REQUIREMENTS:

The revisions to Part 220 do not substantially alter the requirements for the permitting of major stationary sources which are currently in effect in NYS. As such, the professional services that will be needed by any facility are not anticipated to significantly change from the type of services which are currently required to comply with NO_x RACT requirements. For both cement and glass manufacturing plants the Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform a facility specific RACT analysis for emissions of NO_x that proposes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the proposed RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. The Department does not anticipate that the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

PROFESSIONAL SERVICES:

The Department does not expect any small businesses or local governments to be subject to the proposed rulemaking.

COMPLIANCE COSTS:

The proposed NO_x RACT revisions to Part 220 will apply to major facilities only. Major facilities are those that have a potential to emit NO_x emissions that exceed 100 tons/yr (upstate) and 25 tons/yr (downstate). The proposal does not identify specific RACT emission limits for these facilities. Affected facilities will be required to evaluate control strategies based upon their economic and technical feasibility, and submit a RACT analysis for review and approval by the Department. A RACT compliance standard will be established for each individual source based upon the control options that are reasonably available for that source. The Department is proposing these revisions to require NO_x controls for portland cement plants and glass manufacturing plants consistent with the guidelines developed by the Ozone Transport Commission (OTC) and reported in the February 28, 2007 OTC Technical Support Document (TSD) entitled 'Identification and Evaluation of Candidate Control Measures'. The OTC TSD was prepared by MACTEC Federal Programs, Inc. (MACTEC). The costs associated with establishing a RACT standard include the cost of identifying and evaluating the various control options (performing a RACT analysis), preparing a report, and implementing the selected RACT compliance standard. The determination of the facility specific RACT standard will be determined consistent with the Department's guidance document, Air Guide 20 (AG-20). In AG-20 the Department established the cost that defines the upper economic limit of implementing NO_x RACT, currently in the range of $5,000 to $5,500 per ton reduced.

The costs associated with the proposed revisions at a particular facility will be greatly influenced by site specific factors and are expected to be similar to the cost estimates developed by the OTC. The OTC cost estimates are based upon the application of selective non-catalytic reduction technology for portland cement plants, and the application of oxy-fuel firing technology for glass manufacturing facilities. Below are the cost effectiveness estimates for the portland cement and glass manufacturing NO_x control strategies that were developed by the OTC and reported in the OTC TSD:

Portland Cement Plants: $1,000 - $2,500 per ton reduced

Glass Manufacturing Plants: $1,300 - $2,600 per ton reduced

Based on the OTC cost effectiveness estimates and the projected emission reductions, the Department estimates the total cost to industry as follows:

Portland Cement Plants: $3,100,000 - $7,750,000

Glass Manufacturing Plants: $390,000 - $780,000

Affected facilities that currently do not utilize CEMS to monitor their NO_x emissions will experience additional costs associated with the purchase, installation, and operation of a NO_x CEMS. These costs are expected to vary from facility to facility and are not part of the RACT analysis.

MINIMIZING ADVERSE IMPACT:

The Department does not expect any small businesses or local governments to be subject to the proposed rulemaking. The proposed rulemaking revisions as described above are not expected to create adverse impacts on small businesses or local governments and will not create an unfair disadvantage to small businesses or local governments in NYS.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Small businesses and local governments will be given opportunities to participate in the rule making process. The proposed revisions will undergo publication of general notice in both the ''Environmental Notice Bulletin'' and ''State Register''. The Department will also hold public hearings, during the notice period, to allow those interested parties and facilities a chance to comment on the proposed regulation.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

As noted earlier, this requirement flows from the State's obligations under the CAA. This is not a mandate on local governments. It applies equally to any entity that owns or operates a subject source. The Department does not expect any small businesses or local governments to be subject to the proposed rulemaking.

Revised Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200 and 220. The Department is proposing to revise Part 220 to require updated Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO_x) for cement kilns at portland cement plants, and to require NO_x RACT for glass furnaces at glass plants. The Department is also proposing to add two new definitions to Part 200; continuous emissions monitoring system certification protocol, and continuous emissions monitoring system plan. The proposed rulemaking will apply statewide and all rural areas of New York State (NYS) will be affected. Rural areas are defined as rural counties in NYS that have populations less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile and villages within those towns.

COMPLIANCE REQUIREMENTS:

The revisions to Part 220 do not substantially alter the requirements for the permitting of major stationary sources which are currently in effect in NYS. As such, the professional services that will be needed by any facility located in a rural area are not anticipated to significantly change from the type of services which are currently required to comply with existing NO_x RACT requirements. For both cement and glass manufacturing plants the Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform a facility specific RACT analysis for emissions of NO_x that proposes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the proposed RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. The Department does not anticipate that the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

COSTS:

The proposed NO_x RACT revisions to Part 220 will apply to major facilities only. Major facilities are those that have a potential to emit NO_x emissions that exceed 100 tons/yr (upstate) and 25 tons/yr (downstate). The proposal does not identify specific RACT emission limits for these facilities. Affected facilities will be required to evaluate control strategies based upon their economic and technical feasibility, and submit a RACT analysis for review and approval by the Department. A RACT compliance standard will be established for each individual source based upon the control options that are reasonably available for that source. The Department is proposing these revisions to require NO_x controls for portland cement plants and glass manufacturing plants consistent with the guidelines developed by the Ozone Transport Commission (OTC) and reported in the February 28, 2007 OTC Technical Support Document (TSD) entitled 'Identification and Evaluation of Candidate Control Measures'. The OTC TSD was prepared by MACTEC Federal Programs, Inc. (MACTEC). The costs associated with establishing a RACT standard include the cost of identifying and evaluating the various control options (performing a RACT analysis), preparing a report, and implementing the selected RACT compliance standard. The determination of the facility specific RACT standard will be determined consistent with the Department's guidance document, Air Guide 20 (AG-20). In AG-20 the Department established the cost that defines the upper economic limit of implementing NO_x RACT, currently in the range of $5,000 to $5,500 per ton reduced.

The costs associated with the proposed revisions at a particular facility will be greatly influenced by site specific factors and are expected to be similar to the cost estimates developed by the OTC. The OTC cost estimates are based upon the application of selective non-catalytic reduction technology for portland cement plants, and the application of oxy-fuel firing technology for glass manufacturing facilities. Below are the cost effectiveness estimates for the portland cement and glass manufacturing NO_x control strategies that were developed by the OTC and reported in the OTC TSD:

Portland Cement Plants: $1,000 - $2,500 per ton reduced

Glass Manufacturing Plants: $1,300 - $2,600 per ton reduced

Based on the OTC cost effectiveness estimates and the projected emission reductions, the Department estimates the total cost to industry as follows:

Portland Cement Plants: $3,100,000 - $7,750,000

Glass Manufacturing Plants: $390,000 - $780,000

Affected facilities that currently do not utilize CEMS to monitor their NO_x emissions will experience additional costs associated with the purchase, installation, and operation of a NO_x CEMS. These costs are expected to vary from facility to facility and are not part of the RACT analysis.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing rural areas. The proposed revisions are consistent with the NO_x RACT requirements that have been or will be adopted across all of the OTC states. Therefore, New York will be no more stringent than the other OTC states and will not create an unfair disadvantage to businesses in NYS.

RURAL AREA PARTICIPATION:

Rural areas will be given opportunities to participate in the rule making process. The proposed revisions will undergo a publication of general notice in both the ''Environmental Notice Bulletin'' and ''State Register''. The Department will also hold public hearings, during the notice period, to allow those interested parties and facilities located in rural areas a chance to comment on the proposed regulation.

Revised Job Impact Statement

NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200 and 220. The proposed rulemaking will apply statewide. Two new definitions will be added to Part 200; continuous emissions monitoring system certification protocol, and continuous emissions monitoring system plan. The current Part 220 will be divided into two sub-parts: 220-1 for portland cement plants; and 220-2 for glass manufacturing plants. In addition to other requirements, the existing regulation imposes Reasonably Available Control Technology (RACT) requirements on emissions of oxides of nitrogen (NO_x) from portland cement kilns. The existing NO_x RACT requirements for portland cement kilns have been in place since 1995. The Department is proposing to revise Part 220 to require updated NO_x RACT for cement kilns at portland cement plants (Subpart 220-1), and to require NO_x RACT for glass furnaces at glass plants (Subpart 220-2). These RACT requirements are a component of New York's State Implementation Plan (SIP) for attainment of the 1997 8-hour ozone national ambient air quality standard (NAAQS).[1] On March 12, 2008, the United States Environmental Protection Agency (EPA) promulgated a stricter ozone NAAQS. On March 12, 2009, the Department after analyzing measured ozone data for the years 2006 - 2008 recommended that the New York City, Poughkeepsie-Newburgh-Kingston, Albany-Schenectady-Troy-Glens Falls, Rochester, Buffalo-Niagara Falls and Jamestown metropolitan areas be designated nonattainment for the 2008 ozone NAAQS.

The revisions to Part 220 are among a series of sustained actions undertaken by New York State (NYS), in conjunction with EPA and other States, to control emissions of ozone precursors, including nitrogen oxides and VOCs, so that NYS and other States in the Ozone Transport Region (OTR) may attain the ozone NAAQS. In particular, the revisions to Part 220 will be similar to the NO_x RACT requirements for cement and glass plants in other states throughout the OTR.

For both cement and glass manufacturing plants the Department is taking a RACT approach that requires a facility specific analysis. The plant owner or operator will be required to perform a facility specific RACT analysis for emissions of NO_x that proposes a RACT emission limit(s), identifies the procedures and monitoring equipment to be used to demonstrate compliance with the proposed RACT emission limit(s), and includes a schedule for equipment installation. The RACT analysis will be submitted to the Department for review and approval. The Department does not anticipate that the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED:

Due to the nature of the proposed amendments to Part 220 no measurable effect on the categories or numbers of jobs, or employment opportunities in any specific category is anticipated. There will be some new jobs or employment opportunities created for consultants for RACT and permit reviews. There will also be employment opportunities created for monitoring and compliance testing. Finally, there will be employment opportunities created for air pollution control companies to install emission control technologies that may be required for facilities to meet the established NO_x RACT emission limit(s).

REGIONS OF ADVERSE IMPACT:

There are no regions of the State where the proposed revisions would have a disproportionate adverse impact on jobs or employment opportunities. Through the proposed revisions, the Department is requiring facilities to re-examine their existing NO_x RACT requirements by conducting an updated RACT analysis.

MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing jobs or the promotion of the development of any significant new employment opportunities. The

proposed revisions are consistent with the NO_x RACT requirements that have been or will be adopted across all of the Ozone Transport Commission (OTC) states. Therefore, New York will be no more stringent than the other OTC states and will not create an unfair disadvantage to businesses in NYS.

SELF-EMPLOYMENT OPPORTUNITIES:

The types of facilities affected by these regulatory changes are larger operations than what would typically be found in a self-employment situation. There may be an opportunity for self-employed consultants to advise facilities on how best to comply with the revised requirements or conduct emissions monitoring and/or testing at an affected facility. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

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[1] On July 18, 1997, EPA promulgated primary and secondary ozone NAAQS of 0.08 parts per million (ppm) (the 8-hour ozone NAAQS). 'See National Ambient Air Quality Rule for Ozone', 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 CFR section 50.10). The standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.08 ppm. When the standard rounding conventions are used, this standard is measured as 0.084 ppm.

Assessment of Public Comment

Comments Received From December 23, 2009

Through 5:00 p.m. February 17, 2010

United States Environmental Protection Agency (EPA), Region 2: (Commenter number 1)

1.) Comment: Where applicable, New York should tighten the compliance schedule allowed for facilities to implement RACT to a timeframe before the dates established in the proposed rules (i.e., 18 months from effective date of regulation or one year from when compliance plans are due - whichever is sooner).

Response: The proposed timeframes were established to address air quality concerns, recognizing the need to ensure compliance with the requirements, without placing an undue burden on the affected facilities. The timeframes established in the final rule will be determined by the time reasonably necessary for the affected facilities to comply with the proposed requirements, and not an artificial deadline set by EPA guidance.

2.) Comment: Generic RACT provisions - It is EPA policy (November 7, 1996 policy memo, titled ''Approval Options for Generic RACT Rules Submitted to Meet the non-CTG VOC RACT Requirement and Certain NO_x RACT Requirements'') that regulations that contain generic RACT provisions or case-by-case RACT determinations are not fully approvable by EPA unless: 1) the state has submitted a generic rule but now believes that it has submitted all the source-specific rules and has submitted a negative declaration that to its best knowledge, there are no remaining unregulated sources; 2) the generic rule covers only a limited number of sources, with emissions, in the aggregate, that are determined to be de minimis; 3) the generic rule has broader applicability but the state has submitted and EPA has approved (or will have approved by the date of final action on the generic rule) source-specific rules for all but a de minimis amount of source emissions. New York proposed rule Part 220 contains generic RACT provisions applicable to cement plants and glass manufacturing. While some of New York's rules require case-by-case RACT determinations to be submitted to EPA as SIP revisions, New York should commit to submit the case-by-case RACT determinations approved by the Department to EPA as a SIP revision by a date certain. For example, New York should submit to EPA within one year after the source is required to submit the compliance plan to New York.

Response: The Department will establish generic or case-by-case Reasonably Available Control Technology (RACT) determinations for certain source categories where the universe of sources is small, the universe of sources or processes vary greatly, and/or the information on retrofit controls is limited. The Department has investigated NO_x controls for cement kilns at portland cement plants and glass furnaces at glass plants to determine the appropriate RACT control level. There are three portland cement plants and four glass manufacturing plants in New York that will be subject to the proposed revisions. The uniqueness of the design and operation at each of these facilities can result in disparities in what is RACT at the individual plants. Therefore, for both cement and glass manufacturing plants the Department is taking a RACT approach that requires a facility specific analysis instead of the Department setting a specific presumptive RACT limit or technology. Department approved RACT determinations will be submitted by the Department to EPA for approval as separate State Implementation Plan (SIP) revisions.

3.) Comment: 220 would regulate ''glass plants'' (220-2) as well as the existing requirements for ''portland cement plants'' (220-1). Cement plants and glass plants need to submit RACT compliance plans by 10/1/10 and implement RACT by 7/1/12 - see first comment above.

Response: The Department will determine the appropriate implementation date based on air quality concerns and the ability of the industry to comply with the proposed rule requirements. Also, please see response to comment number one above.

4.) Comment: Generic RACT provisions - New York should include a prescribed RACT limit/control (i.e., SNCR, low NO_x burners, emission rate or control efficiency) with the option of an alternate RACT limit.

Response: The Department disagrees with this comment. The ability to apply these specific controls on existing portland cement and glass plants has not yet been established. The Department believes that the facility specific technology assessment required by the regulation will best determine the technology applicable to these sources. Also, please see response to comment number two above.

5.) Comment: 220-1.8(c) allows for ''equivalent requirements approved by the department.'' New York should also state that Approved equivalent requirements will be submitted by the department to the United States Environmental Protection Agency for approval as separate State Implementation Plan revisions.

Response: The Department agrees with this comment and will add the following sentence at the end of this subdivision: ''Any approved equivalent CEMS requirements will be submitted by the department to the United States Environmental Protection Agency for approval as separate State Implementation Plan revisions''.

6.) Comment: 220-1.8(d)(4)(i) and (d)(5)(iii)('a') compliance time frames are not consistent - 30 day averages vs. 24 hour daily averages, respectively. Same comment applies to 220-2.4(d)(4)(i) and (d)(5)(iii)('a').

Response: The Department agrees that the timeframes are inconsistent and will revise these sections to reflect a compliance timeframe that is based on a 30 day rolling average.

7.) Comment: In Section 220-2.5, Glass Plants Source Monitoring, the draft rule intends to adopt the provisions of 40 CFR Part 60 as requirements for NO_x CEMS. What is the rationale for using 40 CFR Part 60 (CEM requirements for new sources) under Section 220-2.5, and using 40 CFR Part 75 under Section 220-1.8?

Response: The portland cement plants affected by this proposed rule are currently required by the Clean Air Interstate Rule NO_x budget program to comply with 40 CFR Part 75 emissions monitoring requirements. The portland cement plants have been conducting 40 CFR Part 75 NO_x monitoring for many years and their systems are well established. On the other hand, three of the four affected glass plants currently have no established NO_x emissions monitoring requirements. Only one glass plant is currently required, as part of a new source review requirement, to conduct NO_x monitoring using a continuous emissions monitor (CEM); this monitoring is required to meet the 40 CFR Part 60 CEM requirements. The 40 CFR Part 75 CEM requirements are appropriate for cement plants, while the 40 CFR Part 60 CEM requirements are appropriate for glass plants. The Department proposed the different CEM requirements to ensure proper NO_x emissions monitoring while reasonably minimizing the impact on the affected facilities.

8.) Comment: 220-1.7, Startup/shutdown, upset conditions, and malfunctions -this provision refers to Part 201-1 which has not been federally approved, in addition, a previous version - Part 201.5(e) which includes the start-up/shutdown malfunction provisions was intentionally removed from the federally approved New York SIP (10/3/05, 70 FR 57511) as per the request of New York.

Response: Proposed section 220-1.7 is essentially the same as section 220.7 in the existing rule. However, the Department has reviewed proposed section 220-1.7 and concluded that this section is not needed and will be deleted. The provisions of Part 201 regarding unavoidable noncompliance and violations (section 201-1.4 and subparagraph 201-6.5(c)(3)(ii)), are requirements that apply generally to all permitted major facilities and do not need to be referenced in Part 220.

Guardian Industries Corp.: (Commenter number 2)

9.) Comment: Guardian is concerned that there is no stated relief or exemption for facilities already implementing LAER (Lowest Achievable Emission Rate) for NO_x emissions. When constructed in 1998, Guardian's facility located in Geneva, New York was required to meet LAER for NO_x and monitor emissions with a CEM system. In the air quality control hierarchy, LAER is far more stringent than RACT. The RACT analysis and permit modification requirement in the proposed rule would force us to incur unnecessary expenses by having to conduct the RACT analysis. The rule should be re-written to specifically exclude glass plants which

were permitted and operating under controls more stringent than RACT from having to conduct the RACT analysis and make any permit changes.

Response: The Department agrees that in the air quality control hierarchy, LAER emission controls are more stringent than RACT emission controls, but only if the RACT and LAER determinations were conducted at the same time, or within a narrow timeframe. Generally, LAER emissions controls are more stringent than RACT emission controls; however, temporal consideration is an important element in determining whether or not that is true when comparing a specific set of emissions controls. A LAER determination made in 1998 may not result in the same determination if conducted in 2010. Furthermore, it is possible that emission controls that were determined to be LAER in 1998 may be determined to be RACT in 2010. It is also possible that a 2010 RACT determination may result in more stringent controls than what was determined to be LAER in 1998. Accordingly, the Department will not revise the proposed rule as requested by the commenter.

Insurance Department

EMERGENCY RULE MAKING

Workers' Compensation Insurance - Independent Livery Driver Benefit Fund

I.D. No. INS-26-10-00001-E
Filing No. 617
Filing Date: 2010-06-11
Effective Date: 2010-06-11

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

Action taken: Addition of Subpart 151-5 (Regulation 119) to Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Chapter 392 of the Laws of 2008, parts of which became effective immediately, with other parts becoming effective on January 1, 2009 and January 1, 2010, enacts a new Article 6-G of the Executive Law, a new Section 18-c of the Workers Compensation Law, and a new Section 3451 of the Insurance Law. Article 6-G authorizes the creation of a new Independent Livery Driver Benefit Fund (the "Fund") to provide coverage to livery drivers dispatched by independent livery bases that are members of the Fund. Section 18-c sets forth criteria for the designation of a livery base as an independent livery base. Although the State Insurance Fund is authorized under Article 6-G to provide the insurance afforded therein, Section 3451 of the Insurance Law authorizes the Superintendent of Insurance to promulgate rules and regulations permitting insurers authorized to write workers' compensation and employers' liability insurance to provide coverage to the new independent livery driver benefit fund ("Fund").

Insurers authorized to write workers' compensation and employers' liability insurance have expressed interest in writing policies of insurance affording coverage to the Fund. Providing the Fund with alternative choices may lower the costs that will be borne for the coverage and can provide other benefits to the Fund. This regulation was previously promulgated on an emergency basis on December 17, 2009 and March 12, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 8, 2010 and the Department is awaiting approval to publish the regulation, however because of the effective date of the relevant provision of the law is January 1, 2010, and the need to have rates and forms approved in advance of that date, it is essential that this regulation, which establishes procedures that implement provisions of the law, be continued on an emergency basis.

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

Subject: Workers' Compensation Insurance - Independent Livery Driver Benefit Fund.

Purpose: Authorizes workers' compensation and employers' liability insurers to provide coverage authorized by Executive Law article 6-G.

Text of emergency rule: A new subpart 151-5 is added to read as follows:

Section 151-5.0 Purpose.

The purpose of this sub-part is to authorize workers' compensation and employers' liability insurers to provide coverage as afforded under Executive Law Article 6-G.

Section 151-5.1 Authorization of workers' compensation insurers' to write insurance pursuant to Executive Law Article 6-G.

(a) Pursuant to Insurance Law section 3451, insurance companies authorized to write workers' compensation insurance and employers' liability insurance, as defined in Insurance Law section 1113(a)(15), are hereby authorized to write policies of insurance affording coverage in accordance with Executive Law Article 6-G.

(b) No policy or certificate thereunder providing for coverage pursuant to Executive Law Article 6-G shall be issued or issued for delivery in this State unless the forms have been filed with, and approved by, the superintendent in accordance with Insurance Law Article 23.

(c) No policy or certificate thereunder providing for coverage pursuant to Executive Law Article 6-G shall be issued or issued for delivery in this State unless the rates have been filed with the superintendent for prior approval in accordance with Article 23 of the Insurance Law and subpart 151-1 of this Part.

(d) Every policy and certificate thereunder providing for coverage pursuant to Executive Law Article 6-G issued or issued for delivery in this State shall provide coverage in accordance with the provisions of Executive Law Article 6-G.

(e) The policy shall be issued on a group basis to the Independent Livery Driver Benefit Fund and shall provide coverage to livery drivers dispatched by independent livery bases that are members of the Independent Livery Driver Benefit Fund established pursuant to Executive Law Article 6-G.

(f) A certificate issued under the group master policy shall be provided to each member independent livery base and contain all material terms and conditions of coverage with respect to a livery driver, unless the group master policy is incorporated by reference, and in which event, a copy of the master policy shall accompany the certificate or shall be promptly provided to a member independent livery base upon request.

(g) An insurer issuing or renewing the group policy shall maintain separate statistics tracking group loss and expense experience for the group program. The statistics shall be maintained in conformance with Part 243 of Title 11 of the New York Codes, Rules and Regulations (Regulation 152).

(h) Coverage disputes between insurers pursuant to Executive Law Article 6-G shall be subject to mandatory arbitration of controversies between insurers, pursuant to the provisions of section 5105 of the Insurance Law and section 65-4.11 of subpart 65-4 of this Title (Regulation 68-D).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 8, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of Part 151-5 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 119) derives from Sections 201, 301, and 3451 of the Insurance Law, and Executive Law Article 6-G.

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

Section 3451 of the Insurance Law (L. 2008, c. 392, § 12), permits the Superintendent to promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G.

Executive Law Article 6-G establishes clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases, and establishes the Independent Livery Driver Benefit Fund (''the Fund'') to provide independent contractor livery drivers workers' compensation benefits in certain circumstances where No-Fault automobile insurance does not provide sufficient coverage. Article 6-G permits the Fund to purchase insurance from the State Insurance Fund (''SIF'') or, if the Superintendent authorizes it by regulation, from an insurer licensed to write workers' compensation or employers' liability insurance.

2. Legislative objectives: Chapter 392 of the Laws of 2008 enacted Executive Law Article 6-G, establishing clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases, and establishing

the Fund to provide independent contractor livery drivers workers' compensation with benefits in certain circumstances where No-Fault automobile insurance does not provide sufficient coverage. Before passage of this law, the only recourse for independent contractor livery drivers was No-Fault automobile insurance. This resulted in delays in payment as No-Fault insurers ascertained whether livery drivers were independent contractors and eligible for coverage.

The law also permits the Superintendent to promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G.

3. Needs and benefits: Pursuant to Insurance Law § 3451, the Superintendent may promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G. This regulation will ensure that the Fund has a choice of procuring coverage from either SIF or an authorized insurer, which may provide savings to the Fund, and ultimately the livery bases that pay for the coverage.

4. Costs: No costs will be imposed by the proposed rule. Executive Law Article 6-G permits the Fund to purchase insurance from SIF or, if the Superintendent authorizes it by regulation, from an insurer licensed to write workers' compensation or employers' liability insurance. This rule authorizes workers' compensation and employees' liability insurers to provide coverage to the Fund for livery drivers dispatched out of independent livery bases pursuant to Insurance Law § 3451 and Executive Law Article 6-G. An insurer may, but is not required to, offer to provide coverage to the Fund. The Fund has a choice of procuring coverage from either SIF or an authorized insurer, which may provide savings to the Fund, and ultimately the livery bases that pay for the coverage.

5. Local government mandates: This rule has no impact on local governments.

6. Paperwork: This rule imposes no new paperwork on affected parties. An insurer would have to file rates and forms subject to the Superintendent's approval as it would for any other workers' compensation coverage, and designate an individual to maintain statistics in conformance with Part 243 of Title 11 of the New York Code, Rules and Regulations (Regulation 152).

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

8. Alternatives: The only alternative was for the Superintendent not to authorize insurers to provide coverage to the Fund. In that case, only SIF would have been able to provide coverage. This regulation allows insurers to compete for the business of the Fund and may reduce the costs of insurance as a result.

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

10. Compliance schedule: The rule does not impose a compliance schedule.

Regulatory Flexibility Analysis

1. Small businesses:

The rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The rule is directed at workers' compensation insurers authorized to do business in New York State, none of which falls within the definition of ''small business'' set forth in Section 102(8) of the State Administrative Procedure Act (''SAPA''). The Insurance Department has monitored Annual Statements and Reports on Examination of authorized workers' compensation insurers subject to this rule, and believes that none of the insurers falls within the definition of ''small business'', because there are none that are both independently owned and have fewer than one hundred employees.

Pursuant to Insurance Law § 3451, the Superintendent may promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G. This regulation authorizes a workers' compensation and employees' liability insurer to provide coverage of the Independent Livery Driver Benefit Fund (''the Fund'') for livery drivers dispatched out of independent livery bases pursuant to Insurance Law Section 3451 and Executive Law Article 6-G. This will give the Fund a choice of procuring coverage from either the State Insurance Fund or an insurer. Since livery bases pay for the coverage, this regulation may ultimately benefit them if the costs of insurance are reduced as a result.

2. Local governments:

The rule has no impact on local governments.

Rural Area Flexibility Analysis

Chapter 392 of the Laws of 2008 enacted Executive Law Article 6-G, establishing clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases, and creating the Independent Livery Driver Benefit Fund (''the Fund'') to provide independent contractor livery drivers workers' compensation with benefits in certain circumstances were No-Fault automobile insurance does not provide sufficient coverage.

The law also permits the Superintendent to promulgate regulations authorizing an insurer licensed to write workers' compensation and employers' liability to provide coverage as authorized pursuant to Executive Law Article 6-G. This rule authorize workers' compensation and employers' liability insurers to provide coverage as afforded under Executive Law Article 6-G.

Neither New York City, Nassau County nor Westchester County are rural areas.

The rule contains no provisions that create impacts unique to rural areas of the state.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. The rule authorizes workers' compensation and employers' liability insurers to provide coverage as afforded under Executive Law Article 6-G. Participation by insurers is voluntary. For those insurers that choose to offer coverage, existing personnel should be able to perform this task.

There should be no region in New York that would experience an adverse impact on jobs and employment opportunities. This regulation should not have any impact on self-employment opportunities.

Niagara Falls Water Board

NOTICE OF ADOPTION

Adoption of a Schedule of Rates, Fees and Charges

I.D. No. NFW-10-10-00001-A

Filing No. 621

Filing Date: 2010-06-11

Effective Date: 2010-06-11

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

Action taken: Amendment of section 1950.20 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, section 1230-j

Subject: Adoption of a schedule of Rates, fees and Charges.

Purpose: To pay for the increased costs necessary to operate, maintain and manage the system, and to achieve covenants with bondholders.

Text or summary was published in the March 10, 2010 issue of the Register, I.D. No. NFW-10-10-00001-EP.

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

Text of rule and any required statements and analyses may be obtained from: John J. Ottaviano, Legal Counsel, Niagara Falls Water Board, PO Box 1230, 172 East Avenue, Lockport, New York 14094, (716) 438-0488, email: jottaviano@harrisbeach.com

Assessment of Public Comment

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

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Water Rates, Charges and Regulations

I.D. No. PSC-26-10-00003-P

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

Proposed Action: The PSC is considering an investigation instituted by Staff of the New York State Department of Public Service of Independent Water Works, Inc. for alleged discriminatory practices and failure to charge tariffed rates.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1), (10), 89-i and 89-j

Subject: Water rates, charges and regulations.

Purpose: To approve, reject or modify findings with respect to the rates, charges, rules and regulations of Independent Water Works, Inc.

Substance of proposed rule: On February 2, 2010 the Commission issued an Order in Case 05-W-0707 which directed a reduction of the rates charged by Independent Water Works, Inc. (IWW or company). The reduced rates were to go into effect on February 5, 2010 on a temporary basis subject to comments by the parties. By letter dated February 25, 2010, the Attorney for Home Depot, U.S.A., Inc. and LNT, Inc., two of IWW's customers, commented that IWW was not charging its customers the rates directed in that Order and that it appeared that IWW was giving one of the customers a 65% discount. This information was confirmed by a review of the required notices IWW sent its customers, copies of which were submitted in compliance with the Commission's February 2, 2010 Order. As a result, Staff initiated an investigation of IWW concerning alleged discriminatory billing practices and failure to charge its customers its tariffed rates. The company provides metered water service to approximately 19 commercial customers in the Highlands Commercial Development in the Town of Southeast, Putnam County.

The Commission will determine if the company's tariffed rates are being applied correctly and, if they are not, determine the appropriate remedy. The Commission may also consider other related matters.

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

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

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

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

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

(10-W-0262SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Water Rates and Charges

I.D. No. PSC-26-10-00004-P

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

Proposed Action: On May 27, 2010 West Valley Crystal Water Company, Inc. filed a petition requesting authority to increase its annual revenues by approximately $271,480 or 571% to become effective October 1, 2010.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: For approval to increase West Valley Crystal Water Company, Inc.'s annual revenues by about $271,480 or 571%.

Substance of proposed rule: On May 27, 2010, West Valley Crystal Water Company, Inc. (West Valley or the company) filed, to become effective on October 1, 2010, tariff amendments (Leaf No. 12, Revision 7) to its electronic tariff schedule P.S.C. No. 3 – Water. The filed amendments reflect new rates to produce additional annual revenues of about $271,480 or 571%. The company provides unmetered water service to approximately 217 customers in the Hamlet of West Valley located within the Town of Ashford, Cattaraugus County. Fire protection service is not provided. The company's tariff, along with its proposed changes, will be available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us) located under Commission Documents – Tariffs. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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

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

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

(10-W-0264SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Notification Concerning Tax Refunds

I.D. No. PSC-26-10-00005-P

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

Proposed Action: The PSC is considering Verizon New York Inc.'s petition seeking retention of a portion of a property tax refund related to its regulated, intrastate New York operations.

Statutory authority: Public Service Law, section 113(2)

Subject: Notification concerning tax refunds.

Purpose: To consider Verizon New York Inc.'s request to retain a portion of a property tax refund.

Substance of proposed rule: On June 4, 2010, Verizon New York Inc. (Verizon or the company) filed a petition proposing the disposition of that portion of a property tax refund allocable to its regulated, intrastate New York operations. The tax refund of approximately $6,700,000 was the result of the settlement of claims related to their real property assessments in New York City. Verizon requests permission to retain that portion of the tax refund allocable to its regulated, intrastate New York operations of approximately $4,100,000. The Commission may approve or reject in whole or in part, the company's request or may take other related action.

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

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

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

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

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

(10-C-0274SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Weighted Average Cost of Capacity

I.D. No. PSC-26-10-00011-P

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

Proposed Action: The Commission is considering a tariff filing by KeySpan Gas East Corporation d/b/a National Grid (KeySpan) to update its definition of weighted average cost of capacity and eliminate the Capacity Release Surcharge Adjustment.

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

Subject: Weighted Average Cost of Capacity.

Purpose: To revise tariff language to allow KeySpan to update its definition of weighted average cost of capacity.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by KeySpan

Gas East Corporation d/b/a National Grid (KeySpan) to: (1) update its definition of weighted average cost of capacity; (2) add corresponding language to its Mandatory Capacity Program; and (3) eliminate the Capacity Release Surcharge Adjustment. 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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

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

(10-G-0278SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Weighted Average Cost of Capacity

I.D. No. PSC-26-10-00012-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 tariff filing by The Brooklyn Union Gas Company d/b/a National Grid (Brooklyn Union) to update its definition of weighted average cost of capacity and eliminate the Capacity Release Surcharge Adjustment.

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

Subject: Weighted Average Cost of Capacity.

Purpose: To revise tariff language to allow KeySpan to update its definition of weighted average cost of capacity.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a proposal filed by The Brooklyn Union Gas Company d/b/a National Grid (Brooklyn Union) to: (1) update its definition of weighted average cost of capacity; (2) add corresponding language to its Mandatory Capacity Program; and (3) eliminate the Capacity Release Surcharge Adjustment. 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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

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

(10-G-0279SP1)

Workers' Compensation Board

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medical Treatment Guidelines

I.D. No. WCB-26-10-00013-P

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

Proposed Action: Amendment of sections 300.23(d), 325-1.2, 325-1.3, 325-1.4, 325-1.24; repeal of section 325-1.6; and addition of Part 324 and section 325-1.25 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 141, 13, 13-a, 13-b, 13-k, 13-l, 13-m

Subject: Medical Treatment Guidelines.

Purpose: Requires use of Medical Treatment Guidelines to treat neck, back, knee and shoulder, and provides processes surrounding such use.

Substance of proposed rule (Full text is posted at the following State website:www.wcb.state.ny.us): The proposed adopts and mandates the use of treatment guidelines for workers' compensation injuries or illnesses to the neck, back, shoulder, and knee, and amends other provisions to support the guidelines.

Section 300.23 (d) is amended to state that it does not apply when a request for a variance is denied.

A new Part 324 is added to Subchapter C regarding Medical Treatment Guidelines.

Section 324.1 defines relevant terms used in this Part including ''Maximum Medical Improvement,'' ''Medical Treatment Guidelines,'' ''Review of Records,'' and ''Treating Medical Provider.''

Section 324.2 mandates treatment in accordance with the Medical Treatment Guidelines for the mid and low back, neck, knee, and shoulder, which are incorporated by reference, for all work related injuries or illnesses on an after October 18, 2010, regardless of the date of accident or date of disablement. Establishes a list of pre-authorized procedures pursuant to Workers' Compensation Law § 13-a (5), which includes all medical care consistent with the Medical Treatment Guidelines except for 12 treatments or procedures. Provides that variances from the Medical Treatment Guidelines are only allowed as provided in § 324.3.

Section 324.3 sets forth what is required to request a variance, that the burden of proof is on the treating medical provider that a variance is medically necessary and appropriate, the requirements related to a response to a variance, including the time period in which a response must be made, and how denials of variances are resolved.

Section 324.4 sets for an optional prior approval process whereby a treating medical provider can request approval from the insurance carrier or Special Fund that the treatment is consistent with the Medical Treatment Guidelines before it is performed. This section establishes how providers can opt-in to the program and makes a request, how insurance carriers can opt-out of the process, how insurance carriers who participate respond to a request, and how denials are resolved.

Section 324.5 provides that if the Medical Treatment Guidelines do not address a condition, treatment or diagnostic test for a part of the body covered by the Medical Treatment Guidelines, then the factors in necessary to request a variance shall be used to determine whether the insurance carrier or Special Fund is obligated to pay for the medical care at issue.

Section 324.6 requires insurance carriers and Special Fund to incorporate the Medical Treatment Guidelines and relevant regulatory provisions into their policies, procedures, and practices, and certify that this has been completed within 120 days of the effective date of Part 324.

Section 325-1.2 is amended to require specialists and consultants to file the same medical report forms used by treating providers.

Section 325-1.3 is amended to require medical reports of attending physicians be filed on the correct version of the form or forms prescribed by the chair for such purpose and that medical reports must be filed when a follow-up visit is necessary except the time between follow-up visits cannot exceed 90 days.

Section 325-1.4 regarding prior authorization for special services is amended to clarify and modify the procedure so it reflects the procedures actually used currently, make clear the ability of physical and occupational therapists to request prior authorization, clarify when prior authorization is necessary when multiple special services are to be performed, and incorporate the pre-authorized list from Section 324.2 (d) of this Title.

Section 325-1.6 is repealed.

Section 325-1.24 is amended to limit its applicability to bills for medical services provided on and after October 1, 1994, and before October 18, 2010.

Section 325-1.25 is added to set forth the process for the submission of medical bills, the time in which medical bills must be paid and/or objected to, the objections that can be raised, and the resolution of objections.

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

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

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

Summary of Regulatory Impact Statement

1. Statutory Authority:

Workers' Compensation Law (WCL) § 117 (1) authorizes the Chair to make regulations consistent with the WCL and the Labor Law. WCL § 141 authorizes the Chair to enforce all provisions of the chapter and make administrative regulations.

WCL § 13 establishes employer liability for medical treatment and authorizes the Chair to establish a fee schedule for medical treatment. The Chair's authority to establish a fee schedule forms the basis for Medical Treatment Guidelines (Guidelines) which set the standards of appropriate treatment.

WCL § 13-b requires individuals providing medical care or conducting independent medical examinations (IMEs) of claimants to be authorized by the Chair, except for six enumerated exceptions. The Chair has the authority to temporarily suspend or revoke a physician's authorization to treat or conduct IMEs. WCL §§ 13-k, 13-l, and 13-m, respectively, allow the Chair to authorize podiatrists, chiropractors, and psychologists to treat and/or conduct IMEs, and to temporarily suspend or revoke their authorizations.

WCL § 13-a (5) requires prior authorization from the carrier for special procedures costing more than $1,000, increased by Chapter 6 of the Law of 2007 from $500. A denial by the carrier must be within 30 days and must be based upon a conflicting second opinion rendered by an authorized physician. The 2007 reform legislation also added a provision directing the Chair to issue a list of pre-authorized procedures costing over $1,000.

Although the statutes do not specifically require the adoption of guidelines, it is clear that the absence of them has resulted in an inefficient system. Because medical practitioners have no consistent, up-to-date standards on which to base treatment, claimants may not be receiving the high quality care they deserve. Further, with no agreed upon standards on which to assess medical necessity, costly disputes and unnecessary treatment delays occur. In his oversight of oversight of the workers' compensation system, the Chair has an obligation to recommend procedures to rectify these problems. These guidelines should help to do so.

2. Legislative Objectives:

The purpose of the reform in chapter 6 of the Laws of 2007, effective March 13, 2007, was to increase benefits and improve delivery of services to injured workers while reducing costs. By letter dated March 13, 2007, the Governor directed the Superintendent of Insurance, with the assistance of the Board's Chair and the Commissioner of Labor, to design guidelines to account for modern diagnostic and treatment techniques and evidence-based standards of medical treatment in order to minimize litigation conflicts and speed return to employment. The Governor appointed an Advisory Committee of respected individuals in the industry to assist the Superintendent and who recommended to him proposed treatment guidelines for the shoulder, knee, neck, and back injuries that all providers would be required to use when treating injuries to those body parts. The Superintendent then recommended them to the Chair.

The goals of the Medical Treatment Guidelines (Guidelines) are three fold:

1. Improve the quality of treatment;
2. Improve the speed of delivery and reduce friction costs; and
3. Eliminate unnecessary medical treatments which do not contribute to a positive outcome.

These goals are consistent with the legislation and the Governor's directive in that they facilitate delivery of quality medical treatment to injured workers and provide a structure for that treatment based upon evidence-based standards and best practices.

WCL § 13-a (5), as amended by Chapter 6, increases the prior authorization threshold and requires a list of pre-authorized procedures. The pre-authorized list allows the Board appropriate regulatory flexibility to add or remove procedures depending on best practices, increases or decreases in costs, or various managed care approaches.

3. Needs and Benefits:

Because New York does not currently have treatment guidelines, New York practitioners do not have up-to-date standards for treatment of the knee, shoulder, back and neck, which account for approximately 36% of the claims but nearly 60% of medical costs. Similarly, insurance carriers, self-insured employers, and the State Insurance Fund (''carriers'') do not have standards to assess the medical necessity of treatment, which results in disputes over treatment, delayed care, and increase frictional costs.

The Guidelines set the standard of treatment. Carriers will only pay for treatment consistent with the Guidelines or approved through a variance process. The Guidelines create criteria for timing and use of diagnostic testing and treatments, and controls utilization of some significant cost drivers such as chiropractic manipulations, physical therapy modalities, MRIs, therapeutic injections, and nerve blocks injections. It also places limitations on 12 procedures that are subject to abuse or are complex and invasive. It prohibits ineffective treatments such as use of Medex machines and electro-analgesic nerve blocks.

In other states, treatment guidelines have significantly reduced medical costs. In California, a 24 visit cap on chiropractic and physical therapy decreased chiropractic costs by 72% and physical therapy costs by 58% in 18 months.

The Guidelines will benefit participants by improving the quality of care. Treatment guidelines, grounded in evidence-based medicine and the sound clinical judgment of highly credentialed physicians, is a useable and practical tool for stakeholders.

Without treatment guidelines, biases may affect determinations of medically necessary care to the claimant's detriment. While denial of care to reduce costs is harmful, overuse of medical services does not necessarily improve outcomes. Treatment guidelines minimize the effects of bias by addressing sound treatment practices, providing better care at lower cost.

Carriers use utilization management to assess appropriateness of care to control costs and ensure quality. However, lack of uniformity in UR standards may lead to variations in the treatment and adds frictional costs by producing needless disputes.

Uniform UR standards based on treatment guidelines should significantly reduce variation in treatment, increase the transparency of the medical claim and payment process, lead to decisions based on sound, evidence-based medicine, and reduce disputes. When disputes do arise, adjudicators will have a standard to resolve them.

Instances will occur where the Guidelines are not appropriate for a particular claimant. In such situations the treating medical provider may request approval for a variance by submitting information on the form prescribed for this purpose. The burden of proof for a variance is on the claimant and treating medical provider. Carriers have 30 days to review the request and respond. If the variance is denied, and the claimant requests review of the denial, a determination will be made at an expedited hearing or, if both the claimant and the carrier agree in writing, by a medical arbitrator appointed by the Chair. If the dispute is resolved by a medical arbitrator, there is no further appeal. The variance process provides flexibility to ensure that claimants receive necessary care.

All the treatments outlined in the Guidelines comprise the pre-authorized list, except for 12 procedures which are subject to abuse or are complex and invasive. By adopting the Guidelines as the standard of care for the neck, back, shoulder, and knee, and making all but 12 procedures pre-authorized, medically sound, evidence based treatment will flow promptly which will improve recovery and expedite a return to work.

4. Costs:

The proposed rule will impose some additional costs on the regulated parties, the Board, the State, and local governments which are expected to be offset by the savings from use of the guidelines. Medical professionals, insurance carriers, self-insured employers, third party administrators, and the Board will be required to incorporate the guidelines into their procedures. Costs will vary depending on current practices, size of the entity, familiarity with and use of any treatment guidelines.

The Board will provide training on the Guidelines to stakeholders at no cost. Copies of the Guidelines will be available on the Board's website free of charge. The cost of a hard copy is $10.00 per guideline or $5.00 for a compact disc of the four Guidelines.

Treating providers will incur some cost when requesting a variance due to the need to complete the required form. Upon receiving a variance request, the carrier has the option of having it reviewed by its own medical staff, or seeking an IME opinion. If the carrier does not believe the variance request meets the burden of proof required, it may deny the variance request without a medical opinion; however, for all other denials a medical opinion is necessary. Carriers will incur the costs if an IME or records review is obtained. The cost, however, will be offset by a reduction in IMEs due to the pre-authorized list.

If a variance is denied, the issue will be resolved at an expedited hearing or, if both parties consent, by a medical arbitrator. Parties will incur costs if the denial is resolved through the hearing process; however, these costs should be offset by the reduction in the number of denials. If the parties opt to use the medical arbitrator, the costs are nominal because there is no testimony or administrative appeal.

There will be some cost for providers who opt-in and those providers who do not opt-out of the optional prior approval process. This process provides an opportunity for the treating provider to seek the carrier's agreement, prior to providing treatment. If the carrier agrees that the treatment is consistent with the Guidelines, the provider can treat and bill, knowing that the carrier will not object. Providers will have costs associated with completing the optional approval form, and carriers will have costs associated with their responses. However, the cost is offset by the savings to the provider generated by prompt payment and fewer disputes. Carrier costs are offset by savings from eliminating the need for hearings to resolve treatment disputes.

Use of the Guidelines means that providers and carriers employ the same standards to determine if medical treatment is necessary, resulting in fewer disputes over medical bills which reduces costs and speeds payment. The pre-authorized list reduces delays in treatment and improves medical outcomes.

Use of the Guidelines is expected to result in millions of dollars of savings by eliminating unnecessary and excessive treatments and therapies which will offset any additional costs.

Except for adjustments to the proper fee schedule amount, the rule requires carriers to file with the Board on a prescribed form their valuation objections to medical bills. This submission will diminish disputes over whether an objection was filed and the timeliness of the objection. There will be nominal costs associated with filing the form which can be faxed, emailed, or filed by regular mail.

5. Local Government Mandates:

The rule only imposes a mandate on local governments that are self-insured or that own and/or operate a hospital. Those entities will need to comply with the requirements in the rule the same as a private self-insured employer or insurance carrier or private hospital.

On and after October 18, 2010, the rule requires that all claimants with injuries to the neck, back, shoulder, and/or knee be treated in accordance with the Guidelines. Self-insured local governments will be required to incorporate the Guidelines into their practices and certify that this has been done. Local governments who are self-insured will be required to pay for medical treatment that is consistent with the Guidelines, to respond to variance requests and to optional prior approval requests if they do not opt-out. Physicians employed by public hospitals will be required to use the Guidelines to treat injured workers, to request a variance, and follow all of the other rules.

6. Paperwork Requirements:

Treating medical providers, carriers, the State Insurance Fund, claimants, and others will have new paperwork requirements. Submissions relating to the Guidelines are on prescribed forms. Variance requests and responses, and requests for review of a denial and the election to opt-in to the medical arbitrator process require the use of one form. For those participating in the optional prior approval process, the requests and responses require the use of one form. Use of prescribed forms ensures easy in identification and processing.

In addition to the two new forms, the regulations require use of three existing forms.

Carriers are required to certify that they have incorporated the Guidelines into their procedures. If they modify their practices, they must recertify that the Guidelines are still incorporated.

7. Duplication:

The proposed regulation does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

The Board shared a draft of the regulations with the AFL-CIO, Business Council of New York State, State Insurance Fund, New York Insurance Association, American Insurance Association, Property Casualty Insurers Association of America, Medical Society of the State of New York, New York Conference of Mayors, New York State Association of Counties, and the Association of Towns of the State of New York, and requested comments. With respect to the Guidelines, the Board solicited comments between August 13, 2009, and September 9, 2009. The Board's Medical Director reviewed the comments and incorporated some changes.

There are no practicable alternatives to adopting treatment guidelines. Currently, the Board has no treatment guidelines, which does not lend itself to uniform standards of quality treatment and containment of costs. A uniform system will encourage proper and timely treatment, and reduce unnecessary litigation and delay.

The rule provides that all treatment consistent with the Guidelines costing more than $1,000, except for twelve procedures, is on the pre-authorized list. An alternative would be to not put medical care over $1,000 on the pre-authorized list and require prior authorization. This was rejected because it is impedes the delivery of care. Twelve procedures still require prior authorization because they are complex or high risk, invasive, or subject to abuse.

An alternative would be to require strict adherence to the Guidelines without the possibility of a variance. The ability to vary from the guidelines is necessary because claimants are different and all injuries do not always progress the same. Without a variance, some claimants would not receive the best medical care.

An alternative would be to have all denials reviewed by the Medical Director or medical arbitrator. However, as there is no statutory authority for such option, the rule allows the parties to opt-in to the arbitration process.

The rule requires that the claimant request review of the denial of a variance. An alternative would be to automatically schedule an expedited hearing, or if the parties both opt-in, to refer the dispute to the medical arbitrator, without any further action by the claimant or carrier. This alternative was not chosen because the claimant may not want to proceed with the variance request and undergo that specific procedure.

Another alternative would be to eliminate the optional prior approval process. However, the pilot survey shows that the process improves communications and reduces bill disputes.

The rule amends § 325-1.3 to increase the time between the submission of medical reports from forty-five days to ninety days. An alternative would be to leave the time period at forty-five days. However, by requiring reports only when a medically necessary visit is required, but no more than ninety days apart, fewer unnecessary office visits will be scheduled and costs reduced.

Another alternative would be to require that the prescribed form be used for all valuation objections. Originally, the rule had such a requirement, but the rule was changed to exempt objections that merely adjust the fee so that it reflects the appropriate fee schedule.

9. Federal Standards:

No federal standards are applicable to this proposed regulation.

10. Compliance Schedule:

Participants will be able to comply when the regulations take effect on October 18, 2010. During the one month between adoption and the effective date, participants will have time to finalize incorporation of the guidelines into their processes and undergo training.

Summary of Regulatory Flexibility Analysis

1. Effect of rule:

Small businesses and local governments whose only involvement with the workers' compensation system is that they are employers and are required to have coverage will not be affected by this rule. Group self-insured trusts, third party administrators hired by private insurance carriers and group self-insured trusts, independent medical examination (IME) entities, and attorneys may be small businesses who will be impacted by this regulation. All health practitioners authorized by the Chair to treat or conduct independent medical examinations of claimants will have to comply with parts of this rule. Finally, local governments that own and/or operate a hospital will be effected by this rule.

The approximately 2,511 political subdivisions that are self-insured for workers' compensation coverage in New York State will have to comply with the provisions of this proposal. Those local governments who are not self-insured and do not own and/or operate a hospital will not be affected by this rule.

2. Compliance requirements:

The proposed rule imposes new compliance requirements on the small businesses and local governments described above.

Small businesses authorized to provide medical treatment to claimants will have to treat neck, back, shoulder, and knee injuries consistent with the Medical Treatment Guidelines (Guidelines) and self-insured local governments, third-party administrators, and group self-insured trusts who administer their own claims (hereafter referred to as ''affected payers'') will be required to pay only for such treatments. In order to vary from the Guidelines, the provider must request a variance using the prescribed form from the affected payer and file a copy with the Workers' Compensation Board (Board). The burden of proof for a variance rests on the treating provider. Affected payers must have the request reviewed by their own medical professional or obtain an IME or review of records. The affected payer must respond within fifteen business days if an IME is not obtained or thirty days if an IME is obtained. Denials of variance requests must be based on a medical opinion unless the denial is because the provider did not meet his burden of proof. The denial will be resolved by either a medical arbitrator or at an expedited hearing. Both the affected payer and claimant must choose to have the issue resolved by a medical arbitrator; otherwise it will be resolved at a hearing.

Providers who are small businesses and affected payers who participate in the optional prior approval process must complete the appropriate forms and respond within the required time frames. Affected payers must have its medical professional review the request for optional prior approval. If the affected payer has denied the optional prior approval, the dispute shall be resolved by the medial arbitrator and no further action is required.

Self-insured local governments and group self-insured trusts are required to certify that they have incorporated the Guidelines and this rule

into their policies, procedures, and practices. If they modify their policies, procedures, and practices, they must certify that the Guidelines and this rule are still incorporated.

Rather than submitting medical reports every forty-five days, the rule requires authorized providers who are small businesses to submit medical reports when a follow-up visit is necessary, except the interval between medical reports can be no greater than 90 days. This actually lessens an existing compliance requirement.

The rule now requires that the prescribed form be used to request and respond to prior authorizations. Throughout the rule, treating providers and affected payers are required to use specific methods to transmit forms. Specifically, those methods are facsimile, email, or some other method of electronic transmission. Exceptions are provided for those who do not have the capability.

The rule requires affected payers to use the Chair prescribed form for valuation objections to medical bills, except when the affected payer adjusts the amount billed so it conforms to the appropriate workers' compensation fee schedule.

3. Professional services:

Small businesses and local governments effected by the rule will not need any new professional services to comply with this rule. The Board will be providing training on the Guidelines and the processes surrounding them at no charge.

4. Compliance costs:

The proposed rule will impose some additional costs on the affected small businesses and local governments, which are expected to be more than offset by the savings from use of the Guidelines. Medical professionals and affected payers will be required to incorporate the Guidelines into their policies, practices, and procedures. There will also be a cost to self-insured local governments and group self-insured trusts associated with the requirement that it must certify within one hundred and twenty days of the effective date that it has completed such incorporation. To assist in this process, the Board will be providing training to small businesses and local governments, as well as all other stakeholders and the Board's employees at no charge.

The Guidelines will be available on the Board's website free of charge. The cost for a hardcopy will be $10.00 per guideline or $40.00 for all four. The charge for one or more of the Guidelines on a compact disc is $5.00.

Small businesses that are treating medical providers will incur some cost when requesting a variance. Upon receiving a variance request, an affected payer may have the request reviewed by its own medical staff or having an IME or records review performed. If the affected payer does not believe the variance request meets the burden of proof required, it may deny the variance request without a medical opinion; however, for all other denials where the burden of proof has been met, there must be a medical opinion. Affected payers will incur costs if an IME or records review is obtained. The cost for IMEs or records reviews to respond to variance requests will be offset by the reduction in number of IMEs required to respond to requests for prior authorization for the procedures and treatments on the pre-authorized list.

If a variance is denied, a Workers' Compensation Law Judge will resolve the issue at an expedited hearing or, if both parties consent, a medical arbitrator will resolve the issue. Affected payers will incur costs if the denial is resolved through the hearing process; but they should be offset by the reduction in the number of prior authorization denials that need to be resolved. If the parties opt to use the medical arbitrator the costs are nominal as there is no hearing or testimony.

There will be some cost for those providers who are small businesses and those affected payers who participate in the optional prior approval process, which provides an opportunity for the treating medical provider to seek the payer's agreement that the treatment is consistent with the Guidelines. The treating medical provider will incur costs completing the form to request the optional prior approval and the affected payer will incur costs having the request reviewed by its staff medical professional.

By mandating use of the Guidelines, providers and payers are using the same standards to determine if medical treatment is necessary, which will result in a reduction in disputes over medical bills. Reductions in disputes will reduce the costs involved in resolving them and increase the speed of payment. Further, the Guidelines along with the pre-authorized list will reduce the delays in treatment and care and improve outcomes so that claimants may return to work faster.

The use of the Guidelines is expected to result in millions of dollars of savings. Costs associated with unnecessary and excessive treatment and therapies will be eliminated or greatly minimized with implementation of the Guidelines as they:

- o Limit chiropractic manipulation to 20-24 visits for neck and 6-12 visits for back injuries, depending on severity
- o Limit various physical therapy modalities to 12-20 visits
- o Provide that an MRI for back injuries is not appropriate in the first 6 weeks unless there are red flags
- o Place limits on therapeutic injections in a 12 month period
- o Prohibit repeated non-therapeutic nerve block injections
- o Place additional limitations on 12 procedures that are subject to abuse or are complex and invasive
- o Prohibit ineffective treatments (e.g. Medex machines, electro-analgesic nerve blocks, etc.).

Injuries involving the knee, shoulder, back and neck account for approximately 36% of the claims but nearly 60% of system medical costs. Currently, many providers treat well in excess of the Guidelines.

The rule requires affected payers to file with the Board their objections to medical bills submitted by providers for payment on the Chair prescribed form, except for adjustments to the proper fee schedule amount. There will be a cost associated with having to use and file the prescribed form with the Board, which should be minimal. The form can be filed by fax, email, or regular mail.

5. Economic and technological feasibility:

It is economically and technologically feasible for small businesses and local governments to comply with this rule. The rule relies on existing technological capabilities and services already provided to affected payers.

6. Minimizing adverse impact:

As stated above, the implementation of Guidelines is expected to save millions of dollars.

To minimize possible adverse impacts, the regulations provide some flexibility by allowing for variances from the Guidelines. Variances are allowed in limited circumstances because claimants are different and all injuries or illnesses do not always progress in the same manner. Without the ability to request a variance, when it is appropriate and medically necessary, some claimants would not receive the best medical care.

The rule requires the claimant or his or her legal representative to request review of the denial of a variance rather than automatically scheduling an expedited hearing, or if the parties both opt-in, referring the dispute to the medical arbitrator without any further action by the claimant or affected payer. By requiring the claimant to request review after consulting with his or her treating provider, the claimant has the opportunity to decide if he wants to move forward with the variance request. Further, as the burden of proof is on the claimant to show that the variance is medically necessary and appropriate, having the claimant request review provides an opportunity for him or her to evaluate whether the burden has been met.

Medical professionals who are small businesses and affected payers will be required to incorporate the Guidelines into their policies, practices, and procedures. To assist in this process, the Board will be providing training to stakeholders and Board employees at no charge.

The rule requires self-insured local governments and group self-insured trusts to certify that they have incorporated the Guidelines and the provisions of the rule into their policies, procedures, and practices within one hundred and twenty days after the rule is effective and upon modification of such policies, procedures, and practices.

The rule amends § 325-1.3 to increase the maximum length of time between the submission of medical reports from forty-five days to ninety days. Physicians have complained that they are forced to examine claimants when it is not medically necessary in order to file a medical report every forty-five days. This results in a medical report that is no different than the previous report, because nothing has changed medically. In addition, the provider is entitled to a fee for the office visit, which increases costs. By requiring reports only when a medically necessary visit is required, but no more than ninety days apart, fewer unnecessary office visits will be scheduled and costs reduced.

Originally, the rule required that all valuation objections of medical bills be on the Chair prescribed form. In response to legitimate concerns, the rule was changed to exempt objections that merely adjust the fee so that it reflects the appropriate amount under the workers' compensation fee schedule. Some providers bill using their usual and customary rate, which is greater than the fee schedule. When the affected payers process and pay the bills they must adjust for the fee schedule and object to that portion of the bill that is above the fee schedule. As there is no dispute for the Board to resolve in these situations, the benefit of using the prescribed form was outweighed by the cost and burden to the affected payers.

7. Small business and local government participation:

The Board shared a draft of the regulations with the AFL-CIO, Business Council of New York State, Medical Society of the State of New York, New York Conference of Mayors, New York State Association of Counties, and the Association of Towns of the State of New York, and requested comments. In addition, the Board either met with or had conference calls with representatives from most of these entities. Changes were made to the regulations in response to the comments. With respect to the Guidelines themselves, the Board solicited comments on them between August 13, 2009, and September 9, 2009. Those seeking revisions to the guidelines were instructed to provide medical evidence supporting such changes. The Board received numerous comments which were reviewed

by the Board's Medical Director and some changes were made to the guidelines.

Summary of Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule will apply to all insurance carriers, the State Insurance Fund self-insured employers, self-insured local governments, local governments that own and/or operate hospitals, attorneys, medical providers, group self-insured trusts, third party administrators and claimants across the state. These individuals and entities exist in all rural areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Medical providers in rural areas authorized to treat claimants will have to treat neck, back, shoulder, and knee injuries consistent with the Medical Treatment Guidelines (Guidelines) and insurance carriers, self-insured employers, self-insured local governments, third-party administrators, group self-insured trusts who administer their own claims, and the State Insurance Fund in rural areas (hereafter referred to as ''affected payers'') will be required to pay only for such treatments. If the provider wants to vary from the Guidelines, he or she will have to request a variance submitting the prescribed form to the Workers' Compensation Board (Board) and affected payer. The burden of proof for the variance rests on the treating provider. Affected payers respond to the request and determine if it will have the request reviewed by its own medical professional or obtain an IME or review of records. The affected payer must respond within fifteen business days if an IME is not obtained or thirty days if an IME is obtained. Denials of variance requests must be based on a medical opinion unless the denial is because the provider did not meet his burden of proof. The denial will be resolved by either a medical arbitrator or at an expedited hearing. Both the affected payer and claimant must choose to have the issue resolved by a medical arbitrator; otherwise it will be resolved at a hearing.

Treating providers in rural areas who participate in the optional prior approval process must complete the appropriate forms and respond within the required time frames. Affected payers must have its medical professional review the request for optional prior approval. If the affected payer has denied the optional prior approval, the dispute shall be resolved by the medial arbitrator and no further action is required.

Insurance carriers, self-insured employers, self-insured local governments, group self-insured trusts, and the State Insurance Fund are required to certify that they have incorporated the Guidelines and this rule into their policies, procedures, and practices. If they modify their policies, procedures, and practices, they must certify that the Guidelines and this rule are still incorporated.

Rather than submitting medical reports every forty-five days, the rule requires authorized providers, including those in rural areas, to submit medical reports when a follow-up visit is necessary, except the interval between medical reports can be no greater than 90 days. This actually lessens an existing compliance requirement.

The rule now requires that the prescribed form be used to request and respond to prior authorizations. Throughout the rule, treating providers and affected payers are required to use specific methods to transmit forms. Specifically, those methods are facsimile, email, or some other method of electronic transmission. Exceptions are provided for those who do not have the capability.

The rule requires affected payers to use the Chair prescribed form for valuation objections to medical bills, except when the affected payer adjusts the amount billed so it conforms to the appropriate workers' compensation fee schedule.

Individuals and entities in rural areas affected by the rule will not need any new professional services to comply with this rule. The Board will be providing training on the Guidelines and the processes surrounding them at no charge.

3. Costs:

The proposed rule will impose some additional costs on the individuals and entities identified above, which are expected to be more than offset by the savings from use of the Guidelines. Medical professionals and affected payers, including those in rural areas, will be required to incorporate the Guidelines into their policies, practices, and procedures. There will also be a cost to insurance carriers, self-insured employers, and group self-insured trusts associated with the requirement that it must certify within one hundred and twenty days of the effective date that it has completed such incorporation. To assist in this process, the Board will be providing training to small businesses and local governments, as well as all other stakeholders and the Board's employees at no charge.

The Guidelines will be available on the Board's website free of charge. The cost for a hardcopy will be $10.00 per Guideline or $40.00 for all four to cover the Board's cost. The charge for one or more of the Guidelines on a compact disc is $5.00.

Treating medical providers in rural areas will incur some cost when requesting a variance. Upon receiving a variance request, an affected payer in a rural area may have the request reviewed by its own medical staff or having an IME or records review performed. If the affected payer does not believe the variance request meets the burden of proof required, it may deny the variance request without a medical opinion; however, for all other denials where the burden of proof has been met, there must be a medical opinion. Affected payers will incur costs if an IME or records review is obtained. The cost for IMEs or records reviews to respond to variance requests will be offset by the reduction in number of IMEs required to respond to requests for prior authorization for the procedures and treatments on the pre-authorized list.

If a variance is denied, a Workers' Compensation Law Judge will resolve the issue at an expedited hearing or, if both parties consent, a medical arbitrator will resolve the issue. Affected payers and claimants will incur costs if the denial is resolved through the hearing process; but they should be offset by the reduction in the number of prior authorization denials that need to be resolved. If the parties opt to use the medical arbitrator the costs are nominal as there is no hearing or testimony.

There will be some cost for those providers in rural areas and those affected payers who participate in the optional prior approval process, which provides an opportunity for the treating medical provider to seek the affected payer's agreement that the treatment is consistent with the Guidelines. The treating medical provider will incur costs completing the form to request the optional prior approval and the affected payer will incur costs having the request reviewed by its staff medical professional.

By mandating use of the Guidelines, providers and affected payers across the State are using the same standards to determine if medical treatment is necessary, which will result in a reduction in disputes over medical bills. Reductions in disputes will reduce the costs involved in resolving them and increase the speed of payment. Further, the Guidelines along with the pre-authorized list will reduce the delays in treatment and care and improve outcomes so that claimants may return to work faster.

The use of the Guidelines is expected to result in millions of dollars of savings. Costs associated with unnecessary and excessive treatment and therapies will be eliminated or greatly minimized with implementation of the Guidelines as they:

- o Limit chiropractic manipulation to 20-24 visits for neck and 6-12 visits for back injuries, depending on severity
- o Limit various physical therapy modalities to 12-20 visits
- o Provide that an MRI for back injuries is not appropriate in the first 6 weeks unless there are red flags
- o Place limits on therapeutic injections in a 12 month period
- o Prohibit repeated non-therapeutic nerve block injections
- o Place additional limitations on 12 procedures that are subject to abuse or are complex and invasive
- o Prohibit ineffective treatments (e.g. Medex machines, electro-analgesic nerve blocks, etc.).

Injuries involving the knee, shoulder, back and neck account for approximately 36% of the claims but nearly 60% of system medical costs. Currently, many providers treat well in excess of the Guidelines.

The rule requires affected payers to file with the Board their objections to medical bills submitted by providers for payment on the Chair prescribed form, except for adjustments to the proper fee schedule amount. There will be a cost associated with having to use and file the prescribed form with the Board, which should be minimal. The form can be filed by fax, email, or regular mail.

4. Minimizing adverse impact:

As stated above, the implementation of Guidelines is expected to save millions of dollars.

To minimize possible adverse impacts, the regulations provide some flexibility by allowing for variances from the Guidelines. Variances are allowed in limited circumstances because claimants are different and injuries or illnesses do not always progress in the same manner. Without the ability to request a variance, when it is appropriate and medically necessary, some claimants would not receive the best medical care.

The rule requires the claimant or his or her legal representative to request review of the denial of a variance rather than automatically scheduling an expedited hearing, or if the parties both opt-in, referring the dispute to the medical arbitrator without any further action by the claimant or affected payer. By requiring the claimant to request review after consulting with his or her treating provider, the claimant has the opportunity to decide if he wants to move forward with the variance request. Further, as the burden of proof is on the claimant to show that the variance is medically necessary and appropriate, having the claimant request review provides an opportunity for him or her to evaluate whether the burden has been met. Such review and required action will ensure the claimant truly wants the treatment requested in the variance before the affected payer must defend the denial at a hearing.

Medical professionals and affected payers will be required to incorporate the Guidelines into their policies, practices, and procedures. To assist in this process, the Board will be providing training to stakeholders and Board employees. There will be no charge for this training at this time.

The training will not only cover the Guidelines, but all provisions of this rule.

The Superintendent of Insurance in his recommended implementation standards for the Guidelines included the requirement that affected payers certify annually that they have incorporated the Guidelines and this rule into their policies, procedures, and practices. The recommendation was modified as it was deemed to be too burdensome when compared to the benefit received. Rather, the rule requires an initial certification and then a new certification when the policies, procedures, and practices are modified.

The rule amends § 325-1.3 to increase the maximum length of time between the submission of medical reports from forty-five days to ninety days. Physicians have complained that they are forced to examine claimants when it is not medically necessary in order to file a medical report every forty-five days. This results in a medical report that is no different than the previous report, because nothing has changed medically. In addition, the provider is entitled to a fee for the office visit, which increases costs. By requiring reports only when a medically necessary visit is required, but no more than ninety days apart, fewer unnecessary office visits will be scheduled and costs reduced.

Originally, the proposed rule required all valuation objections to medical bills be on the Chair prescribed form. In response to legitimate concerns, the rule was changed to exempt objections that merely adjust the fee so that it reflects the appropriate amount under the workers' compensation fee schedule. Some providers do not adjust their billing systems to bill workers' compensation treatments at the appropriate fee schedule. Rather these providers bill using their usual and customary rate. When the affected payers process and pay the bills they must adjust for the fee schedule and object to that portion of the bill that is above the fee schedule. As there is no dispute for the Board to resolve in these situations, the benefit of using the prescribed form was outweighed by the cost and burden to the affected payers.

5. Rural area participation:

The Board shared a draft of the regulations with the AFL-CIO, Business Council of New York State, State Insurance Fund, New York Insurance Association, American Insurance Association, Property Casualty Insurers Association of America, Medical Society of the State of New York, New York Conference of Mayors, New York State Association of Counties, and the Association of Towns of the State of New York, and requested comments. In addition, the Board either met with or had conference calls with representatives from most of these entities. Changes were made to the regulations in response to the comments. With respect to the Guidelines themselves, the Board solicited comments on them between August 13, 2009, and September 9, 2009. Those seeking revisions to the guidelines were instructed to provide medical evidence supporting such changes. The Board received numerous comments which were reviewed by the Board's Medical Director and some changes were made to the guidelines.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. Pursuant to the directive of former Governor Eliot Spitzer, the Superintendent submitted recommended treatment guidelines for workers' compensation injuries and illnesses to the neck, back, shoulder, and knee (Medical Treatment Guidelines) to the Chair of the Workers' Compensation Board (Board) in December 2007, and submitted recommended implementation standards in June 2008. This rule adopts and mandates use of the Medical Treatment Guidelines, as modified by the Chair, and establishes the necessary processes to support the use of such guidelines.

The rule does not eliminate any existing process, procedure, or program. While the adoption of the Medical Treatment Guidelines and the establishment of a pre-authorized list of procedures should reduce medical disputes and the need for prior approval for special services costing more than $1,000, such reductions will not result in an adverse impact on jobs. Further, the full implementation of the Medical Treatment Guidelines should result in savings that are greater than any costs that the rule may impose.