

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### NOTICE OF ADOPTION

**Standards of Identity for Olive Oil, Olive Pomace Oil, Refined Olive Oil, and Virgin Olive Oil**

**I.D. No.** AAM-24-10-00001-A

**Filing No.** 1104

**Filing Date:** 2010-10-29

**Effective Date:** 2010-11-10

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

**Action taken:** Addition of Part 269 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 16, 18 and 204-a

**Subject:** Standards of identity for olive oil, olive pomace oil, refined olive oil, and virgin olive oil.

**Purpose:** To ensure that olive oil, and varieties thereof, meet appropriate compositional requirements to promote fair dealing.

**Text or summary was published** in the June 16, 2010 issue of the Register, I.D. No. AAM-24-10-00001-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Stephen Stich, New York State Department of Agriculture and Markets, 10B Airline Drive, Albany, NY 12235, (518) 457-4492, email: stephenstich@agmkt.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

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## Office of Alcoholism and Substance Abuse Services

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### NOTICE OF ADOPTION

#### Credentialing of Addictions Professionals

**I.D. No.** ASA-36-10-00009-A

**Filing No.** 1102

**Filing Date:** 2010-10-25

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of Part 853 and repeal of Part 855 of Title 14 NYCRR.

**Statutory authority:** Mental Health Law, sections 19.07, 19.09, 19.21, 32.01 and 32.02

**Subject:** Credentialing of Addictions Professionals.

**Purpose:** To consolidate and update the credentialing process and requirements.

**Text or summary was published** in the September 8, 2010 issue of the Register, I.D. No. ASA-36-10-00009-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Patricia Flaherty, OASAS, 1450 Western Avenue, Albany, NY 12203-3526, (518) 485-2317, email: patriciaflaherty@oasas.state.ny.us

**Additional matter required by statute:** Incorporation by reference material.

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Correctional Services

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

#### Inmate Personal Property Claims

**I.D. No.** COR-45-10-00001-P

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

**Proposed Action:** This is a consensus rule making to amend sections 1700.5(d)(2) and 1700.10 of Title 7 NYCRR.

**Statutory authority:** Correction Law, section 112

**Subject:** Inmate Personal Property Claims.

**Purpose:** To update the current area of oversight for DOCS Office of Inmate Claims and to change reporting period.

**Text of proposed rule:** Amend Section 1700.5(d)(2) as follows:

(2) Claims over \$1,000. All claims approved for over \$1,000 must be reviewed and approved in sequence by the Superintendent, Division of [Program Services] *Budget and Finance* (Office of Inmate Accounts) and the Attorney General (AG). Upon final approval, the facility will process a voucher to the Office of the State Comptroller (OSC) for payment.

Amend Section 1700.10 as follows:

Facilities are required to provide *annual* [quarterly] reports of inmate property claims to the Division of [Program Services] *Budget and Finance*, Office of Inmate Accounts. The *annual* [quarterly] reports will [(reflect- [ing] the period[s] of April 1st [through June 30th, July 1st through September 30th, October 1st through December 31st, and January 1st] through March 31st () will be cumulative] and will be due on the 15th of *April* [the month following] each *year* [quarter]. Reports shall include: inmate names and numbers; short descriptions of their losses; the dates of those losses; the amounts of the settlements; and claim approval dates.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue, Building 2 - State Campus, Albany, NY 12206-2050, (518) 457-4951, email: Maureen.Boll@docs.state.ny.us

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

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

#### Consensus Rule Making Determination

In accordance with Correction Law section 112, the Commissioner of the Department of Correctional Services The commissioner of correction shall have the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof.

7 NYCRR 1700 contains the policy and procedure for the filing and recovery of value for inmate personal property which has been lost, damaged or destroyed while they have been under custody of the department. The Commissioner has determined that the Division of Budget and Finance should have responsibility for the functions of the Office of Inmate Accounts. Additionally, the Department's internal reporting mechanism for Inmate Claims is being changed from quarterly to annual.

The proposed amendment to this rule merely updates the current area of oversight for the DOCS Office of Inmate Accounts from the Division of Program Services to the Division of Budget and Finance, as was recently changed in the Department's organizational plan. The quarterly reporting of Inmate Claims activity by each facility to Central Office did not appear to provide any additional benefit when compared to annual reporting in the year end analysis of the Inmate Claims process. Therefore, to increase the efficiency of operations due to decreased staffing levels the change from quarterly to annual reporting was determined to be necessary. This change does not have any impact on an inmate's ability to file a personal property claim or to exhaust the Department's administrative remedies before filing with the Court of Claims.

The Department of Correctional Services has determined that no person is likely to object to the proposed actions because they make technical changes that are non-controversial. See SAPA § 102(11)(c).

#### Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This rulemaking is merely updating the area of oversight for the Office of Inmate Accounts and revising the inmate claims reporting period from quarterly to annual in the interest of efficiency of operations.

**Action taken:** Amendment of section 100.2(ee) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

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

**Specific reasons underlying the finding of necessity:** The State Education Department is proposing modified requirements for the provision of Academic Intervention Services (AIS) during the 2010-2011 school year based on several factors, including: (1) the change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency; (2) the fact that such changes were not announced to the field until late July; and (3) the fiscal impact that school districts may experience because of the increase in the number of students required to receive AIS. The proposed requirements would hold districts harmless from the expected fiscal impact of the change in cut scores. School districts will continue to have the option to offer services to those children who they feel are in need of the additional support.

Specifically, the proposed amendment provides that for the 2010-2011 school year only:

(1) Students scoring at or below a scale score of 650 must receive academic intervention instructional services.

(2) Students scoring above a scale score of 650 but below level 3/proficient will not be required to receive academic intervention instructional and/or student support services unless the school district deems it necessary.

(3) Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-11 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-10.

(4) In recognition of the effects on school districts of a change in cut scores for such school year, a waiver is given for the 2010-2011 school year from the requirement that school districts review and revise their description of AIS based on student performance results.

The proposed amendment was adopted as an emergency rule at the July 2010 Regents meeting, effective July 27, 2010. A Notice of Proposed Rule Making was published in the State Register on August 4, 2010.

The proposed amendment has been adopted as a permanent rule at the October 2010 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on November 10, 2010. However, the emergency rule which took effect on July 27, 2010 will expire on October 24, 2010. The expiration of the emergency rule would disrupt administration of the modified requirements for Academic Intervention Services in the 2010-2011 school year.

Therefore, a second emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the July 2010 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule, in order to avoid disruption to the administration of the modified requirements for Academic Intervention Services in the 2010-2011 school year.

**Subject:** Academic Intervention Services.

**Purpose:** To establish modified requirements for AIS during the 2010-2011 school year.

**Text of emergency rule:** Subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective October 25, 2010, as follows:

(ee) Academic intervention services.

(1) Requirements for providing academic intervention services (*AIS*) in kindergarten to grade three. Schools shall provide academic intervention services to students in kindergarten to grade three when such students:

(i) are determined, through a district-developed or district-adopted procedure that meets State criteria and is applied uniformly at each grade level, to lack reading readiness based on an appraisal of the student, including his/her knowledge of sounds and letters; or

(ii) are determined, through a district-developed or district-adopted procedure applied uniformly at each grade level, to be at risk of not achieving the State designated performance level in English language arts and/or mathematics. This district procedure may also include diagnostic screening for vision, hearing and physical disabilities pursuant to article 19 of the Education Law, as well as screening for possible limited English proficiency or possible disability pursuant to Part 117 of this Title.

(2) Requirements for providing academic intervention services in grade four to grade eight. Schools shall provide academic intervention services when students:

(i) score below the State designated performance level on one or more of the State elementary assessments in English language arts, mathematics, social studies or science; *provided that for the 2010-2011 school year only, the following shall apply for the English language arts and mathematics assessments:*

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## Education Department

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### EMERGENCY RULE MAKING

#### Academic Intervention Services

**I.D. No.** EDU-31-10-00004-E

**Filing No.** 1094

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

(a) those students scoring at or below a scale score of 650 shall receive academic intervention instructional services; and

(b) those students scoring above a scale score of 650 but below level 3/proficient shall not be required to receive academic intervention instructional and/or student support services unless the school district, in its discretion, deems it necessary. Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-2011 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010, and shall no later than the commencement of the first day of instruction either post to its Website or distribute to parents in writing a description of such process.

(ii) are limited English proficient (LEP) and are determined, through a district-developed or district-adopted procedure uniformly applied to LEP students, to be at risk of not achieving State learning standards in English language arts, mathematics, social studies and/or science, through English or the student's native language. This district procedure may also include diagnostic screening for vision, hearing, and physical disabilities pursuant to article 19 of the Education Law, as well as screening for possible disability pursuant to Part 117 of this Title; or

(iii) are determined, through a district-developed or district-adopted procedure uniformly applied, to be at risk of not achieving State standards in English language arts, mathematics, social studies and/or science. This district procedure may also include diagnostic screening for vision, hearing, and physical disabilities pursuant to article 19 of the Education Law, as well as screening for possible limited English proficiency or possible disability pursuant to Part 117 of this Title.

(3) . . .

(4) Description of academic intervention services.

(i) . . .

(ii) The description of academic intervention services shall be approved by each local board of education by July 1, 2000. In the New York City School District, the New York City Board of Education may designate that the plans be approved by the chancellor or his designee or by community school boards for those schools under their jurisdiction. Beginning July 1, 2002 and every two years thereafter, each school district shall review and revise its description of academic intervention services based on student performance results; *except that this requirement shall not apply to student performance results for the 2010-2011 school year, which shall be excluded from such review.*

(iii) . . .

(iv) . . .

(5) . . .

(6) . . .

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-31-10-00004-P, Issue of August 4, 2010. The emergency rule will expire December 20, 2010.

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

**Regulatory Impact Statement**

**1. STATUTORY AUTHORITY:**

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

Education Law section 207 empowers the Board of 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.

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.

Education Law section 3204(3) provides for the courses of study in the public schools.

**2. LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to academic intervention services (AIS).

**3. NEEDS AND BENEFITS:**

The proposed amendment would establish modified requirements for the provision of AIS during the 2010-2011 school year based on several factors, including: (1) the change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency; (2) the fact that such changes will not be announced to the field until late July or early August; and (3) the fiscal impact that school districts may experience because of the increase in the number of students required to receive AIS. The purpose of the proposed amendment is to provide flexibility to school districts in providing AIS during the 2010-2011 school year in order to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics. School districts will continue to have the option to offer services to those children who they feel are in need of the additional support.

Specifically, the proposed amendment provides that for the 2010-2011 school year only:

(1) Students scoring at or below a scale score of 650 must receive academic intervention instructional services.

(2) Students scoring above a scale score of 650 but below level 3/proficient will not be required to receive academic intervention instructional and/or student support services unless the school district deems it necessary.

(3) Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-11 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-10, and shall post to its Website or distribute to parents in writing a description of such process no later than the commencement of the first day of instruction.

(4) In recognition of the effects on school districts of a change in cut scores for such school year, a waiver is given for the 2010-2011 school year from the requirement that school districts review and revise their description of AIS based on student performance results.

**COSTS:**

(a) Costs to State government: None.

(b) Costs to local government: The proposed amendment establishes modified requirements for the provision of AIS during the 2010-2011 school year to provide flexibility to school districts and to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency. School districts may incur some costs associated with distributing to parents of students a written description of the district's process for determining whether AIS will be offered to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010. However, the proposed amendment allows school districts to post the description on its Website in lieu of distributing to parents, and it is anticipated that any associated costs would be minimal and can be absorbed using existing district staff and resources. More importantly, any such costs would be more than offset by the reduction in costs to schools districts resulting from implementation of the modified AIS requirements in the 2010-2011 school year.

(c) Costs to private regulated parties: None.

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

**5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment establishes modified requirements for the provision of AIS during the 2010-2011 school year to provide flexibility to school districts and to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency. As part of the modified requirements, the proposed amendment requires each school district to develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-2011 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010, and to either post to its Website or distribute to parents in writing a description of such process no later than the commencement of the first day of instruction.

**6. PAPERWORK:**

The proposed amendment requires each school district to develop and maintain on file a uniform process by which the district determines

whether to offer AIS during the 2010-2011 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010, and to either post to its Website or distribute to parents in writing a description of such process no later than the commencement of the first day of instruction.

**7. DUPLICATION:**

The proposed amendment does not duplicate existing State or federal regulations.

**8. ALTERNATIVES:**

There were no significant alternatives and none were considered.

**9. FEDERAL STANDARDS:**

There are no related federal standards.

**10. COMPLIANCE SCHEDULE:**

It is anticipated regulated parties will be able to achieve compliance with the proposed rule by its effective date.

**Regulatory Flexibility Analysis**

**1. EFFECT OF RULE:**

The proposed amendment applies to each school district within the State.

**2. COMPLIANCE REQUIREMENTS:**

The proposed amendment establishes modified requirements for the provision of academic intervention services (AIS) during the 2010-2011 school year to provide flexibility to school districts and to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency. As part of the modified requirements, the proposed amendment requires each school district to develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-2011 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010, and to either post to its Website or distribute to parents in writing a description of such process no later than the commencement of the first day of instruction.

Specifically, the proposed amendment provides that for the 2010-2011 school year only:

(1) Students scoring at or below a scale score of 650 must receive academic intervention instructional services.

(2) Students scoring above a scale score of 650 but below level 3/proficient will not be required to receive academic intervention instructional and/or student support services unless the school district deems it necessary.

(3) Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-11 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-10, and shall post to its Website or distribute to parents in writing a description of such process no later than the commencement of the first day of instruction.

(4) In recognition of the effects on school districts of a change in cut scores for such school year, a waiver is given for the 2010-2011 school year from the requirement that school districts review and revise their description of AIS based on student performance results.

**3. PROFESSIONAL SERVICES:**

The proposed amendment imposes no additional professional service requirements on school districts.

**4. COMPLIANCE COSTS:**

The proposed amendment establishes modified requirements for the provision of AIS during the 2010-2011 school year to provide flexibility to school districts and to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency. School districts may incur some costs associated with distributing to parents of students a written description of the district's process for determining whether AIS will be offered to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010. However, the proposed amendment allows school districts to post the description on its Website in lieu of distributing to parents, and it is anticipated that any associated costs would be minimal and can be absorbed using existing district staff and resources. More importantly, any such costs would be more than offset by the reduction in costs to schools districts resulting from implementation of the modified AIS requirements in the 2010-2011 school year.

**5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:**

The proposed rule does not impose any technological requirements on school districts. Economic feasibility is addressed under the Costs section above.

**6. MINIMIZING ADVERSE IMPACT:**

The purpose of the proposed amendment is to provide flexibility to school districts in providing academic intervention services (AIS) during the 2010-2011 school year in order to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics. School districts will continue to have the option to offer services to those children who they feel are in need of the additional support.

**7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:**

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

**Rural Area Flexibility Analysis**

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

The proposed rule applies to all school districts in the State, 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.

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

The proposed amendment establishes modified requirements for the provision of academic intervention services (AIS) during the 2010-2011 school year to provide flexibility to school districts and to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency. As part of the modified requirements, the proposed amendment requires each school district to develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-2011 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010, and to either post to its Website or distribute to parents in writing a description of such process no later than the commencement of the first day of instruction.

Specifically, the proposed amendment provides that for the 2010-2011 school year only:

(1) Students scoring at or below a scale score of 650 must receive academic intervention instructional services.

(2) Students scoring above a scale score of 650 but below level 3/proficient will not be required to receive academic intervention instructional and/or student support services unless the school district deems it necessary.

(3) Each school district shall develop and maintain on file a uniform process by which the district determines whether to offer AIS during the 2010-11 school year to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-10, and shall post to its Website or distribute to parents in writing a description of such process no later than the commencement of the first day of instruction.

(4) In recognition of the effects on school districts of a change in cut scores for such school year, a waiver is given for the 2010-2011 school year from the requirement that school districts review and revise their description of AIS based on student performance results.

The proposed rule imposes no additional professional services requirements on school districts in rural areas.

**3. COMPLIANCE COSTS:**

The proposed amendment establishes modified requirements for the provision of AIS during the 2010-2011 school year to provide flexibility to school districts and to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency. School districts may incur some costs associated with distributing to parents of students a written description of the district's process for determining whether AIS will be offered to students who scored above a scale score of 650 but below level 3/proficient on a grade 3-8 English language arts or mathematics State assessment in 2009-2010. However, the proposed amendment allows school districts to post the description on its Website in lieu of distributing to parents, and it is anticipated that any associated costs would be minimal and can be absorbed using existing district staff and resources. More importantly, any such costs would be more than offset by the reduction in costs to schools districts resulting from implementation of the modified AIS requirements in the 2010-2011 school year.

**4. MINIMIZING ADVERSE IMPACT:**

The purpose of the proposed amendment is to provide flexibility to

school districts in providing academic intervention services (AIS) during the 2010-2011 school year in order to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics. School districts will continue to have the option to offer services to those children who they feel are in need of the additional support.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

**Job Impact Statement**

The proposed amendment establishes modified requirements for the provision of academic intervention services (AIS) during the 2010-2011 school year to provide flexibility to school districts and to hold districts harmless from the expected fiscal impact of an increase in the number of students required to receive AIS as a result of a change in cut scores for the grades 3-8 assessments in English language arts and mathematics which determine student proficiency.

The proposed rule 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.

**EMERGENCY  
RULE MAKING**

**Standing Committees of the Board of Regents**

**I.D. No.** EDU-32-10-00007-E

**Filing No.** 1095

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

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

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

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

**Specific reasons underlying the finding of necessity:** The proposed amendment is necessary to reorganize the committee structure of the Board of Regents so that the Board may more effectively meet its statutory responsibilities. The proposed amendment conforms the Rules of the Board of Regents to the recent reconfiguration of the standing committees of the Board of Regents, as follows:

(1) The Committee on Elementary, Middle, Secondary and Continuing Education will be renamed the "Committee on P-12 Education."

(2) A new Committee on Adult Education and Workforce Development will be created.

(3) The Committee on Vocational and Education Services for Individuals with Disabilities is abolished, and its functions regarding vocational rehabilitation will be transferred to the Committee on Adult Education and Workforce Development, and its functions regarding special education programs and services for students with disabilities will be transferred to the Committee on P-12 Education.

(4) The adult education and workforce development functions of the Committee on P-12 Education will be transferred to the Committee on Adult Education and Workforce Development.

(5) The functions of the Committee on Adult Education and Workforce Development regarding proprietary school supervision are specified.

(6) The former Committee on Policy Integration and Innovation is abolished.

(7) Clarification is provided regarding the ex officio membership of the chancellor, vice chancellor, and chancellor emeritus on each subcommittee, task force and work group.

(8) Several minor technical changes are made to the Rules to add a reference to Regents work groups and to provide for reasonable notice of meetings to committee members.

The Board of Regents has determined that the reorganization of the committee structure is necessary to assist the Board of Regents to effectively meet its responsibilities to govern the University of the State of New York, determine the educational policies of the State and oversee the State Education Department. The committee reorganization is also consistent with a current restructuring of the Department's internal organization. The proposed amendment will conform the Regents Rules to recent

changes to the names and functions of certain Regents standing committees so that they may efficiently and effectively carry out the Board's work. The minor technical changes with conform the Rules to the current nomenclature and practice used by the Board.

The proposed amendment was adopted as an emergency rule at the July 2010 Regents meeting, effective July 27, 2010. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on August 11, 2010.

The proposed amendment has been adopted as a permanent rule at the October 2010 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on November 10, 2010. However, the emergency rule which took effect on July 27, 2010 will expire on October 24, 2010.

Therefore, a second emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the July 2010 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule.

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

**Purpose:** To conform the Regents Rules to a recent reorganization of the Regents Committees.

**Text of emergency rule:** Section 3.2 of the Rules of the Board of Regents is amended, effective October 25, 2010, as follows:

§ 3.2. Committees.

(a) The chancellor shall appoint the following standing committees and designate the leadership of each committee:

[(1) Policy Integration and Innovation.]

[(2)] (1) Higher Education.

[(3) Elementary, Middle, Secondary and Continuing Education] (2) P-12 Education.

[(4)] (3) Cultural Education.

[(5)] (4) Ethics.

[(6)] (5) Professional Practice.

[(7) Vocational and Educational Services for Individuals with Disabilities] (6) Adult Education and Workforce Development.

(b) The chancellor, vice chancellor, and any chancellor emeritus who is also a current member of the Board of Regents shall be ex officio members of each standing committee, *subcommittee, task force and work group.*

(c) The chancellor from time to time may establish subcommittees, [and] task forces *and work groups* and shall designate the members and chairperson of any subcommittee, [or] task force *or work group.*

(d) The functions of the standing committees shall include:

[(1) Committee on Policy Integration and Innovation:

(i) provides a forum for debate and recommendation on innovation and cross-cutting issues;

(ii) identifies policy research, evaluation needs and implementation strategies;

(iii) plans board retreats and training;

(iv) plans the periodic evaluation of the commissioner by the board;

(v) guides the creation of the 24-month calendar;

(vi) monitors implementation of board priorities; and

(vii) identifies technology needs and implementation strategies.]

[(2)] (1) Committee on Higher Education:

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) . . .

(vi) . . .

(vii) . . .

(viii) . . .

[(3) Committee on Elementary, Middle, Secondary and Continuing Education] (2) Committee on P-12 Education shall have the following functions with respect to elementary, middle and secondary education, including special education programs and related educational services to students with disabilities:

(i) develops policy recommendations regarding elementary, middle and secondary education, [workforce preparation and continuing education], and coordination of interagency agreements and activities;

(ii) reviews the monitoring of elementary, middle and secondary education [and workforce preparation and continuing education] programs, services, and results;

(iii) monitors State aid programs to elementary, middle and secondary schools;

(iv) seeks input from the public and the professional field concerning elementary, middle and secondary education [and workforce preparation and continuing education] policies and practices;

(v) reviews and approves amendments to the Rules of the Board of

Regents and Regulations of the Commissioner of Education pertaining to elementary, middle and secondary education [and workforce preparation and continuing education];

(vi) reviews the provision of technical assistance to elementary, middle and secondary schools;

(vii) develops legislative and budgetary proposals for elementary, middle and secondary education [and workforce preparation and continuing education] and monitors the advocacy of such proposals, and leads in pressing for legislative and budgetary priorities within the department and with the Legislature;

(viii) initiates studies and activities leading to the improvement of educational conditions and outcomes for children from birth through high school graduation [and adults in workforce preparation and continuing education programs]; and

(ix) reviews and makes recommendations to the full board on incorporation and chartering of institutions and organizations proposing to offer prekindergarten, kindergarten, elementary, middle or secondary education programs.

[(4)] (3) Committee on Cultural Education:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .
- (vii) . . .
- (viii) . . .

[(5)] (4) Committee on Ethics:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .

[(6)] (5) Committee on Professional Practice:

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .
- (v) . . .
- (vi) . . .
- (vii) . . .
- (viii) . . .
- (ix) . . .
- (x) . . .
- (xi) . . .

[(7) Committee on Vocational and Educational Services for Individuals with Disabilities] (6) *Committee on Adult Education and Workforce Development*:

(i) develops policy recommendations regarding *adult education and workforce development*, vocational rehabilitation, [and special education] and *proprietary school supervision*, overall coordination of *such programs and services* [vocational and educational services to individuals with disabilities], and coordination of interagency agreements and activities;

(ii) monitors the implementation of *adult education and workforce development*, vocational rehabilitation, [and special education programs and services] and *proprietary school supervision*, and interagency agreements;

(iii) develops legislative and budgetary proposals for *adult education and workforce development*, vocational rehabilitation [, special education and related educational services for individuals with disabilities], and *proprietary school supervision*, and monitors the advocacy of such proposals, and leads in pressing for legislative and budgetary priorities within the department and with the Legislature;

(iv) reviews and approves amendments to the Rules of the Board of Regents and Regulations of the Commissioner of Education relating to *adult education and workforce development*, vocational rehabilitation [, special education and related educational services for individuals with disabilities], and *proprietary school supervision*, and

(v) seeks input from the public and professional field on policies and practices concerning *adult education and workforce development*, vocational rehabilitation [, special education and related educational services for individuals with disabilities], and *proprietary school supervision*.

(e) Each committee shall examine into and report to the Regents respecting matters pertaining to its functions and related subjects.

(f) Each committee shall meet at the time and place designated by its leadership, and *reasonable* notice thereof shall be [mailed] *provided* to each member of the committee [five days prior to the date of such meeting].

(g) The chancellor may appoint special temporary committees, and may also appoint delegates for special occasions where in the chancellor's judgment it is proper and desirable that the Regents or the department be represented.

(h) The commissioner in consultation with the chancellor shall designate members of the staff whose function it will be to advise and assist each committee in the performance of its work.

***This notice is intended*** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-32-10-00007-EP, Issue of August 11, 2010. The emergency rule will expire December 20, 2010.

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

***Regulatory Impact Statement***

1. STATUTORY AUTHORITY:

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

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to conform the Regents Rules to a recent reorganization of the committee structure of the Board of Regents to assist the Board in meeting its statutory responsibility to determine the educational policies of the State and to carry out the laws and policies of the State relating to education.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to conform the Regents Rules to a recent reorganization of the committee structure of the Board of Regents so that the Board may more effectively meet its statutory responsibilities. The proposed amendment conforms the Rules of the Board of Regents to the recent reconfiguration of the standing committees of the Board of Regents, as follows:

(1) The Committee on Elementary, Middle, Secondary and Continuing Education will be renamed the "Committee on P-12 Education."

(2) A new Committee on Adult Education and Workforce Development will be created.

(3) The Committee on Vocational and Education Services for Individuals with Disabilities is abolished, and its functions regarding vocational rehabilitation will be transferred to the Committee on Adult Education and Workforce Development, and its functions regarding special education programs and services for students with disabilities will be transferred to the Committee on P-12 Education.

(4) The adult education and workforce development functions of the Committee on P-12 Education will be transferred to the Committee on Adult Education and Workforce Development.

(5) The functions of the Committee on Adult Education and Workforce Development regarding proprietary school supervision are specified.

(6) The former Committee on Policy Integration and Innovation is abolished.

(7) Clarification is provided regarding the ex officio membership of the chancellor, vice chancellor, and chancellor emeritus on each subcommittee, task force and work group.

(8) Several minor technical changes are made to the Rules to add a reference to Regents work groups and to provide for reasonable notice of meetings to committee members.

The Board of Regents has determined that the reorganization of the committee structure is necessary to assist the Board of Regents to effectively meet its responsibilities to govern the University of the State of New York, determine the educational policies of the State and oversee the State Education Department. The committee reorganization is also consistent with a current restructuring of the Department's internal organization. The proposed amendment will conform the Regents Rules to recent changes to the names and functions of certain Regents standing committees so that they may efficiently and effectively carry out the Board's work. The minor technical changes with conform the Rules to the current nomenclature and practice used by the Board.

4. COSTS:

(a) Cost to State government: None.

(b) Cost to local government: None.

(c) Costs to private regulated parties: None.

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

The proposed amendment relates to the internal organization of the Board of Regents and merely reorganizes the committee structure of the

Board of Regents, and will not impose any costs on State and local government, private regulated parties or the State Education Department.

**5. LOCAL GOVERNMENT MANDATES:**

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

**6. PAPERWORK:**

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

**7. DUPLICATION:**

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

**8. ALTERNATIVES:**

There are no significant alternatives and none were considered.

**9. FEDERAL STANDARDS:**

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

**10. COMPLIANCE SCHEDULE:**

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

**Regulatory Flexibility Analysis**

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

**Rural Area Flexibility Analysis**

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

**Job Impact Statement**

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

## EMERGENCY RULE MAKING

### Age and Four-Year Limitations for Participation in Senior High School Athletic Competition

**I.D. No.** EDU-32-10-00009-E

**Filing No.** 1112

**Filing Date:** 2010-10-26

**Effective Date:** 2010-10-26

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

**Action taken:** Amendment of section 135.4 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 803 (not subdivided) and 3204(2) and (3)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment establishes a process for granting a waiver from the age and four-year limitations for senior athletic competition prescribed in section 135.4 of the Commissioner's Regulations to students with disabilities, as defined in section 4401 of the Education Law, and thereby permit their participation in non-contact sports for an additional fifth year in school. Under this waiver process, the student must apply for and be granted a waiver by the superintendent of schools or the chief executive officer of a nonpublic school. Such a waiver would be available under limited circum-

stances to students with disabilities who meet certain criteria specified in the proposed amendment.

The proposed amendment will advance initiatives of inclusion of students with disabilities in the overall academic experience by allowing these students who would otherwise not be able to participate in interscholastic athletic competition due to their age or years in school to participate in a sport for an additional season if they have not yet graduated as a result of their disability delaying their education. This amendment is designed to offer students with disabilities continued socialization with teammates during practice and games and to further develop the student's skills and personal abilities associated with participation in such sport, all while assuring the safety of the given student and the other students competing in the sport and preserving fair athletic competition.

The proposed amendment was adopted at the July 2010 Regents meeting as an emergency measure, effective July 27, 2010, in order to timely and effectively implement the waiver process for the 2010-2011 school year. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on August 11, 2010.

Since publication of the rule in the State Registrar, the Department received public comment warranting a substantial revision to the rule, as set forth in the Revised Regulatory Impact Statement submitted herewith.

Pursuant to the State Administrative Procedure Act section 202(4-a), the revised rule cannot be adopted by regular (non-emergency) action until at least 30 days after publication of the revised rule in the State Register. Since the Board of Regents only meets at fixed intervals, the earliest time the proposed amendment could be adopted by regular action would be the December 2010 Regents meeting. Since the July emergency adoption will expire on October 25, 90 days after its filing with the Department of State on July 27, 2010, there will be a lapse in the rule's effectiveness if adopted by regular action, which will, in turn, disrupt the implementation of this rule.

Therefore, a second emergency adoption is necessary to revise the rule as specified above and to ensure that the emergency rule adopted at the July 2010 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule. Emergency action is necessary for the preservation of the general welfare to continue the implementation of the process for granting waivers from the age and four-year limitations for senior athletic competition to eligible students with disabilities.

**Subject:** Age and four-year limitations for participation in senior high school athletic competition.

**Purpose:** To provide a waiver for a student with a disability to participate in certain high school sports for a fifth year.

**Text of emergency rule:** 1. Subclause (1) of clause (b) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective October 26, 2010, as follows:

(1) Duration of competition. A pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and prior to graduation, except as otherwise provided in this subclause, *or except as authorized by a waiver granted under clause (d) of this subparagraph to a student with a disability*. If a board of education has adopted a policy, pursuant to subclause (a)(4) of this subparagraph, to permit pupils in the seventh and eighth grades to compete in senior high school athletic competition, such pupils shall be eligible for competition during five consecutive seasons of a sport commencing with the pupil's entry into the eighth grade, or six consecutive seasons of a sport commencing with the pupil's entry into the seventh grade. A pupil enters competition in a given year when the pupil is a member of the team in the sport involved, and that team has completed at least one contest. A pupil shall be eligible for interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which he or she attains the age of 19, except as otherwise provided in subclause (a)(4) *or clause (d)* of this subparagraph, or in this subclause. The eligibility for competition of a pupil who has not attained the age of 19 years prior to July 1st may be extended under the following circumstances:

(i) If sufficient evidence is presented by the chief

school officer to the section to show that the pupil's failure to enter competition during one or more seasons of a sport was caused by illness, accident, or similar circumstances beyond the control of the student, such pupil's eligibility shall be extended accordingly in that sport. In order to be deemed sufficient, the evidence must include documentation showing that is a direct result of the illness, accident or other circumstance beyond the control of the student, the pupil will be required to attend school or one or more additional semesters in order to graduate.

(ii) If the chief school officer demonstrates to the satisfaction of the section that the pupil's failure to enter competition during one or more seasons of a sport is caused by such pupil's enrollment in a national or international student exchange program or foreign study program, that as a result of such enrollment the pupil will be required to attend school for one or more additional semesters in order to graduate, and that the pupil did not enter competition in any sport while enrolled in such program, such pupil's eligibility shall be extended accordingly in such sport.

2. Clause (d) of subparagraph (ii) of paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is added, effective October 26, 2010, as follows:

*(d) Waiver from the age requirement and four-year limitation for interschool athletic competition for students with disabilities in senior high school grades 9, 10, 11, and 12. For purposes of this clause, the term non-contact sport shall include swimming and diving, golf, track and field, cross country, rifle, bowling, gymnastics, skiing and archery, and any other such non-contact sport deemed appropriate by the Commissioner. A student with a disability, as defined in section 4401 of the Education Law, who has not yet graduated from high school may be eligible to participate in a senior high school noncontact athletic competition for a fifth year under the following limited conditions:*

*(1) such student must apply for and be granted a waiver to the age requirement and four-year limitation prescribed in subclause (b)(1) of this subparagraph. A waiver shall only be granted upon a determination by the superintendent of schools or chief executive officer of the school or school system, as applicable, that the given student meets the following criteria:*

*(i) such student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more;*

*(ii) such student is otherwise qualified to compete in the athletic competition for which he or she is applying for a waiver and the student must have been selected for such competition in the past;*

*(iii) such student has not already participated in an additional season of athletic competition pursuant to a waiver granted under this subclause;*

*(iv) such student has undergone a physical evaluation by the school physician, which shall include an assessment of the student's level of physical development and maturity, and the school physician has determined that the student's participation in such competition will not present a safety or health concern for such student; and*

*(v) the superintendent of schools or chief executive officer of the school or school system has determined that the given student's participation in the athletic competition will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.*

*(2) Such student's participation in the additional season of such athletic competition shall not be scored for purposes of such competition.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-32-10-00009-EP, Issue of August 11, 2010. The emergency rule will expire December 24, 2010.

**Text of rule and any required statements and analyses may be obtained from:** Chris Moore, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Avenue, Albany, New York 12234, (518) 473-8296

### **Regulatory Impact Statement**

#### **1. STATUTORY AUTHORITY:**

Education Law section 101 charges the Department with the general management and supervision of public schools and the educational work of the State.

Education Law section 207 empowers the Board of 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 sections 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.

Education Law section 803 provides the Board of Regents with overall authority over physical education instruction in schools.

Education Law section 3204(2) and (3) relates to compulsory education.

#### **2. LEGISLATIVE OBJECTIVES:**

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to the age and four-year limitations for senior high school athletic competition.

#### **3. NEEDS AND BENEFITS:**

The proposed amendment will provide a waiver for a student with a disability to participate in senior high school athletic competition for an additional season despite the age and four-year limitations prescribed in section 135.4 of the Commissioner's regulations. The proposed amendment will advance initiatives of inclusion by allowing students with disabilities who would otherwise not be able to participate in interscholastic athletic competition due to their age or years in school to participate in a sport for an additional season if they have not graduated as a result of their disability delaying their education. This amendment will offer these students continued socialization with teammates and continued opportunity to develop the skills and abilities associated with his or her participation in such sport.

#### **4. COSTS:**

(a) Costs to State government: It is anticipated that the waiver provided by the proposed amendment will be exercised in limited circumstances and that appeals from a decision regarding a waiver will be limited, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff.

(b) Costs to local government: It is anticipated that the waiver provided by the proposed amendment will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

(c) Costs to private regulated parties: For the same reasons as discussed in (b) above, it is anticipated that costs to private schools will be minimal and capable of being absorbed using existing staff and resources.

(d) Costs to the regulating agency for implementation and administration of this rule: There will be minimal costs imposed on the State Education Department to implement and enforce the regulations. These costs will be absorbed by existing staff.

#### **5. LOCAL GOVERNMENT MANDATES:**

The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in high school athletic competition if such a student meets certain criteria. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not

previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets all such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that where applicable, a decision regarding a waiver may be appealed to the New York State Public High School Athletic Association in accordance with the Association's rules. As applicable in accordance with Education Law section 310, such a decision may be appealed to the Commissioner of Education.

#### 6. PAPERWORK:

This proposed amendment will impose minimal additional paperwork requirements on local school districts and on the State.

#### 7. DUPLICATION:

The proposed amendment does not duplicate existing State or federal regulations.

#### 8. ALTERNATIVES:

The State Education Department considered applying the waiver to both non-contact and contact sports, but determined that this was not appropriate given substantial concerns for student safety. There is likely to be significant differences in physical maturity and development between a 14 year-old and a 19 or 20 year-old. Moreover, in light of selection/classification, a 12 or 13 year-old may be competing in a sport with a 19 or 20 year-old, which presents a significant difference in not only physical maturity but athletic ability and performance. These physical disparities pose a substantial risk of harm to the given student and the other students competing in the sport. Therefore, this alternative was considered, but rejected.

#### 9. FEDERAL STANDARDS:

There are no related federal standards.

#### 10. COMPLIANCE SCHEDULE:

It is anticipated regulated parties will be able to achieve compliance with the proposed rule by its effective date.

### *Regulatory Flexibility Analysis*

#### 1. EFFECT OF RULE:

The proposed amendment applies to each school district within the State.

#### 2. COMPLIANCE REQUIREMENTS:

The proposed amendment will provide a waiver for a student with a disability to participate in senior high school athletic competition for an additional season despite the age and four-year limitations prescribed in section 135.4 of the Commissioner's regulations. The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in such competition if such student meets certain eligibility criteria. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that where applicable, a decision regarding a waiver

may be appealed to the New York State Public High School Athletic Association in accordance with the Association's rules. As applicable in accordance with Education Law section 310, such a decision may be appealed to the Commissioner of Education.

The proposed amendment is expected to only impose minimal reporting, recordkeeping and other compliance requirements associated with reviewing and deciding a student's application for a waiver. It is anticipated that the waiver will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

#### 3. PROFESSIONAL SERVICES:

The proposed amendment imposes no additional professional service requirements on school districts.

#### 4. COMPLIANCE COSTS:

The proposed amendment does not impose any significant costs on school districts. The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in such competition if such student meets certain eligibility criteria. The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that the waiver provided by the proposed amendment will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement educational policy as determined by the Board of Regents by permitting, under certain specified circumstances, a waiver from the age requirement and four-year limitation for interschool athletic competition to students with disabilities in senior high school grades 9, 10, 11, and 12 who seek to participate in interschool non-contact sport competition. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The proposed amendment has been carefully drafted to address the specific circumstances for granting a waiver and it is anticipated that the waiver will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any compliance requirements and costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

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

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

The proposed rule applies to all school districts in the State, 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.

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

The proposed amendment will provide a waiver for a student with a disability to participate in senior high school athletic competition for an additional season despite the age and four-year limitations prescribed in section 135.4 of the Commissioner's regulations. The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in such competition if such student meets certain eligibility criteria. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that where applicable, a decision regarding a waiver may be appealed to the New York State Public High School Athletic Association in accordance with the Association's rules. As applicable in accordance with Education Law section 310, such a decision may be appealed to the Commissioner of Education.

The proposed amendment is expected to only impose minimal reporting, recordkeeping and other compliance requirements associated with reviewing and deciding a student's application for a waiver. It is anticipated that the waiver will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport.

The proposed amendment imposes no additional professional service requirements on school districts.

##### **3. COMPLIANCE COSTS:**

The proposed amendment does not impose any significant costs on school districts. The proposed amendment will require local school districts to implement a process for granting waivers to students with disabilities to participate for an additional season in such competition if such student meets certain eligibility criteria. The superintendent of schools or the chief executive officer of a private school will be required to determine whether the given student meets such criteria and whether the student will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.

It is anticipated that the waiver provided by the proposed amendment will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for mak-

ing similar decisions under existing regulations relating to a student's ability to participate in a sport.

##### **4. MINIMIZING ADVERSE IMPACT:**

The proposed amendment is necessary to implement educational policy as determined by the Board of Regents by permitting, under certain specified circumstances, a waiver from the age requirement and four-year limitation for interschool athletic competition to students with disabilities in senior high school grades 9, 10, 11, and 12 who seek to participate in interschool non-contact sport competition. Specifically, the amendment requires that (1) the student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more, (2) the student previously was selected for and competed in the sport which he or she is applying for a waiver, (3) the student is otherwise qualified to compete in such sport, (4) the student has not previously been granted such a waiver, (5) the student has undergone and passed an evaluation by the school physician, and (6) the superintendent of schools or chief executive officer, as applicable, has determined that the student's participation will not adversely affect the opportunity of the other students to successfully compete in the competition.

The proposed amendment has been carefully drafted to address the specific circumstances for granting a waiver and it is anticipated that the waiver will be exercised in limited circumstances, given the restrictions on eligibility for such waiver and the specific circumstances the proposed amendment is intended to address, and that any compliance requirements and costs associated with the proposed amendment will be minimal and capable of being absorbed by existing staff, who currently are responsible for making similar decisions under existing regulations relating to a student's ability to participate in a sport. The proposed amendment implements Regents policy intended to apply State-wide to all schools, and therefore it is not possible to provide an exemption to, or prescribe lesser standards for, schools in rural areas.

##### **5. RURAL AREA PARTICIPATION:**

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

#### **Job Impact Statement**

The proposed amendment provides a waiver for a student with disability to participate for a fifth year in senior high school athletic competition despite the age and four-year limitations prescribed in Section 135.4 of the Commissioner's regulations, if the student with disability meets certain criteria.

The proposed rule 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 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.

## **EMERGENCY RULE MAKING**

### **Waivers from Corporate Practice Restrictions for Certain Entities to Provide Certain Professional Services**

**I.D. No.** EDU-43-10-00010-E

**Filing No.** 1106

**Filing Date:** 2010-10-26

**Effective Date:** 2010-10-26

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

**Action taken:** Amendment of sections 29.18 and 59.14 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 6501 (not subdivided), 6503-a, 6504 (not subdivided), 6506(6), 6507(2)(a), 6508(1), 6509 (not subdivided), 6510 (not subdivided) and 6511 (not subdivided)

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

**Specific reasons underlying the finding of necessity:** The proposed amendments to the Commissioner's regulations and the Rules of the Board of Regents implement amendments to the Education Law that authorize the Department to issue to certain entities a waiver from restrictions on corporate practice for services provided under Articles 154 and 163 of the Education Law and psychotherapy services under section 8401(2) of the Education Law and authorized and provided under Articles 131, 139 or 153 of the Education Law. Chapters 130 and 132 of the Laws of 2010 were signed on June 18, 2010 to address critical issues relating to the authority of certain entities to employ LMSWs, LCSWs, LMHCs, LMFTs, LCATs, LPs, and licensed psychologists to provide services within the scopes of practice of those professions.

The proposed regulations implement the provisions of Chapters 130 and 132, which became effective on June 18, 2010, by setting forth the requirements to be met by a qualified entity in order to receive a waiver. In order for the Department to develop, publish and review the applications required under the new law in a timely manner, the regulations must be adopted on an emergency basis.

An emergency action is necessary to ensure there is adequate time for eligible entities providing social work, psychological, and mental health practitioner services to apply for a waiver from corporate practice prohibitions under section 6503-a of the Education Law and for the application to be processed by the Office of Professions.

**Subject:** Waivers from corporate practice restrictions for certain entities to provide certain professional services.

**Purpose:** Allow Department to issue waivers from certain corporate practice prohibitions to qualified not-for-profit or educational corporations.

**Substance of emergency rule:** The Commissioner of Education proposes to promulgate regulations to implement the provisions of section 6503-a of the Education Law. The following is a summary of the substance of the regulations:

§ 59.14 Waiver for entities providing certain professional services.

(a) Applicability. Section 6503-a of the Education Law authorizes the Department to issue a waiver for certain entities for:

(1) services provided under Articles 154 or 163 of the Education Law for which licensure would be required, or

(2) services constituting the provision of psychotherapy as defined in section 8401(2) of the Education Law and authorized and provided under article 131, 139, or 153 of the Education Law.

(b) Eligibility. To be eligible for a waiver, an entity must be in existence prior to June 18, 2010 and be either:

(1) a not-for-profit corporation formed for charitable, educational, or religious purposes or other similar purposes deemed acceptable by the Department; or

(2) an education corporation as defined in section 216-a of the Education Law.

(c) Application for a waiver.

(1) To provide the services described in subdivision (a) of this section, an entity shall have obtained a waiver from the Department no later than July 1, 2012. The Department may issue a waiver to a qualified entity after July 1, 2012, regardless of the date on which the entity was created, upon a demonstration of need for the entity's services satisfactory to the Department.

(2) Within 120 days after the posting of the application form on the Department's website, any entity described in subdivision (b) of this section providing services described in subdivision (a) of this section on or after June 18, 2010, shall submit an application for a waiver on forms prescribed by the Commissioner. Upon submission of an application for a waiver under this section, the entity may continue to operate and provide services until the Department either denies or approves the entity's application.

(3) An application for a waiver under this section shall include:

(i) the name of the entity;

(ii) evidence that the entity is either a not-for-profit corporation; or an education corporation as defined in section 6503-a of the Education Law;

(iii) evidence of the date the entity came into existence;

(iv) the primary address, phone number, website and email address for the entity;

(v) contact information for the individual responsible for submitting the application;

(vi) the name and address of each director and officer of the entity;

(vii) a copy of the certificate of incorporation or other documentation that authorizes the entity to provide the services described in subdivision (a);

(viii) a listing of other jurisdictions in which the entity may provide the services described in subdivision (a);

(ix) the information required in paragraph (1) of subdivision (e) of this section; and

(x) an attestation by an officer authorized by the entity that:

(a) identifies the scope of services to be provided;

(b) includes a list of professions under Title 8 of the Education Law in which professional services will be provided;

(c) includes a statement that only a licensed professional, a person authorized to provide such services, or a professional entity authorized by law to provide such services shall provide services authorized under this section;

(d) the entity will comply with section 18 of the Public Health Law relating to patient access to records;

(e) the entity will make available information requested by the Department relating to the entity's eligibility for a waiver and compliance with the requirements of this section and section 6503-a of the Education Law;

(f) includes a statement as to whether any application by the entity for an operating certificate or license with another state or federal agency, political subdivision, municipal corporation, or local government agency has been granted and such operating certificate or license is currently in effect; whether such application is pending or was disapproved; whether such a certificate or license was revoked; and whether a written authorization or contract was terminated for cause by one of such agencies;

(g) the entity has adequate fiscal and financial resources to provide such services;

(h) the statements on the application are true and accurate.

(d) Entities that do not require a waiver. A waiver is not required of:

(1) any entity operated under an operating certificate appropriately issued in accordance with article sixteen, thirty-one, or thirty-two of the mental hygiene law, article twenty-eight of the public health law, or comparable procedures by a New York state or federal agency, political subdivision, municipal corporation, or local government agency or unit, in accordance with the scope of the authority of such operating certificate;

(2) a university faculty practice corporation duly incorporated pursuant to the not-for-profit corporation law;

(3) an institution of higher education authorized to provide a program leading to licensure in a profession defined under article 131, 139, 153, 154, or 163 of the Education Law, to the extent that the scope of such services is limited to the services authorized to be provided within such registered program;

(4) an institution of higher education providing counseling only to the students, staff, or family members of students and staff of such institution; or

(5) any other entity that is otherwise authorized by law to provide such services and only to the extent that services are authorized under any certificates of incorporation or such other organizing documents as may be applicable.

(e) Provision of professional services.

(1) The entity shall describe in the application the services that will be provided that would otherwise be restricted to individuals licensed or authorized under Articles 153, 154 or 163 of the Education Law. The description shall indicate the profession(s) in which services will be provided and include:

(i) An attestation that individuals authorized to practice only under supervision will receive the required supervision;

(ii) A description of whether the services will be provided by licensed or authorized individuals employed by the entity or provided through a contract with licensed professional(s) or a professional entity, as defined in Education Law section 6503-a(5); and

(iii) An attestation that the entity will verify the licensure, limited permit or other authorization of individuals and professional entities providing services as employees of or on behalf of the entity.

(2) Unless otherwise authorized by law, an entity that holds a waiver under this section shall not provide services in any profession other than those authorized in 6503-a of the Education Law and included on the application for a waiver.

(f) Attestation of moral character.

(1) Each director and officer shall submit on forms prescribed by the Commissioner an attestation regarding whether:

(i) the individual has been found guilty after trial, or pleaded guilty, no contest or nolo contendere to a crime (felony or misdemeanor) in any court;

(ii) the individual has criminal charges (felony or misdemeanor) pending in any court;

(iii) any licensing or disciplinary authority has refused to issue a license or has ever revoked, annulled, cancelled, accepted surrender of, suspended, placed on probation, or refused to renew a professional license or certificate held by the individual now or previously, or has ever fined, censured, reprimanded or otherwise disciplined the individual;

(iv) there are any pending charges against the individual in any jurisdiction for any sort of professional misconduct; or

(v) a hospital or licensed facility has restricted or terminated the individual's professional training, employment or privileges, or whether

the individual has ever voluntarily resigned or withdrawn from such association to avoid imposition of such measure.

(2) Any information included in the application that indicates that a director or officer of the entity has committed an act which raises a reasonable question as to the individual's moral character shall be made in accordance with the procedures specified in Subpart 28-1 of the Rules of the Board of Regents.

(g) Review of waiver applications. The application shall not be deemed acceptable if the entity has not submitted information identified in paragraphs (c), (e), and (f). The Department may deny an application based on the failure of the applicant to submit the required information within a reasonable period of time. When, in the determination of the department, all necessary information has been received, a decision shall be made within 90 days of such determination. If the waiver application is denied, then the entity shall cease the provision of professional services as defined in section 6503-a(1)(a) of the Education Law. The determination of the Department shall be final, and a copy thereof shall be forwarded to the applicant.

(h) Waiver certificates.

(1) An entity that has been issued a waiver under this section shall apply for a waiver certificate for each setting at which the entity provides professional services in New York.

(2) The application may be made as part of the initial application for a waiver or after the Department has approved the entity for a waiver.

(3) Each waiver certificate shall display the name of the entity and the address of the site.

(4) Any entity that willfully fails to obtain a certificate of waiver for each site and/or to display the waiver certificate at each site shall be subject to the penalties set forth in section 6511 of the Education Law.

(i) Notification of changes.

(1) An entity that is issued a waiver pursuant to section 6503-a of the Education Law shall notify the Department within 60 days of any change in the information supplied to the department, including but not limited to a change in the:

(i) name and terms of officers or directors;

(ii) site(s) at which professional services are provided; and

(iii) person responsible for filing the waiver application or the person's contact information; and/or

(iv) a transfer or assignment of interest as set forth in subdivision (j) of this section, provided that the entity shall notify the Department immediately of such change.

(2) Notification shall be made in a form prescribed by the department.

(j) Transfer or assignment of waiver. A waiver issued by the Department pursuant to section 6503-a of the Education Law shall not be transferable or assignable. For purposes of this section, a transfer or assignment shall mean the conveyance of a waiver under this section from one entity to another entity.

(k) Triennial application. A waiver issued pursuant to this section shall be valid for three years. An entity that is issued a waiver shall submit an application for renewal of the waiver every three years.

§ 29.18 Unprofessional conduct in waived entities.

(a) An entity that is issued a waiver pursuant to section 6503-a of the Education Law and section 59.14 of this Title shall be under the supervision of the Board of Regents and subject to the disciplinary procedures and penalties set forth in subarticle 3 of Article 130 of the Education Law. Any such waiver shall be subject to suspension, revocation or annulment for cause, and any entity holding such a waiver shall be subject to disciplinary proceedings and penalties in the same manner, to the same extent, and for the same reasons as individuals and professional entities practicing the same profession. A certificate of waiver shall be considered the same as a license to practice a profession.

(b) Failure to disclose information. It shall be unprofessional conduct for an entity issued a waiver to have failed to disclose all information required by the Department in order to make an accurate determination of the entity's application. This shall include the failure to notify the Department that a director or officer of the entity has committed an act which raises a reasonable question as to moral character.

(c) Penalties for professional misconduct. The Board of Regents may impose upon an entity found guilty of unprofessional conduct under this section those penalties and fines authorized in section 6511 of the Education Law.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-43-10-00010-P, Issue of October 27, 2010. The emergency rule will expire January 23, 2011.

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

### Regulatory Impact Statement

#### 1. STATUTORY AUTHORITY:

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

Section 6501 of the Education Law provides that, 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 6503-a of the Education Law authorizes the Board of Regents to issue a waiver to qualified entities that seek to provide certain professional services, as defined in the Education Law.

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.

Section 6510 of the Education Law sets for the procedures to be followed in cases of professional misconduct.

Section 6511 of the Education Law establishes penalties for professional misconduct that may be imposed by the Board of Regents.

#### 2. LEGISLATIVE OBJECTIVES:

The proposed regulation carries out the intent of section 6503-a of the Education Law by setting forth the requirements by which a qualified not-for-profit or educational corporations may submit an application for a waiver authorizing it to provide professional services that are within the scopes of practice of psychology, licensed master social work, licensed clinical social work, and the mental health practitioner professions. The proposed amendment is necessary to ensure that entities employing licensed professionals and authorized persons, as defined in the Education Law, meet minimum standards for a waiver and that the entity is accountable and subject to the disciplinary authority of the Board of Regents, in the same way as a licensed professional under Title VIII of the Education Law.

#### 3. NEEDS AND BENEFITS:

Chapters 130 and 132 of the Laws of 2010 amend the Education Law to address critical issues relating to the authority of certain entities to employ licensed master social workers (LMSW), licensed clinical social workers (LCSW), licensed mental health counselors (LMHC), licensed marriage and family therapists (LMFT), licensed creative arts therapists (LCAT), licensed psychoanalysts (LP), and licensed psychologists and to provide services within the scopes of practice of those professions. Prior to the restrictions on practice of those professions established by laws enacted in 2002, any individual or entity could provide psychotherapy and other services that are now restricted. While the new licensing laws provided exemptions for individuals in certain programs, these exemptions did not extend to thousands of not-for-profit and educational corporations throughout New York that provide essential services. This affected not only access to services for vulnerable persons, but also the ability of new graduates to meet the experience requirements for licensure in authorized settings, thereby restricting access to the licensed professions.

On June 18, 2010, Governor Paterson signed into law Chapters 130 and 132 of the Laws of 2010 to authorize the Department to issue waivers authorizing qualified entities to provide certain professional services; to accept supervised experience for licensure completed in settings that are eligible for waivers; to extend the exemption from licensure requirements for individuals in certain programs; and to mandate the Department to recommend, by July 1, 2012, with input from exempt agencies and key stakeholders, any amendments in laws or regulations needed to fully implement licensure by July 1, 2013.

The new section 6503-a of the Education Law authorizes the Department to issue a waiver to certain not-for-profit or educational corporations that were in existence on the effective date of the law, June 18, 2010. An entity must submit a waiver application within 120 days of the applications being posted on the Department's website and may continue to provide services until the application is approved or denied. The law allows entities to continue providing services until July 1, 2012, but if an application is denied by the Department, the entity must cease providing professional services in New York.

The law is very clear that the waiver is not intended to supplant the authority of other State agencies, such as the Department of Health or Office of Mental Health, that have oversight of health and mental health services. In reviewing applications for a waiver, the law requires the Education Department to collaborate with other State agencies to ensure public protection by minimizing the risk of an unqualified entity receiving

a waiver to provide professional services. There are also provisions in the law in regard to eligible entities, professional services that may be offered by entities, oversight by the Board of Regents, and attestations by each officer or director of the entity that he or she is of good moral character. An entity that receives a waiver under the law must apply for a renewal every three years and must request a waiver certificate for each site in New York at which professional services are provided.

Section 6503-a identifies a number of entities that do not require a waiver from the corporate practice prohibitions, including any entity with an operating certificate issued under the Public Health Law, Mental Hygiene Law or in accordance with comparable procedures by a State, federal or local government agency; an institution of higher education that provides a program leading to licensure in medicine, nursing, psychology, social work or the mental health professions; an institution of higher education that provides counseling to students, staff and family members of students and staff; and a university faculty practice corporation. The law allows the Regents to identify in regulation other entities that do not require a waiver, provided that such entity is otherwise authorized by law to provide such services.

The proposed regulations implement the provisions of law by setting forth the requirements to be met by a qualified entity in order to receive a waiver. These include, but are not limited to, the submission of the certificate of incorporation or other documentation that authorizes the entity to provide services described in the law and a description of the services that will be offered to the public. The entity must attest to adequate financial resources and that it will comply with section 18 of the Public Health Law in regard to access to patient information and records. Although the granting of a waiver resolves the issue of the authority of the entity to provide professional services, only licensed or authorized persons may provide services, and the entity is responsible for verifying the licensure of providers and the appropriate supervision of interns or permit holders who are only authorized to practice under supervision.

The proposed addition of section 29.18 of the Rules of the Board of Regents implements the Board of Regents disciplinary authority over entities receiving waivers under Education Law section 6503-a. The amendment clarifies that the entity is subject to the same professional misconduct provisions of the Regents Rules as a licensed professional or professional entity, and that the entity has the same due process rights as a licensed professional or professional entity.

#### 4. COSTS:

(a) Costs to State government: The proposed amendment does not impose any additional costs on State government, beyond those imposed by statute.

(b) Cost to local government: The proposed amendment establishes requirements for certain entities that apply for a waiver of the corporate practice prohibitions, but the law does not authorize local governments to apply for such waivers; therefore, there will be no cost to local government.

(c) Cost to private regulated parties: The proposed regulation will not impose any costs on applicants for the waiver of corporate practice prohibitions.

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

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed regulation implements the requirements of section 6503-a of the Education Law, in regard to the services provided by individuals licensed or authorized under the Education Law in certain not-for-profit or educational corporations. Therefore, the proposed regulation does not impose any program, service, duty or responsibility upon local governments.

#### 6. PAPERWORK:

The proposed regulation imposes no additional reporting or recordkeeping requirements beyond those imposed by section 6503-a of the Education Law. In accordance with section 6503-a, entities applying for a waiver will be required to submit to the State Education Department an application and evidence satisfactory to the Department that the entity meets the requirements in law and regulation for a waiver.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

The proposed amendment implements the requirements of section 6503-a of the Education Law. Therefore, there are no viable alternatives.

#### 9. FEDERAL STANDARDS:

There are no Federal standards for the waiver of corporate practice prohibitions for certain not-for-profit or educational corporations, as defined in section 6503-a of the Education Law.

#### 10. COMPLIANCE SCHEDULE:

Applicants for the waiver must comply with the regulation on the stated effective date.

### *Regulatory Flexibility Analysis*

The proposed amendments to the Commissioner's regulations and the Rules of the Board of Regents implement amendments to the Education Law that authorize the Department to issue to certain entities a waiver from restrictions on corporate practice for services provided under Articles 154 and 163 of the Education Law and psychotherapy services under section 8401(2) of the Education Law and authorized and provided under Articles 131, 139 or 153 of the Education Law. Chapters 130 and 132 of the Laws of 2010 were signed on June 18, 2010 to address critical issues relating to the authority of certain entities to employ licensed master social workers, licensed clinical social workers, licensed mental health counselors, licensed marriage and family therapists, licensed creative arts therapists, licensed psychoanalysts, and licensed psychologists to provide services within the scopes of practice of those professions.

The amendments will require certain not-for-profit and educational corporations to apply for a waiver from corporate practice prohibitions. While there may be an economic impact and recordkeeping, reporting, or other compliance requirements on not-for-profit and educational corporations, there will be no such impact or requirements imposed on small businesses as they are not authorized to apply for a waiver. Because it is clear from the nature of the regulation that there will be no effect on 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:

Education Law section 6503-a was signed into law on June 18, 2010 to address critical issues relating to the authority of certain entities to employ licensed master social workers, licensed clinical social workers, licensed mental health counselors, licensed marriage and family therapists, licensed creative arts therapists, licensed psychoanalysts, and licensed psychologists to provide services within the scopes of practice of those professions. These regulations will affect not-for-profit and educational corporations that provide these services in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The changes in law authorize certain entities, that employ licensed professionals to provide services that are restricted under Title VIII of the Education Law, to submit an application and meet the requirements in law and regulation. They will also be required to apply to renew their waivers triennially. There is no cost for the application and the regulations do not impose any additional reporting or recordkeeping requirements on entities, including those located in rural areas, beyond those requirements inherent in statute.

#### 3. COSTS:

The proposed amendment does not impose any additional costs beyond those imposed by statute.

#### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment implements the provisions of Chapters 130 and 132 of the Laws of 2010. These requirements are in place to ensure that not-for-profit or educational corporations that employ licensed professionals are subject to oversight by the Board of Regents to 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 Mental Health Practitioners and from statewide professional associations whose memberships include individuals who live or work in rural areas.

### *Job Impact Statement*

Education Law section 6503-a was signed into law on June 18, 2010 to address critical issues relating to the authority of certain entities to employ licensed master social workers, licensed clinical social workers, licensed mental health counselors, licensed marriage and family therapists, licensed creative arts therapists, licensed psychoanalysts, and licensed psychologists to provide services within the scopes of practice of those professions. The proposed amendments implement the requirements of section 6503-a to allow the Department to issue a waiver that allows certain not-for-profit corporations and educational corporations, as defined in the law, to overcome the corporate practice prohibitions in the Education Law.

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.

**EMERGENCY  
RULE MAKING**

**Amend Teacher Education Program Registration Requirements for Special Education and Special Education Certification Requirements**

**I.D. No.** EDU-43-10-00011-E

**Filing No.** 1105

**Filing Date:** 2010-10-26

**Effective Date:** 2010-10-26

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

**Action taken:** Amendment of sections 52.21, 80-3.7, 80-4.2 and 80-4.3 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 305(1), (2) and 3004(1)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment requires all registered teacher education programs to include a minimum of three semester hours in educating students with disabilities to ensure that all teachers are better prepared to skillfully collaborate with other teachers and to teach students with disabilities and defines what the three semester hour requirement shall include. The proposed amendment also requires that 15 of the 100 clock hours of field experience required for teacher education programs focus on students with disabilities and that 6 of the 40 clock hours of field experience for Transitional B programs focus on students with disabilities.

The proposed amendment changes the current certification structure for students with disabilities certificates for grades 5 through 9 and 7 through 12 and the registration requirements for programs leading to certificates in these areas. Candidates will no longer be able to enroll in special education teacher preparation programs that lead to students with disabilities (grades 5-9 generalist) and students with disabilities (grades 5-9) and (grades 7-12-specialist) certificate titles after February 1, 2011. A new students with disabilities (grades 7-12- generalist) certificate title will also be created. For candidates seeking this certificate, the candidate will be required to complete six semester hours in mathematics, science, English language arts and social studies within their content core and have sufficient pedagogy to teach these subjects. Teachers holding this certificate will be eligible to be employed to teach in supportive roles such as consultant teachers, resource room service providers and integrated co-teachers.

Teachers holding the new students with disabilities (grades 7-12-generalist) will also have the option of obtaining an extension to this certificate, to authorize the teacher to be employed as the special class teacher of students with disabilities in a specific subject area, upon the completion of certain requirements. To obtain an extension in a specific subject, the teacher shall complete 18 semester hours of study or its equivalent in the subject area of the extension sought. For social studies, the candidate shall complete the 18 semester hours through a combination of study in United State history, world history and geography. This, coupled with passing the content specialty test in the specific subject area, will allow candidates to earn an extension to the base certificate to permit the teacher to be employed as the special class teacher of students with disabilities in that subject in the developmental level of their base certificate. Any district or BOCES that employs a candidate holding this extension must provide weekly collaboration between a certified general education content specialist in the subject area of the extension and the teacher holding the extension, with at least one period per month co-taught by both teachers. The length of the required weekly collaboration and co-taught lesson will be defined at the local level.

Schools enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the regulatory requirement for collaboration and co-teaching for their employed special education teachers, must submit a plan acceptable to the Department with a description of the mentoring and collaboration the teacher will receive.

The proposed regulation also establishes requirements for individual evaluation for the new students with disabilities (grades 7-12- generalist) certificate by requiring candidates seeking a certificate in this area to complete, among other requirements, six semester hours in mathematics, science, social studies and English language arts and have sufficient pedagogical training to teach these subjects. The proposed amendment also phases out individual evaluation for the students with disabilities (grades 5-9- generalist) certificate and the students with disabilities (grades 5-9) and (grades 7-12) content specific certificates by requiring candidates

to apply for these certificates prior to September 1, 2011 and to complete the requirements for such certificate before February 1, 2012 to obtain certification through individual evaluation in these titles.

Emergency action at the October 2010 Board of Regents meeting is necessary for the preservation of the general welfare to provide institutions with sufficient notice of the new program registration requirements for all teacher education programs, which are effective immediately, and notice of the program registration requirements for programs leading to the special education generalist adolescence certificate for programs registered on or after September 2, 2011. Emergency action is also needed to provide teaching candidates with sufficient time to complete the requirements for the special education generalist and specialist certificate titles in grades 5-9 and the special education specialist certificate title in grades 7-12 before the Department phases out individual evaluation for these certificate titles.

**Subject:** Amend teacher education program registration requirements for special education and special education certification requirements.

**Purpose:** Restructure the adolescence level special education certificate structure to fill the need for special education teachers.

**Substance of emergency rule:** The Board of Regents proposes to amend Sections 52.2, 80-4.2 and 80-4.3 of the Regulations of the Commissioner of Education, effective October 17, 2010, relating to teacher education program registration requirements, the structure of adolescence level students with disabilities certificates and individual evaluation requirements and timelines for such titles. The following is a summary of the substance of the proposed amendments.

Item (iii) of subclause (1) of clause (c) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 52.21 is amended to put in place requirements to better prepare all teachers in developing the skills necessary to provide instruction that will promote the participation and progress of students with disabilities in the general education curriculum by requiring all registered teacher education programs to include a minimum of three semester hours in understanding the needs of students with disabilities. The item identifies the areas of study that must be included in the three semester hour requirement and prescribes a process for a waiver from the requirement.

Subitems (A) and (B) are added to item (i) of subclause (2) of clause (c) of subparagraph (ii) of paragraph (2) of subdivision (b) of section 52.21 to require that at least 15 of the 100 clock hours of field experience in all teacher preparation programs include a focus on understanding the needs of students with disabilities.

Subclauses (3) and (4) of clause (a) of subparagraph (iii) of paragraph (2) of subdivision (b) of section 52.21 are amended to establish a start date of September 2, 2011 for requirements for new special education adolescence level-generalist teacher preparation programs.

Subparagraph (vi) of paragraph (3) of subdivision (b) of section 52.21 is amended to establish the program registration requirements for programs registered on or after September 2, 2011 for the new students with disabilities grades 7-12 generalist certificate title to include, within the content core, six semester hours in mathematics, science, English language arts and social studies and sufficient pedagogy to teach these subjects.

Items (iii) and (iv) of subclause (1) of clause (b) of subparagraph (xvii) of paragraph (3) of subdivision (b) of section 52.21 establishes a start date of September 2, 2011 for new special education adolescence level teacher preparation programs preparing special educators for Transitional B certificates.

Item (v) is added to subclause (1) of clause (b) of subparagraph (xvii) of paragraph (3) of subdivision (b) of section 52.21 to establish the program registration requirements for Transitional B certificate candidates for the new students with disabilities grades 7-12 generalist to include, six semester hours in mathematics, science, English language arts and social studies and sufficient pedagogy to teach those subjects prior to program completion.

Items (ii) and (iii) of subclauses (2) of clause (b) of subparagraph (xvii) of paragraph (3) of subdivision (b) of section 52.21 requires that at least 6 of the 40 clock hours of field experience for Transitional B programs focus on meeting the needs of students with disabilities.

Subparagraph (j) of paragraph (4) of subdivision (c) of section 52.21 is amended to clarify that program registration requirements for programs leading to an extension for students with disabilities middle childhood titles are in effect for programs registered prior to September 2, 2011, since the students with disabilities middle childhood title will be eliminated.

Subparagraph (viii) is added to paragraph (4) of subdivision (c) of section 52.21 to establish extensions to authorize the teaching of certain subjects in grades 7 through 12 to students with disabilities for a certificate in students with disabilities adolescence (generalist) and to require study of at least 18 semester hours in the subject to be taught.

Subparagraph (v) of paragraph (2) of subdivision (a) of section 80-3.7 is amended to require that, under individual evaluation, the pedagogical core include three semester hours of study to develop the skills necessary to provide specifically designed instruction to students with disabilities to participate and progress in the general education curriculum.

Subparagraphs (vii) and (viii) of paragraph (3) of subdivision (a) of section 80-3.7 are amended to phase out individual evaluation for candidates seeking students with disabilities in middle childhood titles or students with disabilities in specialist (grades 7-12) certificate. Candidates must apply for their certificate prior to September 1, 2011 and complete all requirements before February 1, 2012 to be eligible for these certificates under individual evaluation. These subparagraphs also establish requirements for individual evaluation for the new students with disabilities grades 7-12 generalist certificate title, requiring within the content core, six semester hours in mathematics, science, English language arts and social studies and sufficient pedagogy to teach these subjects.

Paragraphs (9) and (10) are amended and new paragraphs (11) through (18) are added to subdivision (a) of section 80-4.2 to establish extensions in earth science, biology, chemistry, physics, mathematics, social studies, English language arts and languages other than English (specified) in grades 5-9 or 7-12.

Subdivision (c) is added to section 80-4.2 to provide a general requirement for all extensions which requires (candidates or applicants) to achieve at least a certain course level and course grade for the course to be credited toward the semester hour requirement for the extension sought.

Clauses (a) and (b) of subparagraph (i) of paragraph (2) of subdivision (a); clause (d) of subparagraph (ii) of paragraph (4) of subdivision (a); paragraph (2) of subdivision (b); paragraph (2) of subdivision (c); subparagraph (ii) of paragraph (2) of subdivision (d); subparagraph (ii) of paragraph (2) of subdivision (e); and subparagraph (ii) of paragraph (2) of subdivision (f) of section 80-4.3 are amended to delete duplicative language included in the proposed amendment to subdivision (c) of section 80-4.2.

A new subdivision (n) is added to section 80-4.3 establishing the requirements for subject area extensions to teach adolescence level students with disabilities including 18 semester hours or the equivalent in the subject area of the extension sought and the passage of the content specialty test in that area. For district and BOCES teachers with such an extension, weekly collaboration and monthly co-teaching with a certified general education content specialist in the subject are required to teach the subject to students with disabilities in a special class. There is an exception that allows certain schools identified in the regulation, that cannot meet the regulatory requirement for weekly collaboration and monthly co-teaching, to submit a plan acceptable to the Department with a description of the mentoring and collaboration the candidate will receive. Schools enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district as defined in subdivision 8 of section 4001 of the Education Law that educates only students with disabilities are the schools identified in the regulation that may be eligible for a waiver under this subdivision.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-43-10-00011-P, Issue of October 26, 2010. The emergency rule will expire January 23, 2011.

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

#### **Regulatory Impact Statement**

##### **1. STATUTORY AUTHORITY:**

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

Section 215 of the Education Law authorizes the Commissioner of Education to visit, examine, and inspect schools or institutions under the educational supervision of the State and require reports from such schools.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner of Education to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Subdivision (2) of section 305 of the Education Law authorizes the Commissioner of Education to have general supervision over all schools subject to the Education Law.

Subdivision (1) of section 3004 of the Education Law authorizes the Commissioner of Education to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in all public schools in the State.

##### **2. LEGISLATIVE OBJECTIVES:**

The proposed rule carries out the legislative objectives of the above referenced statutes by establishing requirements for a new teaching certificate title, i.e., a students with disabilities adolescence generalist certificate, subject area extensions for this certificate and related standards for the registration of teacher preparation programs leading to such certificates.

##### **3. NEEDS AND BENEFITS:**

The purpose of the proposed amendment is to ensure an adequate supply of effective adolescence level students with disabilities teachers and to better prepare all teachers to instruct students with disabilities and skillfully collaborate with their colleagues. In 1999, the Board of Regents endorsed a new structure of certificate titles in general and special education. In 2000, teacher preparation programs began offering programs aligned with the new titles. Prior to February 2004, there had been only one special education certificate for teaching students with disabilities Pre-K through Grade 12, in all instructional settings. The 1999 changes to the special education certificate structure focused on student developmental levels and academic content knowledge, to ensure that special educators had sufficient content knowledge in at least one academic subject. This special education redesign resulted in a four-tiered certification structure. Since the changes to the State certification requirements went into effect, the Department has analyzed data related to the supply and demand of special education teachers and found that there is a shortage of these teachers with the appropriate certification to teach students with disabilities in grades 7-12. Approximately 50 percent of students with disabilities are in the birth to grade six, yet, for those students selecting special education as a teaching profession, 80 percent are being prepared at the early childhood or childhood level and only 20 percent at the middle or secondary level. This issue is further exacerbated since the 20 percent are divided between the middle childhood level (5-9) and the secondary level (7-12) and further subdivided by academic disciplines.

Establishment of a students with disabilities generalist certificate at the adolescence level and the phasing out of the students with disabilities 5-9 generalist and content specialist and 7-12 content specialist will entice more candidates into the adolescence level as generalists who can act in supportive roles such as consultant teacher and provide resource room services. These teachers can further develop content expertise through a subject area extension and teach the subject to a special class with required weekly collaboration and monthly co-teaching with a certified general education content specialist.

As more and more students with disabilities are included in regular classes, all teachers must be better prepared to teach students with disabilities. The proposed amendment also requires all teacher preparation programs to include a minimum of three semester hours in educating students with disabilities and defining the elements of those semester hours coupled with a focusing a specific number of hours of required field experience that must focus on the needs of students with disabilities to ensure that all teachers are prepared to instruct such students to their highest level of achievement.

##### **4. COSTS:**

(a) Costs to State government: The amendment will impose minimal costs on State government including the State Education Department. The proposed amendment will not impose additional costs on State government, including the State Education Department ("SED"). It is anticipated that SED will use existing staff to review and process applications for new teacher education program registrations and certificates and extensions under individual evaluation for these titles. In addition, existing staff will review plans submitted by schools enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district who cannot meet the regulatory requirement of consultation and co-teaching to address the consultation and co-teaching requirements through mentoring and collaboration.

(b) Costs to local governments: School districts and BOCES will need to make a certified general education content specialist teacher available for consultation and collaborative teaching to special education teachers that hold a content area extension and are teaching a specific subject area. It is estimated that for each subject area, the equivalent of .25 FTEs will need to be employed as a consultant for every four sections of the subject area.

(c) Cost to private regulated parties: The proposed amendment will impose minimal costs on institutions of higher education as they phase out teacher preparation programs for students with disabilities programs leading to certification in 7-12 and 5-9 students with disabilities content specialist and generalist certificates and design and apply for the new 7-12 students with disabilities adolescence generalist certificate title with the option for a content area extension. It is not anticipated that institutions will need to hire additional faculty for the new programs.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Govern-

ment," the amendment will impose some minimal costs on the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

School districts and BOCES employing special education teachers with extensions must make a certified general education content specialist available to special education teachers assigned to teach special classes that have a content area extension for the purposes of consultation and co-teaching. The school district or BOCES will determine the length of the weekly collaborative time and the co-teaching and will monitor the quality of the consultation and co-teaching. For students with disabilities teachers employed by a school enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the co-teaching and collaboration requirements of the regulation, such schools must submit a plan acceptable to the Department with a description of the mentoring and collaboration the teacher will receive.

#### 6. PAPERWORK:

The proposed amendment will require that for students with disabilities teachers employed by a school enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the regulatory requirement for consultation and co-teaching, such schools must submit a plan acceptable to the Department with a description of the mentoring and collaboration the special education teacher will receive.

The proposed amendment will impose minimal paperwork requirements for institutions of higher education as they phase out teacher preparation programs for students with disabilities programs leading to certification in 7-12 and 5-9 students with disabilities content specialist certificates and the 5-9 students with disabilities generalist certificate and design and apply for the new 7-12 students with disabilities generalist certificate titles with the option for a content area extension.

#### 7. DUPLICATION:

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

#### 8. ALTERNATIVES:

Over the course of three years, alternatives to the amendments were considered, such as preparing every teacher for students with disabilities certification. However, after reaching out to the field and researching the topic, the Department selected the most viable option to ensure the quality and quantity of adolescence level special education teachers and to ensure that all teachers are better prepared to work with students with disabilities.

#### 9. FEDERAL STANDARDS:

There are no related Federal standards.

#### 10. COMPLIANCE SCHEDULE:

If adopted as an emergency measure at the October Regents meeting, the proposed amendment will become effective October 26, 2010. It is anticipated that the proposed amendment will be adopted as a permanent rule in January and that will become effective as a permanent rule on February 2, 2011. Registered programs will not be required to meet the program registration standards for the new certificate title until September 2, 2011. No additional time is needed to comply with the proposed regulation before its stated effective date.

### *Regulatory Flexibility Analysis*

#### (a) Small businesses:

The proposed amendment applies to school districts and boards of cooperative educational services (BOCES) and institutions of higher education that offer teacher preparation programs. 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.

#### (b) Local governments:

##### 1. EFFECT OF RULE:

The purpose of the proposed amendment is to amend the current special education certification structure to ensure the demand for special education teachers at the adolescence level is met and to strengthen the preparation requirements for all teachers so they are able to work more effectively with students with disabilities.

##### 2. COMPLIANCE REQUIREMENTS:

School districts and BOCES employing special education teachers with extensions must make a certified general education content specialist available to special education teachers assigned to teach special classes that have a content area extension for the purposes of consultation and co-teaching. The school district or BOCES will determine the length of the weekly collaborative meeting time and the co-teaching and will monitor the quality of the consultation and co-teaching. For students with disabilities teachers employed by a school enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the co-teaching and consultation regulatory requirements, such schools must submit a plan ac-

ceptable to the Department with a description of the mentoring and collaboration the teacher will receive.

##### 3. PROFESSIONAL SERVICES:

No additional professional services are required for local governments to comply with the proposed amendment.

##### 4. COMPLIANCE COSTS:

The State Education Department anticipates that all School districts and BOCES, including those in rural areas, will need to make a certified general education content specialist available for consultation and collaborative teaching to special education teachers holding a content area extension that are teaching a subject area. It is estimated that for each subject area, the equivalent of .25 FTEs will need to be employed for each subject area.

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

The proposed amendment will not impose any additional technological requirements on small businesses.

##### 6. MINIMIZING ADVERSE IMPACT:

In developing the proposed amendment, the State Education Department considered other approaches to meeting the needs of students with disabilities in the state, however, those approaches were not feasible. Because of the nature of the proposed amendment, establishing different standards for local governments is inappropriate.

##### 7. SMALL BUSINESS PARTICIPATION:

Over a three-year period beginning in 2007, the Department has engaged the field in trying to resolve the problems associated with the limited supply of adolescence special educators and improving the effectiveness of all teachers to work with students with disabilities. Since February 2007 the Department has been seeking guidance from New York State stakeholders through requests for comments, surveys and workgroup meeting, all of which were available for public participation. Local education agencies and institutions of higher education throughout the state participated in providing recommendations.

### *Rural Area Flexibility Analysis*

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

The proposed amendment will apply to all public school districts, boards of cooperative educational services (BOCES), State-operated and State-supported schools, approved private schools in the State and institutions of higher education with teacher preparation programs in all parts of the State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment requires all registered teacher education programs to include a minimum of three semester hours in educating students with disabilities to ensure that all teachers are better prepared to skillfully collaborate with other teachers and to teach students with disabilities and defines what the three semester hour requirement shall include. The proposed amendment also requires that 15 of the 100 clock hours of field experience required for teacher education programs focus on students with disabilities and that 6 of the 40 clock hours of field experience for Transitional B programs focus on students with disabilities.

The proposed amendment changes the current certification structure for students with disabilities certificates for grades 5 through 9 and 7 through 12 and the registration requirements for programs leading to certificates in these areas. Candidates will no longer be able to enroll in special education teacher preparation programs that lead to students with disabilities (grades 5-9 generalist) and students with disabilities (grades 5-9-specialist) and (grades 7-12-specialist) certificate titles after February 1, 2011. A certificate title in students with disabilities (grades 7-12- generalist) will be created. For candidates seeking this certificate, the candidate will be required to complete six semester hours in mathematics, science, English language arts and social studies within their content core and have sufficient pedagogy to teach these subjects. Teachers holding this certificate will be eligible to be employed to teach in supportive roles such as consultant teachers, resource room service providers and integrated co-teachers.

Teachers holding the new students with disabilities (grades 7-12-generalist) will also have the option of obtaining an extension to this certificate, to authorize the teacher to be employed as the special class teacher of students with disabilities in a specific subject area, upon the completion of certain requirements. To obtain an extension in a specific subject, the teacher shall complete 18 semester hours of study or its equivalent in the subject area of the extension sought. For social studies, the candidate shall complete the 18 semester hours through a combination of study in United State history, world history and geography. This, coupled with passing the content specialty test in the specific subject area, will allow candidates to earn an extension to the base certificate to permit the teacher to be employed as the special class teacher of students with disabilities in that subject in the developmental level of their base certificate. Any district or

BOCES that employs a candidate holding this extension must provide weekly collaboration between a certified general education content specialist in the subject area of the extension and the teacher holding the extension, with at least one period per month co-taught by both teachers. The length of the required weekly collaboration and co-taught lesson will be defined at the local level.

Schools enumerated in article 81, 85, 87, 88 or 89 of the Education Law or a special act school district that educates only students with disabilities and who cannot meet the regulatory requirement for collaboration and co-teaching for their employed special education teachers, must submit a plan acceptable to the Department with a description of the mentoring and collaboration the teacher will receive.

The proposed regulation also establishes requirements for individual evaluation for the new students with disabilities (grades 7-12- generalist) certificate by requiring candidates seeking a certificate in this area to complete, among other requirements, six semester hours in mathematics, science, social studies and English language arts and have sufficient pedagogical training to teach these subjects. The proposed amendment also phases out individual evaluation for the students with disabilities (grades 5-9- generalist) certificate and the students with disabilities (grades 5-9) and (grades 7-12) content specific certificates by requiring candidates to apply for these certificates prior to September 1, 2011 and to complete the requirements for such certificate before February 1, 2012 to obtain certification through individual evaluation in these titles.

The amendments do not impose any additional professional service requirements on rural areas, beyond those imposed by such federal statutes and regulations and State statutes.

### 3. COSTS:

The State Education Department anticipates that all School districts and BOCES, including those in rural areas, will need to make a certified general education content specialist available for consultation and collaborative teaching to special education teachers assigned to teach special classes that have a content area extension. It is estimated that for each subject area, the equivalent of .25 FTEs will need to be employed as a consultant for every four sections of the subject area.

The proposed amendment will also impose minimal costs on institutions of higher education with teacher preparation programs, including those in rural areas, as they plan for the phase out teacher preparation programs for students with disabilities programs leading to certification in 7-12 and 5-9 students with disabilities content specialist certificates and the 5-9 students with disabilities generalist certificate and design and apply for the new 7-12 students with disabilities generalist certificate titles with the option for a content area extension. It is not anticipated that institutions will need to hire additional faculty for the new programs.

### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendment makes no exception for institutions, schools or BOCES that are located in rural areas. Because of the nature of the proposed amendment, establishing different standards for institutions located in rural areas of New York State is inappropriate.

### 5. RURAL AREA PARTICIPATION:

Since February 2007 the Department has been seeking guidance from New York State stakeholders through requests for comments, surveys and workgroup meeting, all of which were available for public participation. Local education agencies and institutions of higher education throughout the state participated in providing recommendations, including those located in rural areas of the State.

### Job Impact Statement

The proposed amendment changes the existing structure of adolescence level students with disabilities certificates, strengthens the program registration requirements for all teachers to understand the needs of students with disabilities and establishes certain subject area extensions for students with disabilities teachers to teach a special class provided there is weekly collaboration with a certified content specialist in the subject being taught and monthly co-teaching. The State Education Department expects that the proposed amendment will not have a negative impact on the number of jobs or employment opportunities at higher education institutions, BOCES or school districts. Therefore, the amendment will have no negative impact on jobs or employment opportunities at these institutions. Because it is evident from the nature of the proposed amendment that it will have no negative impact on jobs and employment opportunities, no further steps were needed to ascertain these facts and none were taken. Accordingly, a job impact statement was not required and one was not prepared.

## NOTICE OF ADOPTION

### Academic Intervention Services

**I.D. No.** EDU-31-10-00004-A

**Filing No.** 1108

**Filing Date:** 2010-10-26

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of section 100.2(ee) of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

**Subject:** Academic Intervention Services.

**Purpose:** To establish modified requirements for AIS during the 2010-2011 school year.

**Text or summary was published** in the August 4, 2010 issue of the Register, I.D. No. EDU-31-10-00004-P.

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

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

### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

### Academic Intervention Services

**I.D. No.** EDU-31-10-00005-A

**Filing No.** 1109

**Filing Date:** 2010-10-26

**Effective Date:** 2010-11-10

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

**Action taken:** Addition of section 100.2(ee)(7) to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

**Subject:** Academic Intervention Services.

**Purpose:** To allow a school district to provide a Response to Intervention program in lieu of providing AIS under specified conditions.

**Text or summary was published** in the August 4, 2010 issue of the Register, I.D. No. EDU-31-10-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** 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

### Assessment of Public Comment

The agency received no public comment.

## NOTICE OF ADOPTION

### Retention of Credit for the Architect Registration Examination for Intern Architects

**I.D. No.** EDU-31-10-00018-A

**Filing No.** 1110

**Filing Date:** 2010-10-26

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of section 69.2 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 207 (not subdivided), 6504 (not subdivided), 6507(2)(a) and 7304(4)(1)

**Subject:** Retention of credit for the Architect Registration Examination for intern architects.

**Purpose:** Align NYS requirements for licensure standards with current national NCARB standards regarding retention of ARE credit.

**Text of final rule:** 1. Paragraph (2) of subdivision (b) of section 69.2 of the Regulations of the Commissioner of Education is amended, effective November 10, 2010, as follows:

(2) Applicants who have passed a division of the examination prior to January 1, 2006 shall retain credit for that examination division [without time limitation] *up to and including June 30, 2014*. Applicants who have passed a division of the examination on or after January 1, 2006 shall retain credit for that division for a five-year period that begins on the date of the administration of that examination division.

2. Paragraph (3) is added to subdivision (b) of section 69.2 of the Regulations of the Commissioner of Education, effective November 10, 2010, as follows:

(3) *Extensions*

(i) *The department may allow an extension of the time period provided in paragraph (2) of this subdivision for an applicant to pass one or more divisions of the examination passed on or after January 1, 2006, where completion of all divisions of the examination by the applicant in accordance with the time limitations set forth in paragraph (2) of this subdivision is prevented by one or more of the following:*

- (a) *the birth or adoption of applicant's child;*
- (b) *the applicant has a serious medical condition;*
- (c) *the applicant is engaged in active duty with the Armed Forces; or*
- (d) *the applicant is faced with extreme hardship or other circumstances beyond the control of the applicant.*

(ii) *An applicant shall request such an extension by submitting a written request to the department with supporting documentation for the department's review.*

(iii) *Upon a finding by the department that the conditions for an extension have been met, the department may in its discretion provide the applicant with an appropriate extension as follows:*

- (a) *for the birth or adoption of applicant's child, a six month extension;*
- (b) *for an applicant with a serious medical condition, a period of time not to exceed two years;*
- (c) *for an applicant engaged in active duty with the armed forces, a time period equivalent to that of the applicant's active service in the armed forces, running from the end of the applicant's active service; or*
- (d) *for extensions based upon an applicant's demonstration of extreme hardship or other circumstances, a time period to be determined by the department.*

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 69.2(b)(3)(iii)(d).

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

**Revised Regulatory Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on August 4, 2010, the following non-substantive revision was made to the proposed rule:

Section 69.2(b)(3)(iii)(d) is revised to conform language with a prior reference in 69.2(b)(1)(iii)(d) to consistently refer to the presence of an extreme hardship throughout the adopted amendment.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Impact Statement.

**Revised Regulatory Flexibility Analysis and Rural Area Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on August 4, 2010, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule do not require any revisions to the previously published Regulatory Flexibility Analysis and Rural Area Flexibility Analysis.

sions to the previously published Regulatory Flexibility Analysis and Rural Area Flexibility Analysis.

**Revised Job Impact Statement**

Since publication of the Notice of Proposed Rule Making in the State Register on August 4, 2010, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as so revised, relates to aligning the New York State requirements for licensure with current national standards set by the National Council of Architectural Registration Boards (NCARB) regarding the retention of credit for Architect Registration Examination (ARE) divisions passed prior to January 1, 2006 and extensions to the existing five year rolling clock. The revised rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the revised rule that it will have no impact on jobs or employment opportunities, no further measures were taken. Accordingly, a job impact statement is not required and one has not been prepared.

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Reference and Research Library Resources Systems**

**I.D. No.** EDU-31-10-00019-A

**Filing No.** 1111

**Filing Date:** 2010-10-26

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of section 90.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 215 (not subdivided), 254 (not subdivided), 255(1 through 5), 272(2) and 273 (not subdivided)

**Subject:** Reference and research library resources systems.

**Purpose:** To update terminology and clarify procedures relating to the functions of and State aid for reference and research libraries.

**Text or summary was published** in the August 4, 2010 issue of the Register, I.D. No. EDU-31-10-00019-P.

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

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

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**Standing Committees of the Board of Regents**

**I.D. No.** EDU-32-10-00007-A

**Filing No.** 1107

**Filing Date:** 2010-10-26

**Effective Date:** 2010-11-10

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

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

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

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

**Purpose:** To conform the Regents Rules to a recent reorganization of the Regents Committees.

**Text or summary was published** in the August 11, 2010 issue of the Register, I.D. No. EDU-32-10-00007-EP.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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## Department of Health

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### EMERGENCY RULE MAKING

**Hospital Inpatient Reimbursement****I.D. No.** HLT-45-10-00002-E**Filing No.** 1082**Filing Date:** 2010-10-20**Effective Date:** 2010-10-20

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

**Action taken:** Amendment of Subpart 86-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 2803, 2807, 2807-c, 2807-k, 3612 and 3614

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to meet the statutory timeframes prescribed by Chapter 58 of the Laws of 2009 related to implementing a new hospital inpatient reimbursement system based on All-Patient-Refined-Diagnosis-Related-Groups (APR-DRGs). The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Paragraph (b) of subdivision 35 of section 2807-c of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of the Laws of 2009) specifically provides the Commissioner of Health with authority to issue emergency regulations in order to compute hospital inpatient rates in accordance with the new methodology by December 1, 2009.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of this new reimbursement system that is a cornerstone to health care reform.

**Subject:** Hospital Inpatient Reimbursement.

**Purpose:** Modifies current reimbursement for hospital inpatient services due to the implementation of APR DRGs and rebasing of hospital inpatient rates.

**Substance of emergency rule:** The amendments to sections 86-1.2 through 86-1.89 of Title 10 (Health) NYCRR are required to implement a new payment methodology for certain hospital inpatient fee-for-service Medicaid services based on All Patient Refined-Diagnostic Related Groups (APR-DRGs). The new payment methodology proposed by these amendments provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. It develops one statewide operating base rate using an updated and more reliable cost base rather than current regional and peer group operating base rates which were determined by using extremely outdated costs. The APR-DRG payment system will incorporate patient severity of illness and risk of mortality subclasses to better match patient resource utilization and provide a more precise method for equitable reimbursement.

**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 January 17, 2011.

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

**Regulatory Impact Statement**

Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in section 2807-c(35) of the Public Health Law. In addition, section 2807-c(4)(e-2) of the Public Health

Law requires new per diem rates of reimbursement be implemented for certain exempt units and hospitals based on updated reported operating costs. Section 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv) and (v) requires schedules of payment to be set forth in regulations for supplemental indigent care distributions made to certain eligible hospitals.

Legislative Objectives:

After numerous discussions between the Executive, Legislature, hospital associations and other key stakeholders, the Legislature chose to create a new, modernized reimbursement methodology for the State's Medicaid hospital inpatient system. Pursuant to statute, the APR-DRG methodology was chosen as the new reimbursement system for these services.

Needs and Benefits:

The proposed regulations implement the provisions of Public Health Law section 2807-c(35) which requires a new hospital inpatient reimbursement system based on APR-DRGs and rebased costs. This methodology provides a more transparent and simplified reimbursement system that drives reimbursement consistent with efficiency, quality and public health priorities. This new payment methodology will also allow the Department to publish hospital rates more timely, and provide hospitals with greater predictability of their income streams.

The current reimbursement system for hospital inpatient services is extremely outdated, and does not effectively serve the interests of patients, providers, or the Medicaid system. Not only does the system's overall reimbursement greatly exceed the cost of providing such services, the methodology for allocating payments does not appropriately reflect the acuity of the patient, the quality of service, or the efficiency of the hospital. Over the years the current system has accrued numerous groupings, weightings, adjustments, and add-ons that have ultimately distorted the health care delivery system.

Per diem rates of payment by governmental agencies for inpatient services provided by a general hospital or a distinct unit of a general hospital for services in accord with physical medical rehabilitation and chemical dependency rehabilitation; services provided by critical access hospitals; inpatient services provided by specialty long term acute care hospitals; and services provided by facilities designated by the federal department of health and human services as exempt acute care children's hospitals are also developed using an outdated cost base which does not properly reflect current costs incurred for providing such services.

The APR-DRG methodology addresses the inadequacies of the current system by using an updated and more reliable cost base and a patient classification system that incorporates patient severity of illness and risk of mortality subclasses, reflecting the variable costs associated with each individual patient being treated. Utilizing an updated and more precise cost base will have the effect of reducing the total amount of Medicaid reimbursement paid to hospitals for inpatient services, which is found to be significantly overpaid. Accordingly, the State would be able to, consistent with budgetary constraints, reinvest these savings in primary and preventive care and other traditionally under-paid ambulatory care services in order to improve the quality of patient care, ensure adequate access to these services, and avoid more costly inpatient admissions.

**COSTS:**

Costs to State Government:

Section 2807-c(35) of the Public Health Law requires that the rates of payment for hospital inpatient services result in a net state wide decrease in aggregate Medicaid payments of no less than \$75 million for the period December 1, 2009 through March 31, 2010 and no less than \$225 million for the period April 1, 2010 through March 31, 2011. Effective for annual periods beginning January 1, 2010, distributions to hospitals for indigent care pool DSH payments will be made as follows: \$269.5 million will be distributed to hospitals, excluding major public hospitals, on a regional basis and within the amounts available for each region, to compensate each eligible hospital's proportional share of unmet need for calendar year 2007; \$25 million will be distributed to hospitals, excluding major publics, having Medicaid discharges of 40% or greater as determined from data reported in the 2007 Institutional Cost Report. The distributions will be proportionately distributed based on each eligible facility's uninsured losses to such losses of all the eligible facilities; \$16 million will be proportionately distributed to non-teaching hospitals based on each eligible facility's uninsured losses to such losses for all non-teaching hospitals statewide.

Costs of Local Government:

There will be no additional cost to local governments as a result of these amendments because local districts' share of Medicaid costs is statutorily capped.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of these amendments.

Local Government Mandates:

There are no local government mandates.

**Paperwork:**  
There is no additional paperwork required of providers as a result of these amendments.

**Duplication:**  
These regulations do not duplicate existing State and Federal regulations.

**Alternatives:**  
No significant alternatives are available. The Department is required by the Public Health Law sections 2807-c(4)(e-2) and (35); 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv), and (v) to promulgate implementing regulations.

**Federal Standards:**  
This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

**Compliance Schedule:**  
The proposed amendment establishes the new APR-DRG reimbursement methodology for discharges on or after December 1, 2009; there is no period of time necessary for regulated parties to achieve compliance.

**Regulatory Flexibility Analysis**

**Effect on Small Business and Local Governments:**  
For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.

In aggregate, health care providers subject to this regulation will see a decrease in average per discharge Medicaid funding, but this is not anticipated for all affected providers.

This rule will have no direct effect on Local Governments.

**Compliance Requirements:**  
No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. Some billing rate codes will change, but this will have a minimal impact on providers.

The rule should have no direct effect on Local Governments.

**Professional Services:**  
No new or additional professional services are required in order to comply with the proposed amendments.

**Economic and Technological Feasibility:**  
Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.

**Compliance Costs:**  
No initial capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance. As a result of these amendments to 86-1.2 through 86-1.89 there will be an anticipated decrease in statewide aggregate hospital Medicaid revenues for hospital inpatient services. Revenues will shift among individual hospitals.

**Minimizing Adverse Impact:**  
The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid hospital inpatient reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

**Small Business and Local Government Participation:**  
Draft regulations, prior to filing with the Secretary of State, were shared with industry associations representing hospitals and comments were solicited from all affected parties. Informational briefings were held with such associations.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**  
Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins

Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

The following 9 counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**  
No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

**Professional Services:**  
No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.

**Compliance Costs:**  
No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.

**Minimizing Adverse Impact:**  
The proposed amendments reflect statutory intent and requirements. The Legislature considered various alternatives for creating a new Medicaid fee-for-service reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

**Rural Area Participation:**  
Draft regulations, prior to filing with the Secretary of State, were shared with the industry associations representing hospitals and comments were solicited from all affected parties. Such associations include members from rural areas.

**Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the reimbursement system for inpatient hospital services. The proposed regulations have no implications for job opportunities.

**EMERGENCY  
RULE MAKING**

**Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content**

**I.D. No.** HLT-45-10-00003-E

**Filing No.** 1083

**Filing Date:** 2010-10-20

**Effective Date:** 2010-10-20

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

**Action taken:** Amendment of Part 59 of Title 10 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, section 1194(4)(c); and Environmental Conservation Law, section 11-1205(6)

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

**Specific reasons underlying the finding of necessity:** This amendment to Part 59 is being filed as an emergency action because immediate adoption is necessary to avoid a conflict between Part 59 as it currently exists and an emergency action filed by the Division of Probation and Correctional Alternatives (DPCA) to implement Chapter 496 of the Laws of 2009 (Leandra's Law). This law mandates use of ignition interlock devices for all individuals sentenced for Driving While Intoxicated (DWI) misdemeanor or felony offenses, and is expected to result in more widespread use of ignition interlock devices. Since the Department of Health will continue to set standards for and certify devices to make them eligible for use in NYS, the Department has a vested interest in ensuring success of this initiative. Leandra's Law also greatly expanded DPCA's role in igni-

tion interlock oversight, and DPCA has incorporated certain regulatory provisions that are in existing Part 59 in its new Title 9 NYCRR Part 358, consistent with DPCA's mandate for oversight of the installation, use and servicing of ignition interlock devices. If this amendment to Part 59 does not become effective contemporaneously with DPCA's Part 358, a seamless transfer of responsibility would not take place, and regulated parties would be exposed to contradictory requirements, leading to confusion and non-compliance. It is also noteworthy that the timely transfer of responsibility between agencies ensures that statutory deadlines for implementing an important statewide public safety initiative are met.

In addition, this amendment would enable law enforcement agencies to use breath alcohol testing devices identified in the recently published March 11, 2010 list of devices approved by the federal National Highway Traffic Safety Administration. Existing Part 59 references a 2007 list and must be updated now that a new list is available. The federal and State lists of approved breath testing devices need be identical to avoid legal challenges and preclude inadmissibility of evidence, and to ensure effective enforcement of the law against driving while intoxicated.

**Subject:** Chemical Analyses of Blood, Urine, Breath or Saliva for Alcoholic Content.

**Purpose:** Update technical standards for blood and breath alcohol testing conducted by law enforcement.

**Substance of emergency rule:** This proposed amendment to Part 59 updates standards, reflects changes in nomenclature and technology, and provides clarification of provisions pertinent to alcohol determinations of breath, blood and other body fluids, and certification of ignition interlock devices used for enforcement of Vehicle and Traffic Law.

The Section 59.1 definition for the term techniques and methods is amended to include saliva, which itself is defined in a new subdivision (k). The definition of testing laboratory is revised to clarify the Department's requirements. A definition for calibration is added. Section 59.2 is modified to introduce current terminology, specifically blood alcohol concentration (BAC). The rule clarifies that urine may be used as a specimen, and its analysis requires controls and blanks similar to those used for analyses of blood. This amendment removes the list of persons authorized to draw blood and eliminates technical specifications not required for analytical accuracy. Section 59.2 is further modified to revise the acceptable range for the alcohol reference standard used for calibration verification of instruments for both breath and blood analysis. This section and others now provide for a 0.08 grams/100 ml (w/v) reference standard. This proposal also requires that units for alcohol determinations of blood and urine be expressed as blood alcohol concentration (BAC), meaning percent weight per volume, rather than the outdated terminology of grams percent.

Section 59.3 is modified in several places to address saliva as a potential specimen. The proficiency testing performance criteria for renewal of a permit for the chemical analysis of blood, urine and saliva are clarified. "Competence" is replaced with "proficiency" throughout the section. In Section 59.4, outdated NYS-specific criteria for breath testing instruments are replaced with documentation that the model has been accepted by the U.S. Department of Transportation/National Highway Traffic Safety Administration (NHTSA) as an evidential breath alcohol measurement device. The proposed amendment includes the list of NHTSA-approved breath measurement instruments published in the Federal Register on March 11, 2010 to remove any possible ambiguity about the fact that devices listed therein, including the Alcotest 9510 manufactured by Draeger Safety, Inc., are fully approved by the Department of Health. The training agencies' responsibilities for instrument maintenance, including the establishment of a calibration cycle, and records retention are clarified.

The Section 59.5 two-hour time frame for specimen collection is eliminated, and the requirement for certain techniques and methods to be a component of each training agency's curriculum and to be put to use by the analyst is clarified. The requirement for observation of a subject prior to collection of a breath sample has been clarified. Minor technical changes have been made to Section 59.6.

This proposal would reduce the hours spent in initial training for a breath analyst permit as specified in Section 59.7, from 32 hours required to 24 hours, and require training agencies to develop learning objectives. The minimum time for hands-on training with breath analysis instruments is reduced from ten to six hours. Revised Section 59.7 establishes an application window of 120 calendar days preceding the permit's expiration date. The Section also clarifies that a permit expires and is void when not renewed, but that the Commissioner of Health may extend the permit expiration date for 30 calendar days, during which period the permit remains valid. The amendment makes clear that failure to renew in accordance with time frames established in the regulation results in the permit becoming void, which then requires the analyst to participate in the 24-hour initial/comprehensive training course. Section 59.7, as revised, requires training agencies to submit information on training sessions and participant lists to the Department of Health in a format designated by the Commissioner.

Section 59.9, as amended, provides for an effective period of four years for technical supervisor certification, an increase of two years. The responsibilities of a technical supervisor have been modified to reflect current practice. Notably, the duty to conduct field inspections has been eliminated, as has the responsibility to provide expert testimony, since the recognition of expertise is a role of the court. Revised Section 59.9 clarifies that a technical supervisor may delegate certain tasks, including instrument maintenance and preparation of chemicals used in testing, to a person not qualified as a supervisor, provided the work product is reviewed and found acceptable. A new sentence at the end of the section codifies long-standing Department policy that suspension or revocation of an operator's permit held by a supervisor triggers suspension or revocation of the person's certification as a technical supervisor.

Existing Sections 59.10 and 59.11 are repealed, and replaced with two new sections that provide criteria, respectively, for certification for ignition interlock devices and for testing of such devices by independent laboratories. The existing reference to a seven-county pilot study of ignition interlock devices is removed, and outdated performance standards for devices are replaced with NHTSA standards. Existing provisions for the application process, manufacturer interaction with testing laboratories, and discontinuance of certification remain in effect. New Section 59.10 requires the manufacturer to provide contact information, including identification of a person to respond to Department inquiries, and requires the manufacturer to furnish a certificate stating that the company issuing the requisite liability coverage will notify the Department at least 30 days prior to cancellation of the policy before the expiration date. Section 59.10 also makes clear the Department's requirement that the manufacturer must demonstrate, through arrangements with a testing laboratory, that the device meets the NHTSA model specifications when calibrated to a set point of 0.025% BAC; and stipulates that only devices that employ fuel cell technology or another technology with demonstrated comparable accuracy and specificity are eligible for certification.

New Section 59.11 specifies the minimal elements of a testing laboratory report and requires such report to be submitted directly to the Department. In both new sections, a reference to "circumvention" has been added with each occurrence of the word "tampering," to recognize that these are both prohibited in Vehicle and Traffic Law Section 1198.

Existing Section 59.12 is repealed. New Section 59.12 establishes requirements for continued ignition interlock certification. New Section 59.12 requires a manufacturer to notify the Department of any operational modification to a certified device, and to obtain express approval for its continued use, as modified, under the existing certification. The definition of operational modification and the process for reporting modifications has been moved from Section 59.10 to Section 59.12. A new requirement is added that the manufacturer notify the Department of each renewal of insurance coverage, each change of issuing company, and each change in liability limits. The section requires manufacturers to supply to installation/service providers a sufficient number of labels with text that conforms to the text mandated by statute. The vast majority of the section's other requirements, including reporting and labeling requirements and manufacturer-service provider interactions, have been eliminated from Section 59.12; most have been incorporated into a new 9 NYCRR Part 358 being promulgated by the Division of Probation and Correctional Alternatives (DPCA) contemporaneously with this regulation in response to the anticipated August 2010 implementation of the ignition interlock provisions of Leandra's Law (L. 2009, Ch. 496). New Section 59.12 establishes a process for periodic renewal to ensure that information on file with the Department is current. The application form has been removed from the regulation, as it will be available electronically.

**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 January 17, 2011.

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

#### **Summary of Regulatory Impact Statement**

##### **Statutory Authority:**

The New York State (NYS) Vehicle and Traffic Law, Section 1194(4)(c), and Department of Environmental Conservation Law, Section 11-1205(6), authorize the Commissioner of Health to adopt regulations concerning methods of testing breath and body fluids for alcohol content. NYS Vehicle and Traffic Law, Section 1198(6) authorizes the Commissioner of Health to promulgate regulations setting standards for use of ignition interlock devices.

##### **Legislative Objectives:**

This amendment is consistent with the legislative objective of ensuring effective enforcement of laws against driving while intoxicated (DWI).

This proposal is consistent with Chapter 669 of the Laws of 2007, which authorized statewide use of ignition interlock devices, and Chapter 496 of the Laws of 2009 (Leandra's Law), which mandates that every person sentenced for any DWI offense, must have an ignition interlock device installed as a requirement for conditional discharge or probation.

#### Needs and Benefits:

Part 59 establishes standards for chemical tests on blood, breath, and urine for the presence of alcohol, for purposes of detecting unacceptable levels of alcohol in persons. Courts rely on Part 59 provisions daily in adjudicating alcohol-related offenses; the State's correctional alternatives program relies on effective operation of ignition interlock devices to prevent repeat offenders from driving while impaired by alcohol. The existing regulation must be updated, as it is inconsistent with existing DWI statutes, as well as current and anticipated usage of ignition interlock devices.

The specificity of Section 59.2 standards for collecting, handling and analyzing a specimen for blood alcohol analysis has prevented convictions even though the defendant was driving while intoxicated. This amendment would delete the list of persons authorized to draw blood, as the listing could present a legal conflict with similar provisions in Vehicle and Traffic Law Section 1194(4)(a) and Public Health Law Section 3703. This amendment would eliminate technical specifications for the collection of blood within a two-hour timeframe, and use of a clean and sterile syringe and anticoagulant, and require that alcohol units be expressed as blood alcohol concentration, rather than the outdated terminology of grams percent. The reference standard for calibration verification of breath and blood analysis instruments has been changed to a standard greater than or equal to 0.08 grams/100 ml, consistent with the Vehicle and Traffic Law provision that sets 0.08% weight per volume (w/v) alcohol in blood as the threshold for certain DWI sanctions. The amendment describes criteria for revocation or nonrenewal of a blood alcohol analysis permit based on unsuccessful proficiency testing (PT) performance or failure to participate in PT challenges.

Section 59.4 affords training agencies the flexibility of establishing retention times for records, as these may vary by record type and potential use in a legal proceeding; delegation of recordkeeping activities is authorized. Section 59.4, as revised, stipulates the commissioner's approval of breath measurement devices for use in NYS provided the device has been accepted by the National Highway Traffic Safety Administration (NHTSA). The revised section includes the list of NHTSA-approved breath measurement instruments published in the Federal Register on March 11, 2010 to remove any possible ambiguity about the fact that devices listed therein, including the Alcotest 9510 manufactured by Draeger Safety Inc., are fully approved by the Department of Health. The requirement in Section 59.5 for conducting breath analysis within two hours of arrest or a positive breath alcohol screening test has been removed. The requisite for test subject observation prior to testing has been clarified, as the existing provision for continuous observation carries the risk of unintended and unnecessarily specific interpretation, thus jeopardizing successful DWI prosecution. The reference to operational checklists, which are no longer used, has been eliminated. The requirement for certain techniques and methods to be a component of each training agency's curriculum and to be put into use by analysts is clarified.

This proposal would reduce from 32 to 24 hours the time trainees must spend in initial training. The reduction from 10 to six hours in hands-on use of instruments is reasonable given the decreasing complexity of instrumentation overall, and the trend towards use of one device model within a jurisdiction. Training agencies would be required to identify learning objectives and design examinations in keeping with objectives. The outdated term equilibrators has been deleted, as breath analyzers no longer need to counter a matrix effect from use of simulator solutions. As modified, the rule requires retraining to renew a BTO permit take place via a course designed to refresh applicants' recall of formal training material, such as including mechanisms to assess proficiency and measure retained knowledge. The proposal stipulates that retraining must occur within the 120 days prior to permit expiration, to eliminate overlap within the two-year BTO cycle. This amendment would afford, at the Commissioner's discretion, a 30-day extension in permit expiration date, in an effort to avoid the potential legal dilemma of administrative permit lapses due to paperwork processing delays. Operators whose permits are voided are required to participate successfully in another initial certification course before a new BTO permit may be issued, to demonstrate that recall and competency have been maintained.

The effective period for a technical supervisor's certification has been increased from two to four years. Supervisor responsibilities have been detailed; and supervisors are permitted to delegate certain tasks, provided they review the work product to ensure the designee's performance meets expectations. A reference to field inspection of instruments by supervisors has been modified to reflect the current practice of remote calibration checks. Provision of expert testimony has also been deleted from the list

of supervisor's responsibilities, since the process of qualifying subject matter experts rests with the court.

Existing Section 59.10 is repealed. New Section 59.10 retains many existing ignition interlock certification criteria, rearranged for ease of comprehension. The reference to a seven-county pilot study for ignition interlock devices has been eliminated, as Chapter 669 of the Laws of 2007 amended the Vehicle and Traffic Law to expand the study into a statewide program. New Section 59.10 requires the manufacturer to identify a person to respond to Department inquiries, and requires the manufacturer to furnish a certificate stating that the company issuing the requisite liability coverage will notify the Department at least 30 days prior to cancelling a policy before the expiration date. New Section 59.10 also makes clear that the manufacturer must demonstrate, through arrangements with a testing laboratory, that the device meets the NHTSA model specifications when calibrated to a set point of 0.025% BAC; and stipulates that only devices that employ fuel cell technology or another technology with demonstrated comparable accuracy and specificity are eligible for certification, thus ensuring deployment of state-of-the-art equipment.

Existing Section 59.11 is repealed. New Section 59.11 replaces New York State-specific criteria for certification of interlock devices with NHTSA standards, as the NYS standards, codified in 1990, are less encompassing than federal standards. Submission of testing agency credentials with each application for device approval is no longer required. New Section 59.11 details requirements for certification of the testing laboratory, the laboratory's responsibilities in the device approval process, and the minimum components of a testing laboratory report. In both new Section 59.10 and 59.11 a reference to "circumvention" has been added with each occurrence of the word "tampering," to recognize that these are distinct Vehicle and Traffic Law violations.

Existing Section 59.12 is repealed. New Section 59.12 establishes requirements for continued ignition interlock certification. New Section 59.12 requires a manufacturer to notify the Department of any operational modification to a certified device, and to obtain approval for continued use, as modified, under the existing certification. The definition of operational modification and the process for reporting modifications has been moved to Section 59.12. The amendment codifies a currently implicit requirement that manufacturers notify the Department of changes to insurance coverage. The text required for the warning label is revised to conform to the text mandated by statute. The section requires the manufacturers to supply a sufficient number of labels to installation/service providers. The vast majority of the section's other requirements, including reporting and labeling requirements and manufacturer-service provider interactions, have been eliminated from Section 59.12; most have been incorporated into a new 9 NYCRR Part 358 being promulgated by the Division of Probation and Correctional Alternatives (DPCA) to implement the ignition interlock provisions of Leandra's Law. New Section 59.12 establishes a process for periodic renewal to ensure that information on file with the Department is current. The application form for device certification has been removed from the regulation, and will be available electronically.

#### COSTS:

##### Costs to Private Regulated Parties:

The requirements of this regulation applicable to ignition interlock manufacturers and installation/service providers impose no new costs on these private regulated parties. The newly codified requirement that manufacturers notify the Department of changes to insurance coverage may be accomplished electronically at no cost to the manufacturer. The renewal of certification form/attestation may be electronically submitted.

##### Costs to State Government:

Affected State agencies other than the Department of Health, i.e., the State Police, the Division of Criminal Justice Services (DCJS), and DPCA, would incur minimal additional costs as a result of adoption of this amendment, as the amendment relaxes, clarifies or codifies practices already implemented. The State Police and DCJS, as training agencies, may realize cost savings from the proposed reduced duration of the breath analyst certification course, from 32 to 24 hours.

##### Costs to Local Government:

The Nassau County, Suffolk County and New York City Police Departments, which are local-government training agencies, would incur either no to minimal additional costs as a result of this amendment's adoption, as the amendment relaxes, clarifies or codifies processes already in place. These training agencies may realize cost savings from the proposed reduced duration of the breath analyst certification course, from 32 to 24 hours, which represents one full day that officers need not be absent from the work pool.

Prosecutorial units of local government may experience cost savings resulting from this amendment's deletion of specific requirements for specimen collection that, historically, have been challenged successfully by defense attorneys.

##### Costs to the Department of Health:

Adoption of this regulation would impose minimal additional costs on the Department. Implementation of a renewal process for the six manufacturers that currently hold ignition interlock certifications will use existing resources and result in minimal additional work load. Regulated parties will be provided with the text of the final adopted rule by electronic mail.

**Local Government Mandates:**

This regulation does not impose any new mandate on any county, city, town, village, school district, fire district or other special district.

**Paperwork:**

The proposal to extend, from two to four years, the effective period of breath analyzer supervisor permits will reduce paperwork, as will deletion of the requirement for quarterly reporting to multiple agencies of ignition interlock use data. This amendment's emphasis on learning goals rather than course structure would allow for paperwork reduction, as recertification courses would be adaptable to online distance learning modules. Manufacturers are encouraged to utilize electronic means of communication for required notifications and certificate renewals.

**Duplication:**

Part 59 as amended would be consistent with, but not duplicate, federal standards for approval of breath alcohol evidentiary devices as promulgated by the NHTSA.

**Alternative Approaches:**

At the present time, there are no acceptable alternatives to pursuing adoption of the amendment as written. The major stakeholders have reached agreement that inability to move forward with the changes as proposed would likely impede DWI enforcement and prosecutorial activities in NYS. The clarifications and updates in this amendment are required to keep the regulation current with law enforcement practices and changes to laws governing ignition interlock programs and evidence-gathering protocols related to DWI prosecutions, as well as technological advances in the devices themselves.

**Federal Standards:**

The proposed rule does not exceed any minimum standards of the federal government; it references sources for information on federally approved devices, and is consistent with federal standards for ignition interlock and breathalyzer device approval.

**Compliance Schedule:**

Regulated parties should be able to comply with these regulations effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

No Regulatory Flexibility Analysis is required pursuant to Section 202-b (3)(b) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse economic impact on small businesses or local governments, and does not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Rural Area Flexibility Analysis**

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb (4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose any adverse impact on facilities in rural areas, and does not impose any reporting, recordkeeping or other compliance requirements on regulated parties in rural areas.

**Job Impact Statement**

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities.

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

**Prenatal Care Assistance Program (PCAP)**

**I.D. No.** HLT-45-10-00008-P

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

**Proposed Action:** This is a consensus rule making to repeal sections 85.40 and 86-4.36 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a and 365-a

**Subject:** Prenatal Care Assistance Program (PCAP).

**Purpose:** To repeal a Prenatal Care Assistance Program (PCAP) provision that is no longer in existence.

**Text of proposed rule:** Pursuant to the authority vested in the Department of Health and the Commissioner of Health by sections 201 and 206 of the Public Health Law and sections 363-a and 365-a (2) of the Social Services Law, sections 85.40 and 86-4.36 of Title 10 of the Official Compilation of

Codes, Rules and Regulations of the State of New York are repealed, to be effective upon publication of a Notice of Adoption in the New York State Register, as follows:

Section 85.40 is repealed.

Section 86-4.36 is repealed.

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

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

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

**Consensus Rule Making Determination**

**Statutory Authority:**

The statutory authority for the regulation is contained in sections 201 and 206 of the Public Health Law (PHL) and sections 363-a and 365-a(2) of the Social Services law which authorizes the commissioner to direct the promulgation or repeal of rules and regulations as may be necessary. The proposed elimination of regulation 85.40 and 86-4.3 of Title 10 NYCRR repeals a program provision that is no longer in existence due to new legislation (Chapter 484 of 2009) that became effective November 1, 2009.

**Basis:**

The proposed regulation repeals an obsolete provision of the Department's Prenatal Care Assistance Program (PCAP) set forth in sections 85.40 and 86-4.3 of Title 10 NYCRR. 2009 legislation has eliminated the PCAP designation, and its associated rates. Chapter 484 of 2009 sets forth prenatal care standards applicable to all Medicaid prenatal care providers and therefore effectively eliminates the prenatal care designation assigned to specific Medicaid clinic providers.

**Job Impact Statement**

No job impact statement is required pursuant to section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities. Even though the Prenatal Care Assistance Program has been abolished, all Article 28 clinics, if certified, can provide prenatal care services and presumptive eligibility determinations according to the new prenatal care standards. This will allow for pregnant women to have increased access to prenatal care services across the state.

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**Insurance Department**

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

**Workers' Compensation Insurance - Independent Livery Driver Benefit Fund**

**I.D. No.** INS-45-10-00005-P

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

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

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

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

**Purpose:** Authorizes insurers licensed to write WC and EL insurance to provide coverage pursuant to Exec. Law Article 6-G.

**Text of proposed 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' li-*

ability 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).

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew Mais, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5257, email: amais@ins.state.ny.us

**Data, views or arguments may be submitted to:** Alex Tisch, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5288, email: atisch@ins.state.ny.us

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

#### Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of 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 where No-Fault automobile insurance does not provide sufficient coverage.

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

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

#### **Noncommercial Private Passenger Automobile Insurance Merit Rating Plans**

**I.D. No.** INS-45-10-00010-P

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

**Proposed Action:** This is a consensus rule making to amend Part 169 (Regulation 100) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2334, 2335, 2345 and 3425

**Subject:** Noncommercial Private Passenger Automobile Insurance Merit Rating Plans.

**Purpose:** The proposed rule raises the insurance premium surcharge threshold, for a motor vehicle accident, from \$1,000 to \$2,000.

**Text of proposed rule:** Section 169.0(d) is amended to read as follows:

(d) Insurers' merit rating plans are also subject to *Insurance Law* section 2335 [of the New York Insurance Law], which restricts the circumstances under which policy premiums for any motor vehicle insurance coverage may be increased. *Chapter 277 of the Laws of 2010 amended Insurance Law section 2335 by prohibiting an insurer from imposing a premium increase for an accident where the property damage does not exceed two thousand dollars.*

Section 169.1(a) is amended to read as follows:

(a) Property damage threshold. An accident that does not result in aggregate damage to property in excess of [the dollar amount of the accident reporting threshold of the Department of Motor Vehicles (DMV)] *two thousand dollars* shall not result in the assignment of points or any surcharge under the rules of any merit rating plan. [All subsequent changes in the property damage reporting threshold to DMV shall be deemed to be incorporated into each insurer's merit rating plan on the same date the change becomes effective for DMV reporting purposes.] However, if an insured has two or more accidents involving any property damage during the experience period, a surcharge may be imposed.

**Text of proposed rule and any required statements and analyses may be obtained from:** Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5257, email: amais@ins.state.ny.us

**Data, views or arguments may be submitted to:** Buffy Cheung, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5587, email: bcheung@ins.state.ny.us

**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.**

#### **Consensus Rule Making Determination**

Sections 201, 301, 2334, 2335, 2345 and 3425 of the Insurance Law authorize the Superintendent to promulgate regulations governing all noncommercial motor vehicle merit rating plans.

The minimum threshold amount of property damage for which insurers may impose a premium surcharge is currently based on the amount (\$1,000) set forth in Vehicle & Traffic Law section 605.

Chapter 277 of the Laws of 2010 amends Section 2335 of the Insurance Law to raise from \$1,000 to \$2,000 the minimum threshold amount of property damage which, if exceeded in a motor vehicle accident, would allow an insurer to impose a policy premium surcharge.

No person is likely to object to the proposed rule as the amendment is required in order to comply with Chapter 277 of the Laws of 2010.

#### **Job Impact Statement**

The proposed rule is required in order to comply with Chapter 277 of the Laws of 2010. The proposed rule should have no adverse impact on jobs or economic opportunities in New York State as the rule merely raises from \$1,000 to \$2,000 the minimum threshold amount of property damage which, if exceeded in a motor vehicle accident, would allow an insurer to impose a policy premium surcharge.

## **Department of Labor**

### **PROPOSED RULE MAKING HEARING(S) SCHEDULED**

#### **Child Performers**

**I.D. No.** LAB-45-10-00020-P

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

**Proposed Action:** Addition of Part 186 to Title 12 NYCRR.

**Statutory authority:** Labor Law, section 154-a

**Subject:** Child Performers.

**Purpose:** To establish regulations regarding the employment of child performers.

**Public hearing(s) will be held at:** 10:00 a.m., Dec. 27, 2010 at 75 Varick St., 7th Fl., New York, NY.

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

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

**Substance of proposed rule (Full text is posted at the following State website: [www.labor.state.ny.us](http://www.labor.state.ny.us)):** The proposed rule creates a new section of regulations designated as 12 NYCRR Part 186 entitled "Child Performers" created under Chapter 89 of the Laws of 2008. The Child Performer Education and Trust Act of 2003 requires trust accounts to be established for child performers, requires all child performers to have permits issued by the New York State Department of Labor, requires all employers of child performers to have employer certificates of eligibility issued by the New York State Department of Labor, and requires employers of child performers to provide teachers to such child performers. By Chapter 89 of the Laws of 2008, the Commissioner of Labor was required to promulgate rules and regulations as shall be necessary and proper to effectuate the purposes and provisions of the Act, including but not limited to rules and regulations determining the hours of work and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers.

These proposed regulations add a new Part 186 to 12 NYCRR to create in a single part all regulations pertaining to child performers. They define the type of work that will categorize a child as a "child performer," including but not limited to work as part of a "reality show," a term defined in the regulations. They also exempt various types of performances from regulatory oversight in accordance with Section 35.01(2) of the Arts and Cultural Affairs Law. They set forth the time and manner in which a child must obtain and renew a Child Performer Permit and the time and manner in which the employer of a child performer must obtain and renew an Employer Certificate of Eligibility. The proposed regulations also provide for a Temporary Child Performer Permit valid for a limited period of time so as to permit a child performer to be employed prior to submission of all documents necessary for a Child Performer Permit to be issued and for an Employer Certificate of Group Eligibility permitting twenty or more child performers to be employed on certain projects for a period of not more than two days.

The proposed regulations require parents and guardians to set up child

performer trust accounts into which employers are required to deposit fifteen percent of a child performer's gross earnings. They also require employers to provide a teacher to a child performer who is either guaranteed three or more consecutive days of employment, or who is scheduled to work two consecutive days and it is subsequently determined that additional calls will be necessary. They also set forth the hours and conditions of work for child performers, such hours and conditions set by the age of the child performer.

The proposed regulations provide for the issuance of variances in the event of significant hardship and for the suspension or revocation of a permit or certificate after hearing. In addition, the proposed regulations permit the Commissioner of Labor to impose fines for violation of the regulations.

The proposed sections of Part 186 are summarized as follows:

- Subpart 186-1 Purpose and scope
- Subpart 186-2 Definitions
- Subpart 186-3 Responsibilities of Parents and Guardians
- Subpart 186-4 Responsibilities of Employers
- Subpart 186-5 Educational Requirements
- Subpart 186-6 Hours and Conditions of Work
- Subpart 186-7 Variances
- Subpart 186-8 Suspension or Revocation of Permits and Certificates
- Subpart 186-9 Penalties and Appeals

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeffrey Shapiro, New York State Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: jeffrey.shapiro@labor.ny.gov

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

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

#### **Regulatory Impact Statement**

Statutory Authority: Section 35.01 of the Arts and Cultural Affairs Law makes it unlawful, with certain exceptions, to employ, exhibit or cause to be exhibited any child under the age of sixteen years except as provided by Section 151 of the Labor Law. Labor Law Article 4-A, which includes Section 151, sets for the circumstances under which child performers may be employed. Among the provisions therein are requirements that fifteen percent of a child performer's earnings be placed in a child performer trust account in accordance with Estates Powers and Trust Law Article 7, Part 7 and that the child performer either fulfill the requirements of Education Law Article 65, Part 1, or be provided a teacher by his or her employer. Section 154-a of Article 4-A of the Labor Law (as added by L. 2008 Ch. 89) charges the Commissioner with promulgating rules and regulations determining the hours and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers.

Legislative Objectives: The purpose of the authorizing legislation is to: protect the safety, health and well being of child performers; ensure that child performers who work or reside in the State of New York are provided with adequate education; and ensure that a portion of the child performer's earnings are kept in trust until the age of majority.

Needs and Benefits: New Part 186 addresses the need to protect child performers from the potential negative effects of their employment by including all existing requirements related to the welfare of child performers in one regulation. It advocates on behalf of the child performer to prevent unscrupulous employers from taking advantage of a vulnerable individual by including rules related to hours and conditions of work, education, and compensation. The rule protects the child performer from the potential squandering of his or her earnings by a parent or guardian by requiring the establishment of a trust fund for the child performer's pay. The child performer's best interests are also protected by mandating that alternative education be available while the child is involved with a performance, and that a responsible person supervises the child performer at all times, looking out for his or her best interest. This rule outlines responsibilities for both the child performer's employer, and parent or guardian in achieving the above objectives. The rule makes the Department responsible for certification and monitoring.

Costs: The cost to comply with this rule is minimal for child performers and their parent or guardians. There is no cost to apply for a Child Performer Permit, nor any cost to renew the permit. There may be costs incurred in obtaining a physician's statement that the child performer is physically fit, but that would be minimal. Per statute, the parent or guardian is required to establish a trust fund for the child performer, which will have no or minimal cost. To establish such an account, a parent/guardian/custodian need only go to a bank and open an account designated "in trust for" the child performer.

Costs of compliance for employers will vary based on length of time the child performer is employed and the number of child performers employed. These costs will mostly be incurred in the provision of teachers, nurses and/or responsible persons for child performers. Nurses are

only required to be provided for child performers that are less than six (6) months of age. Employers may incur some additional accounting costs in the process of transferring at least fifteen percent of the child performer's gross wages into a trust account and then providing the parent or guardian with written records of the transfers. These costs should be insignificant. The cost to apply for an initial Employer Certificate of Eligibility is \$350.00. However, there is a lower cost for employers operating theatres containing fewer than 500 seats; their initial cost for the Employer Certificate is \$200. Renewals for all Certificates are \$200. An Employer Certificate of Group Eligibility is \$200.

Local Government Mandate: This rule would only apply to local governments when the child performer's employment is not part of the activities of a school and is not under the direction, control or supervision of a department of education and is not broadcast from a school and is not in a production made by students to meet academic requirements in a recognized course of study. When child performers are employed in performances not associated with the home school or district, home school districts will need to work with the parents and on-site teachers of the child performers to agree on an educational plan that complies with home district requirements while the child is working away from his/her home school. Reports will be provided to the home school regarding the child performer's educational status and progress. Home schools may have access to records regarding the child performer's education at the performance site. If the child performer satisfies the educational requirements agreed to in the educational plan established between the employer and home school or district, that student shall be deemed present by the home district for attendance purposes. Therefore, the local district's State aid related to attendance will not be affected as the rule requires that the child performer receive instruction as a condition of the absence being excused.

Paperwork: This rule creates reasonable paperwork requirements to ensure compliance. The proposed rule would require that employers collect and keep copies of each child performer's Child Performer Permit, proof of age, emergency contact information, instructions for emergency medical treatment, the child performer's equivalent educational requirements (if the child performer is to be employed three or more consecutive days during the school year) and documentation of a child performer's trust account. This documentation or sworn certified copies thereof, must be kept by the employer for a period of not less than six years and made available for the Commissioner of Labor's inspection either at the place of employment or at such other place within New York State as directed by the Commissioner.

Application materials developed by the Department will seek to minimize necessary paperwork. The only document required of an employer besides the application for the Employer Certificate of Eligibility, is proof of insurance coverage for workers' compensation and disability benefits. Parents or guardians must provide the Department with information regarding a child performer's employment, and obtain either a current and valid Temporary Child Performer Permit or a Child Performer Permit before employment begins for that child. The parents or guardians must also acknowledge that they have reviewed the guidelines posted on the Department's website regarding eating disorders. Parents or guardians must supply documentation with their application for a Child Performer Permit, including evidence of a trust account, evidence of satisfactory academic performance, certification of physical fitness from a physician, and copies of identifying documents. None of these documents are difficult to procure for a parent or guardian, and the Department does not consider these requirements onerous. Moreover, such documentation assists the Department in ensuring that the child performer's best interests are protected. When the Department approves an employer's application for an Employer Certificate of Eligibility, it will issue a paper certificate to the applicant. When it approves a parent or guardian's application for a Child Performer Permit, the Department will issue a paper permit. Applications for Temporary Child Performer Permits may be made and issued electronically.

Employers must also comply with a notification process. Employers must notify the Department in writing of its employment of a child performer or child performers on a form developed by the Department at least five business days prior to the commencement of the employment. If there are changes in the information reported in this notice, the employer must notify the Department of the changes within twenty-four hours of the change.

The employer must give the parent or guardian written records of the transfer of fifteen percent of a child performer's gross wages to a trust account within five days of such transfer. This may or may not involve additional paperwork, as the employer could choose to document the transfers on the pay stubs. The employer must require any teacher provided for the child performer to complete a written report. This report will record attendance, lessons completed and grades, and will be given by the teacher to the child performer's school, parents or guardians and employer at the end of each employment or at intervals during employment as required by such school.

The Department proposes sensible recordkeeping requirements and monitoring procedures. Monitoring is an opportunity for the Department to ensure compliance and that proper protection of child performers is maintained. The Department will conduct the monitoring process in a reasonable manner to ensure that it does not cause undue hardship. However, employers are expected to fully comply with the recordkeeping requirements of the regulations and to respond cooperatively to the Department's request for information. Child performer records shall also be open to inspection by school attendance and probation officers, the regular school or local school district, the State Education Department and the State Comptroller.

**Duplication:** This rule does not duplicate, overlap or conflict with any other State or federal requirements. As described above, the local district's State aid related to attendance will not be affected as the rule requires that the child performer receive instruction as a condition of the absence being excused.

**Alternatives:** The Department conducted significant outreach to various groups that represent child performers and various employers who employ child performers, and asked them to make recommendations regarding the hours and conditions of work, as well as the educational needs, of child performers. The groups included the following: Actors' Equity Association, the League of American Theatres, the Motion Picture Association of America, Screen Actors Guild, the Actors Fund, the Alliance of Resident Theatres/New York, On Location Education, the NYS AFL-CIO, AFTRA, the Professional Performing Arts School, the Association of Independent Commercial Producers, the New York City Ballet, New York City Metropolitan Opera House, American Ballet Theatre, and the Broadway League. The Department also spoke with Dr. Jennifer Berman and Dr. Ron Zodikvitch, two noted psychiatrists, who have both spent considerable time working with child performers; Paul Petersen, a former child performer himself and President and Founder of A Minor Consideration, a non-profit organization that advocates for the concerns and protection of child performers; and Janet Pallozzotto, a mother of a former child performer and recognized advocate. The Department used input from these various groups and individuals to draft Part 186.

Several groups representing theatre owners, producers, the motion picture industry and ballet companies requested an exemption from the rule's requirements when they were only using a larger group of children for a short scene. This situation arises under circumstances where the group is being used either as a backdrop for a specific scene (e.g. a school assembly) or where they are performing in a scene as a group (e.g. a school glee club or church choir). The intention of the employer under these circumstances is not to employ the individual children as child performers but to secure the services of the group for a short, one time use. Recognizing that this need is prevalent in productions, the Department created the Employer Certificate of Group Eligibility. If an employer is engaging a group or organization of child performers numbering twenty or more, for a duration of two days or less, the employer may apply for this group certificate. The group certificate reduces the burden on the employer by eliminating the need to comply with the requirements necessary for individual child performers who are employed for more than two days. The fee for an Employer Certificate of Group Eligibility is \$200.00, which is less than the individual Employer Certificate of Group Eligibility.

A child is not considered to be a "child performer" for purposes of these regulations when the child is performing: as part of the normal activities of a church, academy, or school; in a private home and is not being recorded for commercial purposes; under the direction, control, or supervision of a Department of Education; in programs broadcast from a school, church, academy, museum, library or other religious, civic or educational institution; for less than two hours a week from the studio of a regularly licensed broadcasting company, as long as the performance is non-professional in nature; or in productions made by students to satisfy academic requirements in a recognized course of study. These exemptions do not apply, however, when the child performer is participating in a reality show.

Parents were also concerned about the ability to apply for and receive the Child Performer Permit in a timely manner when an unexpected and imminent performance opportunity occurs for the child. To accommodate these situations, the rule provides for a temporary solution. A parent or guardian of a child performer may apply for a Temporary Child Performer Permit prior to the first employment of a child performer. This allows the child performer to work temporarily while the parent or guardian fulfills the requirements for the Child Performer Permit. Such permit is valid for fifteen days.

Various production groups requested some flexibility if an employer would incur substantial hardship in complying with this rule, such as a need to deviate from the hourly requirements related to meals, education or work time. In response, the rule allows an employer to apply to the Department for a variance to the problem requirement no later than two business days prior to when the requested modification shall take effect.

**Federal Standards:** Child performers are exempted from the child labor

provisions of the federal Fair Labor Standards Act. There are no other federal standards regulating the employment of child performers.

**Compliance Schedule:** An employer's application for an Employer Certificate of Eligibility is due prior to employing a child performer. An Employer Certificate of Eligibility is valid for three years, and a renewal application for such certificate is due thirty days prior to the certificate's expiration date. An employer must notify the Department in writing of its employment of a child performer at least five business days prior to the commencement of such employment. If the information on this notice changes, the employer must notify the Department of the change within 24 hours of the change being made.

A parent or guardian of a child performer must apply for a Child Performer Permit prior to commencement of employment. A Child Performer Permit is valid for six months, and a renewal application for such permit is due thirty days prior to the permit's expiration date. The parent or guardian must provide the employer with documentation of the child performer's child performer trust account within fifteen days of the commencement of employment.

This regulation shall become effective upon publication of its adoption in the State Register. However, the statutory requirements regarding the establishment of a trust fund and the provision of a certified teacher to enable the child performer to fulfill State education requirements became effective with the enactment of Chapter 630 of the Laws of 2003. This rule helps to clarify those requirements.

#### **Regulatory Flexibility Analysis**

**Effect of Rule:** Labor Law 154-a charges the Commissioner of Labor with promulgating regulations determining the hours and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers. These regulations apply to all child performers who either reside or work in New York State and to all the entities that employ them. It is possible that small employers may employ child performers and therefore be subject to these regulations. It is not anticipated that local governments would employ a child performer, and therefore would not be subject to this Part. Additionally, when a child performer's performance is part of the activities of a school or is under the direction, control, or supervision of a department of education or is broadcast from a school, or is in productions made by students to meet academic requirements in a recognized course of study, it is exempted from these regulations, unless the child performer is participating in a reality show. A school district will be expected to work with the child performer's employer in developing and agreeing to a suitable education plan for the child while he/she is employed, and monitor, through notice from the parents/employer, the student's status in fulfilling that plan. These activities will not have an adverse impact on the respective school districts.

Approximately 446 employers have current Child Performer Certificates of Eligibility. While the number of Child Performer Permits varies depending upon the amount of available work, 12,178 Child Performer Permits were issued in 2009. Each of these employers and child performers would be subject to this Part. Employers subject to these regulations represent a small fraction of all New York State employers.

**Compliance Requirements:** Employers, including small businesses, are required to apply for an Employer Certificate of Eligibility prior to employing any child performer. Such Certificate is valid for three years. Employers are required to apply for a renewal no later than 30 days prior to the expiration of an Employer Certificate of Eligibility. Applicants must provide their identifying business information and contact information, the type and location of employment of child performers for which the certificate is requested, proof of Workers Compensation and Disability Benefits Insurance coverage and compliance with other legal mandates, and a signed acknowledgement that the applicant has read, understands, and agrees to abide by the laws, rules and regulations applicable to the employment of child performers. Employers may also apply for an Employer Certificate of Group Eligibility permitting employment of a group of twenty or more children for a group appearance in a production or performance. Such Employer Certificate of Group Eligibility is valid only for the duration of the performance but not for more than two days.

An employer[s] must notify the Commissioner in writing of its intent to employ a child performer at least five business days prior to the start of that employment. The employer must provide identifying information for each child performer being employed, a description of the performance, and the dates and locations of each child performer's employment. The employer must also notify the Commissioner of any modifications to the information provided in the original notice within twenty-four hours of the change.

Prior to employing a child performer, employers must collect a copy of the child performer's valid Temporary Child Performer Permit or Child Performer Permit, proof of age, emergency contact information for the parent(s) or guardian(s), instructions from the parent(s) or guardian(s) with regard to the provision of emergency medical treatment for the child performer, and, if the child is to be employed more than two days during

the school year, the child performer's equivalent educational requirements as provided to the parent(s) or guardian(s) by the child performer's teacher and principal. The employer must verify the existence of the child performer's trust account within fifteen days of the start of employment. The employer must keep these documents on file at the place of employment. No Child Performer Permit is required for a child employed pursuant to an Employer Certificate of Group Eligibility.

Employers must transfer fifteen percent or more of the child performer's gross wages into a trust account. The trust account information must be provided to the employer by the parent or guardian within fifteen days of the commencement of the child performer's employment. The employer must provide the parent or guardian with a written record of the deductions from gross wages and proof of transfer to the trust account within five business days of such transfer. When the parent or guardian has not provided the trust account information, the employer must transfer the funds to the Comptroller to be placed in the child performer's holding fund. No trust fund need be established for a child employed pursuant to an Employer Certificate of Group Eligibility.

Employers must ensure that one or more persons are designated to serve as a responsible person to supervise the child performer and ensure that the employer acts in the child performer's interests during employment. Upon mutual agreement the child performer's parent or guardian may serve as the responsible person. For children employed pursuant to an Employer Certificate of Group Eligibility, the employer must provide at least one responsible person for every twenty children or fraction thereof so employed.

Employers must also ensure that a nurse is provided for child performers less than six (6) months of age. For child performers between the age of fifteen (15) days and six (6) weeks of age, a nurse must be provided for each three (3) or fewer infants. For child performers between the age of six (6) weeks to six (6) months of age, a nurse must be provided for each ten (10) or fewer infants.

If the child performer is unable to attend school for three or more consecutive days, the employer must employ a teacher to fulfill educational requirements pursuant to the education law. Additionally, when the child performer is employed for performances planned on the production schedule for only two days within a thirty day time period and it is subsequently determined that additional calls will be necessary, the child performer's employer shall provide a teacher on the third day of such employment and on each day thereafter during which the primary or secondary school regularly attended by the child performer is in session. The employer must employ one teacher per ten child performers, with the exception that up to twenty child performers may be taught per teacher if the child performers are not in more than two grade levels. The employer must also set aside a location where educational instruction will be provided.

Employers must comply with the restrictions on hours of work and work conditions for child performers in this part. The restrictions on hours of work are per child performer, not per employer. The required conditions of employment include the following: providing a time and a suitable place for meal periods; providing a place for the child performer to play, rest, or study; and, where age appropriate, providing access to a crib or playpen, nutritious food, and diapers. The employer may permit the parent, guardian, or responsible person to be within sight or sound of the child performer at all times during the employment. Where a child performer is less than six years old, the employer must allow a parent or guardian to accompany the child performer at all times at the workplace.

An employer may not employ a child performer in any activity that could result in harm to the child performer's health, education, morals or general welfare. Employers must allow a child performer at least twelve hours of rest between days of employment, and ten minutes of rest time for every four hours of work time. An employer may not "hold" child performers when work is finished in order to ensure that the full rest and recreation time is provided.

The employer must provide orientation training to the child performer, and either the responsible person or parents of child performers under the age of six, regarding the following: safety and health precautions for the venue or location; traffic patterns backstage or on location; safe waiting areas for child performers; restricted areas; location of rest areas/rooms, toilet, makeup areas, and other relevant rooms; emergency procedures; and whom to talk to about hazardous conditions and what actions to take.

**Professional Services:** Employer may be required to procure the services of a teacher certified by New York or with credentials recognized by New York. Employers may also be required to procure the services of a nurse, if they employ child performers less than six (6) months of age.

**Compliance Costs:** The application fee is generally capped at \$350.00 for an original Employer Certificate of Eligibility and \$200.00 for renewal of the Certificate. For applicants operating theaters of fewer than 500 seats, however, the application fee for an original Employer Certificate of Eligibility and the renewal fee of such Certificate are both capped at \$200.00.

An employer who is subject to these regulations shall be required to provide a certified teacher if the child performer is working for three or more consecutive days.

An employer must also designate one or more individuals to serve as a responsible person to supervise the child performer at all times during his or her employment. Upon mutual agreement the child performer's parent or guardian may serve as the responsible person. The responsible person shall not be assigned any other duty by the employer that interferes with the responsible person's duties. For children employed pursuant to an Employer Certificate of Group Eligibility, the employer must provide at least one responsible person for every twenty children or fraction thereof so employed.

**Economic and Technological Feasibility:** The regulation does not require any use of technology to comply. The Department will offer, but not mandate, on-line application and notification for certificates and permits. The Department will post information on its website when these applications are available on-line.

**Minimizing Adverse Impact:** Fees and paperwork are minimal. Therefore, the Department does not anticipate that the regulations will adversely impact small employers who comply with this Part. The Department conducted significant outreach to various groups that represent child performers and various employers who employ child performers, and asked them to make recommendations regarding the hours and conditions of work, as well as the educational needs, of child performers. The groups included the following: Actors' Equity Association, the League of American Theatres, the Motion Picture Association of America, Screen Actors Guild, the Actors Fund, the Alliance of Resident Theatres/New York, On Location Education, the NYS AFL-CIO, AFTRA, the Professional Performing Arts School, the Association of Independent Commercial Producers, the New York City Ballet, New York City Metropolitan Opera House, American Ballet Theatre, and the Broadway League. The Department also spoke with Dr. Jennifer Berman and Dr. Ron Zodkevitch, two noted psychiatrists, who have both spent considerable time working with child performers; Paul Petersen, a former child performer himself and President and Founder of A Minor Consideration, a non-profit organization that advocates for the concerns and protection of child performers; and Janet Pallozzotto, a mother of a former child performer and recognized advocate. The Department used input from these various groups and individuals to draft Part 186. Furthermore, Labor Law § 152(2)(a) explicitly states that a child performer who is working pursuant to permit requirements shall not be declared absent from school. The exception described above to the rule requiring that the employer employ one teacher per ten child performers is contained in the current SAG contract as was adopted in the regulations as means of lowering employer costs in a manner already familiar to the industry.

**Small Business and Local Government Participation:** The Department conducted outreach with small businesses and local governments during the rule making process. Notice of the rule making process was distributed to business organizations and to government entities, and posted on the website for comment. The Department spoke directly with industry employers representing the performing arts and with associations representing both businesses and child performers. As discussed in the Regulatory Impact Statement and above, the proposal incorporates many of their recommendations. The proposed rule will also be posted on the Department website with a reference to the rule making process in the State Register.

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

##### **1. Types and estimated numbers of rural areas:**

Any rural area where children are employed as performers will be affected. However, because performances taking place in a house of worship, or academy or school, as part of the regular services, curriculum, or activities thereof, or in a private home when the child's performance is not being recorded for commercial purposes, or are exempted from the requirements of this Part, except when such performances are part of a reality show, the impact will be greatly reduced for rural areas. Most of the affected areas will most likely be urban. The vast majority of child performers and their employers are found in and around New York City in theatre, the television and advertising industries, and in film. When theatre is taken on the road, it is traditionally found in cities.

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

Employers who employ child performers will have reporting, record-keeping and other compliance requirements as a result of statute and regulation. The burden will rest mostly on the employer, who must collect a copy of the Child Performer Permit, current emergency contact information, instructions regarding emergency medical treatment, information about the child performer's trust account, and the child performer's equivalent educational requirements from the child performer's parent or guardian. The employer must also provide the child performer's parent or guardian with a written record of deductions from gross wages and proof

of transfer to existing child performer trust accounts. All documents related to this rule must be available for inspection by the Department, school attendance officers, the state education department or local school district, and the Comptroller.

The employer must notify the Department of its employment of the child performer in writing at least five business days prior to the start of the employment. The employer must report the name, address, and last four digits of the social security number of each child performer being employed, a description of each child performer's intended performance, the dates, location(s) and duration of such intended performance, and the name and contact information of the employer's representative who will be at the scene of the performance. Additionally, the employer must notify the Department of any additions, deletions, or other modifications to the information reported in such a notice within twenty-four hours of the change.

The rule also requires employers to provide a teacher for any child performer who is unable to fulfill his or her regular educational requirements due to work. The teacher must be available on any day the child performer is employed that his or her regular school is in session. The teacher must be certified or have credentials recognized by the child performer's state or nation of residence. Therefore, employers may be required to engage the services of professional educators to comply with this rule.

The rule also requires employers to provide a nurse for any child performer less than six (6) months of age. Child performers between the age of fifteen (15) days and six (6) weeks of age must have a nurse provided for each three (3) or few babies. Child performers between the six (6) weeks of age and to six (6) months of age must have a nurse provided for each ten (10) or few infants.

### 3. Costs:

Employers who are covered by this rule shall enter into contracts with professional educators and nurses in order to comply with this rule. The cost for individual employers will depend upon the number of hours their child performers are employed and the age of the child performers. Nurses are only required for child performers who are less than six (6) months of age. Employers may also be required to hire an additional staff to function as a responsible person, who will be present to represent the best interests of the child. Such responsible person may be a parent or guardian, however; so the cost of such staffing will be dependent on the extent to which the employer utilizes the availability of parents or guardians, as well as on the extent to which the employer utilizes child performers.

Other than staffing needs, costs associated with the rule will be administrative. Employers must prepare applications and notices, as well as regular transfers of a percentage of the child performer's gross income to a trust account. The fee to employers for an Employer Certificate of Eligibility shall be \$350.00 for the initial Certificate and \$200.00 for each renewal (such Certificates being valid for a period of three years), except that the fee to employers operating theaters containing fewer than 500 seats shall be \$200.00 for the initial Certificate and \$200.00 for each renewal. It is not anticipated that any child performer employer would have to retain additional outside professional services to prepare these documents and financial transfers, although most, if not all, likely retain accountants and other staff to manage payroll and financial transfers for other performers.

Legal services may be required to negotiate, draft or review contracts with individuals providing teaching services or acting as the responsible person. It is anticipated that a vast majority of child performer employers in the State already have procurement or legal staff who regularly work on such contracts.

The cost to comply with this rule is minimal for child performers and their parent or guardian. There is no cost to apply for or renew a Child Performer Permit. There may be minimal costs incurred in obtaining a physician's statement that the child performer is physically fit.

### 4. Minimizing adverse impact:

This rule is necessary to implement Labor Law § 154-a. This enabling legislation requires the promulgation of regulations to determine the hours and conditions of work necessary to safeguard the health, education, morals and general welfare of child performers. As discussed in the other SAPA documents related to this rule making, the Department included recommendations within the proposal to minimize adverse impact without jeopardizing the physical or mental health, education or general welfare of the children involved.

### 5. Rural area participation:

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

### Job Impact Statement

The rule will facilitate the orderly employment of child performers in New York by codifying procedures and policies that have applied to child

performers for a number of years and further providing for the protection of child performers and assurances that the child performers will receive the education which is mandated under state law. This should increase the availability of child performers for the arts, entertainment, and advertising industries and bring more of this work to New York. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs or employment opportunities, therefore no Job Impact Analysis is required.

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## Office of Mental Health

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### NOTICE OF ADOPTION

#### Correction of an Inaccurate State Agency Name

**I.D. No.** OMH-35-10-00023-A

**Filing No.** 1100

**Filing Date:** 2010-10-25

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of Part 505 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, section 7.09

**Subject:** Correction of an inaccurate State agency name.

**Purpose:** To update the name of the Commission on Quality of Care and Advocacy for Persons with Disabilities within existing regulation.

**Text or summary was published** in the September 1, 2010 issue of the Register, I.D. No. OMH-35-10-00023-P.

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

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

#### Assessment of Public Comment

The agency received no public comment.

### NOTICE OF ADOPTION

#### Correction of an Inaccurate Address in Existing Regulation

**I.D. No.** OMH-35-10-00024-A

**Filing No.** 1101

**Filing Date:** 2010-10-25

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of Part 510 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 33.02; and Public Officers Law (Freedom of Information Law), art. 6

**Subject:** Correction of an inaccurate address in existing regulation.

**Purpose:** To correct the address of the Department of State, Committee on Open Government.

**Text or summary was published** in the September 1, 2010 issue of the Register, I.D. No. OMH-35-10-00024-P.

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

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

#### Assessment of Public Comment

The agency received no public comment.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

#### Medical Assistance Rates of Payment for Residential Treatment Facilities for Children and Youth

**I.D. No.** OMH-45-10-00006-P

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

**Proposed Action:** This is a consensus rule making to amend Part 578 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 43.02

**Subject:** Medical Assistance Rates of Payment for Residential Treatment Facilities for Children and Youth.

**Purpose:** To carve out the cost of pharmaceuticals from the per diem reimbursement rate for Residential Treatment Facilities.

**Text of proposed rule:** A new subdivision (o) is added to Section 578.14 of Title 14 NYCRR to read as follows:

(o) *Effective on or after January 1, 2011, and contingent upon federal approval, allowable operating costs shall not include the costs of pharmaceuticals listed on the New York State Medicaid formulary. Such costs may be reimbursed, as appropriate, on a fee-for-service basis by the Medicaid program.*

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

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

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

#### Consensus Rule Making Determination

This rule making is filed as a Consensus rule on the grounds that it is non-controversial and makes a technical correction. No person is likely to object to this rule since its purpose is to provide fiscal relief to residential treatment facility (RTF) providers and to improve access to services by children and adolescents who require the level of care provided in a RTF.

The amendment to Part 578 specifies that, on or after January 1, 2011, and contingent upon approval by the Centers for Medicare and Medicaid Services (CMS), allowable operating costs for RTFs for children and youth licensed by the Office shall not include the costs of pharmaceuticals listed on the New York State Medicaid formulary. These costs may be reimbursed, as appropriate, on a fee-for-service basis by the Medicaid program.

This amendment will provide financial relief to RTFs, as the costs of psychiatric medications have increased more rapidly than the rate of inflation. Currently, RTF providers are paid on an all-inclusive basis, and rates are set prospectively. The rates are based upon allowable costs reflected in the provider's cost report, which is submitted two fiscal years prior to the rate year. Thus, there is a significant lag before increased costs are reflected in the provider's rate. Because pharmaceutical costs are high, and tend to rise quickly, this lag can result in a serious cash flow problem for providers. This amendment will give fiscal relief to providers and ultimately reduce taxpayer costs.

In addition, this amendment should allow for an improvement in access to services by high-need children and adolescents who require the level of care provided in a RTF. Often, high-need individuals have complex health care problems, but some RTF providers have been unable to admit these patients due to the fact that the cost of purchasing the required drug treatments was found to be financially impossible for the provider. The carve out of the pharmaceutical costs included in the New York State Medicaid formulary will permit RTF providers to access medically necessary drugs, including HIV/AIDS-related medications, directly from the fee-for-service billing pharmacy.

**Statutory Authority:** Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Section 43.02 of the Mental Hygiene Law provides that the Commissioner has the power to establish standards and methods for determining rates of payment made by government agencies pursuant to Title 11 of Article 5 of the Social Services Law for services provided by facilities, including residential treatment facilities for children and youth licensed by the Office of Mental Health.

#### Job Impact Statement

A Job Impact Statement is not submitted with this notice because it is evident by the nature of the rule that there will be no adverse impact on jobs and employment opportunities. This rule specifies that, effective on or after January 1, 2011, and contingent upon the approval of the Centers for Medicare and Medicaid Services approval, allowable operating costs for residential treatment facilities (RTF) will not include the costs of pharmaceuticals listed on the New York State Medicaid formulary. These costs may, as appropriate, be reimbursed on a fee-for-service basis by the Medicaid program. This rule will provide financial relief to RTF providers and improve access to services provided in a RTF for children and adolescents.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Operation of Residential Programs for Adults

**I.D. No.** OMH-45-10-00009-P

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

**Proposed Action:** This is a consensus rule making to amend section 595.9 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09 and 31.04

**Subject:** Operation of Residential Programs for Adults.

**Purpose:** Clarify the due process protections of non-discharge ready residents who are no longer eligible for services.

**Text of proposed rule:** 1. Subdivision (c) of Section 595.9 of Title 14 NYCRR is amended to read as follows:

(c) A resident who is not discharge-ready or who is no longer eligible for services can be discharged provided discharge planning activities have been followed to the extent practicable under the circumstances, and one of the following conditions applies:

(1) the resident has permanently vacated the residence;

(2) the resident's condition has changed, as follows:

(i) the psychiatric or medical status of the resident has changed such that the resident requires inpatient hospital care; and/or

(ii) the resident's capacity for self preservation, as determined pursuant to section 595.16 of this Part, requires a level of care other than the residential program, or the resident is otherwise at risk due to requiring additional medical or psychiatric services or supports not available within the residential program; or

(iii) the psychiatric status of the resident has changed such that the services or support required can be provided in a less restrictive setting, and a clinically-appropriate less restrictive setting has been identified and is available;

(3) the resident fails to meet one or more material responsibilities for residency as described in section 595.10(a)(2) and (c) of this Part; or

(4) the resident's behavior poses an immediate and substantial threat to the health, safety and well-being of the resident or other individuals or creates a serious and ongoing disruption of the therapeutic environment of the residential program.

2. Subdivision (e) of Section 595.9 of Title 14 NYCRR is amended to read as follows:

(e) A discharge under paragraph (c)(2) of this section requires that a clinical assessment be conducted by clinical staff who are qualified by credentials, training and experience to conduct such assessments, provided, however, that a determination under subparagraph (c)(2)(iii) of this section, such services and support required can be provided in a less restrictive setting, must be made by a physician. If an individual is to be discharged because that individual is no longer capable of self preservation as determined pursuant to section 595.16 of this Part, or would be otherwise at risk due to requiring different or additional services, supports or physical environments not available within the residential program except to the extent required pursuant to the Federal Americans with Disabilities Act, the individual shall be notified in writing of the need for and intent to secure an appropriate alternative living arrangement.

3. Subdivision (f) of Section 595.9 of Title 14 NYCRR is amended to read as follows:

(f) A discharge under subparagraph (c)(2)(ii) or (iii) of this section, or a discharge under paragraph (c)(3) of this section, requires the following:

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

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

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

**Consensus Rule Making Determination**

This rulemaking is filed as a Consensus rule on the grounds that its purpose is to make technical corrections and is non-controversial. No person is likely to object to this rulemaking since it merely clarifies that the grounds for discharge of a person who is not discharge ready include situations where a determination by a physician has been made that the supports and services available at the community residence could be provided in a less restrictive setting. The current language of the regulations does not make it clear that this option is available for residents in these situations, which is an unintended and unfair result.

14 NYCRR Part 595 was developed to establish operating and administration standards for licensed residential programs serving adult individuals diagnosed with a severe and persistent mental illness. These programs have a rehabilitative focus; their purpose is to provide residential services which support and assist individuals with their goal of integration into the community.

Licensed residential programs subject to 14 NYCRR Part 595 receive reimbursement under the Medical Assistance program for the provision of community rehabilitation services. As such, they are subject to the standards set forth in 14 NYCRR Part 593, including eligibility requirements and service authorization and planning requirements.

14 NYCRR Part 595 requires programs subject to these standards to establish a discharge planning process with each resident, which begins at admission and continues throughout a resident's stay. A "discharge-ready" resident is one who fulfills discharge criteria, and agrees to the discharge.

However, Part 595 permits a program to discharge a resident without the resident's agreement, (i.e., the resident is "not discharge ready") under certain conditions outlined in subdivision (c) of Section 595.9. Acceptable reasons for discharge of "not discharge-ready" residents basically include: the resident has permanently vacated the residence; the resident's medical or psychiatric status requires a different level of care; the resident fails to meet a material responsibility of residency; and the resident's behavior poses an immediate threat to the health or safety of the resident or others.

In 2007, amendments were made to Section 595.9 to establish an enhanced review process to afford sufficient due process protections to residents being discharged. The amendments also set some additional requirements for both programs and OMH to follow in establishing and implementing grievance procedures for residents who are being discharged. This process was intended to strike an appropriate balance between the recognition that residential programs for adults are treatment programs, and the practical reality that they also serve as a residence to the individual as long as he or she remains admitted to the program.

This process is crafted as a dispute mediation process. It is designed to ensure that residents who providers seek to discharge before they are discharge ready are given an opportunity to be heard. The purpose of the process is to encourage both parties in a dispute to identify mutually acceptable solutions to the problems precipitating the action, whenever that is possible. It is not intended to be an adversarial process wherein residents or providers require legal representation to defend their rights, although residents are free to include advocates if they wish (which could be a family member, friend, or peer). The process was carefully structured to ensure that time frames were reasonable and fair to both residents and providers. The time frames are also important because mediation is usually more successful when the process is initiated soon after a conflict has arisen.

Over the past three years, confusion has arisen with respect to what due process applies in a situation wherein a resident has progressed in his/her recovery to the point where services and support available at the residence can be provided in a less restrictive setting but the resident simply does not want to leave the community residence. Although a resident in this circumstance may be considered "not discharge ready" in accordance with Section 595.9(b), and the due process procedures established in Section 595.9 were intended to apply to this situation, the regulatory language does not make this clear. However, the fact that a resident refuses to leave does not negate the obligation of the provider to offer services to the resident.

The proposed amendment rectifies this situation by clarifying that grounds for discharge of a person who is not discharge ready include situations where a determination by a physician has been made that the services and available at the community residence could be provided in a less restrictive setting. It would then be apparent that a person in this circumstance would be entitled to all of the due process protections that are currently available for residents whose discharges are based on a determination that they need a level of care other than the residential program. Because existing timeframes for the review of a resident's objections are brief, residents receive quick resolution of their issues so that the beds will not be held empty for any longer than necessary. Furthermore, because a determination that a person could receive supports and services in a less restrictive setting is not intended to indicate that the services are not medically necessary, the provider will be expected to continue to provide those services pending the placement of the person in the less restrictive setting.

These proposed clarifying amendments will benefit both residents and providers. By ensuring that residents who could receive services in a less restrictive setting, are entitled to the due process protections available to other residents who require a different (i.e., more intense) level of care, an opportunity to be heard is provided wherein their concerns and objections can be reviewed and hopefully resolved, and they can move forward in their progress and recovery. Providers will then be better able to offer the supports and services available in these residential settings to persons who clinically need those services at that level of care. It also will help to ensure that providers are only seeking Medical Assistance reimbursement for services that are, in fact, medically necessary.

Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction and to set standards of quality and adequacy of facilities, equipment, personnel, services, records and programs for the provision of services for persons with mental illness pursuant to an operating certificate.

**Job Impact Statement**

The proposed amendments to 14 NYCRR Part 595 will not adversely impact jobs or employment opportunities in New York State, nor should it impact existing employees and volunteers of residential programs for adults. The amendments provide an additional administrative review level for discharge determinations for certain non discharge-ready residents who wish to have these determinations reviewed.

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## Power Authority of the State of New York

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**ERRATUM**

A Notice of Proposed Rule Making, I.D. No. PAS-42-10-00001-P, pertaining to Rates for the Sale of Power and Energy (New York City), published in the October 20, 2010 issue of the *State Register* contained an incorrect Proposed Action. The correct Proposed Action follows:

**Proposed Action:** Increase in rates for sale of firm power and related tariff changes applicable to governmental customers located in New York City.

A Notice of Proposed Rule Making, I.D. No. PAS-42-10-00002-P, pertaining to Rates for the Sale of Power and Energy (Westchester County), published in the October 20, 2010 issue of the *State Register* contained an incorrect Substance of Proposed Rule. The correct substance follows:

**Substance of proposed rule making:** Pursuant to the New York Public Authorities Law, Section 1005, the Power Authority of the State of New York (the "Authority") proposes to revise the rates charged to its Westchester County Governmental Customers ("Westchester Customers") for Rate Year 2011.

The Authority proposes to decrease the base production rates by 16.37% compared to 2010 rates charged to the Westchester Customers.

Written comments on the proposed revisions will be accepted through Monday, December 6, 2010, at the address below. *For further information, contact:* Power Authority of the State of New York, Karen

Delince, Corporate Secretary, 123 Main St., 11-P, White Plains, NY 10601, (914) 390-8085, (914) 390-8040 (fax), secretarys.office@nypa.gov

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## Public Service Commission

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### NOTICE OF ADOPTION

#### The Provision of Water Service and the Request for Waiver of Tariff Provisions

**I.D. No.** PSC-38-09-00007-A

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and Thomas J. Farone and Son, Inc. for the provision of water service and waiver of tariff provisions.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 89-b

**Subject:** The provision of water service and the request for waiver of tariff provisions.

**Purpose:** To approve the provision of water service and the request for waiver of tariff provisions.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and Thomas J. Farone and Son, Inc. for the provision of water service and waiver of tariff provisions referencing 16 NYCRR Parts 501 and 502, subject to the terms and conditions set forth in the order.

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

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

#### Assessment of Public Comment

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

(07-W-1445SA1)

### NOTICE OF ADOPTION

#### Approval of the Itron Open Way Electricity Meter Line for Use in New York State

**I.D. No.** PSC-01-10-00018-A

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving Itron Incorporated's petition to allow the Itron Open Way Electricity Meter line for use in New York State.

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

**Subject:** Approval of the Itron Open Way Electricity Meter line for use in New York State.

**Purpose:** To approve the Itron Open Way Electricity Meter line for use in New York State.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving Itron Incorporated's petition to allow the Itron Open Way Electricity Meter line for use in New York State.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or

social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

#### Assessment of Public Comment

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

(09-E-0860SA1)

### NOTICE OF ADOPTION

#### Approving the IMAC Systems Inc. Meter Pulser to be Used As an Automatic Meter Reading Device in New York State

**I.D. No.** PSC-27-10-00017-A

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the IMAC Systems Inc. Meter Pulser to be used as an automatic meter reading device in New York State.

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

**Subject:** Approving the IMAC Systems Inc. Meter Pulser to be used as an automatic meter reading device in New York State.

**Purpose:** To approve the IMAC Systems Inc. Meter Pulser to be used as an automatic meter reading device in New York State.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the IMAC Systems Inc. Meter Pulser to be used as an automatic meter reading device in New York State.

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

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

#### Assessment of Public Comment

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

(10-G-0280SA1)

### NOTICE OF ADOPTION

#### Approving the Rio Tronics Pulse Initiator to be Used As an Automatic Meter-Reading Device in New York State

**I.D. No.** PSC-28-10-00008-A

**Filing Date:** 2010-10-20

**Effective Date:** 2010-10-20

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the Rio Tronics Pulse Initiator to be used as an automatic meter-reading device in New York State.

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

**Subject:** Approving the Rio Tronics Pulse Initiator to be used as an automatic meter-reading device in New York State.

**Purpose:** To approve the Rio Tronics Pulse Initiator to be used as an automatic meter-reading device in New York State.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the Rio Tronics Pulse Initiator to be used as an automatic meter-reading device in New York State.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-

2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(10-G-0301SA1)

**NOTICE OF ADOPTION**

**Proposed Treatment of Refunds from Tennessee Gas Pipeline Company**

**I.D. No.** PSC-29-10-00007-A  
**Filing Date:** 2010-10-20  
**Effective Date:** 2010-10-20

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the proposed treatment of refunds from Tennessee Gas Pipeline Company related to PCB clean up costs as filed by the New York State Utilities.

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

**Subject:** Proposed treatment of refunds from Tennessee Gas Pipeline Company.

**Purpose:** To approve the treatment of refunds from Tennessee Gas Pipeline Company related to PCB clean up costs filed by NYS Utilities.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the proposed treatment of refunds from Tennessee Gas Pipeline Company related to PCB clean up costs as filed by The Brooklyn Union Gas Company d/b/a National Grid NY, KeySpan Gas East Corporation d/b/a National Grid, Niagara Mohawk Power Corporation d/b/a National Grid, Central Hudson Gas & Electric Corporation, Consolidated Edison Company of NY, Inc., New York State Electric & Gas Corporation, and Orange and Rockland Utilities, Inc., subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(10-G-0251SA1)

**NOTICE OF ADOPTION**

**Approving the Mercury Instruments SIP-CB to be Used As a Gas Meter Recording Collection and Transmitting Device**

**I.D. No.** PSC-30-10-00007-A  
**Filing Date:** 2010-10-20  
**Effective Date:** 2010-10-20

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the Mercury Instruments SIP-CB to be used as a gas meter recording collection and transmitting device in New York State.

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

**Subject:** Approving the Mercury Instruments SIP-CB to be used as a gas meter recording collection and transmitting device.

**Purpose:** To approve the Mercury Instruments SIP-CB to be used as a gas meter recording collection and transmitting device in NYS.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the Mercury Instruments SIP-CB to be used as a gas meter recording collection and transmitting device in New York State.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(10-G-0315SA1)

**NOTICE OF ADOPTION**

**Approving the IMAC Systems Pulsimatic Transmitter to be Used As an Automatic Meter-Reading Device in NYS**

**I.D. No.** PSC-31-10-00006-A  
**Filing Date:** 2010-10-22  
**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the IMAC Systems Pulsimatic Transmitter to be used as an automatic meter-reading device in New York State.

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

**Subject:** Approving the IMAC Systems Pulsimatic Transmitter to be used as an automatic meter-reading device in NYS.

**Purpose:** To approve the IMAC Systems Pulsimatic Transmitter to be used as an automatic meter-reading device in New York State.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the IMAC Systems Incorporated Pulsimatic Transmitter to be used as a gas meter recording collection and transmitting device in New York State.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(10-G-0311SA1)

**NOTICE OF ADOPTION**

**The Provision of Water Service and the Request for Waiver of Tariff Provisions**

**I.D. No.** PSC-31-10-00010-A  
**Filing Date:** 2010-10-22  
**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and KO-HO Realty LLC for the provision of water service and waiver of tariff provisions.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 89-b

**Subject:** The provision of water service and the request for waiver of tariff provisions.

**Purpose:** To approve the provision of water service and the request for waiver of tariff provisions.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and KO-HO Realty, LLC for the provision of water service and waiver

of tariff provisions referencing 16 NYCRR Parts 501 and 502, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(09-W-0598SA1)

### NOTICE OF ADOPTION

#### The Provision of Water Service and the Request for Waiver of Tariff Provisions

**I.D. No.** PSC-31-10-00011-A

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and Malta Properties 1, LLC for the provision of water service and waiver of tariff provisions.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 89-b

**Subject:** The provision of water service and the request for waiver of tariff provisions.

**Purpose:** To approve the provision of water service and the request for waiver of tariff provisions.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the amended joint petition of Saratoga Water Services, Inc. Malta Properties 1, LLC for the provision of water service and waiver of tariff provisions referencing 16 NYCRR Parts 501 and 502, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(09-W-0641SA1)

### NOTICE OF ADOPTION

#### The Provision of Water Service and the Request for Waiver of Tariff Provisions

**I.D. No.** PSC-31-10-00012-A

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and Bluth Company, LLC for the provision of water service and waiver of tariff provisions.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 89-b

**Subject:** The provision of water service and the request for waiver of tariff provisions.

**Purpose:** To approve the provision of water service and the request for waiver of tariff provisions.

**Substance of final rule:** The Commission, on October 14, 2010, adopted

an order approving the amended joint petition of Saratoga Water Services, Inc. Bluth Company, LLC for the provision of water service and waiver of tariff provisions referencing 16 NYCRR Parts 501 and 502, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(09-W-0645SA1)

### NOTICE OF ADOPTION

#### The Provision of Water Service and the Request for Waiver of Tariff Provisions

**I.D. No.** PSC-32-10-00014-A

**Filing Date:** 2010-10-22

**Effective Date:** 2010-10-22

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

**Action taken:** On 10/14/10, the PSC adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and Malta Mobile Acres, Inc. for the provision of water service and waiver of tariff provisions.

**Statutory authority:** Public Service Law, sections 4(1), 20(1) and 89-b

**Subject:** The provision of water service and the request for waiver of tariff provisions.

**Purpose:** To approve the provision of water service and the request for waiver of tariff provisions.

**Substance of final rule:** The Commission, on October 14, 2010, adopted an order approving the amended joint petition of Saratoga Water Services, Inc. and Malta Mobile Acres, Inc. for the provision of water service and waiver of tariff provisions referencing 16 NYCRR Parts 501 and 502, subject to the terms and conditions set forth in the order.

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

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

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.  
(09-W-0541SA1)

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

#### Waiver of the Requirements of 16 NYCRR, Part 96 to Permit Project Construction As Designed

**I.D. No.** PSC-45-10-00013-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Concern for Independent Living for waiver of the requirements of 16 NYCRR, Part 96 to permit project construction as designed.

**Statutory authority:** Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

**Subject:** Waiver of the requirements of 16 NYCRR, Part 96 to permit project construction as designed.

**Purpose:** To consider the request for waiver from 16 NYCRR, Part 96, by Concern for Independent Living for 815 E. NY Ave., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering to grant, deny or modify, in whole or part, the petition filed by Concern for Independent Living for waiver of the requirements of 16 NYCRR, Part 96 to permit project construction as designed for 815 East New York Avenue, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(10-E-0495SP1)

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

**Whether Keyspan Should be Permitted to Transfer a Parcel of Property Located at 809-873 Neptune Ave., Brooklyn, NY**

**I.D. No.** PSC-45-10-00014-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, modify or deny, in whole or in part, the petition of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (Keyspan), requesting approval to transfer a parcel of property.

**Statutory authority:** Public Service Law, section 70

**Subject:** Whether Keyspan should be permitted to transfer a parcel of property located at 809-873 Neptune Ave., Brooklyn, NY.

**Purpose:** To decide whether to approve Keyspan's request to transfer a parcel of property in 809-873 Neptune Ave., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering a petition from The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (Keyspan), requesting approval to transfer a parcel of property owned by Keyspan and located at 809-873 Neptune Ave., Brooklyn, New York to Steel Arrow, LLC. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

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

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

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

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

(08-G-0071SP2)

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

**Use of Monies Realized From the Dissolution of the Rural Telephone Bank**

**I.D. No.** PSC-45-10-00015-P

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

**Proposed Action:** The Commission is considering a request by The Hancock Telephone Company to reimburse its treasury from monies it realized as a result of the dissolution of the Rural Telephone Bank for the purchase of new equipment.

**Statutory authority:** Public Service Law, section 94(2)

**Subject:** Use of monies realized from the dissolution of the Rural Telephone Bank.

**Purpose:** To allow The Hancock Telephone Company to reimburse its treasury.

**Substance of proposed rule:** The Hancock Telephone Company (the company) is requesting permission to reimburse its treasury \$21,082 from the intrastate portion (\$41,442 total company) of monies it realized as a result of the dissolution of the Rural Telephone Bank (RTB) for digital subscriber line (DSL) equipment and cooling equipment. The RTB dissolution proceeds were deferred in New York State Public Service Commission Case 06-C-0314. The company's intrastate RTB deferral balance as of August 31, 2010 was \$645,122. The company experienced an unexpected breakdown of central office cooling equipment, which led to a need for immediate replacement. Also, in order to keep up with its customers' increasing demand for Internet bandwidth, the company purchased additional DSL equipment which will enhance its DSL network and provide it with the ability to offer future broadband services. The Commission is considering whether to grant, deny or modify, in whole or in part, approval of 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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

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

(10-C-0434SP1)

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

**Waiver of the Elimination of the Declining Block Bulk Electric Delivery Rate in Service Class 7**

**I.D. No.** PSC-45-10-00016-P

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

**Proposed Action:** The Commission is considering whether to grant, modify or deny, in whole or in part the petition of Dickerson Pond Association, Cortlandt Manor, NY for waiver of the elimination of the declining block bulk electric delivery rate in Service Class (SC) 7.

**Statutory authority:** Public Service Law, sections 65(1), (2), (4), (5), 66(1), (12) and (14)

**Subject:** Waiver of the elimination of the declining block bulk electric delivery rate in Service Class 7.

**Purpose:** Waiver of the elimination of the declining block bulk electric delivery rate in Service Class 7.

**Substance of proposed rule:** The Commission is considering a petition filed by Dickerson Pond Association for a waiver regarding Consolidated Edison Company of New York, Inc.'s bulk electric delivery rate. The Commission may adopt, reject or modify, in whole or in part, Dickerson Pond Association's petition.

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

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

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

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

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

(10-E-0498SP1)

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

**Rider U - Distribution Load Relief Program (DLRP)**

**I.D. No.** PSC-45-10-00017-P

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

**Proposed Action:** The Commission is considering a proposed tariff filing by Consolidated Edison Company of New York, Inc. to make various changes in its rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 9.

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

**Subject:** Rider U - Distribution Load Relief Program (DLRP).

**Purpose:** To revise Rider U to enhance participants' understanding of DLRP options.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. (Con Edison) to revise Rider U - Distribution Load Relief Program (DLRP) to enhance participants' understanding of DLRP options, ease participation, streamline implementation and better align DLRP with other demand response programs. The proposed filing has an effective date of January 24, 2011. The Commission may make changes to other utilities' demand response programs in its order in this case.

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

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

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

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

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

(10-E-0530SP1)

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

**Increase of Previously Approved Financing Limit in Connection with a Proposed Generator**

**I.D. No.** PSC-45-10-00018-P

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

**Proposed Action:** The Public Service Commission is considering a petition by the Connecticut Municipal Electric Energy Cooperative to increase the previously approved financing limit in connection with a 2.5 MW generator proposed to be located on Fishers Island, New York.

**Statutory authority:** Public Service Law, sections 4(1), 66(1) and 69

**Subject:** Increase of previously approved financing limit in connection with a proposed generator.

**Purpose:** To consider a petition to increase the previously approved financing limit in connection with a proposed generator.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve a petition by the Connecticut Municipal Electric

Energy Cooperative (CMEEC), to increase to \$35 million the previously approved financing limit of \$30 million, in connection with CMEEC's proposed construction and operation of a 2.5 MW electric generator to be located on a leased parcel located within the utility yard of Fishers Island Electric Corporation (FIEC). The project will provide a local source of backup electric power to FIEC and provide CMEEC with peak shaving capacity. The Commission may approve, modify or reject, in whole or in part, the relief requested.

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

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

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

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

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

(10-E-0529SP1)

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

**Minor Rate Filing**

**I.D. No.** PSC-45-10-00019-P

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

**Proposed Action:** The Commission is considering a proposed filing by Bath Electric, Gas & Water Systems to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 1—Electricity.

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

**Subject:** Minor Rate Filing.

**Purpose:** To increase annual electric revenues by approximately \$272,965 or 6.3%.

**Substance of proposed rule:** The Commission is considering a proposal filed by Bath Electric, Gas & Water Systems (Bath) which would increase its annual electric revenues by about \$272,965 or 6.3%. The proposed filing has an effective date of April 1, 2011. The Commission may adopt in whole or in part, modify or reject Bath's proposal.

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

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

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

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

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

(10-E-0532SP1)

## Department of State

### EMERGENCY RULE MAKING

#### Installation of Carbon Monoxide Alarms in Residential Buildings

**I.D. No.** DOS-45-10-00007-E

**Filing No.** 1103

**Filing Date:** 2010-10-25

**Effective Date:** 2010-10-25

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

**Action taken:** Amendment of sections 1220.1 and 1225.1 of Title 19 NYCRR.

**Statutory authority:** Executive Law, sections 377(1), 378(1) and (5-a)

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

**Specific reasons underlying the finding of necessity:** Adoption of this rule on an emergency basis is required to preserve public safety by requiring the installation of carbon monoxide alarms in all one- and two-family dwellings, townhouse dwellings, dwelling accommodations in buildings owned as condominiums or cooperatives, and multiple dwellings, without regard to the date of construction or sale of such buildings, as required by Amanda's Law (Chapter 367 of the Laws of 2009), which will reduce the number of deaths and injuries caused by carbon monoxide poisoning and, in the words of the sponsor of the bill that became Amanda's Law, "create safer homes for New Yorkers;"

**Subject:** Installation of carbon monoxide alarms in residential buildings.

**Purpose:** To implement Executive Law section 378(5-a), as amended by Chapter 367 of the Laws of 2009.

**Substance of emergency rule:** Provisions relating to the installation of carbon monoxide alarms in residential buildings are currently found in section RR313.4 of the Residential Code of New York State (the publication referred to and incorporated by reference in 19 NYCRR Part 1220) and section F611 of the Fire Code of New York State (the publication referred to and incorporated by reference in 19 NYCRR Part 1225). The current provisions require the installation of carbon monoxide alarms in one- and two-family dwellings, townhouses and dwelling accommodations in condominiums and cooperatives constructed or offered for sale after July 30, 2002 and in multiple dwellings constructed or offered for sale after August 9, 2005. This rule implements Amanda's Law (Chapter 367 of the Laws of 2009) by amending section RR313.4 of the Residential Code of New York State and section F611 of the Fire Code of New York State to require the installation of carbon monoxide alarms in all one- and two-family dwellings, townhouses, dwelling accommodations in condominiums and cooperatives, and multiple dwellings, without regard to the date of construction or sale.

The rule adds definitions of terms relevant to the carbon monoxide alarm provisions.

The requirements for newly building constructed after January 1, 2009 are summarized as follows:

(1) in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives constructed on or after January 1, 2008, a carbon monoxide alarm must be installed within each dwelling unit or sleeping unit, on each story where a sleeping area or a carbon monoxide source is located;

(2) in Group I-1 occupancies constructed on or after January 1, 2008, a carbon monoxide alarm must be installed on each story having a sleeping area and on each story where a carbon monoxide source is located;

(3) in Group R occupancies, nursery schools, bed and breakfasts, and multiple dwellings constructed on or after January 1, 2008 and not covered by (1) or (2), a carbon monoxide alarm must be installed in each dwelling unit or sleeping unit where a carbon monoxide source is located (and, in the case of a multiple-story dwelling unit or sleeping unit, on each story where a sleeping area or a carbon monoxide source is located), and in each dwelling unit or sleeping unit on the same story as a carbon monoxide source;

(4) all carbon monoxide alarms must be hard-wired to the building wiring and, where more than one alarm is required, the alarms must be interconnected; and

(5) carbon monoxide alarms shall be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

The requirements for buildings constructed prior to January 1, 2008 are summarized as follows:

(1) in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives constructed prior to January 1, 2008, a carbon monoxide alarm must be installed within each dwelling unit or sleeping unit, on the lowest story having a sleeping area;

(2) in Group I-1 occupancies constructed prior to January 1, 2008, a carbon monoxide alarm must be installed on each story having a sleeping area;

(3) in Group R occupancies, nursery schools, bed and breakfasts, and multiple dwellings constructed prior to January 1, 2008 and not covered by (1) or (2), a carbon monoxide alarm must be installed in each dwelling unit or sleeping unit where a carbon monoxide source is located (in the case of a multiple-story dwelling unit or sleeping unit, the alarm must be installed on the lowest story having a sleeping area), and in each dwelling unit or sleeping unit on the same story as a carbon monoxide source;

(4) battery operated, cord-type and direct-plug alarms may be used, and the alarms are not required to be interconnected; and

(5) Carbon monoxide alarms shall be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

In the case of a building of any age that has no commercial or on-site power source, the alarms must be battery operated and need not be interconnected.

Carbon monoxide alarms are not required if no carbon monoxide source is located in or attached to the building.

All carbon monoxide alarms must be listed and labeled as complying with UL 2034 or CAN/CSA 6.19, and must be installed in accordance with the manufacturer's installation instructions.

Carbon monoxide alarms shall not be removed or disabled, except for service or repair purposes.

**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 December 28, 2010.

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

#### Summary of Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY.

Executive Law section 377 section 377(1) authorizes the State Fire Prevention and Building Code Council to amend the provisions of the New York State Uniform Fire Prevention and Building Code ("Uniform Code") from time to time. Executive Law section 378(1) directs that the Uniform Code shall address standards for safety and sanitary conditions. Executive Law section 378(5-a), as amended by Chapter 367 of the Laws of 2009, provides that the Uniform Code must require one- and two-family dwellings, dwelling accommodations in a building owned as a condominium or cooperative, and multiple dwellings to be equipped with carbon monoxide alarms.

##### 2. LEGISLATIVE OBJECTIVES.

Memoranda accompanying the bills that most recently amended subdivision (5 a) of Executive Law section 378 included the following justifications:

"This legislation is aimed at preventing more unnecessary deaths due to carbon monoxide poisoning. . . . As with smoke detector/fire alarms many years ago, carbon monoxide alarms have earned the respect of the fire service as a valuable tool in the saving of lives. Everyone recognizes that carbon monoxide kills if not responded to immediately. The most serious quality of CO is that, unlike smoke, it is virtually undetectable, even when someone is awake and alert. Chapter 257 of the laws of 2002 required carbon monoxide alarms be installed in one and two family dwellings and in condominiums and cooperatives that are constructed or sold in order to prevent the loss of life. . . . This bill requires multiple dwelling units of three or more families to install carbon monoxide alarms as well."

"Current law requires residential dwellings that are constructed or offered for sale after July 30, 2002 to be updated with a carbon monoxide detector. This legislation would remove the construction and sale provisions, leaving it a new requirement that all homes regardless of construction or sale date be outfitted with a carbon monoxide detector. On January 17th, 2009 Amanda Hansen, a 16 year old from West Seneca, New York, died from carbon monoxide poisoning from a defective boiler while at a sleepover at her friend's house. This legislation would create safer homes for New Yorkers and also prevent future tragedies from occurring."

The Legislative objective sought to be achieved by this rule is a reduction in the number of deaths and injuries caused by CO poisoning.

##### 3. NEEDS AND BENEFITS.

CO is an invisible, odorless gas that is generated by the incomplete

combustion of carbonaceous fuels such as fuel oil, natural gas, kerosene and wood. CO poisoning results from displacement of oxygen in the blood supply by carboxyhaemoglobin, reducing oxygen supply to the brain. In non fire situations, elevated CO levels may be caused by improperly installed or maintained fuel fired appliances, motor vehicles operated in enclosed garages, or appliances intended for outdoor use being used indoors during power failures. As CO is not detectable by the senses, its presence and concentration can only be determined by instruments.

The rule provides that CO alarms shall be listed and labeled as complying with UL 2034 or CAN/CSA 6.19, the consensus standards for single and multiple station CO alarms in the United States and Canada. Listing of alarm devices ensures their safety and compliance with performance standards. The sensitivity standard in UL 2034 and CAN/CSA 6.19 is based on an alarm response to specified concentrations of CO (in parts per million) within specified time frames. These are based on limiting carboxyhaemoglobin saturation to 10 percent, which earlier studies indicated would have no significant effects on human subjects.

A number of different sources were reviewed to develop an estimate of the annual number of fatalities attributable to unintentional, non fire, building source CO poisoning. The sources reviewed contain estimates ranging between 200 and 1200, nationally. The sources include the U.S. Consumer Product Safety Commission (CPSC), California Air Resources Board, the Journal of the American Medical Association, the Morbidity and Mortality Weekly Report (published by the U.S. Centers for Disease Control) and studies by Dr. David Penney (Wayne State University School of Medicine). Extrapolating these data to New York State, excluding New York City, leads the Code Council to expect between 8 and 48 annual fatalities. Using specific coding in the Vital Statistics Death File prepared by its Bureau of Injury Prevention, the New York State Department of Health (DOH) estimates 14 fatalities annually.

In situations where CO poisoning does not result in death, it may cause significant injuries and long term health consequences. In an observation in Archives of Neurology (Vol. 57, No. 8, August 2000), Sohn et al noted the incidence of Parkinsonism and intellectual impairment in a married couple who experienced CO poisoning simultaneously. While it was noted that both individuals showed complete recovery after thirteen months, the observation is suggestive of additional potential consequences. It should also be noted that CPSC has estimated an average of 10,000 injuries or hospital emergency room visits annually from CO poisoning. Based solely on population, New York State (excluding New York City) could experience approximately 400 injuries annually.

In an article in the American Journal of Forensic Medicine and Pathology (Vol. 10, No. 1, 1989), I. R. Hill notes that fine discriminatory functions begin to be impaired at 5 percent saturations, with significant decrements being noted at the 10 percent saturation level. Hill also notes that headaches occur at 20 to 30 percent saturation, and that nausea, dizziness and muscular weakness occur at 30 to 40 percent. Thus, CO poisoning will affect the judgment and capability of persons to evacuate or take other appropriate actions well before concentrations reach fatal levels.

#### 4. COSTS.

The Uniform Code's current requirements regarding the installation of CO alarms in newly constructed buildings have been in effect since January 1, 2008 (the effective date of the most recent major revision of the Uniform Code). Those requirements are continued without substantial change by this rule. Therefore, this rule imposes no new requirement on regulated parties who construct new buildings.

Under this rule, owners of residential buildings constructed prior to January 1, 2008 will also be required to install one or more CO alarms in the places specified in this rule. The requirements for buildings constructed prior to January 1, 2008 are summarized as follows:

(1) in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives constructed prior to January 1, 2008, a CO alarm must be installed within each dwelling unit or sleeping unit, on the lowest story having a sleeping area;

(2) in Group I-1 occupancies constructed prior to January 1, 2008, a CO alarm must be installed on each story having a sleeping area;

(3) in Group R occupancies, nursery schools, bed and breakfasts, and multiple dwellings constructed prior to January 1, 2008 and not covered by (1) or (2), a CO alarm must be installed in each dwelling unit or sleeping unit where a CO source is located (in the case of a multiple-story dwelling unit or sleeping unit, the alarm must be installed on the lowest story having a sleeping area), and in each dwelling unit or sleeping unit on the same story as a CO source;

(4) battery operated, cord-type and direct-plug alarms may be used, and the alarms are not required to be interconnected; and

(5) CO alarms shall be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the CO alarm(s). Cord or plug connected and

battery operated CO alarms are available in home centers and over the internet for \$20 to \$50. Direct wired devices with interconnection capability cost up to \$80. Installation costs in new construction are estimated to be not more than \$50 per device. The annual costs of complying with this rule will include the cost of maintaining each alarm in operative condition, such maintenance to include cleaning the alarm and replacing of the alarm's battery (typically once a year). In addition, most manufacturers recommend that their alarms be checked using the alarm's "test" button on a periodic basis (typically once a week) and replaced on a periodic basis (typically once every five years).

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

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

First, if the State or any local government owns a one- and two-family dwelling, townhouse, dwelling unit in a condominium or cooperative, or multiple dwelling that is not now equipped with CO alarms, the State or such local government, as the case may be, will be required to install one or more CO alarms in the building.

Second, the authorities responsible for administering and enforcing the Uniform Code (typically, cities, towns, villages and, in some cases, counties) will have additional items to verify in the process of reviewing building permit applications, conducting construction inspections, and (where applicable) conducting periodic fire safety and property maintenance inspections. However, the need to verify the installation of required CO alarms will not have a significant impact on the permitting process or inspection process.

#### 5. PAPERWORK.

This rule imposes no new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

#### 6. LOCAL GOVERNMENT MANDATES.

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

First, any county, city, town, village, school district, fire district or other special district that owns a one- and two-family dwelling, townhouse, dwelling unit in a condominium or cooperative, or multiple dwelling that is not now equipped with CO alarms will be required to install one or more CO alarms in the building.

Second, cities, towns, villages and counties that administer and enforce the Uniform Code will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code.

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

#### 7. DUPLICATION.

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

#### 8. ALTERNATIVES.

Consideration was given to adopting a rule requiring all CO alarms, including those to be installed in buildings constructed prior to January 1, 2008, to be hard wired and interconnected. This alternative was rejected as it would have unnecessarily increased the cost of bringing pre-2008 buildings into compliance with the new statutory mandate as set forth in subdivision (5 a) of section 378 of the Executive Law.

#### 9. FEDERAL STANDARDS.

There are no standards of the Federal Government which address the subject matter of the rule. The U.S. Consumer Product Safety Commission does recommend installation of CO alarms.

#### 10. COMPLIANCE SCHEDULE.

Regulated persons who own buildings constructed prior to 2008 will be able to comply with this rule by purchasing and installing readily available, battery operated CO alarms.

Requirements for installing CO alarms in newly constructed buildings have been in place since January 1, 2008 and are not changed by this rule. Regulated persons constructing new buildings will continue to be able to comply with this rule by installing hard-wired CO alarms as part of the construction process.

### *Regulatory Flexibility Analysis*

#### 1. EFFECT OF RULE:

The State Uniform Fire Prevention and Building Code (Uniform Code) currently requires that all residential buildings (one- and two-family dwellings, townhouses, dwelling accommodations in condominiums and cooperatives, and multiple dwellings) constructed after January 1, 2008, and certain residential buildings constructed prior to January 1, 2008, be equipped with one or more carbon monoxide alarms. This rule will amend the Uniform Code to require that all one- and two-family dwellings, all townhouses, all dwelling units in condominiums and cooperatives and all

multiple dwellings, without regard to the date of construction or sale, be equipped with one or more carbon monoxide alarms. Therefore, this rule will affect any small business or local government that owns a residential building in which carbon monoxide alarms were not previously.

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

#### 2. COMPLIANCE REQUIREMENTS:

No reporting or record keeping requirements are imposed upon regulated parties by the rule.

Since this rule amends the Uniform Code, local governments that administer and enforce the Uniform Code will be required to check for compliance with this rule when reviewing applications for building permits, when performing construction inspections, and when performing periodic fire safety and property maintenance inspections.

In addition, small businesses and local governments the own or construct one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, or multiple dwellings will be required to install, use and maintain carbon monoxide alarms in accordance with the rule's provisions. The requirements applicable to newly constructed buildings differ from the requirements applicable to existing buildings, and will be discussed separately.

Newly Constructed Buildings. The Uniform Code's current requirements regarding the installation of carbon monoxide alarms in newly constructed buildings have been in effect since January 1, 2008 (the effective date of the most recent major revision of the Uniform Code). Those requirements are continued without substantial change by this rule. Therefore, this rule imposes no new requirement on regulated parties who construct new buildings. The current requirements for newly constructed buildings (which are continued by this rule) are summarized as follows:

(1) in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives constructed on or after January 1, 2008, a carbon monoxide alarm must be installed within each dwelling unit or sleeping unit, on each story where a sleeping area or a carbon monoxide source is located;

(2) in Group I-1 occupancies constructed on or after January 1, 2008, a carbon monoxide alarm must be installed on each story having a sleeping area and on each story where a carbon monoxide source is located;

(3) in Group R occupancies, nursery schools, bed and breakfasts, and multiple dwellings constructed on or after January 1, 2008 and not covered by (1) or (2), a carbon monoxide alarm must be installed in each dwelling unit or sleeping unit where a carbon monoxide source is located (and, in the case of a multiple-story dwelling unit or sleeping unit, on each story where a sleeping area or a carbon monoxide source is located), and in each dwelling unit or sleeping unit on the same story as a carbon monoxide source;

(4) all carbon monoxide alarms must be hard-wired to the building wiring and, where more than one alarm is required, the alarms must be interconnected; and

(5) carbon monoxide alarms shall be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

Existing Buildings. Under this rule, owners of one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, and multiple dwellings constructed prior to January 1, 2008 will also be required to install one or more carbon monoxide alarms in the places specified in this rule. However, the current version of the Uniform Code requires the installation of carbon monoxide alarms in three major groups of pre-2008 buildings: (1) one- and two-family dwellings and townhouses which are more than three stories in height and which were constructed or offered for sale after June 30, 2002, (2) dwelling accommodations in condominiums and cooperatives constructed or offered for sale after June 30, 2002, and (3) multiple dwellings constructed or offered for sale after August 9, 2005. The requirements currently applicable to these three groups of pre-2008 buildings have been in effect since January 1, 2008. Those requirements are continued without substantial change by this rule. Therefore, this rule imposes no new requirement on buildings in these three groups.

The principal impact of this rule will be on regulated parties who own a residential building in which carbon monoxide alarms were not previously required, viz., (1) one- and two-family dwellings and townhouses which are not more than three stories in height and which were constructed prior to January 1, 2008, (2) one- and two-family dwellings and townhouses which are more than three stories in height, which were constructed prior to June 30, 2002 and which have not been offered for sale since June 30, 2002, (3) dwelling accommodations in condominiums and cooperatives which were constructed prior to June 30, 2002 and which have not been

offered for sale since June 30, 2002, and (4) multiple dwellings which were constructed prior to August 9, 2005 and which were not offered for sale at any time since August 9, 2005. The requirements to be imposed by this rule on the buildings in the groups described in this paragraph will be identical to the existing requirements now imposed by the Uniform Code on the buildings in the groups described in the preceding paragraph. Those requirements are summarized as follows:

(1) in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives constructed prior to January 1, 2008, a carbon monoxide alarm must be installed within each dwelling unit or sleeping unit, on the lowest story having a sleeping area;

(2) in Group I-1 occupancies constructed prior to January 1, 2008, a carbon monoxide alarm must be installed on each story having a sleeping area;

(3) in Group R occupancies, nursery schools, bed and breakfasts, and multiple dwellings constructed prior to January 1, 2008 and not covered by (1) or (2), a carbon monoxide alarm must be installed in each dwelling unit or sleeping unit where a carbon monoxide source is located (in the case of a multiple-story dwelling unit or sleeping unit, the alarm must be installed on the lowest story having a sleeping area), and in each dwelling unit or sleeping unit on the same story as a carbon monoxide source;

(4) battery operated, cord-type and direct-plug alarms may be used, and the alarms are not required to be interconnected; and

(5) carbon monoxide alarms shall be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

#### 3. PROFESSIONAL SERVICES:

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

#### 4. COMPLIANCE COSTS:

The initial capital costs of complying with the rule will include the cost of purchasing and installing the carbon monoxide alarm(s). Cord or plug connected and battery operated carbon monoxide alarms are available in home centers and over the internet for \$20 to \$50. Direct wired devices with interconnection capability cost up to \$80. Installation costs in new construction are estimated to be not more than \$50 per device. Such costs are not likely to vary for small businesses or local governments of different types and differing sizes.

The annual costs of complying with this rule will include the cost of maintaining each alarm in operative condition, such maintenance to include cleaning the alarm and replacing of the alarm's battery (typically once a year). In addition, most manufacturers recommend that their alarms be checked using the alarm's "test" button on a periodic basis (typically once a week) and replaced on a periodic basis (typically once every five years).

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

#### 6. MINIMIZING ADVERSE IMPACT:

The current requirements for the installation of carbon monoxide alarms in buildings constructed on or after January 1, 2008 (the effective date of the most recent overall revision of the Uniform Code) have been in effect since January 1, 2008 and are continued without substantial change by this rule. Thus, the principal impact of this rule will be on regulated parties (including small businesses or local governments) who own buildings constructed prior to January 1, 2008 and who will now be required to install carbon monoxide alarms in such buildings. The rule minimizes any potential adverse economic impact on such regulated parties by allowing for the installation of battery operated, cord-type or direct plug carbon monoxide alarms in buildings constructed prior to January 1, 2008, and by not requiring the alarms installed in such buildings to be interconnected.

The applicable statute (Executive Law section 378(5-a)) requires that this rule apply to all one- and two-family dwellings, townhouses, dwelling units in condominiums or cooperatives, and multiple dwellings. The statute does not authorize the establishment of differing compliance requirements or timetables with respect to dwellings owned or operated by small businesses or local governments.

Providing exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(5-a) and would endanger public safety.

#### 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

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

**Rural Area Flexibility Analysis****1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.**

This rule implements the provisions of subdivision (5-a) of section 378 of the Executive Law, as amended by Chapter 367 of the Laws of 2009, by adding provisions to the State Uniform Fire Prevention and Building Code (the Uniform Code) requiring that carbon monoxide (CO) alarms be installed in all one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, and multiple dwellings. Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

**2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.**

The rule will not impose any reporting or recordkeeping requirements.

The rule will impose the following compliance requirement: owners of one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, and multiple dwellings will be required to install one or more carbon monoxide alarms in the places or places specified in this rule. The requirements applicable to newly constructed buildings differ from the requirements applicable to existing buildings, and will be discussed separately.

**Newly Constructed Buildings.** The Uniform Code's current requirements regarding the installation of carbon monoxide alarms in newly constructed buildings have been in effect since January 1, 2008 (the effective date of the most recent major revision of the Uniform Code). Those requirements are continued without substantial change by this rule. Therefore, this rule imposes no new requirement on regulated parties who construct new buildings. The current requirements for newly constructed buildings (which are continued by this rule) are summarized as follows:

(1) in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives constructed on or after January 1, 2008, a carbon monoxide alarm must be installed within each dwelling unit or sleeping unit, on each story where a sleeping area or a carbon monoxide source is located;

(2) in Group I-1 occupancies constructed on or after January 1, 2008, a carbon monoxide alarm must be installed on each story having a sleeping area and on each story where a carbon monoxide source is located;

(3) in Group R occupancies, nursery schools, bed and breakfasts, and multiple dwellings constructed on or after January 1, 2008 and not covered by (1) or (2), a carbon monoxide alarm must be installed in each dwelling unit or sleeping unit where a carbon monoxide source is located (and, in the case of a multiple-story dwelling unit or sleeping unit, on each story where a sleeping area or a carbon monoxide source is located), and in each dwelling unit or sleeping unit on the same story as a carbon monoxide source;

(4) all carbon monoxide alarms must be hard-wired to the building wiring and, where more than one alarm is required, the alarms must be interconnected; and

(5) carbon monoxide alarms shall be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

**Existing Buildings.** Under this rule, owners of one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, and multiple dwellings constructed prior to January 1, 2008 will also be required to install one or more carbon monoxide alarms in the places specified in this rule. However, the current version of the Uniform Code requires the installation of carbon monoxide alarms in three major groups of pre-2008 buildings: (1) one- and two-family dwellings and townhouses which are more than three stories in height and which were constructed or offered for sale after June 30, 2002, (2) dwelling accommodations in condominiums and cooperatives constructed or offered for sale after June 30, 2002, and (3) multiple dwellings constructed or offered for sale after August 9, 2005. The requirements currently applicable to these three groups of pre-2008 buildings have been in effect since January 1, 2008. Those requirements are continued without substantial change by this rule. Therefore, this rule imposes no new requirement on buildings in these three groups.

The principal impact of this rule will be on regulated parties who own a residential building in which carbon monoxide alarms were not previously required, viz., (1) one- and two-family dwellings and townhouses which are not more than three stories in height and which were constructed prior to January 1, 2008, (2) one- and two-family dwellings and townhouses which are more than three stories in height, which were constructed prior to June 30, 2002 and which have not been offered for sale since June 30, 2002, (3) dwelling accommodations in condominiums and cooperatives which were constructed prior to June 30, 2002 and which have not been offered for sale since June 30, 2002, and (4) multiple dwellings which were constructed prior to August 9, 2005 and which were not offered for sale at any time since August 9, 2005. The requirements to be imposed by this rule on the buildings in the groups described in this paragraph will be identical to the existing requirements now imposed by the Uniform Code

on the buildings in the groups described in the preceding paragraph. Those requirements are summarized as follows:

(1) in one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives constructed prior to January 1, 2008, a carbon monoxide alarm must be installed within each dwelling unit or sleeping unit, on the lowest story having a sleeping area;

(2) in Group I-1 occupancies constructed prior to January 1, 2008, a carbon monoxide alarm must be installed on each story having a sleeping area;

(3) in Group R occupancies, nursery schools, bed and breakfasts, and multiple dwellings constructed prior to January 1, 2008 and not covered by (1) or (2), a carbon monoxide alarm must be installed in each dwelling unit or sleeping unit where a carbon monoxide source is located (in the case of a multiple-story dwelling unit or sleeping unit, the alarm must be installed on the lowest story having a sleeping area), and in each dwelling unit or sleeping unit on the same story as a carbon monoxide source;

(4) battery operated, cord-type and direct-plug alarms may be used, and the alarms are not required to be interconnected; and

(5) carbon monoxide alarms shall be maintained in an operative condition at all times, shall be replaced or repaired where defective, and shall be replaced when they cease to operate as intended.

**3. COMPLIANCE COSTS.**

The initial capital costs of complying with the rule will include the cost of purchasing and installing the carbon monoxide alarm(s). Cord or plug connected and battery operated carbon monoxide alarms are available in home centers and over the internet for \$20 to \$50. Direct wired devices with interconnection capability cost up to \$80. Installation costs in new construction are estimated to be not more than \$50 per device. Such costs are not likely to vary for different types of public and private entities in rural areas.

The annual costs of complying with this rule will include the cost of maintaining each alarm in operative condition, such maintenance to include cleaning the alarm and replacing of the alarm's battery (typically once a year). In addition, most manufacturers recommend that their alarms be checked using the alarm's "test" button on a periodic basis (typically once a week) and replaced on a periodic basis (typically once every five years).

**4. MINIMIZING ADVERSE IMPACT.**

The current requirements for the installation of carbon monoxide alarms in buildings constructed on or after January 1, 2008 (the effective date of the most recent overall revision of the Uniform Code) have been in effect since January 1, 2008 and are continued without substantial change by this rule. Thus, the principal impact of this rule will be on regulated parties who own buildings constructed prior to January 1, 2008 and who will now be required to install carbon monoxide alarms in such building. The rule minimizes any potential adverse economic impact on such regulated parties by allowing for the installation of battery operated, cord-type or direct plug carbon monoxide alarms in buildings constructed prior to January 1, 2008, and by not requiring the alarms installed in such buildings to be interconnected.

The rule also permits the use of battery operated alarms in buildings without a commercial or on-site power source.

Executive Law section 378(5-a) makes no distinction between one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, and multiple dwellings located in rural areas and those located in non-rural areas. However, the impact of this rule in rural areas will be no greater than the impact of this rule in non rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas.

Executive Law section 378(5-a) requires that this rule apply to all one- and two-family dwellings, townhouses, dwelling units in condominiums and cooperatives, and multiple dwellings. The statute does not authorize the establishment of differing compliance requirements or timetables in rural areas.

Providing exemptions from coverage by the rule was not considered because such exemptions are not authorized by Executive Law section 378(5-a) and would endanger public safety.

**5. RURAL AREA PARTICIPATION.**

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

**Job Impact Statement**

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on

jobs and employment opportunities” (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

This rule amends the State Uniform Fire Prevention and Building Code (the Uniform Code) to require that all one- and two-family dwellings, townhouses, dwelling accommodations in condominiums and cooperatives, and multiple dwellings be equipped with carbon monoxide alarms. This amendment is required to satisfy the requirements of subdivision (5-a) of section 378 of the Executive Law, as amended by Chapter 367 of the Laws of 2009.

The Uniform Code has contained provisions requiring installation of carbon monoxide alarms in certain situations since at least 2002. The current requirements relating to installation of alarms in newly constructed buildings have been in effect since January 1, 2008, and are continued without substantial change by this rule. For newly constructed buildings, the carbon monoxide alarms will continue to be installed as part of the construction process.

Under the current version of the Uniform Code and under prior versions of the Uniform Code, an existing building that was not required to have carbon monoxide alarms installed at the time of construction would be required to have carbon monoxide alarms installed at the time the building was offered for sale. Under this rule, existing residential buildings will be required to have carbon monoxide alarms installed, even if they are not being offered for sale. However, potential adverse economic impact on regulated parties is minimized by the provisions of the rule that allow the use of battery operated, cord-type or direct plug carbon monoxide alarms in buildings constructed prior to January 1, 2008, and by provisions that permit the use of battery operated carbon monoxide alarms in buildings without a commercial or on-site power source.

Once installed, the carbon monoxide alarms must be used and maintained in accordance with manufacturer’s instructions.

Existing provisions in the Uniform Code require the installation of carbon monoxide alarms in newly constructed residential buildings. Those requirements are continued without substantial change by this rule. Therefore, this rule adds no new requirements relating to newly constructed buildings, and this rule should have no substantial adverse impact on jobs and employment opportunities related to the construction of new residential buildings.

The costs of purchasing, installing and maintaining the alarms is insignificant in comparison to the cost of purchasing, owning, and operating an existing residential building. Therefore, this rule should have no substantial adverse impact on sales, purchases, ownership or operation of existing residential buildings and, consequently, this rule should have no substantial adverse impact on jobs and employment opportunities related to the sale, purchase, ownership or operation of existing residential buildings.

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## Department of Taxation and Finance

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### NOTICE OF ADOPTION

#### Sales of Cigarettes on Indian Reservations

**I.D. No.** TAF-35-10-00002-A

**Filing No.** 1097

**Filing Date:** 2010-10-22

**Effective Date:** 2010-11-10

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

**Action taken:** Addition of sections 74.6 and 74.7 to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First; 471(1), (4), and (5); 471-e; 475 (not subdivided); and L. 2010, ch. 134, part D

**Subject:** Sales of cigarettes on Indian reservations.

**Purpose:** To implement certain provisions of recently enacted legislation concerning sales of cigarettes on Indian reservations.

**Substance of final rule:** This rule concerns the collection of taxes on sales of cigarettes made on New York State Indian reservations as required by sections 471 and 471-e of the Tax Law, and provides procedures to be followed by New York State licensed cigarette stamping agents for the certification process required by section 471 of the Tax Law. The rule was previously adopted as an emergency measure.

Section 1 of the rule adds a new section 74.6 to the cigarette tax regulations to address sales of cigarettes on Indian reservations and to describe

the two statutory mechanisms (systems) for the delivery of quantities of tax-exempt cigarettes to Indian nations or tribes for the personal use and consumption of their qualified members based on their probable demand plus the amount needed for official nation or tribal use. Indian nations or tribes may elect to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law, or, if such election is not made, the prior approval system established in section 471(5) of the Tax Law will be used. Under the prior approval system New York State licensed cigarette stamping agents and wholesale dealers that have received prior approval from the Tax Department may sell certain quantities of stamped untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand used in both systems.

Section 2 of the rule adds a new section 74.7 to the cigarette tax regulations relating to the statutory provisions of section 471(4) that require every cigarette stamping agent that purchases unstamped packages of cigarettes intended for resale in New York State to annually provide its supplier and the Tax Department with a certification, under penalty of perjury, that the cigarettes will not be resold in violation of Article 20 of the Tax Law. Procedures to be followed for the certification process are set forth in the rule, such as certification signature and swearing requirements, time periods covered by the certification, and the contents of the certification. With regard to the contents, the certification must specifically provide that the agent will only make sales of tax-exempt stamped packages of cigarettes to Indian nations or tribes or to reservation cigarette sellers that are in accordance with the provisions of new section 74.6 of the rule.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 74.6(b)(1).

**Text of rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax\_regulations@tax.state.ny.us

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

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Governments, Rural Area Flexibility Analysis, and Job Impact Exemption are not required to be submitted because the unsubstantial revisions made to the proposed rule do not affect any of the statements made in these documents.

The rule relates to recently enacted legislation regarding the collection of taxes on cigarettes sold on New York State Indian reservations. As amended by Part D of Chapter 134 of the Laws of 2010, section 471(1) of the Tax Law imposes the tax on cigarettes including all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians, and provides for a statutory dual system to be used on and after September 1, 2010, that ensures adequate quantities of stamped but tax-exempt cigarettes are available for purchase by the nation or tribe and its members for their use or consumption based on their probable demand. The rule details requirements for the use of the statutory dual system.

In order to meet the statutory implementation deadline of September 1, 2010, the proposed rule was previously adopted as an emergency measure on June 22, 2010, and provided for the election by an Indian nation or tribe to participate in the Indian tax exemption coupon system for the twelve-month period beginning September 1, 2010, to be made by August 15, 2010. However, various state and federal court challenges by Indian nations or tribes have precluded implementation and enforcement of the statutory and regulatory amendments on September 1, 2010. In light of the uncertainty created by this recent litigation, the proposed rule has been revised to provide flexibility both now and in the future by authorizing the Department to allow the recognized governing body of an Indian nation or tribe to elect to use the Indian tax exemption coupon system on a date other than the preceding August 15 for the twelve-month period beginning September 1 and ending August 31. In the case of a later election, the Indian tax exemption coupon system would apply with respect to that Indian nation or tribe for the remainder of the twelve-month period beginning September 1, and the amount of coupons provided to the recognized governing body for the first quarter during which the election applies would be reduced to account for the quantity of tax-exempt cigarettes sold to the Indian nation or tribe or a reservation cigarette seller in compliance with the prior approval system during the quarter.

These unsubstantial revisions merely provide more flexibility as to the date by which the election can be made, and there are no modifications to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Exemption necessary as a result of the changes.

**Assessment of Public Comment**

Written comments were received from the Seneca Nation of Indians (the Nation) and Altria Client Services Inc. on behalf of Philip Morris USA Inc. (PM USA) regarding proposal TAF-35-10-00002-P.

The Nation objects to the imposition of tax with respect to cigarettes sold on its territories, characterizing the imposition of tax as an infringement on its sovereignty and treaty rights. The Nation also asserts that the proposed rule and its regulatory impact statements are not in accordance with the law. The Nation requests that the Department withdraw the proposed rule.

As noted in its submission, the Nation has commenced an action in the United States District Court for the Western District of New York raising sovereignty concerns in challenging the imposition of tax with respect to cigarettes sold on its reservations. Several other actions in state and federal court, involving the Nation and other Indian nations and tribes, are also pending. The Department disagrees with the Nation's assertions and the actions are being defended accordingly. It is noted that, by decision and order dated October 14, 2010, the Court denied the motion by the Nation and the plaintiff-intervener Cayuga Indian Nation of New York for a preliminary injunction, finding that they failed to demonstrate a likelihood of success on their claim that the tax law amendments unconstitutionally burden the right of tribal sovereignty (*Seneca Nation of Indians v Paterson*, No. 10-CV-687A, W.D.N.Y.). The Court, however, on the same day, granted a stay of enforcement of the tax law amendments pending appeal. While these proceedings have suspended the Department's ability to enforce the statutory and regulatory amendments, adoption of this rule will maintain the rule, previously adopted and readopted as emergency measure, in place.

The Nation asserts that the rule would impose costs and job impacts that are not recognized in the proposed rule making. The Nation also contends that the Department did not solicit the input of the Nation, other Indian nations, and reservation businesses concerning these impacts. With regard to this contention, it is noted that the Department's outreach, as stated in the notice of proposed rulemaking, is in compliance with the State Administrative Procedure Act. Furthermore, as noted in the Rural Area Flexibility Analysis, the emergency rule adopted in June was sent to the New York State Indian nations and tribes, including the Nation, at that time. With the exception of the change discussed below, that rule is identical to this rule.

With regard to the Nation's contention concerning the impact, it is the Tax Law itself that imposes the tax and requires Indian nations or tribes to elect to participate in either the coupon or prior approval system. Section 471(1) of the Tax Law imposes the tax on all cigarettes possessed for sale in the State with limited exceptions. As amended by Chapter 134 of the Laws of 2010, section 471(1) explicitly states that the tax is imposed on all cigarettes sold on an Indian reservation to non members of the Indian nation or tribe and to non-Indians, and provides for a dual system to ensure that adequate quantities of stamped but tax exempt cigarettes are available for purchase by the nation or tribe and its members for their own use or consumption. Section 471-e, as amended by Chapter 134, establishes the "Indian tax exemption coupon system" which Indian nations or tribes may elect to participate in to obtain these tax exempt cigarettes, and section 471(5), as added by Chapter 134, provides that for any year that this election is not made, the "prior approval" system will be used. The Tax Law further requires that both coupons and prior approvals be limited by each nation's or tribe's "probable demand," and sets forth the manner by which probable demand will be calculated. Under the Tax Law, all cigarettes sold by agents and wholesalers to Indian nations or tribes or reservation cigarette sellers located on an Indian reservation must bear a tax stamp. Accordingly, the Tax Law itself imposes the tax and provides that Indian nations or tribes elect to participate in the coupon system or the prior approval system will govern. The rule has a limited function in this regard: it provides guidance and procedures on the legislatively mandated calculation of probable demand, which the Nation does not contest, and the method for agents and wholesale dealers to obtain prior approval for untaxed cigarette sales. Moreover, section 471-e(6) of the Tax Law, as added by Chapter 134, provides that "[t]he failure of the department to establish, issue and provide Indian tax exemption coupons. . . or to promulgate any rules, regulations or directives necessary to implement the provisions of this section, shall not relieve wholesale dealers of the obligation to sell only tax-stamped cigarettes to Indian nations and tribes, and to reservation cigarette sellers."

The Nation next expressed concern regarding the mechanics of the prior approval system provided for in the rule. Pursuant to section 471(1) of the Tax Law, if an election to participate in the Indian tax exemption coupon system is not made, the prior approval system will be the mechanism for the delivery of tax-exempt cigarettes to Indian nations or tribes and their members for their use or consumption. The rule establishes that agents and wholesale dealers may sell certain quantities of stamped untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers with the prior approval of the Department through the use of an interactive Web application. The Nation states that the rule includes no safeguards to prevent state-licensed wholesalers or reservation retailers from hoarding the quota of untaxed cigarettes and exacting inflated prices or divert-

ing tax-exempt cigarettes to other markets for sale to non-nation members. The Nation asserts that the rule would permit state-licensed wholesalers to sell directly to reservation retailers and to circumvent the market-role of Nation-licensed stamping agents and wholesalers in the distribution of cigarettes on the reservations. According to the Nation, the prior approval system does not protect the ability of Nation-licensed retailers, wholesalers, and stamping agents to participate in undisputed tax-free commerce.

It is noted that neither the law nor the rule seeks to comprehensively regulate the on-reservation distribution of the cigarettes. The law and rule do not compel state-licensed agents and wholesalers to sell to reservation retailers rather than Nation-licensed agents and wholesalers in circumvention of the Nation's distribution system. With regard to the hoarding issue, the system set up by the Department requires wholesalers who have received prior approval for the sale of tax-exempt cigarettes to verify the sale within 48 hours or the approval expires. A person diverting tax-exempt cigarettes off the reservation to other markets would be doing so in violation of law and subject to criminal and civil sanctions and, in the case of a state-licensed wholesaler, license revocation (see, Tax Law, sections 472, 480[3]). The law and rule ensure that adequate quantities of stamped but tax-exempt cigarettes are available for purchase by the nations or tribes and their members for their use or consumption.

The statute does provide a mechanism for the nations and tribes to affect the on-reservation distribution of the tax-exempt cigarettes: the coupon system. In this regard, revisions were made to the proposed rule in light of the uncertainty created by the federal and state court challenges that have precluded implementation of the statutory and regulatory amendments on September 1, 2010. These revisions, in section 74.6(b)(1) of the rule, provide flexibility both now and in the future by authorizing the Department to allow the election to participate in the coupon system to be made on a date other than the preceding August 15 for the twelve-month period beginning September 1 and ending August 31.

PM USA's comments advocate for the implementation and enforcement of the tax laws and regulations concerning sales of cigarettes on Indian reservations. PM USA expressed concern that the proposed rule, through its focus on the requirements of state-licensed stamping agents with regard to the coupon and prior approval systems and the certification procedures, may be viewed as allowing other persons to sell unstamped cigarettes to retailers, including tribal cigarettes sellers, for resale in New York. Initially, it is noted that the Department is aware that enforcement issues are raised by untaxed cigarettes being introduced into New York through other, illegal channels. However, the proposed rule does not override and is not in conflict with existing cigarette tax laws and regulations which provide that unstamped cigarettes may generally only be introduced into the New York State market through licensed cigarette stamping agents.

With regard to the agent certification provisions of the proposed rule, PM USA asserts that manufacturers like itself will be unable to determine whether an agent's certification is made in good faith and whether an agent's sales of unstamped cigarettes are in compliance with Article 20 of the Tax Law, and suggests that the Department provide notice to suppliers as to whether particular agents are violating the law. The Department believes that the statutory obligation of the manufacturer as set forth in the rule is clear-to not sell unstamped packages of cigarettes to an agent unless it has received the required certification (Tax Law section 471[4][A]) and no revisions are necessary in this regard.

Lastly, PM USA offered two clarifying changes to the proposed rule in sections 74.7(b)(2) and (3) regarding the contents of the agent certification. Again, the Department believes the agents' obligations are clear in these provisions and did not make the suggested revisions.

Other than the change to authorize the Department to allow the election to participate in the coupon system at a later time discussed above, no changes have been made to the rule.

## NOTICE OF ADOPTION

### Cigarette Tax

**I.D. No.** TAF-35-10-00003-A

**Filing No.** 1098

**Filing Date:** 2010-10-22

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of sections 70.1 and 80.2 and Parts 74 and 82; repeal of section 79.2; and addition of new section 79.2 to Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171, subd. First, 472(1), 475 (not subdivided); and L. 2010, ch. 134, part D

**Subject:** Cigarette Tax.

**Purpose:** To implement statutory provisions and set commissions to agents for affixing cigarette stamps relating to the new rate of tax.

**Text or summary was published** in the September 1, 2010 issue of the Register, I.D. No. TAF-35-10-00003-P.

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

**Text of rule and any required statements and analyses may be obtained from:** John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W.A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax\_regulations@tax.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**NOTICE OF ADOPTION**

**City of New York Withholding Tables and Other Methods**

**I.D. No.** TAF-35-10-00020-A

**Filing No.** 1099

**Filing Date:** 2010-10-22

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of section 291.1(b) and Appendix 10-C of Title 20 NYCRR.

**Statutory authority:** Tax Law, sections 171 subdivision First; 671(a)(1); 697(a); 1309 (not subdivided) and 1312(a); Administrative Code of the City of New York, sections 11-1771(a) and 11-1797(a); and L. 2010, ch. 57, part EE, section 4

**Subject:** City of New York withholding tables and other methods.

**Purpose:** To provide current City of New York withholding tables and other methods.

**Text or summary was published** in the September 1, 2010 issue of the Register, I.D. No. TAF-35-10-00020-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 W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax\_regulations@tax.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

**Office for Technology**

**NOTICE OF ADOPTION**

**Electronic Signatures and Records Act (ESRA)**

**I.D. No.** OFT-35-10-00006-A

**Filing No.** 1096

**Filing Date:** 2010-10-21

**Effective Date:** 2010-11-10

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

**Action taken:** Amendment of Part 540 of Title 9 NYCRR.

**Statutory authority:** State Technology Law, sections 103, 303, 304 and 305

**Subject:** Electronic Signatures and Records Act (ESRA).

**Purpose:** The Amendment will support Executive Order 17 and reduce the impact of existing mandates on local governments.

**Text or summary was published** in the September 1, 2010 issue of the Register, I.D. No. OFT-35-10-00006-P.

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

**Text of rule and any required statements and analyses may be obtained from:** John Aveni, Esq., Office for Technology, State Capitol, ESP, P.O. Box 2062, Albany, New York 12220-0062, (518) 473-5115, email: john.aveni@cio.ny.gov

**Assessment of Public Comment**

The agency received no public comment.

**Workers' Compensation Board**

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

**Independent Livery Driver Benefit Fund**

**I.D. No.** WCB-45-10-00004-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 300.1(a)(9); and addition of Part 309 to Title 12 NYCRR.

**Statutory authority:** Executive Law, section 160-eee; and Workers' Compensation Law, sections 2(9), 18-c(2)(a) and 117

**Subject:** Independent Livery Driver Benefit Fund.

**Purpose:** To set criteria for membership in Independent Livery Driver Benefit Fund, termination from the Fund and presumptive wage.

**Substance of proposed rule (Full text is posted at the following State website: www.wcb.state.ny.us):** The proposed rule amends paragraph (9) of subdivision (a) of section 300.1 to modify the definition of "Prima Facie Medical Evidence" and adds new Part 309 to implement specific provisions regarding the Independent Livery Driver Benefit Fund (ILDBF).

Section 300.1(a) provides definitions of terms. The proposed rule modifies the definition of "Prima Facie Medical Evidence" in paragraph (9) to account for the special requirements for claims of independent livery drivers. Specifically, for independent livery drivers Prima Facie Medical Evidence means a medical report referencing an injury covered by the ILDBF as provided in Executive Law § 160-ddd or, if the injury results from a crime, a medical report referencing an injury and a police report stating that a crime occurred.

A new Part 309 to govern the implementation of the ILDBF.

Section 309.1 provides definitions of terms used in Part 309. Among the definitions are "covered services," "crime," "governing Taxi and Limousine Commission," "independent livery base," "independent livery driver," "livery," "livery base," "livery driver," and "New York State Average Weekly Wage."

Section 309.2 provides rules for who may be members of the ILDBF and how membership is terminated. Subdivision (a) of this section states that only livery bases designated by the Workers' Compensation Board (Board) may join the ILDBF. Subdivision (b) of this section provides that a livery base will only be designated by the Board as an independent livery base if it submits the affirmation required by WCL § 18-c(2) attesting that the base meets the criteria set forth in subdivision (c) of § 309.2 and if it provides written notice in the stated time periods of any inaccuracies in or changes to the information in the affirmation. Subdivision (c) of this section requires a livery base to meet the following criteria:

(1) The livery base is not classified by the governing Taxi and Limousine Commission as a black car base or luxury limousine base and is not a member of the New York Black Car Operators' Injury Compensation Fund, Inc.;

(2) All livery drivers dispatched by the livery base provide and determine their own clothing;

(3) All livery drivers dispatched by the livery base set their own hours and days of work;

(4) All livery drivers choose which dispatches or fares to accept, and no livery driver suffers any consequence by the livery base for failing to respond to its dispatch, except that every livery driver must comply with all requirements of his or her governing taxi and limousine commission regarding acceptance of dispatches, fares, trips, passengers and destinations. A livery base may temporarily deny a livery driver access to its dispatches for failing to respond to a dispatch in violation of local and state laws or governing taxi and limousine commission rules and regulations regarding refusing dispatches;

(5) All livery drivers may affiliate with one or more other livery bases, except if prohibited by rules or regulations of the governing taxi and limousine commission;

(6) Either the livery driver or livery base may terminate their affiliation at any time, except that a livery base must terminate its relationship with the livery driver in accordance with any rules and regulations of the governing taxi and limousine commission;

(7) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, the owner or registrant of more than fifty (50) percent of the liveries dispatched by the livery base;

(8) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, paying or participating in paying for the purchase, maintenance, repair, insurance, licensing, or fuel, of more than fifty (50) percent of the liveries dispatched by the livery base;

(9) No livery driver dispatched by the livery base receives an Internal Revenue Service form W-2 from such base, or is subject to the withholding of any federal income taxes by the livery base, except a livery base that is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base meets the criteria of paragraph (10) of this subdivision;

(10) If the livery base is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base and it issues an Internal Revenue Service form W-2 to a livery driver or livery drivers, or withholds any federal income taxes for a livery driver or livery drivers, such livery base provides workers' compensation coverage for that livery driver or those livery drivers that is separate from the Fund; and

(11) The livery base does not impose any fines or penalties or both on any livery drivers, except the livery base may impose fines or penalties or both on a livery driver for violating the rules and regulations of the governing taxi and limousine commission regarding the conduct of livery drivers while performing their duties as livery drivers and in order to recover the cost of any fines or penalties or both imposed on the livery base by the governing taxi and limousine commission due to the behavior of that livery driver who violated the rules and regulations of the governing taxi and limousine commission.

Subdivision (d) of § 309.2 sets forth the procedures to terminate the membership of a livery base in the ILDBF.

Section 309.3 sets forth requirements for livery drivers. Subdivision (a) of this section states that an independent livery driver is a livery driver who is licensed to drive a livery by the appropriate governing taxi and limousine commission and is dispatched by an independent livery base with which he or she is affiliated. This subdivision provides that an independent livery driver injured during a dispatch by an independent livery base may be entitled to benefits in accordance with Insurance Law Article 51 and is not entitled to workers' compensation benefits, except as set forth in Workers' Compensation Law § 160-ddd and § 309.3(a)(3). Paragraph (3) of § 309.3(a) sets forth the circumstances under which an independent livery driver is entitled to workers' compensation benefits from the ILDBF. Paragraph (4) of this subdivision makes clear that an independent livery driver is not entitled to workers' compensation benefits from the ILDBF if he or she was not performing covered services or was in violation of the rules and regulations of the governing taxi and limousine commission regarding the solicitation or picking up of passengers at the time of death, crime or injury. Paragraph (5) of this subdivision requires independent livery drivers to file all claims in New York with the Board. Paragraph (6) requires an independent livery driver or someone on his or her behalf to provide written notice to the ILDBF in accordance with Workers' Compensation Law § 18. Finally, paragraph (7) sets the presumptive wage for independent livery drivers as \$13,000 annual wage for an average weekly wage of \$250. The presumptive wage may be rebutted by the submittal of competent evidence. Further the presumptive wage will increase each year on July 1st by the percentage increase in the New York State Average Weekly Wage.

Pursuant to subdivision (b) of § 309.3, a livery driver that is not an independent livery driver is the employee of the livery base with which he or she is affiliated.

**Text of proposed rule and any required statements and analyses may be obtained from:** Cheryl M Wood, Workers' Compensation Board, 20 Park Street, Room 400, Albany, NY 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: Chapter 392 of the Laws of 2008 amended the Executive Law and WCL to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage.

Executive Law § 160-eee authorizes the Chair of the Workers' Compensation Board (Board) to adopt regulations necessary to effectuate the provisions of Executive Law Article 6-G.

Workers' Compensation Law (WCL) § 18-c(2)(a) directs the Chair to set by regulation the criteria livery bases must meet in order to be considered an independent livery base eligible to join the Independent Livery Driver Benefit Fund (ILDBF).

The last paragraph of WCL § 2(9) provides that the Chair shall set by regulation the amounts livery drivers are presumptively deemed to receive in annual wages.

WCL § 117 authorizes the Chair to make reasonable rules consistent with the WCL and Labor Law.

2. Legislative objectives: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the ILDBF, then the livery base is deemed the employer of the driver pursuant to WCL § 18-c(5). If the livery base is a member of the ILDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. The legislation created the ILDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

3. Needs and benefits: The purpose of this rule is to implement specific provisions of Chapter 392. While Executive Law Article 6-G and the amendments to the WCL set forth a framework to govern the ILDBF and the benefits it will pay, the amendment to 12 NYCRR § 300.1 and the addition of Part 309 provide the detail and clarification necessary to actually implement the legislation by setting forth: 1) necessary definitions; 2) the criteria to determine which livery bases may join the ILDBF; 3) clarification on when and which benefits are payable from the ILDBF; and 4) the presumptive average weekly wage. Such detail and clarification is necessary to assist the insurance carrier writing the policy, the bases in determining if they are eligible to join the ILDBF, and the drivers in understanding what action they need to take to obtain benefits.

Currently § 300.1 defines "Prima Facie Medical Evidence" as "a medical report referencing an injury, which includes traumas and illness." This definition is too broad for claims by independent livery drivers as it encompasses all injuries and not just those listed in Executive Law § 160-ddd and or those caused by the commission of a crime. This rule amends the definition of "Prima Facie Medical Evidence" to encompass such provisions.

Executive Law § 160-aaa sets forth the statutory definitions relating to the ILDBF such as "independent livery driver," "covered services," "independent livery base," "livery," "livery driver," and "livery base." Section 309.1 sets forth necessary definitions to properly understand Part 309 and to clarify the implementation of Chapter 392.

In order to be designated as an independent livery base, WCL § 18-c(2) requires an officer or director of the base to submit an affirmation sworn under penalty of perjury attesting that the criteria set by the Chair in regulation are true with respect to the base. In the absence of regulations setting forth the criteria, the statute lists default criteria.

After consulting with the livery industry and the appropriate Taxi and Limousine Commissions (TLCs), it was determined that the livery bases cannot meet all of the statutory default criteria, in part due to the rules of the TLCs. In addition the statutory criteria does not comport with how the livery industry operates. The criteria in § 309.2(c) has been drafted to reflect how the livery industry operates. By prescribing the criteria livery bases must meet through regulation, it assures that there are owners of livery bases who can attest to the truth of such criteria and join the ILDBF.

In addition to setting forth the criteria that the livery base must attest to in the affirmation, § 309.2 requires livery bases to provide the Board and ILDBF with written notice of any inaccuracies in the information in the affirmation within 5 business days of discovery or knowledge of the inaccuracies and to provide written notice of any changes in the information in the affirmation within 10 business days of the changes. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c) as required by WCL § 18-c(3).

Article 6-G fails to set forth the procedures and timeframes for termination of a livery base's membership in the ILDBF. Subdivision (d) of § 309.2 covers such termination by setting forth the process when the livery base fails to make the required payments to the ILDBF, when the livery base must leave the ILDBF because it is no longer designated as an independent livery base, and when a livery base decides to leave the ILDBF.

Section 309.3 provides necessary clarification and detail for livery drivers. For example, this section clarifies that a livery driver is an independent livery driver when he or she is appropriately licensed and

dispatched by a livery base that is a member of the ILDBF. It also clarifies that the ILDBF only has jurisdiction over claims filed in New York with the Board and that written notice of an injury, illness or death must be provided to the ILDBF in accordance with WCL § 18.

As statutorily mandated § 309.3 sets forth the presumptive wages for livery drivers. After reviewing numerous cases in which a livery driver was found to be an employee and an average weekly wage was set, the Board determined that it was usually set at \$250 per week, unless tax returns or other records showed otherwise. Because this is the rate that is set in existing cases for livery drivers, the rule sets \$250 as the presumptive wage. To ensure the presumptive wage is current, the regulation also provides for yearly adjustments in accordance with the percentage increase in the New York State Average Weekly Wage, as defined in WCL § 2(16).

4. Costs: The rule imposes minimal costs on regulated parties. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur postage if the notice is sent through the United States Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. Livery bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver.

Livery drivers will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage.

This rule imposes no costs on local governments, as the rule does not impose any requirements on them.

The Board will incur costs to approve the affirmations for membership in the ILDBF and provide written notice of the charges and conduct a hearing with regard to possible revocation of a livery base's designation as an independent livery base. These activities will be performed by existing staff and incorporated into existing procedures.

5. Local government mandates: This rule does not impose any mandates or requirements on local governments.

6. Paperwork: This rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. If a livery base wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked.

Livery drivers or someone on their behalf must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

The Board is required to send written notice to a livery base of the charges which form the basis for its decision to seek the revocation of the base's designation as an independent livery base.

7. Duplication: This rule does not duplicate any other state or federal rule.

8. Alternatives: One alternative, suggested by the livery base industry, would be to modify the definition of "covered services" to require the independent livery base that dispatched the livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term.

Another alternative would be to fail to clarify that claims for benefits from the ILDBF must be filed in New York. This alternative was rejected

and the clarification included to ensure that drivers know their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3).

A third alternative would be to eliminate all criteria to join the ILDBF so all bases could join. This alternative was rejected as the intent was to address those situations where the status of the driver is unclear. Some livery bases own all of the cars that the drivers operate. In such a case the base is the employer and it is inappropriate for such bases to be part of the ILDBF. However, there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation properly opts not to follow the statutory provision in § 18-c(2)(i) and allows participation in the ILDBF with ownership of up to 50% of the vehicles. The decisions to allow participation by bases that own vehicles and the percentage of ownership were made after consulting with the livery industry. Bases with more than 50% ownership of the vehicles have the ability to direct and control the activity of the drivers and are employers, therefore their participation is not appropriate.

9. Federal standards: There are no federal standards that apply.

10. Compliance schedule: The regulated parties can comply with these requirements upon adoption of the rule.

#### *Regulatory Flexibility Analysis*

1. Effect of rule: This rule only governs livery drivers, livery owners and livery bases in New York City (NYC), Westchester County and Nassau County. Therefore, this rule has no impact on small businesses or local governments outside these three areas. Further, the rule only governs livery drivers and bases so it does not impose any requirements or mandates on local governments in NYC, Westchester County or Nassau County. The rule will affect the approximately 800 livery bases in the three locations and the owners and drivers of the approximately 25,000 liveries. It is estimated that the majority of livery bases, drivers and livery owners are small businesses. Finally, the rule effects the Independent Livery Driver Benefit Fund (ILDBF) which is a statutorily created non-profit.

2. Compliance requirements: This rule imposes reporting and record-keeping requirements on small businesses. First the rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. There is no specific form for the notice, but it does have to be filed within the specified time periods. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is in violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c). If a livery base that is a small business wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC. This notice is necessary to ensure that the ILDBF does not accept liability for any further claims; the Board is informed that the livery base is now required to have full workers' compensation coverage for all drivers, and the TLC ensures the base complies with its rules.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked. The notice mirrors the required notice when a workers' compensation insurance carrier cancels coverage of an employer.

Livery drivers or their dependents must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who are small businesses who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

3. Professional services: Small businesses will not need any professional services to comply with this rule. The affirmation the livery bases must complete is a form created by the Board and does not require any professional services to complete. The same is true of the written notices the livery bases and livery drivers who are small businesses must submit.

4. Compliance costs: The proposed rule will impose minimal costs on small businesses. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. WCL § 18-c(2)(a) requires livery bases, including those that are small businesses, to submit an affirmation sworn under penalty of perjury in order to be designated as an independent livery base. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur the cost of postage if the notice is sent through the U. S. Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. The cost will be for postage for the notice to the three entities if it is sent through the mail and not electronically. Livery

bases that join the ILDBF will pay \$260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately \$1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver. Such costs would include obtaining documentation as to the actual wage the driver earned.

Livery drivers, including those that are small businesses, will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. However, the Board may excuse the lack of notice if there is sufficient reason that the notice could not be given, the employer had actual knowledge, or the employer is not prejudiced by the lack of notice. The notice can be hand delivered or mailed. The cost is mainly postage if mailed and is incurred by all workers injured on the job. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Injured workers may file claims by calling a toll free number and providing information over the telephone, by completing and submitting the form online, or by completing a paper form and mailing it to the Board. Only if the livery driver completes and mails the paper form will he or she incur costs. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage. Livery drivers, who are small businesses, may hire a legal representative with respect to a claim for workers' compensation benefits. Such livery drivers will not incur any out of pocket costs as WCL § 24 requires legal representatives to be paid fees awarded by the Board and paid out of any indemnity benefits paid to the livery driver. The acceptance of a fee directly from a livery driver is a misdemeanor.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

5. Economic and technological feasibility: It is economically and technologically feasible for small businesses to comply with this rule. The affirmation is a form prescribed by the Board and is simple to complete. There are no required forms or formats for the written notices livery bases must submit. Livery drivers who are small businesses can provide the written notice and complete the claim form for benefits without any assistance. However, livery drivers may retain a legal representative with respect to their claim who may assist them when completing the claim form and seeking a higher wage than the presumptive wage. Pursuant to Executive Law § 160-ddd requires the ILDBF to purchase an insurance policy, which it has done. The insurance carrier will handle the claims and payment of benefits and bill and collect the annual payment from the livery bases.

6. Minimizing adverse impact: The rule was drafted to ensure that livery bases would be able to join the ILDBF and livery drivers could access benefits when injured or killed within the provisions of Executive Law § 160-ddd. To minimize adverse impact on both the livery bases and drivers the regulation does not modify the definition of "covered services." It was suggested, by the livery base industry, that "covered services" be defined to require the independent livery base that dispatched the injured livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term. The definition of "covered services" for the ILDBF is almost the same as the definition for that same term for the Black Car Fund. The Appellate Division, Third Department in *Aminov v. N.Y. Black Car Operators Injury Comp. Fund*, 2 A.D.3d 1007 (3d Dept. 2003) specifically found that the time waiting for a dispatch is covered. Therefore, modifying the definition as suggested would not be appropriate. Further defining "reasonable time" as twenty minutes has no reasonable basis. The rule as originally drafted included a definition of the term "dispatch" taken from the rules of the New York City Taxi and Limousine Commission. However, after further review it was determined that this definition was inconsistent with the decision in *Aminov* and improperly limited the coverage of the statute. Therefore, the definition was removed and the term is not defined in the regulations.

To minimize adverse impacts the rule clarifies that claims for benefits from the ILDBF must be filed in New York. This clarification ensures livery drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3). For example, benefits could be awarded for injuries that do not meet the statutory requirements or set an average weekly wage above the presumptive wage

without further evidence. When the insurance carrier writing the policy to cover these claims set the cost of the policy it was based on benefits only being paid as provided in statute and regulation. Any awards above the statutory or regulatory levels would cause the premium for the policy to increase, potentially beyond the means of the bases.

The rule sets criteria bases must meet to join the ILDBF to minimize the adverse impact of the default criteria provided in WCL § 18-c(2). Without the criteria in the rule livery bases that own any liveries would be unable to join the ILDBF. While it is inappropriate for the livery base to own all or a majority of the liveries, as such a base would clearly be the employer; there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c(2)(i) to allow ownership up to 50% of the vehicles.

The criteria in the rule account for the rules of the governing TLCs to eliminate adverse impacts from conflicts between the rules and the criteria in the statute. The criteria in WCL § 18-c(2)(iv) provides that livery drivers choose which dispatches or fares to accept, however the governing TLCs have rules prohibiting drivers from refusing to accept certain fares. If this criterion was not modified in the rule, no base would be able to submit the affirmation sworn under penalties of perjury.

7. Small business and local government participation: The rule was drafted after discussions with groups representing the livery bases, the ILDBF Board of Directors, the NYC TLC and the Westchester County TLC. Drafts of the regulation were shared with representatives of livery bases, the ILDBF Board of Directors, the NYC TLC, Westchester County TLC and Nassau County TLC.

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

This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. The rule only applies to livery bases, livery drivers, livery owners and taxi and limousine commissions in New York City, Westchester County and Nassau County. The seven affected counties do not have populations less than 200,000 and therefore do not fall within the definition of a rural area as provided in Executive Law § 481(7). As the rule does not apply to any rural areas a Rural Area Flexibility Analysis is not required.

#### **Job Impact Statement**

The proposed rule will not have an adverse impact on jobs, but will preserve jobs. This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates the Independent Livery Driver Benefit Fund (ILDBF) to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. This rule ensures that livery bases are eligible and can afford to join the ILDBF so that the bases can continue to operate. Without Chapter 392 and this rule, bases that could not afford workers' compensation policies would be forced to close resulting in the loss of some jobs. This rule also implements Chapter 392 so that livery drivers who are killed, injured due to a crime or suffer a catastrophic injury as provided in Executive Law § 160-ddd can obtain workers' compensation benefits.