

# RULE MAKING ACTIVITIES

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

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

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

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## Department of Agriculture and Markets

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Various Trees and Plants of the Prunus Species

**I.D. No.** AAM-46-10-00019-P

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

**Proposed Action:** Repeal of Part 140 and addition of new Part 140 to Title 1 NYCRR.

**Statutory authority:** Agriculture and Markets Law, sections 18, 164 and 167

**Subject:** Various trees and plants of the Prunus species.

**Purpose:** To amend the existing plum pox virus quarantine in New York State in response to the most recent detections of this virus.

**Public hearing(s) will be held at:** 11:00 a.m., Jan. 12, 2011 at Department of Agriculture and Markets, 10B Airline Dr., Albany, NY.

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

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

**Text of proposed rule:** Section 140.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed and a new section 140.2 is added to read as follows:

(a) That area of Niagara County which is bordered on the north by Lake Ontario and bordered on the east Johnson Creek Road, which extends south to its intersection with Route 104 (Ridge Road); extends west on Route 104 (Ridge Road) to its intersection with Orangeport Road; and extends south on Orangeport Road to its intersection with Slayton-Settlement Road; extending west on Slayton-Settlement Road to its intersection with Route 78 (Lockport-Olcott Road); extending south on Route 78 (Lockport-Olcott Road) to its intersection with Stone Road; extending northwest on Stone Road to its intersection with Sunset Drive; extending south on Sunset Drive to its intersection with Shunpike Road; extending west on Shunpike Road to its intersection with Route 93 (Townline Road); extending south on Route 93 (Townline Road) to its intersection with Route 270 (Campbell Boulevard); extending south on Route 270 (Campbell Boulevard) to its intersection with Beach Ridge Road; extending southwest on Beach Ridge Road to its intersection with Townline Road; extending south on Townline Road to its intersection with the Tonawanda Creek; following the Tonawanda Creek west to its entry into the Niagara River; following the Niagara River north to its entry into Lake Ontario.

(b) That area of Orleans County which is bordered on the north by Lake Ontario, on the east heading South from Lake Ontario on Kent Road to intersection with Ridge Road (Route 104); extending south on Desmond Road to intersection with State Route 31 (Telegraph Road); extending west on State Route 31 to intersection with Richs Corners Road; extending south on Richs Corners Road to its intersection with State Route 31A (East Lee Street Road); extending west on Route 31A to Culver Road; extending south on Culver Road to intersection with East Barre Road; extending west on East Barre Road to its intersection with State Route 98 (Quaker Hill Road); extending south on State Route 98 to the southern border of Orleans County; extending west along the southern border of Orleans County; extending north along the western border of Orleans County.

(c) That area of Wayne County which is bordered on the north by Lake Ontario and is bordered on the east by Mapleview Heights; extending south on Mapleview Heights to its intersection with Wright Road; extending east on Wright Road to its intersection with Dutch Street Road; extending south on Dutch Street Road to its intersection with Lasher Road; extending south on Lasher Road to its intersection with Wilson Road; extending west on Wilson Road to its intersection with Brown Road; extending south on Brown Road to its intersection with Salter Road; extending west on Salter Road and becoming Clinton Avenue; continuing west on Clinton Avenue to its intersection with Route 414; extending south on Route 414 to its intersection with Catch Pole Road; extending west on Catch Pole Road to its intersection with Covell Road; extending south on Covell Road to its intersection with Wayne Center Rose Road; extending west on Wayne Center Rose Road and becoming Ackerman Road; continuing west on Ackerman Road to its intersection with Route 14; extending south on Route 14 to its intersection with Burton Road; extending west on Burton Road to its intersection with Middle Sodus Road; extending north on Middle Sodus Road to its intersection with Maple Street Road; extending north on Maple Street Road to its intersection with McMullen Road; extending northwest on McMullen Road to its intersection with Deneef Road; extending south on Deneef Road to its intersection with Zurich Road; extending west on Zurich Road to its intersection with Arcadia-Zurich-Norris Road; extending south on Arcadia-Zurich-Norris Road to its intersection with Henkle Road; extending west on Henkle Road to its intersection with Heidenreich Road; extending south on Heidenreich Road to its intersection with Fairville Station Road; extending northwest on Fairville Station Road to its intersection with Maple Ridge Road; extending northwest on Maple Ridge Road to its intersection with Decker Road; extending west on Decker Road to its intersection with Sand Hill Road; extending north on Sand Hill Road to its intersection with Smith Road; extending west on Smith Road to its intersection with Newark Road; extending south on Newark Road to its intersection with Desmith Road; extending west on Desmith Road to its intersection with Schilling Road; extending northwest on Schilling Road to its intersection with State Route

21; extending south on state Route 21 to its intersection with Cole Road; extending west on Cole Road to its intersection with Parker Road; extending south on Parker Road to its intersection with LeRoy Road; extending west on LeRoy Road to its intersection with Maple Avenue; extending north on Maple Avenue to its intersection with Marion Road; extending west on Marion Road to its intersection with Ontario Center Road; extending north on Ontario Center Road to its intersection with Atlantic Avenue; extending west on Atlantic Avenue to its intersection with Lincoln Road; extending north on Lincoln Road to its intersection with Haley Road; extending west on Haley Road to its intersection with County Line Road; extending north on County Line Road to its intersection with Lake Ontario.

Section 140.3 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed and a new section 140.3 is added to read as follows:

(a) That area of Niagara County bordered on the north by Lake Ontario; bordered on the west by Maple Road; extending south on Maple Road to its intersection with Wilson-Burt Road; extending east on Wilson-Burt Road to its intersection with Beebe Road; extending south on Beebe Road to its intersection with Ide Road; extending east on Ide Road to its intersection with Route 78 (Lockport-Olcott Road); extending north on Route 78 (Lockport-Olcott Road) to its intersection with Lake Ontario, in the Towns of Burt, Newfane, and Wilson in the County of Niagara, State of New York.

(b) That area of Niagara County bordered on the [east] west by Porter Center Road starting at its intersection with Route 104 (Ridge Road) and extending north-northeast on Porter Center Road to its intersection with Langdon Road; extending east on Langdon Road to its intersection with Dickersonville Road; extending north on Dickersonville Road to its intersection with Schoolhouse Road; extending east on Schoolhouse Road to its intersection with Ransomville Road; extending south on Ransomville Road to its intersection with Route 104 (Ridge Road); [extends east] extending northeast on Route 104 (Ridge Road) to its intersection with Simmons Road; extending south on Simmons Road to its intersection with Albright Road; extending east on Albright Road to its intersection with Townline Road; extending south on Townline Road to its intersection with Lower Mountain Road; extending west on Lower Mountain Road to its intersection with Meyers Hill Road; extending south on Meyers Hill Road to its intersection with Upper Mountain Road; extending west on Upper Mountain Road to its intersection with Indian Hill Road; extending north-east on Indian Hill Road to its intersection with Route 104 (Ridge Road); extending east on Route 104 (Ridge Road) to its intersection with Porter Center Road, in the Town of Lewiston, in the County of Niagara, State of New York.

(c) That area of Niagara County bordered on the north by Lake Ontario extending east to the intersection of Keg Creek, extending south to its intersection with Route 18 (Lake Road); extending east on Route 18 (Lake Road) to its intersection with Hess Road, extending south on Hess Road to its intersection with Drake Settlement Road, west on Drake Settlement Road to its intersection with Transit Road; extending north on Transit Road to its intersection with Route 18 (Lake Road); extending west on Route 18 (Lake Road) to its intersection with Lockport Olcott Road; extending north on Lockport Olcott Road to the border with Lake Ontario.

(d) That area of Orleans County bordered on the north by Route 104 (Ridge Road) at its intersection with Eagle Harbor Waterport Road; extending south on Eagle Harbor Waterport Road to its intersection with Eagle Harbor Knowlesville Road; west on Eagle Harbor Knowlesville Road to its intersection with Presbyterian Road; extending southwest on Presbyterian Road to its intersection with Longbridge Road; extending south on Longbridge Road to its intersection with State Route 31; extending west on State Route 31 to its intersection with Wood Road; extending south on Wood Road to West County House Road; extending west on West County House Road to its intersection with Maple Ridge Road; extending west on Maple Ridge Road to its intersection with Culvert Rd; extending north on Culvert Rd. to its intersection with Telegraph Road; extending west on Telegraph Road to its intersection with Beales Road; extending north on Beales Road to its intersection with Portage Road; extending east on Portage Road to its intersection with Culvert Rd; extending north on Culvert Rd. to its intersection with Route 104 (Ridge Road), in the Towns of Ridgeway and Gaines, in the County of Orleans, State of New York.

(e) That area of Wayne County bordered on the north by Lake Road at its intersection with Redman Road; extending east to its intersection with Maple Avenue; extending south on Maple Avenue to its intersection with Middle Road; extending west on Middle Road to its intersection with Rotterdam Road; extending south on Rotterdam Road to its intersection with State Route 104; extending west on State Route 104 to its intersection with Pratt Road; extending south on Pratt Road to its intersection with Ridge Road; extending west on Ridge Road to its intersection with Richardson Road; extending south on Richardson Road to its intersection with Tripp Road; extending south on Tripp Road to its intersection with Podger Road;

extending west on Podger Road to its intersection with East Townline Road; extending north on East Townline Road to its intersection with Everdyke Road; extending west on Everdyke Road to its intersection with Russell Road; extending south on Russell Road to its intersection with Pearsall Road; extending west on Pearsall Road to its intersection with State Route 21; extending north on State Route 21 to its intersection with State Route 104; extending east on State Route 104 to its intersection with East Townline Road; extending north on East Townline Road to its intersection with Van Lare Road; extending east on Van Lare Road to its intersection with Redman Road; extending north on Redman Road to its intersection with Lake Road, in the Town of Sodus, in the County of Wayne, State of New York.

(f) That area of Wayne County bordered on the north by Shepard Road at its intersection with Fisher Road; extending east on Shepard Road to its intersection with Salmon Creek Road; extending southwest on Salmon Creek Road to its intersection with Kenyon Road; extending west on Kenyon Road to its intersection with Furnace Road; extending north on Furnace Road to its intersection with Putnam Road; extending east on Putnam Road to its intersection with Fisher Road; extending north on Fisher Road to its intersection with Shepard Road, in the Towns of Ontario and Williamson, in the County of Wayne, State of New York.

(g) That area of Wayne County bordered on the northeast by Sodus Bay to its intersection with Ridge Road; extending west on Ridge Road to its intersection with Boyd Road; extending north on Boyd Road to its intersection with Sergeant Road; extending north on Sergeant Road to its intersection with Morley Road; extending east on Morley Road to its intersection with State Route 14; extending north on State Route 14 to its intersection with South Shore Road; extending east on South Shore Road; than bordered on the east north east by Sodus Bay, in the Town of Sodus, in the County of Wayne, State of New York.

**Text of proposed rule and any required statements and analyses may be obtained from:** Kevin King, Director, Division of Plant Industry, NYS Department of Agriculture & Markets, 10B Airline Drive, Albany, New York 12235, (518) 457-2087

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

**Public comment will be received until:** Five days after the last scheduled public hearing.

#### **Regulatory Impact Statement**

##### 1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Said Section also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

##### 2. Legislative objectives:

The proposed rule establishing a quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the further spread within the State of a serious viral infection of plants, the plum pox virus (Potyvirus).

##### 3. Needs and benefits:

This proposed rule repeals the existing plum pox virus quarantine in New York State and replaces it with a new regulation which responds to the most recent detections of this virus in the State. The purpose of the amendments is to help prevent the further spread of this viral infection of stone fruit trees within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but debilitates the productive life of the trees. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. There is no known treatment or cure for this virus. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox virus by feeding on the sap of infected trees and

then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for plum pox.

In 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox virus quarantine in that portion of Niagara County. The plum pox virus was subsequently detected in four (4) other locations in Niagara County as well as one location in Orleans County. In response to these detections, on October 8, 2008, the Department adopted, on an emergency basis, amendments to the rule, which established the quarantine in Orleans County and extended the quarantine in Niagara County. This rule was adopted on a permanent basis on December 10, 2008.

On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these latest findings, the proposed rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The rule also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the rule deregulates the third of the three (3) regulated areas in Niagara County. This is due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols.

The proposed amendments are necessary, since the failure to immediately establish or extend this quarantine could result in the further, unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the natural resources of New York, but could also result in the imposition on New York of a federal quarantine or quarantines by other states. Such quarantines would cause economic hardship for New York's nurseries and stone fruit growers, since such quarantines may be broader than this one. The consequent loss of business would harm industries which are important to New York's economy and as such, would harm the general welfare.

#### 4. Costs:

##### (a) Costs to the State government:

Under this proposal, regulated articles in the newly established regulated areas that are exposed to plum pox virus would be destroyed. Compensation for the regulated articles is predicated upon the age of the plants and trees. Compensation would range from \$4,368 to \$17,647 per acre, of which the USDA would pay 85% of the compensation. Accordingly, New York's 15% share of the compensation would be \$655 to \$2,647 per acre, provided the owners of the regulated articles in question submit verified claims to the Department in accordance with section 165 of the Agriculture and Markets Law, and provided further that damages are awarded based on those claims.

Nursery dealers and nursery growers would also be eligible to receive compensation for regulated articles planted in the newly established regulated areas and nursery stock regulated areas that would otherwise be prohibited from sale. New York would pay up to \$1,000 per acre in costs to remove such regulated articles.

##### (b) Costs to local government:

None.

##### (c) Costs to private regulated parties:

Regulated parties handling regulated articles in the newly established nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the newly established regulated areas and nursery stock regulated areas.

##### (d) Costs to the regulatory agency:

None. It is anticipated that the regulatory oversight and enforcement of the expanded quarantine under this proposal would be accomplished through use of existing staff and resources.

##### 5. Local government mandate:

None.

##### 6. Paperwork:

Nursery dealers and nursery growers handling regulated articles in the newly established nursery stock regulated areas would require a compliance agreement with the Department. They may also require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement of these regulated articles.

##### 7. Duplication:

None.

##### 8. Alternatives:

None. The failure of the State to establish and extend the quarantine under this proposal in response to the most recent findings of the plum pox virus could result in the establishment of quarantines by the federal government or other states. It could also place the State's own natural resources at risk from the further spread of plum pox virus which could result from the unrestricted movement of regulated articles in the regulated areas. In light of these factors, there does not appear to be any viable alternative to the establishment of the quarantine proposed in this rulemaking.

##### 9. Federal standards:

Sections 301.74 through 301.74-5 of Title 7 of the Code of Federal Regulations (CFR) restricts the interstate movement of regulated articles susceptible to the plum pox virus. The proposed amendments do not exceed any minimum standards for the same or similar subject areas, since it restricts the intrastate, rather than interstate, movement of regulated articles by establishing a plum pox virus quarantine in New York State.

##### 10. Compliance schedule:

It is anticipated that regulated persons would be able to comply with the proposed amendments immediately.

#### **Regulatory Flexibility Analysis**

##### 1. Effect on small business:

In response to the most recent detections of the plum pox virus, this proposed rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The proposed rule also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the proposed rule deregulates the third of the three (3) regulated areas in Niagara County, since the virus has not been detected in this regulated area for three (3) consecutive years.

It is estimated that seven (7) stone fruit growers in Wayne County and three (3) stone fruit growers in Niagara County are located in the quarantine or regulated areas established by this proposal. All of these entities are small businesses.

It is not anticipated that local governments would be involved in the handling or movement of regulated articles within any part of the proposed quarantine areas.

##### 2. Compliance requirements:

Any regulated parties in the nursery stock regulated areas established by this proposal would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in these newly established areas would be required to enter into compliance agreements.

The proposed amendments would prohibit regulated parties in the newly established nursery stock regulated areas from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties in these newly established areas would be required to maintain sales records of regulated articles for a period of three years.

All regulated parties in the regulated areas established under this proposal would be prohibited from moving regulated articles within those regulated areas. Regulated parties would, however, be able to move regulated articles to and from the newly established regulated areas pursuant to a limited permit.

##### 3. Professional services:

In order to comply with the proposed amendments, regulated parties handling regulated articles in the newly established nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

##### 4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule:

None.

##### (b) Annual cost for continuing compliance with the proposed rule:

Regulated parties handling regulated articles in the newly established nursery stock regulated areas pursuant to a compliance agreement may

require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas.

It is not anticipated that local governments would be involved in movement of regulated to or through the regulated areas.

#### 5. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposed amendments establish and extend the quarantine to only those areas where the plum pox virus has been detected. Additionally, the proposal lifts the quarantine in one area of Niagara County where the virus has not been detected for three (3) years. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the proposed rule minimizes adverse economic impact as much as is currently possible.

#### 6. Small business and local government participation:

In 1999, a Plum Pox Virus Task Force was established in response to the initial discovery of the plum pox virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference and assists in outreach as needed in response to changes in the spread of the virus. Outreach efforts will continue.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments:

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Nursery dealers and nursery growers handling regulated articles within the newly established nursery stock regulated areas, other than pursuant to a compliance agreement, would require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, would be made pursuant to compliance agreements for which there is no charge.

#### Rural Area Flexibility Analysis

##### 1. Type and estimated numbers of rural areas:

In response to the most recent detections of the plum pox virus, the proposed rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The proposal also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the rule deregulates the third of the three (3) regulated areas in Niagara County, since the virus has not been detected in this regulated area for three (3) consecutive years.

It is estimated that seven (7) stone fruit growers in Wayne County and three (3) stone fruit growers in Niagara County are located in the quarantine or regulated areas established by this proposal. All of these entities are located in rural areas of New York State.

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

Any regulated parties in the nursery stock regulated areas established by this proposal would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in these newly established nursery stock regulated areas would be required to enter into compliance agreements.

All regulated parties in the newly established regulated areas would be prohibited from moving regulated articles within those regulated areas. Regulated parties would, however, be able to move regulated articles to and from the newly established regulated areas pursuant to a limited permit.

In order to comply with the proposed rule, regulated parties handling regulated articles in the newly established nursery stock regulated areas, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

#### 3. Costs:

Regulated parties handling regulated articles in the newly established nursery stock regulated areas pursuant to compliance agreement may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of

\$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs will be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles exposed to the plum pox virus.

#### 4. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on regulated parties in rural areas. The rule establishes and extends the quarantine to only those areas where the plum pox virus has been detected. Additionally, the rule deregulates in one area of Niagara County where the virus has not been detected for three (3) consecutive years. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

#### 5. Rural area participation:

In 1999, a Plum Pox Virus Task Force was established in response to the initial discovery of the plum pox virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference and assists in outreach as needed in response to changes in the spread of the virus. Outreach efforts will continue.

#### Job Impact Statement

The establishment and extension of the plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. In response to the most recent detections of the plum pox virus, the proposed rule amends the existing quarantine areas in Niagara and Orleans County and establishes a new quarantine area in Wayne County. The rule also amends two (2) of the three (3) regulated areas in Niagara County, establishes a new regulated area in Orleans County and establishes three (3) new regulated areas in Wayne County. Finally, the proposed rule deregulates the third of the three (3) regulated areas in Niagara County, since the virus has not been detected in this regulated area for three (3) consecutive years.

It is estimated that seven (7) stone fruit growers in Wayne County and three (3) stone fruit growers in Niagara County are located in the quarantine or regulated areas established by the proposed rule.

A further spread of this plant infection would have very adverse economic consequences to these industries in New York State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government and by other states. By helping to prevent the further spread of the plum pox virus, the proposed rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's stone fruit and nursery industries.

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## Office of Alcoholism and Substance Abuse Services

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### EMERGENCY RULE MAKING

#### Opioid Treatment Services

**I.D. No.** ASA-46-10-00007-E

**Filing No.** 1135

**Filing Date:** 2010-11-01

**Effective Date:** 2010-11-01

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

**Action taken:** Repeal of Part 828; and addition of new Part 828 to Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 32.01, 32.05, 32.07 and 32.09

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

**Specific reasons underlying the finding of necessity:** 1. The regulation has not been changed substantially in 34 years and the treatment of opioid addiction has changed substantially over that period of time and recognizes and allows for advances in toxicology testing and pharmacology.

2. Federal regulations were promulgated 9 years ago and this regulation brings NYS more reflective of the Federal regulations.

**Subject:** Opioid Treatment Services.

**Purpose:** Bring the current practice of opioid treatment services within NYS and to bring the regulation into alignment with Federal regulations.

**Substance of emergency rule:** The proposed regulations would revise Section 828 of the Mental Hygiene law (Requirements for the operation of chemotherapy substance abuse programs) to allow for changes in addiction treatment services as the last changes to the regulation occurred under DSAS as Part 1040 in 1984 as 1040.21. It was then renumbered as Part 828 and moved to OASAS in 2000, with no significant changes. The methadone regulation has existed for 24 years without change even though the Federal rules of opioid treatment have changed due to advancements and evidence based practice.

Changes for Opioid Treatment Programs

- Conform OASAS regulations to federal regulations (42 CFR Part 8) regarding certification of opioid treatment programs (OTP).
- Adds regulations related to buprenorphine (methadone alternative) treatment, removing an obstacle to physicians to administer buprenorphine in OTPs where clients may receive supportive services.
- Provides for opioid medical maintenance (OMM), pursuant to federal waiver, for certain qualified opioid patients and providers.
- Provides guidelines for certified providers to provide services at additional locations.
- Requires medical directors to become certified in an area of addiction medicine.
- Requires testing for Hepatitis and makes testing for STDs optional.
- Increases flexibility in toxicology testing.
- No longer requires OASAS approval for methadone dosage increases above 200 milligrams.
- Recognizes that treatment for opioid addiction may be provided in a residential or in-patient setting and makes provisions for regulation of such services.
- Greater consistency between federal and state regulations will benefit both providers and clients.
- Adds language that states only clients with a primary diagnosis of opioid addiction may be admitted to an OTP.
- Annual physical still required however at clinics discretion patient may be able to go to their private MD.
- New language added for transfer patients.
- More flexibility for counselor to patient staffing ratios.
- Greater flexibility in providing patients with take home medication and removes agency approval on a one-time basis for up to 30 days take home dose.
- Adds recall to reduce diversion.
- Defines role of security guards at the OTP.
- Defines aftercare.
- States specialized services that are not defined by regulation must be approved by OASAS prior to implementation.
- States providers must establish a community relations policy and committee.
- Providers must establish a quality improvement policy.
- Requires 50% of the counseling staff to be CASAC or CASAC-T within four years.

This regulation was originally published in the NYS Register in December 2008. Many providers commented and OASAS responded. Here are the additional changes to the regulation.

- Adds language for approved medication which provides programs the ability to use methadone, buprenorphine or any other agent approved for opioid treatment by federal authorities.
- Provides for opioid medical maintenance (OMM), pursuant to federal waiver, for certain qualified opioid patients and providers.
- Adds language for health care coordinator which is consistent with other regulations in the Part.
- Changed language for nurse/patient ratio back to prior language as no change was intended.
- Continuing care treatment is limited to four months, where after a client who requires more counseling should be referred to another modality.
- Increases flexibility in toxicology testing.
- Multidisciplinary team language changed to be consistent with our regulations in the Part.

- Mandatory use of Locatdr form lifted.
- Allows for prescribing professionals to perform medical services except for initial dose and medical maintenance.
- Clarified definitions for taper and detox.
- Clarified language for transfer patients.
- Recognizes that treatment for opioid addiction may be provided in a residential or in-patient setting and makes provisions for regulation of such services.
- Changed the language and now allows an individual who voluntarily completed treatment to return to treatment without confirming current opioid dependence of two years and instead can accept them with one year.

A primary goal of the proposed amendments is to improve treatment cost effectiveness in all opioid treatment programs. The proposed amendments accomplish this in several ways. OTPs flexibility in toxicology testing is expanded to permit the option of oral fluid testing which is less onerous to staff, more dignified for the patient, and allows several patients to be tested simultaneously. Increased toxicology testing will improve patient outcomes through early identification and appropriate counseling. Because fewer patients present with sexually transmitted disease (STD) testing for STD is no longer required, but can be completed as necessary for those patients who request testing or exhibit signs and symptoms. However, to protect the public, testing for Hepatitis is mandated but federal funding or local DOH funds are available for Hepatitis testing and vaccines to offset costs.

More efficient and cost-effective administration is also a goal of the proposed rule. OASAS does not expect to incur increased costs related to administering the new rule. OASAS will modify the review instrument currently used to evaluate OTPs and will provide additional technical assistance to OTPs, but this is not expected to increase agency costs because staff time currently needed to process individual and general regulatory waivers to current regulations will be decreased and can be allocated more efficiently.

Municipalities may recognize savings because the proposed regulation changes the number of years it may take a client to achieve a monthly reduced medication pick-up schedule for take home medications from four years to three years. Medicaid costs for visits and billing will be reduced because the patient goes to an OMM only once per month rather than weekly.

The proposed amendments will result in a reduction in paperwork for both OASAS and its certified providers. For example, the proposed regulations will reduce the number of individual patient exemptions and general waivers from current regulation, saving providers and the agency costly administrative time. An estimated monthly average of 10 requests for waivers would be eliminated. The proposed regulation allows more flexibility in take home medication and clinic schedule changes, areas of the highest number of individual patient exemptions.

The proposed regulation removes a requirement for OASAS approval for methadone dosage increases above 200 milligrams based on review of several available studies. In January 2007, 103 of 115 certified clinics requested a waiver from OASAS regarding prior OASAS approval for methadone dosage increases; granting the waiver resulted in 114 fewer individual patient exemptions regarding dosage increases during 2007. The proposed draft regulations would eliminate the need for providers to submit this waiver renewal upon recertification.

Federal regulations set the minimum standards and preserve states' authority to regulate OTPs and determine appropriate additional regulations. New York state has many unique concerns because the state has more OTP clinics and patients (115 and 39,314 respectively) than any of the other 44 states and territories providing opioid treatment. In New York City, multiple clinics serving thousands of patients may exist within blocks of each other leading to community resistance and public opposition to community based treatment programs. As a result, New York state regulations tend to be more stringent than federal standards.

OASAS solicited comments on the proposed regulations and possible alternatives from a cross-section of New York's upstate and downstate treatment provider community, as well as urban and rural programs. OASAS utilized a statewide coalition group, the Committee of Methadone Program Administrators (COMPA), to distribute the proposed regulation to all of its members and to collect comments. All comments received were reviewed and incorporated wherever appropriate. The proposed regulations were also shared with the National Alliance of Methadone Advocates (NAMA), New York States Council of Local Mental Hygiene Directors, New York State's Advisory Council, and Alcoholism and Substance Abuse Providers of New York State (ASAP).

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 29, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Deborah Egel, 1450 Western Ave., Albany, NY 12203, (518) 485-2312, email: DeborahEgel@oasas.state.ny.us

**Summary of Regulatory Impact Statement**

The proposed Opioid Treatment for Addiction regulation was originally submitted for public review and comment within the field and then publicly in the NYS Department of State Register in December 2008. Prior to these proposed changes the last amendment to the regulation occurred under DSAS as Part 1040 in 1984 as 1040.21. It was then renumbered as Part 828 and moved to OASAS in 2000, with no significant changes. The methadone regulation has existed for 26 years without change even though the Code of Federal Regulations, title 42, Part 8 of opioid treatment have changed due to advancements and evidence based practice. Therefore the impact of the proposal will more closely align state regulations with federal rules that were promulgated in 2001, that changed due to advancements and evidence based practice.

Opioid addiction is a chronic illness which can be treated effectively with medications that are administered under conditions consistent with their pharmacological efficacy, and when treatment includes necessary supportive services such as psychosocial counseling, treatment for co-occurring disorders, medical services and, when appropriate, vocational rehabilitation. Medication assisted treatment is an evidence based practice for opioid dependency treatment. The proposed regulation sets forth standards to guide opioid dependency treatment.

Proposed changes recognize opioid addiction as a chronic illness that can be treated with certain medications (medication assisted treatment) in conjunction with supportive services (counseling, treatment for co-occurring disorders, and vocational rehabilitation).

**1. Statutory Authority:**

Mental Hygiene Law (MHL) § 19.07(e) authorizes the Commissioner of the Office of Alcoholism and Substance Abuse Services (OASAS) to ensure that persons who abuse or are dependent on alcohol and/or substances and their families receive effective and high quality care and treatment. MHL § 19.09(b) authorizes the Commissioner to adopt regulations to implement any matter under his or her jurisdiction.

MHL § 19.16 requires the commissioner to establish and maintain, either directly or through contract, a central registry for purposes of preventing multiple enrollment in methadone programs.

MHL § 19.40 authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

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

MHL § 19.21 (b) requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse, and chemical dependence facilities.

MHL § 19.21(d) requires the Commissioner to promulgate regulations to evaluate chemical dependence treatment effectiveness and to establish a procedure for reviewing and evaluating the performance of providers of services in a consistent and objective manner.

MHL § 32.01 authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by MHL article 32.

MHL § 32.05 requires providers to obtain an operating certificate issued by the Commissioner in order to operate chemical dependence services including but not limited to methadone.

MHL § 32.09(b) gives the Commissioner the power to withhold an operating certificate for a Methadone provider until statutory requirements are satisfied.

**2. Legislative Objectives:**

Article 32 of the Mental Hygiene Law (§ 32.01) enables the Commissioner to regulate and assure consistent high quality of services within the state for persons suffering from chemical abuse or dependence, their families and significant others, and those at risk of becoming chemical abusers. 14 NYCRR Part 828 establishes requirements for chemotherapy substance abuse treatment (methadone). Revising policy and procedures with regard to opioid treatment, will establish a standard for all facilities, which is in the best interest of the patient, and will assist opioid treatment programs to provide better health care services and recovery from opioid dependency.

**3. Needs and Benefits:**

The proposed amendments advance the goals of guaranteeing patients the best treatment in a manner that is cost effective and accountable. The proposed amendments are needed because of developments inside and outside the agency including: (1) issues identified during an on-going broad-based dialogue with OASAS certified providers and affiliated stakeholders to define a "gold standard" for treatment and/or identify "best practices" for quality patient-centered care; (2) the need to conform regulations to updated federal standards related to opioid treatment (42 CFR Part 8), and; (3) evolution of social attitudes toward greater acceptance of persons recovering from chemical dependence

Part 828 conforms state and federal regulations affecting approximately 36% (40,000) of addiction patients in New York State. Opioid Treatment

Program (OTP) physicians may administer buprenorphine (methadone alternative) in an OTP where clients will receive additional beneficial services such as counseling, toxicology, and medical support. Opioid Medical Maintenance (OMM; pursuant to a federal waiver to select providers approved by OASAS) permits monthly dispensing in a physician's office for certain patients who do not need long-term counseling.

This regulation was originally published in the NYS Register in December 2008. Many providers responded and offered comments. Here are the resulting changes to the regulation.

- Adds regulations related to buprenorphine (methadone alternative) treatment, removing an obstacle to physicians to administer buprenorphine in OTPs where clients may receive supportive services.
- Provides for opioid medical maintenance (OMM), pursuant to federal waiver, for certain qualified opioid patients and providers.
- Adds language for health care coordinator which is consistent with other regulations in the Part.
- Changed language for nurse/patient ratio back to prior language as no change was intended.
- Continuing care treatment is limited to four months, where after a client who requires more counseling should be referred to another modality.
- Increases flexibility in toxicology testing.
- Multidisciplinary team language changed to be consistent with our regulations in the Part.
- Mandatory use of Locatdr lifted.
- Allows for prescribing professionals to perform medical services except for initial dose and medical maintenance.
- Clarified definitions for taper and detoxification.
- Clarified language for transfer patients.
- Recognizes that treatment for opioid addiction may be provided in a residential or in-patient setting and makes provisions for regulation of such services.
- Changed the language and now allows an individual who voluntarily completed treatment to return to treatment without confirming current opioid dependence of two years and instead can accept them with one year.

In addition, all technical issues such as lettering, grammar and punctuation were fixed where necessary.

**4. Costs:**

Additional costs, if any, are up-front, minimal, and offset by improved treatment outcomes, increased staff efficiency, and clearer compliance directives.

**a. Costs to regulated parties:**

Patients and service providers are regulated parties. Patients will not incur additional costs. Providers may incur minimal up-front costs associated with laboratory testing, training and/or hiring qualified health professionals, but costs will be offset by improved outcomes, increased staff efficiency, and clearer compliance directives.

The proposed toxicology regulations are more cost effective: optional oral fluid testing is less onerous to staff, more dignified for the patient, and can address several patients simultaneously. Providers will know when patients relapse to deliver appropriate services for improved outcomes. The proposed regulation no longer mandates sexually transmitted disease (STD) testing but recommends testing to be completed as necessary for patients who request testing or exhibit signs and symptoms. However, to protect the public, testing for Hepatitis is mandated because Hepatitis C has become epidemic; federal and DOH funds offset costs of testing and vaccines.

OASAS proposes requiring medical directors hired after the promulgation of the new rule to be certified in Addiction Medicine. All medical directors must obtain a board certification in one of three types of addiction medicine subspecialties and become buprenorphine certified within four months of employment (completion of an 8-hour course). Physicians may be hired on a probationary basis with four years to obtain certification.

The regulation requires fifty percent of staff to be Qualified Health Professionals (QHPs). Patients in OTPs with multiple medical, psychiatric and psychosocial barriers require specially trained staff. Most OASAS outpatient programs already meet or exceed this requirement because Credentialed Alcohol and Substance Abuse Counselors (CASAC) trainees are counted towards the 50 percent requirement. The proposed amendments for OTPs include a two year implementation to reach the 50% level plus flexibility in medication administration, toxicology and staffing configurations.

Providers will not incur any additional costs for materials. Requirements for OTP quality assurance are already mandated under Federal standards.

**b. Costs to the agency, State and local governments:**

OASAS does not anticipate increased administrative costs. OASAS will modify the review instrument currently used to evaluate OTPs and provide technical assistance to OTPs. Staff time needed to process indi-

vidual and general regulatory waivers to current regulations will be decreased and such time can be allocated more efficiently.

Counties, cities, towns or local districts will incur no additional costs. Municipalities may realize savings because the regulation reduces (four years to three years) the time for an OTP client to achieve a monthly medication pick-up schedule; Medicaid costs will be reduced because the patient goes to an OMM monthly rather than weekly.

#### 5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments.

#### 6. Paperwork / Reporting:

Paperwork will be reduced by reducing the requests for patient exemptions and regulatory waivers (average of 10 per month). The requirement that OASAS approve methadone dosage increases above 200 milligrams is removed. Studies show that adequate dosage varies among patients depending on metabolism and interaction with concurrent medications, yet inadequate methadone dosing is common (NIH, 1998; Marion, 2005). Dosing flexibility can be safe and improves treatment retention (Tenore, 2004; Maddux, et al, 1997). In January 2007, 103 of 115 OASAS clinics requested a waiver for dosage increases; granting the waiver resulted in 114 fewer individual patient exemptions. The proposed regulation eliminates the necessity of submitting this waiver renewal upon recertification.

#### 7. Duplications:

There are no duplications of other state or federal requirements.

#### 8. Alternatives:

The only other alternative is to keep the existing regulation in place. This would be detrimental to both the opioid treatment providers and patients being served. In an effort to elicit comments on the proposed regulations and possible alternatives, these amendments were shared with New York's treatment provider community, representing a cross-section of upstate and downstate, as well as urban and rural programs. OASAS used a statewide coalition group, the Committee of Methadone Program Administrators (COMPMA), to facilitate distribution of this proposed regulation to all of its members and have collected comments. The regulations has been published, more comments were received, reviewed and more changes were made. Additionally, these regulations were also shared with the National Alliance of Methadone Advocates (NAMA), New York State's Council of Local Mental Hygiene Directors, New York State's Advisory Council, and Alcoholism and Substance Abuse Providers of NYS (ASAP).

#### 9. Federal Standards:

Federal regulations set minimum standards for OTPs. New York's take-home regulations are more stringent than federal standards; New York has more OTP clinics and patients (115 and 39,314 respectively) than any of the other states and territories providing opioid treatment. Multiple New York City clinics serve thousands of patients within blocks of each other and often face community resistance.

Methadone diversion and related mortality is a concern because of the number of clinics and a substantial black market (Bell & Zador, 2000, Breslin & Malone, 2006, & Lewis, 1997). Regulations addressing diversion limit patients' receipt of take-home medication (minimum two years of treatment and additional criteria to receive a 30 day take-home supply). The proposed regulation seeks to reduce diversion yet balance patients' ease of access by increasing testing frequency and adding routine "call backs" for patients with take home doses (Varenbut, et.al, 2007). Studies show benefits to take home options: improves treatment retention, attracts new patients, rewards patients' abstinence or treatment compliance, and improves patient quality of life (Ritter, et al, 2005). Most methadone-related deaths linked to diversion involved patients in pain management centers, not OTPs (Center for Substance Abuse Treatment, 2004; Cicero, 2005).

#### 10. Compliance Schedule:

Providers may comply with the proposed changes upon adoption. Full implementation of this Part will be completed within one year of adoption with the exception of phased-in staffing requirements.

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Cicero T.J. (2005). Diversion and abuse of methadone prescribed for pain management. *Journal of American Medical Association*, 293(3): 297-298.

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National Institute of Health. (1998). National Consensus Development Panel on Effective Medical Treatment of Opiate Addiction. *Journal of the American Medical Association*, 280 (1998): 1936-43.

Ritter, A. & Di Natalie, R. (2005). The relationship between take-away methadone policies and methadone diversion. *Drug and Alcohol Reviews*, 24:347-352.

Tenore, P. (2004). DINO-VAMP: A helpful acronym in determining optimal methadone dosing and brief review of dosing literature. *Journal of Maintenance in the Addictions*, Vol. 2(4), 29-45.

Varenbut, M., Teplin, D., Daiter, J., Raz, B., Worster, A, Emadi-Konjin, P., Frank, N., Konyer, A., Greenwald, I., & Snider-Adler, M. (2007) "Tampering by office-based methadone maintenance patients with methadone take home privileges: a pilot study", *Harm Reduction Journal* 2007, 4:15 doi:10.1186/1477-7517-4-15. Available at: <http://www.pharmreductionjournal.com/content/4/1/15>

The Center of Substance Abuse Treatment (CSAT) of the Substance Abuse and Mental Health Services Administration (SAMHSA) within the US Department of Health and Human Services (HHS).

#### Regulatory Flexibility Analysis

**Effect of the Rule:** The proposed Part 828 will impact certified and/or funded providers. It is expected that the development of opioid treatment programs will require providers to amend some of their policies and procedures in their treatment modality. These new services will result in better patient treatment outcomes. Local health care providers may see an increase in patients seeking medication assisted treatment for opioid dependency due to less restrictive procedures for medication assisted treatment. As a result of patients receiving these services, local governments may see a decrease in services associated with active illicit drug use such as arrests and emergency room visits. Also, local governments and districts will not be affected because any nominal increase in cost will be offset by better patient outcomes.

**Compliance Requirements:** It is expected that there will be some changes in compliance requirements. However, providers are equipped to make the changes which will enhance patient care. Also, providers are already required by federal statutes to provide certain services such as utilization review, so it is not expected that this regulation, which provides additional guidance on good utilization review practices, will have additional costs.

**Professional Services:** While it is expected that programs may require additional professional services the impact is nominal because over half of the current opioid treatment providers already meet the criteria set forth in the regulation for qualified health professionals and the regulation allows for phased implementation over four years.

**Compliance Costs:** Some programs may need additional formally trained staff to meet the proposed requirements; however, new CASAC credentialing rules, acceptance of CASAC trainees and phased implementation will decrease any barriers for compliance. Laboratory fees may increase; however, existing reimbursement fees should be sufficient to meet these requirements.

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

**Minimizing Adverse Impact:** Part 828 has been carefully reviewed to ensure minimum adverse impact to providers. Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare of New York, The Federal Center for Substance Abuse Treatment, The Federal Drug Enforcement Agency, the OASAS Methadone Transformation Team, the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services and approximately 50 opioid treatment programs were given the opportunity to comment on this proposal. Any impact this rule may have on small businesses and the administration of state or local governments and agencies will either be a positive impact or the nominal costs and compliance are small and will be absorbed into the already existing economic structure. The positive impact for our patients and our health care system, outweigh any potential minimal costs.

**Small Business and Local Government Participation:** The proposed regulations were shared with New York's treatment provider community

including, Alcoholism and Substance Abuse Providers of NYS, Inc., Greater New York Hospital Association, Healthcare of New York, The Federal Center for Substance Abuse Treatment, The Federal Drug Enforcement Agency, the OASAS Methadone Transformation Team, the Council of Local Mental Hygiene Directors and the Advisory Council on Alcoholism and Substance Abuse Services.

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

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

#### **Job Impact Statement**

The implementation of Part 828 will have an impact on jobs in that it will require 50% of the staff at an OTP to be a qualified health professional which is in alignment with other NYS treatment regulations (eg. Part 822). The hiring of formally trained staff will improve patient outcomes. At the present time OASAS has determined that most programs already meet or exceed this requirement. In addition, the regulation allows for CASAC trainees to be counted towards the 50% of QHP on staff and there is a phased implementation over the course of four (4) years. Finally, the change in CASAC testing requirements should increase the number of CASAC's in NYS. So while the current staff may need to enter formal education programs in order to maintain their employment this will help create new professional staff in New York State. This regulation will not adversely impact jobs outside of the agency.

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## Department of Audit and Control

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

#### **Official Station and Limitations of Traveling Expenses**

**I.D. No.** AAC-46-10-00005-P

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

**Proposed Action:** Amendment of sections 8.2 and 8.13 of Title 2 NYCRR.

**Statutory authority:** State Finance Law, sections 8 and 109

**Subject:** Official station and limitations of traveling expenses.

**Purpose:** To clarify the regulation and correct a typographical error.

**Text of proposed rule:** 2 NYCRR § 8.2 is amended as follows:

§ 8.2 Official station defined; limitations on traveling expenses imposed thereby

(a) Official station. (1) The official station of every employee shall be designated by the head of the agency. Such designation shall be in the best interests of the State and not for the convenience of an employee or to maximize travel expense reimbursement. Every designation of the official station of an employee shall be subject to review by the Comptroller. If any designation of an official station is found to be inconsistent with the provisions of this Part, a request for travel expense reimbursement based upon such an inconsistent designation may be disapproved by the Comptroller.

(2) No transportation costs will be allowed for travel between any employee's [place of residence] home and his or her official station. The [place of residence] home is considered to be the [city or town in which] location where the employee primarily resides. [Agency management retains discretion in allowing transportation costs to locations within the proximity of the official station.]

(3) Travel in proximity of official station. Transportation costs will be allowed when an employee is traveling to or from an alternate work location that is thirty-five miles or less from the employee's official station or the employee's home. Reimbursement will be at the appropriate mileage rate for the mileage between either: (a) the employee's home and the

alternate work location, or (b) the employee's official station and the alternate work location, whichever mileage is less. Agency management retains discretion to establish a reasonable reimbursement policy that provides for higher reimbursement when the employee travels to or from an alternate work location within thirty-five miles from the employee's home or his or her official station.

(b) Subsistence charges. The expense of meals or lodging within the immediate vicinity of the official station will not normally be reimbursed unless it is in the best interest of the State as determined by the head of the agency's finance office and subject to audit by the Comptroller.

**Text of proposed rule and any required statements and analyses may be obtained from:** Wendy H. Reeder, Esq., Office of the State Comptroller, 110 State Street, Albany, New York 12236, (518) 474-5714, email: wreeder@osc.state.ny.us

**Data, views or arguments may be submitted to:** Jamie L. Elacqua, Esq., Office of the State Comptroller, 110 State Street, Albany, New York 12236, (518) 473-4146, email: jlelacqua@osc.state.ny.us

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

#### **Regulatory Impact Statement**

1. Statutory authority: Section 109 of the State Finance Law provides that State employees shall receive reimbursement for actual and necessary transportation expenses pursuant to the Comptroller's rules regulations and guidelines. Additionally, section 8 of the State Finance Law provides that the Comptroller may make regulations as deemed necessary in the performance of his or duties imposed under law.

2. Legislative objectives: The Comptroller has recently issued new guidelines and the rule is necessary to harmonize the travel guidelines with the travel regulations. Also amended by this rule is correcting a typographical error in section 8.13.

3. Needs and benefits: This rule creates the "lesser mileage" rule. It is intended to provide for minimum compensation for state employees traveling within thirty-five miles of their home or official work station to an alternate work location.

4. Costs: There is no readily available method to calculate the costs associated with this rule; however we believe this rule will be cost neutral. State agencies have the discretion to pay mileage at a higher rate than the minimum rate and currently pay more allowed by the lesser mileage rule. Additionally, many travelers do not charge when traveling to an alternate work location, since the increase in mileage is usually small amounts. The fact that State agencies may continue to pay more and there is no way to determine how many travelers will charge for their mileage to an alternate work location makes the potential for increase of costs unquantifiable.

5. Local government mandates: No duty, service or responsibility is imposed by the rule upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork: There are no new reporting requirements or other paperwork as result of this rule.

7. Duplication: There is no duplication.

8. Alternatives: No significant alternatives were considered.

9. Federal standards: There is no lesser mileage rule for federal employee travel.

10. Compliance schedule: It is estimated that regulated persons will be able to achieve compliance with this rule immediately.

#### **Regulatory Flexibility Analysis**

1. Effect of rule: This rule will not impact small businesses or local governments since they are not regulated entities pursuant to this rule.

2. Compliance requirements: There will be no reporting, recordkeeping, or other affirmative acts that a small business or local government will have to undertake to comply with the rule.

3. Professional services: No professional services are needed for small businesses or local government to comply with this rule.

4. Compliance costs: There are no compliance costs associated with this rule for small businesses or local governments.

5. Economic and technological feasibility: Not applicable since small businesses and local governments are not regulated entities pursuant to this rule.

6. Minimizing adverse impact: Not applicable since small businesses and local governments are not regulated entities pursuant to this rule.

7. Small business and local government participation: Not applicable since small businesses and local governments are not regulated entities pursuant to this rule.

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

1. Types and estimated numbers of rural areas: This rule will apply to all State agencies in that are located in rural areas.

2. Reporting, recordkeeping and other compliance requirements; and professional services: No new requirements are applicable.

3. Costs: This rule will require State agencies in rural areas to compensate State employees in accordance with the rule.

4. Minimizing adverse impact: This rule will not adversely impact rural areas.

5. Rural area participation: This rule was proposed with input from the Public Employees Federation, the Governor's Office of Employee Relations and other unions which represent state employee interests in both urban and rural areas.

## Banking Department

### EMERGENCY RULE MAKING

#### Business Conduct of Mortgage Loan Servicers

**I.D. No.** BNK-46-10-00001-E

**Filing No.** 1113

**Filing Date:** 2010-11-01

**Effective Date:** 2010-11-01

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

**Action taken:** Addition of Part 419 to Title 3 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** The legislature required the registration of mortgage loan servicers as part of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") to help address the existing foreclosure crisis in the state. By registering servicers and requiring that servicers engage in the business of mortgage loan servicing in compliance with rules and regulations adopted by the Banking Board or Superintendent, the legislature intended to help ensure that servicers conduct their business in a manner acceptable to the Department. However, since the passage of the Mortgage Lending Reform Law, foreclosures continue to pose a significant threat to New York homeowners. The Department continues to receive complaints from homeowners and housing advocates that mortgage loan servicers' response to delinquencies and their efforts at loss mitigation are inadequate. These rules are intended to provide clear guidance to mortgage loan servicers as to the procedures and standards they should follow with respect to loan delinquencies. The rules impose a duty of fair dealing on loan servicers in their communications, transactions and other dealings with borrowers. In addition, the rule sets standards with respect to the handling of loan delinquencies and loss mitigation. The rule further requires specific reporting on the status of delinquent loans with the Department so that it has the information necessary to assess loan servicers' performance.

In addition to addressing the pressing issue of mortgage loan delinquencies and loss mitigation, the rule addresses other areas of significant concern to homeowners, including the handling of borrower complaints and inquiries, the payment of taxes and insurance, crediting of payments and handling of late payments, payoff balances and servicer fees. The rule also sets forth prohibited practices such as engaging in deceptive practices or placing homeowners' insurance on property when the servicers has reason to know that the homeowner has an effective policy for such insurance.

**Subject:** The business conduct of mortgage loan servicers.

**Purpose:** To implement the purpose and provisions of the Mortgage Lending Reform Law of 2008 with respect to mortgage loan servicers.

**Substance of emergency rule:** Section 419.1 contains definitions of terms that are used in Part 419 and not otherwise defined in Part 418, including "Servicer", "Qualified Written Request" and "Loan Modification".

Section 419.2 establishes a duty of fair dealing for Servicers in connection with their transactions with borrowers, which includes a duty to pursue loss mitigation with the borrower as set forth in Section 419.11.

Section 419.3 requires compliance with other State and Federal laws relating to mortgage loan servicing, including Banking Law Article 12-D, RESPA, and the Truth-in-Lending Act.

Section 419.4 describes the requirements and procedures for handling to consumer complaints and inquiries.

Section 419.5 describes the requirements for a servicer making payments of taxes or insurance premiums for borrowers.

Section 419.6 describes requirements for crediting payments from borrowers and handling late payments.

Section 419.7 describes the requirements of an annual account state-

ment which must be provided to borrowers in plain language showing the unpaid principal balance at the end of the preceding 12-month period, the interest paid during that period and the amounts deposited into and disbursed from escrow. The section also describes the Servicer's obligations with respect to providing a payment history when requested by the borrower or borrower's representative.

Section 419.8 requires a late payment notice be sent to a borrower no later than 17 days after the payment remains unpaid.

Section 419.9 describes the required provision of a payoff statement that contains a clear, understandable and accurate statement of the total amount that is required to pay off the mortgage loan as of a specified date.

Section 419.10 sets forth the requirements relating to fees permitted to be collected by Servicers and also requires Servicers to maintain and update at least semi-annually a schedule of standard or common fees on their website.

Section 419.11 sets forth the Servicer's obligations with respect to handling of loan delinquencies and loss mitigation, including an obligation to make reasonable and good faith efforts to pursue appropriate loss mitigation options, including loan modifications. This Section includes requirements relating to procedures and protocols for handling loss mitigation, providing borrowers with information regarding the Servicer's loss mitigation process, decision-making and available counseling programs and resources.

Section 419.12 describes the quarterly reports that the Superintendent may require Servicers to submit to the Superintendent, including information relating to the aggregate number of mortgages serviced by the Servicer, the number of mortgages in default, information relating to loss mitigation activities, and information relating to mortgage modifications.

Section 419.13 describes the books and records that Servicers are required to maintain as well as other reports the Superintendent may require Servicers to file in order to determine whether the Servicer is complying with applicable laws and regulations. These include books and records regarding loan payments received, communications with borrowers, financial reports and audited financial statements.

Section 419.14 sets forth the activities prohibited by the regulation, including engaging in misrepresentations or material omissions and placing insurance on a mortgage property without written notice when the Servicer has reason to know the homeowner has an effective policy in place.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 29, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Jane M. Azia, NYS Banking Department, 1 State Street, New York, NY 10004, (212) 709-3503, email: jane.azia@banking.state.ny.us

#### Regulatory Impact Statement

##### 1. Statutory Authority.

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2. Legislative Objectives.

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

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

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

Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, addresses the first component of the mortgage servicing statute by setting standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as setting financial responsibility standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. This part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor servicers' conduct and prohibits certain practices such as engaging in deceptive business practices.

Collectively, the provisions of Part 418 and 419 implement the intent of the Legislature to register and supervise mortgage loan servicers.

## 3. Needs and Benefits.

Governor Paterson reported in early 2008 that there were more than 52,000 foreclosure filings in 2007, or approximately 1,000 per week. That number increased in 2008, averaging approximately 1,100 per week in the first quarter. While there was some drop in foreclosure filings in 2009 to just over 50,000, the crisis continues and the problems that have affected so many have been found to implicate not only the origination of residen-

tial mortgage loans, but also their servicing and foreclosure. The Mortgage Lending Reform Law adopted a multifaceted approach to the problem. It addressed a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loan servicers.

Until July 1, 2009, when the mortgage loan servicer registration provisions first became effective, the Department regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also act as agents for owners of mortgages in negotiations relating to loss mitigation when a mortgage becomes delinquent. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

Further, unlike in the case of a mortgage broker or a mortgage lender, borrowers cannot "shop around" for loan servicers, and generally have no input in deciding what company services their loans. The absence of the ability to select a servicer obviously raises concerns over the character and viability of these entities given the central part of they play in the mortgage industry. There also is evidence that some servicers may have provided poor customer service. Specific examples of these activities include: pyramiding late fees; misapplying escrow payments; imposing illegal prepayment penalties; not providing timely and clear information to borrowers; erroneously force-placing insurance when borrowers already have insurance; and failing to engage in prompt and appropriate loss mitigation efforts.

More than 2,000,000 loans on residential one-to-four family properties are being serviced in New York. Of these over 8% were seriously delinquent as of the fourth quarter of 2009. Despite various initiatives adopted at the state level and the creation federal programs such as Making Home Affordable to encourage loan modifications and help at risk homeowners, the number of loans modified have not kept pace with the number of foreclosures. Foreclosures impose costs not only on borrowers and lenders but also on neighboring homeowners, cities and towns. They drive down home prices, diminish tax revenues and have adverse social consequences and costs.

As noted above, Part 418, initially adopted on an emergency basis on July 1 2009, relates to the first component of the mortgage servicing statute - the registration of mortgage loan servicers. It was intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers. It also provided for the suspension, revocation and termination of licensees involved in wrongdoing and establishes minimum financial standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers and establishes certain consumer protections for homeowners whose residential mortgage loans are being serviced. These regulations provide standards and procedures for servicers to follow in their course of dealings with borrowers, including the handling of borrower complaints and inquiries, payment of taxes and insurance premiums, crediting of borrower payments, provision of annual statements of the borrower's account, authorized fees, late charges and handling of loan delinquencies and loss mitigation. Part 419 also identifies practices that are prohibited and imposes certain reporting and record-keeping requirements to enable the Superintendent to determine the servicer's compliance with applicable laws, its financial condition and the status of its servicing portfolio.

Since the adoption of Part 418, 45 entities have pending applications or been approved for registration and nearly 180 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements.

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

These regulations will improve accountability and the quality of service in the mortgage loan industry and will help promote alternatives to foreclosure in the state.

## 4. Costs.

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be

mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC and OTS publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. The State Foreclosure Working Group, consisting of thirteen state Attorneys General and three state Banking regulators, including New York, collects and reports on similar data from the largest subprime mortgage servicers. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and recordkeeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

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

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

#### 5. Local Government Mandates.

None.

#### 6. Paperwork.

Part 419 requires mortgage loan servicers to keep books and records related to its servicing for a period of three years and to produce quarterly reports and financial statements as well as annual and other reports requested by the Superintendent. It is anticipated that the quarterly reporting relating to mortgage loan servicing will be done electronically and would therefore be virtually paperless. The other recordkeeping and reporting requirements are consistent with standards generally required of mortgage bankers and brokers and other regulated financial services entities.

#### 7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations. The various federal laws that touch upon aspects of mortgage loan servicing are noted in Section 9 "Federal Standards" below.

#### 8. Alternatives.

The Mortgage Lending Reform Law required the registration of mortgage loan servicers and empowered the Superintendent to prescribe rules and regulations to guide the business of mortgage servicing. The purpose of the regulation is to carry out this statutory mandate to register mortgage loan servicers and regulate the manner in which they conduct business. The Department circulated a proposed draft of Part 419 and received comments from and met with industry and consumer groups. The current Part 419 reflects the input received. The alternative to these regulations is to do nothing or to wait for the newly created federal bureau of consumer protection to promulgate national rules, which could take years, may not happen at all or may not address all the practices covered by the rule. Thus, neither of those alternatives would effectuate the intent of the legislature to address the current foreclosure crisis, help at-risk homeowners vis-à-vis their loan servicers and ensure that mortgage loan servicers engage in fair and appropriate servicing practices.

#### 9. Federal Standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies, and there are no comprehensive federal rules governing mortgage loan servicing. Federal laws such as the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and regulations adopted thereunder, 24 C.F.R. Part 3500, and the Truth-in-Lending Act, 15 U.S.C. section 1600 et seq. and Regulation Z adopted thereunder, 12 C.F.R. section 226 et seq., govern some aspects of mortgage loan servicing, and there have been some recent amendments to those laws and

regulations regarding mortgage loan servicing. For example, Regulation Z, 12 C.F.R. section 226.36(c), was recently amended to address the crediting of payments, imposition of late charges and the provision of payoff statements. In addition, the recently enacted Dodd-Frank Wall Street Reform and Protection Act of 2010 (Dodd-Frank Act) establishes requirements for the handling of escrow accounts, obtaining force-placed insurance, responding to borrower requests and providing information related to the owner of the loan. While the newly created Bureau of Consumer Financial Protection established by the Dodd-Frank Act may propose additional regulations for mortgage loan servicers, there is no certainty that it will do so or to what extent.

#### 10. Compliance Schedule.

The regulations will become effective on October 1, 2010.

#### Regulatory Flexibility Analysis

##### 1. Effect of the Rule:

The rule will not have any impact on local governments. The Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") requires all mortgage loan servicers, whether registered or exempt from registration under the law, to service mortgage loans in accordance with the rules and regulations promulgated by the Banking Board or Superintendent. Of the 45 entities which have pending applications or have been approved for registration to date and the nearly 180 entities which have indicated that they are exempt from the registration requirements, it is estimated that very few are small businesses.

##### 2. Compliance Requirements:

The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Banking Department of servicers who are not a bank, mortgage banker, mortgage broker or other exempt organizations (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "Mortgage Loan Servicer Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, sets for the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting of borrower payments, late payments, account statements, delinquencies and loss mitigation, fees and recordkeeping.

##### 3. Professional Services:

None.

##### 4. Compliance Costs:

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC and OTS publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. The State Foreclo-

sure Working Group, consisting of thirteen state Attorneys General and three state Banking regulators, including New York, collects and reports on similar data from the largest subprime mortgage servicers. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and recordkeeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

Compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

#### 5. Economic and Technological Feasibility:

For the reasons noted in Section 4 above, the rule should impose no adverse economic or technological burden on mortgage loan servicers that are small businesses.

#### 6. Minimizing Adverse Impacts:

As noted in Section 1 above, most servicers are not small businesses. Many of the requirements contained in the rule derive from federal or state laws, existing servicer guidelines utilized by Fannie Mae and Freddie Mac and best industry practices.

Moreover, the ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, help borrowers at risk of foreclosure and decrease the number of foreclosures in this state.

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

The Banking Department distributed a draft of proposed Part 419 to industry representatives, received industry comments on the proposed rule and met with industry representatives in person. The Department likewise distributed a draft of proposed Part 419 to consumer groups, received their comments on the proposed rule and met with consumer representatives to discuss the proposed rule in person. The rule as finally proposed reflects the input received from both industry and consumer groups.

#### *Rural Area Flexibility Analysis*

Types and Estimated Numbers. Since the adoption of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law"), which required mortgage loan servicers to be registered with the Department unless exempted under the law, 45 entities have pending applications or have been approved for registration and nearly 180 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements. Only one of the non-exempt entities applying for registration is located in New York and operating in a rural area. Of the exempt organizations, all of which are required to comply with the conduct of business contained in Part 419, approximately 100 are located in New York, including several in rural areas. However, the overwhelming majority of exempt organizations, regardless of where located, are banks or credit unions that are already regulated and are thus familiar with complying with the types of requirements contained in this regulation.

Compliance Requirements. The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Banking Department of servicers that are not a bank, mortgage banker, mortgage broker or other exempt organization (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "MLS Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law of 2008 requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2010, sets forth the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law of 2008 by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting borrower payments, late payments, account statements, delinquencies and loss mitigation and fees. This part also imposes certain recordkeeping and

reporting requirements in order to enable the Superintendent to monitor servicers' conduct and prohibits certain practices such as engaging in deceptive business practices.

Costs. The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. The periodic reporting requirements of Part 419 are consistent with those imposed on other regulated entities. In addition, many of the other requirements of Part 419, such as those related to the handling of loan delinquencies, taxes, insurance and escrow payments, collection of late fees and charges and crediting of payments, derive from federal or state laws, current federal loan modification programs, servicing guidelines utilized by Fannie Mae and Freddie Mac or servicers' own protocols. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, credit unions, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Of the 45 entities that have pending applications or have been approved for registration, only one is located in a rural area of New York State. Of the few exempt organizations located in rural areas of New York, virtually all are banks or credit unions. Moreover, compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

Minimizing Adverse Impacts. As noted in the "Costs" section above, while mortgage loan servicers may incur some higher costs as a result of complying with the rules, the Department does not believe that the rule will impose any meaningful adverse economic impact upon private or public entities in rural areas.

In addition, it should be noted that Part 418, which establishes the application and financial requirements for mortgage loan servicers, authorizes the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of mortgage loans servicers that service not more than 12 mortgage loans or more than \$5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden on mortgage loan servicers operating in rural areas.

Rural Area Participation. The Department issued a draft of Part 419 in December 2009 and held meetings with and received comments from industry and consumer groups following the release of the draft rule. The Department also maintains continuous contact with large segments of the servicing industry though its regulation of mortgage bankers and brokers and its work in the area of foreclosure prevention. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

#### *Job Impact Statement*

Article 12-D of the Banking Law, as amended by the Mortgage Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1, 2009, sets forth the application, exemption and approval procedures for registration as a mortgage loan servicer, as well as financial responsibility requirements for applicants, registrants and exempted persons.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. Thus, this part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor servicers' conduct and prohibits certain practices such as engaging in deceptive business practices.

Compliance with Part 419 is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. The vast majority of mortgage loan servicers are sophisticated financial entities that service millions, if not billions, of dollars in loans and have the experience, resources and systems to comply with the requirements of the rule. Moreover, many of the requirements of the rule reflect derive from federal or state laws and reflect existing best industry practices.

## New York State Canal Corporation

### NOTICE OF WITHDRAWAL

#### Snowmobiling on Canal Lands

I.D. No. NCC-43-10-00005-W

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

**Action taken:** Notice of proposed rule making, I.D. No. NCC-43-10-00005-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on October 27, 2010.

**Subject:** Snowmobiling on Canal Lands.

**Reason(s) for withdrawal of the proposed rule:** Incorrect text of proposed rule appeared in the 10/27/10 publication of the *State Register*; corrected text is being resubmitted.

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

#### Snowmobiling on Canal Lands

I.D. No. NCC-46-10-00018-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 150.6 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 354(5), 382(7)(d) and (k); Canal Law, sections 10(9), (15), (26), 85, 100 and 138-b(5)(a)

**Subject:** Snowmobiling on Canal Lands.

**Purpose:** Authorize the issuance of revocable permits to organized snowmobile clubs where local municipal support has been demonstrated.

**Text of proposed rule:** § 150.6 Prohibited Activities

(8) operate a snowmobile, motorbike or any other motorized vehicle, provided however, the Canal Corporation may, in its discretion, issue a revocable permit to a snowmobile club that is a member of the New York State Snowmobile Association for snowmobile use after each municipal governing board located within the permit area has passed a Resolution approving of such snowmobile use; such permit shall require liability insurance through a blanket insurance policy administered by the New York State Snowmobile Association and funded by the Office of Parks, Recreation and Historic Preservation. The permit shall also require that signing be placed in accordance with the New York State Snowmobile Trail Signing Handbook and that all operations be consistent with laws, rules and regulations governing the use and operation of snowmobiles. Minimum snow cover for snowmobile operations, trail opening and closing times and dates, and a maximum speed limit shall be specified.

**Text of proposed rule and any required statements and analyses may be obtained from:** Marcy Pavone, NYS Thruway Authority, 200 Southern Blvd, Albany, NY 12209, (518) 436-2860, email: marcy\_pavone@thruway.state.ny.us

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

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

#### Regulatory Impact Statement

##### 1. Statutory Authority:

Public Authorities Law (PAL) section 354, subdivision 5, authorizes the Thruway Authority to make "rules and regulations governing the use of the thruways and all other properties and facilities under its jurisdiction." Further, section 382, subdivision 7(d) authorizes the Canal Corporation to "make and alter by-laws for its organization and internal management and make rules and regulations governing the use of its property and facilities." Subdivision 7(k) of the same section authorizes the Canal Corporation to "exercise those powers and duties of the authority pursuant to the canal law." Canal Law section 10, subdivision 9 authorizes the Canal Corporation to "prescribe rules and regulations not inconsistent with law relating to the navigation, protection and maintenance of the canal system..." Subdivision 15 authorizes the Canal Corporation to "issue revocable permits pursuant to this chapter" and subdivision 26 authorizes the Canal Corporation to "[P]erform such other acts as in its judgment constitute a duty required to efficiently administer the canal system." Canal Law section 85 states that "[T]he corporation shall pre-

scribe and enforce rules and regulations, not inconsistent with the law, governing navigation on the canals and for the use of the terminals connected with the canals and for the use of all other property of the corporation under the corporation's control and maintained as a part of the canal system." Canal Law section 100 authorizes the Canal Corporation to issue revocable permits and Canal Law section 138-b(5)(a) directs the Canal Recreationway Commission, in carrying out the duties of the Canal Corporation under the Canal Recreationway Plan, to "evaluate and make recommendations for new operational, maintenance and capital initiatives or projects to enhance the canal."

##### 2. Legislative Objectives:

The amendment to 21 NYCRR 150.6 would authorize the Canal Corporation to issue revocable permits for snowmobile use to a snowmobile club that is a member of the New York State Snowmobile Association where local municipal support for such snowmobile use in the form of a resolution has been demonstrated. The Canal Corporation initiated a pilot program in 1998 that allowed snowmobile use on Canal lands on a case-by-case basis in rural areas where local municipal support was demonstrated. The program was initiated in response to requests made by organized snowmobile groups and their elected representatives. This amendment is in response to additional requests that have been received by the Canal Corporation. Although snowmobiling is a prohibited activity in the Canal Rules and Regulations, the use is consistent with the Canal Recreationway Plan and this issuance of revocable permits provides an opportunity to enhance the overall use of the Canal System.

##### 3. Needs and Benefits:

The proposed change to the regulation authorizes the issuance of revocable permits for snowmobile use on a case-by-case basis to clubs that are members of the New York State Snowmobile Association where local municipal support in the form of a resolution has been demonstrated. A pilot program was initiated in 1998 in response to requests made by organized snowmobile groups and their elected representatives. Although snowmobiling on Canal lands is a prohibited activity, the use is consistent with the Canal Recreationway Plan. Also, the prohibition against snowmobiling is difficult to enforce. Allowing snowmobiling through permits with organized clubs has helped manage the use and provided the Canal Corporation with a level of protection by requiring clubs to provide liability insurance coverage. It also makes the clubs responsible for placing signage and for repairing damage to the Canalway Trail caused by snowmobiles.

Approximately five snowmobile pilot programs have operated in different parts of the State on Canal lands since 1998. The clubs have acted responsibly and they are helping to maintain the trails. Although the pilot programs have been allowed to continue, no other permits for snowmobile use have been issued despite the additional requests received each year from clubs across the State and a number of municipal resolutions that were recently adopted urging the Canal Corporation to allow snowmobiling on Canal lands.

The permit would require liability insurance in the amount of \$1 million per occurrence and \$2 million aggregate through a blanket insurance policy administered by the New York State Snowmobile Association and funded by the Office of Parks, Recreation and Historic Preservation, which administers the snowmobiling program statewide. The blanket insurance is made available to clubs for their use of designated State corridor snowmobile trails. The permit would also require that signing be placed in accordance with the New York State Snowmobile Trail Signing Handbook and that all operations be consistent with laws, rules and regulations governing the use and operation of snowmobiles. Minimum snow cover for snowmobile operations, trail opening and closing times and dates, and a 25 mile per hour maximum speed limit would be specified.

Given the success of the snowmobile pilot programs and the popularity of snowmobiling in rural portions of the Canal System, the Canal Corporation is enacting this regulation to enhance the use of the Canal System.

##### 4. Costs:

There is no cost to regulated parties for the implementation of and continuing compliance with the regulation. There are no additional administrative costs for implementation of the revised regulation.

##### 5. Local Government Mandates:

This rule imposes no additional program, service, duty, or responsibility on local government beyond the local governing duties required in the normal course of business.

##### 6. Paperwork:

None.

##### 7. Duplication:

There is no duplication of State or Federal Law.

##### 8. Alternatives:

The Canal Corporation considered a no action alternative but chose to pursue this rule in response to requests from local governments, elected officials and snowmobiling clubs. This is an opportunity to help manage the use of Canalway Trails, expand a popular pilot program and enhance

the overall use of the New York State Canal System. The Canal Corporation considered offering this program to clubs that are not members of the New York State Snowmobile Association, however, few clubs exist who are not members of the Association and the ability of those clubs to obtain the required insurance independently is unlikely. Further, clubs who are not members of the Association are also not eligible for funds for trail maintenance through the New York State Office of Parks, Recreation and Historic Preservation which would make it virtually impossible for a club to have maintained trails without that funding.

9. Federal Standards:

There is no specific federal requirement.

10. Compliance Schedule:

The revocable permits will be issued to snowmobiling clubs at the discretion of the Canal Corporation upon receipt of a completed application supported by resolution of the local governing municipality.

**Regulatory Flexibility Analysis**

1. Effect of Rule: This rule provides local governments an opportunity to demonstrate support, in the form of a resolution, to snowmobiling clubs that are members of the New York State Snowmobile Association and want to apply for a revocable permit from the Canal Corporation.

2. Compliance Requirements: Participation is voluntary. Local governments would have an opportunity to demonstrate support of local snowmobiling clubs in the form of a resolution.

3. Professional Services: There is no need for professional services.

4. Compliance Costs: There are no compliance costs.

5. Economic and Technological Feasibility: There are no additional economic or technological requirements.

6. Minimizing Adverse Impact: This rule will have no adverse impact on local governments because participation in the program authorized by this rule making is voluntary and the resolution in support of clubs that are members of the New York State Snowmobile Association would be conducted as part of a local governments' normal course of business.

7. Small Business and Local Government Participation: This regulation is in response to requests from various local municipalities, such as those in Washington and Niagara County, that have contacted the Canal Corporation in response to requests made by organized snowmobile groups to allow snowmobiling on Canal lands.

**Rural Area Flexibility Analysis**

1. Types and estimated numbers of rural areas: This rule allows local municipalities along the Canal System to offer their support, in the form of a resolution, to snowmobiling clubs that want to apply for a revocable permit from the Canal Corporation.

2. Reporting, recordkeeping and other compliance requirements: No reporting, recordkeeping and other compliance requirements will be necessary by a local government other than what is required in its normal course of business.

3. Costs: No additional costs are required.

4. Minimizing adverse impact: Participation is voluntary and the application for the permit will be made by a snowmobiling club where support for participation in the program in the form of a resolution by the local governing municipality has been demonstrated.

5. Rural area participation: Participation is voluntary. This regulation is in response to requests from various local municipalities, such as those in Washington and Niagara County, that have contacted the Canal Corporation in response to requests made by organized snowmobile groups to allow snowmobiling on Canal lands.

**Job Impact Statement**

Based on the nature and purpose of the proposed rule, it will not have a substantial adverse impact on jobs and employment opportunities. As such, a Job Impact Statement is not required.

**Statutory authority:** Education Law, sections 101, 207, 305(1) and (2); and 26 USC sections 54E and 54F

**Subject:** Qualified School Construction Bonds (QSCB) and Qualified Zone Academy Bonds (QZAB).

**Purpose:** Establish criteria for QSCB and to update QZAB provisions.

**Substance of revised rule:** The Commissioner of Education proposes to amend section 155.22 of the Commissioner's Regulations, effective December 8, 2010, relating to Qualified School Construction Bonds issued pursuant to 26 USC section 54F and Qualified Zone Academy Bonds issued pursuant to 26 USC sections 1397E and 54E. The following is a summary of the substance of the proposed amendment.

Section 155.22 is revised to organize the regulation into subdivision (a), relating to Qualified Zone Academy Bonds, and subdivision (b), relating to Qualified School Construction Bonds. The provisions relating to Qualified Zone Academy Bonds (QZAB) are revised to provide for a separate Charter school allocation from the QZAB State limitation amount. The QZAB provisions are also updated to include QZAB issued under 26 USC 54E, as added by Pub.L. 110-343, 122 Stat. 3765, 3869. Prior to the addition of section 54E, QZAB were issued pursuant to 26 USC section 1397E.

Provisions relating to Qualified School Construction Bonds (QSCB) are established in section 155.22(b).

Section 155.22(b)(1) sets forth the purpose of the subdivision, to establish procedures for the allocation and issuance of QSCB as authorized by 26 USC section 54F.

Section 155.22(b)(2) sets forth definitions for terms used in the subdivision.

Section 155.22(b)(3) establishes procedures for allocating respective amounts of the QSCB State limitation amount to local educational agencies LEAs), including provisions for allocating to the large city school districts, charter schools, and all other LEAs.

Section 155.22(b)(4) establishes procedures for making adjustments for unused allocations.

Section 155.22(b)(5) requires QSCB to be used within three years after issuance.

Section 155.22(b)(6) requires that capital construction projects to be financed through the issuance of QSCB must be submitted for review to the Office of Facilities Planning in the State Education Department.

Section 155.22(b)(7) provides that capital construction projects funded in whole or in part with QSCB and involving the repair, renovation or alternation of public school facilities that are approved by the Commissioner, shall be eligible to receive building aid pursuant to the provisions of Education Law section 3602(6).

**Revised rule compared with proposed rule:** Substantial revisions were made in section 155.22(a)(3), (b)(3) and (4).

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

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

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

**Revised Regulatory Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on September 1, 2010, the proposed rule has been substantially revised as follows:

Clause 155.22(a)(3)(i)(b) and clause 155.22(b)(3)(iii)(a) have been revised to increase the total allocation amounts for charter schools of Qualified Zone Academy Bonds (QZAB) and Qualified School Construction Bonds (QSCB) to be not less than \$2,000,000 for QZAB and not less than \$5,000,000 for QSCB.

Subparagraph 155.22(b)(3)(ii) has been revised to increase the maximum QSCB limitation amount for the Syracuse and Yonkers city school districts to \$15 million.

Subparagraph 155.22(b)(4)(i) has been revised to ensure consistency with a June 11, 2010 policy letter of the U.S. Department of Education, by clarifying that QSCB limitation amounts carried forward to successive calendar year(s) by a large local educational agency shall not be included in the amounts to be reallocated by the Commissioner pursuant to that subparagraph.

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

**Revised Regulatory Flexibility Analysis**

Since publication of a Notice of Proposed Rule Making in the State Register on September 1, 2010, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

## Education Department

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

#### Qualified School Construction Bonds (QSCB) and Qualified Zone Academy Bonds (QZAB)

I.D. No. EDU-35-10-00019-RP

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

**Proposed Action:** Amendment of section 155.22 of Title 8 NYCRR.

The aforesaid revisions do not require any changes to the previously published Regulatory Flexibility Analysis for Small Businesses and Local Government.

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

Since publication of a Notice of Proposed Rule Making in the State Register on September 1, 2010, the proposed rule has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The aforesaid revisions do not require any changes to the previously published Rural Area Flexibility Analysis.

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

Since publication of a Notice of Proposed Rule Making in the State Register on September 1, 2010, the proposed amendment has been substantially revised as set forth in the Statement Concerning the Regulatory Impact Statement.

The proposed amendment, as so revised, will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the revised proposed amendment 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.

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

Since publication of a Notice of Proposed Rule Making in the State Register on September 1, 2010, the State Education Department received the following comments:

##### 1. COMMENT:

Proposed section 155.22(b)(4)(i) would appear to allow Qualified School Construction Bond (QSCB) limitation amounts that are allocated by the Federal government directly to the Buffalo and Rochester city school districts, as large local educational agencies (LEAs) pursuant to 26 USC section 54F(d)(2), to be re-directed to the State if unused in any calendar year. This is contrary to a June 11, 2010 policy letter from the U.S. Secretary of Education, which permits large LEAs that receive direct allocations to maintain them without limitations, whether the district had reallocated such allocations to the State or not. Section 155.22(b)(4)(i) should be deleted to permit the Buffalo and Rochester school districts to maintain their respective direct QSCB allocations for their individual district needs.

##### 2. DEPARTMENT RESPONSE:

Section 155.22(b)(4)(i) provides that: "in the event a local educational agency that received a direct allocation pursuant to 26 USC section 54F(d)(2) for any calendar year, reallocates such allocation to the State pursuant to 26 USC section 54F(d)(2)(D) for such calendar year, the commissioner may adjust the amounts allocated. . . as needed to assure that the State limitation amount for such calendar year is exhausted." The purpose of this provision is to ensure maximum usage of QSCB amounts by permitting reallocation of unused amounts to school districts that are able to use such amounts in a given calendar year. The provision is consistent with 26 USC section 54(d)(2)(D), which provides that a large LEA may reallocate its unused direct allocation to the State, and that any amount so reallocated to the State may be allocated by the State to QSCB issuers within the State.

We disagree with the comment's contention that the June 11, 2010 policy letter from the U.S. Secretary of Education "permits large LEAs that receive direct allocations to maintain them without limitations, whether the district had reallocated such allocations to the State or not [emphasis added]." The applicable provision of the policy letter states "[i]f a QSCB allocation to a State or a large LEA is unused for a calendar year, the State or large LEA, respectively, may carry it forward to the next calendar year, increasing the following year's limitation [emphasis added]", and further provides that "[t]here is no limitation on the number of years to which unused allocation may be carried forward." Use of the term "respectively" means that a State may carry forward unused amounts allocated to the State and a large LEA may carry forward unused amounts allocated to such large LEA. However, if the large LEA reallocates its amount to the State pursuant to 26 USC section 54F(d)(2)(D), such amount becomes part of the State's allocation.

Nevertheless, the provision in section 155.22(b)(4)(i) is not meant to prohibit or restrict a large LEA from carrying forward its allocation amount to a successive calendar year or years, as provided for in Secretary's policy letter. In order to clarify the intent of the provision, section 155.22(b)(4)(i) has been revised to state that the ". . . commissioner may adjust the amounts allocated pursuant to paragraph (3) of this subdivision as needed to assure exhaustion of the State limitation amount for such calendar year (excluding any amounts carried forward to a successive calendar year or years by the State or a large LEA)."

##### 2. COMMENT:

Proposed section 155.22(b)(3)(ii) would provide the Syracuse and Yonkers city school districts direct QSCB allocations by the State of up to

\$10 million each in the 2010-2011 school year. This amount should be raised to \$80 million for the Syracuse city school district and \$50 million for the Yonkers city school district, in order to more fairly reflect the size and scope of these districts and to account for the extent of construction and reconstruction work such school districts anticipate for this school year.

##### DEPARTMENT RESPONSE:

The Department disagrees that the Syracuse and Yonkers allocations should be increased to \$80 million and \$50 million respectively. These amounts would represent 73% of the available funding for two districts educating only 3% of the State student population. Additionally, Syracuse and Yonkers do not rise to the level of the federal largest 100 school districts, yet the requested amount for Syracuse is 20% greater than Buffalo would receive and 40% greater than Rochester, and greater than the amounts received by 85% of the federal largest 100 school districts. This is not acceptable to the Department.

However, upon further consideration, the Department believes that some increase in the QSCB allocation limitation amount is warranted. A review of the largest 100 school districts nationwide that received direct federal allocations indicates the districts received amounts in proportion to their shares of the Title I basic grant funds. Applying the same proportional strategy to Syracuse and Yonkers would increase their maximum limitation amounts to \$15 million each. The proposed rule has been revised to reflect this higher amount.

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## Department of Environmental Conservation

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### NOTICE OF ADOPTION

#### **Migratory Game Bird Hunting, and Game Harvest Reporting**

**I.D. No.** ENV-33-10-00005-A

**Filing No.** 1115

**Filing Date:** 2010-10-28

**Effective Date:** 2010-11-17

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

**Action taken:** Amendment of sections 2.30 and 180.10 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909, 11-0911 and 11-0917

**Subject:** Migratory game bird hunting, and game harvest reporting.

**Purpose:** To conform migratory game bird hunting regulations to recent changes in law, and to update game harvest reporting regulations.

**Text or summary was published** in the August 18, 2010 issue of the Register, I.D. No. ENV-33-10-00005-P.

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

**Text of rule and any required statements and analyses may be obtained from:** Bryan L. Swift, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8866, email: wildliferegs@gw.dec.state.ny.us

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

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

The department received written comments from more than two dozen individuals on the proposed changes to 6 NYCRR section 180.10 – Game Harvest Reporting. All but two of the comments were in support of extending the game harvest reporting requirement from 48 hours to 7 days.

The two opposed to the change cited concerns that this would make it easier for a hunter to illegally take deer and it would make it more difficult for law enforcement to prosecute hunters for failure to report a deer legally taken. However, both agreed with the need to allow more flexibility with reporting for hunters who do not have ready access to a telephone or internet for more than 48 hours. We considered these concerns but believe that the justification for our original proposal (improving overall game harvest reporting by allowing more time) outweighed these concerns. It is not clear to us how the time

frame for reporting is related to the likelihood of deer being taken illegally, and we believe that a longer reporting period will not compromise enforcement of non-reporting or illegal game harvest.

No other public comments were received on proposed changes to section 180.10 or section 2.30.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Hunting Wild Turkey

**I.D. No.** ENV-46-10-00002-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 1.40 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0903 and 11-0905

**Subject:** Hunting wild turkey.

**Purpose:** To establish a spring youth turkey hunting season on Long Island that coincides with the youth turkey hunt in upstate NY.

**Text of proposed rule:** Title 6 of NYCRR, section 1.40, entitled "Hunting wild turkey," is amended as follows:

Amend existing subparagraph 1.40 (c) (3) (i) to read as follows:

(3) Spring youth hunt. (i) Season. There shall be a [S]spring youth hunt for wild turkey. Eligible participants shall be those persons 12 through 15 years old holding a turkey permit and junior hunting license, or persons 12 through 15 years old holding a turkey permit but not required to have a hunting license pursuant to section 11-0707 of the Environmental Conservation Law. The youth hunt shall be open in *Suffolk County (Wildlife Management Unit 1C)* and all areas of the State in which a [S]spring turkey hunting season is held pursuant to paragraph 2 of this subdivision, and the dates of the youth hunt shall be as follows:

(a) During years in which May 1st is a Thursday, Friday, Saturday or Sunday, the [S]spring youth hunt shall be the last full weekend (Saturday and Sunday) of April.

(b) During years in which May 1st is a Monday, Tuesday, or Wednesday, the [S]spring youth hunt shall be the next to last full weekend of April.

**Text of proposed rule and any required statements and analyses may be obtained from:** Michael V. Schiavone, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8886, email: wildliferegs@gw.dec.state.ny.us

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

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

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

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

#### Regulatory Impact Statement

##### 1. Statutory Authority

Section 11-0303 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (DEC or department) to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to: ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. ECL sections 11-0903 and 11-0905 provides for the establishment of hunting regulations for wild turkey.

##### 2. Legislative Objectives

The legislative objectives behind the statutory provisions listed above are to authorize the department to establish, by regulation, certain basic wildlife management tools, including the setting of open areas for hunting wild turkey. These tools are used by the department in recognition of the importance of wild turkey hunting for recreational purposes.

##### 3. Needs and Benefits

The Division of Fish, Wildlife and Marine Resources proposes to establish a two-day spring youth hunting season for wild turkey in Suffolk County (Wildlife Management Unit 1C) to provide new outdoor recreational opportunities for junior hunters (ages 12-15).

Upstate New York (north of the Bronx-Westchester County boundary) has had a special two-day youth turkey hunt prior to the start of the regular spring season since 2004. Each year, about 9,000 junior hunters harvest around 1,500 birds during the youth hunt weekend. Long Island hunters enjoyed their first regular fall turkey hunting season in November 2009, and that season was successfully implemented without incident. We estimate that 668 hunters of all ages participated in the fall 2009 season, spent 1,728 combined days afield (about 2.6 days effort per hunter) and harvested 102 birds, about 60 percent of which were toms. There were no hunting-related shooting incidents during the five-day fall season. Many of those hunters have expressed support for a spring season as well, and representatives of the New York State Conservation Council and the Suffolk Alliance of Sportsmen have requested that additional opportunities for junior hunters be established on Long Island.

Long Island's wild turkey population is a relatively recent phenomenon, but it is secure enough to sustain a limited harvest. In the early 1990s, with strong public support, DEC staff trapped approximately 75 wild turkeys in upstate New York and released those birds at three locations in Suffolk County. The Long Island population is now estimated at more than 3,000 birds and growing. Turkeys are a common sight at many locations in Suffolk County, attracting the interest of local hunters and non-hunters alike. In some localities, turkeys have become a nuisance or caused property damage, and we expect these problems to increase in the future in both suburban and agricultural areas. Hunting can help control population growth and may help prevent or provide relief from some of these problems.

This proposal would provide an important opportunity for junior hunters and their adult mentors on Long Island to engage in the sustainable use of the wild turkey resource. Wild turkey populations are very resilient, and we are confident that a special youth season will have little or no impact on long-term turkey population status on Long Island. In recent years, other small game hunting opportunities on Long Island have declined as a result of loss of habitat to suburban development and its concomitant impacts on wildlife populations and public access to those populations. Establishing a spring youth turkey season would help offset the loss of these other hunting opportunities.

##### 4. Costs

None beyond normal administrative costs.

##### 5. Paperwork

The proposed revisions do not require any new or additional paperwork from any regulated party.

##### 6. Local Government Mandates

These amendments do not impose any program, service, duty or responsibility upon any county, city, town village, school district or fire district.

##### 7. Duplication

There are no other regulations similar to this proposal.

##### 8. Alternatives

The first alternative is to have no youth turkey hunt in Suffolk County. We could defer opening a spring youth turkey hunting season on Long Island indefinitely, but valuable recreational opportunities would be lost. A youth hunt allows junior hunters to spend time afield with experienced adult hunters gaining the necessary knowledge and skills to become safe and responsible members of the hunting community. The goal of the youth hunt is to sustain hunting participation and its associated recreational and wildlife conservation benefits, but the ultimate goal is the passing down of tradition, knowledge, and experiences from one generation to the next, and spending quality time with friends and family outdoors.

The second alternative is to hold a youth hunt earlier or later in the spring. Having the youth hunt on the last weekend in April maximizes hunting opportunity and minimizes conflicts between the hunting and

non-hunting public. Most importantly, by holding the youth hunt near the median date for the onset of incubation, hunters are given the greatest amount of opportunity to go afield and harvest a bird while minimizing the risk to nesting hens, causing minimum disruption to breeding behavior, and minimizing the risk of overharvest.

The third alternative is to have a youth turkey hunt during the fall. Providing a special season just for youth hunters allows them to be afield in less crowded conditions and to slowly acclimate to hunting while accompanied and mentored by an experienced adult hunter. A youth hunt during the fall would lose these benefits as there are multiple hunting seasons already open on Long Island at that time. In addition, participation in a fall youth hunt may be negatively impacted by competing demands on the time of adult hunters who are afield in pursuit of other species (e.g., deer). Furthermore, spring turkey hunting involves learning unique skills and techniques to locate and call in birds that are less effective in the fall. Many hunters find the spring turkey experience one of the best ways to connect with nature at any time of the year.

#### 9. Federal Standards

There are no Federal standards associated with turkey hunting.

#### 10. Compliance Schedule

Hunters would have to comply with the new regulations beginning in the spring of 2011, if they are adopted as proposed.

#### Regulatory Flexibility Analysis

The purpose of this rule making is to amend wild turkey hunting regulations to establish a two-day spring youth turkey hunting season in Suffolk County that coincides with the existing youth turkey hunt in upstate New York. This rule will not impose any reporting, record-keeping, or other compliance requirements on small businesses or local government. Therefore, a Regulatory Flexibility Analysis is not required.

All reporting or record keeping requirements associated with wild turkey hunting are administered by the New York State Department of Environmental Conservation (department). Small businesses may, and town or village clerks do, sell hunting licenses, but this rule does not affect that activity. Thus, there will be no effect on reporting or record keeping requirements imposed on those entities.

Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rule making may slightly increase the number of participants or the frequency of participation in wild turkey hunting, particularly in Suffolk County. Some small businesses currently benefit from turkey hunting because hunters spend money on goods and services, and thus an increase in hunter participation should lead to positive economic impacts on such businesses.

Additional hunting activity will not require any new or additional reporting or record-keeping by any small businesses or local governments. For these reasons, the department has concluded that this rule making does not require a Regulatory Flexibility Analysis.

#### Rural Area Flexibility Analysis

The purpose of this rule making is to amend wild turkey hunting regulations to establish a two-day spring youth turkey hunting season in Suffolk County that coincides with the existing youth turkey hunt in upstate New York. This rule will not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas, other than individual hunters.

All reporting or record keeping requirements associated with turkey hunting are administered by the New York State Department of Environmental Conservation. Small businesses may, and town or village clerks do, issue hunting licenses, but this rule making does not affect that activity.

Additional hunting activity will not require any new or additional reporting or record-keeping by entities in rural areas, and no professional services will be needed for people living in rural areas to comply with the proposed rule. Furthermore, this rule making is not expected to have any adverse impacts on any public or private interests in rural areas of New York State. For these reasons, the department has concluded that this rule making does not require a Rural Area Flexibility Analysis.

#### Job Impact Statement

The purpose of this rule making is to amend wild turkey hunting regulations. The New York State Department of Environmental Conservation (DEC or department) has historically made regular revisions to its wild turkey hunting regulations. Based on DEC's experience in promulgating those revisions and the familiarity of regional department staff with the specific areas of the State impacted by this proposed rule making, the department has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually use the hunting of wild turkeys as a means of employment, but some licensed hunting guides benefit from turkey hunting by taking clients on hunting trips. This rule making could enhance this activity. Moreover, this rule making is not expected to significantly change the number of participants or the frequency of participation in the regulated activities. In fact, this rule making may slightly increase the number of participants or the frequency of participation in wild turkey hunting, particularly in Suffolk County.

For these reasons, the department anticipates that this rule making will have no impact on jobs and employment opportunities. Therefore, the department has concluded that a job impact statement is not required.

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## Department of Health

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### NOTICE OF ADOPTION

#### Certified Home Health Agency Program

**I.D. No.** HLT-33-10-00006-A

**Filing No.** 1137

**Filing Date:** 2010-11-02

**Effective Date:** 2010-11-17

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

**Action taken:** Amendment of section 505.23 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, section 363-a(2)

**Subject:** Certified Home Health Agency Program.

**Purpose:** To repeal provisions of the Department's home health services regulations that are obsolete due to expired statutory authority.

**Text or summary was published** in the August 18, 2010 issue of the Register, I.D. No. HLT-33-10-00006-PC.

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

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

#### Assessment of Public Comment

The agency received no public comment.

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

#### Potentially Preventable Readmissions

**I.D. No.** HLT-46-10-00008-P

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

**Proposed Action:** Addition of section 86-1.37 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 2807-c(35)(b)(v)

**Subject:** Potentially Preventable Readmissions.

**Purpose:** Implements a revised reimbursement policy related to hospital readmissions that are determined to be potentially preventable.

**Text of proposed rule:** Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35) of the Public Health Law, Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regula-

tions of the State of New York, is amended by adding a new Section 86-1.37, to be effective upon publication of the Notice of Adoption in the New York State Register, to read as follows:

**Part 86-1.37 Readmissions**

(a) For discharges occurring on and after July 1, 2010, Medicaid rates of payment to hospitals that have an excess number of readmissions as defined in accordance with the criteria set forth in subdivision (c), as determined by a risk adjusted comparison of the actual and expected number of readmissions in a hospital as described by subdivision (d), shall be reduced in accordance with subdivision (e).

(b) Definitions. For purposes applicable to this section the following terms shall be defined as follows:

(1) Potentially Preventable Readmission (PPR) shall mean a readmission to a hospital that follows a prior discharge from a hospital within 14 days, and that is clinically-related to the prior hospital admission.

(2) Hospital shall mean a general hospital as defined pursuant to section 2801 of the Public Health Law.

(3) Observed Rate of Readmission shall mean the number of admissions in each hospital that were actually followed by at least one PPR divided by the total number of admissions.

(4) Expected Rate of Readmission shall mean a risk adjusted rate for each hospital that accounts for the severity of illness, APR-DRG, and age of patients at the time of discharge preceding the readmission.

(5) Excess Rate of Readmission shall mean the difference between the observed rates of potentially preventable readmissions and the expected rate of potentially preventable readmissions for each hospital.

(6) Behavioral Health shall mean an admission that includes a primary or secondary diagnosis of a major mental health related condition, including, but not limited to, chemical dependency and substance abuse.

(7) Managed Care Encounter Data shall mean claims-like data that describes services provided by managed care plans to their enrollees.

**(c) Readmission Criteria.**

(1) A readmission is a return hospitalization following a prior discharge that meets all of the following criteria:

(i) The readmission could reasonably have been prevented by the provision of appropriate care consistent with accepted standards in the prior discharge or during the post discharge follow-up period.

(ii) The readmission is for a condition or procedure related to the care during the prior discharge or the care during the period immediately following the prior discharge and including, but not limited to:

(a) The same or closely related condition or procedure as the prior discharge.

(b) An infection or other complication of care.

(c) A condition or procedure indicative of a failed surgical intervention.

(d) An acute decompensation of a coexisting chronic disease.

(iii) The readmission is back to the same or to any other hospital.

(2) Readmissions, for the purposes of determining PPRs, excludes the following circumstances:

(i) The original discharge was a patient initiated discharge and was Against Medical Advice (AMA) and the circumstances of such discharge and readmission are documented in the patient's medical record.

(ii) The original discharge was for the purpose of securing treatment of a major or metastatic malignancy, multiple trauma, burns, neonatal and obstetrical admissions.

(iii) The readmission was a planned readmission or one that occurred on or after 15 days following an initial admission.

(iv) For readmissions occurring during the period up through March 31, 2012, the readmission involves an original discharge determined to be behavioral health related.

**(d) Methodology.**

(1) Rate adjustments for each hospital shall be based on such hospital's 2007 Medicaid paid claims data and managed care encounter data for discharges that occurred between January 1, 2007 and December 31, 2007.

(2) The expected rate of readmissions shall be reduced by 24% for each hospital for periods prior to September 30, 2010, and 38.5% for the periods on and after October 1, 2010.

(3) Excess readmission rates are calculated based on the difference between the observed rate of PPRs and the expected rate of PPRs for each hospital.

(4) In the event the observed rate of PPRs for a hospital is lower than the expected rate of PPRs, the excess number of readmissions shall be set at zero.

**(e) Payment Calculation.**

(1) For the excess readmissions identified in paragraph (3) of subdivision (d) of this section, each hospital's projected payment rate for the 2010 rate period, as otherwise computed in accordance with this subpart, will be used to compute the relative aggregate payments, excluding behavioral health, associated with the risk adjusted excess readmissions in each hospital.

(2) For each hospital, a hospital specific readmission adjustment factor shall be computed as one minus the ratio of the hospital's relative aggregate payments associated with the excess readmissions from paragraph (3) of subdivision (d) of this section and the hospital's relative aggregate payments for all non-behavioral health Medicaid discharges as determined pursuant to this subdivision.

(3) Non-behavioral health related payments to hospitals shall be reduced by applying the hospital readmission adjustment factor from paragraph (2) of this subdivision to the applicable case payment or per diem payment amount for all non-behavioral health related Medicaid discharges to the hospital.

**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: regsqna@health.state.ny.us

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

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

**Regulatory Impact Statement**

**Statutory Authority:**

The requirement to implement a rate adjustment to hospitals to address potentially preventable readmissions (PPRs) using a methodology that is based on a comparison of the actual and the expected number of PPRs in a given hospital pursuant to regulations is set forth in section 2807-c(35)(b)(v) of the Public Health Law.

**Legislative Objectives:**

After discussions between the Executive, Legislature, and hospital associations, the Legislature chose to address the issue of a high rate of readmissions in hospitals that could have been avoided. Pursuant to statute, the PPR methodology was chosen as the vehicle to address this through a rate adjustment that would reduce reimbursement to hospitals that had a historically (based on 2007 data) high rate of clinically related readmissions.

**Needs and Benefits:**

The proposed regulations implement the provisions of Public Health Law section 2807-c(35)(b)(v) which requires a rate adjustment related to PPRs. Hospital readmissions are increasingly viewed as indicative of quality of care issues, ranging from complications during the hospital stay or immediately afterward, incomplete treatment of the underlying medical problem during the hospitalization, or poor or no outpatient care. Readmissions are also costly; thereby fueling the interest in linking payment to quality of care, especially when these readmissions might have been avoided.

This regulation, in concert with enacted statute, implements an adjustment to hospital rates to incentivize these providers to become more accountable to the individuals that they are discharging. Better quality of care, upfront, will likely reduce the rate of readmissions thereby saving funds that would have otherwise been expensed simultaneously resulting in better patient outcomes. It is anticipated that this payment adjustment is the first step into addressing the policy issue of readmission rates in hospitals and will likely be refined in future regulation amendments to address a broader Medicaid population and more recent data sources.

**COSTS:**

**Costs to State Government:**

Section 2807-c(35)(b)(v) of the Public Health Law requires that the rates of payment for hospital inpatient services be reduced to result in a net statewide decrease in aggregate Medicaid payments of no less than \$35 million for the period July 1, 2010 through March 31, 2011 and no less than \$47 million for the period April 1, 2011 through March 31, 2012.

**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:**

The proposed regulations do not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

**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(35)(b)(v) to promulgate imple-

menting regulations. However, alternatives may be available at a later date as a result of the requirement that the Department enters into consultations with representatives of the health care facilities regarding potential prospective revisions to the methodologies and benchmarks set forth in this amendment by no later than April 1, 2011.

**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 a new rate adjustment to address potentially preventable readmissions (PPRs) in hospitals for discharges on or after July 1, 2010; 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, record keeping 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. 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.

**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 the amendment to 86-1.37 there will be an anticipated decrease in statewide aggregate hospital Medicaid revenues for hospital inpatient services.

**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.

**Minimizing Adverse Impact:**

The proposed amendment reflects statutory intent and requirements. This amendment is the result of ongoing discussions with industry associations regarding the appropriate implementation of a risk adjusted PPR methodology. The Department is required by Public Health Law sections 2807-c(35)(b)(v) to enter into consultations with representatives of health care facilities regarding potential prospective revisions to the applicable methodologies and benchmarks set forth in this amendment by no later than April 1, 2011.

**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, record keeping, 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 addressing hospital readmissions that are determined to be clinically related to an initial discharge; however, the enacted budget adopted the risk adjusted PPR 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.

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

**Public Water Systems**

**I.D. No.** HLT-46-10-00016-P

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

**Proposed Action:** Amendment of Subpart 5-1 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, sections 201(1)(l) and 225(8)

**Subject:** Public Water Systems.

**Purpose:** To incorporate mandatory regulations (federal Ground Water Rule) to increase protection against microbial pathogens in ground water.

**Substance of proposed rule (Full text is posted at the following State website: [www.health.state.ny.us](http://www.health.state.ny.us)):** These amendments are necessary due to the promulgation by the United States Environmental Protection Agency (EPA) of the Ground Water Rule (GWR) on October 11, 2006, in order to make New York's regulations of Public Water Systems (PWS) consistent with EPA requirements.

The GWR was promulgated to reduce the risk of exposure to fecal contamination that may be present in public water systems that use ground water sources. The GWR also specifies when corrective action (which may include disinfection) is required to protect consumers who receive water from ground water systems from bacteria and viruses.

The new requirements of the GWR include:

- new Maximum Contaminant Levels/Treatment Techniques for indicators of fecal contamination in ground water sources (wells);
- expanded requirements for conducting inspections of public water systems known as sanitary surveys;

- additional record-keeping requirements for public water systems and local and state health departments; and
- customer notification by public water systems when there is a significant deficiency in the facilities or operation of the public water system or if there is fecal contamination of the raw source water and the system does not provide at least 4-log (99.99%) removal or disinfection of viruses.

Water systems must correct significant deficiencies at facilities or in system operation which may allow contaminated water to reach consumers, when directed by the State or local health department. Customers must be notified and the system must correct this violation of the regulation, either immediately or after development of an approved correction plan.

The minimum required concentration of disinfectant entering the water distribution system (and for chemical disinfectants other than chlorine) is clarified. Systems using chlorine must maintain a minimum of 0.2 mg/l at the entry point, and must notify the State if the concentration falls below that level for four or more hours. Systems must take specific actions if the system fails to meet these requirements, and notify the public in case of failure to meet the specified requirements.

Monitoring plan requirements are expanded to require inclusion of all required sampling locations and frequencies. For simple ground water systems, these monitoring plans will be simple to prepare. While comprehensive monitoring plans are currently required in Department guidance, the current requirements apply only to plans for monitoring disinfection byproducts.

Consecutive PWS, who purchase or otherwise obtain water from PWS's using ground water sources (wholesalers), must describe in their monitoring plan the process by which they will notify their wholesaler in the event of a total-coliform positive sample (unless invalidated or determined to have originated in the distribution system). If the consecutive system, or the wholesaler, provides 4-log treatment that is confirmed, using process compliance monitoring, this additional notification and source water sampling is not required. Confirmation of treatment system performance through measurements and record keeping is known as process compliance monitoring.

Several tables summarizing violation determination or monitoring frequencies have been revised and or added. The affected tables and substantial changes include:

Table 6

- New treatment technique violations when fecal contamination is found at a system that does not provide 4-log microbial treatment.
- The required fecal indicator will remain E.coli. (If fecal contamination is observed in the untreated source water, corrective action must be taken.)

Table 11

- Enterococcus and bacteriophage are added as fecal contaminants, however no monitoring requirements are added.
- Systems with disinfection waivers will no longer be eligible for reduced microbiological monitoring, previously allowed at State discretion.

New Table 11B

- Lists actions required when microbial contamination is detected in routine or follow-up monitoring samples.

GWR Notifications are added to Table 13 of Required Notifications Tables 15 and 15A

- Revised to reflect changes to disinfection residual measurement as amended by the GWR.

All PWS's must respond to notification of significant deficiencies observed at the PWS and indicate that failure to address any significant deficiencies is a treatment technique violation.

The requirements for completion of daily operation records are simplified to allow for the use of electronic or other forms. These records must include documentation of process compliance monitoring at ground water systems where 4-log treatment is required.

Reporting requirements for all PWS's specific to GWR violations

and significant deficiencies have been expanded to ensure that consumers are informed of source contamination or threats to the quality of water provided by the water system.

The reporting responsibilities of consecutive systems are clarified, and include notification of the wholesaler from whom they purchase water as well as the health department, whenever microbiological contamination is observed.

Ground water systems must notify the State within 24 hours of a GWR violation. Failure to do so will result in the requirement for a Tier 1 notification for failure to notify as well as for the violation.

**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: regsqna@health.state.ny.us

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

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

**Regulatory Impact Statement**

Statutory Authority:

Public Health Law Section 201(1)(l) authorizes the Department of Health (DOH) to regulate public water systems. In addition, Section 225 (8) requires the DOH to establish a system of public notification of public health hazards to be used by public water systems (PWSs). The revisions are in accord with the requirements of the United States Environmental Protection Agency for the Ground Water Rule (GWR), at 71 FR 65574, November 8, 2006, Vol. 71, No. 216 Correction 71 FR 67427, November 21, 2006, Vol. 71, No. 224.

Legislative Objectives:

The legislative objective is to protect public health. The purpose of promulgating these revised regulations is the enhancement of current protections governing public water supply systems with ground water sources for protection of the health of the consumers. Further, it is necessary to update the State Sanitary Code to be consistent with federal requirements in order to minimize burdens placed on regulated parties.

Needs and Benefits:

An estimated 8,600 public water systems (PWSs) in New York State, serving over 3.6 million people, use ground water as the source of drinking water. The United States Environmental Protection Agency (EPA) promulgated revised federal drinking water regulations to reduce potential adverse health risks that may be associated with ground water sources and, in particular, the risks associated with fecal contamination. Fecal contamination includes all of the bacteria and viruses-both pathogenic (disease-causing) and non-pathogenic-found in feces. Under certain circumstances, these microorganisms can migrate into ground water sources. Unlike existing requirements for surface water sources, no earlier federal regulations required filtration or disinfection of ground water sources to remove microbial contaminants, although New York State currently requires disinfection at all public water systems, including ground water systems.

These revisions to the PWS regulations, 10 NYCRR Subpart 5-1, are proposed to implement federally mandated provisions of the GWR that were promulgated in October 2006 and became effective December 1, 2009. The GWR aims to improve upon the protection provided by existing sanitary survey requirements for Ground Water Systems (GWSs). A risk-targeted approach was selected for implementation. Because of the difficulties involved in monitoring for the wide range of specific pathogenic bacteria and viruses that could occur in ground water, one of the key provisions of the risk-targeted approach is monitoring for a more easily measured bacterial or viral fecal indicator microorganism. Based on source water sampling results, as well as sanitary survey results, PWSs will be required to take action to minimize the possible presence of pathogenic bacteria and viruses that pose threats to human health.

In the event that the revisions are not made, water systems will still be required to comply with the regulations, and additionally work directly with a second agency for oversight and enforcement. Oversight of public water systems in New York State is by State and Local Health Departments: State, City, and County Health Departments (SLHDs). If the revised regulations are not adopted, oversight of wa-

ter systems for the GWR will be done directly by EPA while oversight for the implementation of the remaining aspects of public water system oversight will continue under the SLHDs. Additional reporting will be required for both agencies.

The Economic Analysis for the GWR (EAGWR) that was prepared by EPA (EPA 815-R-06-014, October 2006), is available at: <http://www.epa.gov/safewater/>. It reports that the "GWR will provide important protection against illnesses and deaths attributable to ground water contamination. EPA also believes that the GWR will provide this desired protection from groundwater pathogen contamination at a justifiable cost." EPA found that "The GWR is cost-effective (using either the Enhanced or the Traditional Cost of Illness approach): no other alternative achieves greater benefits at the same cost or the same benefits at lower cost."

After a new federal regulation is adopted, requirements must be fulfilled so the State can obtain primacy enforcement responsibility (primacy), a formal process of transfer of authority for rule implementation in which EPA ensures that the State has the authority to take all necessary actions for rule implementation. The GWR was promulgated with a primacy deadline of October 2008 but with the option of a two-year extension. The extension of the date that final primacy requirements are due to the EPA was negotiated and, on November 24, 2008, approved by EPA Region 2. The date for submission of the primacy package by New York State for primacy in implementing the GWR is now November 8, 2010. These revisions of the State Sanitary Code, Subpart 5-1, are needed to incorporate rule requirements and revisions to obtain primacy for GWR implementation from the EPA.

#### Costs:

##### Costs to Public Water Systems:

The costs to ground water systems to comply with the rule were estimated based on EPA's EAGWR. For those approximately 300 systems in New York State (3.5% of approximately 8,600 systems statewide) needing capital construction to comply with the rule, initial capital costs were estimated by EPA at an average of about \$1.51 per household per year. For systems serving less than 10,000 customers (over 99% of all ground water systems), the average per system cost was estimated at an average of \$1900. Overall, the cost of compliance is estimated at less than \$1 per ground water system customer household per year.

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

State and local government agencies are affected in several ways by these rule revisions. Some public water systems are operated by local, state or federal government agencies. In New York State, direct supervision of public water systems is performed by SLHDs. The cost to the government agencies that operate water systems to comply with these revised rules will be higher than any increases in oversight costs incurred to implement this rule. There will be little increase in the cost of oversight from the current cost of oversight activities required under the existing rules because most oversight activities are currently required. There will be a small increase in the cost related to record keeping, but the greatest impact to oversight will be the increased effort to enforce rule provisions. Still, if the regulations are not revised, and oversight is split between the SLHDs and the EPA who could retain GWR primacy, the burden on public water systems will be greater.

##### Source(s) of Cost Information:

The EAGWR was developed by the EPA to evaluate costs of GWR implementation and summarized costs nationally. The report is available online at the address given above. The costs were proportionally applied to the size and type of ground water Public Water Systems in New York State. For the purposes of the EAGWR, one-time and yearly costs were projected over a 25-year time period to coincide with the estimated life span of capital equipment and a time lag of 5 to 10 years for treatment technology installation after rule promulgation.

##### Local Government Mandates:

These revised rules impose little change in what is requested of the SLHDs. Most of the SLHDs that will be overseeing implementation of these rules are operated by the county governments. None of the

provisions affect public water systems owned or operated by local governments any differently from systems operated by any other public or private parties. Local governments that operate public water systems will have to comply with the revised regulations, but the new compliance standards will apply even if the revised regulations are not adopted.

##### Paperwork:

These revised regulations do not require new forms or other paperwork but for some PWS there will be revisions to the current forms. The biggest increase in paperwork will be for any systems for which enforcement action will be required. If these revisions are not made, the paperwork burden will increase because system reporting will need to go to the EPA as well as the SLHDs. Reporting requirements may vary between the two agencies resulting in two different reporting standards.

##### Duplication:

Adoption of these revised regulations will reduce duplication in effort for public water systems that use ground water sources because without the revisions, the EPA will not grant primacy to the State for GWR provisions. Without State primacy, systems will face the complication of direct oversight by both EPA and SLHDs for drinking water rules compared with the current system of oversight by SLHDs. States were granted discretion for certain aspects of rule implementation, without reducing the standard for implementation. The simplest approach that met minimum requirements and protected public health was selected in coordination for rule implementation with advice from a Ground Water Rule Implementation Work Group (GWRIWG) that included representatives of the regulated community and local governments.

##### Alternatives:

The GWRIWG, consisting of members of groups impacted by the revisions to the regulations under the GWR, met several times to provide advice to the Bureau of Water Supply Protection on rule implementation. Some of the options discussed but not selected might have posed an even greater financial or administrative burden on the public water systems. The alternative of not revising the regulations was considered. This would make oversight of water system compliance with the ground water rule the responsibility of the EPA. That option would assign additional reporting and coordination efforts to the water systems in order to report to, meet with, and otherwise be overseen by both the EPA and the SLHD that would retain primacy for enforcement of other drinking water regulations. The proposed rule revisions are the better alternative.

##### Federal Standards:

These revisions are proposed because of changes in the minimum standards of the federal government for public water systems. After the federal government adopts drinking water regulations under the Safe Drinking Water Act, the state obtains primacy for oversight of rule implementation through the primacy process, which includes revising state regulations and developing or revising implementation guidance documents. Certain aspects of GWR implementation were left to states. The proposed options were selected to provide the least impact on public water systems while meeting rule requirements and protecting public health. For example, EPA requires states to select a fecal indicator but suggests that using two is more protective. To date, available information from New York public water systems do not show that the additional expense of requiring sampling for two indicators of fecal contamination would be more protective than continuing the practice of sampling for E. Coli.

If the proposed revisions to the regulations are not adopted, the federal standards will be implemented directly by the federal EPA and may result in a greater regulatory and compliance burden on the water systems.

##### Compliance Schedule:

Public Water Systems must comply with GWR requirements effective December 1, 2009, even if these proposed regulatory revisions are not promulgated. SLHDs will have to ensure that all 8 components of the sanitary survey are completed at all community water systems by December 31, 2012 and noncommunity water systems by Decem-

ber 31, 2014. Since sanitary surveys are already required at all public water systems in New York State, this will require only minor changes in the documentation of the sanitary survey.

Effective December 1, 2009, any time a routine coliform sample has a positive result at a ground water system that does not provide and document effective treatment, the water system will have to collect one or more follow-up samples from the raw source water. If the system is complying with the GWR by treating the water, they will have to ensure that process compliance monitoring demonstrates adequate, effective treatment and report the measurements to the SLHD with their monthly operations report.

Note: The above compliance schedule was established by EPA and has taken effect. In late 2008, The NY State Department of Health (DOH) and the EPA signed an agreement extending the deadline for DOH to obtain primary enforcement responsibility ("primacy") for implementing the GWR, as required under federal regulations. The extension agreement expires on November 8, 2010. When DOH obtains primacy, it will accept authority and responsibility for implementing all aspects of the GWR. The extension agreement authorized DOH to implement day-to-day oversight of rule implementation, while EPA conducts any required GWR enforcement actions on issues that are not resolved within 60 days. Expedient adoption of these regulatory changes will allow the Department to submit the primacy package to EPA prior to the expiration of the extension agreement.

#### **Regulatory Flexibility Analysis**

##### **Effect of Rule:**

The revisions to 10 NYCRR Subpart 5-1 are necessary to implement the Federal Ground Water Rule (GWR). If the revisions are not made, the provisions of the rule will be imposed directly by the United States Environmental Protection Agency (EPA), in addition to the current structure where oversight of public water system compliance with the rest of 10 NYCRR Part 5 is conducted by State and Local (City and County) Health Departments (SLHDs). So the impact of adopting these revisions to the regulations will benefit small businesses by allowing oversight to remain the responsibility of the SLHDs. Systems will have one fewer set of reporting paperwork to prepare and one less agency directly overseeing regulatory compliance. Because most of the sources for ground water systems are not contaminated, most water systems will need to make only minor adjustments to current operation requirements in order to implement the requirements of the GWR.

Local governments and small businesses operate most of the ground water public water systems (GWPWS) affected by these revisions to 10 NYCRR Subpart 5-1. The revised regulations impact about 8,600 of the almost 10,000 public water systems in New York State. Of these impacted systems, 8 serve a population greater than 100,000, 60 serve populations between 10,000 and 100,000, and the rest serve smaller populations. Of the seven largest systems, two are water authorities (one mixed public and private ownership, the other local government owned), three are operated by privately owned companies, and two are municipalities. It is estimated that over 95% of the impacted water systems are either small businesses or local governments. In New York State, about 950 GWPWS are operated by local governments, over 200 GWPWS by state agencies and 16 GWPWS by the federal government.

##### **Compliance Requirements:**

These revisions require only minor changes to record keeping or reporting requirements for public water systems. Up to 10 % of the water systems may need to provide additional documentation of disinfection adequacy in the event that they increase the documentation of treatment process as one of the alternatives they may take to comply with the rule requirements. For most of these systems, the additional documentation would amount to recording disinfectant concentration, an existing requirement, at a new or alternate location from currently required location(s), once a day. If these revisions are not made, reporting requirements will increase as new reporting to the EPA will be required in addition to reporting to the SLHD, but the content of the reports will be the same whether one or two agencies provide oversight.

##### **Professional Services:**

The revision of these rules require only minor changes to the requirements for professional services that a small business or local government is likely to need to comply with the rule. There will be a small (averaging less than \$5 per system per year) increase in water sampling costs for some of the water systems, particularly those that use more than one well to supply water to their customers on a regular basis. In the event that contamination in the form of a total coliform positive sample is detected during routine sampling of the distribution system at a public water system, source water sampling must be completed to determine whether fecal contamination is present in the source water. A typical water sample analyzed for total coliform and E. Coli costs about \$50, including sampling and analysis.

Ground water systems that serve less than 1000 customers will have additional sampling costs if they have more than one well. Because systems must sample either each well or representative wells according to their sampling plan, systems with a sampling plan can minimize the need for additional sampling. Of the systems impacted by this rule, 703 have more than two wells, and 1389 use two wells. The remaining systems operate a single well. The 114 systems with a single well serving 1000 or more people may incur additional sampling costs (averaging less than \$5 per system per year) to comply with this rule. The other 5889 systems serving less than 1000 population with one well will not be required to pay for any extra samples under these rules, unless they have fecal contamination in the source water.

Because of the enhanced treatment requirements in the few cases of a public water system where fecal contamination is confirmed in the source water, professional services may be required for design of new or updated water treatment or other system updates. Prices will vary with the complexity of required design. EPA estimated costs were prorated for New York State and the cost for professional design services was estimated to be about \$0.30 (thirty cents) per household per year.

##### **Compliance Costs:**

The EPA estimates that the mean annual cost per household for complying with the GWR will be less than \$1 a year for 96% of households affected by the new requirements of the rule. For an estimated 83% of systems, there will be no additional costs incurred in complying with this rule. For those systems needing capital construction to comply with the rule, initial capital costs were estimated by EPA as an average of about \$1.51 per household per year, with an average of \$1900 per system serving less than 10,000 customers (over 99% of all ground water systems). As described under "Compliance Requirements", above, the cost to systems of compliance with GWR requirements will be higher if the regulations are not revised as direct oversight would be performed by both EPA and the SLHDs. Because compliance with the federal regulations is mandatory for public water systems, the overall workload is similar, but higher costs come from the time and effort spent meeting and otherwise communicating with the EPA, an additional oversight agency.

##### **Economic and Technological Feasibility:**

Extensive research has been completed by the EPA to determine whether small businesses and local governments can economically and technically comply with these revised regulations. Their report includes cost/benefit and feasibility analyses and is available online at: [http://www.epa.gov/safewater/disinfection/gwr/pdfs/support\\_gwr\\_economicanalysis.pdf](http://www.epa.gov/safewater/disinfection/gwr/pdfs/support_gwr_economicanalysis.pdf).

Currently available technology is adequate to meet GWR requirements, although ongoing or future innovation may result in water treatment that would use less energy and/or chemicals while remaining effective at protecting the health of consumers. About 5% of systems may need to add to currently utilized facilities in order to comply with this rule, most of which would be at minimal additional expense.

##### **Minimizing Adverse Impact:**

Water systems will have to comply with the requirements of the GWR even if these rules are not revised. In reviewing aspects of rule implementation over which the EPA granted limited discretion to states, costs for implementation as well as ease of implementation by water systems and effective protection of ground water from contamination were considered. For example, some systems are required to

complete triggered monitoring, following the trigger of a total coliform positive sample from the distribution system of a public water system. The proposed regulations will require testing for the most effective single fecal indicator, rather than the optional two or three fecal indicator organisms that may be selected by states. Another example is that when a sample collected from the distribution system is found to contain total coliform bacteria (TC+), at a public water system serving less than 1000 population, the system may use one of their currently required follow-up samples rather than collecting an additional sample at the raw water source. Again, the adverse impact of implementing this federally mandated rule will be greater if the regulations are not revised because of the additional oversight agency added if the state is unable to obtain primacy for rule implementation.

#### Small Business and Local Government Participation:

An ad hoc work group was organized to provide advice to the Department on those aspects of GWR implementation over which states were given discretion. For example, states are instructed to choose at least one fecal indicator organism and were encouraged to select two microorganisms as fecal indicators for use under the rule. The group provided valuable advice on this and other topics. The work group consensus was in favor of the Department's adoption of the GWR. The following organizations and individuals were invited to participate and kept apprised of work group meetings and progress:

- New York State Section of the American Water Works Association (NYSAWWA)
- New York State Association of Towns
- New York State Conference of Environmental Health Directors
- New York State Association of County Health Officials
- New York State Rural Water Association (NYRWA)
- New York State Housing Association, Inc.
- League of Women Voters
- New York State Hospitality & Tourism Association
- Empire State Restaurant & Tavern Association
- New York State Restaurant Association
- Operators of NY State Public Water Systems (not a group)

Of these, most groups accepted the invitation and participated in some form, whether by attending meetings and participating in discussions, by providing comments on proposed alternatives, or by coordinating with representatives of other groups who were not able to participate directly. Local governments were represented through the participation of county health department staff (CEHD). The interests of water systems were represented by NYSAWWA and NYRWA. In addition, the USEPA consulted with small businesses, water organizations, states and other representatives in writing the requirements of the federal GWR that these revisions to the State Sanitary Code (in 10 NYCRR) are intended to address.

#### Rural Area Flexibility Analysis

##### Types and Estimated Numbers of Rural Areas:

The proposed revisions to 10 NYCRR Subpart 5-1 are being made in response to promulgation of the federal Ground Water Rule (GWR) that resulted in revisions to several sections of federal regulations. The GWR goal is to reduce exposure to fecal contamination in the drinking water provided by public water systems. These proposed revisions are needed in order for the New York State Department of Health, Bureau of Water Supply Protection to obtain primacy from the United States Environmental Protection Agency (EPA) for enforcement of the GWR. If New York does not obtain primacy for rule enforcement, the public ground water systems will be required to comply with the rule provisions under the additional oversight of the EPA. That means that instead of direct oversight provided by the by State and Local (City and County) Health Departments (SLHDs) where the water system is located, the system will be overseen by the SLHD for implementation of some rules and by the EPA for the GWR. The revisions impact all public ground water systems including many public water systems in rural areas. However, if these revisions to the regulations are not made, the impact on systems across the state will not be reduced, and in fact may be greater.

The revisions apply to public water systems in New York State that

use ground water as the source for any part of their drinking water. In New York's rural counties, much of the population served by public water systems is served by a large number of mostly small public ground water systems. Most surface water systems (surface water systems supply drinking water to over 80% of New York's population served by community/residential public water systems) are not impacted by this rule. Ground water sources are used by 87% of the public water systems in the state (serving about 30% of the community water system population (Note, because some surface water systems also use ground water sources, this does not add up to 100%)). Many of the systems that use ground water are located in the 42 of the 62 counties in New York State that are considered rural.

Statewide, about 70% of public water systems that use ground water are in rural counties, defined as those counties with a population less than 200,000 residents. These ground water systems serve about 60% of the residential population served by public water systems in these rural counties. The rural counties also host 68%, (4305 of the 6343) of the ground water noncommunity water systems in the state (those public water systems at schools, factories, motels, restaurants and other locations with nonresidential or seasonal consumers). These noncommunity systems in rural counties serve 74% of the population served by noncommunity public water systems.

EPA's analysis of the economic impact of the GWR indicates that there will be a proportionally higher impact on small systems required to implement changes to their operation, particularly in cases where treatment is added or enhanced in order to meet rule requirements, largely because there are fewer customers per system to share the cost. While most rural systems are small systems, EPA did not differentiate between rural and suburban small water systems in their economic impact analysis.

#### Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:

These revisions do not substantially change reporting or record keeping requirements for public water systems in rural areas. Water systems are currently required to maintain records and report to the SLHDs no less than monthly. For a few systems, there may be minor changes in reporting requirements, but for most systems, reporting requirements will not change. Because of the enhanced treatment requirements in the case of a public water system where fecal contamination is found in the source water, in some cases, professional services may be required for design of new or updated water treatment or other system updates. If not adopted, the federal GWR provisions will be directly overseen at the water systems by the EPA. This would add the complication of oversight being provided by two separate agencies, so the impact of not updating the regulations on systems will be greater than authorizing the New York State Department of Health and its designees to enforce the new provisions.

#### Costs:

The United States Environmental Protection Agency estimates that the mean annual cost per household for complying with the GWR will be less than \$1 a year for 96% of households affected by the new requirements of the rule. For an estimated 83% of systems, there will be no additional costs incurred in complying with this rule. For those systems needing capital construction to comply with the rule, initial capital costs were estimated by EPA as an average of about \$1.51 per household per year, with an average of \$1900 per system serving less than 10,000 customers (over 99% of all ground water systems). Again, the cost will be higher if the regulations are not revised as compliance with the federal regulations is mandatory for the public water systems.

#### Minimizing Adverse Impact:

In developing the discretionary aspects of GWR implementation, efforts were taken to make implementation as simple as possible, and to minimize blanket requirements such as universal chlorination requirements or the sudden elimination of disinfection waivers. For most rural public water systems, any additional costs for implementation of revised rule provisions will be minimal and be incurred over a period of several years. If a rural water system is found to have fecal contamination of the source water, then immediate action will be required to provide safe drinking water to the system's customers.

#### Rural Area Participation:

An ad hoc work group was organized to provide advice on those aspects of GWR implementation over which states were given discretion. For example, states are instructed to choose at least one fecal indicator organism and were encouraged to select two microorganisms as fecal indicators for use under the rule. The group provided advice on this and other items. The work group consensus was in favor of the Department's adoption of the GWR. The following organizations and individuals were invited to participate and kept apprised of work group meetings and progress:

- New York State Section of the American Water Works Association (NYSAWWA)
- New York State Association of Towns
- New York State Conference of Environmental Health Directors
- New York State Association of County Health Officials
- New York State Rural Water Association (NYRWA)
- New York State Housing Association, Inc.
- League of Women Voters
- New York State Hospitality & Tourism Association
- Empire State Restaurant & Tavern Association
- New York State Restaurant Association
- Operators of NY State Public Water Systems (not a group)

Several of these work group participants represent rural communities and businesses. The Restaurant Association (who also represented the Tavern Association) and the New York State Housing Association, Inc., represent numerous businesses which operate public water systems in rural areas. Staff from participating County Health Departments, including a representative of the New York State Conference of Environmental Health Directors and staff of New York State Health Department District and Regional Offices represented rural areas across the state. The New York Rural Water Association and New York Section of the American Water Works Association both have members who work at or own ground water systems in rural areas and participated in development of the regulations.

#### **Job Impact Statement**

The Department of Health has determined that the proposed revisions will not have substantial adverse impact on jobs or employment opportunities. The proposed revisions enhance existing requirements under the State Sanitary Code for protection of drinking water quality. In the event that these revisions are not adopted by New York State, the requirements will be imposed directly by the United States Environmental Protection Agency. Thus, the adoption of the changes to the regulations will not substantially impact employment. It is possible that new technologies or products developed to comply with the revised rules would bring new employment opportunities to the state.

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## Insurance Department

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### EMERGENCY RULE MAKING

#### **Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims**

**I.D. No.** INS-46-10-00003-E

**Filing No.** 1116

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

**Effective Date:** 2010-10-29

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

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

**Statutory authority:** Insurance Law, sections 201, 301, 1303 and 4117; and Workers' Compensation Law, section 32

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

**Specific reasons underlying the finding of necessity:** Workers' Compensa-

tion Law ("WCL") Section 32 permits the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the Special Disability Fund ("SDF"). Furthermore, no insurer, self-insured employer, or the State Insurance Fund ("SIF") may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. The law mandates the Superintendent to set a reserve standard specific to transactions authorized by WCL Section 32. This regulation establishes the required reserve standards.

Presently, the SDF reimburses carriers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on private insurance carriers, self-insured employers (including political sub-divisions), group self-insurers, and SIF. The combination of increasing requests for reimbursement from the SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

The Legislature enacted Chapter 6 of the Laws of 2007, which amended Section 15(8)(h) of the Workers' Compensation Law, in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amends Section 32(i) of the Workers' Compensation Law to permit the chair of the New York State Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the SDF. Furthermore, Section 32(i)(5) mandates that no carrier, self insured employer, or SIF may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent. This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of any claims.

The Waiver Agreement Management Office (WAMO), acting on behalf of the Workers' Compensation Board, will enter into waiver agreements with insurers, self-insured employers, and SIF whereby those parties agree to assume the liability for, management, administration or settlement of claims. In consideration of the assumption of those obligations, the insurer, self-insured employer, or SIF will receive a lump-sum payment from WAMO. WAMO will also negotiate and execute other waiver agreements (i.e., the retail/individual waiver agreements) contemplated by the regulation.

The New York State Dormitory Authority will be issuing tax exempt revenue bonds beginning in November, 2009, to fund the waiver agreements to be entered into by WAMO. This regulation must be in place before that time so that insurers (one of the parties to wholesale waiver agreements) will be able to enter into waiver agreements with WAMO. Nor will self-insured employers or the SIF be in a position to execute waiver agreements with WAMO until such time as this regulation is in place.

The rapid depopulation of the SDF through the waiver agreements will lead to a decrease the SDF assessments that New York State insurers and employers must pay. This regulation was previously promulgated on an emergency basis on November 18, 2009, February 10, 2010, May 7, 2010, and August 5, 2010. For the reasons stated above, the rule must be kept in effect on an emergency basis for the furtherance of the general welfare.

**Subject:** Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims.

**Purpose:** This regulation requires reserves to be established for those claims subject to reimbursement by the Special Disability Fund.

**Text of emergency rule:** A new subpart 151-4 is added to read as follows:

*Section 151-4.1 Preamble.*

The Special Disability Fund ("SDF") reimburses carriers and self-insured employers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on insurers writing workers compensation insurance in New York, self-insured employers (including political sub-divisions), group self-insurers, and the State Insurance Fund. The combination of increasing requests for reimbursement from SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

The Legislature enacted Chapter 6 of the Laws of 2007, which amended Workers' Compensation Law Section 15(8)(h), in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amends Workers' Compensation Law section 32(i) to permit the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Workers' Compensation Law section 32(i)(5) mandates that no carrier, self-insured employer, or the State Insurance Fund may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. This purpose of this subpart is to ensure that an insurer, self-insured employer, or State Insurance Fund does not over-reserve for claims if it voluntarily assumes the liability for, or management, administration or settlement.

*Section 151-4.2 Definitions.*

Waiver agreement, in this subpart, means any agreement entered into between an insurer, self-insured employer, or the State Insurance Fund and the New York State Workers' Compensation Board pursuant to Workers' Compensation Law sections 32(i)(2) and (3).

*Section 151-4.3 Reserve Amounts.*

(a) An insurer other than the State Insurance Fund that enters into a waiver agreement shall establish reserves for those claims in accordance with Insurance Law sections 1303 and 4117(d).

(b) The State Insurance Fund or a self-insured employer holding reserves that enters into a waiver agreement shall establish reserves for those claims in accordance with the principles set forth in Insurance Law sections 1303 and 4117(d).

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 26, 2011.

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

**Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the promulgation of Part 151-4 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, 1303, and 4117 of the Insurance Law, Section 32 of the Workers' Compensation Law ("WCL"), and Chapter 6 of the Laws of 2007. These provisions establish the Superintendent's authority to establish the amount of reserves an insurer, self-insured employer, or the State Insurance Fund ("SIF") may hold for claims for which the entity has waived its right to reimbursement from the Special Disability Fund ("SDF"), and for which it has assumed the liability, management, administration, or settlement.

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

Section 1303 of the Insurance Law requires every insurer to maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims.

Section 4117(d) of the Insurance Law sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers' compensation insurance.

Section 32 of the Workers' Compensation Law permits the chair of the workers' compensation board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the SDF. Furthermore, no carrier, self-insured employer, or the State Insurance Fund ("SIF") may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent.

Section 80 of Chapter 6 of the Laws of 2007, gives the Superintendent the authority, in consultation with the chair of the workers' compensation board, to promulgate regulations relating to the standards to be followed in the approval of forms and procedural requirements needed to implement the provisions of this act.

2. Legislative objectives: The SDF reimburses carriers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on private insurance carriers, self-insured employers (including political sub-divisions), group self-insurers, and SIF. The combination of increasing requests for reimbursement from the SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

As a result, the Legislature enacted Chapter 6 of the Laws of 2007, which amended Section 15(8)(h) of the Workers' Compensation Law, in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amended Section 32(i) of the Workers' Compensation Law to permit the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Section 32(i)(5) mandates that no carrier, self-insured employer, or SIF may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent. This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of any claims.

3. Needs and benefits: This regulation requires an insurer, self-insured employer, or SIF to establish reserves for those claims subject to reimbursement by the SDF in accordance with Insurance Law Sections 1303 and 4117(d), thereby ensuring that insurers, self-insured employers, or SIF do not over-reserve for claims for which they have directly assumed the liability, management, administration, or settlement. Insurance Law Section 1303 states that all insurers must maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of the statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims. In turn, Insurance Law Section 4117(d) sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers' compensation insurance.

4. Costs: Participation in the program is voluntary. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or manage-

ment, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

5. Local government mandates: The proposed rule does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. Paperwork: This regulation requires no new paperwork. Insurers, self-insured employers and SIF already administer the claims for second injuries. However, by assuming the liability, management, administration, and settlement directly, these insurers, self-insured employers, or SIF would no longer be reimbursed by the SDF, and thereby reduce their paperwork.

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

8. Alternatives: The law mandates the Superintendent to set a reserve standard specific to transactions authorized by WCL Section 32(i)(5). Reserving in accordance with Insurance Law Sections 1303 and 4117(d) will ensure that insurers that assume the liability, management, administration, and settlement of claims for which they were previously reimbursed by the SDF do not over-reserve for those claims. Nor would reserving in accordance with these sections result in inadequate reserves for those claims.

Section 80 of Chapter 6 of the Laws of 2007, gives the Superintendent the authority, in consultation with the chair of the workers' compensation board, to promulgate regulations relating to the standards to be followed in the approval of forms and procedural requirements needed to implement the provisions of WCL Section 32(i)(5). Participation in the program is voluntary. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, it must maintain reserves as required by regulation of the Superintendent.

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

10. Compliance schedule: Insurers, self-insured employers, or SIF, if they choose to assume the liability for, or management, administration or settlement of any claims, will be expected to demonstrate compliance with the reserve standards established by this regulation immediately upon entering into a waiver agreement.

#### **Regulatory Flexibility Analysis**

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

This regulation applies to all workers' compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund ("SIF"). This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of those claims from the Workers' Compensation Special Disability Fund ("SDF") by requiring those entities to reserve in accordance with Insurance Law Sections 1303 and 4117(d).

The basis for this finding is that this rule is directed at workers' compensation insurers authorized to do business in New York State, none of which falls within the definition of "small business" as found in Section 102(8) of the State Administrative Procedure Act ("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. Nor does SIF, which is also effected by the regulation, come within the definition of "small business" found in SAPA Section 102(8).

The prerequisites maintained by the Workers' Compensation Board for an employer to be self-insured make it highly unlikely that any small businesses, as defined by SAPA Section 102(8), are in fact self-insured. All of the currently self-insured employers have high credit scores and payrolls equal to or greater than \$732,000. Moreover, all self-insured employers must post a security deposit with the Workers' Compensation Board of at least \$935,000 or provide a letter of credit for the required amount of security. These qualifications, among others, preclude the overwhelming majority of small employers from becoming self-insured.

In any event, this rule is applicable only if a workers' compensation insurer, self-insured employer, or SIF voluntarily chooses to enter into waiver agreement. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there

will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

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

1. Types and estimated numbers of rural areas:

This regulation applies to all workers' compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund ("SIF"). These entities do business throughout New York State, including rural areas as defined under State Administrative Procedure Act ("SAPA") Section 102(10).

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

This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Insurers, self-insured employers, and SIF already administer the claims from a claims management perspective. If anything, they would have a reduction in paperwork because the reimbursement process would no longer be necessary.

3. Costs:

To insurers: Participation in the program is voluntary. If a carrier, self-insured employer or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

4. Minimizing adverse impact:

Participation in the program is voluntary. If a carrier, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

5. Rural area participation:

The legislature in 2007 amended Workers' Compensation Law Section 32(i)(5) was amended to mandate that an insurer, self insured employer, or SIF may not assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. In order for the mechanism contemplated by the statute to operate, the Superintendent must promulgate a regulation establishing reserve standards.

The entities covered by this regulation - workers' compensation insurers authorized to do business in New York State, self-insured employers, and SIF - do business in every county in this state, including rural areas as defined under SAPA Section 102(10). This regulation mandates that insurers should set reserves in accordance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and SIF should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The regulation 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 mandates that insurers must set reserves in accordance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and the State Insurance Fund should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The insurer's existing personnel should be able to perform this task. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This regulation should not have a measurable impact on self-employment opportunities.

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

#### **Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims**

I.D. No. INS-46-10-00006-P

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

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

**Statutory authority:** Insurance Law, sections 201, 301, 1303 and 4117; and Workers' Compensation Law, section 32

**Subject:** Workers' Compensation Insurance Rates: Reserves for Special Disability Fund Claims.

**Purpose:** This regulation requires reserves to be established for those claims subject to reimbursement by the Special Disability Fund.

**Text of proposed rule:** A new subpart 151-4 is added to read as follows:

*Section 151-4.1 Preamble.*

*The Special Disability Fund ("SDF") reimburses carriers and self-insured employers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).*

*The SDF funds its operations and claims payments by making annual assessments on insurers writing workers compensation insurance in New York, self-insured employers (including political sub-divisions), group self-insurers, and the State Insurance Fund. The combination of increasing requests for reimbursement from SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.*

*The Legislature enacted Chapter 6 of the Laws of 2007, which amended Workers' Compensation Law Section 15(8)(h) in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amends Workers' Compensation Law section 32(i) to permit the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Workers' Compensation Law section 32(i)(5) mandates that no carrier, self-insured employer, or the State Insurance Fund may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. This purpose of this subpart is to ensure that an insurer, self-insured employer, or State Insurance Fund does not over-reserve for claims if it voluntarily assumes the liability for, or management, administration or settlement.*

*Section 151-4.2 Definitions.*

*Waiver agreement, in this subpart, means any agreement entered into between an insurer, self-insured employer, or the State Insurance Fund and the New York State Workers' Compensation Board pursuant to Workers' Compensation Law sections 32(i)(2) and (3).*

*Section 151-4.3 Reserve Amounts.*

*Any insurer, self-insured employer, or the State Insurance Fund that enters into a waiver agreement shall establish reserves for those claims in accordance with Insurance Law sections 1303 and 4117(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:** Michael Rasnick, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-7474, email: mrasnick@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.**

**Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the promulgation of Part 151-4 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, 1303, and 4117 of the Insurance Law, Section 32

of the Workers' Compensation Law ("WCL"), and Chapter 6 of the Laws of 2007. These provisions establish the Superintendent's authority to establish the amount of reserves an insurer, self-insured employer, or the State Insurance Fund ("SIF") may hold for claims for which the entity has waived its right to reimbursement from the Special Disability Fund ("SDF"), and for which it has assumed the liability, management, administration, or settlement.

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

Section 1303 of the Insurance Law requires every insurer to maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims.

Section 4117(d) of the Insurance Law sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers' compensation insurance.

Section 32 of the Workers' Compensation Law permits the chair of the workers' compensation board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the SDF. Furthermore, no carrier, self-insured employer, or the State Insurance Fund ("SIF") may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent.

Section 80 of Chapter 6 of the Laws of 2007, gives the Superintendent the authority, in consultation with the chair of the workers' compensation board, to promulgate regulations relating to the standards to be followed in the approval of forms and procedural requirements needed to implement the provisions of this act.

2. Legislative objectives: The SDF reimburses carriers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on private insurance carriers, self-insured employers (including political sub-divisions), group self-insurers, and SIF. The combination of increasing requests for reimbursement from the SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

As a result, the Legislature enacted Chapter 6 of the Laws of 2007, which amended Section 15(8)(h) of the Workers' Compensation Law, in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amended Section 32(i) of the Workers' Compensation Law to permit the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Section 32(i)(5) mandates that no carrier, self-insured employer, or SIF may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent. This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of any claims.

3. Needs and benefits: This regulation requires an insurer, self-insured employer, or SIF to establish reserves for those claims subject to reimbursement by the SDF in accordance with Insurance Law Sections 1303 and 4117(d), thereby ensuring that insurers, self-insured employers, or SIF do not over-reserve for claims for which they have directly assumed the liability, management, administration, or settlement. Insurance Law Section 1303 states that all insurers must maintain reserves in an amount

estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of the statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims. In turn, Insurance Law Section 4117(d) sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers' compensation insurance.

4. Costs: Participation in the program is voluntary. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

5. Local government mandates: The proposed rule does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. Paperwork: This regulation requires no new paperwork. Insurers, self-insured employers and SIF already administer the claims for second injuries. However, by assuming the liability, management, administration, and settlement directly, these insurers, self-insured employers, or SIF would no longer be reimbursed by the SDF, and thereby reduce their paperwork.

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

8. Alternatives: The law mandates the Superintendent to set a reserve standard specific to transactions authorized by WCL Section 32(i)(5). Reserving in accordance with Insurance Law Sections 1303 and 4117(d) will ensure that insurers that assume the liability, management, administration, and settlement of claims for which they were previously reimbursed by the SDF do not over-reserve for those claims. Nor would reserving in accordance with these sections result in inadequate reserves for those claims.

Section 80 of Chapter 6 of the Laws of 2007, gives the Superintendent the authority, in consultation with the chair of the workers' compensation board, to promulgate regulations relating to the standards to be followed in the approval of forms and procedural requirements needed to implement the provisions of WCL Section 32(i)(5). Participation in the program is voluntary. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, it must maintain reserves as required by regulation of the Superintendent.

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

10. Compliance schedule: Insurers, self-insured employers, or SIF, if they choose to assume the liability for, or management, administration or settlement of any claims, will be expected to demonstrate compliance with the reserve standards established by this regulation immediately upon entering into a waiver agreement.

#### **Regulatory Flexibility Analysis**

##### **1. Small businesses:**

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

This regulation applies to all workers' compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund ("SIF"). This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of those claims from the Workers' Compensation Special Disability Fund ("SDF") by requiring those entities to reserve in accordance with Insurance Law Sections 1303 and 4117(d).

The basis for this finding is that this rule is directed at workers' compensation insurers authorized to do business in New York State, none of which falls within the definition of "small business" as found in Section 102(8) of the State Administrative Procedure Act ("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. Nor does SIF, which is also effected by the regulation, come within the definition of "small business" found in SAPA Section 102(8).

The prerequisites maintained by the Workers' Compensation Board for an employer to be self-insured make it highly unlikely that any small businesses, as defined by SAPA Section 102(8), are in fact self-insured. All of the currently self-insured employers have high credit scores and payrolls

equal to or greater than \$732,000. Moreover, all self-insured employers must post a security deposit with the Workers' Compensation Board of at least \$935,000 or provide a letter of credit for the required amount of security. These qualifications, among others, preclude the overwhelming majority of small employers from becoming self-insured.

In any event, this rule is applicable only if a workers' compensation insurer, self-insured employer, or SIF voluntarily chooses to enter into waiver agreement. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

##### **2. Local governments:**

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

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

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

This regulation applies to all workers' compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund ("SIF"). These entities do business throughout New York State, including rural areas as defined under State Administrative Procedure Act ("SAPA") Section 102(10).

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

This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Insurers, self-insured employers, and SIF already administer the claims from a claims management perspective. If anything, they would have a reduction in paperwork because the reimbursement process would no longer be necessary.

##### **3. Costs:**

To insurers: Participation in the program is voluntary. If a carrier, self-insured employer or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

##### **4. Minimizing adverse impact:**

Participation in the program is voluntary. If a carrier, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

##### **5. Rural area participation:**

The legislature in 2007 amended Workers' Compensation Law Section 32(i)(5) was amended to mandate that an insurer, self insured employer, or SIF may not assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. In order for the mechanism contemplated by the statute to operate, the Superintendent must promulgate a regulation establishing reserve standards.

The entities covered by this regulation - workers' compensation insurers authorized to do business in New York State, self-insured employers, and SIF - do business in every county in this state, including rural areas as defined under SAPA Section 102(10). This regulation mandates that insurers should set reserves in accordance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and SIF should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The regulation 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 mandates that insurers must set reserves in accordance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and the State Insurance Fund should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The insurer's existing personnel should be able to perform this task. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This regulation should not have a measurable impact on self-employment opportunities.

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## Division of the Lottery

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### NOTICE OF ADOPTION

#### Video Lottery Gaming Capital Award Program Relating to Depreciation of Capital Improvements; Increase Hours of Operation of VLG

**I.D. No.** LTR-37-10-00004-A

**Filing No.** 1138

**Filing Date:** 2010-11-02

**Effective Date:** 2010-11-17

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

**Action taken:** Amendment of sections 2836-20.9 and 2836-24.1 of Title 21 NYCRR.

**Statutory authority:** Tax Law, sections 1601, 1604, 1612 and 1617-a

**Subject:** Video Lottery Gaming capital award program relating to depreciation of capital improvements; Increase hours of operation of VLG.

**Purpose:** To conform to the enabling sections of the Tax Law upon which the regulations are based and authorized.

**Text of final rule:** Section 2836-20.9 is amended to read as follows:

2836-20.9 Hours of Operation.

The hours of operation of video lottery gaming at all licensed video lottery gaming facility locations shall be [sixteen (16)] *twenty consecutive hours* [in a twenty-four (24) hour period] *per day*, unless otherwise approved by the division in writing after a sixty (60) day written application is made by the video gaming agent. In no event shall video lottery gaming be conducted [between the hours of 2:00] *past 4:00 a.m. [to 8:00 a.m.]* Public access to the video lottery gaming floor must be restricted at all times video lottery gaming is not in operation. The failure of the video lottery gaming agent to comply with the hours of operation set forth in this part shall be a violation of these regulations.

Section 2836-24.1 is amended to read as follows:

2836-24.1

(c) Any agent which has received a vendor's capital award, choosing to divest the capital improvement toward which the award was [supplied] *applied*, prior to [reaching] the [forty year straightline] *full* depreciation [value] of the *capital* improvement *in accordance with generally accepted accounting principles*, shall reimburse the state in amounts equal to the total of any such awards.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 2836-20.9.

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

#### Revised Job Impact Statement

The proposed amendment revision made to 21 NYCRR Section 2836-20.9 does not require a Revised Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State and is being made to correct a technical error in the Notice of Proposed Rulemaking.

There are no revisions to 21 NYCRR 2836-24.1.

The amendments are being made to conform to the enabling sections of the Tax Law upon which the regulations are based and authorized.

Moreover, the amendments may have a positive effect on jobs or employment opportunities as a result of an increase in the hours of the operation of Video Lottery Gaming.

#### Assessment of Public Comment

The agency received no public comment.

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## Office of Mental Health

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

#### Standards Pertaining to Payment for Hospitals Licensed by the Office of Mental Health

**I.D. No.** OMH-46-10-00017-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 574 of Title 14 NYCRR.

**Statutory authority:** Mental Hygiene Law, sections 7.09, 31.04 and 43.02; Social Services Law, sections 364 and 364-a

**Subject:** Standards Pertaining to Payment for Hospitals Licensed by the Office of Mental Health.

**Purpose:** Make minor technical corrections to existing regulation and use "person-first" language.

**Text of proposed rule:** 1. Section 574.1 of 14 NYCRR Part 574 is amended to read as follows:

(a) The purpose of these regulations is to establish standards pertaining to payments made by government agencies pursuant to title 11 of article 5 of the Social Services Law for services provided to patients of hospitals licensed by the Office of Mental Health in accordance with the provisions of Part [82] 582 of this Title.

(b) In order to be eligible for payments pursuant to title 11 of article 5 of the Social Services Law, a hospital must comply with the requirements of the Mental Hygiene Law, Parts 574, 577 and [82]582 of this Title and applicable provisions of title XIX of the Social Security Act as identified in section 502.2(c) of this Title.

(c) The Medical Assistance Program in New York State is administered by the New York State Department of [Social Services] *Health* by and through local social services districts in cooperation with various State agencies, including the Office of Mental Health; or by the New York State Department of [Social Services] *Health* by and through various State agencies, including the Office of Mental Health.

(d) The standards for payment established by these regulations are intended to limit hospitals eligible for payment to those that meet State and Federal requirements.

2. Section 574.3 of 14 NYCRR Part 574 is amended to read as follows:

(a) These regulations apply to hospitals licensed pursuant to article 31 of the Mental Hygiene Law and issued operating certificates in accordance with Part [82] 582 of this Title.

(b) These regulations apply to payments made by government agencies pursuant to title 11 of article 5 of the Social Services Law for services provided by a hospital licensed by the Office of Mental Health in accordance with the provisions of Part [82] 582 of this Title.

3. Subdivision (c) of section 574.4 of 14 NYCRR Part 574 is amended to read as follows:

(c) Hospital shall mean a facility providing inpatient care or treatment of [the mentally ill] *persons with mental illness* which has been issued an operating certificate by the Office of Mental Health pursuant to article 31 of the Mental Hygiene Law and in accordance with Part [82]582 of this Title. For purposes of this Part, the term hospital shall not include hospitals licensed pursuant to article 28 of the Public Health Law, residential treatment facilities for children and youth issued an operating certificate in accordance with Part 584 of this Title and hospitals within the Office of Mental Health.

4. Paragraph (1) of Section 574.5(a) of 14 NYCRR Part 574 is amended to read as follows:

(1) The hospital has a valid operating certificate issued by the Office of Mental Health, in accordance with Part [82]582 of this Title.

**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: cobjdd@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 minor, technical corrections and is non-controversial.

No person is likely to object to this rulemaking since it merely corrects references to a regulation that was repealed, corrects the name of a State agency, and uses "person-first" language.

Currently Part 574 references 14 NYCRR Part 82. That Part was repealed in 1987 and renumbered as Part 582. In addition, the Department of Social Services no longer exists, and the Medical Assistance Program in New York State is now administered by the Department of Health. Both of those corrections have been made in the rule making. Lastly, "person-first" language is more respectful and courteous of others; therefore, a reference to "the mentally ill" has been amended to read "persons with mental illness".

Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his or her jurisdiction. Sections 364 and 364-a of the Social Services Law gives the Office of Mental Health the responsibility for establishing and maintaining standards for medical care and services in facilities operated by it or subject to its supervision pursuant to Mental Hygiene Law. Section 43.02 of the Mental Hygiene Law provides that payments under the Medical Assistance Program for services at facilities licensed by the Office of Mental Health shall be at rates certified by the Commissioner of Mental Health and approved by the Director of Budget.

**Job Impact Statement**

A Job Impact Statement is not submitted with this Notice because it merely corrects inaccurate references in existing regulation and incorporates "person-first" language. It is obvious from the nature of this rule that there will be no impact on jobs and employment opportunities as a result of this rulemaking.

**Power Authority of the State of New York**

**NOTICE OF ADOPTION**

**Rates for the Sale of Power and Energy**

**I.D. No.** PAS-06-09-00002-A

**Filing Date:** 2010-11-02

**Effective Date:** 2010-11-01

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

**Action taken:** Update the service tariffs (ST-38A, ST-38B, and ST-39A) applicable to the Power Authority's Municipal and Rural Electric Cooperative System customers.

**Statutory authority:** Public Authorities Law, section 1005(5)

**Subject:** Rates for the sale of power and energy.

**Purpose:** Update Municipal/Rural Electric Cooperative systems' service tariffs to streamline them/include additional required information.

**Text or summary was published** in the February 11, 2009 issue of the Register, I.D. No. PAS-06-09-00002-P.

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

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

**Assessment of Public Comment**

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

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

**Rates for the Sale of Power and Energy**

**I.D. No.** PAS-46-10-00009-P

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

**Proposed Action:** Revision in rates for Village of Mayville.

**Statutory authority:** Public Authorities Law, section 1005

**Subject:** Rates for the sale of power and energy.

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

**Text of proposed rule:**

VILLAGE OF MAYVILLE  
Proposed Monthly Rates

	Proposed Rates <sup>1</sup>
<b>Residential S.C. 1</b>	
Customer Charge	\$3.91
	Non-Winter (May-October)
Energy Charge, per kWh	\$.04490
	Winter (November-April)
Energy Charge, per kWh	
First 1,000 kWh	\$.04490
1,001 - 2,000 kWh	\$.05860
Over 2,000 kWh	\$.06747
<b>Small Commercial S.C. 2</b>	
Customer Charge	\$4.25
	Non-Winter (May-October)
Energy Charge, per kWh	\$.05640
	Winter (November-April)
Energy Charge, per kWh	\$.06397

<sup>1</sup> Purchased Power Adjustment reflected in proposed rates

VILLAGE OF MAYVILLE  
Proposed Monthly Rates

	Proposed Rates <sup>1</sup>
<b>Large Commercial - Primary S.C. 3</b>	
Demand Charge, per kW	\$3.25
Energy Charge, per kWh	\$.03393
<b>Large Commercial - Secondary S.C. 3</b>	
Demand Charge, per kW	\$4.75
Energy Charge, per kWh	\$.03461
<b>Large Non Commercial S.C. 4</b>	
Demand Charge, per kW	\$5.00
Energy Charge, per kWh	\$.05125
<b>Security Lighting S.C. 5</b>	
(Charge per Lamp, per month)	
150 High Pressure Sodium	\$2.88
250 High Pressure Sodium	\$4.32
400 Mercury Vapor	\$4.32
Energy Charge, per kWh	\$.02519
<b>Street Lighting S.C. 6</b>	
Facility Charge (per lamp)	\$5.82
Energy Charge, per kWh	\$.02820

<sup>1</sup> Purchased Power Adjustment reflected in proposed rates

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

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

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

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

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

## Public Service Commission

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

**Whether to Approve Electric Submetering at 1295 Fifth Avenue, New York, NY**

**I.D. No.** PSC-46-10-00010-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 the October 21, 2010 filing of the plan to submeter electricity at 1295 Fifth Avenue, New York, New York, filed by Frawley Plaza, LLC.

*Statutory authority:* Public Service Law, arts. 2, 51, 53 and 66

*Subject:* Whether to approve electric submetering at 1295 Fifth Avenue, New York, NY.

*Purpose:* Whether to approve electric submetering at 1295 Fifth Avenue, New York, NY.

*Substance of proposed rule:* The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, submetering and the submetering plan, filed by Frawley Plaza, LLC, on October 21, 2010. The Commission shall consider all related matters contained in the filing.

*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. Brillinger, 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-E-0836SP6)

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

**Whether to Approve Submetering at 1940-1966 First Avenue and 420 East 102nd Street, New York, NY**

**I.D. No.** PSC-46-10-00011-P

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

*Proposed Action:* The Commission is considering the October 21, 2010 filing of the plan to submeter electricity at 1940-1966 First Avenue and 420 East 102nd Street, New York, New York, filed by Metro North Owners, LLC.

*Statutory authority:* Public Service Law, arts. 2, 51, 53 and 66

*Subject:* Whether to approve submetering at 1940-1966 First Avenue and 420 East 102nd Street, New York, NY.

*Purpose:* Whether to approve submetering at 1940-1966 First Avenue and 420 East 102nd Street, New York, NY.

*Substance of proposed rule:* The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, submetering and the submetering plan, filed by Metro North Owners, LLC, on October 21, 2010. The Commission shall consider all related matters contained in the filing.

*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. Brillinger, 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-E-0837SP6)

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

**Winter Bundled Sales Service Option**

**I.D. No.** PSC-46-10-00012-P

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

*Proposed Action:* The Commission is considering a proposed tariff filing by Central Hudson Gas & Electric Corporation to make various changes in its rates, charges, rules and regulations contained in its Schedule for Gas Service, PSC No. 12—Gas.

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

*Subject:* Winter Bundled Sales service option.

*Purpose:* To revise the commodity price points and weightings for Winter Bundled Sales service.

*Substance of proposed rule:* The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Central Hudson Gas & Electric Corporation (Central Hudson) to revise the commodity price points and weightings for the Winter Bundled Service (WBS) option provided under Central Hudson's Retail Access Program. The proposed filing reflects changes to pipeline capacity that Central Hudson has under contract and utilizes for WBS. The proposed filing has an effective date of February 1, 2011.

*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. Brillinger, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

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

(10-G-0541SP1)

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

**Whether to Approve Electric Submetering at 510-580 Main Street, New York, NY**

**I.D. No.** PSC-46-10-00013-P

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

**Proposed Action:** The Commission is considering the October 21, 2010 filing to submeter electricity at 510-580 Main Street, New York, New York, filed by North Town Roosevelt, LLC.

**Statutory authority:** Public Service Law, art. 2, sections 51, 53 and 66

**Subject:** Whether to approve electric submetering at 510-580 Main Street, New York, NY.

**Purpose:** Whether to approve electric submetering at 510-580 Main Street, New York, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, submetering and the submetering plan, filed by North Town Roosevelt, LLC, on October 21, 2010. The Commission shall consider all related matters contained in the filing.

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

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

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

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

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

(08-E-0838SP6)

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

**Whether to Approve Electric Submetering at 1890 Lexington Avenue and 1990 Lexington Avenue, New York, New York**

**I.D. No.** PSC-46-10-00014-P

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

**Proposed Action:** The Commission is considering the October 21, 2010 filing of the plan to submeter electricity at 1890 Lexington Avenue and 1990 Lexington Avenue, New York, New York filed by KNW Apartments, LLC.

**Statutory authority:** Public Service Law, arts. 2, 51, 53 and 66

**Subject:** Whether to approve electric submetering at 1890 Lexington Avenue and 1990 Lexington Avenue, New York, New York.

**Purpose:** Whether to approve electric submetering at 1890 Lexington Avenue and 1990 Lexington Avenue, New York, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, submetering and the submetering plan, filed by KNW Apartments, LLC, on October 21, 2010. The Commission shall consider all related matters contained in the filing.

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

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

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

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

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

(08-E-0839SP6)

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

**Policies and Procedures for TOA**

**I.D. No.** PSC-46-10-00015-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 whether to delegate, in whole or in part, to the Director of the Office of Telecommunications the authority to issue indefinite Temporary Operating Authority (TOA) for franchise renewals for cable companies.

**Statutory authority:** Public Service Law, sections 215 and 216

**Subject:** Policies and procedures for TOA.

**Purpose:** To establish policies and procedures for TOA.

**Substance of proposed rule:** The Commission is considering whether to delegate, in whole or in part, to the Director of Telecommunications the authority to issue indefinite Temporary Operating Authority (TOA) certificates for cable television companies negotiating renewals of existing franchises with municipalities.

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

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

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

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

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

(08-V-1289SP2)

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## State University of New York

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**NOTICE OF ADOPTION**

**Traffic and Parking Regulations at the State University of New York College at Oneonta**

**I.D. No.** SUN-12-10-00007-A

**Filing No.** 1117

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

**Effective Date:** 2010-11-17

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

**Action taken:** Amendment of section 564.4 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 360(1)

**Subject:** Traffic and parking regulations at the State University of New York College at Oneonta.

**Purpose:** To amend existing regulations to add or modify locations of certain stop and yield signs, and address uninspected vehicles.

**Text or summary was published** in the March 24, 2010 issue of the Register, I.D. No. SUN-12-10-00007-P.

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

*Text of rule and any required statements and analyses may be obtained from:* Lisa S. Campo, State University of New York, State University Plaza, S-325, Albany, New York 12246, (518) 320-1400, email: lisa.campo@suny.edu

**Assessment of Public Comment**

The agency received no public comment.

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## Triborough Bridge and Tunnel Authority

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### NOTICE OF ADOPTION

**Establish a New Crossing Charge Schedule for Use of Bridges and Tunnels Operated by Triborough Bridge and Tunnel Authority**

**I.D. No.** TBA-36-10-00014-A

**Filing No.** 1114

**Filing Date:** 2010-10-28

**Effective Date:** 2010-10-28

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

**Action taken:** Repeal of section 1021.1 and addition of new section 1021.1 to Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 553(5)

**Subject:** To establish a new crossing charge schedule for use of bridges and tunnels operated by Triborough Bridge and Tunnel Authority.

**Purpose:** To raise additional revenue.

*Final rule as compared with last published rule:* Substantial revisions were made in the following section 1021.1A and B tolls, E-ZPass tolls for fare media other than E-ZPass.

*Text of rule and any required statements and analyses may be obtained from:* Joyce Mulvaney, Director of Public Affairs, Triborough Bridge and Tunnel Authority, 2 Broadway, 22nd Floor, New York, NY 10004, (646) 252-7416, email: jmulvaney@mtabt.org

**Revised Regulatory Impact Statement**

A revised regulatory impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

**Revised Regulatory Flexibility Analysis**

A revised regulatory flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

**Revised Rural Area Flexibility Analysis**

A revised rural area flexibility analysis is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

**Revised Job Impact Statement**

A revised job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

**Assessment of Public Comment**

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

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## Urban Development Corporation

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### EMERGENCY RULE MAKING

**Downstate Revitalization Fund Program**

**I.D. No.** UDC-46-10-00004-E

**Filing No.** 1134

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

**Effective Date:** 2010-10-29

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

**Action taken:** Addition of Part 4249 to Title 21 NYCRR.

**Statutory authority:** Urban Development Act, section 5(4); L. 2008, ch. 57, part QQ, section 16-r; L. 1968, ch. 174

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

**Specific reasons underlying the finding of necessity:** Effective provision of economic development assistance in accordance with the enabling legislation requires the creation of the Rule. Program assistance will address the dangers to public health, safety and welfare by providing financial, project development, or other assistance for the purposes of supporting investment in distressed communities in the downstate region, and in support of such projects that focus on: encouraging business, community and technology-based development and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

**Subject:** The Downstate Revitalization Fund Program.

**Purpose:** Provide the basis for administration of The Downstate Revitalization Fund including evaluation criteria and application process.

**Text of emergency rule:** PART 4249

**DOWNSTATE REVITALIZATION FUND PROGRAM**

*Section 4249.1 General*

*These regulations set forth the types of available assistance, evaluation criteria, application and project process and related matters for the Downstate Revitalization Fund (the "Program"). The Program was created pursuant to § 16-r of the New York State Urban Development Corporation Act, as added by Chapter 57 of the Laws of 2008 (the "Act") for the purposes of supporting investment in distressed communities in the downstate region and in support of projects that focus on encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.*

*Section 4249.2 Definitions*

*For purposes of these regulations, the terms below will have the following meanings:*

(a) "Corporation" shall mean the New York State Urban Development Corporation doing business as Empire State Development Corporation.

(b) "Distressed communities" shall mean areas as determined by the Corporation meeting criteria indicative of economic distress, including land value, employment rate; rate of employment change; private investment; economic activity, percentages and numbers of low income persons; per capita income and per capita real property wealth; and such other indicators of distress as the Corporation shall determine.

(c) "Downstate" shall mean the geographical area defined by the Corporation. The defined geographical area will be disseminated to eligible parties by the Corporation.

*Section 4249.3 Types of Assistance*

*The Program offers assistance in the form loans and/or grants to for-profit businesses, not-for-profit corporations, public benefit*

corporations, municipalities, and research and academic institutions, for activities including, but not limited to, the following:

(a) support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including, but not limited to, smart growth and energy efficiency initiative; intellectual capital capacity building;

(b) support for the attraction or expansion of a business including, but not limited to, those primarily engaged in activities identified as a strategic industry and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the general municipal law;

(c) support for land acquisition and/or the construction, acquisition or expansion of buildings, machinery and equipment associated with a project; and

(d) support for projects located in an investment zone as defined by paragraph (i) of subdivision (d) of section 957 of the General Municipal Law.

#### 4249.4 Eligibility

(a) Eligible applicants shall include, but not be limited to, business improvement districts, local development corporations, economic development organizations, for profit businesses, not-for-profit corporations, public benefit corporations, municipalities, counties, research and academic institutions, incubators, technology parks, private firms, regional planning councils, tourist attractions and community facilities.

(b) The Corporation shall be eligible for assistance in the form of loans, grants, or monies contributing to projects for which the Corporation or a subsidiary act as developer.

(1) The Corporation may act as developer in the acquisition, renovation, construction, leasing or sale of development projects authorized pursuant to this Program in order to stimulate private sector investment within the affected community.

(2) In acting as a developer, the Corporation may borrow for purposes of this subdivision for approved projects in which the lender's recourse is solely to the assets of the project, an may make such arrangements and agreements with community-based organizations and local development corporations as may be required to carry out the purposes of this section.

(3) Prior to developing and such project, the Corporation shall secure a firm commitment from entities, independent of the Corporation, for the purchase or lease of such project. Such firm commitment shall be evidenced by a memorandum of understanding or other document describing the intent of the parties.

(4) Projects authorized under this subdivision whether developed by the Corporation or a private developer, must be located in distressed communities, for which there is demonstrated demand within the particular community.

(c) No full-time employee of the state or full-time employee of any agency, department, authority or public benefit corporation (or any subsidiary of a public benefit corporation) of the state shall be eligible to receive assistance under this initiative, nor shall any business, the majority ownership interest of which is beneficially controlled by any such employee, be eligible for assistance under this initiative.

#### Section 4249.5 Evaluation criteria

(a) The Corporation shall give priority in granting assistance to those projects:

(1) with significant private financing or matching funds through other public entities;

(2) likely to produce a high return on public investment;

(3) with existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties;

(4) deemed likely to increase the community's economic and social viability;

(5) with cost benefit analysis that demonstrates increased economic activity, sustainable job creation and investments;

(6) located in distressed communities;

(7) whose application is submitted by multiple entities, both public and private; or

(8) such other requirements as determined by the Corporation as are necessary to implement the provisions of the Program.

#### Section 4249.6 Application and Approval Process

(a) The Corporation may, at its discretion and within available appropriations, issue requests for proposals and may at other times accept direct applications for program assistance.

(b) Promptly after receipt of the application, the Corporation shall review the application for eligibility, completeness, and conformance with the applicable requirements of the Act and this Rule. Applications shall be processed in full compliance with the applicable provisions of the Act's 16-r.

(c) If the proposal satisfies the applicable requirements and initiative funding is available, the proposal may be presented to the Corporation's directors for adoption consideration in accordance with applicable law and regulations. The directors normally meet once a month. If the project is approved for funding and if it involves the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of any property, the Corporation will schedule a public hearing in accordance with the Act and will take such further action as may be required by the Act and applicable law and regulations. After approval by the Corporation and a public hearing the project may then be reviewed by the State Public Authorities Control Board ('PACB'), which also generally meets once a month, in accordance with PACB requirements and policies. Following directors' approval, and PACB approval, if required, documentation will be prepared by the Corporation. Notwithstanding the foregoing, no initiative project shall be funded if sufficient initiative monies are not received by the Corporation for such project.

#### Section 4249.7 Confidentiality

(1) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Corporation, which is submitted by such person or entity to the Corporation in connection with an application for assistance, shall be confidential and exempt from public disclosures.

#### Section 4249.8 Expenses

(a) An application fee of \$250 must be paid to the Corporation for projects that involve acquisition, construction, reconstruction, rehabilitation alteration or improvement of real property, the financing of machinery and equipment and working capital loans and loan guarantees before final review of an application can be completed. This fee will be refunded in the event the application is withdrawn or rejected.

(b) The Corporation will assess a commitment fee of up to two percent of the amount of any Program loan involving projects for acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property, the financing of machinery and equipment and working capital payable upon acceptance of commitment with up to 1 percent rebated at closing. No portion of the commitment fee will be repaid if the commitment lapses and the project does not close. The Corporation will assess a fee of up to 1 percent, payable at closing, of the amount of any Program grant involving the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property or the financing of machinery and equipment or any loan guarantee.

(c) The applicant will be obligated to pay for expenses incurred by the Corporation in connection with the project, including, but not limited to, expenses related to attorney, appraisals, surveys, title insurance, credit searches, filing fees, public hearing expenses and other requirements deemed appropriate by the Corporation.

#### Section 4249.9 Affirmative action and non-discrimination

Program applications shall be reviewed by the Corporation's affirmative action department, which shall, in consultation with the applicant and/or proposed recipient of the program assistance and any other relevant involved parties, develop appropriate goals, in compliance with applicable law (including section 2879 of the public authori-

ties law, article fifteen-A of the executive law and section 6254(11) of the unconsolidated laws) and the Corporation's policy, for participation in the proposed project by minority group members and women. Compliance with laws and the Corporation's policy prohibiting discrimination in employment on the basis of age, race, creed, color, national origin, gender, sexual preference, disability or marital status shall be required.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires January 26, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@empire.state.ny.us

#### **Regulatory Impact Statement**

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968, as amended (the "Act"), provides, in part, that the corporation shall, assisted by the commissioner of economic development and in consultation with the department of economic development, promulgate rules and regulations in accordance with the state administrative procedure act.

Section 12 of the Act provides that the corporation shall have the right to exercise and perform its powers and functions through one or more subsidiary corporations.

Section 16-r of the Act provides for the creation of the downstate revitalization fund. The corporation is authorized, within available appropriations, to provide financial, project development, or other assistance from such fund to eligible entities as set forth in this subdivision for the purposes of supporting investment in distressed communities in the downstate region, and in support of such projects that focus on: encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

2. Legislative Objectives: Section 16-r of the Act sets forth the Legislative intent of the Downstate Revitalization Fund to provide financial assistance to eligible entities in New York with particular emphasis on: supporting investment in distressed communities in the downstate region, and in support of projects that focus on encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation, and small business growth.

It further states such activities include but are not limited to: support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including, but not limited to, smart growth and energy efficiency initiatives, intellectual capital capacity building; support for the attraction or expansion of a business including, but not limited to, those primarily engaged in activities identified as a strategic industry and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the general municipal law; support for land acquisition and/or the construction, acquisition or expansion of buildings, machinery, and equipment associated with a project; and support for projects located in an investment zone as defined by paragraph (i) of subdivision (d) of section 957 of the general municipal law.

The Legislative intent of Section 16-r of the Act is to assist business in downstate New York in a time of need and to promote the retention and creation of jobs and investment in the region.

The adoption of 21 NYCRR Part 4249 will further these goals by setting forth the types of available assistance, evaluation criteria, application and project process and related matters for the Downstate Revitalization Fund.

3. Needs and Benefits: Chapter 53 of the Laws of 2008, page 884, lines 5 thru 15 allocated \$35 million to support investment in projects that would promote the revitalization of distressed areas in the downstate region. As envisioned, the program would focus new investments on business, community and technology-based development. While the downstate region has experienced relatively strong growth in recent years, there still remain a significant number

of areas that demonstrate high levels of economic distress. As measured by the poverty rate, the Bronx, at over 30%, ranks as the poorest urban county in the U.S. Brooklyn (Kings County) continues to rank among the top ten counties with the highest poverty rates in the country (22.6%). Overall, the poverty rate in New York City is just over 20%. The Community Service Society study, *Poverty in New York City, 2004: Recovery?*, concluded that if the number of New York City residents who live in poverty resided in their own municipality, they would constitute the 5th largest city in the U.S. Beyond the New York metro area in the Hudson Valley, the poverty rate exceeds 9%. Disproportionate levels of unemployment, population and job loss have left significant areas of the downstate region with shrinking revenue bases and opportunities for economic revitalization.

If it is assumed that at least half of the \$35 million allocation to the Fund is used for new capital investment, this would support approximately 160 construction-related jobs, generating an additional \$10 million in personal income in downstate distressed areas. The Corporation used the Implan® regional economic analysis system to model employment and personal income multipliers for construction spending to estimate the direct, indirect and induced jobs related to the Fund amounts assumed to be devoted to capital spending on infrastructure and construction-related activity.

New York State may collect approximately \$0.66 million in personal income tax and sales tax on income spending. To estimate the personal income tax revenues generated by this spending, the Corporation assumed the tax calculation for single or married filing separately on taxable income over \$20,000, using the standard deduction and 6.85% on income over \$20,000. Sales tax was estimated on taxable disposable income earned by wage earners. The Corporation assumed that 75% of gross income is disposable income and 40% of that is taxable.

This level of capital spending (assumed to be primarily on site development, infrastructure, building rehabilitation and new construction) will provide the basis for further investment in a broad range of economic activity.

4. Costs: The Fund as identified in Chapter 53 of the Laws of 2008, page 884, lines 17 thru 27 will be funded through the issuance of Personal Income Tax bonds. In addition to the interest costs, it is expected that fees and costs associated with issuing bonds, including the Corporation's fee, underwriting, banking and legal fees, will be approximately 1.6%.

The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development. Participation is voluntary and would be considered on a case-by-case basis depending on the location of the municipality involved.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule on regulated parties. Standard applications used for most other Corporation assistance will be employed keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients. The rule provides that the Corporation may, however, require applicants to submit materials prior to submission of a formal application to determine if a proposal meets eligible criteria for Fund assistance.

6. Local Government Mandates: The Fund imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district. To the contrary, the Fund offers local governments potentially enhanced resources, either directly or indirectly, to encourage economic and employment opportunities for their citizens. Participation in the program is optional; local governments who do not wish to be considered for funding do not need to apply.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: The Fund proposed regulations provide for a variety of potential program outcomes, by type of assistance, eligible applicants, and eligible uses. These program criteria were informed through an extensive strategic planning process managed for Down-

state ESDC by the management consultant A. T. Kearney. Their report, *Delivering on the Promise of New York State*, developed a strategy for the State to capitalize on its rich and diverse assets to encourage the growth of the Innovation Economy.

The following are three examples of alternatives that were provided during the outreach portion of the rulemaking process. All of the suggestions offered were from members of the small business community and local governments who responded to the Corporations request for input. All of the suggestions were included in the rules and regulations submitted with this Regulatory Impact Statement.

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4249.3, Part (a) provides for “support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives.”

2. Regulations should clearly define “distressed communities” using specific, objective criteria.

Section 4249.2, Part (a) defines “Distressed Communities”

3. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4249.6 “Application and approval process” from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

#### **Regulatory Flexibility Analysis**

1. Effects of Rule: “Small business” is defined by the State Economic Development law to be an enterprise with 100 or fewer employees. The vast majority - roughly 98 percent - of New York State businesses are small businesses.

We applied this criterion to ESD’s models of the Downstate economy to determine how many small businesses could benefit from the Downstate Revitalization Fund. We limited the analysis to industries that are likely to have eligible businesses: manufacturing, transportation and warehousing, information, finance and insurance, professional and technical services, management of companies and enterprises, and arts, entertainment and recreation.

Across these 7 broad sectors our analysis indicates that approximately 115,000 small businesses will be eligible for funding under the Downstate Revitalization Fund.

In addition approximately 2,000 municipalities and local economic development-oriented organizations will be eligible for funding.

2. Compliance Requirements: There are no compliance requirements for small businesses and local governments in these regulations.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: To the extent that there are existing capabilities at the local level to administer projects involving Downstate Revitalization Fund investments, there should be relatively little, if any additional administration costs.

5. Economic and Technological Feasibility: Compliance with these regulations should be economically and technologically feasible for small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide financing for joint discretionary and competitive economic development projects for distressed communities. In addition the rule specifies that project evaluation criteria include significant support from the local business community, local government, community organizations, academic institutions, and other regional parties.

Because this program is open to for-profit businesses confidentiality features are included in the application process.

7. Small Business and Local Government Participation: The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also notified.

ESDC received 10 responses to its outreach to interested parties on the proposed regulations. Much of the responses received consisted of general supporting statements for the programs or critique of the enabling legislation.

Listed are several comments received on the proposed rules related to the Downstate Revitalization Fund and our response to the comment.

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4249.3, Part (a) provides for “support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives.”

2. Regulations should clearly define “distressed communities” using specific, objective criteria.

Section 4249.2, Part (a) defines “Distressed Communities”

3. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4249.6 “Application and approval process” from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

4. Regulations should allow for municipal comments when the applicant is not a municipality.

Section 4249.5, Part 3 gives preference to projects with the “existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties.”

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

1. Types and Estimated Numbers of Rural Areas: The ESD Downstate region is almost non-rural character. Of the 44 counties defined as rural by the Executive Law § 481(7), none are in are in the Downstate region Of the 9 counties that have certain townships with population densities of 150 persons or less per square mile, only two counties - Dutchess and Orange - are in the Downstate region.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements; no affirmative acts will be needed to comply; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development.

4. Minimizing Adverse Impact: The purpose of the Downstate Revitalization Fund Program is to maximize the economic benefit of new capital investment in distressed areas of the downstate region. The statute stipulates that projects must be located in distressed communities for which there is a demonstrated demand. This suggests that cooperation among state, local, and private development entities will seek to maximize the Program’s effectiveness and minimize any negative impacts.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those only in urban areas or only in rural areas, except for the requirement that applicants must be

in downstate counties and be in distressed communities. The extent of local government support for a project is a significant criteria for project acceptance. A public hearing may also be required under the NYS Urban Development Corporation Act. The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also asked for their review and comment.

***Job Impact Statement***

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of Downstate New York through strategic investments to support investments in distressed communities in Downstate regions and to support projects that focus on encouraging responsible development.

There will be no adverse impact on job opportunities in the state.