

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.

Department of Agriculture and Markets

ERRATUM

A Notice of Emergency Rule Making, I.D. No. AAM-38-10-00010-E, pertaining to Species of Ash Trees, Parts Thereof and Products and Debris Therefrom Which are at Risk to Infestation by the Emerald Ash Borer, published in the September 22, 2010 issue of the *State Register* contained the incorrect Specific Reasons, Text of Emergency Rule, Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement. The hard copy documents filed with the Department of State on September 7, 2010 included the intended text and statements. The electronic submission contained incorrect attachments. The correct text and statements are as follows:

Specific reasons underlying the finding of necessity: The amendment is being adopted as an emergency measure because of the threat that the Emerald Ash Borer (EAB) will spread outside the areas it now infests. EAB, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. The average adult Emerald Ash Borer is 3/4 of an inch long and 1/6 of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to 1 1/4 inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem tissue, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the Emerald Ash Borer includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes

through the bark and dying and thinning branches near the top of the tree. A tree infested by EAB will die within two years. Ash trees, as well as ash nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are all subject to infestation.

The pest was first discovered in Michigan in 2002, and has since spread to twelve other states as well as to two provinces in Canada. In 2009, EAB was detected in New York in Cattaraugus County. This prompted the establishment of a quarantine in Cattaraugus County and adjacent Chautauqua County. In 2010, the pest was detected in Monroe, Livingston, Genessee, Steuben, Greene and Ulster Counties. As a result of these latest findings, the amendment will extend the quarantine to these six counties as well as to the following: Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Seneca, Yates, Schuyler, Chemung, Columbia and Dutchess Counties. Each of these additional 13 counties will serve as a buffer between counties with known or suspected infestations and those which have no known infestations.

Extending the quarantine will help ensure that as control measures are undertaken, EAB does not spread beyond those areas via the movement of infested trees and materials. Since the EAB is not considered established in the State, the risk of moving infested materials poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State. The immediate adoption of this amendment is necessary to preserve the general welfare and compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The failure to immediately establish a quarantine in these additional counties could result in the further spread of this pest, thereby threatening the State's forest, yard and park trees while potentially subjecting New York to a federal quarantine and quarantines by other states which would affect the entire State. The spread of EAB would cause economic hardship to the nursery and forest products industry as well as cause reductions in private property values and recreation revenues. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this amendment is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The amendments establishing the quarantine will help ensure that as control measures are undertaken, the Emerald Ash Borer infestation does not spread beyond those areas via the artificial movement of infested trees and materials.

Text of emergency rule: Subdivision (j) of section 141.1 of 1 NYCRR is amended to read as follows:

(j) Quarantine area. This term applies to *Niagara, Erie, Orleans, Genessee, Wyoming, Allegany, Monroe, Livingston, Steuben, Wayne, Ontario, Yates, Schuyler, Chemung, Greene, Ulster, Chautauqua* and Cattaraugus Counties.

Section 141.2 of 1 NYCRR is amended to read as follows:

Section 141.2. Quarantine area.

Regulated articles as described in section 141.3 of this Part shall not be shipped, transported or otherwise moved from any point within *Niagara, Erie, Orleans, Genessee, Wyoming, Allegany, Monroe, Livingston, Steuben, Wayne, Ontario, Yates, Schuyler, Chemung, Greene, Ulster, Chautauqua* and Cattaraugus Counties to any point outside of said counties, except in accordance with this Part.

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. Section 167 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 regulations accord with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Emerald Ash Borer (EAB).

3. Needs and benefits:

The rule will expand the EAB quarantine to the six counties where EAB has been detected (i.e. Monroe, Genesee, Livingston, Steuben, Greene and Ulster Counties), as well as to the following counties: Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties. Each of these additional 10 counties will serve as a buffer between counties with known infestations and those which have no known infestations.

On August 9, 2010, the Pennsylvania Department of Agriculture expanded the Commonwealth's Emerald Ash Borer quarantine by adding 31 counties to the 12 counties currently under quarantine. The quarantine in Pennsylvania now includes the 42 western counties of the commonwealth. This is significant since movement of wood products occurs frequently across the New York - Pennsylvania border and although Pennsylvania's action is not coordinated with New York's, it strongly correlates with the Department's proposed quarantine.

The Emerald Ash Borer, *Agrilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. It was first discovered in Michigan in June 2002, and has since spread to at least twelve other states as well as to two provinces in Canada. The initial detection of this pest in New York occurred on June 16, 2009 in the Town of Randolph, which is located in southwestern Cattaraugus County and is adjacent to Chautauqua County. More recently, additional detections have been confirmed in six other counties (Monroe, Genesee, Livingston, Steuben, Greene and Ulster) during July and August, 2010.

EAB can cause serious damage to healthy trees by boring through their bark, consuming cambium tissue, which contains growth cells, and phloem tissue, which is responsible for carrying nutrients throughout the tree. This boring activity results in loss of bark, or girdling, and ultimately results in the death of the tree within two years.

The average adult EAB is 3/4 of an inch long and 1/6 of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to 1 1/4 inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the EAB includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree.

Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Materials at risk of attack and infestation by the EAB include the following species of North American ash trees: White Ash (*Fraxinus Americana*); Green Ash (*Fraxinus pennsylvanica*); Black Ash (*Fraxinus nigra*); and Blue Ash (*Fraxinus quadrangulata*).

Since the EAB is not considered established in the State, moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to susceptible ash trees in forests as well as in parks and yards throughout the State.

The proposed regulations would prohibit the movement of any article infested with EAB, regardless of where the articles are located in the State. Otherwise, only the movement of regulated articles, i.e. trees, firewood and all host material living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of the White Ash, Green Ash, Black Ash and Blue Ash genera susceptible to the pest, is restricted under the rule. The extent of the restrictions depends on the regulated articles in question.

In the case of nursery stock, the proposed regulations would prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area.

In the case of all other regulated articles, the proposed regulations would prohibit the following: the intrastate movement of these articles from the quarantine area to any point outside the quarantine area, except under a limited permit or unless accompanied by a certificate of inspection indicating freedom of infestation.

In the case of all regulated articles, the rule would permit movement of these articles through the quarantine area if the regulated articles originate outside the quarantine area and the point of origin of the regulated articles is on the waybill or bill of lading; a certificate of inspection accompanies the regulated articles; the vehicle moving the regulated articles does not stop in the quarantine area except for refueling or traffic conditions; and the vehicle moving the regulated articles during the period May 1 through August 31 is either an enclosed vehicle or is completely covered by canvas, plastic or closely woven cloth.

Under the regulations, certificates of inspection may be issued when the regulated articles have been inspected and found to be free of infestation or have been grown, produced, stored or handled in such a manner that, in the judgment of the inspector, no infection is present in the articles.

Limited permits may be issued for the movement of noncertified regulated articles from the quarantine area to a specified destination outside the quarantine area for specified processing, handling or utilization.

Under the rule, certificates of inspection and limited permits may be withdrawn or canceled whenever an inspector determines that further use of such certificate or permit might result in the spread of infestation.

The regulations would also provide that persons shipping, transporting, or receiving regulated articles may be required to enter into written compliance agreements. These agreements would allow the shipment of these articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that EAB is not spread.

The regulations are necessary, since the effective control of the EAB within the limited areas of the State near and where this insect has been found is important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

4. Costs:

(a) Costs to the State government: None. Annual surveys would be required to monitor the natural spread of the beetle at a cost of \$200,000 to \$250,000. However, it is anticipated that this survey program would be funded by the United States Department of Agriculture (USDA) through a continuing cooperative agreement with the New York State Department of Environmental Conservation (DEC).

Additional work will be required of Department staff to inspect regulated parties and implement compliance agreements. The Department is working with USDA-APHIS to develop a cooperative agreement to fund and support the additional regulatory activity necessitated by the rule.

(b) Costs to local government: None, as a result of the quarantine. Some local governments may face expenses in tree maintenance since ash trees have become popular trees to use to line streets. However, the rule does not require local governments to remove the trees from the quarantine area. Accordingly, local governments within the quarantine area will not incur any additional expenses due to the quarantine.

(c) Costs to private regulated parties: There are 2,689 licensed nursery growers and/or nursery dealers in the quarantined counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol for ash nursery stock.

Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceeds \$13-million annually.

Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the proposed regulations, other than pursuant to compliance agreement, would require an inspection and the issuance of a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there will be 100 or fewer such inspections each year with a total annual cost of less than \$2,500.00.

Most shipments would be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of \$25 per hour.

Tree removal services would have the option of leaving host materials within the quarantine area or transporting them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

(d) Costs to the regulatory agency:

(i) The initial expenses the agency will incur in order to implement and administer the regulation: None.

(ii) Additional work will be required of Department staff to inspect regulated parties and implement compliance agreements. The Department is working with USDA-APHIS to develop a cooperative agreement to fund and support the additional regulatory activity required under the rule.

5. Local government mandate:

None.

6. Paperwork:

Regulated articles inspected and certified to be free of EAB moving from the quarantine area established by the rule would have to be accompanied by a state or federal certificate of inspection and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

The alternative of no action was considered. However, that option was not feasible, given the threat EAB poses to the State's forests and forest-based industries. Additionally, the option of establishing a quarantine throughout the entire state was also considered, but rejected as too onerous on regulated parties in counties near or where there has been no finding of the pest. However, the failure of the State to expand the quarantine in and near where EAB has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of EAB that could result from the unrestricted movement of White Ash, Green Ash, Black Ash and Blue Ash from the quarantine areas. In light of these factors, there does not appear to be any viable alternative to the quarantine set forth in this proposal.

9. Federal standards:

The proposed regulations do not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

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

Regulatory Flexibility Analysis:

1. Effect on small businesses:

The small businesses affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 2,689 licensed nursery growers and/or dealers within these counties. There are an unknown number of loggers, sawmills and forest-products

manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

2. Compliance requirements:

There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. All regulated parties in the quarantine area established by the regulations would be required to obtain certificates and limited permits in order to ship other regulated articles (e.g. firewood and forest products) from that area. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

3. Professional services:

In order to comply with the regulations, small businesses shipping regulated articles from the quarantine area would require professional inspection services, which would be provided by the Department or the United States Department of Agriculture (USDA).

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

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 rule: None.

(b) Annual cost for continuing compliance with the rule: There are 2,689 licensed growers and/or dealers which would be affected by the quarantine set forth in the regulations. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants.

According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceeds \$13-million annually.

Regulated parties exporting other types of host materials (e.g. firewood and forest products) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 or fewer such inspections each year with a total annual cost of less than \$2,500.00.

Most shipments would be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of \$25 per hour.

Tree removal services would have the option to leave host materials within the quarantine area or transport them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

5. Minimizing adverse impact:

The Department has designed the rule to minimize adverse economic impact on small businesses. This is done by limiting the quarantine area to only those parts of New York State near or where EAB has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of EAB; and to prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the regulations provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact. 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 regulations minimize adverse economic impact as much as is currently possible.

It is not anticipated that local governments would be involved in the shipment of regulated articles from the quarantine area.

6. Small business and local government participation:

The Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of extending the EAB quarantine.

On August 4, 2010, the Department held an information meeting for regulated and interested parties to share information about EAB detections during July 2010. The meeting involved about 35 individuals representing environmental groups, forest products manufacturers, nursery and landscape businesses, local government, forest landowners and maple producers.

The group heard presentations about current survey, detections and infestation levels discovered during July and early August. A national perspective was provided by USDA- APHIS regarding survey, regulatory, and other control measures being implemented nationally and by other states. The attendees were asked to provide their views regarding what State government should be doing and specifically asked to identify issues related to where to draw lines for quarantine purposes.

There was significant agreement and support for quarantining large blocks of counties. There was strong feelings about the need to avoid gaps in the quarantine area and the resulting economic hardship that might ensue if this were done. Several individuals specifically identified the lines that NSYDAM has determined as appropriate for the quarantine region.

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 rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping regulated articles (exclusive of nursery stock) from the quarantine area, other than pursuant to a compliance agreement, would require an inspection and the issuance of a certificate of inspection. Most shipments, however, would be made pursuant to compliance agreements.

Rural Area Flexibility Analysis:

1. Types and estimated numbers of rural areas:

The regulated parties affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 2,689 licensed nursery growers and/or dealers within these counties. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

Most of these businesses are in rural areas as defined by section 481(7) of the Executive Law.

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

There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants. All regulated parties in the quarantine area established by the rule would be required to obtain certificates and limited permits in order to ship other regulated articles (e.g. firewood and forest products) from that area. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

In order to comply with the regulations, all regulated parties shipping regulated articles from the quarantine area would require professional inspection services, which would be provided by the Department, the Department of Environmental Conservation (DEC) and the United States Department of Agriculture (USDA).

3. Costs:

There are 2,689 licensed nursery growers and/or dealers in the 16 counties which would be affected by the quarantine. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceeds \$13-million annually.

Regulated parties exporting regulated articles (exclusive of nursery stock) from the quarantine area established under the regulations, other than pursuant to compliance agreement, would require a federal or state certificate of inspection. This service is available at a rate of \$25 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 or fewer such inspections each year with a total annual cost of less than \$2,500.00.

Most shipments would be made pursuant to compliance agreements. Services required prior to shipment of host materials, including inspection of the materials, taking and analyzing soil samples and reviewing shipping records, are available at a rate of \$25 per hour.

Tree removal services would have the option to leave host materials within the quarantine area or transport them outside of the quarantine area under a limited permit to a federal/state disposal site for processing.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the regulations were drafted to minimize adverse economic impact on all regulated parties, including those in rural areas. This is done by limiting the quarantine area to only those parts of New York State near and where the Emerald Ash Borer has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of EAB and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the regulations would provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the proposed regulations were designed to minimize adverse impact. 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:

On August 4, 2010, the Department held an information meeting for regulated and interested parties to share information about EAB detections during July 2010. The meeting involved about 35 individuals representing environmental groups, forest products manufacturers, nursery and landscape businesses, local government, forest landowners and maple producers.

The group heard presentations about current survey, detections and infestation levels discovered during July and early August. A national perspective was provided by USDA- APHIS regarding survey, regulatory, and other control measures being implemented nationally and by other states. The attendees were asked to provide their views regarding what State government should be doing and specifically asked to identify issues related to where to draw lines for quarantine purposes.

There was significant agreement and support for quarantining large blocks of counties. There was strong feelings about the need to avoid gaps in the quarantine area and the resulting economic hardship that might ensue if this were done. Several individuals specifically identified the lines that the Department has determined as appropriate for the quarantine region.

Outreach efforts will continue.

Job Impact Statement:

The amendments will not have a substantial adverse impact on jobs or employment opportunities and in fact, will likely aide in protecting jobs and employment opportunities for now and in the future. Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

By extending the Emerald Ash Borer (EAB) quarantine to Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties, the amendment is designed to prevent the further spread of this pest to other parts of the State. There are an estimated 750-million ash trees in New York State (excluding the Adirondack and Catskill Forest Preserves), with ash species making up approximately seven percent of all trees in our forests. A spread of the infestation would have very adverse economic consequences to the nursery, forestry and wood-working (e.g. lumber yard, flooring and furniture and cabinet making) industries of the State, due to the destruction of the regulated articles upon which these industries depend. Additionally, a spread of the infestation could result in the imposition of more restrictive quarantines by the federal government, other states and foreign countries, which would have a detrimental impact upon the financial well-being of these industries.

By helping to prevent the spread of EAB, the rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's nursery, forestry and wood-working industries.

Office of Alcoholism and Substance Abuse Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Non-Medically Supervised Chemical Dependence Outpatient Services and Specialized Services

I.D. No. ASA-40-10-00002-P

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

Proposed Action: This is a consensus rule making to repeal Parts 821 and 1045; and addition of Part 824 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07(c), 19.09(b), 19.40, 32.07(a) and 32.02

Subject: Non-medically supervised Chemical Dependence Outpatient Services and Specialized Services.

Purpose: Consolidate and clarify current regulations; repeal obsolete regulation.

Text of proposed rule: Repeal Parts 821 and 1045.

PART 824

SPECIALIZED SERVICES

§ 824.1 Definitions.

(a)(1) *Specialized services shall mean chemical dependence services not defined in other Parts of this Title. Specialized services shall be defined by the Commissioner pursuant to section 19.07 of the mental hygiene law and shall require an appropriate review and approval of a certification or recertification application pursuant to this Title. Such services may be provided in any setting deemed appropriate by the Commissioner.*

§ 824.2 Standards.

(a) *Standards for certification and regulation of any specialized service shall be developed by the Office and may be unique to the service to be delivered by such specialized service. Unless otherwise indicated, standards for any other program or service certified, authorized or licensed by the Office shall not apply to such specialized service.*

§ 824.3 *Savings Clause. (a) Any operating certificate issued by the Office pursuant to Part 1045 of this Title prior to the repeal of Part 1045 shall remain in effect until the term of such operating certificate has expired or such operating certificate is suspended or revoked by due process of law, at which time any recertification of such program or renewal of such operating certificate shall be pursuant to the provisions of this Part.*

Text of proposed rule and any required statements and analyses may be obtained from: Sara Osborne, Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203-3526, (518) 485-2317, email: SaraOsborne@oasas.state.ny.us

Data, views or arguments may be submitted to: Sara Osborne, Office of Alcoholism and Substance Abuse Services, 1450 Western Ave., Albany, NY 12203-3526, (518) 485-2317, email: SaraOsborne@oasas.state.ny.us

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

Consensus Rule Making Determination

The proposed repeal of Parts 821 and 1045 and concurrent adoption of a new Part 824 were submitted to, and approved by, the OASAS Executive team on September 21, 2009; the same was approved by the OASAS Advisory Council on October 7, 2009. A request for verification of approval to adopt by consensus rule was sent by email on May 6, 2010 to representatives of the NY State Conference of Local Mental Hygiene Directors (Jed Wolkenbreit, Counsel) and to the committee on regulatory review of Alcohol and Substance Abuse Providers (ASAP; Robert Leberman, President/CEO).

Mr. Leberman responded on May 7, 2010 that the "ASAP Committee is in agreement" with the proposed promulgation by consensus rulemaking.

Mr. Wolkenbreit responded on May 20, 2010 that the proposed repeal and promulgation appears to be a "proper reorganization of the regulations" with no anticipated "reason why the Conference would have any problem with these rules being promulgated by consensus."

In total, these comments and approvals represent the OASAS provider community, bureau heads and executives within the agency, and providers of related mental hygiene services that may be interested stakeholders.

Job Impact Statement

No change -- increase or decrease -- in the number of jobs and employment opportunities is anticipated as a result of the proposed repeal of Part 1045 or new Part 824 because upon the expiration of such providers' operating certificates, their renewal and/or recertification will be pursuant to a new Part 824 subjecting them to the same regulatory requirements as currently applicable.

Office of Children and Family Services

EMERGENCY RULE MAKING

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

I.D. No. CFS-40-10-00001-E

Filing No. 955

Filing Date: 2010-09-15

Effective Date: 2010-09-15

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

Action taken: Amendment of sections 421.24, 428.3, 428.5, 430.11 and 430.12 of Title 18 NYCRR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) *Within 30 days after the removal of a child from the custody of the child's parent or parents, or earlier where directed by the court, or as required by section 384-a of the Social Services Law, the social services district must exercise due diligence in identifying all of the child's grandparents and other adult relatives, including adult relatives suggested by the child's parent or parents and, with the exception of grandparents and/or other identified relatives with a history of family or domestic violence. The social services district must provide the child's grandparents and other identified relatives with notification that the child has been or is being removed from the child's parents and which explains the options under which the grandparents or other relatives may provide care of the child, either through foster care or direct legal custody or guardianship, and any options that may be lost by the failure to respond to such notification in a timely manner. The identification and notification efforts made in accordance with the paragraph must be recorded in the child's uniform case record as required by section 428.5(c)(10)(viii) of this Title.*

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 13, 2010.

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

Regulatory Impact Statement

1. Statutory authority

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

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

2. Legislative objectives

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

3. Needs and benefits

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

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

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

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

similar requirement in regard to a child who is in receipt of an adoption subsidy and is of school age. The regulations implement section 204 of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 that amended 42 U.S.C. § 671(a)(30) to provide that States must provide assurances that each school age child receiving Title IV-E foster care or adoption assistance payments is either a full-time elementary or secondary school student, has completed secondary education or is not capable of attending school due to a documented medical condition. This requirement that applies to both foster and adopted children is also reflected in instructions provided to the States by the federal Department of Health and Human Services in Program Instruction ACYF-CB-PI-08-05 issued on October 23, 2008.

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

4. Costs

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

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

There is no fiscal impact associated with the regulatory amendment to 18 NYCRR 421.24(c)(19). Currently, the New York City Administration for Children's Services notifies adoptive parents to verify that they are continuing to support their adoptive children and continue to be legally responsible for the support of their adoptive children. Acceptable documentation includes proof of school attendance. Documentation provided by the adoptive parent can be maintained in the social services district in the adoption subsidy case file. The regulatory amendments do not require any modification to New York's statewide automated child welfare information system, called CONNECTIONS. As defined in 18 NYCRR 466.2(a), the CONNECTIONS system is administered by OCFS and contains data elements required by applicable State and federal statutes and regulations relating to the provision of child welfare services, including foster care, adoption assistance, adoption services, preventive services, child protective services and other family preservation and family support services. The requirements associated with documenting information in the child's uniform case record progress notes can be supported by CONNECTIONS.

5. Local government mandates

The regulations require social services districts to carry out functions similar to those they already have been obligated by State statute and OCFS regulations to perform. Current OCFS regulation 18 NYCRR 430.11(c) requires the social services district placing a child into foster care, whenever possible, to place the child in a foster care setting that permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents. OCFS regulation 18 NYCRR 430.10(b) currently requires the social services district that is contemplating the place-

ment of a child into foster care to attempt, prior to placement, to locate adequate alternative living arrangements with a relative or family friend which would enable the child to avoid placement into foster care. Section 1017 of the Family Court Act and section 384-a of the SSL currently provide that when a child is to be removed from his or her home, the social services district must identify and discuss with such relative, including grandparents, available options to function as the child's foster parent or to assume direct legal custody of the child. The social services district must also notify the relative that the child may be adopted by foster parents if attempts at reunification with the birth parent are not required or are unsuccessful.

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

6. Paperwork

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

7. Duplication

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

8. Alternative approaches

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

9. Federal standards

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

10. Compliance schedule

Compliance with the regulations would take effect upon adoption.

Regulatory Flexibility Analysis

1. Effect on Small Businesses and Local Governments

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

2. Compliance Requirements

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

The regulations require that within 30 days of the removal of a foster child from his or her home, the social services district must exercise

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

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

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

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

3. Professional Services

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

4. Compliance Costs

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

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

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

5. Economic and Technological Feasibility

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

6. Minimizing Adverse Impact

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

7. Small Business and Local Government Participation

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

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas

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

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

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

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

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

The regulations set forth standards social services districts must satisfy in relation to the educational stability of children when they are

removed from their homes and placed into foster care. The regulations address the need to assess the proximity of foster care placements to the school the child attended at the time of removal and the appropriateness of the child remaining in that school after entering foster care. Where the foster child can not remain in the same school, the agency with case management responsibility must coordinate with local school officials in order that the foster child be provided with immediate and appropriate enrollment in a new school.

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

3. Costs

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

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

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

4. Minimizing adverse impact

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

5. Rural area participation

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

Job Impact Statement

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

Department of Civil Service

NOTICE OF ADOPTION

Separate Units for Suspension, Demotion or Displacement (Layoff Units)

I.D. No. CVS-28-10-00004-A

Filing No. 962

Filing Date: 2010-09-17

Effective Date: 2010-10-06

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

Action taken: Amendment of section 72.1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, sections 80(5) and 80-a(4)

Subject: Separate units for suspension, demotion or displacement (layoff units).

Purpose: To designate the Authorities Budget Office (ABO) as a separate layoff unit within the Department of State.

Text or summary was published in the July 14, 2010 issue of the Register, I.D. No. CVS-28-10-00004-P.

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

Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Education Department

EMERGENCY RULE MAKING

School and School District Accountability

I.D. No. EDU-26-10-00008-E

Filing No. 972

Filing Date: 2010-09-21

Effective Date: 2010-09-21

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

Action taken: Amendment of section 100.2(p)(1) of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: On June 9, 2010, Thelma Meléndez de Santa Ana, the Assistant Secretary of the Office of Elementary and Secondary Education of the United States Department of Education (USDE), informed Commissioner Steiner that USDE had approved New York's request to amend its State accountability plan under Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), Public Law section 107-110, to include in the students with disabilities (SWD) subgroup, students who had previously been identified as SWD during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress.

The purpose of the proposed amendment is to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE. Adoption of the proposed amendment will provide a more accurate account of the academic progress that schools and districts are making with students with disabilities commencing with the 2009-2010 school year.

The proposed amendment was adopted as an emergency rule at the

June 2010 Regents meeting, effective June 29, 2010. A Notice of Proposed Rule Making was published in the State Register on June 30, 2010.

The proposed amendment has been adopted as a permanent rule at the September 2010 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on October 6, 2010. However, the emergency rule which took effect on June 29, 2010 will expire on September 26, 2010. The expiration of the emergency rule would disrupt administration of New York's amended accountability plan.

Therefore, a second emergency action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the June 2010 Regents meeting remains continuously in effect until the effective date of its adoption as a permanent rule, in order to avoid disruption to the administration of New York's amended accountability plan.

Subject: School and school district accountability.

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

Text of emergency rule: Subparagraph (i) of paragraph (1) of subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective September 27, 2010 as follows:

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-26-10-00008-P, Issue of June 30, 2010. The emergency rule will expire November 19, 2010.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

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

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

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

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

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

LEGISLATIVE OBJECTIVES:

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

NEEDS AND BENEFITS:

Commissioner's Regulations section 100.2(p)(1)(i) has been amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the NCLB relating to academic standards and school and school district accountability. The State and local educational agencies (LEAs) are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

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

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

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

COSTS:

Cost to the State: None.

Costs to local government: None.

Cost to private regulated parties: None.

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

The proposed amendment is necessary to conform the Commissioner's Regulations to New York State's amended accountability plan, as approved by the USDE, to allow inclusion in the students

with disabilities subgroup, those students who had previously been identified as students with disabilities during the preceding one or two school years, for purposes of calculating Adequate Yearly Progress. The proposed amendment will not impose any costs on the State, the State Education Department or LEAs beyond those imposed by State and federal statutes.

LOCAL GOVERNMENT MANDATES:

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

PAPERWORK:

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

DUPLICATION:

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

ALTERNATIVES:

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

FEDERAL STANDARDS:

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

COMPLIANCE SCHEDULE:

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

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

Regulatory Flexibility Analysis

Small businesses:

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

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

Local government:

EFFECT OF RULE:

The proposed amendment applies to school districts and charter schools.

COMPLIANCE REQUIREMENTS:

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

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

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

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

MINIMIZING ADVERSE IMPACT:

Commissioner's Regulations section 100.2(p)(1)(i) has been amended to establish criteria and procedures to ensure State and local educational agency compliance with the provisions of the NCLB relating to academic standards and school and school district accountability. The State and local educational agencies (LEAs) are required to comply with the NCLB as a condition to their receipt of federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

NCLB section 1111(b)(2) requires each state that receives funds to demonstrate, as part of its State Plan, that the state has developed and is implementing a single, statewide accountability system to ensure

that all LEAs, public elementary schools and public high schools make adequate yearly progress (AYP). Each state must implement a set of yearly student academic assessments in specified subject areas that will be used as the primary means of determining the yearly performance of the state and each LEA and school in the state in enabling all children to meet the State's academic achievement standards.

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

LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

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

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

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

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

COSTS:

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

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

MINIMIZING ADVERSE IMPACT:

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

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

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

RURAL AREA PARTICIPATION:

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

Job Impact Statement

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

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

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

EMERGENCY
RULE MAKING**Qualified School Construction Bonds (QSCB) and Qualified Zone Academy Bonds (QZAB)**

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

Filing No. 969

Filing Date: 2010-09-21

Effective Date: 2010-09-21

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

Action taken: Amendment of section 155.22 of Title 8 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Internal Revenue Code section 54F (26 USC section 54F), as added by section 1521(a) of Part III of Subtitle F of Title I of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L. 111-5, 123 Stat. 115, 355 provides for the issuance of Qualified School Construction Bonds for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue, by a State or local government within the jurisdiction of which such school is located. There is a national qualified school construction bond limitation of \$11 billion for each of the 2009 and 2010 calendar years. Within such national bond limitation amounts, the Secretary of the U.S. Treasury will allocate state limitation amounts to each state for the state's allocation to bond issuers within the state.

New York State is home to three city school districts, New York City, Buffalo and Rochester, that are large enough to qualify as part of the 100 largest nationwide school districts, and as such, these districts will receive direct federal Qualified School Construction Bond Allocations from the U.S. Treasury Secretary. Additionally, New York State received \$192 Million in the 2009 and \$178 Million in the 2010 calendar years to allocate to other districts in the State that did not receive a direct federal allocation.

The 2009 allocation was retained by the State to fund State expenditures for local district capital projects. The purpose of the proposed amendment to section 155.22 of the Commissioner's Regulations is to prescribe the procedures for New York State to allocate its \$174,782,000 2010 state limitation amount to those school district bond issuers not receiving a direct federal allocation.

In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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.

The proposed rule is being adopted as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to immediately establish procedures for the State's allocation to prospective issuers of Qualified School Construction Bonds (QSCBs) of their respective bond limitation amounts from the State bond limitation amount, so that such bond issuers may timely apply for and receive their respective bond limitation amounts, and timely issue QSCBs for the 2010 calendar year. Establishment of these procedures under an emergency action will allow districts to timely receive federal ARRA Stimulus funds for school renovation and construction via interest free bonding capacity. This will encourage districts to update and improve their educational facilities in order to support greater educational achievement while providing local construction jobs in the community. Emergency adoption will also give New York State recipients the greatest opportunity to utilize allocations prior to the federal expiration dates for the program.

A Notice of Proposed Rule Making was published in the State Register on September 1, 2010. It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the November 2010

Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period for State agency rulemakings pursuant to the State Administrative Procedure Act.

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

Purpose: To establish QSCB and update QZAB provisions.

Substance of emergency rule: The Board of Regents has amended section 155.22 of the Commissioner's Regulations, as an emergency action effective September 21, 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 emergency rule.

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).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-35-10-00019-P, Issue of September 1, 2010. The emergency rule will expire December 19, 2010.

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

Education Law section 305(1) provides that the Commissioner of Education is the chief executive officer of the State system of education and of the Board of Regents, and charged with the enforcement of all general and special laws relating to the educational system of the

State and the execution of all educational policies determined by the Board of Regents. Section 305(2) provides that the Commissioner shall have general supervision over all schools and institutions subject to the Education Law or any statute relating to education.

26 USC section 54E, as added by section 313(a) of Title III of Division C of the Emergency Economic Stabilization Act of 2008, Pub.L.110-343, 122 Stat. 3765, 3869, establishes a federal tax credit to holders of qualified zone academy bonds issued for qualified purposes under the statute, establishes a national zone academy bond limitation for such credit, and provides for the allocation of such limitation amount to state education agencies for allocation to qualified zone academies within each respective state.

26 USC section 54F, as added by section 1521(a) of Part III of Subtitle F of Title 1 of Div. B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L.111-5, provides for the issuance of Qualified School Construction Bonds for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue, by a State or local government within the jurisdiction of which such school is located; establishes a national qualified school construction bond limitation, and provides for the allocation of such limitation amount to state education agencies for allocation to bond issuers within each respective state.

LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutes and is necessary for the implementation of the provisions of 26 USC section 54F in that it will establish criteria for the allocation of the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2), and update the Qualified Zone Academy provisions in Commissioner's Regulation section 155.22 to include Qualified Zone Academy Bonds issued under 26 USC 54E.

NEEDS AND BENEFITS:

Internal Revenue Code section 54F (26 USC section 54F), as added by section 1521(a) of Title 1 of Part III of Subtitle F of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L. 111-5, provides for the issuance of Qualified School Construction Bonds for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue, by a State or local government within the jurisdiction of which such school is located. The statute establishes a national qualified school construction bond limitation for each of the 2009 and 2010 calendar years. Within such national bond limitation amount, the Secretary of the U.S. Treasury will allocate state limitation amounts to each state for the state's allocation to bond issuers within the state.

New York State is home to three city school districts, New York City, Buffalo and Rochester, that are large enough to qualify as part of the 100 largest nationwide school districts, and as such, these districts will receive direct federal Qualified School Construction Bond Allocations from the U.S. Treasury Secretary. Additionally, New York State received \$192 Million in the 2009 and \$178 Million in the 2010 calendar years to allocate to other districts in the State that did not receive a direct federal allocation.

The 2009 allocation was retained by the State to fund State expenditures for local district capital projects. The purpose of the proposed amendment to section 155.22 of the Commissioner's Regulations is to prescribe the procedures for New York State to allocate its \$174,782,000 2010 state limitation amount to those school district bond issuers not receiving a direct federal allocation.

In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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.

COSTS:

(a) Costs to State government: None. The proposed rule does not

impose any additional costs on the State beyond those inherent in the authorizing statutes, 26 USC sections 54E and 54F. Although school districts participating in the QSCB and QZAB programs will be entitled to building aid for capital construction projects as they are under existing law, it is anticipated that there will be a reduced cost to the State as there is no interest on the bonds and the State will not be obligated to pay its share of interest on the borrowing.

(b) Costs to local government: The proposed rule does not impose any costs on local government. It merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2), and updates the Qualified Zone Academy provisions in Commissioner's Regulation section 155.22 to include Qualified Zone Academy Bonds (QZAB) issued under 26 USC 54E. Participation in both the QSCB and QZAB programs is voluntary.

(c) Costs to private, regulated parties: None. The proposed rule does not impact private parties in any way.

(d) Cost to the regulating agency for implementation and continued administration of this rule: None. The proposed rule does not impose any additional costs on the State Education Department beyond those imposed by the authorizing statutes, 26 USC sections 54E and 54F. It merely amends Commissioner's Regulation section 155.22 to establish procedures for allocation of the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2), and amends the Qualified Zone Academy Bond (QZAB) provisions to provide for a separate Charter school allocation from the QZAB State limitation amount, and to update the QZAB provisions to include Qualified Zone Academy Bonds (QZABs) issued under 26 USC 54E. Participation in both the QSCB and QZAB programs is voluntary.

LOCAL GOVERNMENT MANDATES:

The proposed rule will not impose any program, service, duty or responsibility on local governments. It merely amends Commissioner's Regulation section 155.22 to establish procedures for allocation of the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2), and amends the Qualified Zone Academy Bond (QZAB) provisions to provide for a separate Charter school allocation from the QZAB State limitation amount, and to update the QZAB provisions to include Qualified Zone Academy Bonds (QZABs) issued under 26 USC 54E. Participation in both the QSCB and QZAB programs is voluntary.

PAPERWORK:

Local educational agencies, other than those located in cities having a population of more than one hundred twenty-five thousand inhabitants, may apply in a form prescribed and by a date established by the commissioner for approval to receive an allocation from the State limitation amount allocation. Such application shall include, but is not limited to:

(1) a certification by the local educational agency that the bonds to be issued meet the requirements for a qualified school construction bond pursuant to 26 USC section 54F(a).

(2) a description of the capital construction project(s) to be financed through the issuance of qualified school construction bonds; and

(3) the written approval of the superintendent of schools and the Board of Education for such bond issuance.

DUPLICATION:

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

ALTERNATIVES:

There are no significant alternatives and none were considered. The proposed rule is necessary to establish the procedures for New York State to allocate its state limitation amount to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2), and to update the Qualified Zone Academy

provisions to include Qualified Zone Academy Bonds (QZAB) issued under 26 USC 54E.

FEDERAL STANDARDS:

The proposed rule does not exceed any minimum standards of the Federal government for the same or similar subject areas. The proposed rule is consistent with the authority provided under 26 USC section 54F to establish a process for the allocation of the State's Qualified School Construction Bond state limitation amount to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2), and to update provisions in the Commissioner's Regulation regarding Qualified Zone Academy provisions to include Qualified Zone Academy Bonds (QZAB) issued under 26 USC 54E.

COMPLIANCE SCHEDULE:

The proposed amendment does not place any compliance requirements on school districts. It merely amends Commissioner's Regulation section 155.22 to establish procedures for allocation of the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2), and amends the Qualified Zone Academy Bond (QZAB) provisions to provide for a separate Charter school allocation from the QZAB State limitation amount, and to update the QZAB provisions to include Qualified Zone Academy Bonds (QZABs) issued under 26 USC 54E. Participation in both the QSCB and QZAB programs is voluntary.

Regulatory Flexibility Analysis

Small Businesses:

The proposed rule relates to the process by which local educational agencies gain access to a program entitled Qualified School Construction Bonds (QSCB), established in 26 USC section 54F, for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such bond issue. The purchaser of the bonds receives a Federal tax credit in lieu of interest payments on the bonds. The proposed rule merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of QSCB pursuant to 26 USC section 54F, and updates the Qualified Zone Academy provisions in Commissioner's Regulation section 155.22 to include Qualified Zone Academy Bonds (QZAB) issued under 26 USC 54E. The proposed amendment does not impose any adverse economic impact, reporting, record keeping or other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

EFFECT OF RULE:

The proposed rule applies to all public school districts and boards of cooperative educational services in the State.

COMPLIANCE REQUIREMENTS:

The proposed rule will not impose any compliance requirements on local governments. It merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2). In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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. Participation in both the QSCB and QZAB programs is voluntary.

Local educational agencies, other than those located in cities having a population of more than one hundred twenty-five thousand inhabitants, may apply in a form prescribed and by a date established by the commissioner for approval to receive an allocation from the State

limitation amount allocation. Such application shall include, but is not limited to:

(1) a certification by the local educational agency that the bonds to be issued meet the requirements for a qualified school construction bond pursuant to 26 USC section 54F(a).

(2) a description of the capital construction project(s) to be financed through the issuance of qualified school construction bonds; and

(3) the written approval of the superintendent of schools and the Board of Education for such bond issuance.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed rule does not impose any costs on local government. It merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2). In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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. Participation in both the QSCB and QZAB programs is voluntary.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new economic or technological requirements on local governments.

MINIMIZING ADVERSE IMPACT:

The proposed rule does not impose any compliance requirements or compliance costs on local governments. It merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2). In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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. Participation in both the QSCB and QZAB programs is voluntary.

LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all school districts and boards of cooperative educational services in the State, including the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 persons per square mile or less.

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

The proposed rule will not impose any compliance requirements on local governments. It merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2). In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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. Participation in both the QSCB and QZAB programs is voluntary.

Local educational agencies, other than those located in cities having a population of more than one hundred twenty-five thousand inhabitants, may apply in a form prescribed and by a date established by the commissioner for approval to receive an allocation from the State limitation amount allocation. Such application shall include, but is not limited to:

(1) a certification by the local educational agency that the bonds to be issued meet the requirements for a qualified school construction bond pursuant to 26 USC section 54F(a).

(2) a description of the capital construction project(s) to be financed through the issuance of qualified school construction bonds; and

(3) the written approval of the superintendent of schools and the Board of Education for such bond issuance.

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

COMPLIANCE COSTS:

The proposed rule does not impose any costs on rural areas. It merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2). In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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. Participation in both the QSCB and QZAB programs is voluntary.

MINIMIZING ADVERSE IMPACT:

The proposed rule does not impose any compliance requirements or compliance costs on rural areas. The proposed rule does not impose any compliance requirements or compliance costs on local governments. It merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2). In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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. Participation in both the QSCB and QZAB programs is voluntary.

RURAL AREA PARTICIPATION:

Copies of the proposed amendment have been distributed to members of the Department's Rural Advisory Committee, which includes representatives of school districts in rural areas.

Job Impact Statement

The proposed amendment relates to the process by which local educational agencies gain access to a program entitled Qualified School Construction Bonds (QSCB), established in 26 USC section 54F, for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such bond issue. The purchaser of the bonds receives a Federal tax credit in lieu of interest payments on the bonds. The proposed amendment merely provides for a method for the Commissioner to allocate the State limitation amount for the issuance of Qualified School Construction Bonds (QSCB) issued under 26 USC section 54F to those school district bond issuers not receiving a direct federal allocation pursuant to 26 USC section 54(F)(d)(2). In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) 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. Participation in both the QSCB and QZAB programs is voluntary.

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

EMERGENCY RULE MAKING

New Standards for Academic Progress for Tuition Assistance Program for the 2010-11 Academic Year

I.D. No. EDU-40-10-00006-E

Filing No. 965

Filing Date: 2010-09-17

Effective Date: 2010-09-17

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

Action taken: Amendment of section 145-2.2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 602(1) and (2), 661(2), 665(2) and (6); and L. 2010, ch. 53

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

Specific reasons underlying the finding of necessity: The enacted 2010-11 New York State budget includes new provisions for TAP which are set forth in Chapter 53 of the Laws of 2010. In particular, Chapter 53 establishes new standards of academic progress (SAP) for non-remedial students first receiving State aid in 2007-08 and thereafter. These standards take effect for students enrolled in the 2010-11 academic year. These standards, however, do not apply to "students enrolled in a program of remedial study approved by the Commissioner."

The intent of the new law is to ensure that students receiving TAP funds and not needing remedial instruction or needing only a small amount of such remedial instruction demonstrate sufficient academic progress to complete their academic program in a timely manner. The intent is not to deny TAP to students who need remedial instruction.

However, a problem arises for some students who entered college on or after the 2007-08 academic year and were meeting the 2006 standards of academic progress. Now they are faced with new standards which may preclude them from being eligible for TAP for the 2010 fall term. For example, for students in a baccalaureate program based on semesters, under the 2006 SAP requirements, students must have completed at least 21 credits by the end of the fourth term in order to be eligible for TAP in the fifth term. However, under the new 2010 SAP students now must have completed 30 credits by the end of the fourth term to be eligible for TAP in the fifth term. Some students are therefore put into a situation where they were not aware of the new requirements and could not possibly have time to take additional credit hours to meet the new standards in the 2010 SAP. A similar situation is also true for students pursuing an associate degree.

To remedy this situation, in the proposed emergency regulation, these returning students that "fall in the gap" between the 2006 and 2010 SAP, will be deemed to be remedial students for the 2010-11 academic year only and therefore can continue to be eligible for TAP if they meet the 2006 SAP. The rationale is that these "gap" students are not progressing along their academic programs at a rate of success that the State finds acceptable for participation in the TAP program. They therefore are being given an academic year to achieve the level of academic performance necessary for participation in TAP.

Emergency action is necessary at the September Regents meeting for the preservation of the general welfare to implement Chapter 53 of the Laws of 2010 and to ensure that remedial students are not denied TAP eligibility for the 2010-2011 academic year.

Subject: New standards for academic progress for tuition assistance program for the 2010-11 academic year.

Purpose: Implement Chapter 53 of the Laws of 2010 and provide clarity as to what constitutes a program of remedial study.

Text of emergency rule: Clause (b) of subparagraph (iv) of paragraph (2) of subdivision (b) of section 145-2.2 of the Regulations of the Commissioner of Education shall be amended effective September 17, 2010, to read as follows:

(b)(1) for students who receive their first State award during the 2006-2007 academic year and thereafter, and who are enrolled full-time in a two-year, four-year, or five-year undergraduate program on a semester or trimester basis, or their equivalent, the applicable required minimum number of credits accrued and minimum grade point average earned at the time of the institution's certification for each payment made on the student's award, as specified in subparagraph (i), (ii), (iii) or (iv) of paragraph (c) of subdivision (6) of section 665 of the Education Law; provided that institutions operating on a trimester basis during the 2006-2007 academic year shall apply the satisfactory academic progress standard pursuant to the provisions in section 665 of the Education Law, and shall apply the particular requirements prescribed in the satisfactory academic progress charts in such section of law for the 2007-2008 academic year and thereafter.

(2)(i) notwithstanding subclause (1) of this clause, for students receiving a State award in the 2010-2011 academic year who are not enrolled in a program of remedial study, as defined in item (ii) of this subclause, and who first received aid in the 2007-2008 academic year and thereafter, and who are enrolled in a two-year, four-year or five-year undergraduate program on a semester or trimester basis, or their equivalent, shall apply the required minimum number of credits accrued and minimum grade point average earned at the time of the institution's certification for each payment made on the student's award, as applicable in Chapter 53 of the Laws of 2010; provided that students enrolled in a program of remedial study, as defined in item (ii) of this subclause, shall apply the particular requirements prescribed in the satisfactory academic progress charts in section 665 of the Education Law for the 2010-2011 academic year.

(ii) For purposes of this subclause only, students enrolled in a program of remedial study shall mean:

(A) students enrolled in remedial courses equivalent to at least six credits in their initial term of receipt of state financial aid and enrolled in at least nine credits in their first year of receipt of state financial aid; or

(B) students enrolled in remedial courses equivalent to at least three credits in their initial term of receipt of state financial aid and enrolled in at least nine credits in their first year of receipt of state financial aid; or

(C) students enrolled in the Higher Education Opportunity Program (HEOP), the Education Opportunity Program (EOP), the Search for Education, Elevation and Knowledge (SEEK) program or the College Discovery (CD) program; or

(D) students who first received an award in the 2007-2008 academic year and thereafter and who in the semester, trimester or their equivalent, preceding the 2010-2011 academic year, met the requirements prescribed in the satisfactory academic progress charts in section 665 of the Education Law for the 2007-2008 academic year but do not meet applicable standards for academic progress for the 2010-2011 academic year, as set forth in Chapter 53 of the Laws of 2010, shall be deemed to be in an approved program of remedial study for purposes of determining which standards for academic progress apply.

(E) students who first received an award in the 2007-2008 academic year and thereafter and who in the first semester, trimester or their equivalent of the 2010-2011 academic year, met the requirements prescribed in the satisfactory academic progress charts as set forth in Chapter 53 of the Laws of 2010 but did not meet applicable standards in Chapter 53 of the laws of 2010 for academic progress for the second semester, trimester or their equivalent in the 2010-2011 academic year, for good cause, as described in guidelines prescribed by the Commissioner, shall be deemed to be in an approved program of remedial study for purposes of determining which standards for academic progress apply.

(F) For purposes of subitems (A) and (B), remedial courses taken in a prior academic year where the student was not eligible for state financial aid or in the summer preceding the student's initial term of receipt of state financial aid may be counted towards the required credits of remedial study to be considered a program of remedial study for purposes of this subclause.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 15, 2010.

Text of rule and any required statements and analyses may be obtained from: Peg Rivers, NYS Education Department, 9th Floor, EBA, 89 Washington Avenue, Office of Counsel, Albany, NY 12234, (518) 473-6090, email: jfrey@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Subdivision (2) of section 602 of the Education Law empowers the

Commissioner of Education to promulgate regulations establishing requirements for the president to follow in determining student eligibility for State student aid relating to full-time study, part-time study, accelerated study, matriculation, loss of good academic standing, and permissible use of general and academic performance awards and loans. Subdivision (1) of section 602 of the Education Law empowers the Commissioner of Education to select qualified recipients of academic performance awards.

Subdivision (2) of section 661 of the Education Law grants the Board of Regents the power to establish times for which a student must provide certain information, as required by the Board of Regents, to his or her institution through the submission of a form provided by the Board of Regents.

Subdivision (6) of section 665 empowers the Commissioner of Education to establish standards for a student's good academic standing and loss thereof.

Chapter 53 of the Laws of 2010 establishes new standards of academic progress for TAP awards for students not enrolled in a program of remedial study approved by the commissioner and who first received aid in 2007-2008, and thereafter.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment implements Chapter 53 of the Laws of 2010 by establishing new standards of academic progress for the 2010-2011 academic year for students not enrolled in a program of remedial study. The proposed amendment also defines programs of remedial study for purposes of determining which standards of academic progress apply.

3. NEEDS AND BENEFITS:

The enacted 2010-11 New York State budget includes new provisions for TAP which are set forth in Chapter 53 of the Laws of 2010. In particular, Chapter 53 establishes new standards of academic progress (SAP) for non-remedial students first receiving State aid in 2007-08 and thereafter. These standards take effect for students enrolled in the 2010-11 academic year. These standards, however, do not apply to "students enrolled in a program of remedial study approved by the Commissioner."

The intent of the new law is to ensure that students receiving TAP funds and not needing remedial instruction or needing only a small amount of such remedial instruction demonstrate sufficient academic progress to complete their academic program in a timely manner. The intent is not to deny TAP to students who need remedial instruction.

However, a problem arises for some students who entered college on or after 2007-08 and were meeting the standards of academic progress established in 2006-07. Now they are faced with new standards which may preclude them from being eligible for TAP for the 2010 fall term. For example, for students in a baccalaureate program based on semesters, under the 2006 SAP requirements, students must have completed at least 21 credits by the end of the fourth term in order to be eligible for TAP in the fifth term. However, under the new 2010 SAP students now must have completed 30 credits by the end of the fourth term to be eligible for TAP in the fifth term. Some students are therefore put into a situation where they were not aware of the new requirements and could not possibly have time to take additional credit hours to meet the new standards in the 2010 SAP. A similar situation is also true for students pursuing an associate degree.

To remedy this situation, in the proposed emergency regulation, these returning students that "fall in the gap" between the 2006 and 2010 SAP, will be deemed to be remedial students for the 2010-11 academic year only and therefore can continue to be eligible for TAP under the 2006 SAP. The rationale is that these "gap" students are not progressing along their academic programs at a rate of success that the State finds acceptable for participation in the TAP program. They therefore are being given an academic year to achieve the level of academic performance necessary for participation in TAP.

For purposes of the new standards of academic progress established in Chapter 53 of the Laws of 2010, a student shall be deemed to be in a program approved by the Commissioner for remedial study if he/she: (1) is enrolled in the Higher Education Opportunity Program (HEOP), the Education Opportunity Program (EOP), The Search for Education, Elevation and Knowledge (SEEK) program or the College Discovery (CD) program; (2) takes six credit hours of remedial instruction the first semester and at least nine credit hours of remedial instruction in the first year; or (3) takes three credit hours of remedial instruction in the first semester and six credit hours of remedial instruction in the second semester. Remedial courses taken in the summer session preceding the first academic year may count towards the required nine or more credits of remedial instruction for the purpose of program approval by the Commissioner for remedial study. In addition, for students first becoming eligible for TAP in the 2010-2011 academic year due to a change in their financial circumstances, remedial courses taken in a previous academic year may also be counted. For the 2010-11 academic year only, a student who first received an award prior to the 2010-2011 academic year and does not meet the eligibility requirements to be certified for TAP under the 2010-2011 SAP shall be

deemed to be in an approved program of remedial study for the 2010-11 academic year solely for the purpose of defining which standards of academic progress apply for the 2010-11 academic year. This includes students who become ineligible for TAP in the Spring 2010 term because they have insufficient time to adjust their schedule in the Fall term to carry the required number of credits under the new standards of academic progress due to courses becoming unavailable, full or because the add/drop period has ended. The Department will issue guidance on this issue to the colleges.

4. COSTS:

a. Costs to the State government. The proposed amendment will not impose any additional costs upon State government, including the State Education Department beyond those imposed by Chapter 53 of the Laws of 2010.

b. Costs to local government. None.

c. Costs to private regulated parties. The proposed amendment will not impose any additional costs upon public or nonpublic colleges and universities, education opportunity centers, or other postsecondary institutions beyond the minimal costs to such institutions to update information materials concerning the number of credits and minimum grade point average a student must have completed before the school's certification for payment on the student's award, and to update information materials concerning the number of credits a student must have completed to qualify for payment on an award for accelerated study.

d. Costs to the regulatory agency for implementation and continued administration of this amendment. None. The proposed amendment simply conforms the Commissioner's Regulations to Chapter 53 of the Laws of 2010, and will not impose any new duties or responsibilities upon the State Education Department. The Commissioner of Education is already required to approve each institution's standard of satisfactory academic progress prior to the institution's implementation of such standard.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment will not impose any new mandates, and accordingly, will not impose any additional duties or responsibilities on local governments.

6. PAPERWORK:

The proposed amendment does not impose any additional reporting requirements on any regulated party. The paperwork requirements for public and nonpublic colleges and universities, education opportunity centers, and other postsecondary institutions will be minimal. In addition, the amendment will not increase the paperwork requirements for students.

7. DUPLICATION:

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

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

The proposed amendment concerns eligibility requirements for students receiving State student aid through the tuition assistance program (TAP), and therefore, there are no applicable federal standards.

10. COMPLIANCE SCHEDULE:

The proposed amendment conforms the Commissioner's Regulations to Chapter 53 of the Laws of 2010, which becomes effective for the 2010-2011 academic year.

Regulatory Flexibility Analysis

The proposed amendment relates to the standards for academic progress for the tuition assistance program for the 2010-2011 academic year. The purpose of the proposed amendment is to implement Chapter 53 of the Laws of 2010 and provide clarity as to what constitutes a program of remedial study to determine whether the 2006 or 2010 standards of academic progress apply for the 2010-2011 academic year.

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all public and nonpublic colleges and universities, education opportunity centers, and other postsecondary institutions that are eligible, where applicable, to participate in the tuition assistance program (TAP) in New York State, including those located in the 44 rural counties having less than 200,000 inhabitants and the 71 towns in urban counties having a population density of 150 per square mile or less.

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

The enacted 2010-11 New York State budget includes new provisions

for TAP which are set forth in Chapter 53 of the Laws of 2010. In particular, Chapter 53 establishes new standards of academic progress (SAP) for non-remedial students first receiving State aid in 2007-08 and thereafter. These standards take effect for students enrolled in the 2010-11 academic year. These standards, however, do not apply to “students enrolled in a program of remedial study approved by the Commissioner.” The purpose of the proposed amendment is to implement Chapter 53 of the Laws of 2010 and define what constitutes a program of remedial study.

The amendment does not add or alter reporting or recordkeeping requirements for public and nonpublic colleges and universities, education opportunity centers, or other postsecondary institutions, including those located in rural areas, or impose reporting or recordkeeping requirements for students that participate in such programs. In addition, the amendment will not require regulated parties to acquire professional services.

3. COSTS:

The proposed amendment will not impose any additional costs on public and nonpublic colleges and universities, education opportunity centers, or other postsecondary institutions located in rural areas beyond minimal costs to update information materials concerning the number of credits and the grade point average a student must have before being certified for the next payment on his or her TAP award.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes the minimum number of credits earned and the minimum grade point average a student must achieve before being certified for the next payment on his or her TAP award for the 2010-2011 academic year. It also defines a program of remedial study so that colleges, universities and other postsecondary institutions can determine which standards of academic progress apply. Chapter 53 of the Laws of 2010 does not make any differentiation in eligibility based upon the geographic location of the student. In the interests of equity, uniform criteria are established for all students across the State.

5. RURAL AREA PARTICIPATION:

A copy of the proposed amendment was shared with public and nonpublic colleges and universities, education opportunity centers, and other postsecondary institutions that are eligible to participate in the tuition assistance program (TAP) in New York State. These institutions are located in all areas of the State, including rural areas.

Job Impact Statement

The proposed amendment relates to the new standards for academic progress for the tuition assistance program for the 2010-2011 academic year. The purpose of the proposed amendments is to implement Chapter 53 of the Laws of 2010 and provide clarity as to what constitutes a program of remedial study to determine whether the 2006 or 2010 standards of academic progress apply for the 2010-2011 academic year.

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

NOTICE OF ADOPTION

Duties of the Senior Deputy Commissioner for P-12 Education

I.D. No. EDU-20-10-00016-A

Filing No. 974

Filing Date: 2010-09-21

Effective Date: 2010-10-06

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

Action taken: Amendment of section 3.8 of Title 8 NYCRR.

Statutory authority: Education Law, section 101 (not subdivided)

Subject: Duties of the Senior Deputy Commissioner for P-12 Education.

Purpose: Designate the Senior Deputy Commissioner for P-12 Education as Deputy Commissioner of Education pursuant to Education Law, section 101.

Text or summary was published in the May 19, 2010 issue of the Register, I.D. No. EDU-20-10-00016-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Relates to the Establishment of a Clinically Rich Graduate Level Principal Preparation Program

I.D. No. EDU-23-10-00002-A

Filing No. 968

Filing Date: 2010-09-21

Effective Date: 2010-10-06

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

Action taken: Amendment of sections 52.1, 52.21 and 80-3.10 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 210, 305(1), (2), 3004(1) and 3007(2)

Subject: Relates to the establishment of a clinically rich graduate level principal preparation program.

Purpose: Establishes the program registration standards for the clinically rich principal preparation program.

Text or summary was published in the June 9, 2010 issue of the Register, I.D. No. EDU-23-10-00002-EP.

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

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on June 9, 2010, the State Education Department has received comments relating to the proposed amendments on graduate level clinically rich principal preparation pilot programs. The following is a summary of the concerns and suggestions and the responses of the Education Department.

COMMENT: Several commentors supported the following aspects of the pilot program: emphasis on preparing effective leaders for high need schools; alignment with Interstate School Leaders Licensure Consortium Standards; the clinical experience component; research-based curriculum linking theory and practice; strong partnerships between programs and other organizations; and gathering data on effectiveness of the pilot programs before expanding the programs. In addition, one commentor was supportive of the fact that the pilot programs only admit those candidates who demonstrate excellence in teaching, experience working as advocates for children and family in high need schools, leadership capability and a sincere intent to serve as instructional leaders.

DEPARTMENT RESPONSE: The Department agrees with these comments.

COMMENT: Commentors expressed concern about the capacity of non-collegiate institutions to offer this pilot program.

DEPARTMENT RESPONSE: The Department will select program providers for graduate level clinically rich principal preparation pilot programs through a Request for Proposal (RFP) process. Rigorous selection criteria and program approval criteria, including the institution's capacity to offer the pilot programs, will be specified in the RFP. Institutions of Higher Education (IHEs) and non-collegiate institutions, will be held to the same standards. Non-collegiate programs will also be required to seek accreditation from an accrediting body approved by the Board of Regents and must demonstrate a proven history of having a positive impact on student achievement and student growth for all students, including students with disabilities, English language learners, and students living in poverty.

In addition, to ensure that any program selected to offer the pilot programs is of high quality, the Board of Regents will establish a Blue Ribbon Commission, comprised of highly renowned school leader educators, to evaluate all applications. The Blue Ribbon Commission will make recommendations to the Board of Regents for those programs that should be authorized to establish clinically rich principal preparation programs. The goal is to create a process that will ensure a rigorous programmatic review and to select only the highest quality providers to assist in the preparation of principals for our high need schools.

COMMENT: A couple commentors expressed concern about the mentor pool and high quality mentoring, given the requirement that the mentoring has to take place in a high need school.

DEPARTMENT RESPONSE: The proposed amendment defines a principal-mentor as “an experienced and highly effective principal who holds a certificate as a school building leader and is selected through collaboration between the program provider and the school district and is as-

signed to provide mentoring and support to a candidate in this pilot program.” Mentors can come from outside districts and should be recruited and interviewed jointly by the district which is providing the clinical experience along with the program provider. This will ensure close alignment between these two parties. Mentors can be recently retired principals, or hold other district-level leadership positions (as long as they have had successful experience as a principal or have worked effectively with principals as district-level leaders). This should deepen the pool of candidates from which mentors are selected. The Department is also contemplating including a training requirement for mentors (also part of the RFP) to further ensure the quality of mentoring in this program.

COMMENT: One commentator expressed concern about the lack of dialogue with faculties of New York State’s IHEs in the process of developing the emergency regulations on clinically rich principal preparation programs and in the process of developing the examination framework for teachers and school leaders.

DEPARTMENT RESPONSE: The Department disagrees with this comment. The work of the Wallace state wide committees helped inform this initiative. Those committees included college professors, program directors and state wide practitioner organizations. The Department has also engaged the public through a 45-day public comment period for the pilot programs. The Department has received and reviewed comments on the regulations from IHEs. The Commissioner has also reached out to, and met with Deans from City University of New York (CUNY), State University of New York (CUNY), and independent colleges, as well as P-12 Educators. The Department will continue to have ongoing discussions with stakeholders to explore ideas for improving education in high need schools and shortage areas throughout the State.

Moreover, experts from IHEs and P-12 schools serve on each of the committees for certification examinations. Therefore, IHEs are involved in the process of developing the examination framework for teachers and school leaders.

COMMENT: One commentator was concerned that there is little evidence demonstrating that program graduates of clinically rich preparation programs are effective in promoting school improvement and student learning.

DEPARTMENT RESPONSE: This pilot program is based on the best available research (Boyd et al 2009) and best practices (e.g., The Boston Residency model). In addition, a 2007 study commissioned by the Wallace Foundation, “Preparing School Leaders for a Changing World: Lessons from Exemplary Leadership Development Programs” identified several features of programs that produced graduates with “. . . knowledge and skills necessary to undertake instructional improvement, organizationally sophisticated leadership practice, and a stronger commitment to a career in school leadership.” These features were used to develop the RFP including the emphasis on clinically rich experiences for candidates. In addition, program providers must demonstrate their capacity to incorporate the Educational Leadership Policy Standards: ISLLC 2008 into their programs. ISLLC Standards were developed after a tremendous amount of research conducted by a National Research Panel.

However, the Department agrees that more studies need to be conducted to prove the effectiveness of the clinically rich preparation model. The RFP will require program providers to submit a detailed evaluation plan to assess program effectiveness in bringing about student learning. In addition, the pilot programs will be required to participate in a comprehensive annual evaluation of the program conducted by an external party authorized by the Department and the Board of Regents.

COMMENT: One commentator indicated that the clinically rich preparation model is not a panacea to solve the problems of high need schools.

DEPARTMENT RESPONSE: The Department agrees with this comment and has been engaging in other important initiatives (i.e., STEM initiatives, induction programs, career ladders, supplemental compensation for effective teachers and leaders, etc.) to maximize student achievement and growth in high need schools.

COMMENT: One commentator commented on the admission requirement that candidates must have three years of classroom teaching experience. The respondent was concerned that three years of experience is too short a duration to become an instructional leader.

DEPARTMENT RESPONSE: The proposed amendment requires candidates to have at least three years experience and the Department welcomes candidates with more experience. Moreover, in addition to at least three years of teaching experience, candidates must demonstrate excellence in teaching, experience working as advocates for children and families in high need schools, leadership capability, and a sincere intent to serve as instructional leaders to be admitted into the pilot program.

COMMENT: One commentator expressed concern about the short duration of the pilot programs, since the programs shall end on June 30, 2016.

DEPARTMENT RESPONSE: As indicated previously, more studies need to be conducted to prove the effectiveness of the clinically rich preparation model. For this reason, the pilot program will expire in six years. If

the pilot program is successful, the Department may extend the duration of the program.

COMMENT: One commentator expressed concern that to be eligible for the program, institutions must “have had a positive impact on student achievement and student growth for all students. . . .” The commentator cautioned the Department to interpret data about student achievement with sensitivity because it may take many years for systemic reform to occur.

DEPARTMENT RESPONSE: The Department agrees with this comment. Any measure of student growth that will be utilized for this program will be analyzed carefully and thoughtfully and the Department will take into consideration the instructional environment of the organization and other factors when interpreting data on student achievement for purposes of this program.

COMMENT: Two commentators suggested designing a sound evaluation system to measure the effectiveness of the pilot programs.

DEPARTMENT RESPONSE: The Department accepts this suggestion. The RFP will require program providers to submit a detailed evaluation plan to assess program effectiveness in bringing about student learning. In addition, the pilot programs will be required to participate in a comprehensive annual evaluation conducted by an external party authorized by the Department and the Board of Regents.

COMMENT: One commentator suggested establishing carefully designed approval criteria for the pilot programs.

DEPARTMENT RESPONSE: The Department agrees with this suggestion. As indicated previously, the Department will select program providers for the pilot programs through a RFP process. Selection criteria and program approval criteria will be specified in the RFP.

COMMENT: One commentator suggested that the Department should monitor the pilot programs to ensure that they meet the general regulation standards, achieve accreditation, and maintain an 80 percent pass rate on the appropriate certification examinations.

DEPARTMENT RESPONSE: The Department accepts this suggestion and will closely monitor the pilot program. Moreover, the pilot programs must meet all of the same accountability requirements of other school leader preparation programs.

COMMENT: One commentator suggested that all providers meet national accreditation requirements.

DEPARTMENT RESPONSE: The Department requires accreditation for all program providers.

COMMENT: One commentator suggested that we stress quality content such as what was used in the NYSED Educational Leadership Program Enhancement Project 2009-2012 guidelines. The commentator also asked that we emphasize more content and longer preparation for the pilot programs.

DEPARTMENT RESPONSE: As mentioned previously, the pilot program providers will be selected through a rigorous RFP process. The RFP will require that specific content and will require providers to use up to date research to inform the instruction in the program. The Blue Ribbon Committee will also ensure that only the highest quality providers who offer high quality content and clinical experience to establish clinically rich principal preparation programs.

COMMENT: One respondent suggested that the Department should not constrain the program design to one form of mentoring, limit candidates to only their school site, or limit internship experiences to one site.

DEPARTMENT RESPONSE: The Department accepts this suggestion. The intent of the regulation is to prepare highly qualified principals for high need schools through a clinical setting. An applicant could present varying models for this to occur which could include clinical residencies in both a high need school and a high performance school. The Blue Ribbon Commission and the Board of Regents will select those approaches that, in their judgment, best meet the intent of the program.

COMMENT: One respondent suggested that the pilot programs should partner with districts, not just specific schools.

DEPARTMENT RESPONSE: The pilot programs involve not only the school, but the district. The proposed amendment requires candidates in the pilot program to be supported by a team comprised of program faculty, teachers and administrators at the high need school and the superintendent. By including the superintendent in the support team, the programs are partnering with the district. Moreover, the RFP will encourage partnerships of all types, including district partnerships.

COMMENT: One commentator suggested that rather than creating new programs, allocate the funds to existing educational leadership programs.

DEPARTMENT RESPONSE: The Department welcomes the existing educational leadership programs to submit an application to participate in the program through the RFP process.

COMMENT: One commentator suggested that we require formative and summative program evaluation.

RESPONSE: The Department accepts this suggestion. Formative and summative evaluations of graduate effectiveness will be included as a requirement in the RFP.

COMMENT: One commentor suggested developing a new path for education leaders, requiring a master's degree in instructional leadership as a prerequisite to educational leadership programs.

DEPARTMENT RESPONSE: Instructional leadership is an important component of the pilot programs. However, the Department encourages other innovative designs of educational leadership programs, including the one mentioned above.

NOTICE OF ADOPTION

Special Act School Districts

I.D. No. EDU-26-10-00006-A

Filing No. 970

Filing Date: 2010-09-21

Effective Date: 2010-10-06

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

Action taken: Amendment of section 105.3 of Title 8 NYCRR.

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

Subject: Special Act school districts.

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

Text or summary was published in the June 30, 2010 issue of the Register, I.D. No. EDU-26-10-00006-P.

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

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on June 30, 2010, the State Education Department received the following comment.

COMMENT: The proposed amendment will provide more flexibility for the appointment of public members of Special Act boards of education based upon their availability to serve. Problems still remain with the appointment and reappointment processes. Candidates have expressed that the appointment process is lengthy and cumbersome which can cause delays in candidates serving on Special Act boards. Concern was expressed that any perceived lack of interest in serving as a public board member may be the result of the process and not reflective of community commitment to Special Act schools. It is recommended that (1) clear deadlines within the appointment process be established to ensure its timeliness; (2) the State Education Department be required to issue a public notice of the availability of a pending open public members position in local papers; and (3) a streamlined process be developed for the reappointment of a public member when no other applications for appointment are received.

DEPARTMENT RESPONSE: The recommendations are beyond the scope of the proposed amendment, which is intended to replace the current provisions in Commissioner's Regulation § 105.3(b) and (c) providing for uniform, consecutive 4-year terms for all public members that commence on the first day of a school year (July 1st) and end on the last day of the fourth school year thereafter (June 30th), with provisions establishing terms commencing and ending on such dates as determined by the Commissioner, and thereby provide flexibility for the appointment of public members based upon their availability to serve.

The appointment of public members to the boards of education of Special Act school districts is by design a thorough process of review and approval. An internal State Education Department committee reviews all applications to ensure that each candidate meets the minimum qualifications for interview and for possible appointment. Applications that pass the internal review process are forwarded to a local interview team comprising a district superintendent of schools, a duly licensed certified public accountant or public accountant; and individuals recommended by organizations representing superintendents of schools and/or boards of education and teachers. Upon

completion of the local interview team process, recommendations for appointment are forwarded to the Department. A team of senior Department staff reviews the recommendations with the district superintendent who managed the local interview process. As a result of this discussion, a recommendation is forwarded to the Commissioner for review and appointment.

Since circumstances may change regarding a person's eligibility in the four years since the original appointment, reappointments to Special Act boards follow the same procedures as the original appointment process with one major exception: the final review by senior Department staff is eliminated. The Department will continue to make every effort to expedite appointments and reappointments of public members without jeopardizing the integrity of the process.

In certain areas of the state, it has been difficult to get candidates to serve as public members on Special Act boards. Due to fiscal constraints, the Department is not able to advertise openings in local newspapers. However, the Department is involved in other outreach activities, including: placing the application and necessary information prominently on the website of the Office of Elementary, Middle, Secondary and Continuing Education; encouraging district superintendents with Special Act schools in their supervisory districts to help recruit candidates; and, through the district superintendents, enlisting the assistance of local organizations and agencies to advertise Special Act public member vacancies.

NOTICE OF ADOPTION

School and School District Accountability

I.D. No. EDU-26-10-00008-A

Filing No. 971

Filing Date: 2010-09-21

Effective Date: 2010-10-06

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

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

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

Subject: School and School District Accountability.

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

Text or summary was published in the June 30, 2010 issue of the Register, I.D. No. EDU-26-10-00008-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Charter Schools

I.D. No. EDU-27-10-00010-A

Filing No. 973

Filing Date: 2010-09-21

Effective Date: 2010-10-06

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

Action taken: Amendment of section 3.16 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 206(not subdivided), 207(not subdivided), 305(1), (2), (20) and 2852(7)

Subject: Charter schools.

Purpose: Delegates to the Commissioner authority to approve charter revisions, with certain exceptions, pursuant to Education Law, section 2852(7).

Text or summary was published in the July 7, 2010 issue of the Register, I.D. No. EDU-27-10-00010-P.

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

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

Assessment of Public Comment

The agency received no public comment.

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

Diploma Credit for Languages Other Than English and State Assessments in Social Studies

I.D. No. EDU-40-10-00022-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 100.1, 100.2, 100.4 and 100.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 208 (not subdivided), 305(1) and (2), 308 (not subdivided), 309 (not subdivided) and 3204(3)

Subject: Diploma credit for languages other than English and State assessments in social studies.

Purpose: To implement cost-saving measures associated with administering State assessments by eliminating certain State examinations.

Text of proposed rule: 1. Subdivision (j) of section 100.1 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(j) Second language proficiency examinations means State tests of language skills in modern or classical languages other than English or Native American languages that were administered prior to July 1 of the 2010-2011 school year.

2. Subparagraph (iv) of paragraph (1) of subdivision (d) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(iv) A student may be exempted from such unit of study requirements in a language other than English by passing an approved second language proficiency examination [when such an examination is available], as defined in 100.1(j) of this Part.

3. Paragraph (3) of subdivision (d) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(3) Beginning in May 1989, all students entering grade nine prior to the 2001-2002 school year who [pass] passed an approved second language proficiency examination shall be awarded the first unit of credit in a language other than English, unless the student has already been awarded such first unit of credit in a language other than English, as set forth in section 100.1(b) of this Part.

4. Paragraph (4) of subdivision (d) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(4) Public school students first entering grade nine in the 2001-2002 school year and thereafter shall earn at least one unit of credit in a language other than English, as defined in section 100.1(b) of this Part, in order to complete the language other than English requirement for a high school diploma. Students may earn one unit of credit by [passing] having passed the State second language proficiency assessment, when available. [In those languages for which no State proficiency assessment is available, a locally developed test, which is determined to be equivalent to the State proficiency assessment pursuant to subdivision (f) of this section, may be administered. At least six months prior to the administration of such test, the proposed test booklet, answer sheet, scoring key, directions and all other auxiliary materials shall be provided to the commissioner for approval, and shall be accompanied by such empirical evidence of the reliability of the test scores and of the comparability of the proposed test to corresponding State assessments with respect to content and difficulty, as is available].

5. Paragraph (5) of subdivision (d) of section 100.2 of the Regula-

tions of the Commissioner of Education is added, effective January 5, 2011, as follows:

(5) Beginning in the 2010-2011 school year, students enrolled in grades eight or earlier may be granted one unit of credit by successfully completing two units of study in a language other than English and passing a locally developed test, both of which are aligned to the Checkpoint A learning standards for languages other than English, which has been approved for high school credit by the public school district superintendent or the chief administrative officer of a registered charter or nonpublic high school.

6. Paragraph (5) of subdivision (m) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(5) The comprehensive assessment report for each nonpublic school will include the following information, for each school building, for the three school years immediately preceding the school year in which the report is issued:

(i) student test data on the elementary and middle level English language arts and mathematics assessments in the New York State Testing Program, the Regents competency tests, [the program evaluation tests,] all Regents examinations, [the introduction to occupations examinations,], the second language proficiency examinations as defined in this Part;

(ii) . . .

(iii) . . .

(iv) . . .

(v) . . .

(vi) . . .

The chief administrative officer of each nonpublic school shall initiate measures designed to improve student results wherever it is warranted. The chief administrative officer of each nonpublic school shall be responsible for making the comprehensive assessment report accessible to parents.

7. Paragraph (2) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

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

(i) score below:

(a) the State designated performance level on one or more of the State elementary assessments in English language arts, mathematics [, social studies] or science; and/or

(b) the State designated performance level on a State elementary assessment in social studies administered prior to the 2010-2011 school year; provided that beginning in the 2010-2011 school year, at which time a State elementary assessment in social studies shall no longer be administered, a school shall provide academic intervention services when students are determined to be at risk of not achieving State learning standards in social studies pursuant to clause (iii) of this paragraph;

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

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

8. Paragraph (3) of subdivision (ee) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(3) Requirements for providing academic intervention services in grade nine to grade twelve. Schools shall provide academic intervention services when students:

(i) score below:

(a) the State designated performance level on one or more of the State intermediate assessments in English language arts, mathematics [, social studies] or science [, or score below the State designated performance level on any one of the State examinations required for graduation]; and/or

(b) the State designated performance level on a State intermediate assessment in social studies administered prior to the 2010-2011 school year; provided that beginning in the 2010-2011 school year, at which time the State intermediate assessment in social studies shall no longer be administered, a school shall provide academic intervention services when students are determined to be at risk of not achieving State learning standards in social studies pursuant to clause (iii) of this paragraph; and/or

(c) the State designated performance level on any one of the State examinations in English language arts, mathematics, social studies or science that are required for graduation.

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

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

9. Paragraph (2) of subdivision (b) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(2) Required assessments. (i) Except as otherwise provided in subparagraphs (iv) and (v) of this paragraph, all students shall take the following assessments, provided that testing accommodations may be used as provided for in section 100.2(g) of this Part in accordance with department policy:

(ii) . . .

(iii) for schools years prior to July 1 of the 2010-2011 school year, all students in grade five shall take the social studies elementary assessment;

(iv) . . .

(v) . . .

(vi) . . .

10. Paragraph (4) of subdivision (c) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(4) The unit of study requirements for languages other than English in this subdivision may be initiated in any grade prior to grade eight, pursuant to section 100.2(d)(2) of this Part, provided that in public schools such subject shall be taught by teachers certified in that area.

(i) To receive one unit of high school credit for languages other than English prior to grade nine, pursuant to section 100.2(d) of this Part a student must take and pass the second language proficiency examination when available, or beginning in the 2010-2011 school year, successfully complete two units of study in a language other than En-

glish and pass a locally developed test, both of which are aligned to the Checkpoint A learning standards for languages other than English, which has been approved for high school credit by the public school district superintendent or chief administrative officer of a registered charter or nonpublic high school.

11. Paragraph (2) of subdivision (d) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(2) Credit may be awarded for an accelerated course only when at least one of the following conditions has been met:

(i) . . .

(ii) the student passes the course and the associated State proficiency examination or Regents examination, when [where] available. The credit must be accepted as a transfer credit by all registered New York State high schools; or

(iii) in cases where no [State proficiency examination or other] appropriate state assessment is available, the student passes a course in the middle, junior high or intermediate school [which] that has been approved for high school credit by the public school district superintendent(s), or his or her designee(s), of the district(s) where the middle, junior high or intermediate school and the high school are located.

12. Paragraph (3) of subdivision (d) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(3) Such opportunity shall be provided subject to the following conditions:

(i) . . .

(ii) A student shall be awarded high school credit for such courses only if such student passes a Regents examination, a second language proficiency examination when available, or a career and technical education proficiency examination, or, if no such examinations are available, a locally developed examination [which] that establishes student performance at a high school level as determined by the principal.

13. Paragraph (3) of subdivision (e) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(3) The program evaluation test in social studies in grade eight, beginning in May 1989. Beginning with the school year 2000-2001 through the 2009-2010 school year, the social studies intermediate assessment shall replace the program evaluation test and shall be administered in grade eight.

14. Clause (d) of subparagraph (i) of paragraph (2) of subdivision (h) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(d) Compliance requirements. A Model A middle-level education program shall meet the requirements of this section and all other applicable sections of this Title, and shall also meet the following requirements:

(1) districts shall administer required middle grade State assessments in English language arts, mathematics [, social studies] and science;

(2) . . .

(3) . . .

(4) . . .

(5) . . .

(6) . . .

15. Clause (d) of subparagraph (ii) of paragraph (2) of subdivision (h) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(d) Compliance requirements. A Model B middle-level education program shall meet the requirements of this section and all other applicable sections of this Title, except that the prescribed time requirements for units of study in courses where there are no required State assessments as set forth in paragraph (c)(1) of this section shall be met subject to such modifications as set forth in the approved application and plan, and shall also meet the following design principles:

(1) districts shall administer required middle grade State assessments in English language arts, mathematics [, social studies] and science;

- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .
- (e) . . .

16. Clause (d) of subparagraph (iii) of paragraph (2) of subdivision (h) of section 100.4 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(d) Compliance requirements. A Model C middle-level education program shall meet the requirements of this section and all other applicable sections of this Title, subject to any modifications of such requirements as provided for in the district's approved application and plan, and shall also meet the following design principles:

(1) districts shall administer required middle grade State assessments in English language arts, mathematics, [social studies] and science;

- (2) . . .
- (3) . . .
- (4) . . .
- (5) . . .
- (6) . . .

17. Clause (g) of subparagraph (iv) of paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(g) Languages other than English, one unit of commencement-level credit [which can be earned by passing the State second language proficiency examination pursuant to section 100.2(d) of this Title]. A student identified as having a disability which adversely affects the ability to learn a language may be excused from the language other than English requirement set forth in this subparagraph if such student's individualized education program indicates that such requirement is not appropriate to the student's special educational needs. Such a student need not have a sequence in a language other than English but must meet the requirements for the total number of credits required for a diploma.

18. Clause (c) of subparagraph (v) of paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(c) two additional units in a language other than English for a total of three units and the Regents comprehensive assessment in that language *when available*. *In those languages for which no Regents comprehensive assessment is available, a locally developed test, which is aligned to the Checkpoint B learning standards for languages other than English, may be administered.* A student identified as having a disability [which] that adversely affects the ability to learn a language may be excused from the language other than English requirement set forth in this subparagraph if such student's individualized education program indicates that such requirement is not appropriate to the student's special educational needs. Such a student need not have a sequence in a language other than English but must meet the requirements for the total number of credits required for a diploma. Students completing a five-unit sequence in career and technical education or the arts (visual arts, music, dance, and theatre) are not required to complete the additional two units of the language other than English requirement for the Regents diploma with advanced designation but must still meet the requirements for the total number of units of credit.

19. Clause (g) of subparagraph (v) of paragraph (1) of subdivision (d) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective January 5, 2011, as follows:

(g) A student who, *prior to the commencement of the 2010 - 2011 school year*, earns a score of at least 85 on the State second language proficiency examination in accordance with 100.2(d)(3) and meets the requirements of subparagraphs (i), (iii) and (iv) of this paragraph shall receive one unit of credit.

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

Data, views or arguments may be submitted to: Dr. John B. King, Jr., Office of P-12, State Education Department, 89 Washington Avenue, Albany, New York 12234

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

Regulatory Impact Statement

STATUTORY AUTHORITY:

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

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

Education Law section 208 authorizes the Board of Regents to establish examinations as to attainments in learning and to award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law section 209 authorizes the Board of Regents to establish secondary school examinations in studies furnishing a suitable standard of graduation and of admission to colleges; to confer certificates or diplomas on students who satisfactorily pass such examinations; and requires the admission to these examinations of any person who shall conform to the rules and pay the fees prescribed by the Regents.

Education Law section 305 (1) and (2) provide that the Commissioner of Education, as chief executive officer of the State system of education and of the Board of Regents, shall have general supervision over all schools and institutions subject to the provisions of the Education Law, or of any statute relating to education, and shall execute all educational policies determined by the Board of Regents.

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

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

Education Law section 3204 (3) provides for required courses of study in the public schools and authorizes the State Education Department to alter the subjects of required instruction.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes and is necessary to implement policy enacted by the Board of Regents relating to the State learning standards, State assessments, graduation and diploma requirements, and higher levels of student achievement.

NEEDS AND BENEFITS:

In response to current fiscal constraint, this proposed amendment implements cost-saving measures associated in administering State examinations and assessments by eliminating certain State examinations beginning in the 2010-2011 school year, specifically second language proficiency (SLP) examinations, Regents comprehensive examinations in German, Hebrew and Latin, and State assessments in social studies for grades five and eight. Despite the elimination of these assessments, this proposed amendment will ensure that students continue to meet State learning standards and earn diploma credit.

Given the elimination of SLP examinations, students will be required to pass a locally-developed examination, in addition to completing two units of study, which will be aligned with Checkpoint A learning standards for languages other than English and approved for high school credit by the superintendent or chief administrative officer of a charter or public school, as applicable. Further, despite the

elimination of State assessments in social studies, schools will remain required to provide academic intervention services to students when such students have been determined through a district-developed or district-adopted procedure to be at risk of not achieving State learning standards in social studies. Lastly, despite the elimination of Regents comprehensive examinations in Hebrew, German and Latin, students may pass a locally-developed test aligned with Checkpoint B learning standards for languages other than English to earn Regents diploma credit.

COSTS:

(a) Costs to State government: None. The proposed amendment creates no additional costs on State government.

(b) Costs to local government: The proposed amendment is necessary to implement cost-saving measures for the administration of State assessments. The proposed amendment eliminates certain State examinations for students, including SLP examinations. Although school districts will be required to administer a locally-developed examination in lieu of an SLP examination, schools should be familiar with the applicable learning standards and the administration of such locally-developed tests. Therefore, it is anticipated that any costs associated with administering this test will be minimal and capable of being absorbed by existing staff, who would currently be responsible for developing or administering locally-developed tests.

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

(d) Costs to regulating agency for implementation and continued administration of this rule: This proposed amendment will require no additional costs to the State Education Department as a regulating agency.

LOCAL GOVERNMENT MANDATES:

The proposed amendment imposes no additional program, service, duty or responsibility upon local governments, but will ensure that all students in grade eight and below have continued opportunities to earn diploma credit in languages other than English.

PAPERWORK:

There is no additional paperwork required as a result of this amendment.

DUPLICATION:

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

ALTERNATIVES:

There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

There are no related federal standards.

COMPLIANCE SCHEDULE:

It is anticipated that school districts will be able to achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

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

2. COMPLIANCE REQUIREMENTS:

As a cost-saving measure for administering State assessments, the proposed amendment eliminates certain State examinations for students, specifically second language proficiency (SLP) examinations, State assessments in social studies in grades five and eight, and Regents comprehensive examinations in Hebrew, Latin and German. It is anticipated that this amendment will impose minimal reporting, recordkeeping and other compliance requirements on school districts.

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

The proposed amendment will not impose any significant costs on

school districts. Although districts will be required to administer a locally-developed examination that is aligned with Checkpoint A learning standards for languages other than English in lieu of administering an SLP examination, school districts should already be familiar with these learning standards and the administration of locally-developed examinations. Therefore, it is anticipated that any costs associated with implementing the proposed amendment will be minimal and capable of being absorbed by existing staff, who would currently be responsible for developing and administering locally-developed tests.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement certain cost-saving measures for the State in a time of fiscal constraint. The proposed amendment has been carefully drafted to minimize the impact on districts. Any compliance requirements and costs associated with implementing this proposed amendment will be minimal and capable of being absorbed by existing staff and resources.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

As a cost-saving measure for administering State assessments, the proposed amendment eliminates certain State examinations and assessments beginning in the 2010-2011 school year, specifically second language proficiency (SLP) examinations, Regents comprehensive examinations in German, Hebrew and Latin, and State assessments in social studies in grades five and eight, all while ensuring that students continue to meet State learning standards and earn diploma credit in these subject areas.

The proposed amendment will not impose any significant additional reporting, recordkeeping or other compliance requirements, or professional services requirements on school districts located in rural areas.

3. COSTS:

The proposed amendment does not impose any significant costs on school districts in rural areas. The amendment eliminates certain State examinations, specifically second language proficiency (SLP) examinations, state assessments in social studies, and Regents comprehensive examinations in Hebrew, Latin and German. Although districts will be required to administer a locally-developed examination that is aligned with Checkpoint A learning standards for languages other than English in lieu of administering an SLP examination, school districts should already be familiar with the applicable learning standards and the administration of such locally-developed tests. It is anticipated that any costs associated with implementing the proposed amendment will be minimal and capable of being absorbed by existing staff, who would currently be responsible for developing and administering locally-developed tests.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on school districts located in rural areas. The proposed amendment eliminates certain State examinations. The proposed amendment has been carefully drafted to meet statutory requirements while minimizing the impact on regulated parties. School districts should already be familiar with the applicable learn-

ing standards, and therefore, it is anticipated that any costs associated with implementing the proposed amendment will be minimal and capable of being absorbed by existing staff.

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

The purpose of this proposed amendment is to eliminate certain State examinations for students beginning in the 2010-2011 school year, specifically second language proficiency (SLP) examinations, Regents comprehensive examinations in German, Hebrew and Latin, and State assessments in social studies in grades five and eight, while ensuring that students continue to meet State learning standards and earn diploma credit in these subject areas. This amendment will not have any significant impact on jobs or employment opportunities in this or any field. Because it is evident from the nature of the proposed rule that it will have no impact on jobs and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Mandatory Quality Review Program for Public Accountancy

I.D. No. EDU-30-10-00003-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 70.10 of Title 8 NYCRR.

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

Subject: Mandatory quality review program for public accountancy.

Purpose: To establish the requirements for the mandatory quality review program for public accountancy.

Substance of revised rule: The Commissioner of Education proposes to add a new section 70.10 to the Regulations of the Commissioner of Education, relating to establishing a mandatory quality review program in public accountancy. The following is a summary of the proposed amendment:

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

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

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

Subdivision (d) of section 70.10 of the Regulations of the Commissioner of Education establishes a Quality Review Oversight Committee (QROC) to oversee the mandatory quality review program. The QROC will consist of five members who must be New York licensed CPAs and hold a current registration with the Department. Members will serve five year terms except those first appointed will serve staggered terms so that an equal number of terms terminate annually. Responsibilities of the QROC include: receiving and approving quality review plans of entities seeking to be sponsoring organizations; monitoring sponsoring organizations to determine that each sponsoring organization is providing an acceptable level of oversight over reviewers, review teams and firms participating in the quality review program; inform the Department of issues and /or problems relating to the quality review program; annually

report to the Department that the sponsoring organization holds qualifications necessary to continue as an approved sponsoring organization; annually assess the effectiveness of the quality review program; annually report on any recommended modifications to the quality review program; review each quality review report submitted by a firm to determine that the firm is complying with applicable professional standards and ensure that any documents received from a firm or reviewer, sponsoring organization or entity administering peer review outside the state of New York shall be confidential and not constitute a public record and shall not be subject to disclosure under article six and six-A of the Public Officers Law.

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

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

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

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

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

Subdivision (j) of section 70.10 of the Regulations of the Commissioner of Education defines the requirements for access to the results of quality reviews by the department. Any firm required to participate in the program shall submit to the department: a quality review report, the firm's letter of response, an acceptance letter from a sponsoring organization, a letter(s) signed by the firm accepting the documents and a letter from the sponsoring organization notifying the reviewed firm that required actions have been appropriately completed. The quality review report, the reviewed firm's letter of response and acceptance of the quality review report by the sponsoring organization must be made available to the department via a secure website within 30 days of the date of the acceptance letter. If applicable, a letter signed by the reviewed firm accepting the quality review documents with the understanding that the firm agrees to take any actions required by the reviewer must be made available to the

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

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

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

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

Revised rule compared with proposed rule: Substantial revisions were made in section 70.10(b)(5), (7), (c)(5), (f) and (f)(3).

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

Data, views or arguments may be submitted to: Frank Munoz, Deputy Commissioner of the Professions, New York State Education Department, 89 Washington Avenue, 2nd Floor, Albany, New York 12234, (518) 474-1756, email: fmunoz@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 July 28, 2010, the following substantial revisions were made to the proposed rule:

Paragraphs (5) and (7) of subdivision (b) of section 70.10 of the Regulations of the Commissioner of Education were amended to replace the term "assigned" with "approved".

Paragraph (5) of subdivision (c) of section 70.10 of the Regulations of the Commissioner of Education is amended to replace the term "conducted" with "completed".

Subdivision (f) of section 70.10 of the Regulations of the Commissioner of Education is amended to replace the phrase "and assignment" with the term "approval".

Subparagraph (ii) of paragraph (3) of subdivision (f) of section 70.10 of the Regulations of the Commissioner is amended to delete the words "assignment by an approved sponsoring organization to" and to change the word "commence" to "commencing".

Subclause (1) of clause (a) of subparagraph (ii) of paragraph (3) of subdivision (f) of section 70.10 of the Regulations of the Commissioner of Education is amended to delete the words "manager or person with equivalent supervisory responsibilities".

The above revisions to the proposed rule do not require revisions 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 July 28, 2010, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement herewith.

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

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on July 28, 2010, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

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

Revised Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the State Register on July 28, 2010, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

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

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on July 28, 2010, the State Education Department received the following comments.

COMMENT: Two commenters expressed concern that the proposed regulations require auditors performing audits for small not-for-profit entities to undergo a peer review in accordance with government auditing standards also known as the "Yellow Book" standards promulgated by the Comptroller General of the United States. The commenters believe that requiring the application of these peer review standards could raise the cost of an independent audit of small not-for-profit entities. Another commenter expressed concern that the regulation would require all NYS Charities Bureau clients to be audited according to the "Yellow Book" standard, and that the CPAs would be required to meet the "Yellow Book" Continuing Professional Education requirement.

RESPONSE: The proposed regulation implements the requirements of Chapter 651 of the Laws of 2008, which requires "a firm that performs attest services for any New York State or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office, or other governmental entity performing a governmental or proprietary function for New York State or any one or more municipalities thereof, or performs attest services specifically required to be performed pursuant to New York State law... to undergo an external peer review in conformity with" Generally Accepted Government Auditing Standards issued by the Comptroller General of the United States. The proposed amendment does not impose any additional requirements above those imposed by statute.

COMMENT: One commenter expressed concerns over the ambiguity of the phrases "begins providing attest services" and "initial performance" of attest services.

RESPONSE: The AICPA standards define the date of performance as the date the accountant issues an attestation report. The same date will be used for purposes of the proposed amendment. The Department will clarify this in guidance.

COMMENT: One commenter expressed concerns over the use of the term "conducted" and suggested that the term "completed" be used to avoid ambiguity and conform to current professional standards. The regulation states that the peer review must be "conducted" within 18 months. The commenter would prefer the term "completed."

RESPONSE: The Department has revised the proposed regulation to use the term completed instead of conducted to avoid any ambiguity and conform to the AICPA standards.

COMMENT: One commenter recommends that the Quality Review Oversight Committee recommend to the Department the acceptance of peer review reports rated "pass with deficiencies," similar to reports rated "pass without deficiencies."

RESPONSE: The Department believes that the Quality Review Oversight Committee should review all reports with deficiencies and reserve its ability and judgment to determine if such deficiencies warrant disciplinary action. The Department believes this to be in the public's best interest.

COMMENT: One commenter suggested a change to the reporting standard to coincide with existing peer review standards by including the wording "in all material respects" in the regulation. The commenter also suggested changing the section on referrals to the Office of Professional Discipline to include the wording "in all material respects," based on the fact that this language is used in reports on financial statements and in the proposed quality review standards.

RESPONSE: The proposed regulation provides for the adoption of AICPA standards for peer review. These standards require the review team to report whether or not a firm's is complying with applicable profes-

sional standards "in all material respects." Therefore it is not necessary to include the suggested level of specificity in the proposed regulation.

COMMENT: Professional standards require that a letter of comments be issued by the review team, if deficiencies were found during a quality review and if the quality review was commenced prior to January 1, 2009. To conform to these professional standards, the commenter suggested that the Department clarify that in addition to a quality review report, the letter of comments should also be submitted to the Department for those firms falling into this category.

RESPONSE: The Department believes that because the implementation date of the quality review requirement is January 1, 2012, many of the firms submitting reports under the regulation will have had their quality reviews commenced after January 1, 2009 and this requirement will not affect many of the firms submitting reports in compliance with the regulation. However to address this concern, the Department will clarify the need to submit a letter of comments in guidance for firms that fall into this category.

Department of Environmental Conservation

NOTICE OF ADOPTION

Asphalt Pavement and Asphalt Based Surface Coating Regulation and Update of VOC Lists

I.D. No. ENV-16-10-00013-A

Filing No. 975

Filing Date: 2010-09-21

Effective Date: 2011-01-01

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

Action taken: Addition of Part 241; and amendment of Parts 200, 205 and 211 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, 19-0303, 19-0305, 71-2103 and 71-2105

Subject: Asphalt Pavement and Asphalt Based Surface Coating regulation and update of VOC lists.

Purpose: Adopt asphalt pavement VOC limitations, asphalt based surface coating VOC content and labeling requirements and update VOC lists.

Text of final rule: Subdivisions 200.1(a) through 200.1(af) remain unchanged.

The table under 200.1(ag) is revised to remove the following entry:

78933 Methyl ethyl ketone (2-Butanone)

Sections 200.1(ah) through 200.1(cf) remain unchanged.

New paragraphs are added to subdivision 200.1(cg) as follows:

(34) *dimethyl carbonate*

(35) *1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (known as HFE-7000)*

(36) *3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (known as HFE-7500, HFE-s702, T-7145, and L-15381)*

(37) *1,1,1,2,3,3,3-heptafluoropropane (known as HFC 227ea)*

(38) *methyl formate*

(39) *propylene carbonate*

Sections 200.2 through 200.8 remain unchanged.

Table 1 of existing Section 200.9 is amended as follows:

Regulation	Referenced Material	Availability
241.3	<i>ASTM, D977 (Re-approved 2005)</i>	****
	<i>ASTM, D2397 (Re-approved 2005)</i>	****
	<i>ASTM, D6997 (Re-approved 2004)</i>	****
241.5(b)(3)	<i>40 CFR Part 60, Appendix A, method 24 (July 1, 2009)</i>	*

Sections 205.1(a) through 205.1(b)(1) remain unchanged.

Paragraphs 205.1(b)(2) and (3) are modified to read as follows:

(2) any aerosol coating product; [and]

(3) any architectural coating that is sold in a container with a volume of one liter (1.057 quart) or less[.]; and

A new section 205.1(b)(4) is added to read as follows:

(4) *any asphalt pavement and asphalt based surface coating regulated under Part 241 of this Title.*

Sections 205.2 through 205.8 remain unchanged.

Section 211.1 [Definitions

(a) 'Asphalt.' The dark brown to black cementitious material (solid, semisolid or liquid in consistency) of which the main constituents are bitumens which occur naturally or as a residue of petroleum refining.

(b) 'Cutback asphalt.' Any asphalt which has been liquefied by blending with petroleum solvents (Diluents) or, in the case of some slow cure asphalts (road oils), which have been produced directly from the distillation of petroleum.

(c) 'Penetrating prime coat.' An application of low viscosity asphalt to an absorbent surface in order to prepare it for paving with an asphalt concrete.

Section 211.2] Air pollution prohibited

No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others.

Section 211.[3] 2 Visible emissions limited

Except as permitted by a specific part of this Subchapter and for open fires for which a restricted burning permit has been issued, no person shall cause or allow any air contamination source to emit any material having an opacity equal to or greater than 20 percent (six minute average) except for one continuous six-minute period per hour of not more than 57 percent opacity.

[Section 211.4 Volatile organic compounds prohibited

(a) The use of volatile organic compounds to liquefy asphalt used for paving is prohibited, except for:

(1) asphalt used in the production of long-life stockpile material for pavement patching and repair;

(2) asphalt applied at low ambient temperature from October 16th to May 1st; and

(3) asphalt used as a penetrating prime coat for the purpose of preparing an untreated absorbent surface to receive an asphalt surface.

(b) The amount of volatile organic compounds in emulsified asphalt, as determined by testing methods of the ASTM (American Society for Testing and Materials), may not exceed the following amounts in percent by weight:

(1) two percent for ASTM grades RS-1, SS-1, SS-1h, CSS-1, and CSS-1h;

(2) three percent for ASTM grades RS-2, CRS-1, CRS-2, HFRS-2 and HFMS-2h;

(3) 10 percent for ASTM grades MS-2 and HFMS-2; and

(4) 12 percent for ASTM grades CMS-2 and CMS-2h.]

6 NYCRR Part 241, *Asphalt Pavement and Asphalt Based Surface Coating*

241.1 *Applicability*

This Part applies to:

(a) *any person who applies, supplies, sells, offers for sale, or manufactures any asphalt pavement; and*

(b) *any person who applies, supplies, sells, offers for sale, or manufactures any asphalt-based surface coating.*

241.2 *Definitions*

(a) 'Asphalt'. The dark brown to black cementitious material (solid, semisolid or liquid in consistency) of which the main constituents are bitumens which occur naturally or as a residue of petroleum refining.

(b) 'Asphalt pavement.' Pavement that is composed of stone, sand, and gravel bound together by asphalt.

(c) 'Cutback asphalt'. Any asphalt which has been liquefied by blending with petroleum solvents (diluents) or, in the case of some slow cure asphalts (road oils), has been produced directly from the distillation of petroleum.

(d) 'Asphalt-based surface coating'. A coating labeled and formulated for application to worn asphalt pavement surfaces including, but not limited to, highway, driveway, parking, curb and/or berm surfaces to perform one or more of the following functions:

(1) fill cracks,

(2) seal, coat, or cover the surface to provide protection or prolong its life, or

(3) restore or preserve the appearance.

(e) 'Emulsified asphalt'. An emulsion of asphalt and water that contains an emulsifying agent; it is a heterogeneous system containing two normally immiscible phases (asphalt and water) in which the water forms the continuous phase of the emulsion, and minute globules of asphalt form the discontinuous phase.

(f) 'Penetrating prime coat'. An application of low viscosity asphalt to an absorbent surface in order to prepare the surface for application of asphalt pavement.

241.3 Asphalt pavement. No emulsified asphalt, as classified under ASTM International standard specifications D 977 or D 2397 (see Table 1, section 200.9 of this Title), may be applied, sold, offered for sale, or manufactured that contains oil distillate, as determined by ASTM International standard test method D 6997, in amounts that exceed the following limits (milliliters of oil distillate per 200 gram sample):

(a) three milliliters for ASTM grades RS-1, SS-1, SS-1h, CRS-1, CSS-1, and CSS-1h;

(b) five milliliters for ASTM grades RS-2, CRS-2, and HFRS-2;

(c) sixteen milliliters for ASTM grades MS-2, HFMS-2 and HFMS-2h; and

(d) twenty milliliters for ASTM grades CMS-2 and CMS-2h.

241.4 Cutback asphalt prohibition. The use of cutback asphalt in paving activities is prohibited except in the following circumstances:

(a) when the asphalt is used in the production of long-life stockpile material for pavement patching and repair; or

(b) when the asphalt is used as a penetrating prime coat for the purpose of preparing a surface to receive asphalt pavement.

241.5 Asphalt based surface coating.

(a) VOC limitation. No asphalt based surface coating may be applied, sold, offered for sale, or manufactured if it contains more than 100 grams of VOC per liter.

(b) VOC content determination.

(1) Except as provided in paragraph (2) of this subdivision, the VOC content of an asphalt based surface coating must be determined through the use of the following equation:

$$VOC\ Content = \frac{Ws}{(Vm - Vw)}$$

where:

VOC content = grams of VOC per liter of coating

Ws = weight of VOCs, in grams

Vm = volume of coating, in liters

Vw = volume of water, in liters

The VOC content of a tint base shall be determined prior to the addition of the colorant.

(2) An alternative method may be used if approved by the Department and the Administrator.

(3) The Department may additionally require the manufacturer to conduct a 40 CFR part 60, appendix A, method 24 (see Table 1, section 200.9 of this Title) analysis to verify the VOC content.

(c) Product labeling and recordkeeping.

(1) Small container asphalt-based surface coating labeling. Any manufacturer of an asphalt based surface coating that is supplied, sold, or offered for sale in containers less than or equal to ten gallons in size must display on the container the following information:

(i) the product name, and

(ii) the VOC content. Each container must display either the maximum or the actual VOC content of the coating, as supplied, including the maximum thinning as recommended by the manufacturer. VOC content shall be displayed in grams of VOC per liter of coating. VOC content displayed shall be calculated using manufacturer's formulation data, or shall be determined according to subdivision (b) of this section.

(2) Bulk asphalt-based surface coating recordkeeping.

(i) Any person who sells or offers for sale any asphalt-based surface coating in quantities greater than 10 gallons in size must provide to the purchaser, and the Department upon request, the following information regarding the coating:

(a) the invoice sheet, bill of sale, or product manifest document;

(b) the name of the supplier;

(c) the name of the manufacturer;

(d) the product name;

(e) the VOC content; and

(f) the Material Safety Data Sheet.

(ii) Any person who applies an asphalt-based surface coating from a container greater than 10 gallons in size must have available for inspection by Department staff the documentation described in paragraph (c)(2)(i) of this section until the time that all the relevant coating is applied or discarded.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 200.9, 241.5(c)(1) and (2).

Text of rule and any required statements and analyses may be obtained from: Kenneth Newkirk, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3251, (518) 402-8396, email: airregs@gw.dec.state.ny.us

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

Summary of Revised Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is revising the State Implementation Plan (SIP) to show that New York State will attain the 8-hour ozone national ambient air quality standard (NAAQS) by 2012 in the New York City metropolitan area and by 2009 in the other nonattainment areas across the State. These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground level ozone pollution - nitrogen oxides (NOx) and volatile organic compounds (VOCs). This rulemaking proposal is aimed at achieving some of the VOC emission reductions necessary to do this.

Under the federal Clean Air Act (CAA), ozone pollution in the Northeast is recognized as a regional problem. Under CAA section 176A(b)(2), the region is required to assess the degree of interstate transport of ozone or its precursors throughout the region, assess strategies for mitigating the interstate pollution, and recommend to EPA measures to reduce pollution.

According to the Environmental Conservation Law (ECL), the Department has the authority to undertake rules and regulations to protect the natural resources and environment and control air pollution in order to enhance the health, safety and welfare of the people of New York State and their overall economic and social well being. ECL sections 1-0101, 3-0301, 19-0103, 19-0105, 19-0301, and 19-0303 establish the authority of the Department to regulate air pollution and air contamination sources. ECL section 19-0305 authorizes the Department to enforce the codes, rules and regulations, and ECL sections 71-2103 and 71-2105 set forth the applicable civil and criminal penalty structures. Together, these sections of the ECL set out the overall state policy goal of reducing air pollution and providing clean, healthy air for the citizens of New York and provide general authority to adopt and enforce measures to do so.

In the northeastern United States the ozone nonattainment problem is pervasive as concentrations of ozone often exceed the level of the national ambient air quality standard by mid-afternoon on a summer day. The contiguous metropolitan areas of Washington, D.C., Baltimore, Philadelphia, New York, and Hartford are designated ozone nonattainment areas. Unlike other pollutants, ozone is a secondary pollutant - not emitted directly but formed in the atmosphere by a variety of photochemical reactions involving VOCs and NOx in the presence of sunlight.

The Department is obligated to protect public health and satisfy federal regulatory requirements intended to support that goal. The proposed regulatory revisions are necessary to reduce VOC emissions to improve air quality, protect public health, and meet the State's SIP obligations.

Revisions to Parts 205, 211, and promulgation of the new Part 241.

The Department is proposing to revise 6 NYCRR Parts 205 and 211 and promulgate a new Part 241 that will provide VOC emissions reductions from asphalt pavement and asphalt based surface coatings as part of the effort to reduce ozone pollution in the state and reach attainment of the 8-hour ozone NAAQS. It applies to any entity that manufactures, sells, or supplies asphalt pavement and asphalt based surface coatings.

These revisions are among a series of sustained actions undertaken by New York State, in conjunction with EPA and other States, to control emissions of ozone precursors, including nitrogen oxides and VOCs, so that New York State and States in the Ozone Transport Region may attain the ozone NAAQS. The effective date of the regulation is anticipated to be January 1, 2011.

Hot mix asphalt paving is sometimes "cutback" (thinned) with volatile organic solvents to ensure the mix can be properly applied. Since August 21, 1983, the use of cutback asphalt during the summer months is prohibited pursuant to the provisions of section 211.4(a)(2). The Department intends to retain and clarify this prohibition in the present rule making.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, for the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. The proposal requires that all asphalt based surface coatings contain no more than 100 grams of VOC per liter and requires labeling and documentation of the products.

The proposed regulatory revision of VOC emissions from asphalt pavement and asphalt based surface coating is expected to have a minimal impact on consumers since formulations already exist that meet the proposed limits. EPA provided guidance on the reduction of VOC from asphalt, and included cost information in their "Control of VOCs from

Use of Cutback Asphalt'' EPA - 450 / 2-77-037. The reduction of VOC emissions from asphalt formulations is expected to result in either a decrease in the cost of production for manufacturers of asphalt formulations, or no cost impact at all. The Department is not aware of any additional costs that may cause price increases for asphalt formulations.

There are no direct costs to State and local governments associated with the proposed revisions to Parts 205, 200, and the promulgation of the new Part 241, as discussed in the previous paragraph. The regulatory amendments will apply equally to all entities that manufacture, sell, or supply asphalt pavement and asphalt based surface coatings. The regulatory amendments will not impose a mandate on local governments, since compliance obligations of local governments will be no different than those of any other subject entities. The authority and responsibility for implementing and administering Part 241 will reside solely with the Department.

The requirements for recordkeeping and reporting under proposed Part 241 will only be applicable to persons who manufacture, sell, or supply asphalt pavement and asphalt based surface coatings.

Under the proposed regulatory revisions, minor additional paperwork will be imposed on manufacturers of asphalt pavement and sellers and applicators of asphalt based surface coatings. Sellers and applicators of any asphalt based surface coating that is sold in a bulk container (greater than 10 gallons in size) will be required to retain the associated Material Safety Data Sheet as well as other specific information about the coating until such time that the entire amount of the coating in the bulk container is applied or finally discarded.

Revisions to Part 200

Concurrently, Part 200 is being revised to incorporate Federal requirements by adding six organic compounds to the section 200.1(cg) list of compounds that are not VOCs. Similarly, the Hazardous Air Pollutant (HAP) listing is being revised to remove methyl ethyl ketone. These revisions are being made to remain consistent with EPA's definition of volatile organic compounds (VOC) for purposes of preparing State implementation plans (SIPs) to attain the NAAQS for ozone under title I of the Clean Air Act (CAA).

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). EPA added various compounds to the list that specifies certain compounds that are not to be considered VOCs. The department is proposing to add these compounds to the section 200.1(cg) list of compounds that are not VOCs. The six added compounds include: dimethyl carbonate; 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-C3F7OCH3) (known as HFE-7000); 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (known as HFE-7500, HFE-s702, T-7145, and L-15381); 1,1,1,2,3,3,3-heptafluoropropane (known as HFC 227ea); methyl formate (HCOOCH3); and propylene carbonate.

The CAA allows individuals to petition EPA to add or delete chemicals from the HAPs list under CAA section 112(b)(3)(A). Pursuant to such a petition process, methyl ethyl ketone was deleted from the list of HAPs established in CAA 112(b). See 40 CFR 63.21, Deletion of methyl ethyl ketone from the list of hazardous air pollutants. The Department, as a result, is proposing to revise the list of HAPs at 200.1(ag) in order to remove methyl ethyl ketone to be consistent with EPA. Methyl ethyl ketone has been regulated and billed as both a VOC and a HAP in New York State, but will be removed from the HAP list. Methyl ethyl ketone will continue to be regulated as a VOC.

No new costs are being imposed as a result of these revisions to the VOC and HAP lists in Part 200. It is possible that some Title V facilities might experience a small decrease in the amount of their fee bill, and consequently a reduction in operating costs, based upon the removal of the six compounds from the VOC list. In the case of methyl ethyl ketone, which the Department is proposing to remove from the HAP list, the compound will remain billable as a regulated VOC.

There are no direct costs to State and local governments associated with the proposed revisions to the VOC and HAP lists in Part 200. The proposed revisions to Part 200 impose no compliance requirements on any entity. These regulatory actions are not expected to impose additional costs, and could potentially result in a decrease in billed amounts.

Due to the addition of the six compounds to the list of compounds that are not considered to be VOCs, some facilities might experience a small decrease in the amount of paperwork that needs to be maintained.

Revised Regulatory Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York is proposing to promulgate regulations designed to limit the VOCs emitted by various grades of asphalt pavement and in asphalt based surface coating in a new Part 241. Concurrently, Depart-

ment regulations will be revised to align VOC and hazardous air pollutant (HAP) listings with federal requirements in Part 200.

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). The New York State Department of Environmental Conservation (Department) is revising the State Implementation Plan (SIP) to show that New York State will attain the 8-hour ozone NAAQS by 2012 in the New York City metropolitan area and by 2009 in the other nonattainment areas across the State (Buffalo-Niagara Falls, Rochester, Capital District, Poughkeepsie, Jamestown, Jefferson County, and Essex County). These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground level ozone pollution - nitrogen oxides (NOx) and VOCs.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, for the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. A new applicability section will accompany the provisions that are being removed from Part 211 and placed in Part 241. With two exceptions, proposed section 241.3 contains the new, lower VOC content limits for various grades of asphalt pavement. Proposed section 241.4 prohibits the use of cutback asphalt throughout the year. Proposed section 241.5 mandates that all asphalt based surface coating applied in New York State contain no more than 100 grams of VOC per liter and requires labeling and documentation of the asphalt based surface coating products.

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). Six compounds are considered to have negligible photochemical reactivity, and will be added to the list of compounds that are not VOCs. Also, EPA has specified that methyl ethyl ketone will no longer be considered a hazardous air pollutant (HAP), and the Department is revising its regulations to remain consistent. The compound will continue to be regulated as a VOC.

Together, these modifications will ensure that the State achieves the VOC emission reductions from asphalt pavement and asphalt based surface coating needed so the State can make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

1. Effects on Small Businesses and Local Governments. This is not a mandate on local governments. It applies to any entity that manufactures, sells or applies asphalt pavement and asphalt based surface coatings. Asphalt pavement reformulation is anticipated to provide a cost savings for the manufacturers. Any small businesses or local governments contracting to have asphalt paving or asphalt based surface coating performed on their premises will incur potentially lower costs.

No new costs are being imposed as a result of the revisions to the VOC and HAP lists in Part 200. All major facilities in New York State that emit air pollutants are required to obtain a Title V permit under Part 201 and pay a per-ton monetary fee according to the amount of regulated air pollutants they emit. The fee assessment includes all of the compounds listed in Part 200. By removing a pollutant from the list, facilities are able to realize a cost saving if they previously emitted the delisted compound.

In the case of methyl ethyl ketone, which the Department is proposing to remove from the HAP list, the compound will remain billable as a regulated VOC. As a result, there will be no additional costs to any regulated entity.

2. Compliance Requirements. Local governments are not directly affected by the revisions to 6 NYCRR Parts 205, 211, or 241. Small businesses are required to comply with the same requirements as larger businesses, individuals, or any others. Anyone specifically contracting for asphalt pavement or asphalt based surface coating, will acquire compliant asphalt with low VOC content from manufacturers. All manufacturers of asphalt pavement and asphalt based surface coating will be required to reformulate their products. Small businesses or local governments contracting for pavement will purchase compliant products from their existing suppliers.

The proposed revisions to Part 200 will not impose a mandate on local governments. The proposed revisions will impose no compliance obligation on any entity.

3. Professional Services. Local governments are not directly affected by the revisions to 6 NYCRR Parts 205, 211 and 241. It is not anticipated that small businesses that manufacture asphalt pavement and asphalt based surface coating will need to contract out for professional services to comply with this regulation. In the few cases where small manufacturers do not already have compliant formulations, alternate asphalt formulations are readily available.

The proposed revisions to Part 200 will not require any entity to obtain any professional services. No additional compliance burden is associated with these regulatory actions, as the Department implements them.

4. **Compliance Costs.** There are no additional compliance costs for small businesses and local governments as a result of this rule. Since there are compliant asphalt formulations now available, small businesses and local governments are not expected to see a price increase for the purchase of compliant asphalt pavement.

The proposed revisions to Part 200 impose no compliance requirements on any entity. These regulatory actions are not expected to impose additional costs, and could potentially result in a decrease in billed amounts.

It should be noted that the impact to consumers is expected to be minimal since compliant asphalt pavement and asphalt based surface coatings formulations are already available. EPA, in its guidance ("Control of VOCs from Use of Cutback Asphalt" EPA - 450 /2-77-037) recognizes that existing reformulations will likely reduce costs to manufacturers, and not cause any price increases.

5. **Minimizing Adverse Impact.** Local governments are not directly affected by the revisions to Parts 205 and 211 and addition of the new 241. The Department does not anticipate any issues regarding reformulation of asphalt products. This regulation will provide manufacturers with consistent VOC formulations, and potentially cost savings.

The revision of the VOC and HAP listings will provide consistency for all areas of the state, and facilities could potentially select compounds with lower photochemical reactivity. The authority and responsibility for implementing and administering the changes to Part 200 will reside solely with the Department.

6. **Small Business and Local Government Participation.** The requirement for reduced VOC content in asphalt pavement and asphalt based surface coating is consistent for all manufacturers statewide. The Department will also be giving official notice of this rulemaking to the public, including businesses and each of the facilities that manufacture asphalt in the state. The authority and responsibility for implementing and administering Part 241 and the changes to Part 200 will reside solely with the Department.

As a member of the Ozone Transport Commission (OTC), the Department participated in outreach through development of regulatory guidance. The Department participated in outreach to the regulated community through this process, including the solicitation of comments from affected industry and a public meeting. A specific New York State process will be undertaken, extending public notice, hearing, and comment opportunities to all areas of the state as part of this rulemaking.

7. **Economic and Technological Feasibility.** Local governments are not directly affected by the revisions to Parts 205 or 211, or the addition of the new Part 241. Compliant asphalt pavement and asphalt based surface coating are available to meet all consumer needs. The VOC content limits are consistent with other OTC states. Asphalt pavement products at or below the specific VOC content limits are currently available.

The revised listing of VOCs in Part 200 that are considered to have negligible photochemical reactivity was determined by a specific EPA process. Similarly, EPA has reviewed sufficient information regarding methyl ethyl ketone to determine that it no longer needs to be considered a HAP.

Revised Rural Area Flexibility Analysis

New York faces a significant public health challenge from ground-level ozone, which causes health effects ranging from respiratory disease to death. In response to this public health problem, New York has enacted a series of regulations designed to control ozone and its chemical precursors which include volatile organic compounds (VOCs). Among other regulatory actions, New York is proposing to promulgate regulations designed to limit the VOCs emitted by various grades of asphalt pavement and in asphalt based surface coating in a new Part 241. Concurrently, Department regulations will be revised to align VOC and hazardous air pollutant (HAP) listings with federal requirements in Part 200.

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). The New York State Department of Environmental Conservation (Department) is revising the State Implementation Plan (SIP) to show that New York State will attain the 8-hour ozone NAAQS by 2012 in the New York City metropolitan area and by 2009 in the other nonattainment areas across the State (Buffalo-Niagara Falls, Rochester, Capital District, Poughkeepsie, Jamestown, Jefferson County, and Essex County). These SIP revisions must include the establishment of new or revised control requirements for emissions of the precursors of ground level ozone pollution - nitrogen oxides (NOx) and VOCs.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, under the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. A new applicability section will accompany the provisions that are being removed from Part 211 and placed in Part 241. With two exceptions, proposed section 241.3 contains the new, lower VOC content limits for various grades of asphalt pavement. Proposed section 241.4 prohibits the use of cutback asphalt throughout the year. Proposed section 241.5 mandates that all asphalt based surface coatings contain no more than 100 grams of VOC per liter and requires labeling and documentation of the asphalt based surface coating products.

The proposal includes reducing the VOC content of, and consequently emissions from, asphalt pavement and asphalt based surface coatings for all classifications of these products. The reduction is consistent with a regional effort to reduce VOC emissions from asphalt products, agreed upon through the Ozone Transport Commission (OTC).

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). Six compounds are considered to have negligible photochemical reactivity, and will be added to the list of compounds that are not VOCs. Also, EPA has specified that methyl ethyl ketone will no longer be considered a HAP, and the Department is revising its regulations to remain consistent. The compound will continue to be regulated as a VOC.

These changes are a necessary part of the Department's strategy to bring the New York City Metropolitan area into attainment with the ozone NAAQS by 2012 and the upstate nonattainment areas by 2009.

The proposal will ensure that the State achieves the VOC emission reductions from asphalt pavement and asphalt based surface coatings and cutback asphalt needed to make immediate progress towards attaining the eight-hour ozone NAAQS statewide.

1. **Types and estimated number of rural areas:** Rural areas are not adversely affected by the revisions to Parts 205, 211, and 241. The proposal will apply on a statewide basis. The impact to rural consumers, if any, is expected to be minimal since compliant asphalt formulations are currently available from the existing asphalt pavement production plants.

The revisions to Part 200 do not impose any compliance obligations on any facility. They apply consistently throughout the state, with no adverse impact on rural areas.

2. **Reporting, recordkeeping and other compliance requirements:** Parts 205, 211, and 241 will apply on a statewide basis. Rural area businesses are not expected to be affected by these revisions. Professional services are not anticipated to be necessary to comply with this rule. Part 241 imposes minor recordkeeping requirements on all manufacturers and suppliers of asphalt pavement and asphalt based surface coatings. These requirements apply consistently statewide.

The revisions to Part 200 do not impose any compliance obligations on any facility, and will not adversely affect rural areas.

3. **Costs:** The cost of proposed regulations regarding reduction of VOC content in asphalt pavements will be minimal. Compliant asphalt pavement products exist and are readily available to replace higher VOC content asphalt pavement. No additional costs will be incurred by the industry and the elimination of petroleum based VOC content reduces product cost. According to Environmental Protection Agency Control Technology Guidance (EPA-450/2-77-037) the use of lower VOC asphalts are more cost effective for users. The same mixing plant that formulates mixtures can prepare compliant pavement mixtures without any equipment changes.

No new costs are being imposed as a result of the revisions to the VOC and HAP lists in Part 200. All major facilities in New York State that emit air pollutants are required to obtain a Title V permit under Part 201 and pay a per-ton monetary fee according to the amount of regulated air pollutants they emit. The fee assessment includes all of the compounds listed in Part 200. By removing a pollutant from the list, facilities are able to realize a cost saving if they previously emitted the delisted compound.

In the case of methyl ethyl ketone, which the Department is proposing to remove from the HAP list, the compound will remain billable as a regulated VOC. As a result, there will be no additional costs to any regulated entity.

4. **Minimizing adverse impact:** The proposal is not anticipated to have an adverse effect on rural areas. The rule is intended to create air quality benefits for the entire state, including rural areas, through the reduction of ozone forming pollutants and the allowance of compounds with minimal photochemical reactivity. These revisions are not expected to have adverse impacts on rural areas since compliant asphalt pavement and asphalt based surface coatings will be available statewide. The regulation ensures a fair and level playing field for all asphalt pavement and asphalt based surface coatings manufacturers, and provides consistent VOC and HAP lists for facilities throughout the state.

5. **Rural area participation:** Rural areas are not specifically affected by the revisions. Reformulations of asphalt pavement will potentially provide a cost savings to asphalt manufacturers and the existing facilities provid-

ing asphalt pavement will remain. VOC and HAP listings are consistent for all areas of the state, and facilities could potentially select compounds with lower photochemical reactivity.

As a member of the OTC, the Department participated in outreach through development of regulatory guidance in the form of a model rule. The Department participated in outreach to the regulated community through this process, including the solicitation of comments from affected industry and a public meeting. The Department plans on holding public hearings at various locations throughout New York State once the regulation is proposed. Some of these locations will be convenient for persons from rural areas to participate. Additionally, there will be a public comment period in which interested parties can submit written comments.

Revised Job Impact Statement

1. Nature of impact: The Department of Environmental Conservation (the Department) proposes to revise Parts 205 and 211 and add a new Part 241 to reduce volatile organic compound (VOC) emissions from asphalt pavement and asphalt based surface coatings. Part 200 will be revised to be consistent with federal requirements regarding organic compounds and remove methyl ethyl ketone from the Hazardous Air Pollutants (HAP) list.

The proposal includes reducing the VOC content of, and consequently emissions from, asphalt paving for all classifications of asphalt. The reduction is consistent with a regional effort to reduce VOC emissions from asphalt paving, agreed upon through the Ozone Transport Commission (OTC). These changes are a necessary part of the Department's strategy to bring the New York City Metropolitan area into attainment with the ozone NAAQS by 2012 and the upstate nonattainment areas by 2009.

Currently, the maximum amount of VOCs that may be contained in asphalt is limited by the provisions of section 211.4(b). The VOC content of asphalt based surface coatings is currently subject to the limit established in Part 205, Architectural and Industrial Maintenance (AIM) Coatings, under the general category of flat coatings.

The proposed Part 241, Asphalt Pavement and Asphalt Based Surface Coating, will contain all regulatory provisions applicable to asphalt pavements and asphalt based surface coatings. A new applicability section will accompany the provisions that are being removed from Part 211 and placed in Part 241. With two exceptions, proposed section 241.3 contains the VOC content limits for various grades of asphalt pavement. Proposed section 241.4 prohibits the use of cutback asphalt throughout the year. Proposed section 241.5 mandates that all asphalt based surface coatings contain no more than 100 grams of VOC per liter and requires labeling and documentation of the asphalt based surface coating products.

These efforts will help New York to make immediate progress towards attaining ozone standards statewide. Asphalt formulations which meet the lower VOC content limits are currently available, therefore manufacturers will not be adversely impacted by this rule. These revisions are not expected to have an adverse impact on jobs and employment opportunities in the State. Part 211 has applied Statewide since it was promulgated in 1983. Part 241 will likewise be applied statewide. Since the proposed lower VOC content limits are anticipated to reduce costs to asphalt pavement and asphalt based surface coatings producers, there are no expected adverse impact on jobs.

The Department is proposing to revise section 200.1(cg) to make it consistent with the federal definition of VOC that may be found at 40 CFR 51.100(s). The Environmental Protection Agency (EPA) added various compounds to the list that specifies certain compounds not to be considered VOCs. The Department is proposing to add these compounds to the section 200.1(cg) list of compounds that are not VOCs. The six added compounds include: dimethyl carbonate; 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (n-C3F7OCH3) (known as HFE-7000); 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6-dodecafluoro-2-(trifluoromethyl) hexane (known as HFE-7500, HFE-s702, T-7145, and L-15381); 1,1,1,2,3,3,3-heptafluoropropane (known as HFC 227ea); methyl formate (HCOOCH3); and propylene carbonate. These compounds are considered to have negligible photochemical reactivity.

The federal Clean Air Act (CAA) allows individuals to petition EPA to add or delete chemicals from the HAPs list under CAA section 112(b)(3)(A). Pursuant to such a petition process, methyl ethyl ketone was deleted from the list of HAPs established in CAA 112(b). See 40 CFR 63.21, Deletion of methyl ethyl ketone from the list of hazardous air pollutants. The Department is proposing to revise the list of HAPs at 200.1(ag) in order to remove methyl ethyl ketone and to maintain consistency with the federal list. Methyl ethyl ketone has been regulated and billed as both a VOC and a HAP in New York State, but will be removed from the HAP list. Methyl ethyl ketone will continue to be regulated as a VOC.

2. Categories and numbers affected: This rule will affect approximately 70 in-State asphalt pavement and asphalt based surface coating manufacturing facilities. The VOC listing and HAP delisting affects any facility utilizing the compounds listed.

3. Regions of adverse impact: The Department does not expect there to be regions of adverse impact in the State. The VOC emission limits in Part

211 have applied statewide since 1983 and there has been no resulting adverse impact on any particular region of the State. Of the approximately 70 in-state asphalt pavement and asphalt based surface coating manufacturers, three are located in the New York City Metropolitan Area. The Department, however, expects that compliant asphalt products will be readily available and that there will potentially be a cost savings.

The VOC listing revision and removal of methyl ethyl ketone from the HAP list will not adversely impact employment. The facilities utilizing the compounds will be able to avoid the associated emissions fee, potentially reducing facility operating costs.

There will be no adverse impact on employment as a result of this rulemaking.

4. Minimizing adverse impact: The Department is providing an implementation date of January 1, 2011 in order to provide sufficient time for the regulated community to prepare for compliance with Part 241. The facilities must reformulate asphalt pavement products, but compliant formulations already exist. The Department, therefore, does not anticipate any adverse impacts on employment from the adoption of these rule revisions. The Department, moreover, believes that this rule will have a positive economic impact on the asphalt pavement industry because there is a potential reduction in operating costs.

As a member of the OTC, the Department participated in outreach through development of regulatory guidance, in the form of a model rule. The Department participated in outreach to the regulated community through this process, including the solicitation of comments from affected industry and a public meeting. A specific New York State process will be undertaken, including public notice, hearing, and comment opportunities to all areas of the state as part of this rulemaking.

There are no adverse impacts expected from either the listing of VOC compounds or from the elimination of methyl ethyl ketone from the HAP list. Facilities will be allowed to use these compounds, with reduced photochemical reactivity, as alternatives to other compounds, reducing their environmental impact and, potentially, operating costs.

In sum, the Department does not expect this regulation to have an adverse effect on employment in the State.

5. Self employment opportunities: Not applicable.

Assessment of Public Comment

The New York State Department of Environmental Conservation's (NYSDEC) received a set of comments from the US EPA regarding the proposed regulation.

1. Comment: EPA recommends that New York achieve regional consistency by adopting a similar VOC limit to the other member states of the OTC which limits the emulsified asphalt to a 0.1 percent VOC by weight (or comparable limit in milliliters of oil distillate per 200 gram sample) during the ozone season months.

Response: Department staff representing New York in the Ozone Transport Commission (OTC) entered into a 'Memorandum of Understanding Among the States of the Ozone Transport Commission Regarding the Development of Specific Control Measures to Support Attainment and Maintenance of the Ozone National Ambient Air Quality Standards' on June 1, 2000 (the MOU) to address the regional problem of ozone nonattainment across the Ozone Transport Region. The MOU recognized EPA-identified emission reduction shortfalls in the attainment demonstrations of some OTC states, and that regional control measures could best help to address these shortfalls.

The OTC member states issued a formal resolution during the June 7, 2006 OTC Annual Meeting in which they agreed to pursue rulemakings or other implementation methods to achieve reductions of emissions from various categories of VOCs and NOx. See 'Resolution 06-02 Of The Ozone Transport Commission Concerning Coordination And Implementation Of Regional Ozone Control Strategies For Certain Source Categories'. By Resolution 06-02, the OTC member states agreed to establish a VOC content limit (emission rate) for asphalt pavement of 4 percent.

Approximately 75 percent of all asphalts used in NYS are limited by the proposed regulation to 2.5 percent or less VOC content by weight (five or three milliliters oil distillate) as follows: First, approximately 50 percent of all asphalt emulsions in NYS are in the first category in the regulation under subdivision 241.3(a) (RS-1, SS-1, SS-1h, CRS-1, CSS-1, and CSS-1h) and are used primarily as penetrating prime coats between layers of asphalt pavement. Second, approximately 25 percent of asphalts are from the second category under subdivision 241.3(b) (RS-2, CRS-2, and HFRS-2).

The remaining 25 percent of asphalts are known as "mixing grade" emulsions. These asphalts are used with a dense graded aggregate in a variety of cold mix paving and recycling operations. These grades need more solvent to appropriately mix the aggregate and emulsion. The solvent is primarily needed to coat the fine aggregate. As the amount of fine aggregate in the mix is increased, more solvent must be added to the mix to sufficiently saturate it. This is of particular concern to localities as they are more apt to use stone with high fine aggregate proportions. These types of

asphalts are included in the last 2 categories under subdivisions 241.3(c) and 241.3(d) (MS-2, HFMS-2 and HFMS-2h) and (CMS-2 and CMS-2h).

Division of Air Resources staff used a value of four percent for asphalt when they performed modeling for the OTC to determine whether these proposed reductions, along with all of the other control measures, would be enough to demonstrate attainment of air quality standards. The categories in the proposed regulation (subdivisions 241.3(a), (b), (c), and (d)) represent reductions of 25 percent, 17 percent, 20 percent, and 17 percent, respectively.

The Department chose to reduce VOC content by these percentages because the Department believes, based on input from the New York State Department of Transportation, that requiring further VOC reductions would hamper the development of emerging technologies. NYSDOT is experimenting with the use of emulsified asphalt in recycled-in-place asphalt pavements and warm mix asphalt and has concluded that further VOC reductions at this time will limit the development of these technologies.

2. Comment: Proposed subpart 241.4, "Cutback Asphalt" prohibits the use of cutback asphalt except in certain circumstances. EPA recommends that New York establish a VOC content limit for those certain circumstance exceptions, i.e., 0.1 percent (or equivalent limit expressed in milliliters of oil distillate per 200 gram sample) from April 15 to October 15.

Response: This rulemaking does not specifically address the VOC content limit for cutback asphalt. The Department merely continued the prohibition on the use of cutback asphalt that already existed (along with the limited exemptions).

3. Comment: Proposed subpart 214.5, "Asphalt Based Surface Coating" establishes a 100 gram of VOC per liter limit. New York should consider revising the limit to 50 gram per liter, consistent with the CARB's SCM and the July 1, 2009 California Bay Area AQMD Regulation 8, Organic Compounds Rule 3, Architectural Coatings "driveway sealer" limit with a future effective date of 1/1/2011.

Response: The Department is currently participating in an ongoing OTC process to develop model rules to update the Architectural and Industrial Maintenance coatings regulations, in coordination with other states in the region. Department staff chair a subcommittee charged with investigating lower limitations for a number of coatings, including asphalt based surface coatings. The subcommittee is considering the VOC content limit for asphalt coatings at 50 grams per liter. Once the model rules are developed and an MOU among the OTC states has been signed by the OTC member commissioners, the Department will consider revising Part 241 accordingly.

4. Comment: If New York decides to adopt a seasonal limit for the cutback or emulsified asphalt - New York should then include a provision which requires that any noncompliant asphalt be stored in sealed containers during the ozone season.

Response: The Department appreciates the suggestion.

Department of Health

EMERGENCY RULE MAKING

NYS Newborn Screening Panel

I.D. No. HLT-40-10-00008-E

Filing No. 964

Filing Date: 2010-09-17

Effective Date: 2010-09-17

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

Action taken: Amendment of section 69-1.2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2500-a

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

Specific reasons underlying the finding of necessity: Advancing technology, and emerging and rising public expectations for this critical public health program demand that the panel of screening conditions be expanded through this amendment of 10 NYCRR Section 69-1.2, which would add one inherited disorder of the immune system to the scope of newborn screening services already provided by the Department's Wadsworth Center. This regulatory amendment adds one condition - severe combined immunodeficiency (SCID) - to the 44 genetic/congenital disorders and one infectious disease that comprise New York State's newborn screening

test panel. The Department of Health finds that immediate adoption of this rule is necessary to preserve the public health, safety and general welfare, and that compliance with State Administrative Procedure Act (SAPA) Section 202(1) requirements for this rulemaking would be contrary to the public interest.

Immediate implementation of the proposed screening for SCID is both feasible and obligatory at this time. A laboratory test method using a dried blood spot specimen was recently validated by the Department's Newborn Screening Program. The Program has determined that a scaled-up version of the recently developed test method reproducibly generates reliable results for the large number of newborns' specimens accepted by the Program. The required instrumentation (i.e., robots to prepare DNA and thermal cyclers to detect TRECs) is already in operation at the Department's Wadsworth Center laboratory and dedicated to newborn screening. A system for follow-up and ensuring access to necessary treatment for identified infants is fully established and adequately staffed.

Early detection through screening is critical to successful treatment of SCID. A survey of more than 150 patients commissioned by the Immune Deficiency Foundation found that SCID patients who were diagnosed early and treated by 3.5 months showed a 91-percent survival rate; those treated after 3.5 months had a 76-percent survival rate. Average costs for a bone marrow transplant also increase significantly after the infant reaches 3.5 months of age, exceeding \$300,000 because of additional complications and the need for more supportive care. Now that the Program is technically proficient in DNA technology, data collection and interpretation, and has demonstrated proficiency in triage and referral procedures, failure to include SCID screening immediately would mean infants would go undetected, undetected, and may suffer serious systemic infections and even succumb to an early death. Accordingly, the Department is obligated to avoid further delays in implementing screening for SCID.

Subject: NYS Newborn Screening Panel.

Purpose: Adds Severe Combined Immunodeficiency (SCID) to NYS Newborn Screening Panel.

Text of emergency rule: Section 69-1.2(b) is amended as follows:

(b) Diseases and conditions to be tested for shall include:
argininemia (ARG);

* * * *

propionic acidemia (PA);
severe combined immunodeficiency and other inherited T-cell deficiencies (SCID)

short-chain acyl-CoA dehydrogenase deficiency (SCADD);

tyrosinemia (TYR); and

very long-chain acyl-CoA dehydrogenase deficiency (VLCADD)

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 15, 2010.

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

Summary of Regulatory Impact Statement

Statutory Authority:

Public Health Law (PHL) Section 2500-a (a) provides statutory authority for the Commissioner of Health to designate in regulation diseases or conditions for newborn testing in accordance to the Department's mandate to prevent infant and child mortality, morbidity, and diseases and disorders of childhood.

Legislative Objectives:

In enacting PHL Section 2500-a, the Legislature intended to promote public health through mandatory screening of New York State newborns to detect those with serious but treatable neonatal conditions and to ensure their referral for medical intervention. Emerging medical treatments and the complexity of genetic testing require periodic reassessments of the benefits of newborn screening. These reassessments ensure that the New York State's Newborn Screening Program (the NYS Program) meets the legislative intent of preventing childhood diseases and disorders by early detection. This proposal, which would modify the newborn screening panel currently in regulation by adding severe combined immunodeficiency (SCID), is in keeping with the legislature's public health aims of early identification and timely medical intervention for all the State's youngest citizens.

Needs and Benefits:

Severe Combined Immunodeficiency (SCID) is a primary immune deficiency, which results in the infant's failure to develop a normal immune system. The defining characteristic for SCID is a severe defect in the production and function of T-cells and/or B-cells. Affected infants are susceptible to a wide range of infections that are typically controlled by a

normal immune system. If undetected and untreated, SCID typically leads to death in the first year of life. It is noteworthy that, in May of 2010, the U.S. Department of Health and Human Services (DHHS) Secretary Kathleen Sebelius added SCID to the core newborn screening panel that represents a national standard 30-test panel that states are encouraged to adopt.

The pediatric immunology community now recognizes this once-fatal disease is a disorder that can be treated and most likely cured at a reasonable cost. Early detection through screening is critical to successful treatment. Current estimates suggest that one in every 50,000 to 100,000 newborns may be affected; however, since many infants may succumb to infection before being diagnosed, the true incidence of SCID and related forms of T-cell immune deficiency may be higher. A DNA-based test for immune deficiency has been recently modified for accurate, high-throughput analyses, making possible its use for newborn screening. This test detects T-cell Receptor Gene Excision Circles or TRECs, which are produced during normal T-cell maturation but are absent or severely reduced in infants with SCID.

Immediately after confirming a SCID diagnosis, infants are started on intravenous immunoglobulins (IVIG) and antibiotics, and a donor search is initiated to perform stem cell transplant from donor bone marrow or cord blood. SCID infants and children require IVIG for as long as they lack the ability to produce antibodies - before and often for some time after a transplant. If the transplant proves not totally corrective, IVIG may be needed for life. Alternatively, enzyme replacement therapy with bovine pegademase (PEG-ADA), an injectable medication, can be used to treat the approximately 40-percent of SCID patients with a form of the disorder characterized by a deficiency of the enzyme adenosine deaminase. This treatment is typically used only when the patient is not a candidate for the more conventional bone marrow transplant treatment.

General health care costs attributable to treatment of SCID-confirmed infants, including those related to a stem cell transplant (i.e., use of a surgical suite, stays in the neonatal intensive care unit) cannot be assessed due to large variations in charges for the professional component of specialists' and ancillary providers' services, and the scope of potentially required donor-matching services. However, overall health care costs would be reduced since early diagnosis of SCID provides the opportunity for less expensive treatments, and avoids medical complications, thereby reducing the number and average length of hospital stays, and emergency and intensive care services necessary due to recurrent infections in affected children.

If a matched, related donor cannot be found or a transplant fails, infants diagnosed with SCID typically are initially treated using IVIG as an outpatient procedure. Since IVIG only replaces the missing end product, but does not correct the deficiency in antibody production, the replacement therapy usually becomes necessary for the patient's entire lifespan. The cost of lifetime IVIG replacement therapy is estimated to be approximately \$600,000. Costs for enzyme replacement therapy for one form of SCID with PEG-ADA, which is designated as an orphan drug, are estimated at \$3,800 per injection. PEG-ADA is administered by intramuscular injection twice weekly and once weekly after stabilization is reached, usually in one to three weeks. Costs for a transplant including a 1 year follow-up period are \$300,000, while costs for an unscreened and undiagnosed child who does not receive early treatment can exceed \$600,000.

Costs:

Costs to Private Regulated Parties:

Birthing facilities would incur no new costs related to collection and submission of blood specimens to the NYS Program, since the dried blood spot specimens now collected would also be tested for SCID.

The NYS Program estimates that following implementation of this proposal, 125 newborns would screen positive for SCID annually statewide, with SCID being confirmed in seven of those infants.

Birthing facilities would likely incur minimal additional costs related to fulfilling their responsibilities for referral of screen-positive infants; such costs would be limited to human resources costs for less than 0.5 person-hour. Any birthing facility can calculate its specific cost impact based on its annual number of births and related expenses, and a referral rate of one infant per 2,100 births. The Department estimates that on average specialized care facilities would receive referrals of fewer than two infants per month for clinical assessment and additional testing to confirm or refute screening results.

Annual cost for arranging for SCID-related referrals for a facility at which 2,000 babies are delivered each year would range from 1/2 of \$40 to 1/2 of \$100, depending on whether clerical staff or nursing staff arranged for the referral, or specifically \$20-50 a year. Larger birthing facilities (i.e., those with the resources to perform transplants) would not incur even these minimal costs for referral to another facility.

Costs for Implementation and Administration of the Rule:

Costs to State Government:

State-operated facilities providing birthing services and infant follow-up and medical care would incur costs and savings as described above for private regulated parties.

State Medicaid costs will not increase with regard to referral costs, as such costs are included in rates for delivery-related services, and are not separately reimbursed. Costs associated with treatment for SCIDS for Medicaid-eligible infants would generally be borne by the State, as most counties have already reached their cap for Medicaid liability. However, there would likely be a net savings to Medicaid since early diagnosis provides the opportunity for less expensive treatment, (on the order of \$300,000) and avoids medical complications, thereby reducing the number and average length of hospital stays, and emergency and intensive care services necessary due to recurrent infections (which can exceed \$600,000).

Costs to the Department:

Costs incurred by the Department's Wadsworth Center for performing SCID screening tests, providing short- and long-term follow-up, and supporting continuing research in neonatal and genetic diseases will be covered by State budget appropriations. The Program expects minimal to no additional laboratory instrumentation costs related to this proposal, since the necessary technology has already been purchased.

The Department will incur minimal administrative costs for notifying all New York State-licensed physicians, hospital chief executive officers (CEOs) and their designees, and other affected parties, by letter informing them of a newborn screening panel expansion or, on an ongoing basis, of information regarding positive SCID screening results.

Costs to Local Government:

Local government-operated facilities providing birthing services and medical care to affected infants would incur the costs and savings described above for private regulated parties.

Local Government Mandates:

The proposed regulations impose no new mandates on any county, city, town or village government; or school, fire or other special district, unless a county, city, town or village government; or school, fire or other special district operates a facility, such as a hospital, caring for infants 28 days of age or under and, therefore, is subject to these regulations to the same extent as a private regulated party.

Paperwork:

No increase in paperwork would be attributable to activities related to specimen collection, and reporting and filing of test results. Facilities that submit newborn specimens will sustain minimal to no increases in paperwork, specifically, only that necessary to conduct and document follow-up and/or referral of infants with abnormal screening results. Educational materials for parents and health care professionals and forms will be updated to include information on SCID at minimal costs at the next printing.

Duplication:

These rules do not duplicate any other law, rule or regulation.

Alternative Approaches:

Potential delays in detection of SCID until onset of clinical symptoms would result in increased infant morbidity and mortality, and are therefore unacceptable. Given the recent recommendation by DHHS, which takes into account that treatment is available to ameliorate adverse clinical outcomes in affected infants, the Department has determined that there are no alternatives to requiring newborn screening for this condition.

Federal Standards:

The DHHS has recommended a core newborn screening panel that represents a national standard 30-test panel that states are encouraged to adopt. A DHHS-commissioned Advisory Committee on Heritable Disorders of Newborns and Children recently recommended that states' newborn screening programs amend their test panels to include SCID. With the addition of SCID to its panel, the NYS Program would include all the DHHS-recommended tests.

Compliance Schedule:

The Commissioner of Health is expected to notify all New York State-licensed physicians by letter informing them of this newborn screening panel expansion. The letter will also be distributed to hospital CEOs and their designees responsible for newborn screening, as well as to other affected parties.

The infrastructure and mechanisms for making the necessary referrals is already in place in birthing facilities. Consequently, regulated parties should be able to comply with these regulations as of their effective date.

Regulatory Flexibility Analysis

Effect on Small Businesses and Local Governments:

This proposed amendment to add one new condition - an immunodeficiency disorder known as severe combined immunodeficiency (SCID) to the list of 44 genetic/congenital disorders and one infectious disease, for which every newborn in New York State must be tested, will affect hospitals; alternative birthing centers; and physician and midwifery practices operating as small businesses, or operated by local government,

provided such facilities care for infants 28 days of age or under, or are required to register the birth of a child. The Department estimates that ten hospitals and one birthing center in the State meet the definition of a small business. No facility recognized as having medical expertise in clinical assessment and treatment of SCID is operated as a small business. Local governments, including the New York City Health and Hospitals Corporation, operate 21 hospitals. New York State licenses 67,790 physicians and certifies 350 licensed midwives, some of whom, specifically those in private practice, operate as small businesses. It is not possible, however, to estimate the number of these medical professionals operating an affected small business, primarily because the number of physicians involved in delivering infants cannot be ascertained.

Compliance Requirements:

The Department expects that affected facilities, and medical practices operated as small businesses or by local governments, will experience minimal additional regulatory burdens in complying with the amendment's requirements, as functions related to mandatory newborn screening are already embedded in established policies and practices of affected institutions and individuals. Activities related to collection and submission of blood specimens to the State's Newborn Screening Program will not change, since newborn dried blood spot specimens now collected and mailed to the Program for other currently performed testing would also be used for the additional test proposed by this amendment.

Birthing facilities and at-home birth attendants (i.e., licensed midwives) would be required to follow up infants screening positive for SCID, and assume some responsibility for referral for medical evaluation and additional testing as they do for other conditions. The anticipated increased burden is expected to have a minimal effect on the ability of small businesses or local government-operated facilities to comply, as no such facility would experience an increase of more than one to two per month in the number of infants requiring referral.

On average, each birthing facility can expect to refer no more than one additional infant per year for clinical assessment and confirmatory testing as a result of this amendment's proposal to add SCID screening to the existing newborn screening panel. This increase is expected to have minimal effect on a birthing facility's workload since at present approximately 30 infants, on average, are referred by birthing facilities statewide; with the addition of SCID this number would increase by an average of one infant. Therefore, no additional staff would be required for these institutions to comply with this proposal.

The Department anticipates that more than 95 percent of approximately 125 referred infants will ultimately be found not to be afflicted with SCID, based on clinical assessment and laboratory tests.

The Department expects that regulated parties will be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Professional Services:

No need for additional professional services is anticipated. Birthing facilities' existing professional staff are expected to be able to assume any increase in workload resulting from the Program's newborn screening for SCID and identification of screen-positive infants. Infants with positive screening tests for SCID would be referred to a facility employing a physician and other medical professionals with expertise in SCID.

Compliance Costs:

Birthing facilities operated as small businesses and by local governments, and practitioners who are small business owners (e.g., private practicing licensed midwives who assist with at-home births) will incur no new costs related to collection and submission of blood specimens to the State Newborn Screening Program, since the dried blood spot specimens now collected and mailed to the Program for other currently available testing would also be used for the additional test proposed by this amendment. However, such facilities, and, to a lesser extent, at-home birth attendants, would likely incur minimal costs related to following up infants screening positive for SCID, primarily because the testing proposed under this regulation is expected to result in, on average, fewer than one referral per year at each of the 11 birthing facilities that are small businesses.

The NYS Program estimates that following implementation of this proposal, 125 newborns would screen positive for SCID annually statewide. Since timing is crucial, i.e., treatment must commence early to be effective, newborns who screen positive will require immediate referral to a facility with the requisite expertise for clinical assessment and laboratory testing. The Department estimates that on average such a facility would receive referrals of fewer than one infant per month for clinical assessment and additional testing to confirm or refute screening results. Cost figures that follow are based on 125 as a high-end estimate for the maximum number of infants statewide needing immediate referral.

Communicating the need for and/or arranging referral for medical evaluation of an identified infant would require less than 0.5 person-hour; no additional staff would be required. Annual cost for arranging for SCID-related referrals for a facility at which 2,000 babies are delivered each

year would range from 1/2 of \$40 to 1/2 of \$100, depending on whether clerical staff or nursing staff arranged for the referral, or specifically \$20-50 a year. Larger birthing facilities (i.e., those with the resources to perform transplants) would not incur even these minimal costs for referral to another facility.

Economic and Technological Feasibility:

The proposed regulation would present no economic or technological difficulties to any small businesses and local governments affected by this amendment. The infrastructure for specimen collection and referrals of affected infants are already in place.

Minimizing Adverse Impact:

The Department did not consider alternate, less stringent compliance requirements, or regulatory exceptions for facilities operated as small businesses or by local government, because of the importance of the proposed testing to statewide public health. The addition of SCID to the newborn screening panel will not impose a unique burden on facilities and practitioners that are operated by a local government or as a small business. These amendments will not have an adverse impact on the ability of small businesses or local governments to comply with Department requirements for mandatory newborn screening, as full compliance would require minimal enhancements to present specimen collection, reporting, follow-up and recordkeeping practices.

Small Business and Local Government Participation:

The Program will notify all New York State-licensed physicians by letter informing them of this newborn screening panel expansion. An informational letter will also be distributed to hospital chief executive officers (CEOs) and their designees responsible for newborn screening, as well as to other affected parties. Regulated parties that are small businesses and local governments are expected to be prepared to participate in screening and follow-up for SCID on the effective date of this amendment because the staff and infrastructure needed for specimen collection and referrals of affected infants are already in place.

Rural Area Flexibility Analysis

Types of Estimated Numbers of Rural Areas:

Rural areas are defined as counties with a population of fewer than 200,000 residents; and, for counties with a population larger than 200,000, rural areas are defined as towns with population densities of 150 or fewer persons per square mile. Forty-four counties in New York State with a population under 200,000 are classified as rural, and nine other counties include certain townships with population densities characteristic of rural areas.

This proposed amendment to add one new condition - severe combined immunodeficiency (SCID) - to the list of 44 genetic/congenital disorders and one infectious disease, for which every newborn in the State must be tested, would affect hospitals, alternative birthing centers, and physician and midwifery practices located in rural areas, provided such facilities care for infants 28 days of age or under, or are required to register the birth of a child. The Department estimates that 54 hospitals and birthing centers operate in rural areas, and another 30 birthing facilities are located in counties with low-population density townships. No facility recognized as having medical expertise in clinical assessment and treatment of SCID operates in a rural area. New York State licenses 67,790 physicians and certifies 350 licensed midwives, some of whom are engaged in private practice in areas designated as rural; however, the number of professionals practicing in rural areas cannot be estimated because licensing agencies do not maintain records of licensees' employment addresses.

Reporting, Recordkeeping and Other Compliance Requirements:

The Department expects that birthing facilities and medical practices affected by this amendment and operating in rural areas will experience minimal additional regulatory burdens in complying with the amendment's requirements, as activities related to mandatory newborn screening are already part of established policies and practices of affected institutions and individuals. Collection and submission of blood specimens to the State's Newborn Screening Program will not be altered by this amendment; the dried blood spot specimens now collected and mailed to the Program for other currently available newborn testing would also be used for the additional test proposed by this amendment. However, birthing facilities and at-home birth attendants (i.e., licensed midwives) would be required to follow up infants screening positive for SCID, and assume referral responsibility for medical evaluation and additional testing. This requirement is expected to affect minimally the ability of rural facilities to comply, as no such facility would experience an increase of more than one to two per month in infants requiring referral. Therefore, the Department anticipates that regulated parties in rural areas will be able to comply with these regulations as of their effective date, upon filing with the Secretary of State.

Professional Services:

No need for additional professional services is anticipated. Birthing facilities' existing professional staff are expected to be able to assume any increase in workload resulting from the Program's newborn screening for

SCID and identification of screen-positive infants. Infants with a positive screening test for SCID will be referred to a facility employing a physician and other medical professionals with expertise in SCID.

Compliance Costs:

Birth facilities operating in rural areas and practitioners in private practice in rural areas (i.e., licensed midwives who assist with at-home births) will incur no new costs related to collection and submission of blood specimens to the State's Newborn Screening Program, since the dried blood spot specimens now collected and mailed to the Program for other currently available testing would also be used for the additional test proposed by this amendment. However, such facilities and, to a lesser extent, at-home birth attendants would likely incur minimal costs related to follow-up of infants screening positive, since the proposed added testing is expected to result in no more than one additional referral per month. Communicating the need and/or arranging referral for medical evaluation of one additional identified infant would require less than 0.5 person-hour, and these tasks are expected to be able to be accomplished with existing staff. Annual cost for arranging for SCID-related referrals for a facility at which 2,000 babies are delivered each year would range from ½ of \$40 to ½ of \$100, depending on whether clerical staff or nursing staff arranged for the referral, or specifically \$20-50 a year. Larger birthing facilities (i.e., those with the resources to perform transplants) would not incur even these minimal costs for referral to another facility. The Department estimates that more than 95 percent of infants will be ultimately found not to be afflicted with the target condition, based on clinical assessment and additional testing.

Minimizing Adverse Impact:

The Department did not consider less stringent compliance requirements or regulatory exceptions for facilities located in rural areas because of the importance of expanded infant testing to statewide public health and welfare. The addition of SCID to the newborn screening panel will not impose a unique burden on facilities and practitioners operating in rural areas. These amendments will not have an adverse impact on the ability of regulated parties in rural areas to comply with Department requirements for mandatory newborn screening, as full compliance would entail minimal changes to present collection, reporting, follow-up and record-keeping practices.

Rural Area Participation:

The Program will notify all New York State-licensed physicians by letter informing them of this newborn screening panel expansion. An informational letter will also be distributed to hospital chief executive officers (CEOs) and their designees responsible for newborn screening, as well as to other affected parties. Regulated parties in rural areas are expected to be able to participate in screening and follow-up for SCID on the effective date of this amendment.

Job Impact Statement

A Job Impact Statement is not required because it is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs and employment opportunities. The amendment proposes the addition of an immune system disorder, severe combined immunodeficiency (SCID), to the scope of newborn screening services provided by the Department. It is expected that no regulated parties will experience other than minimal impact on their workload, and therefore none will need to hire new personnel. Therefore, this proposed amendment carries no adverse implications for job opportunities.

Insurance Department

EMERGENCY RULE MAKING

Valuation of Life Insurance Reserves

I.D. No. INS-40-10-00004-E

Filing No. 960

Filing Date: 2010-09-17

Effective Date: 2010-09-17

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

Action taken: Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

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

Specific reasons underlying the finding of necessity: This amendment to Regulation No. 147 removes restrictions on the mortality adjustment factors (known as X factors) in the deficiency reserve calculation. The current restrictions on the X factors prevent some insurers from using mortality rates with a slope similar to their expected mortality. The purpose of the X factor in the deficiency reserve calculation is to allow insurers to adjust the valuation mortality assumptions so that the mortality rates better reflect experience mortality rates; removal of current restrictions will allow this to occur. In many cases, this will reduce the amount of deficiency reserves held by an insurer. However, in order to safeguard against inappropriate reserve levels, every insurer using an X factor that is less than 100 percent at any duration for any policy is required by Section 98.4(b)(5) of the Regulation to submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report that complies with the requirements of the Actuarial Standards of Practice.

This amendment also provides clarification in the calculation of the segment length, and addresses whether recalculation is required when valuation mortality changes. Specifically, for companies that are using the 2001 CSO Preferred Structure Mortality Table, there may be instances where the valuation mortality must be changed to meet the requirements of 11 NYCRR 100 (Regulation 179) with respect to the present value of death benefits over certain future periods. In such instances, the segment length would not need to be recalculated for policies issued prior to January 1, 2009.

These standards have already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted these changes for year-end 2009. Since New York has a separate regulation addressing this subject matter, the revised standards are not automatically adopted and need to be adopted via an amendment to Regulation No. 147. Insurers domiciled in states that do not adopt these changes will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes. Adopting these standards will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

Adoption of the amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if these amendments are not adopted. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the September 30, 2010 quarterly statement is November 15, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009, March 25, 2010, and June 21, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 12, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For all of the reasons stated above, an emergency adoption of this third amendment to Regulation No. 147 is necessary for the general welfare.

Subject: Valuation of Life Insurance Reserves.

Purpose: Incorporates revisions to National Association of Insurance Commissioners model regulation and actuarial guideline.

Text of emergency rule: Subparagraphs (ii) and (iii) of Section 98.4(b)(5) of this Part are repealed and subparagraphs (iv) through (ix) are renumbered (ii) through (vii).

Section 98.4(b)(5)(v) of this Part, as re-lettered by this amendment above, is amended to read as follows:

(v) The appointed actuary may decrease X at any valuation date as

long as X [does not decrease in any successive policy years and as long as it] continues to meet all the requirements of this paragraph;

New subdivisions (c) and (d) are added to section 98.5 to read as follows:

(c) For policies subject to a non-elective change in valuation mortality rates because the requirements for continued use of the prior rates were no longer satisfied, the insurer may, but shall not be required to, recalculate the segments.

(d) For policies subject to an insurer-election to substitute the 2001 Preferred Class Structure Mortality Table for the 2001 CSO Mortality Table:

(1) If the policy was issued on a policy form filed for approval prior to January 1, 2009, the insurer may, but shall not be required to, recalculate the segments; and

(2) If the policy was issued on a policy form filed for approval after January 1, 2009, the insurer shall recalculate the segments using the new valuation mortality rates.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 15, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the Third Amendment to Regulation No. 147 (11 NYCRR 98) derives from Sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies.

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

Section 1304 of the Insurance Law requires every insurer authorized under this chapter to transact the kinds of insurance specified in paragraph one, two or three of subsection (a) of section one thousand one hundred thirteen of this chapter to maintain reserves necessary on account of such insurer's policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities ("reserves") for all outstanding policies and contracts of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves. Reserving has not historically included lapse as a factor in calculations, because it was not relevant to traditional forms of life insurance contracts, and therefore Section 4217 does not expressly include references to lapses. However, new products have been developed that were not contemplated at the time Section 4217 was written, such that lapses may be relevant in reserve calculations in some cases.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of Section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for Section 4217 to such policies and contracts as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on estimates of future experience, or in the case of any plan of life insurance or annuity that is of such a nature that the minimum reserves cannot be determined by the methods described in Section 4217(c)(6) and Section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and must be computed by a method that is consistent with the principles of Sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated

by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract. Section 4240(d)(7) states that the Superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits, or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principle focus of the Insurance Law. One fundamental way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. At the same time, an insurer benefits when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment to section 98.4(b)(5) of Regulation No. 147 (11 NYCRR 98) is necessary to help ensure the solvency of life insurers doing business in New York. The original version of Regulation No. 147, which incorporated the National Association of Insurance Commissioners (NAIC) Valuation of Life Insurance Policies model regulation (adopted in 1999), was permanently adopted in 2003. In 2004, the Department and other states became aware that some insurers were creating new products in order to avoid the reserve methodologies described in Regulation No. 147. As a result, the NAIC began developing an Actuarial Guideline in 2004 that addressed the concerns of the Department and other regulators by eliminating any perceived ambiguity in the standards for policies issued July 1, 2005 and later. This revision was adopted by the NAIC in October 2005, and Regulation No. 147 thereafter was amended on an emergency basis to reflect the principles of Section 4217 of the Insurance Law and the NAIC standards for policies issued July 1, 2005 and later. The amendment was permanently adopted effective January 10, 2007.

In September 2006, the NAIC adopted a new version of Actuarial Guideline 38, which included provisions on lapse decrements and a separate asset adequacy analysis requirement for certain universal life with secondary guarantee policies. Regulation 147 was thereafter amended again, and the amendments were adopted on December 26, 2007.

In September 2009, the NAIC adopted revisions to its model regulation related to X factors used for calculating deficiency reserves. The purpose of the X factor in the deficiency reserve calculation is to allow companies to adjust the valuation mortality to mortality that approximates the expected mortality experience of the company. Specifically, the NAIC's revisions remove the following provisions: (1) X could not be less than 20%; and (2) X could not decrease in successive policy years. Additionally, the NAIC adopted a new Actuarial Guideline 46, which provides guidance on the interpretation of the calculation of segment length when there is a change in the valuation mortality rates subsequent to issuance of the policy. For policies issued prior to January 1, 2009, the segment length would not need to be recalculated.

The current restrictions on the X factors in Regulation No. 147 prevent some companies from obtaining mortality with a slope similar to their expected mortality. The removal of these restrictions will enable companies to adjust the valuation mortality to mortality that approximates the expected mortality experience of the company. However, in order to safeguard insureds against inappropriate reserve levels by insurers, the Department requires every insurer using X factors to submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves.

This amendment to Regulation No. 147 incorporates both the NAIC revisions to the model regulation and the interpretation of the Actuarial Guideline, thus resulting in consistency between the NAIC and New York and promoting regulatory uniformity across the U.S. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure to maintain higher risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers.

Thus, the amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if these amendments are not adopted. Failure to implement the changes in New York at the same time they are implemented in other states will make New York authorized companies look weaker financially than their peer companies. If New York authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The amendment to the regulation imposes no new reporting requirements.

7. Duplication: The regulation does not duplicate any existing law or regulation.

8. Alternatives: The only alternative considered by the Department was to not remove the provisions for the X factors and to not include the guidance included in Actuarial Guideline 46 that were adopted by the NAIC in September 2009. The X factor provisions consisted of removing the requirement that X could not be less than 20% and that X could not decrease in successive policy years. The Actuarial Guideline 46 guidance relates to policies issued prior to January 1, 2009, and does not require the contract segments to be recalculated when the valuation mortality rates change after issuance of the policy.

The Department has had numerous discussions with affected insurers and their trade associations, including the Life Insurance Council of New York and American Council of Life Insurers, during the course of the development of a national standard through the National Association of Insurance Commissioners. These items are part of a larger capital and surplus relief plan for insurers. Adopting these standards will allow New York insurers to be subject to the same standards that have already been adopted by the NAIC and which are being implemented in other states. Insurers authorized in states that do not adopt these changes will be forced to hold higher reserves relative to companies authorized in states that have adopted these changes and in those circumstances, New York authorized companies would be at a deficit, from the impression that there is a significant difference in financial stability of New York authorized insurers and those authorized outside the state.

9. Federal standards: There are no federal standards in this subject area.

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2009. This amendment removes two provisions from the X factors used in calculating deficiency

reserves. However, these changes are voluntary, and insurers are not required to make either of these changes. Additionally, these changes would only affect those insurers that use X factors in calculating deficiency reserves. Since the removal of these provisions were already adopted by the NAIC, insurers that wish to incorporate these changes into their reserve methodology should have adequate time to make these changes.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this amendment will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurers and fraternal benefit societies 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. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

2. Local governments:

The amendment 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 number of rural areas: Insurers and fraternal benefit societies covered by the amendment do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: There are no reporting, recordkeeping or other compliance requirements associated with this amendment to the regulation. Entities subject to the regulation will not need to engage professional services to comply with the amendment.

3. Costs: This amendment provides for lower minimum standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: The Department has had numerous discussions with affected insurers and their trade associations, including the Life Insurance Council of New York and American Council of Life Insurers, during the course of the development of a national standard through the National Association of Insurance Commissioners.

Job Impact Statement

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment sets standards for setting life insurance reserves for insurers and fraternal benefit

societies. Compliance should not require the employment of additional personnel or outside contractors.

EMERGENCY RULE MAKING

Recognition Of The 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities

I.D. No. INS-40-10-00005-E

Filing No. 961

Filing Date: 2010-09-17

Effective Date: 2010-09-17

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

Action taken: Amendment of Part 100 (Regulation 179) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240 and 4517, and arts. 24 and 26

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

Specific reasons underlying the finding of necessity: This amendment to Regulation No. 179 extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004 with the superintendent's approval and if certain conditions are met by the insurer related to policies or portions of policies which are coinsured. Previously, this table could only be used for policies issued on or after January 1, 2007. The use of this table allows for the reserves to better match the risks associated with different underwriting classifications.

This standard has already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted this change for year-end 2009. Since New York has a separate regulation addressing this subject matter, the revised standard is not automatically adopted and needs to be adopted via an amendment to Regulation No. 179. Insurers domiciled in states that do not adopt this change will be forced to hold higher reserves relative to companies domiciled in states that have adopted this change. Adopting this standard will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

While the anticipated impact of the adoption of this proposed amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis on inforce business for New York authorized life insurers. Additionally, the impact of this change will likely increase over time. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the September 30, 2010 quarterly statement is November 15, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and

timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009, March 25, 2010, and June 21, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 12, 2010 and the Department is awaiting approval to publish the regulation.

For all of the reasons stated above, it is essential that this regulation be continued on an emergency basis for the general welfare.

Subject: Recognition Of The 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities.

Purpose: This amendment extends the use of the 2001 CSO Preferred Mortality Table to policies issued on or after January 1, 2004.

Text of emergency rule: Paragraph (3) of subdivision (a) of section 100.6 is amended to read as follows:

(3) Part 98.4(b)(5) of this Title: The 2001 CSO Mortality Table is the minimum mortality standard for deficiency reserves. If select mortality rates are used, they may be multiplied by X percent for durations in the first segment, subject to the conditions specified in Parts 98.4(b)(5)(i) – 98.4(b)(5)(ix)(vii) of this Title. In demonstrating compliance with those conditions, the demonstrations may not combine the results of tests that utilize the 1980 CSO Mortality Table with those tests that utilize the 2001 CSO Mortality Table, unless the combination is explicitly required by regulation or necessary to be in compliance with relevant Actuarial Standards of Practice.

Subdivision (a) of section 100.8 is amended to read as follows:

(a) At the election of the insurer, for each calendar year of issue, for any one or more specified plans of insurance and subject to satisfying the conditions stated in section 100.9 of this Part, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum mortality standard for policies issued on or after January 1, 2007. *For policies issued on or after January 1, 2004, and prior to January 1, 2007, the 2001 CSO Preferred Class Structure Mortality Table may be substituted with the prior approval of the superintendent and subject to the conditions of section 100.9 of this Part.* A table from the 2001 CSO Preferred Class Structure Mortality Table used in place of a 2001 CSO Mortality Table, pursuant to the requirements of this Part, will only be treated as part of the 2001 CSO Mortality Table for purposes of reserve valuation.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 15, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The superintendent's authority for the adoption of 11 NYCRR 100 (Regulation No. 179) derives from sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240, 4517, Article 24, and Article 26 of the Insurance Law.

These sections establish the superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies.

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

Section 1304 of the Insurance Law requires insurers to maintain reserves for life insurance policies and certificates according to prescribed tables of mortality and rates of interest.

Section 4217(c)(2)(A)(iii) permits, as a minimum standard of valuation for life insurance policies, any ordinary mortality table adopted by the National Association of Insurance Commissioners (NAIC) after 1980, and approved by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated by the commissioners reserve valuation method

replacing the modified net premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the NAIC after 1980, and approved by the superintendent, for use in determining the minimum nonforfeiture standard.

Section 4224(a)(1) prohibits unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for life insurance policies.

Section 4240(d)(7) states the superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section, which covers various issues related to separate accounts of insurance companies, including reserve issues.

Section 4517(c)(2) requires fraternal benefit societies to comply with the minimum valuation standards of section 4217 of the Insurance Law for life insurance certificates issued on or after January 1, 1980.

Article 24 describes unfair methods of competition and unfair and deceptive acts and practices.

Article 26 describes unfair claim settlement practices, other misconduct and discrimination.

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principal focus of the Insurance Law. One fundamental way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policyholders. The Insurance Law prescribes the mortality tables and interest rates to be used for calculating such reserves. At the same time, an insurer benefits when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment extends the use of the 2001 CSO Preferred Structure Mortality Table to policies issued on or after January 1, 2004. Use of this table allows for the reserves to better match the risks associated with different underwriting classifications. However, use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. While the anticipated impact of this amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis. Based on a survey conducted by the American Council of Life Insurers, the industry wide impact of allowing the use of this table for policies issued on or after January 1, 2004 is estimated to be a decrease in reserves of approximately \$600 million - \$1.2 billion. The retroactive use of such table will not jeopardize New York's long-standing tradition of protecting insureds from insurers that under-serve since the use of such table is conditional, dependent upon the requirements set forth in the current rule being met by the insurer. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the proposed amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases, by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure to maintain higher risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted. Failure to implement the changes in New York at the same time they are implemented in other states will make New York authorized companies look weaker financially than their peer companies. If New York authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will

create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves. Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been available for use by insurers since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004, and the use of this table is optional.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this amendment to Regulation No. 179. There are no costs to other government agencies or local governments.

5. Local government mandates: The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The current rule imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years.

7. Duplication: The regulation does not duplicate any existing law or regulation.

8. Alternatives: The only alternative considered was to not extend the date of using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004. However, this would result in higher reserve requirements for New York authorized life insurers and fraternal benefit societies on some policies, since this change was adopted by the NAIC in September 2009. This change was discussed during various NAIC conference calls and the Department conducted outreach with affected stakeholders, including the Life Insurance Council of New York. Additionally, the American Council of Life Insurers was instrumental in drafting the language for the revised regulation.

This item is part of a larger capital and surplus relief plan for insurers. Adopting this amendment will allow New York insurers to be subject to the same standard that has already been adopted by the NAIC and which is being implemented in other states. Insurers authorized in states that do not adopt this change will be forced to hold higher reserves relative to companies authorized in states that have adopted this change and in those circumstances, New York authorized companies would be at a disadvantage, from the impression that there is a significant difference in financial stability of New York authorized insurers and those authorized outside the state.

9. Federal standards: There are no federal standards in the subject area.

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2009. This amendment allows the use of 2001 CSO Preferred Class Structure Mortality Table for policies issued on or after January 1, 2004. Use of the 2001 CSO Preferred Class Structure Mortality Table, however, is not mandatory. Voluntary election of such table is conditional, dependent upon the requirements set forth in the current rule being met by the insurer. The actuarial certification and supporting actuarial report is due annually on March 1. The statistical report required for insurers that use the 2001 CSO Preferred Class Structure Mortality Table is due annually on July 1. Since use of the 2001 CSO Preferred Class Structure Mortality Table was previously in effect and this amendment only extends the date for using the table, insurers should have ample time to meet the reporting requirements.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this amendment will not

impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all life insurers and fraternal benefit societies authorized to do business in New York State, none of which fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act. The Insurance Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies and believes that none of them fall within the definition of "small business", because there are none which are both independently owned and have under one hundred employees.

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 number of rural areas: Insurers covered by the regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004. The current regulation imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years. Use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. Voluntary election of such table is conditional on the requirements set forth in the prior version of the regulation, which became effective on December 26, 2007, being met by the insurer.

3. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefits societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been able to be used since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004 and the use of this table is optional.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this rule. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: This amendment was discussed during various public NAIC conference calls, and the Department conducted outreach with affected stakeholders, including the Life Insurance Council of New York. Additionally, the American Council of Life Insurers was instrumental in drafting the language for the revised regulation.

Job Impact Statement

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table for use in determining minimum reserve liabilities and nonforfeiture benefits back to policies issued on or after January 1, 2004. Previously, this table could be used for policies issued on or after January 1, 2007. This rule will lower reserve requirements for those insurers that elect to use this table for policies issued on or after January 1, 2004 and therefore decrease the cost of doing business in New York. Compliance should not require the employment of additional personnel or outside contractors.

**EMERGENCY
RULE MAKING**

Workers' Compensation Insurance Assessments

I.D. No. INS-40-10-00007-E

Filing No. 963

Filing Date: 2010-09-20

Effective Date: 2010-09-20

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

Action taken: Addition of Subpart 151-6 (Regulation 119) to Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the Workers' Compensation Board ("WCB") to assess insurers and the State Insurance Fund, for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the Workers' WCB, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the State Insurance Fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

Prior to January 1, 2010, the Workers' Compensation Law required the Workers' Compensation Board to assess insurers on the total "direct premiums" they wrote in the preceding calendar year, whereas the insurers were collecting the assessments from their insureds on the basis of "standard premium," which took into account high deductible policies. As high deductible policies increased in the marketplace, a discrepancy developed between the assessment an insurer collected, and the assessment the insured was required to remit to the Workers' Compensation Board.

Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4) and 151(2)(b) to change the basis upon which the WCB collects the portion of the allocation from each insurer from "direct premiums" to "standard premium" in order to ensure that insurers are not overcharged or under-charged for the assessment, and to ensure that insureds with high deductible policies are charged the appropriate assessment. Effective January 1, 2010, therefore, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the Superintendent of Insurance to define "standard premium," for the purposes of setting the assessments, and to set rules, in consultation with the WCB, and New York Compensation Rating Board, for collecting the assessment from insureds.

This regulation was previously promulgated on an emergency basis on December 29, 2009 and March 25, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 14, 2010 and the Department is awaiting approval to publish the regulation, however because the effective date of the relevant provision of the law is January 1, 2010, and the need that the assessments be calculated and collected in a timely manner, it is essential that this regulation, which establishes procedures that implement provisions of the law, be continued on an emergency basis.

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

Subject: Workers' Compensation Insurance Assessments.

Purpose: This regulation is necessary to standardize the basis upon which the workers' compensation assessments are calculated.

Text of emergency rule: A new sub-part 151-6 entitled Workers' Compensation Insurance Assessments is added to read as follows:

Section 151-6.0 Preamble

(a) Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the workers' compensation board to assess insurers, and the state insurance fund for the special disability fund, the fund for reopened cases, and the operations of the workers' compensa-

tion board, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the state insurance fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

(b) Prior to January 1, 2010, each insurer paid a percentage of the allocation based on the total direct written premiums it wrote in the preceding calendar year. However, Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4), and 151(2)(b) to change the basis upon which the board collects the portion of the allocation from each insurer. Thus, effective January 1, 2010, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the superintendent of insurance to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the workers' compensation board, and New York workers compensation rating board for collecting the assessment from insureds.

Section 151-6.1 Definitions

As used in this Part:

- (a) Board means the New York workers' compensation board.
- (b) Insurer means an insurer authorized to write workers' compensation insurance in this state, except for SIF.
- (c) NYCIRB means the New York workers compensation rating board, which is also known as the New York workers compensation insurance rating board.
- (d) SIF means the state insurance fund.
- (e) Standard Premium means:
- (1) For a non-retrospectively rated policy:
 - (i) the premium determined on the basis of the insurer's approved rates; as modified by:
 - (a) any experience modification or merit rating factor;
 - (b) any applicable territory differential premium;
 - (c) the minimum premium;
 - (d) any construction classification premium adjustment program credits;
 - (e) any credit from return to work or drug and alcohol prevention programs;
 - (f) any surcharge or credit from a workplace safety program;
 - (g) any credit from an independently-filed insurer specialty program (for example, alternative dispute resolution, drug-free workplace, managed care or preferred provider organization programs);
 - (h) any charge for the waiver of subrogation;
 - (i) any charge for foreign voluntary coverage; and
 - (j) the additional charge for terrorism, and the charge for natural disasters and catastrophic industrial accidents; and
 - (ii) For purposes of determining standard premium, the insurer's expense constant, including the expense constant in the minimum premium, the insurer's premium discount, and premium credits for participation in any deductible program shall be excluded from the premium base; or
 - (2) For a retrospectively rated policy, the retrospective premium plus the implied premium discount.

Section 151-6.2 Collection of assessments

Every insurer and SIF shall collect the assessments required by Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) from its policyholders through a surcharge based on standard premium in an amount determined by the superintendent, in consultation with NYCIRB and the Board.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 18, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent of Insurance's authority for the promulgation of Part 151-6 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Amendment to Regulation No. 119) derives from Sections 201 and 301 of the Insurance Law, and Sections 15, 25-A, and 151 of the Workers' Compensation Law.

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.

Sections 15, 25-A, and 151 of the Workers' Compensation Law, as amended by Part QQ of Chapter 56 of the Laws of 2009 require the Superintendent to define the "standard premium" upon which assessments are made for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the Workers' Compensation Board ("WCB"). Section 15 of the Workers' Compensation Law further requires workers' compensation insurers to collect the assessments from their policyholders through a surcharge based on premiums in accordance with the rules set forth by the Superintendent, in consultation with the New York Workers' Compensation Insurance Rating Board ("NYCIRB"), and the chair of the WCB.

2. Legislative objectives: (a) Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the WCB to assess insurers writing workers' compensation insurance and the State Insurance Fund, for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the WCB, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the State Insurance Fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

Prior to January 1, 2010, the Workers' Compensation Law required the WCB to assess insurers on the total "direct premiums" they wrote in the preceding calendar year, whereas the insurers were collecting the assessments from their insureds on the basis of "standard premium," which took into account high deductible policies. As high deductible policies increased in the marketplace, a discrepancy developed between the assessment an insurer collected, and the assessment the insured was required to remit to the WCB.

Therefore, Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4) and 151(2)(b) to change the basis upon which the board collects the portion of the allocation from each insurer from "direct premiums" to "standard premium" in order to ensure that insurers are not over-charged or under-charged for the assessment, and to ensure that insureds with high deductible policies are charged the appropriate assessment. Thus, effective January 1, 2010, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the Superintendent to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the WCB, and NYCIRB for collecting the assessment from insureds.

3. Needs and benefits: This amendment is necessary, and mandated by the Workers' Compensation Law, in order to standardize the basis upon which the workers' compensation assessments are calculated to eliminate discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the WCB.

The discrepancy in the assessment calculation and remittance became evident as a result of the proliferation of large deductible policies. In many instances, the "direct premium" paid on a large deductible policy is less than the "standard premium" would be for that policy. Insurers that offered high-deductible policies were collecting for assessments using the "standard premium," but the Workers' Compensation Law was requiring the WCB to use "direct premiums" to bill insurers. Thus, in some instances, workers' compensation insurers were collecting from employers more money than they were remitting to the WCB.

4. Costs: This amendment standardizes the basis upon which the workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer col-

lects from employers, and the amount that an insurer remits to the WCB. Although the amendment itself does not impose new costs, the impact of changing the basis for workers' compensation assessments may increase costs for some insurers, but reduce costs for others. Taken together, the amendment aims to level the playing field for insurers that offer large deductible policies and those that do not.

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

6. Paperwork: This amendment requires no new paperwork. Insurers and the State Insurance Fund already collect and remit assessments to the WCB. This regulation only standardizes the basis upon which the assessments are calculated, as required by the Workers' Compensation Law.

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

8. Alternatives: No alternatives were considered, because Part QQ requires the Superintendent to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the WCB and NYCIRB, for collecting the assessment from insureds. Based on discussions with NYCIRB and the WCB, the Superintendent determined that the term "standard premium" should conform to the definition currently used by insurers, and should ensure that the definition accounts for high deductible policies.

NYCIRB has been collecting premium data on a "standard" basis since its inception nearly 100 years ago. The "standard premium" is the premium without regard to credits, deviations, or deductibles. As new credits and types of policies (such as large deductible policies) develop, NYCIRB adjusts the definition to account for the changes. The Insurance Department is merely adopting NYCIRB's current definition.

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

10. Compliance schedule: The effective date of the relevant provision of the law is January 1, 2010. The assessments must be calculated and collected as of January 1, 2010.

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 amendment applies to all workers' compensation insurers authorized to do business in New York State, as well as to the State Insurance Fund (SIF). It standardizes the basis upon which the workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers' Compensation Board.

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. 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 come within the definition of "small business" found in section 102(8) of the State Administrative Procedure Act, because SIF is neither independently owned nor operated, nor does it employ one hundred or less individuals.

2. Local governments:

The amendment does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments. This amendment does not affect self-insured local governments, because it applies only to insurers.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This amendment applies to all workers' compensation insurers authorized to do business

in New York State, as well as to the State Insurance Fund (the "SIF"). These entities do business throughout New York State, including rural areas as defined under section 102(10) of the State Administrative Procedure Act ("SAPA").

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 and SIF already collect and remit assessments to the Workers' Compensation Board ("WCB"). This amendment simply standardizes the basis upon which the assessments are calculated.

3. Costs: This amendment standardizes the basis upon which the workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the WCB. Although the amendment itself does not impose new costs, the impact of changing the basis for workers' compensation assessments may increase costs for some insurers, but reduce costs for others. Taken together, the amendment aims to level the playing field for insurers that offer large deductible policies and those that do not.

4. Minimizing adverse impact: The amendment does not impose any impact unique to rural areas.

5. Rural area participation: This amendment is required by statute. The entities covered by this amendment - workers' compensation insurers authorized to do business in New York State and the State Insurance Fund - do business in every county in this state, including rural areas as defined under section 102(10) of SAPA. This amendment standardizes the basis upon which the workers' compensation assessments are calculated.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. The rule merely standardizes the basis upon which workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers' Compensation Board. 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 rule should not have a measurable impact on self-employment opportunities.

EMERGENCY RULE MAKING

Audited Financial Statements

I.D. No. INS-40-10-00010-E

Filing No. 966

Filing Date: 2010-09-21

Effective Date: 2010-09-21

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

Action taken: Repeal of Part 89 and addition of new Part 89 (Regulation 118) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 307(b), 1109, 4710(a)(2) and 5904(b)

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

Specific reasons underlying the finding of necessity: In September 2009, the New York State Insurance Department, after several years of working closely with the National Association of Insurance Commissioners ("NAIC"), received its accreditation under the NAIC's Financial Regulations Standards and Accreditation Program ("accreditation program"). This accreditation program is the cornerstone of uniform solvency regulation across the country. By obtaining accreditation, New York was recognized as having demonstrated its continued commitment to the NAIC and state-based regulation of insurers and other regulated entities. The regulatory regime acknowledged through the accreditation program provides substantial protection for the policyholders and for state and local governments that rely on the stability and solvency of insurers that do an insurance business within their borders.

The accreditation program is designed principally to ensure that all regulated insurers are required to maintain financial solvency. Other goals

achieved by states that have been approved by the accreditation program are verification that the state conducts effective and efficient financial analysis and examination process, and has in place the appropriate organizational and personnel practices.

The benefits of accreditation for the Insurance Department are many. The chief benefit is that New York's examinations, audits and other reviews of its regulated insurers will be recognized by her sister states so that other states will not subject New York domestic insurers to greater barriers of entry and operation than non-New York insurers. Further, accreditation indicates that the Insurance Department examination and audit operations and controls meet a nationally recognized standard assuring potential policyholders that the prospective insurers meet desirable levels of financial solvency.

Accreditation is not a one-time event. Accredited insurance departments are required to undergo a comprehensive review by an independent review team every five years to ensure departments continue to meet baseline financial solvency oversight standards. Newly accredited insurance departments undergo this review both to obtain the initial approval and, in the case of the New York State Insurance Department, an additional review within two years of accreditation. The accreditation standards require state insurance departments to have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs, and that they have the necessary resources to carry out that authority.

Among the commitments made by the Insurance Department to the NAIC as a condition of New York's approval under the accreditation program is an assurance that an NAIC model audit rule (NAIC model) would be timely adopted to be effective for regulated insurers as of January 1, 2010. The purpose of the NAIC model is to implement a state statute or regulation that contains a requirement for an annual audit of each domestic insurer by an independent certified public accountant (CPA), based on the June 1998 version of the NAIC's Model Rule Requiring Annual Audited Financial Reports. Further, the NAIC model, once adopted by a state, requires that an insurer comply with certain best practices related to auditor independence, corporate governance and internal controls over financial reporting. The NAIC model reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model closely hews to the audit and controls standards established by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq., and extends that statute's application to regulated companies.

Continuation of accreditation by the NAIC requires New York to adopt specific rules in addition to those already imposed by current 11 NYCRR 89 (Regulation 118). For example, New York must prohibit each CPA from entering into an agreement of indemnity or release from liability, and must require CPA partner rotation in a manner similar to the NAIC's model.

Each of the required elements is contained in the proposed rule, either as a result of the adoption of the standards of the NAIC model or the continuation of the standards contained in present Regulation 118. New York has made every effort to conform the proposed rule to the NAIC model, except where inconsistent with a statutory requirement expressly established by New York law. Furthermore, and critically, the effective date stated in the proposed rule is required to maintain accreditation - January 1, 2010.

This regulation was previously promulgated on an emergency basis on December 28, 2009; March 25, 2010; and June 23, 2010. The proposal was sent to the Governor's Office of Regulatory Reform (GORR) on March 12, 2010. The Department and GORR had a conference call on May 6, 2010 to discuss questions and comments on the rule package. The Department sent revisions to GORR on June 23, 2010 and GORR responded with written suggestions on July 14, 2010, which are currently being reviewed. Pending GORR's approval, this regulation must be continued on an emergency basis because of the accreditation deadline.

For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the general welfare.

Subject: Audited Financial Statements.

Purpose: To implement provisions of Insurance Law, section 307(b), and add provisions required pursuant to the Federal Sarbanes-Oxley Act of 2002.

Substance of emergency rule: Part 89 (Regulation No. 118) consists of 17 sections addressing the regulation of audits conducted by regulated insurers, fraternal benefit societies and managed care organizations (collectively the "companies").

Section 89.0 states that the purpose of the regulation is to apply audit and reporting standards upon each company.

Section 89.1 lists all definitions needed for the application of the regulation.

Section 89.2 contains the requirement that each company file audited financial statements and also directs each company to its correct filing location.

Section 89.3 sets forth the details of the items to be included in each audited financial statement.

Section 89.4 requires each company to notify the superintendent of the identity of its certified independent public accountant ("CPA") and any replacement.

Section 89.5 details the necessary qualifications for a CPA and restrictions upon employment of the same CPA for an extended period.

Section 89.6 provides rules for consolidated or combined audits of groups of companies.

Section 89.7 describes the scope of the audit and report of the CPA.

Section 89.8 requires both the company and its CPA to notify the superintendent upon the occurrence of a material misstatement or adverse financial condition.

Section 89.9 imposes a duty upon each company to report unremediated material weaknesses in its internal control over financial reporting.

Section 89.10 specifies terms to be included in the contract between a company and its CPA.

Section 89.11 requires each company to ensure that work papers of the CPA will be retained for review.

Section 89.12 contains rules for the appointment and duties of each company's audit committee.

Section 89.13 specifies the rules of conduct to be followed by the company with respect to the preparation of reports and documents.

Section 89.14 describes the requirements for management's report of internal control over financial reporting and incorporates the reports prepared by some of the companies to comply with the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq.

Section 89.15 sets forth special rules needed for Canadian and British insurers.

Section 89.16 contains the effective dates and special rules.

The full text of the regulation may be found at the Department's website (<http://www.ins.state.ny.us/>).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 19, 2010.

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

Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, 307(b), 1109, 4710(a)(2) and 5904(b) of the Insurance Law. These sections establish the superintendent's authority to promulgate regulations governing audited financial statements for authorized insurers as defined by section 107 of the Insurance Law and for fraternal benefit societies and managed care organizations.

Insurance Law Sections 201 and 301 authorize the superintendent to prescribe forms and regulations interpreting the Insurance Law, and to effectuate any power granted to the superintendent under the Insurance Law.

Insurance Law Section 307(b) requires insurers to file annual financial statements on forms prescribed by the superintendent.

Insurance Law Section 1109 provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Section 4710(a)(2) requires municipal cooperative health benefit plans to file annual financial statements on forms prescribed by the superintendent.

Insurance Law Section 5904(b) requires risk retention groups not chartered and licensed as property/casualty insurers to file a copy of the annual financial statement submitted to the state in which the risk retention group is chartered and licensed.

2. Legislative objectives: 11 NYCRR 89 (Regulation 118) was originally promulgated in 1984 to implement the provisions of Section 307(b) of the Insurance Law. The proposed repeal of the current regulation and promulgation of the new regulation continues to implement the provisions of section 307(b), and add provisions required pursuant to the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. ("SOX").

3. Needs and benefits: SOX imposes a comprehensive regime of audits and internal management controls and reports designed to ensure greater transparency and accountability.

The proposed regulation is closely patterned upon a National Association of Insurance Commissioners model regulation ("NAIC model") that reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model is similar to current Regulation 118 but imposes additional rules patterned on SOX. For example, the NAIC model and proposed regulation both require the regulated insurer to forbid its CPA from entering into an agreement of indemnity or release from liability. The proposed regulation

will apply not only to companies already subject to SOX, but also to other companies, such as mutual companies, fraternal benefits societies and managed care organizations, that are presently governed by Regulation 118.

The proposed regulation, once adopted, will ensure that regulated companies engage in best practices related to auditor independence, corporate governance and internal controls over financial reporting.

4. **Costs:** This regulation imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. Costs to be incurred by the parties affected differ depending upon the size of the company and whether that company is publicly held and thus already required to comply with SOX. Companies regulated by SOX will incur few additional costs. Compliance cost estimates received from a cross-section of affected companies that are not subject to SOX are most often estimated to be minimal or negligible. Of those companies that stated compliance would require additional expenditures, the amounts range from \$25,000 a year to in excess of \$2 million (for one large mutual insurance company).

5. **Local government mandates:** The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. **Paperwork:** Paperwork associated with filings to the superintendent should be minimal. The paperwork associated with the audit and controls regime required by the proposed regulation should also be minimal.

7. **Duplication:** None.

8. **Alternatives:** In developing this regulation, the Department obtained industry input and hued to the model regulation developed by the National Association of Insurance Commissioners (the "NAIC model") to implement SOX to the extent possible. However, the model has been modified as necessary to comply with New York statutes and regulations. The proposed regulation also restricts its application only to those entities over which the Department has jurisdiction unlike the NAIC model, which also contains rules that apply to CPAs.

Several comments received by the Department noted the compliance difficulties faced by foreign companies and United States branches of alien insurers, specifically with respect to the roles to be performed by persons not residing in the United States and for the reporting requirements to be imposed upon an integrated enterprise containing insurers in New York as well as entities with no nexus to New York. In response, the Department modified the regulation to provide detailed rules as to whether members of management may attest to filings, and to establish limited exceptions available only to these entities, in addition to the provision that permits a waiver of any provision of the regulation upon evidence of financial or organizational hardship.

One commenter requested that the definition of a managed care organization ("MCO"), entities that are included within the companies subject to this regulation, be restricted to exclude those entities that operate only in New York and that only serve public programs, i.e., Medicaid, Family Health Plus and Child Health Plus. After consideration and consultation with the Department of Health, the Department narrowed the definition of an MCO to exclude all MCOs that are primarily subject to the oversight of the Department of Health, and that also do not file financial documents with the Department other than for escrow accounts. Other MCOs that do file financial documents with the Insurance Department will still be governed by this regulation.

Another commenter objected to restrictions on using the same CPA for SOX audit work and tax return preparation for more than a five-year period for small companies. The exemption from any provision of the proposed regulation available upon proof of financial or organization hardship now addresses this comment.

Several comments noted that a company may be required to file both SOX reports and the reports required by the NAIC model as adopted by the various states. Companies want to avoid making duplicative filings to those required by the state of domicile. The proposed regulation contemplates accepting the domiciliary state filings as New York filings to the extent that they are substantially similar to those required by the proposed regulation.

Several comments noted differences between the NAIC model and the proposed regulation on filing deadlines, exceptions and the rules governing confidentiality of work papers. Different dates or deadlines are due to restrictions in New York law that require modification to the NAIC model. Certain automatic exclusions from the NAIC model could not be included in the proposed regulation to the extent that they conflict with New York law. Finally, the confidentiality of commercial information, including work papers, obtained by state and local government is already subject in New York to a comprehensive regime of rules, exceptions and requirements, and thus did not need to be addressed in the proposed regulation.

9. **Federal standards:** The federal rules under SOX are extensive. The provisions in the proposed regulation are similar to the comparable federal provisions. The regulation does not conflict with any federal rules.

10. **Compliance schedule:** The regulation applies to companies for reporting periods beginning on or after January 1, 2010. Provisions of the regulation allow the company time to bring audit systems and controls into compliance without the need to ask for an extension or waiver. This timetable is contemplated by the NAIC model and has been adopted by many, but not all, states. The Department believes it is highly desirable to conform the application date of this proposed regulation to the effective date in other states.

Regulatory Flexibility Analysis

The Insurance Department finds that this regulation would not impose reporting, recordkeeping or other requirements on small businesses since the provisions contained therein apply only to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business in New York State. Inasmuch as most of these companies are not independently owned and operated and employ more than 100 individuals, they do not fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act.

This regulation specifically considers the impact of the requirements contained therein on small businesses by exempting assessment co-operative property/casualty insurance companies having direct premiums written in New York State of less than \$250,000 in any calendar year and having fewer than 500 policyholders at the end of such calendar year from the requirement to file an annual statement. Further, the proposed regulation allows any company, including a small business, to request an exemption from any and all of its requirements upon written application to the superintendent based upon a financial or organizational hardship upon the company.

This regulation contains, as does current Regulation No. 118, minimum requirements that must be included in the contract between a regulated company and the independent certified public accountant ("CPA") retained by the company. Accordingly, CPAs, regardless of whether they are small businesses or not, could be considered affected parties under this regulation. However, the Insurance Department estimates the impact of the continuation of these rules to be minimal, especially since if a CPA agrees to audit a regulated company, the price of the engagement will compensate the CPA for costs incurred. Additionally, CPAs retained by insurers tend to be large limited liability corporations or partnerships that are not small businesses. In any event, a CPA may choose not to audit a company that will require execution of a contract subject to this regulation.

If the pool of available CPAs in a particular rural area who are qualified to perform the services required by this regulation does not allow for periodic substitution of staff, the company may apply for an exception to the usual requirements requiring such replacements. The Insurance Department will view this circumstance as one of financial or organizational hardship.

The regulation does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirement on any local government.

Rural Area Flexibility Analysis

1. **Types and estimated number of rural areas:** Companies affected by the proposed regulation include regulated insurers, fraternal benefit societies, and managed care organizations authorized to do business in New York State. For this purpose, a managed care organization means the term as defined in 10 NYCRR 98-1.2(x), except for: (1) A prepaid health services plan, as defined in 10 NYCRR 98-1.2(ff); (2) A primary care partial capitation provider, as defined in 10 NYCRR 98-1.2(gg); and (3) A comprehensive HIV special needs plan, as defined in 10 NYCRR 98-1.2(i). The companies affected by this regulation do business in every county in this state, including "rural areas" as defined under section 102(1) of the State Administrative Procedure Act. Some of the home offices of these companies lie within rural areas. Further, companies may establish new office facilities and/or relocate in the future depending on their requirements and needs.

2. **Reporting, recordkeeping and other compliance requirements:** Many of the compliance requirements (such as filing due date and record retention period) are consistent with the requirements presently contained in Regulation 118 and should not impose upon any regulated party, regardless of whether they are located in a rural area or not, any additional paperwork, recordkeeping or compliance requirements. The obligations imposed by the proposed regulation with regard to establishment and maintenance of audit controls and standards are either consistent with or less than those required by current Regulation 118 and a federal statute, the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. ("SOX"), that imposes similar rules. If there are failures in the audit and controls process, a company is required to notify the superintendent. The regulation contains automatic exclusions from compliance for certain small companies. Further, any company that faces organizational or financial hardship can seek an exemption from any requirement imposed by the regulation.

The proposed regulation requires a regulated company to perform the audit of its operation and controls with the assistance of a certified independent public accountant ("CPA"). The terms of the employment of the CPA and the period for which work papers and communications are to be retained (contained in 11 NYCRR 243 ("Standards of Record Retention by Insurance Companies")) are both specified in the proposed regulation. Accordingly, CPAs, regardless of whether they are located in rural areas or not, could be considered affected parties under this regulation. However, the Insurance Department estimates the impact of these rules on CPAs, regardless of whether they are located in rural areas or not, should be negligible, if any at all. Indeed, if a CPA agrees to audit a regulated company, the price of the engagement will compensate the CPA for costs incurred. Additionally, CPAs retained by insurers tend to be large limited liability corporations or partnerships that are not small businesses. In any event, a CPA may choose not to audit a company that will require execution of a contract subject to this regulation.

If the pool of available CPAs in a particular rural area who are qualified to perform the services required by this regulation does not allow for periodic substitution of staff, the company may apply for an exception to the usual requirements requiring such replacements. The Insurance Department will view this circumstance as one of financial or organizational hardship.

3. Costs: The proposed regulation implements requirements largely based on the rules imposed by current Regulation 118 and SOX. The cost of complying with the new requirements will depend on the size of the company and whether the company is already subject to SOX because it is publicly held. Companies regulated by SOX will incur few additional costs beyond those imposed by current Regulation 118 and the federal statute. Compliance cost estimates with respect to the proposed regulation were received from a cross-section of companies that are not subject to SOX. If the company is already required to comply with similar regulations in other states, the additional expense of the New York proposed regulation is estimated to be minimal or negligible. Of those companies that stated compliance would require additional expenditures, the amounts range from \$25,000 a year to in excess of \$2 million (for one very large domestic mutual insurance company).

However, the proposed regulation requires a regulated company to perform the audit of its operation and controls with the assistance of a certified independent public accountant ("CPA"). The terms of the employment of a CPA is specified in the proposed regulation in a manner that is consistent with the current Regulation 118. Further, a CPA can obtain compensation for additional costs as part of the contract entered into with the regulated company. Accordingly, CPAs, regardless of whether they are located in rural areas or not, should not have to incur uncompensated additional costs to comply with the proposed regulation.

4. Minimizing adverse impact: The proposed regulation applies to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business throughout New York State, including rural areas. It does not impose any adverse impacts unique to rural areas.

5. Rural area participation: In developing this regulation, the Department conducted extensive outreach to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business throughout New York State, including those located or domiciled in rural areas.

Job Impact Statement

The Insurance Department finds that this regulation will have no adverse impact on jobs and employment opportunities since, for publicly held companies, its requirements largely reflect obligations already contained in the present Regulation 118 and those imposed by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. ("SOX"). For insurers, fraternal benefit societies or managed care organizations not already subject to SOX, the regulation contain minor refinements of those companies' current obligations under Regulation 118 to establish, maintain and report internal audit and oversight. Compliance may require the employment of additional personnel or outside contractors.

No region in New York should experience an adverse impact on jobs and employment opportunities. This regulation should not have a negative impact on self-employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Excess Line Placements Governing Standards

I.D. No. INS-40-10-00009-P

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

Proposed Action: Amendment of Part 27 (Regulation 41) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2105, 2118 and art. 21

Subject: Excess Line Placements Governing Standards.

Purpose: This will increase the minimum surplus to policyholders required to be maintained by new and current excess line insurers.

Text of proposed rule: Section 27.1 is amended by adding a new subdivision (s), to read as follows read as follows:

(s) *Eligible means that an insurer not authorized in this state has satisfied the requirements of this Part, including establishing the requisite trust fund and maintaining the minimum surplus.*

Section 27.13(b) and (c) are amended to read as follows:

(b) No excess line broker shall place coverage with an unauthorized insurer, unless [its] *the insurer's* financial statements or other evidence demonstrate that [such] *the insurer:*

(1) is solvent and otherwise substantially complies with solvency requirements for authorized insurers;

(2) has surplus to policyholders sufficient to support its writings, reasonable in relation to its outstanding liabilities, adequate to its financial needs and[, in no event, less than]:

(i) [in the case of individual incorporated insurers, US\$15,000,000;] *for an individual incorporated excess line insurer that:*

(a) *is eligible prior to January 1, 2011, the insurer maintains surplus to policyholders of not less than US\$25,000,000 as of January 1, 2011, US\$35,000,000 as of July 1, 2011, and US\$45,000,000 as of January 1, 2012; or*

(b) *becomes eligible on or after January 1, 2011, the insurer maintains surplus to policyholders of not less than US\$45,000,000;*

(ii) [in the case of an] *for an association of insurance underwriters consisting of individual incorporated excess line insurers located outside the United States, each insurer maintains surplus to policyholders of not less than [US\$25,000,000]US\$45,000,000 and the association maintains an aggregate surplus to policyholders of not less than US\$10,000,000,000; or*

(iii) [in the case of a] *for a partnership of unlicensed insurers, each licensed in its domicile and which partnership is duly authorized by its domiciliary jurisdiction to insure risks on a joint and several basis[,] that:*

(a) *is eligible prior to January 1, 2011, each insurer maintains surplus to policyholders of not less than [US\$15,000,000; and] US\$25,000,000 as of January 1, 2011, US\$35,000,000 as of July 1, 2011, US\$45,000,000 as of January 1, 2012; or*

(b) *becomes eligible on or after January 1, 2011; each insurer maintains surplus to policyholders of not less than US\$45,000,000;*

(3) *as of January 1, 2014 and every three years thereafter, the insurer increases its surplus to policyholders in an amount not less than \$3,000,000; and*

(4) maintains a trust fund in compliance with section 27.14 of this Part.

(c) For purposes of subdivision (b) of this section, in the case of an insurance exchange created by the laws of a state other than this State, no excess line broker shall procure coverage from that exchange or any of its syndicates, unless:

(1) the insurance exchange maintains funds in trust or custodial accounts, under terms acceptable to the superintendent, in an amount no less than US\$75,000,000, in the aggregate, provided that an amount at least equal to the greater of US\$30,000,000 or one-third of the aggregate, is maintained on a joint and several basis for the protection of all insurance exchange policyholders;

(2) the syndicates of such insurance exchange maintain total capital and surplus, or their substantial equivalent, not less than US\$100,000,000 in the aggregate; and

(3) each syndicate with which excess line insurance is placed [maintains] *has surplus to policyholders sufficient to support its writings, reasonable in relation to its outstanding liabilities, adequate to its financial needs; and if the syndicate:*

(i) *is eligible prior to January 1, 2011, the syndicate maintain minimum capital and surplus, or their substantial equivalent, of not less than [US\$15,000,000] US\$25,000,000 as of January 1, 2011, US\$35,000,000 as of July 1, 2011, US\$45,000,000 as of January 1, 2012, or*

(ii) *becomes eligible on or after January 1, 2011 and the syndicate maintains minimum capital and surplus, or their substantial equivalent, of not less than US\$45,000,000; and*

(4) *as of January 1, 2014 and every three years thereafter, each such syndicate increases its capital and surplus, or their substantial equivalent, in an amount not less than \$3,000,000.*

Section 27.13(1)(3) is amended to read as follows:

(1)(3) In no event shall the superintendent make an affirmative finding of acceptability when the unauthorized insurer's surplus to policyholders is less than [US\$4,500,000] US\$25,000,000; *provided, that as of Janu-*

ary 1, 2014, and every three years thereafter, the minimum amount shall be increased by US\$3,000,000.

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5585, email: amais@ins.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, 2105, 2118 and Article 21 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing the placement of insurance with eligible foreign and alien excess line insurers through licensed excess line brokers. Insurance Law §§ 201 and 301 authorize the Superintendent to effectuate any power accorded to him or her by the Insurance Law and prescribe regulations interpreting the Insurance Law.

Article 21 of the Insurance Law sets forth the duties and obligations of insurance brokers and excess line brokers. Insurance Law § 2105 sets forth licensing requirements for excess line brokers. Insurance Law § 2118 sets forth the duties of excess line brokers with regard to the placement of insurance with eligible foreign and alien excess line insurers, including their responsibility to ascertain and verify the financial condition of an unauthorized insurer before placing business with that insurer.

2. Legislative objectives: Article 21 of the Insurance Law establishes minimum standards for the placement of New York risks with eligible excess line insurers, including an excess line broker's responsibility to ascertain and verify the financial condition of an unauthorized insurer before placing business with that insurer.

3. Needs and benefits: 11 NYCRR 27 ("Regulation 41") governs the placement of excess line insurance. Article 21 of the Insurance Law and Regulation 41 enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from unauthorized insurers (known as "excess line insurers") if the unauthorized insurers are "eligible," and an excess line broker places the insurance.

Although the Superintendent does not directly regulate excess line insurers and excess line insurers are not subject to the minimum capital and surplus requirements applicable to authorized insurers, the Superintendent is responsible for ensuring that adequately and appropriately capitalized insurers provide coverage to consumers. Further, excess line insurance policies are not eligible for coverage by any New York State financial security funds in the event of an insurer's insolvency. Therefore, Regulation 41 establishes certain minimum financial standards and surplus to policyholders requirements for excess line insurers to ensure the claims paying viability of excess line insurers.

Specifically, Regulation 41 currently requires excess line insurers to maintain a minimum surplus to policyholders of \$15 million to support their writings in New York State. However, the Superintendent has not updated the current minimum surplus to policyholders requirement since January 1, 1994. Risks that are placed in the excess market require either declinations from three licensed insurers or listing on the export list, a list of insurance coverages for which the Superintendent of Insurance has determined declinations are not required. These are coverages that licensed companies do not want to write. The current \$15 million minimum requirement may have been adequate in the past but with escalating jury awards, the amount is inadequate.

Policies being written today have higher limits and therefore the exposure is greater than it was in the past. Even the cost to defend a claim has risen greatly. Therefore, the requirement must be updated to recognize the aforementioned reasons as well as the effects of compound inflation in order to provide additional protection against insolvency. As a result, this amendment increases the minimum amount of surplus to policyholders that a new excess line insurer must maintain from \$15 million to \$45 million; provides significant incremental increases in the minimum surplus to policyholders for current excess line insurers, specifically, an increase to \$25 million as of January 1, 2011, \$35 million as of July 1, 2011, and \$45 million as of January 1, 2012; and gradually increases the surplus requirements applicable to all excess line insurers in future years. Presently 96% of the eligible excess line insurers have the \$25 million surplus required by January 1, 2011.

Moreover, this amendment increases from \$25 million to \$45 million the minimum surplus to policyholders requirements set forth in section 27.13(b)(2)(ii) of Regulation 41 for each insurer of an association of insurance underwriters consisting of individual incorporated excess line insurers located outside the United States, and increases from \$15 million to \$45 million the minimum surplus to policyholders requirements set

forth in section 27.13(c) of Regulation 41 for each syndicate of an Insurance Exchange.

4. Costs: This amendment does not impose any compliance costs on state or local governments. The Insurance Department and excess line brokers should not incur additional costs.

However, excess line insurers may incur costs in securing the additional funds necessary to comply with the increased minimum surplus to policyholders requirements set forth in this amendment. Based on the Department's review of excess line insurers' 2009 capital and surplus to policyholders for foreign insurers and the 2008 capital and surplus for alien insurers, only 5 out of the 133 currently eligible insurers have less than \$25 million in minimum surplus to policyholders. Of the 133 eligible excess line insurers, 25 have less than \$45,000,000 in minimum surplus to policyholders. Some of the insurers are members of larger groups of affiliated insurers, and the Department anticipates that the parent company will provide its subsidiaries with the additional required surplus to meet the new minimum requirements. The Department does not believe that the amendment will discourage new insurers from entering the market or decrease competition in New York's excess lines market.

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

6. Paperwork: There is no additional paperwork required.

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

8. Alternatives: The Department conducted extensive outreach with the Property Casualty Insurers Association of America (PCIA), a trade association composed of more than 1,000 member property/casualty insurers and the American Insurance Association (AIA), a property/casualty insurance trade organization representing 350 insurers. The Department also conducted outreach with the Excess Line Association of New York (ELANY), a non-profit industry advisory association representing excess line brokers. The Department drafted the increased minimum surplus to policyholders requirements in consideration of the comments submitted to the Department by the foregoing associations.

PCIA and AIA commented that the Superintendent should not increase the minimum surplus to policyholders requirements. Specifically, AIA stated that an increase in the minimum surplus to policyholders requirements would create an "uneven playing field," with regard to existing excess line insurers who would be subject to a graduated increase and new eligible excess line insurers who would be required to meet the higher requirements immediately.

The Department considered increasing the minimum surplus to policyholders for existing and new excess line insurers as of a certain date. However, the Department believes that it is equitable and reasonable to implement the change in stages for current excess line insurers, which have already demonstrated a degree of viability in the market.

AIA also suggested that the Superintendent substitute a risk-based capital (RBC) model in place of specific minimum surplus to policyholders requirements. RBC is a method developed by the National Association of Insurance Commissioners (NAIC) to measure the minimum amount of capital that an insurer needs to support its overall business operations, taking into account the size and degree of risks taken by the insurer. The following four major categories of risk must be measured to arrive at an overall RBC amount: (1) off balance sheet risk; (2) asset risk; (3) credit risk; and (4) underwriting risk.

The Department, however, contends that the NAIC never intended for the RBC model to fully replace the minimum surplus to policyholders requirements, but rather complement it. The Department uses RBC to compare an insurer's performance to its peers, whereas, minimum surplus to policyholders provides a fixed cushion to absorb mounting losses that result from poor underwriting, poor reserving or even catastrophic occurrences. Furthermore, RBC concentrates on the quality of the minimum surplus to policyholders. The quantity or amount of surplus to policyholders helps the insurer endure difficult economic times.

Furthermore, alien insurers do not use the RBC model - only domestic insurers use it - and alien insurers do not have a risk model comparable to the RBC model. The Superintendent must apply a consistent approach in analyzing the financial condition of all eligible excess line insurers. Minimum surplus to policyholders is the most equitable and accurate way to assess an excess line insurer's financial strength and viability in the marketplace regardless of whether the insurer is alien or domestic.

Moreover, requiring a specific minimum surplus to policyholders rather than using the RBC model permits the Superintendent to respond to the needs of individual insurers or to market conditions if necessary. For example, section 27.13(l) of Regulation 41 provides the Superintendent with flexibility to permit an excess line insurer to operate with less than the required minimum surplus to policyholders in certain circumstances, such as when coverage is not available, based upon an affirmative finding of acceptability by the Superintendent.

In short, RBC is a useful tool for regulators, but maintenance of an adequate minimum surplus to policyholders is vital for an excess line insurer's survival and for protection of its policyholders, and is not a substitute for specific minimum surplus to policyholders requirements. Also, note that unlike the insurer trade associations, ELANY strongly supports increasing the minimum surplus to policyholders requirements.

PCIA commented that there is currently no solvency issue regarding excess line insurers, nor has there been one for years, and cited to the A.M. Best annual report entitled "2007 Special Report: U.S. Surplus Lines-Market Review" in support of its position.

Although the A.M. Best report cites no insolvencies, the report states that there were 36 financially-impaired excess line insurers between 1977 and 2007, and that excess line insurers had a significantly higher failure rate compared to authorized insurers (1.23% versus 0.80%). In addition, the report notes that with the current price softening on commercial lines business, increased competition from authorized insurers may force excess line insurers to focus on the riskier business. Note that most of the past insolvencies occurred in soft markets, because during a soft market cycle, insurers charge inadequate premiums for the risks that they write since there is so much competition in the marketplace. Additionally, insurers accept risks that they normally would not underwrite. When soft market conditions are combined with inadequate surplus to policyholders, an increase in insolvencies may occur. In light of the foregoing, the Department does not believe that the A.M. Best report supports PCIA's proposition that there are no solvency issues regarding excess line insurers.

PCIA further commented that the proposed amendment would discourage market entry of new excess line insurers, decrease competition in New York's excess line market, and noted that New York already has a principle-based requirement that the broker place business with a financially sound insurer. Therefore, PCIA asserts that there is no need to increase the minimum surplus to policyholders requirements.

The Superintendent has not updated the current minimum surplus to policyholders requirements since January 1, 1994, and therefore the Department believes that it should update the minimum requirement to recognize the effects of compound inflation and provide additional protection against insolvency. Furthermore, the types of business excess line insurers write generally present greater risk by their very nature than those written by authorized insurers. As such, a major catastrophe may result in a large loss to an eligible excess line insurer, which in turn may result in a substantial negative impact on its surplus to policyholders. However, if an insurer has a greater minimum surplus to policyholders, then the insurer has a better chance of weathering this type of loss.

In addition, an excess line broker may place insurance in the excess line market in the belief that the broker is placing the business with a financially strong insurer. However, if the minimum surplus to policyholders were to erode at a rapid pace due to poor management or external circumstances, then the \$45 million minimum surplus to policyholders requirement would prevent the surplus to policyholders from being severely depleted by acting as a floor.

PCIA also commented that the federal Nonadmitted and Reinsurance Reform Act of 2009 (the "Act") may preempt the Department's proposed amendment to Regulation 41.

Although the United States House of Representatives passed the Act, and it is currently pending in the United States Senate, the Department cannot put necessary amendments on hold while waiting to see whether the U.S. Senate passes the Act.

PCIA further commented that this proposal would have a significant impact on a number of existing excess line insurers that would have to secure additional surplus to policyholders, and that the proposed increase to required minimum surplus to policyholders may deter new entrants to the market.

Only a few excess line insurers currently have less than the proposed initial \$25 million in minimum surplus to policyholders. Further, the subsequent increase from \$25 million to \$45 million is graduated, and will be phased-in to minimize the impact this increase in minimum surplus to policyholders will have on the few insurers that do not currently have \$25 million. Therefore, these few excess line insurers should have ample time to secure additional surplus to policyholders.

With regard to PCIA's claim that the proposed increase to required minimum surplus to policyholders may deter new entrants to the market, it is possible that some new entrants may be deterred from entering the New York excess line market. Nonetheless, there currently is healthy competition and adequate capacity in the present New York excess line market, and entry of those insurers that would have difficulty raising the required minimum surplus to policyholders would not be in the best interest of New York insureds, since these insurers may not have the wherewithal to pay claims.

PCIA also stated that only three other states currently require an excess line insurer to maintain more than \$15 million in minimum surplus to policyholders.

The Department notes that other states require an excess line insurer to have done business in another jurisdiction for a specified length of time (generally two to five years) before it may become an eligible excess line insurer in that state (also known as "seasoning"). However, New York does not have such a requirement. Without a seasoning requirement, excess line insurers are less experienced and as a result, may make more underwriting errors until the insurers' underwriters master the intricacies of difficult lines of business by developing underwriting expertise through experience. Therefore, the Department believes that excess line insurers must maintain an adequate minimum surplus to policyholders cushion to effectively operate in the New York marketplace and remain solvent, since excess line insurers tend to underwrite riskier lines of business.

One alternative to this amendment that the Department originally considered was to increase the surplus to policyholders requirement to an amount in excess of \$45 million, because the rate of inflation appears to be increasing. However, the Department considered the needs of insurers affected by this amendment and the potential burden the higher requirement might impose upon them, and concluded that increasing the requirement to \$45 million is reasonable and adequate. Moreover, the full increase to \$45 million will not take effect immediately for current eligible excess line insurers.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Eligible excess line insurers must comply with the regulation within the time frames specified in the regulation.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at excess line insurers, none of which fall within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has monitored Annual Statements of excess line insurers subject to this rule, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have fewer than one hundred employees.

The Insurance Department finds that this rule will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at insurance companies, none of which are local governments.

Rural Area Flexibility Analysis

The Insurance Department finds that this rule does not impose any additional burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

Job Impact Statement

The Insurance Department finds that this rule should have no impact on jobs and employment opportunities since it only increases the minimum amount of surplus to policyholders required to be maintained by new excess line insurers, provides incremental increases in the minimum surplus to policyholders for current excess line insurers and proposes a gradual increase in surplus requirements in future years applicable to all excess line insurers. The intent is to recognize the effects of compound inflation and provide for additional protection against insolvency.

The rule will also indirectly affect excess line brokers, who place business with excess line insurers. Most excess line brokers are small businesses as defined in section 102(8) of the State Administrative Procedure Act. However, the Department does not believe that the rule will discourage market entry of insurers or decrease competition in the state in the surplus lines market. Therefore, there would be no adverse impact on jobs and employment opportunities in New York.

Department of Labor

NOTICE OF ADOPTION

Public Employees Occupational Safety and Health Standards

I.D. No. LAB-25-10-00006-A

Filing No. 956

Filing Date: 2010-09-17

Effective Date: 2010-10-06

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

Action taken: Amendment of section 800.3 of Title 12 NYCRR.
Statutory authority: Labor Law, section 27-a(4)(a)
Subject: Public Employees Occupational Safety and Health Standards.
Purpose: To incorporate by reference updates to OSHA standards into the State Public Employee Occupational Safety and Health Standards.
Text or summary was published in the June 23, 2010 issue of the Register, I.D. No. LAB-25-10-00006-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Michael Paglialonga, Department of Labor, Building 12, State Office Campus, Room 509, Albany, NY 12240, (518) 457-1938, email: michael.paglialonga@labor.ny.gov
Assessment of Public Comment
 The agency received no public comment.

Public Service Commission

NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC-37-07-00011-P	September 12, 2007
PSC-37-07-00012-P	September 12, 2007
PSC-37-07-00013-P	September 12, 2007
PSC-37-07-00014-P	September 12, 2007
PSC-41-07-00015-P	October 10, 2007
PSC-41-07-00016-P	October 10, 2007
PSC-41-07-00018-P	October 10, 2007
PSC-08-08-00020-P	February 20, 2008
PSC-46-08-00007-P	November 12, 2008
PSC-27-09-00013-P	July 8, 2009
PSC-29-09-00008-P	July 22, 2009
PSC-19-10-00021-P	May 12, 2010
PSC-21-10-00018-P	May 26, 2010
PSC-21-10-00020-P	May 26, 2010
PSC-21-10-00021-P	May 26, 2010
PSC-21-10-00022-P	May 26, 2010

NOTICE OF ADOPTION

Major Gas Rate Filing

I.D. No. PSC-51-09-00025-A
Filing Date: 2010-09-21
Effective Date: 2010-09-21

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

Action taken: On 9/16/10, the PSC adopted an order approving Rochester Gas and Electric Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

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

Subject: Major gas rate filing.

Purpose: To approve the rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving Rochester Gas and Electric Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-G-0718SA1)

NOTICE OF ADOPTION

Major Electric Rate Filing

I.D. No. PSC-51-09-00027-A
Filing Date: 2010-09-21
Effective Date: 2010-09-21

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

Action taken: On 9/16/10, the PSC adopted an order approving New York State Electric & Gas Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

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

Subject: Major electric rate filing.

Purpose: To approve the rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

Substance of final rule: The Commission, on August 19, 2010, adopted an order approving New York State Electric & Gas Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0715SA1)

NOTICE OF ADOPTION

Major Electric Rate Filing

I.D. No. PSC-51-09-00028-A
Filing Date: 2010-09-21
Effective Date: 2010-09-21

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

Action taken: On 9/16/10, the PSC adopted an order approving Rochester Gas and Electric Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

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

Subject: Major electric rate filing.

Purpose: To approve the rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving Rochester Gas and Electric Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0717SA1)

NOTICE OF ADOPTION

Major Gas Rate Filing

I.D. No. PSC-51-09-00032-A

Filing Date: 2010-09-21

Effective Date: 2010-09-21

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

Action taken: On 9/16/10, the PSC adopted an order approving New York State Electric & Gas Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

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

Subject: Major gas rate filing.

Purpose: To approve the rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving New York State Electric & Gas Corporation's rates, terms, conditions, and provisions of a Joint Proposal dated July 14, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-G-0716SA1)

NOTICE OF ADOPTION

Minor Rate Filing

I.D. No. PSC-01-10-00013-A

Filing Date: 2010-09-21

Effective Date: 2010-09-21

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

Action taken: On 9/16/10, the PSC adopted an order approving, with modifications, the Village of Brocton's amendments to PSC 1—Electricity, effective October 1, 2010 for an increase in annual revenues of \$94,603 or 12.5%.

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

Subject: Minor Rate Filing.

Purpose: To approve amendments to PSC 1—Electricity, effective October 1, 2010 for an increase in annual revenues of \$94,603 or 12.5%.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving, with modifications, the Village of Brocton's amendments to PSC 1—Electricity, effective October 1, 2010 for an increase in annual revenues of \$94,603 or 12.5%, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(09-E-0845SA1)

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-11-10-00010-A

Filing Date: 2010-09-20

Effective Date: 2010-09-20

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

Action taken: On 9/16/10, the PSC adopted an order approving Crystal Water Supply Company, Inc.'s amendments to PSC 1—Water, effective October 1, 2010 to increase its rates to produce additional revenues of \$3,619 or 6.2%.

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

Subject: Water rates and charges.

Purpose: To approve amendments to PSC 1—Water, effective October 1, 2010 to increase its revenues by \$3,619 or 6.2%.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving Crystal Water Supply Company, Inc.'s amendments to PSC 1—Water, effective October 1, 2010, to increase its rates to produce additional revenues of \$3,619 or 6.2%, and to implement a surcharge of \$166.67 per home per quarter, for two-quarterly billing periods, to reimburse the company for a portion of the cost associated with the required system improvements to become effective October 1, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-W-0094SA1)

NOTICE OF ADOPTION

Reactive Power Demand Information

I.D. No. PSC-23-10-00003-A

Filing Date: 2010-09-16

Effective Date: 2010-09-16

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

Action taken: On 9/16/10, the PSC adopted an order approving Consolidated Edison Company of New York, Inc.'s amendments to PSC 9—Electricity, EDDS 2 and PASNY 4, effective September 23, 2010.

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

Subject: Reactive Power Demand Information.

Purpose: To approve amendments to PSC 9—Electricity, EDDS 2 and PASNY 4, effective September 23, 2010.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving Consolidated Edison Company of New York, Inc.'s amendments to PSC 9—Electricity, EDDS 2 and PASNY 4, effective September 23, 2010 to provide customers with access to reactive power usage information prior to the effective date of the reactive power charges.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(08-E-0751SA11)

NOTICE OF ADOPTION**Weighted Average Cost of Capacity****I.D. No.** PSC-26-10-00011-A**Filing Date:** 2010-09-16**Effective Date:** 2010-10-06

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

Action taken: On 9/16/10, the PSC adopted an order approving KeySpan Gas East Corporation, d/b/a National Grid's amendments to PSC No. 1—Gas, eff. 10/1/10.

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

Subject: Weighted Average Cost of Capacity.

Purpose: To approve amendments to PSC No. 1—Gas, eff. 10/1/10.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving KeySpan Gas East Corporation, d/b/a National Grid's amendments to PSC No. 1—Gas, eff. 10/1/10 to modify their retail access tariffs by adding a provision to charge Energy Services Companies a price for released capacity equal to the Companies' weighted average cost of capacity, and eliminate the capacity release surcharge adjustment.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-G-0278SA1)

NOTICE OF ADOPTION**Weighted Average Cost of Capacity****I.D. No.** PSC-26-10-00012-A**Filing Date:** 2010-09-16**Effective Date:** 2010-09-16

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

Action taken: On 9/16/10, the PSC adopted an order approving Brooklyn Union Gas Company, d/b/a National Grid's amendments to PSC No. 12—Gas, eff. 10/1/10.

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

Subject: Weighted Average Cost of Capacity.

Purpose: To approve amendments to PSC No. 12—Gas, eff. 10/1/10.

Substance of final rule: The Commission, on September 16, 2010 adopted an order approving Brooklyn Union Gas Company, d/b/a National Grid's amendments to PSC No. 12—Gas, eff. 10/1/10 to modify their retail access tariffs by adding a provision to charge Energy Services Companies a price for released capacity equal to the Companies' weighted average cost of capacity, and eliminate the capacity release surcharge adjustment.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-G-0279SA1)

NOTICE OF ADOPTION**Petition for Lightened Regulation****I.D. No.** PSC-27-10-00014-A**Filing Date:** 2010-09-17**Effective Date:** 2010-09-17

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

Action taken: On 9/16/10, the PSC adopted an order approving the petition of Bayonne Energy Center, LLC, as a wholesale electric transmission provider, to be regulated under a lightened regulatory regime.

Statutory authority: Public Service Law, sections 2(13), 5(1)(b), 11, 19, 24, 25, 26, 66, 67, 68, 69, 69-a, 70, 72, 72-a, 75, 76, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118 and 119

Subject: Petition for lightened regulation.

Purpose: To approve the petition of Bayonne Energy Center, LLC for lightened regulation.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving the petition of Bayonne Energy Center, LLC, as a wholesale electric transmission provider, to be regulated under a lightened regulatory regime, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-E-0276SA1)

NOTICE OF ADOPTION**Revenue Decoupling Mechanism (RDM)****I.D. No.** PSC-28-10-00011-A**Filing Date:** 2010-09-16**Effective Date:** 2010-09-16

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

Action taken: On 9/16/10, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to recover the Service Classification No. 6 (SC6) under-collection of approximately \$483,000 from all other classes, subject to the RDM.

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

Subject: Revenue Decoupling Mechanism (RDM).

Purpose: To approve recovery of Service Classification No. 6 (SC6) of approximately \$483,000 from all other classes, subject to the RDM.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving Consolidated Edison Company of New York, Inc.'s recovery of Service Classification No. 6 (SC6)—Public and Private Street Lighting under-collection of approximately \$483,000 from all other classes, subject to the Revenue Decoupling Mechanism.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(08-E-0539SA6)

NOTICE OF ADOPTION

Approval to Lease Certain Real Property and to Construct a Generator**I.D. No.** PSC-28-10-00015-A**Filing Date:** 2010-09-20**Effective Date:** 2010-09-20

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

Action taken: On 9/16/10, the PSC adopted an order approving the Joint Petition of Fishers Island Electric Corporation and Connecticut Municipal Electric Energy Cooperative for a lease of utility property for the construction and operation of a backup generator.

Statutory authority: Public Service Law, sections 5, 68 and 70

Subject: Approval to lease certain real property and to construct a generator.

Purpose: To approve a lease of utility property for the construction and operation of a backup generator.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving the Joint Petition of Fishers Island Electric Corporation and Connecticut Municipal Electric Energy Cooperative (CMEEC) for a lease of utility property for the construction and operation of a 2.5 mw diesel powered electric generator to provide backup emergency electric power generation capacity for Fisher's Island and peak shaving generation capacity for CMEEC, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-E-0282SA1)

NOTICE OF ADOPTION

Water Rates and Charges**I.D. No.** PSC-29-10-00011-A**Filing Date:** 2010-09-21**Effective Date:** 2010-09-21

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

Action taken: On 9/16/10, the PSC adopted an order approving Forest Park Water Company, Inc.'s filing to increase its escrow account level from \$50,000 to \$100,000.

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

Subject: Water rates and charges.

Purpose: To approve Forest Park Water Company, Inc.'s request to increase the level and surcharges in its escrow account.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving Forest Park Water Company, Inc.'s filing to increase its escrow account level from \$50,000 to \$100,000, increase customer quarterly surcharge to fund it from \$10 to \$30, and increases the allowable customer quarterly surcharge used to replenish the account after the \$100,000 threshold has been reached and falls below that level from \$10 to \$50, effective October 1, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-W-0324SA1)

NOTICE OF ADOPTION

Customer Obligations**I.D. No.** PSC-30-10-00008-A**Filing Date:** 2010-09-17**Effective Date:** 2010-09-17

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

Action taken: On 9/16/10, the PSC adopted an order approving The Brooklyn Union Gas Company, d/b/a National Grid's amendments to PSC No. 12—Gas, eff. 10/1/10.

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

Subject: Customer Obligations.

Purpose: To approve amendments to PSC No. 12—Gas, eff. 10/1/10.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving KeySpan Gas East Corporation, d/b/a National Grid's amendments to PSC No. 1—Gas, eff. 10/1/10 to add to and clarify the requirements and obligations of non-residential, multi-family, interruptible and temperature controlled customers.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-G-0329SA1)

NOTICE OF ADOPTION

Customer Obligations**I.D. No.** PSC-30-10-00009-A**Filing Date:** 2010-09-17**Effective Date:** 2010-09-17

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

Action taken: On 9/16/10, the PSC adopted an order approving KeySpan Gas East Corporation, d/b/a National Grid's amendments to PSC No. 1—Gas, eff. 10/1/10.

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

Subject: Customer Obligations.

Purpose: To approve amendments to PSC No. 1—Gas, eff. 10/1/10.

Substance of final rule: The Commission, on September 16, 2010, adopted an order approving KeySpan Gas East Corporation, d/b/a National Grid's amendments to PSC No. 1—Gas, eff. 10/1/10 to add to and clarify the requirements and obligations of non-residential, multi-family, interruptible and temperature controlled customers.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

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

(10-G-0330SA1)

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

Net Energy Metering for Farm Waste Electric Generating Systems

I.D. No. PSC-40-10-00012-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 Consolidated Edison Company of New York, Inc. to make various changes in rates, charges, rules and regulations contained in Schedule for Electric Service, PSC No. 9.

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

Subject: Net Energy Metering for Farm Waste Electric Generating Systems.

Purpose: To effectuate changes to Public Service Law Section 66-j in relation to Net Energy Metering.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Consolidated Edison Company of New York, Inc. to effectuate changes to Public Service Law (PSL) Sections 66-j in relation to net energy metering for farm waste electric generating systems. The amendments increase the rated capacity of farm waste generating systems eligible for net metering from 500 kW to 1,000 kW. The New York State Standard Interconnection Requirements (SIR) document would be modified to incorporate this update to PSL Section 66-j. The filing has an effective date of December 28, 2010.

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

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

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

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

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

(10-E-0407SP1)

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

Net Energy Metering for Farm Waste Electric Generating Systems

I.D. No. PSC-40-10-00013-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Central Hudson Gas & Electric Corporation to make various changes in rates, charges, rules and regulations contained in Schedule for Electric Service, PSC No. 15.

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

Subject: Net Energy Metering for Farm Waste Electric Generating Systems.

Purpose: To effectuate changes to Public Service Law Section 66-j in relation to Net Energy Metering.

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 to effectuate changes to Public Service Law (PSL) Section 66-j in relation to net energy metering for farm waste electric generating systems. The amendments increase the rated capacity of farm waste generating systems eligible for net metering from 500 kW to 1,000 kW. The New York State Standard Interconnection Requirements (SIR) document would be modified to incorporate this

update to PSL Section 66-j. The filing has an effective date of December 28, 2010.

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

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

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

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

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

(10-E-0406SP1)

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

Disposition of a State Sales Tax Refund

I.D. No. PSC-40-10-00014-P

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

Proposed Action: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition filed by Niagara Mohawk Power Corporation d/b/a National Grid to retain in its entirety an approximate \$2.47 million New York State sales tax refund.

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

Subject: Disposition of a state sales tax refund.

Purpose: To determine how much of a state sales tax refund should be retained by National Grid.

Substance of proposed rule: The Public Service Commission is considering whether to approve, modify or reject, in whole or in part, a petition filed by Niagara Mohawk Power Corporation d/b/a National Grid to retain in its entirety an approximate \$2.47 million of a New York State sales tax refund.

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

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

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

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

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

(10-M-0205SA1)

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

Net Energy Metering for Farm Waste Electric Generating Systems

I.D. No. PSC-40-10-00015-P

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

Proposed Action: The Commission is considering a proposed tariff filing by New York State Electric & Gas Corporation to make various changes in rates, charges, rules and regulations contained in Schedule for Electric Service, PSC No. 120.

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

Subject: Net Energy Metering for Farm Waste Electric Generating Systems.

Purpose: To effectuate changes to Public Service Law Section 66-j in relation to Net Energy Metering.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by New York State Electric & Gas Corporation to effectuate changes to Public Service Law (PSL) Section 66-j in relation to net energy metering for farm waste generating systems. The amendments increase the rated capacity of farm waste generating systems eligible for net metering from 500 kW to 1,000 kW. The New York State Standard Interconnection Requirements (SIR) document would be modified to incorporate this update to PSL Section 66-j. The filing has an effective date of December 28, 2010.

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

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

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

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

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

(10-E-0408SP1)

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

Net Energy Metering for Farm Waste Electric Generating Systems

I.D. No. PSC-40-10-00016-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to make various changes in rates, charges, rules and regulations contained in Schedule for Electric Service, PSC No. 220.

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

Subject: Net Energy Metering for Farm Waste Electric Generating Systems.

Purpose: To effectuate changes to Public Service Law Section 66-j in relation to Net Energy Metering.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Niagara Mohawk Power Corporation d/b/a National Grid to effectuate changes to Public Service Law (PSL) Section 66-j in relation to net energy metering for farm waste electric generating systems. The amendments increase the rated capacity of farm waste generating systems eligible for net metering from 500 kW to 1,000 kW. The New York State Standard Interconnection Requirements (SIR) document would be modified to incorporate this update to PSL Section 66-j. The filing has an effective date of December 28, 2010.

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

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

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

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

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

(10-E-0409SP1)

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

Net Energy Metering for Farm Waste Electric Generating Systems

I.D. No. PSC-40-10-00017-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Rochester Gas and Electric Corporation to make various changes in rates, charges, rules and regulations contained in Schedule for Electric Service, PSC No. 19.

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

Subject: Net Energy Metering for Farm Waste Electric Generating Systems.

Purpose: To effectuate changes to Public Service Law Section 66-j in relation to Net Energy Metering.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Rochester Gas and Electric Corporation to effectuate changes to Public Service Law (PSL) Section 66-j in relation to net energy metering for farm waste electric generating systems. The New York State Standard Interconnection Requirements (SIR) document would be modified to incorporate this update to PSL Sections 66-j. The filing has an effective date of December 28, 2010.

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

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

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

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

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

(10-E-0410SP1)

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

Net Energy Metering for Farm Waste Electric Generating Systems

I.D. No. PSC-40-10-00018-P

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

Proposed Action: The Commission is considering a proposed tariff filing by Orange and Rockland Utilities, Inc. to make various changes in rates, charges, rules and regulations contained in Schedule for Electric Service, PSC No. 2.

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

Subject: Net Energy Metering for Farm Waste Electric Generating Systems.

Purpose: To effectuate changes to Public Service Law Section 66-j in relation to Net Energy Metering.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Orange and Rockland Utilities Inc. (the company) to effectuate changes to Public Service Law (PSL) Section 66-j in relation to net energy metering for farm waste electric generating systems. The amendments increase the rated capacity of farm waster generating systems eligible for net metering from 500 kW to 1,000 kW. The company also proposes to clarify language regarding the interconnection requirements for residential, farm or non-

residential customers with wind electric generators. The New York State Standard Interconnection Requirements (SIR) document would be modified to incorporate this update to PSL Section 66-j. The filing has an effective date of December 28, 2010.

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

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

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

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

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

(10-E-0411SP1)

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

NYSERDA Administered SBC Programs

I.D. No. PSC-40-10-00019-P

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

Proposed Action: The Commission is considering whether to continue and adopt, modify, or reject, in whole or in part, potential modifications to the System Benefits Charge (SBC) program for the period July 1, 2011 through December 31, 2015 as proposed by NYSERDA.

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

Subject: NYSERDA administered SBC programs.

Purpose: To promote energy conservation, research and development, and economic assistance to low income customers.

Substance of proposed rule: The Commission is considering whether to continue and adopt, modify, or reject, in whole or in part, potential modifications to the System Benefits Charge (SBC) program for the period July 1, 2011 through December 31, 2015. The SBC program was initiated in 1998 to preserve the public benefits of programs previously provided to our society by regulated monopoly utilities. It provides programs to encourage energy efficiency, a cleaner environment and to reduce the financial burden of energy costs on low-income New Yorkers. In 2005, the SBC programs were renewed and extended through June 30, 2011. In 2008, the SBC programs were further enhanced with electric and gas energy efficiency programs constituting the Energy Efficiency Portfolio Standard (EEPS) which were generally authorized through December 31, 2011.

In particular, the Commission is considering the proposals in a petition dated September 20, 2010 made by the New York State Energy Research and Development Authority (NYSERDA) entitled "System Benefits Charge in New York: Vision for the Future" wherein NYSERDA requests (a) continuation through December 31, 2011 of the SBC program to generally be administered in the same manner and at the same level of funding and collections currently authorized; (b) further continuation of the SBC program with modifications through December 31, 2015; (c) modifications to the SBC policy goals to encourage new SBC technology and market development programs; (d) the transition of the administration of certain electric energy efficiency and outreach & education programs and low-income electric energy efficiency programs into the SBC electric Energy Efficiency Portfolio Standard (EEPS) major program category; (e) the transition of the administration of certain low-income gas energy efficiency measures into the SBC gas Energy Efficiency Portfolio Standard (EEPS) major program category; (f) the elimination on a going-forward basis of the "Peak Load, Energy Efficiency, and Outreach & Education", "Research & Development", and "Low Income" major program categories; (g) creation of a new SBC "Technology and Market Development" major program category; and (h) recovery by NYSERDA of evaluation costs at the rate of 5%, administration costs at the rate of 8%, and New York State Cost Recovery Fees at the rate of 1.69%, of total program costs.

For Calendar Year 2012 and beyond, NYSERDA proposes to allocate \$73,400,000 annually for EEPS electric programs (\$86,042,990 when grossed-up for evaluation, administration and fees), and \$10,600,000 an-

nually for EEPS gas programs (\$12,425,827 when grossed-up for evaluation, administration and fees). If the allocation for gas programs is approved and the costs of such gas programs are to be collected from gas ratepayers, the Commission would have to raise the cap it previously imposed on annual collections from gas ratepayers for energy efficiency programs by a similar amount.

Currently, \$180,250,000 is collected annually from electric ratepayers to fund the non-EEPS SBC programs. If the amount to be collected from ratepayers is held as a constant, after deduction of the amounts NYSERDA proposes to allocate to the EEPS categories (\$98,468,817), a balance of \$81,781,183 annually would remain. After further deducting the costs for evaluation, administration and fees, \$69,764,415 would remain annually to fund the new Technology and Market Development programs.

The Commission has previously established an expectation that non-EEPS SBC energy efficiency programs will deliver 437,250 MWhs annually in incremental electric energy savings during the years 2012 through 2015 as a contribution towards the overall 15% reduction in projected energy usage by 2015 goal. NYSERDA estimates that its proposal would result in approximately 87% of the MWh expectation being met by the new funding of EEPS programs. NYSERDA proposes to deliver the balance (approximately 13%) through future SBC Technology and Market Development program investments and/or adjustments to the funding allocations within the EEPS portfolio to optimize the post-January 2012 energy savings potential of the EEPS portfolio.

If the amount to be collected from ratepayers is held as a constant to what is currently collected (\$180,250,000), the major program category budgets and the incremental SBC collection amounts by utility would be as listed below.

Table 1
Proposed Budget July 1, 2011- December 31, 2011

Major Program Category	Incremental Budget
Energy Efficiency Business & Institutional	\$27,673,356
Energy Efficiency Residential	\$13,078,873
Energy Efficiency Outreach & Education	\$1,500,000
Peak Load, Energy Efficiency, and Outreach & Education	\$42,252,229
Research & Development	\$17,326,671
Low Income	\$19,017,000
Environmental Disclosure Evaluation	\$0
Administration	\$1,780,000
NYS Cost Recovery Fee	\$7,120,000
Total Program Expenses	\$1,504,100
Total NYSERDA Budget	\$10,404,100
	\$89,000,000

Table 2
Proposed Incremental Electric SBC Collections
July 1, 2011- December 31, 2011

SBC Utility	Percentage of Total	Collection Amount
Central Hudson	3.49%	\$3,055,148
Con Edison	49.99%	\$43,738,426
NYSEG	12.41%	\$10,854,575
National Grid	25.75%	\$22,528,834
O&R	2.99%	\$2,611,995
RG&E	5.38%	\$4,711,023
TOTALS	100.00%	\$87,500,000

Table 3
Proposed Incremental EEPS Electric Annual Budgets - Years 2012 - 2015

Outreach & Education Program	\$3,000,000
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Energy Efficiency Programs	\$70,400,000
Subtotal	\$73,400,000
Evaluation	\$4,302,150
Administration	\$6,883,439
NYS Cost Recovery Fee	\$1,457,401
Subtotal	\$12,642,990
Total	\$86,042,990

Table 4

Proposed Incremental EEPS Gas Annual Budgets - Years 2012 - 2015	
Energy Efficiency Programs	\$10,600,000
Subtotal	\$10,600,000
Evaluation	\$621,291
Administration	\$994,066
NYS Cost Recovery Fee	\$210,469
Subtotal	\$1,825,827
Total	\$12,425,827

Table 5

Proposed Technology and Market Development Annual Budgets Years 2012 - 2015	
Technology and Market Development Programs	\$69,764,415
Evaluation	\$4,089,059
Administration	\$6,542,495
NYS Cost Recovery Fee	\$1,385,215
Subtotal	\$12,016,768
Total	\$81,781,183

Table 6

Proposed Incremental Annual Electric and Gas Collections - Years 2012 - 2015	
Incremental EEPS Electric Programs	\$86,042,990
Technology and Market Development Programs	\$81,781,183
Total Annual Electric Collections	\$167,824,173
Incremental EEPS Gas Programs	\$12,425,827
Total Annual Gas Collections	\$12,425,827
Total All Collections	\$180,250,000

Attached is a list of additional issues that the Commission may consider in addressing the proposals. Parties may wish to address these issues in comments or to raise other issues for the Commission's consideration.

1. Should the current non-EEPS energy efficiency programs that are similar to EEPS energy efficiency programs be administered in the same manner as the EEPS programs during the six-month period July 1, 2011 through December 31, 2011?
2. Should the allocation of costs among utilities be made on the basis of sales volumes (as is done for EEPS) instead of on the basis of historical revenues (as was done for SBC III)?
3. Should unspent, uncommitted and unencumbered SBC funds be addressed in a manner designed to encourage the efficient usage of allocated funds to achieve completed projects and to minimize the magnitude of the unspent and uncommitted funds?
4. As robustly funding all of the potential new Technology and Market Development programs identified by NYSERDA would likely exceed the available funding, what priorities should be set for choosing which programs to fund (see NYSERDA's Petition at page 10 for proposed prioritization criteria)?
5. Should priority be given to projects that will realize tangible benefits

within the 2012 to 2015 time frame (mainly demonstration and commercialization projects) as opposed to projects that may entail higher risks and potentially greater benefits over a longer time horizon?

6. What process steps should be followed to ensure that funding decisions are made in an open and optimal manner?

7. Should other potential new Technology and Market Development programs, beyond those identified by NYSERDA, be considered and if so, with what priority?

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

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

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

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

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

(10-M-0457SP1)

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

NYSERDA Administered SBC Programs

I.D. No. PSC-40-10-00020-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 extend NYSERDA's System Benefits Charge programs from their June 30, 2011 expiration date until December 31, 2011, including an additional six months of collecting program costs from electric ratepayers.

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

Subject: NYSERDA administered SBC programs.

Purpose: To promote energy conservation, research and development, and economic assistance to low income customers.

Substance of proposed rule: The Commission is considering whether to extend certain existing System Benefits Charge (SBC) programs currently administered by the New York State Energy Research and Development Authority (NYSERDA) for an additional period of six months, from the current expiration date of June 30, 2011 until December 31, 2011. The expiration date would be made to coincide with the current December 31, 2011 expiration date of most SBC Energy Efficiency Portfolio Standard (EEPS) programs.

The SBC program was initiated in 1998 to preserve the public benefits of programs previously provided to our society by regulated monopoly utilities. It provides programs to encourage energy efficiency, a cleaner environment and to reduce the financial burden of energy costs on low-income New Yorkers. In 2005, the SBC programs were renewed and extended through June 30, 2011. In 2008, the SBC programs were further enhanced with electric and gas energy efficiency programs constituting the Energy Efficiency Portfolio Standard (EEPS) which were generally authorized through December 31, 2011. This notice concerns the original SBC programs that were only authorized through June 30, 2011.

NYSERDA provides quarterly and annual reports to the Public Service Commission of the performance of the SBC program, which will be considered by the Commission. The most recent annual performance report is entitled "New York's System Benefits Charge Programs, Evaluation and Status Report, Year Ending December 31, 2009, Report to the Public Service Commission, Final Report, March 2010". The most recent quarterly performance report is entitled "New York's System Benefits Charge Programs, Evaluation and Status Report, Quarterly Report to the Public Service Commission, Quarter Ending March 31 2010, Final Report, May 2010". Parties wishing to address the performance of the SBC programs in comments or to raise other issues for the Commission's consideration should review the contents of the reports described above.

The programs would generally be administered in the same manner and at the same level of funding and collections currently authorized, with some minor exceptions. The level of projected interest earnings is reduced to reflect current lower market interest rates. The cost of administration is

increased from 7% to 8% to reflect additional costs. The New York State Cost Recovery Fee is adjusted slightly to 1.69%. Program funds for residential energy efficiency programs are reduced somewhat to make up for the other adjustments. As to program administration, the Commission is also considering whether the energy efficiency programs that are similar to EEPS energy efficiency programs should be administered in the same manner as the EEPS programs during the six-month period.

The major program category budgets and the incremental SBC collection amounts by utility that are being considered are listed below.

Table 1
Comparison of Current 1st Half 2011 to Proposed 2nd Half of 2011

	Current 1st Half 2011	Proposed 2nd Half 2011
Collections	\$87,500,000	\$87,500,000
Utility-Administered Programs	(\$262,878)	\$0
Transfer Payments to NYSERDA	\$87,237,122	\$87,500,000
Projected Interest Income	\$3,000,000	\$1,500,000
NYSERDA Budget	\$90,237,122	\$89,000,000

Notes:

1. NYSEG's utility-administered program expires June 30, 2011. It funded the costs of long-term demand side management contracts that predated the SBC program.
2. Does not include SBC II or III carryover, which does not affect incremental collections.
3. Statewide Evaluation Protocol Development, and DPS Evaluation Consultant are already funded out of additional interest earnings through the end of 2011.
4. Evaluation @ 2% (3% Enhanced M&V is already included in EEPS collections through the end of 2011).
5. Administration @ 7%; becomes 8% for 2nd Half of 2011.
6. NYS Cost Recovery Fee @ 1.83%; becomes 1.69% for 2nd Half of 2011.

Table 2
Proposed Budget July 1, 2011- December 31, 2011

Major Program Category	Incremental Budget
Energy Efficiency Business & Institutional	\$27,673,356
Energy Efficiency Residential	\$13,078,873
Energy Efficiency Outreach & Education	\$1,500,000
Peak Load, Energy Efficiency, and Outreach & Education	\$42,252,229
Research & Development	\$17,326,671
Low Income	\$19,017,000
Environmental Disclosure	\$0
Evaluation	\$1,780,000
Administration	\$7,120,000
NYS Cost Recovery Fee	\$1,504,100
Total Program Expenses	\$10,404,100
Total NYSERDA Budget	\$89,000,000

Table 3
Proposed Incremental Electric SBC Collections
July 1, 2011- December 31, 2011

SBC Utility	Percentage of Total	Collection Amount
Central Hudson	3.49%	\$3,055,148
Con Edison	49.99%	\$43,738,426
NYSEG	12.41%	\$10,854,575
National Grid	25.75%	\$22,528,834
O&R	2.99%	\$2,611,995
RG&E	5.38%	\$4,711,023
TOTALS	100.00%	\$87,500,000

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

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

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(05-M-0090SP6)

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

Whether to Permit the Submetering of Natural Gas Service to a Commercial Customer at Quaker Crossing Mall

I.D. No. PSC-40-10-00021-P

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

Proposed Action: The Public Service Commission is considering whether to approve, reject, or modify, in whole or in part, a petition filed by Quaker Crossing, to submeter gas service to a commercial gas customer at Quaker Crossing Mall, 3275 Benzing Rd., Orchard Park, NY.

Statutory authority: Public Service Law, section 66

Subject: Whether to permit the submetering of natural gas service to a commercial customer at Quaker Crossing Mall.

Purpose: To permit the submetering of natural gas service to a commercial customer at Quaker Crossing Mall.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Quaker Crossing LLC, to submeter natural gas to a commercial customer located in the Quaker Crossing retail center.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 10007, (518) 486-2655, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: Secretary@dps.state.ny.us

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

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement
Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(10-G-0431SP1)

Office of Victim Services

**EMERGENCY
RULE MAKING**

Practices and Procedures Before the Office of Victim Services

I.D. No. OVS-40-10-00011-E

Filing No. 967

Filing Date: 2010-09-20

Effective Date: 2010-09-20

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

Action taken: Repeal of Part 525 and addition of new Part 525 to Title 9 NYCRR.

Statutory authority: Executive Law, L. 2010, ch. 56, art. 22, section 623(3)

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

Specific reasons underlying the finding of necessity: Chapter 56 of the Laws of 2010 (enacting portions of the FY 2010-2011 State Budget) eliminates the New York State Crime Victims Board and creates the Office of Victim Services as a new Executive Agency. Previous regulations, Part 525 of Title 9 NYCRR, outlined the Practice and Procedure Before the Board. As the Board no longer exists pursuant to Chapter 56, the previous Part 525 of Title 9 NYCRR shall be repealed and a new Part 525 of Title 9 NYCRR shall be added to outline the Practice and Procedure Before the Office of Victim Services. This new Part shall retain much of the former Board's regulatory structure, but is altered to reflect the elimination of the Board and any new requirements created by Chapter 56. This new Part also reorganizes certain provisions of the former Board's regulatory structure and eliminates confusing language or provisions that were either redundant or contrary to both the new and unchanged provisions of Executive Law, Article 22.

These changes have been determined to be necessary for the general welfare of not only the residents of the State of New York but any person who may be the innocent victim of a crime within the State regardless of their residency or citizenship. These changes are necessary in order to ensure the continued, uninterrupted provision of assistance, as required by both State and federal law, to innocent victims of crime in New York State.

Subject: Practices and procedures before the Office of Victim Services.

Purpose: To implement regulations necessary for the proper implementation of Chapter 56 of the Laws of 2010.

Substance of emergency rule: Chapter 56 of the Laws of 2010 (enacting portions of the FY 2010-2011 State Budget) eliminates the New York State Crime Victims Board (the Board) and creates the Office of Victim Services (the Office) as a new Executive Agency. Previous regulations, Part 525 of Title 9 NYCRR, outlined the Practice and Procedure Before the Board. As the Board no longer exists pursuant to Chapter 56, the previous Part 525 of Title 9 NYCRR shall be repealed and a new Part 525 of Title 9 NYCRR shall be added to outline the Practice and Procedure Before the Office of Victim Services. This new Part shall retain much of the former Board's regulatory structure, but is altered to reflect the elimination of the Board and any new requirements created by Chapter 56. This new Part also reorganizes certain provisions of the former Board's regulatory structure and eliminates confusing language or provisions that were either redundant or contrary to both the new and unchanged provisions of Executive Law, Article 22. A summary of the changes between the previous Part and the new Part are as follows:

Subdivisions (a) through (j) of the previous section 525.1 are deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. Subdivision (o) of the previous section 525.1 is relocated to be included under the definition of medical services or medical expenses [new section 525.1(d)(2)]. The last two sentences of subdivision (q) of the previous section 525.1 are relocated to be included under manner of payments; awards [new section 525.10(g)(6)]. The new 525.1 contains subdivisions (a) through (g) to define/further clarify: child victim [pursuant to Executive Law, section 627(1)(d)], conduct contributing, representative, medical services or medical expenses, transportation expenses incurred for necessary court appearances, hospitalization, and financial counseling.

Subdivisions (a) through (d) of the previous section 525.2 are deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. The new 525.2 contains: a new subdivision (a) related to the electronic filing of claims [pursuant to Executive Law, section 625(3)], the previous subdivision (e) re-lettered as subdivision (b), and a new subdivision (c) related to the initial processing of claims [pursuant to Executive Law, section 627(1)(b)].

Subdivision (d) of the previous section 525.3 is relocated to be included under decision on a claim [new section 525.4(a)]. The new 525.3 contains: in subdivision (a) a time frame during which a claim must be assigned, in subdivision (b) a time frame during which a claim must be investigated [both pursuant to Executive Law, section 627(1)(b)] and a new subdivision (d) related to all claims being investigated regardless of subsequent arrest or conviction [pursuant to Executive Law, section 627(1)(c)].

Subdivision (a) of the previous 525.4 is altered to reflect the

elimination of the Board and is relocated to subdivision (b). Subdivision (b) of the previous 525.4 is altered to reflect the elimination of the Board Members and is relocated to subdivision (e). The new 525.4 also contains: a new subdivision (a) containing the language from the previous 525.3 (mentioned above), a new subdivision (c) related to the federal VOCA requirement that a claimant cooperate with the reasonable requests of law enforcement, a new subdivision (d) related to all claims receiving a decision regardless of subsequent arrest or conviction [pursuant to Executive Law, section 627(1)(c)], and in subdivisions (e) and (f) language to explain when anticipated payment may be made and the decision is the written report the claimant is entitled to [pursuant to Executive Law, section 627(1)(e)].

There are no substantive changes between the previous or new 525.5.

The new 525.6 retains much of the previous 525.6 with the following exceptions: the new subdivision (d) makes the claimant financially responsible for previously scheduled medical exams which were not attended without justification, the new subdivision (f) states that hearings may be adjourned by the office only, not upon the request of any interested party, the new subdivision (g) is rewritten to comply with the confidentiality provisions of the Executive Law, claimant hearings shall not be open to the public, and the new subdivision (i) the hearings shall simply take place at a time and place designated by the office.

The new 525.7 includes language in subdivision (a) that the office shall provide certain written notice about attorney representation to applying claimants [pursuant to Executive Law, section 627(1)(a)].

There are no substantive changes between the previous or new 525.8.

The previous 525.9 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. The new 525.9 includes the language of the previous 525.10 related to emergency awards.

The previous 525.10 is renumbered to the new 525.9 (above). The new 525.10 includes the language of the previous 525.12 related to manner of payment; awards. The new 525.10 retains much of the previous 525.12 language with the following exceptions: the previous 525.12(g)(2)(i) to (iv) is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22, the new subdivision (g)(5) contains the language of the previous 525.26 related to court transportation expenses with clarification that such expenses are available to any eligible claimant, the new subdivision (i)(3)(i) related to determining period of disability for loss of earnings (a regulation previously submitted to the State Register, CVB-52-09-00002-P though never adopted), the new subdivision (j) related to awards for livery cab operators [pursuant to Executive Law, section 627(1)(f)], the new subdivision (k) related to awards for loss of earnings or loss of support in excess of that which was initially awarded [pursuant to Executive Law, section 627(1)(g)], and the new subdivision (l) which contains the statutory references and requirements of the previous 525.11 related to reduction of awards for collateral payments.

The previous 525.11 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22, but references to the reduction of awards for collateral payments are included in the new 525.10(l) (above). The new 525.11 includes the language of the previous 525.13 related to review of a decision on a claim. The new 525.11 retains much of the previous 525.13 language with the following exceptions: the previous 525.13(b) and (c) are altered to reflect the elimination of the Board Members and the remaining language relocated to the new subdivision (b), the new subdivision (b) eliminates certain language contained in the previous 525.13(c) related to hearings being mandatory unless waived by the claimant, the new subdivision (c) relates to the notice to be included on a final determination [pursuant to Executive Law, section 627(1)(e)].

The new 525.12 contains the language of the previous 525.14 related to judicial review.

The new 525.13 is related to the confidentiality of and access to claimant records. The provisions of the previous 525.15 combined

both public and claimant records in one section which was unworkable. The previous 525.15 is deleted and two new, separate sections related to claimant records (525.13) and the access of public records (FOIL) (525.21) are included in its place.

The new 525.14 contains the language of the previous 525.16 related to the availability of rules.

The new 525.15 contains the language of the previous 525.25 related to requests for reduction of a lien to reflect the elimination of the Board Members.

The new 525.16 contains the language of the previous 525.30 related to battered spouses shelter cost guidelines.

The previous 525.17 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. The new 525.17 contains the language of the previous 525.31 related to crimes committed by family members.

The previous 525.18 was renumbered to the new 525.29. The new 525.18 contains the language of the previous 525.32 related to victims of human trafficking, presumption of physical injury.

The previous 525.19 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. The new 525.19 contains the language of the previous 525.33 related to the prohibited use of personal identifying information.

The previous 525.20 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22, to reflect the elimination of the Board. The new 525.20 relates to victim assistance programs and their role in preparing and assisting in the processing of claims to the office [pursuant to Executive Law, sections 623(3) and 627(1)(b)]. It also provides clarification of the office's confidentiality responsibilities.

The previous 525.21 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22, to reflect the elimination of the Board. The new 525.21 relates to the access of public records, containing the model FOIL regulations as developed by the DOS Committee on Open Government and reflecting the elimination of the Board Members. See also, the explanation for the new 525.13 (above).

The previous 525.22 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22, to reflect the elimination of the Board. There is not a new 525.22.

The previous 525.23 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. There is not a new 525.23.

The previous 525.24 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. There is not a new 525.24.

The provisions of the previous 525.25 were generally included in the new 525.15 related to requests for further reduction of lien. There is not a new 525.25.

The provisions of the previous 525.26 are generally included in the new 525.10(g)(5). There is not a new 525.26.

The previous 525.27 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. There is not a new 525.27.

The previous 525.28 is deleted as either redundant or contrary to the new and unchanged provisions of Executive Law, Article 22. There is not a new 525.28.

There was not a previous 525.29. The new 525.29 contains the language of the previous 525.18 related to the construction of rules.

The previous 525.30 was renumbered as the new 525.16. The new 525.30 provides for a severability clause.

The previous 525.31 is renumbered as the new 525.17, there is not a new 525.31. The previous 525.32 is renumbered as the new 525.18, there is not a new 525.32. The previous 525.33 is renumbered as the new 525.19, there is not a new 525.33.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 18, 2010.

Text of rule and any required statements and analyses may be obtained from: John Watson, General Counsel, Office of Victim Services, One Columbia Circle, Suite 200, Albany, New York 12203, (518) 457-8066, email: john.watson@ovs.ny.gov

Regulatory Impact Statement

1. **Statutory authority:** The New York State Executive Law, Article 22 which created the Crime Victims Board (the Board) was originally enacted by Chapter 894 of the Laws of 1966. During its existence for over four decades the Board had the authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law. The rules and regulations which evolved during that time are found in Part 525 of Title 9 of the New York Codes Rules and Regulations (NYCRR). Recently, Chapter 56 of the Laws of 2010 (enacting portions of the FY 2010-2011 State Budget) amended Article 22 of the Executive Law to eliminate the Board and create the Office of Victim Services (the Office) as a new Executive Agency. Chapter 56 provides in subdivision 3, section 623 of the Executive Law, that the Office shall have the power and duty to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law.

2. **Legislative objectives:** By enacting Chapter 56 of the Laws of 2010, the Legislature sought to ensure that, although the Board itself would be eliminated, the provisions and purpose of Article 22 of the Executive Law would continue under a reorganized Executive Agency to be known as the Office of Victim Services.

3. **Needs and benefits:** Chapter 56 of the Laws of 2010 eliminates the New York State Crime Victims Board and creates the Office of Victim Services as a new Executive Agency. Previous regulations, Part 525 of Title 9 NYCRR, outlined the Practice and Procedure Before the Board. As the Board no longer exists pursuant to Chapter 56, the previous Part 525 of Title 9 NYCRR must be repealed and a new Part 525 of Title 9 NYCRR must be added to outline the Practice and Procedure Before the Office of Victim Services. This new Part shall retain much of the former Board's regulatory structure, but is altered to appropriately reflect the elimination of the Board and all new requirements created by Chapter 56. This new Part also reorganizes certain provisions of the former Board's regulatory structure and eliminates language that is either redundant or contrary to both the new and unchanged provisions of Executive Law, Article 22 in order to avoid any confusion on the part of the Office or the public. These changes are necessary in order to ensure the continued, uninterrupted provision of assistance, as required by State and federal law, to innocent victims of crime in New York State.

4. Costs:

a. **Costs to regulated parties.** These proposed regulations would codify much of the former Board's regulatory structure and all new regulatory requirements created by Chapter 56, therefore it is not expected that the proposed regulations would impose any additional costs to the agency or State. The proposed regulatory changes may, in fact, result in saving the agency and State money when the volume of otherwise ineligible claims filed with the Board decreases because claimants or potential claimants would now have access to a more concise and clear regulatory structure.

b. **Costs to local governments.** These proposed regulations do not apply to local governments and would not impose any additional costs on local governments.

c. **Costs to private regulated parties.** The proposed regulations do not apply to private regulated parties and would not impose any additional costs on private regulated parties.

5. **Local government mandates:** These proposed regulations do not impose any program, service duty or responsibility upon any local government.

6. **Paperwork:** These proposed regulations do not require any additional paperwork requirements.

7. **Duplication:** These proposed regulations do not duplicate any other existing state or federal requirements.

8. **Alternatives:** These proposed regulations retain much of the former Board's regulatory structure, but are altered to reflect the elimination of the Board and any new regulatory requirements created by Chapter 56. The proposed regulations also reorganize certain provisions of the former Board's regulatory structure and eliminate confusing language or provisions that were either redundant or contrary to

both the new and unchanged provisions of Executive Law, Article 22. While the changes and reorganization are significant, a wholesale, substantive change to the former Board's regulatory structure was not considered in order to ensure a smooth transition during the agency's reorganization and the continued, uninterrupted provision of assistance, as required by State and federal law, to innocent victims of crime in New York State.

9. Federal standards: Permissible under 42 USC 10602.

10. Compliance schedule: The regulations will be effective immediately.

Regulatory Flexibility Analysis

The Office of Victim Services projects there will be no adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments in the State of New York as a result of this proposed rule change. This proposed rule change simply codifies much of the former New York State Crime Victims Board's (the Board) regulatory structure, reflects the elimination of the Board and any new regulatory requirements created by Chapter 56 of the Laws of 2010, reorganizes certain provisions of the former Board's regulatory structure and eliminates confusing language or provisions that were either redundant or contrary to both the new and unchanged provisions of Executive Law, Article 22. Since nothing in this proposed rule change will create any adverse impacts on any small businesses or local governments in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Regulatory Flexibility Analysis is not required and therefore one has not been prepared.

Rural Area Flexibility Analysis

The Office of Victim Services projects there will be no adverse impact on rural areas or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas in the State of New York as a result of this proposed rule change. This proposed rule change simply codifies much of the former New York State Crime Victims Board's (the Board) regulatory structure, reflects the elimination of the Board and any new regulatory requirements created by Chapter 56 of the Laws of 2010, reorganizes certain provisions of the former Board's regulatory structure and eliminates confusing language or provisions that were either redundant or contrary to both the new and unchanged provisions of Executive Law, Article 22. Since nothing in this proposed rule change will create any adverse impacts on any public or private entities in rural areas in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Rural Area Flexibility Analysis is not required and therefore one has not been prepared.

Job Impact Statement

The Office of Victim Services projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this proposed rule change. This proposed rule change simply codifies much of the former New York State Crime Victims Board's (the Board) regulatory structure, reflects the elimination of the Board and any new regulatory requirements created by Chapter 56 of the Laws of 2010, reorganizes certain provisions of the former Board's regulatory structure and eliminates confusing language or provisions that were either redundant or contrary to both the new and unchanged provisions of Executive Law, Article 22. Since nothing in this proposed rule change will create any adverse impacts on jobs or employment opportunities in the state, no further steps were needed to ascertain these facts and none were taken. As apparent from the nature and purpose of this proposed rule change, a full Job Impact Statement is not required and therefore one has not been prepared.

Workers' Compensation Board

EMERGENCY RULE MAKING

Pharmacy and Durable Medical Equipment Fee Schedules and Requirements for Designated Pharmacies

I.D. No. WCB-40-10-00003-E

Filing No. 957

Filing Date: 2010-09-15

Effective Date: 2010-09-15

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

Action taken: Addition of Parts 440 and 442 to Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117, 13 and 13-o

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

Specific reasons underlying the finding of necessity: This rule provides pharmacy and durable medical equipment fee schedules, the process for payment of pharmacy bills, and rules for the use of a designated pharmacy or pharmacies. Many times claimants must pay for prescription drugs and medicines themselves. It is unduly burdensome for claimants to pay out-of-pocket for prescription medications as it reduces the amount of benefits available to them to pay for necessities such as food and shelter. Claimants also have to pay out-of-pocket many times for durable medical equipment. Adoption of this rule on an emergency basis, thereby setting pharmacy and durable medical equipment fee schedules will help to alleviate this burden to claimants, effectively maximizing the benefits available to them. Benefits will be maximized as the claimant will only have to pay the fee schedule amount and there reimbursement from the carrier will not be delayed. Further, by setting these fee schedules, pharmacies and other suppliers of durable medical equipment will be more inclined to dispense the prescription drugs or equipment without requiring claimants to pay up front, rather they will bill the carrier. Adoption of this rule further advances pharmacies directly billing by setting forth the requirements for the carrier to designate a pharmacy or network of pharmacies. Once a carrier makes such a designation, when a claimant uses a designated pharmacy he cannot be asked to pay out-of-pocket for causally related prescription medicines. This rule sets forth the payment process for pharmacy bills which along with the set price should eliminate disputes over payment and provide for faster payment to pharmacies. Finally, this rule allows claimants to fill prescriptions by the internet or mail order thus aiding claimants with mobility problems and reducing transportation costs necessary to drive to a pharmacy to fill prescriptions. Accordingly, emergency adoption of this rule is necessary.

Subject: Pharmacy and durable medical equipment fee schedules and requirements for designated pharmacies.

Purpose: To adopt pharmacy and durable medical equipment fee schedules, payment process and requirements for use of designated pharmacies.

Substance of emergency rule: Chapter 6 of the Laws of 2007 added Section 13-o to the Workers' Compensation Law ("WCL") mandating the Chair to adopt a pharmaceutical fee schedule. WCL Section 13(a) mandates that the Chair shall establish a schedule for charges and fees for medical care and treatment. Part of the treatment listed under Section 13(a) includes medical supplies and devices that are classified as durable medical equipment. The proposed rule adopts a pharmaceutical fee schedule and durable medical equipment fee schedule to comply with the mandates. This rule adds a new Part 440 which sets forth the pharmacy fee schedule and procedures and rules for utilization of the pharmacy fee schedule and a new Part 442 which sets forth the durable medical equipment fee schedule.

Section 440.1 sets forth that the pharmacy fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of § 440.5 and the reimbursement for drugs dispensed before that is the fee schedule in place on the date dispensed.

Section 440.2 provides the definitions for average wholesale price, brand name drugs, controlled substances, generic drugs, independent pharmacy, pharmacy chain, remote pharmacy, rural area and third party payer.

Section 440.3 provides that a carrier or self-insured employer may

designate a pharmacy or pharmacy network which an injured worker must use to fill prescriptions for work related injuries. This section sets forth the requirements applicable to pharmacies that are designated as part of a pharmacy network at which an injured worker must fill prescriptions. This section also sets forth the procedures applicable in circumstances under which an injured worker is not required to use a designated pharmacy or pharmacy network.

Section 440.4 sets forth the requirements for notification to the injured worker that the carrier or self-insured employer has designated a pharmacy or pharmacy network that the injured worker must use to fill prescriptions. This section provides the information that must be provided in the notice to the injured worker including time frames for notice and method of delivery as well as notifications of changes in a pharmacy network.

Section 440.5 sets forth the fee schedule for prescription drugs. The fee schedule in uncontroverted cases is average wholesale price minus twelve percent for brand name drugs and average wholesale price minus twenty percent for generic drugs plus a dispensing fee of five dollars for generic drugs and four dollars for brand name drugs, and in controverted cases is twenty-five percent above the fee schedule for uncontroverted claims plus a dispensing fee of seven dollars and fifty cents for generic drugs and six dollars for brand-name drugs. This section also addresses the fee when a drug is repackaged.

Section 440.6 provides that generic drugs shall be prescribed except as otherwise permitted by law.

Section 440.7 sets forth a transition period for injured workers to transfer prescriptions to a designated pharmacy or pharmacy network. Prescriptions for controlled substances must be transferred when all refills for the prescription are exhausted or after ninety days following notification of a designated pharmacy. Non-controlled substances must be transferred to a designated pharmacy when all refills are exhausted or after 60 days following notification.

Section 440.8 sets forth the procedure for payment of prescription bills or reimbursement. A carrier or self-insured employer is required to pay any undisputed bill or portion of a bill and notify the injured worker by certified mail within 45 days of receipt of the bill of the reasons why the bill or portion of the bill is not being paid, or request documentation to determine the self-insured employer's or carrier's liability for the bill. If objection to a bill or portion of a bill is not received within 45 days, then the self-insured employer or carrier is deemed to have waived any objection to payment of the bill and must pay the bill. This section also provides that a pharmacy shall not charge an injured worker or third party more than the pharmacy fee schedule when the injured worker pays for prescriptions out-of-pocket, and the worker or third party shall be reimbursed at that rate.

Section 440.9 provides that if an injured worker's primary language is other than English, that notices required under this part must be in the injured worker's primary language.

Section 440.10 provides penalties for failing to comply with this Part and that the Chair will enforce the rule by exercising his authority pursuant to Workers' Compensation Law § 111 to request documents.

Part 442 sets forth the fee schedule for durable medical equipment.

Section 442.1 sets for that the fee schedule is applicable to durable medical goods and medical and surgical supplies dispensed on or after July 11, 2007.

Section 442.2 sets forth the fee schedule for durable medical equipment as indexed to the New York State Medicaid fee schedule, except the payment for bone growth stimulators shall be made in one payment. This section also provides for the rate of reimbursement when Medicaid has not established a fee payable for a specific item and for orthopedic footwear. This section also provides for adjustments to the fee schedule by the Chair as deemed appropriate in circumstances where the reimbursement amount is grossly inadequate to meet a pharmacies or providers costs and clarifies that hearing aids are not durable medical equipment for purposes of this rule.

Appendix A provides the form for notifying injured workers that the claim has been contested and that the carrier is not required to reimburse for medications while the claim is being contested.

Appendix B provides the form for notification of injured workers

that the self-insured employer or carrier has designated a pharmacy that must be used to fill prescriptions.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 13, 2010.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, Special Counsel to the Chair, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Summary of Regulatory Impact Statement

Section 1 provides the statutory authority for the Chair to adopt a pharmacy fee schedule pursuant to Workers' Compensation Law Section (WCL) 13-o as added to the WCL by Chapter 6 of the Laws of 2007 which requires the Chair to adopt a pharmaceutical fee schedule. Chapter 6 also amended WCL Section 13(a) to mandate that the Chair establish a schedule for charges and fees for medical care and treatment. Such medical care and treatment includes supplies and devices that are classified as durable medical equipment (hereinafter referred to as DME).

Section 2 sets forth the legislative objectives of the proposed regulations which provide the fee schedules to govern the cost of prescription medicines and DME. This section provides a summary of the overall purpose of the proposed regulation to reduce costs of workers' compensation and the scope of the regulation with regard to process and guidance to implement the rule.

Section 3 explains the needs and benefits of the proposed regulation. This section provides the explanation of the requirement of the Chair to adopt a pharmacy fee schedule as mandated by Chapter 6 of the Laws of 2007. The legislation authorizes carriers and self-insured employers to voluntarily decide to designate a pharmacy or pharmacy network and require claimants to obtain their prescription medicines from the designated pharmacy or network. This section explains how prescriptions were filled prior to the enactment of the legislation and the mechanisms by which prescriptions were reimbursed by carriers and self-insured employers. This section also provides the basis for savings under the proposed regulation. The cost savings realized by using the pharmacy fee schedule will be approximately 12 percent for brand name drugs and 20 percent for generic drugs from the average wholesale price. This section explains the issues with using the Medicaid fee schedule. The substantive requirements are set forth that carriers must follow to notify a claimant of a designated pharmacy or network. This includes the information that must be included in the notification as well as the time frames within which notice must be provided. This section also describes how carriers and self-insured employers will benefit from a set reimbursement fee as provided by the proposed regulation. This section provides a description of the benefits to the Board by explaining how the proposed regulation will reduce the number of hearings previously necessary to determine proper reimbursement of prescription medications by using a set fee schedule.

Section 4 provides an explanation of the costs associated with the proposed regulation. It describes how carriers are liable for the cost of medication if they do not respond to a bill within 45 days as required by statute. This section describes how carriers and self-insured employers which decide to require the use of a designated network will incur costs for sending the required notices, but also describes how the costs can be offset to a certain degree by sending the notices listed in the Appendices to the regulation with other forms. Pharmacies will have costs associated with the proposed regulation due to a lower reimbursement amount, but the costs are offset by the reduction of administrative costs associated with seeking reimbursement from carriers and self-insured employers. Pharmacies will be required to post notice that they are included in a designated network and a listing of carriers that utilize the pharmacy in the network. This section describes how the rule benefits carriers and self-insured employers by allowing them to contract with a pharmacy or network to provide drugs thus allowing them to negotiate for the lowest cost of drugs.

Section 5 describes how the rule will affect local governments. Since a municipality of governmental agency is required to comply with the rules for prescription drug reimbursement the savings afforded to carriers and self-insured employers will be substantially the same for local governments. If a local government decides to mandate

the use of a designated network it will incur some costs from providing the required notice.

Section 6 describes the paperwork requirements that must be met by carriers, employers and pharmacies. Carriers will be required to provide notice to employers of a designated pharmacy or network, and employers in turn will provide such notice to employees so that employees will know to use a designated pharmacy or network for prescription drugs. Pharmacies will be required to post notice that they are part of a designated network and a listing of carriers that utilize the pharmacy within the network. This section also specifies the requirement of a carrier or self-insured employer to respond to a bill within 45 days of receipt. If a response is not given within the time frame, the carrier or self-insured employer is deemed to have waived any objection and must pay the bill. This section sets forth the requirement of carriers to certify to the Board that designated pharmacies within a network meet compliance requirements for inclusion in the network. This section sets forth that employers must post notification of a designated pharmacy or network in the workplace and the procedures for utilizing the designated pharmacy or network. This section also sets forth how the Chair will enforce compliance with the rule by seeking documents pursuant to his authority under WCL § 111 and impose penalties for non-compliance.

Section 7 states that there is no duplication of rules or regulations.

Section 8 describes the alternatives explored by the Board in creating the proposed regulation. This section lists the entities contacted in regard to soliciting comments on the regulation and the entities that were included in the development process. The Board studied fee schedules from other states and the applicability of reimbursement rates to New York State. Alternatives included the Medicaid fee schedule, average wholesale price minus 15% for brand and generic drugs, the Medicare fee schedule and straight average wholesale price.

Section 9 states that there are no applicable Federal Standards to the proposed regulation.

Section 10 provides the compliance schedule for the proposed regulation. It states that compliance is mandatory and that the proposed regulation takes effect upon adoption.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. As part of the overall rule, these self-insured local governments will be required to file objections to prescription drug bills if they object to any such bills. This process is required by WCL § 13(i)(1) - (2). This rule affects members of self-insured trusts, some of which are small businesses. Typically a self-insured trust utilizes a third party administrator or group administrator to process workers' compensation claims. A third party administrator or group administrator is an entity which must comply with the new rule. These entities will be subject to the new rule in the same manner as any other carrier or employer subject to the rule. Under the rule, objections to a prescription bill must be filed within 45 days of the date of receipt of the bill or the objection is deemed waived and the carrier, third party administrator, or self-insured employer is responsible for payment of the bill. Additionally, affected entities must provide notification to the claimant if they choose to designate a pharmacy network, as well as the procedures necessary to fill prescriptions at the network pharmacy. If a network pharmacy is designated, a certification must be filed with the Board on an annual basis to certify that the all pharmacies in a network comply with the new rule. The new rule will provide savings to small businesses and local governments by reducing the cost of prescription drugs by utilization of a pharmacy fee schedule instead of retail pricing. Litigation costs associated with reimbursement rates for prescription drugs will be substantially reduced or eliminated because the rule sets the price for reimbursement. Additional savings will be realized by utilization of a network pharmacy and a negotiated fee schedule for network prices for prescription drugs.

2. Compliance requirements:

Self-insured municipal employers and self-insured non-municipal employers are required by statute to file objections to prescription

drug bills within a forty five day time period if they object to bills; otherwise they will be liable to pay the bills if the objection is not timely filed. If the carrier or self-insured employer decides to require the use of a pharmacy network, notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Certification by carriers and self-insured employers must be filed on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule. Failure to comply with the provisions of the rule will result in requests for information pursuant to the Chair's existing statutory authority and the imposition of penalties.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will impose minimal compliance costs on small business or local governments which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by small business and local governments as well as any other entity that chooses to utilize a pharmacy network. Notices are required to be posted in the workplace informing workers of a designated network pharmacy. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule.

5. Economic and technological feasibility:

There are no additional implementation or technology costs to comply with this rule. The small businesses and local governments are already familiar with average wholesale price and regularly used that information prior to the adoption of the Medicaid fee schedule. Further, some of the reimbursement levels on the Medicaid fee schedule were determined by using the Medicaid discounts off of the average wholesale price. The Red Book is the source for average whole sale prices and it can be obtained for less than \$100.00. Since the Board stores its claim files electronically, it has provided access to case files through its eCase program to parties of interest in workers' compensation claims. Most insurance carriers, self-insured employers and third party administrators have computers and internet access in order to take advantage of the ability to review claim files from their offices.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts to all insurance carriers, employers, self-insured employers and claimants. The rule provides a process for reimbursement of prescription drugs as mandated by WCL section 13(i). Further, the notice requirements are to ensure a claimant uses a network pharmacy to maximize savings for the employer as any savings for the carrier can be passed on to the employer. The costs for compliance are minimal and are offset by the savings from the fee schedule. The rule sets the fee schedule as average wholesale price (AWP) minus twelve percent for brand name drugs and AWP minus twenty percent for generic drugs. As of July 1, 2008, the reimbursement for brand name drugs on the Medicaid Fee Schedule was reduced from AWP minus fourteen percent to AWP minus sixteen and a quarter percent. Even before the reduction in reimbursement some pharmacies, especially small ones, were refusing to fill brand name prescriptions because the reimbursement did not cover the cost to the pharmacy to purchase the medication. In addition the Medicaid fee schedule did not cover all drugs, include a number that are commonly prescribed for workers' compensation claims. This presented a problem because WCL § 13-o provides that only drugs on the fee schedule can be reimbursed unless approved by the Chair. The fee schedule adopted by this regulation eliminates this problem. Finally, some pharmacy benefit managers were no longer doing business in New York because the reimbursement level was so low they could not cover costs. Pharmacy benefit managers help to create networks, assist claimants in obtaining first fills without out of pocket costs and provide utilization review. Amending the fee schedule will ensure pharmacy benefit managers can stay in New York and help to ensure access for claimants without out of pocket cost.

7. Small business and local government participation:

The Assembly and Senate as well as the Business Council of New York State and the AFL-CIO provided input on the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all carriers, employers, self-insured employers, third party administrators and pharmacies in rural areas. This includes all municipalities in rural areas.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file objections to prescription drug bills within a forty five day time period or will be liable for payment of a bill. If regulated parties fail to comply with the provisions of Part 440 penalties will be imposed and the Chair will request documentation from them to enforce the provision regarding the pharmacy fee schedule. The new requirement is solely to expedite processing of prescription drug bills or durable medical bills under the existing obligation under Section 13 of the WCL. Notice to the injured worker must be provided outlining that a network pharmacy has been designated and the procedures necessary to fill prescriptions at the network pharmacy. Carriers and self-insured employers must file a certification on an annual basis with the Board that all the pharmacies in a network are in compliance with the new rule.

3. Costs:

This proposal will impose minimal compliance costs on carriers and employers across the State, including rural areas, which will be more than offset by the savings afforded by the fee schedule. There are filing and notification requirements that must be met by all entities subject to this rule. Notices are required to be posted and distributed in the workplace informing workers of a designated network pharmacy and objections to prescription drug bills must be filed within 45 days or the objection to the bill is deemed waived and must be paid without regard to liability for the bill. Additionally, a certification must be filed with the Board on an annual basis certifying that all pharmacies within a network are in compliance with the rule. The rule provides a reimbursement standard for an existing administrative process.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government from imposition of new fee schedules and payment procedures. This rule provides a benefit to small businesses and local governments by providing a uniform pricing standard, thereby providing cost savings reducing disputes involving the proper amount of reimbursement or payment for prescription drugs or durable medical equipment. The rule mitigates the negative impact from the reduction in the Medicaid fee schedule effective July 1, 2008, by setting the fee schedule at Average Wholesale Price (AWP) minus twelve percent for brand name prescription drugs and AWP minus twenty percent for generic prescription drugs. In addition, the Medicaid fee schedule did not cover many drugs that are commonly prescribed for workers' compensation claimants. This fee schedule covers all drugs and addresses the potential issue of repackagers who might try to increase reimbursements.

5. Rural area participation:

Comments were received from the Assembly and the Senate, as well as the Business Council of New York State and the AFL-CIO regarding the impact on rural areas.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment is intended to provide a standard for reimbursement of pharmacy and durable medical equipment bills.