

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

EMERGENCY RULE MAKING

Various Trees and Plants of the Prunus Species

I.D. No. AAM-37-10-00017-E

Filing No. 908

Filing Date: 2010-08-31

Effective Date: 2010-08-31

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

Action taken: Amendment of Part 140 of Title 1 NYCRR.

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

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

Specific reasons underlying the finding of necessity: This rule amends the existing plum pox virus quarantine in New York State in response to the most recent detections of this virus in the State. The purpose of the amendments is to help prevent the further spread of this viral infection of stone fruit trees within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit and ornamental nursery stock that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but seriously debilitates the productive life of the plants. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms

of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

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

On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these findings, the regulations amending two (2) of the three (3) regulated areas in Niagara County, establishing a new regulated area in Orleans County and establishing three (3) new regulated areas in Wayne County, were adopted as an emergency measure on March 3, 2010. Additionally, the March 3rd amendments deregulated one of the regulated areas in the Town of Porter in Niagara County. This is due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols. On June 1, 2010, the regulations were readopted on an emergency basis. The regulations adopted on June 1st were the same as those promulgated on March 3rd, except that the June 1st regulations include amendments to the quarantined area in Orleans County (section 140.2(b)) and to one of the regulated areas in Wayne County (section 140.3(g)). Those changes to the regulations merely provide the correct street names for the boundaries and are technical in nature, since they do not change the size or scope of the areas in question. These emergency regulations are substantially the same as those promulgated on June 1st.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule 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 specific reason for this finding is that failure to immediately establish and extend the quarantine to regulate the intrastate movement of stone fruit could result in the further, unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the agricultural resources of the State, but could also result in a federal quarantine or exterior quarantines imposed by other states. Such quarantines would cause economic hardship for New York's stone fruit growers, since such quarantines may be broader than that which we propose and may vary in requirements and prohibitions

from state to state. 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. Accordingly, it appears that this rule should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

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

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

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

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

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

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

south on Heidenreich Road to its intersection with Fairville Station Road; extending northwest on Fairville Station Road to its intersection with Maple Ridge Road; extending northwest on Maple Ridge Road to its intersection with Decker Road; extending west on Decker Road to its intersection with Sand Hill Road; extending north on Sand Hill Road to its intersection with Smith Road; extending west on Smith Road to its intersection with Newark Road; extending south on Newark Road to its intersection with Desmith Road; extending west on Desmith Road to its intersection with Schilling Road; extending northwest on Schilling Road to its intersection with State Route 21; extending south on State Route 21 to its intersection with Cole Road; extending west on Cole Road to its intersection with Parker Road; extending south on Parker Road to its intersection with LeRoy Road; extending west on LeRoy Road to its intersection with Maple Avenue; extending north on Maple Avenue to its intersection with Marion Road; extending west on Marion Road to its intersection with Ontario Center Road; extending north on Ontario Center Road to its intersection with Atlantic Avenue; extending west on Atlantic Avenue to its intersection with Lincoln Road; extending north on Lincoln Road to its intersection with Haley Road; extending west on Haley Road to its intersection with County Line Road; extending north on County Line Road to its intersection with Lake Ontario.

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

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

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

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

(d) That area of Orleans County bordered on the north by Route 104 (Ridge Road) at its intersection with Eagle Harbor Waterport Road; extending south on Eagle Harbor Waterport Road to its intersection with Eagle Harbor Knowlesville Road; west on Eagle Harbor Knowlesville Road to its intersection with Presbyterian Road; extending southwest on Presbyterian Road to its intersection with

Longbridge Road; extending south on Longbridge Road to its intersection with State Route 31; extending west on State Route 31 to its intersection with Wood Road; extending south on Wood Road to West County House Road; extending west on West County House Road to its intersection with Maple Ridge Road; extending west on Maple Ridge Road to its intersection with Culvert Rd; extending north on Culvert Rd to its intersection with Telegraph Road; extending west on Telegraph Road to its intersection with Beales Road; extending north on Beales Road to its intersection with Portage Road; extending east on Portage Road to its intersection with Culvert Rd; extending north on Culvert Rd to its intersection with Route 104 (Ridge Road), in the Towns of Ridgeway and Gaines, in the County of Orleans, State of New York.

(e) That area of Wayne County bordered on the north by Lake Road at its intersection with Redman Road; extending east to its intersection with Maple Avenue; extending south on Maple Avenue to its intersection with Middle Road; extending west on Middle Road to its intersection with Rotterdam Road; extending south on Rotterdam Road to its intersection with State Route 104; extending west on State Route 104 to its intersection with Pratt Road; extending south on Pratt Road to its intersection with Ridge Road; extending west on Ridge Road to its intersection with Richardson Road; extending south on Richardson Road to its intersection with Tripp Road; extending south on Tripp Road to its intersection with Podger Road; extending west on Podger Road to its intersection with East Townline Road; extending north on East Townline Road to its intersection with Everdyke Road; extending west on Everdyke Road to its intersection with Russell Road; extending south on Russell Road to its intersection with Pearsall Road; extending west on Pearsall Road to its intersection with State Route 21; extending north on State Route 21 to its intersection with State Route 104; extending east on State Route 104 to its intersection with East Townline road; extending north on East Townline Road to its intersection with Van Lare Road; extending east on Van Lare Road to its intersection with Redman Road; extending north on Redman Road to its intersection with Lake Road, in the Town of Sodus, in the County of Wayne, State of New York.

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

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

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 November 28, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

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

3. Needs and benefits:

This rule amends the existing plum pox virus quarantine in New York State in response to the most recent detections of this virus in the State. The purpose of the amendments is to help prevent the further spread of this viral infection of stone fruit trees within the State.

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

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

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

On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these findings, the regulations amending two (2) of the three (3) regulated areas in Niagara County, establishing a new regulated area in Orleans County and establishing three (3) new regulated areas in Wayne County, were adopted as an emergency measure on March 3, 2010. Additionally, the March 3rd amendments deregulated one of the regulated areas in the Town of Porter in Niagara County. This is

due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols. On June 1, 2010, the regulations were readopted on an emergency basis. The regulations adopted on June 1st were the same as those promulgated on March 3rd, except that the June 1st regulations include amendments to the quarantined area in Orleans County (section 140.2(b)) and to one of the regulated areas in Wayne County (section 140.3(g)). Those changes to the regulations merely provide the correct street names for the boundaries and are technical in nature, since they do not change the size or scope of the areas in question. The current regulations are substantially the same as those promulgated on an emergency basis on June 1st.

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

4. Costs:

(a) Costs to the State government:

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

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

(b) Costs to local government:

None.

(c) Costs to private regulated parties:

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

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

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

(d) Costs to the regulatory agency:

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

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business:

The establishment and extension of the plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these findings, the regulations amending two (2) of the three (3) regulated areas in Niagara County, establishing a new regulated area in Orleans County and establishing three (3) new regulated areas in Wayne County, were adopted as an emergency measure on March 3, 2010. Additionally, the March 3rd amendments deregulated one of the regulated areas in the Town of Porter in Niagara County. This is due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols. On June 1, 2010, the regulations were readopted on an emergency basis. The regulations adopted on June 1st were the same as those promulgated on March 3rd, except that the June 1st regulations include amendments to the quarantined area in Orleans County (section 140.2(b)) and to one of the regulated areas in Wayne County (section 140.3(g)). Those changes to the regulations merely provide the correct street names for the boundaries and are technical in nature, since they do not change the size or scope of the areas in question. The current regulations are substantially the same as those promulgated on an emergency basis on June 1st.

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

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

2. Compliance requirements:

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

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

All regulated parties in the newly established regulated areas would

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

3. Professional services:

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

4. Compliance costs:

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

None.

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

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

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

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

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

5. Minimizing adverse impact:

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

6. Small business and local government participation:

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

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

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

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The establishment and extension of the plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and

provinces. On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these findings, the regulations amending two (2) of the three (3) regulated areas in Niagara County, establishing a new regulated area in Orleans County and establishing three (3) new regulated areas in Wayne County, were adopted as an emergency measure on March 3, 2010. Additionally, the March 3rd amendments deregulated one of the regulated areas in the Town of Porter in Niagara County. This is due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols. On June 1, 2010, the regulations were readopted on an emergency basis. The regulations adopted on June 1st were the same as those promulgated on March 3rd, except that the June 1st regulations include amendments to the quarantined area in Orleans County (section 140.2(b)) and to one of the regulated areas in Wayne County (section 140.3(g)). Those changes to the regulations merely provide the correct street names for the boundaries and are technical in nature, since they do not change the size or scope of the areas in question. The current regulations are substantially the same as those promulgated on an emergency basis on June 1st.

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

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

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

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

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

3. Costs:

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

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

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

Job Impact Statement

The establishment and extension of the plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. On June 1, 2009 and June 17, 2009, the plum pox virus was detected in two separate locations in Wayne County. On July 17, 2009, the virus was found in a third location in Wayne County and on July 22, 2009, a location in Orleans County tested positive for the virus. In response to these findings, the regulations amending two (2) of the three (3) regulated areas in Niagara County, establishing a new regulated area in Orleans County and establishing three (3) new regulated areas in Wayne County, were adopted as an emergency measure on March 3, 2010. Additionally, the March 3rd amendments deregulated one of the regulated areas in the Town of Porter in Niagara County. This is due to the fact that surveys and sampling within this regulated area have yielded negative results for the virus for three (3) consecutive years which justifies deregulation under existing federal protocols. On June 1, 2010, the regulations were readopted on an emergency basis. The regulations adopted on June 1st were the same as those promulgated on March 3rd, except that the June 1st regulations include amendments to the quarantined area in Orleans County (section 140.2(b)) and to one of the regulated areas in Wayne County (section 140.3(g)). Those changes to the regulations merely provide the correct street names for the boundaries and are technical in nature, since they do not change the size or scope of the areas in question. The current regulations are substantially the same as those promulgated on an emergency basis on June 1st.

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

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

on residential real property on or after July 1, 2009 be registered with the Superintendent of Banks.

Substance of proposed rule (Full text is posted at the following State website: www.banking.state.ny.us): Part 418

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

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

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

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

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

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

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

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

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

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

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

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

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

The Superintendent is empowered to waive, reduce or modify the financial responsibility requirements for certain servicers who service

Banking Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. BNK-37-10-00001-P

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

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

Statutory authority: Banking Law, art. 12-D

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

Purpose: To require that persons or entities which service mortgage loans

not more than 12 mortgage loans or an aggregate amount of loans not exceeding \$5,000,000, whichever is less.

Section 418.13 applies similar financial responsibility requirements to “Exempted Persons” who are not subject to the requirement to register as servicers. Such persons include mortgage bankers, mortgage brokers and most banking institutions and insurance companies.

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

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

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

Supervisory Procedure MB109

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

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

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

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

Supervisory Procedure MB110

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

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

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

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

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

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

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

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

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

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

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

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

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

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

Finally, mortgage loan servicers were added to the list of entities subject to the Superintendent’s power to impose monetary penalties

for violations of a law, regulation or order. (Paragraph (a) of Subdivision (1) of Section 44).

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

2. Legislative Objectives.

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

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

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

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

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

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

3. Needs and Benefits.

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

Currently, the Department regulates the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also may act as agents for owners of mortgages in negotiations relating to modifications. As "middlemen," moreover,

servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

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

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

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

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

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

4. Costs.

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

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

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

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

5. Local Government Mandates.

None.

6. Paperwork.

An application process is being established for potential mortgage

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

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

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

7. Duplication.

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

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

8. Alternatives.

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

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

9. Federal Standards.

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

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

10. Compliance Schedule.

The regulations will become effective immediately. Emergency regulations in substantially similar form have been in effect since July 1, 2009.

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

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

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

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

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

7. Small Business and Local Government Participation:

Industry representatives participated in outreach programs during the month of April, 2009. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

Rural Area Flexibility Analysis

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

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

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

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

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

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

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

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

Rural Area Participation. Industry representatives have participated in outreach programs during the month of April, 2009. The Department also maintains continuous contact with large segments of the

servicing industry through its regulation of mortgage bankers and brokers. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

Job Impact Statement

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

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

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

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

I.D. No. BNK-37-10-00002-P

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

Proposed Action: Amendment of Part 420 and Supervisory Procedure MB 107; and repeal of Supervisory Procedure MB 108 of Title 3 NYCRR.

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

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

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

Substance of proposed rule (Full text is posted at the following State website: www.banking.state.ny.us): Part 420

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supervisory Procedure MB107

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

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

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

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

Section 107.5 covers inactive status.

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

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

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

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

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

Section 599-d sets out the process for obtaining an MLO license. It also sets out the Department’s authority for imposing fees, the authority of the NMLS to collect such fees, the ability of the Superintendent to modify the requirements of Article 12-E in order to ensure compli-

ance with the SAFE Act, the requirement that filings be made electronically and required background information from all applicants.

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

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

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

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

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

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

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

2. Legislative Objectives.

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

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

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

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

3. If licensing of individuals who work for mortgage loan servicers and who engage in loan modification activities is required by the U.S.

Department of Housing and Urban Development, such individuals may be subject to the licensing requirements of the new law and to the new regulation.

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

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

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

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

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

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

3. Needs and Benefits.

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

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

These regulatory requirements will improve accountability among mortgage industry professionals, protect and promote the integrity of the mortgage industry, and improve the quality of service, thereby helping to restore consumer confidence.

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

4. Costs.

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

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

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

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

5. Local Government Mandates.

None.

6. Paperwork.

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

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

7. Duplication.

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

8. Alternatives.

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

9. Federal Standards.

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

10. Compliance Schedule.

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

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

7. Small Business and Local Government Participation:

See response to Item 6 above.

Rural Area Flexibility Analysis

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

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

Costs. Some mortgage businesses in rural areas may choose to pay the increased costs associated with the continuing education requirements and the fees associated with licensing and annual renewal of their MLOs, but are not required to do so. The regulation sets forth a background investigation fee of \$125.00, an initial license processing fee of \$50.00 and an annual license renewal fee of \$50.00. There will also be a fee for the processing of fingerprints and fees to cover the

cost of third party processing of the application. The latter two fees will be posted on the Department's website. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education courses are expected to be minimal. The cost of continuing education is estimated to be approximately \$500 every two years. The Department's increased effectiveness in fighting mortgage fraud and predatory lending will lower costs related to litigation and will decrease losses to consumers and the mortgage industry by hundreds of millions of dollars.

Minimizing Adverse Impacts. The industry supported passage of the prior Article 12-E and had substantial opportunity to comment on the specific requirements of this statute and its supporting regulation. In addition, the industry was involved in a dialogue with the Department during rule development.

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

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

Job Impact Statement

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

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

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

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

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Security at Automated Teller Facilities - Report of Compliance

I.D. No. BNK-37-10-00003-P

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

Proposed Action: Amendment of section 301.6 of Title 3 NYCRR.

Statutory authority: Banking Law, sections 12 and 75-n

Subject: Security at automated teller facilities - Report of Compliance.

Purpose: To improve required reporting on security at automated teller facilities and to require follow up report on corrective action.

Text of proposed rule: Section 301.6 is amended to read in its entirety as follows:

Section 301.6 Report of compliance.

(a)(i) The annual report of compliance required to be filed pursuant to the provisions of section 75-g of the Banking Law shall be filed [between February 11th and March 13th] *within 75 days after the close of each calendar year covering the preceding calendar year. This report shall be certified, under the penalties of perjury, and shall contain language substantially similar to the following:*

I, _____, (person[s] at the institution charged with enforcing compliance with Article II-AA of the Banking Law) hereby certify, *under the penalties of perjury, that all answers contained herein are true, accurate and complete.*

(1) A[a]ll of the automated teller machine facilities operated by _____ (name of institution) which are subject to the provisions of Article II-AA of the Banking Law [are] (choose one or more of the following, as applicable):

([1] i) _____ are in full compliance with the provisions of that Article; and/or [(as applicable)]

([2] ii) _____ are in full compliance with the variance or exemption (as the case may be) granted by the Superintendent for the automated teller machine facility (or facilities) located at _____ (specific address); and/or [(as applicable)]

([3] iii) _____ are not in compliance with the provisions of [that] Article II-AA

([4] 2) _____ (name of institution) uses and maintains only T-120 (commercial/industrial) grade video tapes, or better, in accordance with the provisions of section 301.5 of this Part.

(II) In cases in which some or all of a banking institution's automated teller machine facilities are not in compliance with the provisions of A[a]rticle II-AA, the annual report shall indicate *the following additional information:* (1) the specific address of *each such [facilities,] facility;* (2) the manner in which each such facility fails to meet the requirements of that Article and the reasons for such non-compliance [,] *and* (3) [Additionally, the annual report shall contain] a plan to remedy such non-compliance at each *such [automated teller machine] facility.* [The person signing the annual report shall verify that the information contained therein is true before a notary public.]

(b) *Upon notification of any violation of the provisions of section 75-c of the Banking Law, a report of corrective action required pursuant to section 75-j of the Banking Law shall be filed within ten business days from receipt of such notification. That report shall be certified, under the penalties of perjury, and shall contain language substantially similar to the following:*

I, _____, (person at the institution charged with enforcing compliance with Article II-AA of the Banking Law) hereby certify, *under the penalties of perjury, that all answers contained herein are true, accurate and complete.*

The automated teller machine facility operated by _____ (name of institution) located at _____ (specific address) which is the subject of one or more violations of the provisions of Section 75-c of the Banking Law, is (choose one of the following):

1. _____ in full compliance with the provisions of section 75-c as of _____ (date); or

2. _____ not presently in compliance with the provisions of section 75-c and the annexed remedial plan has been implemented and shall be completed by _____ (date no later than 30 days after initial notification of violation from the Banking Department); upon the date of completion of the remedial plan, - _____ (name of institution) shall file a certified report of compliance with the Banking Department stating that the location meets the requirements of section 75-c.

Annexed hereto is a description of remedial plan.

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

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

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

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

Regulatory Impact Statement

1. Statutory Authority

The ATM Safety Act (the "Act"), Article II-AA of the Banking Law, establishes required security measures for automated teller machine facilities ("ATMs"). Banking Law Section 75-n authorizes the Superintendent of Banks (the "Superintendent") to promulgate rules and regulations to define and implement the provisions of the Act. Banking Law Section 75-f authorizes the Banking Department (the "Department") to enforce the Act.

Section 75-c requires every banking institution to maintain certain specified security measures for each of its ATMs. Section 75-g requires every banking institution with ATMs to file an annual report of compliance with the Superintendent of Banks ("Superintendent"). Section 75-j provides that when a banking institution is found to be in violation of Section 75-c and fails to correct the violation within 10 business days after such finding, the Superintendent may hold a hearing and impose a civil penalty.

2. Legislative Objectives

The objective of the Act is to ensure the convenience and safety of ATM use. See Banking Law Section 75-a. In furtherance of that objective, the legislation sets forth required security measures for ATMs (Section 75-c), requires institutions to notify the Department of the details of the ATMs that it operates (Section 75-d) and annual reports of compliance with the Act (75-g). The Department is authorized to enforce the Act (Section 75-f) and, after notice and hearing, to impose civil penalties on banking institutions which fail to correct violations of Section 75-c within 10 business days after being notified thereof (Section 75-j).

The amendments to the Department's regulations implementing the Act will further these objectives by, among other things, requiring that annual reports to the Department under Section 75-g be made under penalties of perjury, and by requiring institutions which are cited for violations of the Act to file follow up reports, also under penalties of perjury, regarding corrective action taken.

3. Needs and Benefits

Presently, Superintendent's Regulation Part 301.6 requires that a banking institution file an annual report of compliance with the Superintendent and certify that the institution is in compliance with Banking Law Article II-AA. The amendments clarify the filing deadlines and require the annual report of compliance to be made under penalties of perjury.

The amendments would also add a new subsection (b) to Part 301.6. This new subsection would effectively require banking institutions found to be in violation of Section 75-c of the Act to file with the Department, also under penalties of perjury, a report that corrective action has been taken or to provide a remedial plan. This new reporting requirement would facilitate the enforcement of Banking Law Section 75-j, which states that where a banking institution fails to correct a violation of Section 75-c within ten business days of such finding, the Superintendent may after notice and a hearing require the institution to pay a civil penalty.

This type of self reporting would minimize the need for inspectors to follow up on violations by doing reinspections. Proof of failure to correct violations of Banking Law Section 75-c within 10 business days after notification, whether gathered from the required follow up reports or from reinspections, could serve in appropriate cases as the basis for the Department to hold hearings and impose civil monetary penalties pursuant to Section 75-j.

Thus, the self reporting requirement will enable the Banking Department to maximize the effective use of its limited ATM inspection resources.

4. Costs

The requirement that banking institutions found to be in violation of Section 75-c file reports of corrective action will impose some de minimis additional costs on such institutions. However, the filing of these reports will reduce the cost of enforcement of the Act by reducing the need for the Department to reinspect ATMs found to be in violation.

5. Local Government Mandates

The amendments will not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork

The amendments to Part 301.6 will require a new certification from banking institutions which have been notified of violations of Section 75-c of the Act. The form of certification is set forth in the amendment.

7. Duplication

The amendments to Part 301.6 will not result in duplication, overlap or

conflict with any other rules or other legal requirements of the State or the Federal government.

8. Alternative Approaches

Consideration was given to leaving Part 301.6 unchanged. However, as noted in "Needs and Benefits" above it was determined that, the self reporting requirement will enable the Banking Department to maximize the effectiveness of its limited ATM inspection resources. The requirement that reports be filed under penalties of perjury will help to ensure accurate and complete reporting regarding compliance with the Act, which is a matter directly affecting public safety.

9. Federal Standards

No minimum standards of the Federal government for the same or similar subject areas will be exceeded by the amendments to Part 301.6.

10. Compliance Schedule

It is not anticipated that any additional time will be required for banking institutions to comply with the amendments to Part 301.6. While the proposed amendments would become effective immediately upon publication of the Notice of Adoption in the *State Register*, the new reporting requirements will apply only to reports that are required to be filed after the effective date.

Regulatory Flexibility Analysis

The amendments will not impose any adverse economic or technological impact upon local governments. The amendments affect reporting requirements that apply to banking institutions which operate automated teller machine facilities. While some of such banking institutions may be small businesses, the new reporting requirements apply only to institutions found to be in violation of certain provisions of the ATM Safety Act. It is anticipated that the cost of the new requirement that such institutions file a follow up report of the corrective actions they are taking will be minimal.

Rural Area Flexibility Analysis

The amendments affect reporting requirements that apply to banking institutions which operate automated teller machine facilities. While some of those facilities may be located in rural areas, the new reporting requirements apply only to institutions found to be in violation of certain provisions of the ATM Safety Act. The benefits to public safety resulting from the new requirement that such institutions file a follow up report of corrective action taken are equally present when the facility is located in a rural area and outweigh the very minimal burden resulting from such an additional reporting requirement.

Job Impact Statement

A Job Impact Statement is not attached because the amendments to Part 301.6 will not have any appreciable and/or substantial adverse impact on jobs and employment opportunities.

Division of Criminal Justice Services

NOTICE OF ADOPTION

Notification to Designated Offenders

I.D. No. CJS-28-10-00005-A

Filing No. 906

Filing Date: 2010-08-31

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 section 6191.3(f) and (g) to Title 9 NYCRR.

Statutory authority: Executive Law, sections 837(13) and 995-c(4)

Subject: Notification to designated offenders.

Purpose: To address the procedures for notifying designated offenders who are not subject to incarceration or probation supervision.

Text or summary was published in the July 14, 2010 issue of the Register, I.D. No. CJS-28-10-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Natasha M. Harvin, Division of Criminal Justice Services, 4 Tower Place, Albany, New York 12203, (518) 457-8413, email: natasha.harvin@dcjs.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

NOTICE OF ADOPTION

Emissions of NOx from the Drying Process at Hot Mix Asphalt Production Plants

I.D. No. ENV-51-09-00008-A

Filing No. 903

Filing Date: 2010-08-31

Effective Date: 30 days after filing

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

Action taken: Amendment of Part 212 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 19-0311, 71-2103 and 71-2105

Subject: Emissions of NOx from the drying process at hot mix asphalt production plants.

Purpose: Require work practices and the potential installation of add-on control technology to reduce NOx emissions.

Text or summary was published in the December 23, 2009 issue of the Register, I.D. No. ENV-51-09-00008-P.

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

Revised rule making(s) were previously published in the State Register on June 16, 2010.

Text of rule and any required statements and analyses may be obtained from: Scott Griffin, 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.

Revised Regulatory Impact Statement

No revisions were made to the Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESSES AND LOCAL GOVERNMENTS

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process Emission Sources," to include control requirements for hot mix asphalt production plants. These control requirements will be specifically aimed at reducing emissions of oxides of nitrogen (NOx) resulting from combustion during the aggregate drying and heating process. The Department finds that reducing NOx emissions from hot mix asphalt plants is a necessary step in attaining ambient concentrations of ozone and fine particulate matter that are in compliance with the national ambient air quality standards.

The current NOx requirements under Part 212 affect only major facilities. Most, if not all, hot mix asphalt plants in New York State are minor sources. These new requirements will therefore be targeted primarily at minor sources. Approximately 200 hot mix asphalt production plants exist throughout the state, though not all are currently in service. While some asphalt production plants have consolidated under common ownership, many of these could be considered small businesses.

The Department has identified two local government entities that will be affected by the proposed requirements of Part 212. The New York City Department of Transportation (NYC DOT) has been operating a hot mix plant in Brooklyn, and just recently took over a plant in

Queens. The City of Syracuse Department of Public Works (DPW) also owns a hot mix plant. The requirements placed on these municipally-owned plants under the proposed revisions will not differ in any way from the requirements placed on other subject plants.

COMPLIANCE REQUIREMENTS

The new compliance requirements under Part 212 apply uniformly statewide. Under the proposed requirements, owners and operators of hot mix asphalt production plants must comply with NOx reduction practices and the possible application of low NOx burner control technology. Annual burner tune-ups will be required in order to increase the efficiency of the dryer burner. Plants will also be required to implement methods of reducing the moisture content in their aggregate stockpiles, which will have the effect of requiring less drying time and therefore requiring less fuel to be burned.

The owners or operators of plants will also be required to analyze the economic feasibility of installing a low NOx burner when their current burner is due to be replaced (though no later than 2020). In instances where it proves feasible, the installation of a low NOx burner will be required. The cost effectiveness calculation contained in Air Guide 20 will be utilized, with a threshold that represents the dollar-per-ton value of Reasonably Available Control Technology (RACT) at the time the analysis is done, in order to determine economic feasibility.

PROFESSIONAL SERVICES

Burner technicians will be utilized to comply with the annual tune-up requirements. Plant owners or operators will need to obtain low NOx burner specifications from manufacturers to complete the economic analysis. In the event that a low NOx burner is found to be economically feasible, the installation will be performed by burner manufacturer staff.

COMPLIANCE COSTS

The Department will be requiring plants to conduct annual burner tune-ups to ensure efficient combustion for the drying and heating process. Such tune-ups increase the efficiency of the burner, resulting in decreased fuel use and an associated decrease in emissions of NOx and other pollutants. Periodic tune-ups are already a common practice because of the fuel savings that can be obtained. Requiring such tune-ups annually can yield 10 percent reductions in NOx at an approximate cost of \$1,000 per ton reduced, and can have a direct payback to plant owners from decreased fuel consumption.

The Department is also requiring facilities to investigate the best method by which to reduce moisture in aggregate stockpiles. This may simply be a continuation of current practice if such measures are already being taken. By reducing the moisture content of the aggregate before it reaches the dryer, the amount of fuel required to dry and heat the aggregate can be considerably reduced. This could result in significant fuel savings for the plant. Costs will vary depending upon the method selected and the plant's site characteristics, and whether such methods are already employed. A technical paper released by Astec, Inc. (a manufacturer of asphalt plant equipment) proposes an example in which a plant with production volume of 150,000 tons per year could offset the cost of paving under its stockpile in just five to six months due to savings in materials, fuel, and loader operation¹. Any money saved after this payback period would be a direct benefit.

Beginning January 1, 2012, the Department will also require the owner or operator of an asphalt plant to investigate the feasibility of installing a low NOx burner when it comes time for replacement of the burner currently in use. By January 1, 2020, all plants must have submitted such an analysis to the Department. Low NOx burners have the potential to reduce NOx emissions by 25 to 40 percent. The cost effectiveness calculation contained in Air Guide 20 will be utilized, with a threshold that represents the dollar-per-ton value of Reasonably Available Control Technology (RACT) at the time the analysis is done, in order to determine economic feasibility.

MINIMIZING ADVERSE IMPACT

Because these proposed requirements are targeted toward minor facilities, a number of small businesses will be affected, as well as the Syracuse DPW, which owns one plant, and the NYC DOT, which owns two. The Department is requiring a combination of operating

practices and the analysis of control equipment to reduce NOx emissions. In this manner, it hopes to achieve sufficient NOx reductions while minimizing the effects on businesses. The annual burner tune-ups and reduction in aggregate moisture content will reduce NOx at moderate cost while making the plant operate more efficiently and reduce fuel use. The Department is requiring plants to utilize the cost effectiveness threshold value for RACT in conducting the low NOx burner analysis. In instances where the installation of a low NOx burner would be too costly, it would not be required.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

The proposed addition of NOx control requirements to Part 212 results from a candidate control measure developed by member states of the Ozone Transport Commission (OTC). This proposed measure was presented to industry stakeholders at the November 2, 2006 OTC Control Strategy meeting in Baltimore, MD. These stakeholders were given the opportunity to express their impressions and concerns of the candidate control measure. Additionally, a representative from the National Asphalt Pavement Association was present at the 2006 OTC Fall Meeting in Richmond, VA, where this proposed measure was also discussed.

The Department held a public comment period for the initially proposed revisions to Part 212, as well as public hearings on February 8, 9, and 10, 2010, as required by the State Administrative Procedures Act. On February 8, 2010, Department staff met with representatives of the New York Construction Materials Association, Inc. (NYMaterials) to discuss the requirements of the proposed revision. The Department is taking into consideration the comments received during the comment period and the views of NYMaterials in re-proposing these requirements. The Department will be holding an additional public comment period on these latest revisions, and will again take any comments received into consideration.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

The various proposed requirements are all expected to be technically feasible methods of reducing NOx at hot mix asphalt production plants, and apply equally to all plants. The annual burner tune-up requirement comes at a cost of approximately \$1,000 per ton of NOx reduced, and the resulting increase in efficiency can lead to savings in fuel use. Similarly, the costs expended in performing stockpile maintenance can be recouped through reduced fuel use, as less energy would be required to dry the aggregate.

The Department is utilizing a cost threshold to determine the feasibility of installing low NOx burners when the currently installed burners have reached the end of their useful life. The low NOx emissions from some plants may preclude them from finding low NOx burners to be cost effective, though larger plants are likely to see enough of a reduction in NOx to make the application of such technology economically feasible.

¹ Technical Paper T-129, "Stockpiles" by George H. Simmons, Jr. Available on www.astecinc.com.

Revised Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Part 212, "General Process Emission Sources." The proposed revision will include the addition of nitrogen oxide (NOx) control requirements for hot mix asphalt production plants under new section 212.12. Approximately 200 hot mix asphalt production plants exist throughout the state, though not all of these are in service. All such plants throughout the state will be affected, regardless of location. Rural areas are not disproportionately affected by these new control requirements under Part 212.

COMPLIANCE REQUIREMENTS

The new compliance requirements under Part 212 apply uniformly statewide. Under the proposed requirements, owners and operators of hot mix asphalt production plants must comply with NOx reduction practices and the possible application of low NOx burner control technology. Annual burner tune-ups will be required to increase the

efficiency of the dryer burner. Plants will also be required to implement methods of reducing the moisture content in their aggregate stockpiles, which will have the effect of requiring less drying time and therefore requiring less fuel to be burned.

Owners and operators of plants will also be required to analyze the economic feasibility of installing a low NOx burner when their current burner is due to be replaced (though no later than 2020). In instances where it proves feasible, the installation of a low NOx burner will be required. This analysis will utilize the cost effectiveness calculation contained in the Department's Air Guide 20 guidance document. Additionally, a low NOx burner will be required at any new hot mix asphalt production plant.

COSTS

The Department will be requiring plants to conduct an annual burner tune-up to ensure efficient combustion for the drying and heating process. Such tune-ups increase the efficiency of the burner, resulting in decreased fuel use and an associated decrease in emissions of NOx and other pollutants. Periodic tune-ups are already a common practice because of the fuel savings that can be obtained. Requiring such tune-ups annually can yield 10 percent reductions in NOx at an approximate cost of \$1,000 per ton reduced, and can have a direct payback to plant owners from decreased fuel consumption.

The Department is also requiring facilities to investigate the best method by which to reduce moisture in aggregate stockpiles. This may simply be a continuation of current practice if such measures are already being taken. By reducing the moisture content of the aggregate before it reaches the dryer, the amount of fuel required to dry and heat the aggregate can be considerably reduced. This could result in significant fuel savings for the plant. Costs will vary depending upon the method selected and the plant's site characteristics, and whether such methods are already employed. A technical paper released by Astec, Inc. (a manufacturer of asphalt plant equipment) proposes an example in which a plant with production volume of 150,000 tons per year could offset the cost of paving under its stockpile in just five to six months due to savings in materials, fuel, and loader operation¹. Any money saved after this payback period would be a direct benefit.

Beginning January 1, 2012, the Department will also require the owner or operator of an asphalt plant to investigate the feasibility of installing a low NOx burner when it comes time for replacement of the burner currently in use. By January 1, 2020, all plants must have submitted such an analysis to the Department. Low NOx burners have the potential to reduce NOx emissions by 25 to 40 percent. The cost effectiveness calculation contained in Air Guide 20 will be utilized, with a threshold that represents the dollar-per-ton value of Reasonably Available Control Technology (RACT) at the time the analysis is done, in order to determine economic feasibility.

MINIMIZING ADVERSE IMPACT

The Department does not expect any adverse impacts on rural areas. Because the proposed asphalt plant requirements are applicable to sources statewide, no rural area will be affected disproportionately.

The Department is requiring a combination of operating practices and the analysis of control equipment to reduce NOx emissions. In this manner, it hopes to achieve sufficient NOx reductions while minimizing the effects on businesses. The annual burner tune-ups and reduction in aggregate moisture content will reduce NOx emissions at moderate cost while making the plant operate more efficiently and reducing fuel use. The Department is requiring plants to utilize the cost effectiveness threshold value for RACT in conducting the low NOx burner analysis. In instances where the cost of installation of a low NOx burner would exceed the RACT threshold, the installation of such equipment would not be required.

There will be positive environmental impacts from the regulation in rural areas. Rural areas containing applicable sources, as well as rural areas downwind of such sources, should be subject to a decrease in ground-level ozone, airborne particulate matter, and acid deposition due to the reduction in NOx emissions.

RURAL AREA PARTICIPATION

The proposed addition of NOx control requirements to Part 212 results from a candidate control measure developed by member states

of the Ozone Transport Commission (OTC). This proposed measure was presented to industry stakeholders at the November 2, 2006 OTC Control Strategy meeting in Baltimore, MD. These stakeholders were given the opportunity to express their impressions and concerns of the candidate control measure. Additionally, a representative from the National Asphalt Pavement Association was present at the 2006 OTC Fall Meeting in Richmond, VA, where this proposed measure was also discussed.

The Department held a public comment period for the initially proposed revisions to Part 212, as well as public hearings on February 8, 9, and 10, 2010, as required by the State Administrative Procedures Act. On February 8, 2010, Department staff met with representatives of the New York Construction Materials Association, Inc. (NYMaterials) to discuss the requirements of the proposed revision. The Department is taking into consideration the comments received during the comment period and the views of NYMaterials in re-proposing these requirements. The Department will be holding an additional public comment period on these latest revisions, and will again take any comments received into consideration.

¹ Technical Paper T-129, "Stockpiles" by George H. Simmons, Jr. Available on www.astecinc.com.

Revised Job Impact Statement

No revisions were made to the Job Impact Statement.

Assessment of Public Comment

Comments received from June 16, 2010 through 5:00PM, July 16, 2010

Comment: The redrafted regulations require that beginning January 1, 2012, the owner or operator must "analyze the economic feasibility of installing a low NOx burner when it comes time for their current burner to be replaced." Does this mean that an economic feasibility analysis must be submitted in 2012 for all hot mix asphalt (HMA) plants? Or, is an economic feasibility study required at the time a facility is going to replace a burner after January 1, 2012? Commenter: 1

Response: The approach required by the New York State Department of Environmental Conservation (Department) is reflected in the commenter's latter statement: anytime after January 1, 2012, when an HMA facility is preparing to replace its burner, they must provide the Department with an economic feasibility study for a low NOx burner.

Comment: In some instances, it may not be necessary to perform an economic feasibility analysis to determine if a low NOx burner can be installed. The regulations should allow facilities the option to forego the economic feasibility analysis, which would be costly and time-consuming, and install a low NOx burner if the company and/or burner manufacturer has determined it to be economically feasible. In some cases, the preparation and submittal of an economic feasibility analysis may place an unnecessary financial burden on the owner/operator, and impede business operations by the need to prepare the analysis report and wait for Department approval. Commenter: 1

Response: In instances where an HMA plant voluntarily installs a low NOx burner because of its belief that such equipment would prove feasible, the economic analysis will not be a requirement. The preparation and submission of such a plan would be superfluous, and the plant could proceed with the installation without having to wait for Department approval. Of course, for HMA plants intending to show that a low NOx burner is not economically feasible, an analysis will be required in all cases.

Comment: The re-proposed regulations clarify that the Department will accept the manufacturer's classification of a burner as "low NOx." Some facilities have recently installed "low NOx" burners as classified by the manufacturer. These burners should be exempted from the January 1, 2020 deadline for the completion of an economic feasibility analysis and installation of a low NOx burner. Given that the re-proposed regulations will require annual burner tune-ups, these burners can have an effective life well beyond January 1, 2020. Therefore, facilities already operating with low NOx burners should not be forced to replace a perfectly functional low NOx burner if its useful life expectancy is beyond January 1, 2020. Commenter: 1

Response: In cases where an HMA plant has already installed a low

NOx burner according to manufacturer classifications, the Department will support the commenter's proposed approach. Because the purpose of the analysis is to determine whether a low NOx burner would be feasible, such an analysis would not be logical for plants that already operate such equipment. In lieu of the economic analysis, a facility owner should document the existence of a low NOx burner and submit it to the applicable Regional office by the January 1, 2020 deadline.

Comment: The revised regulations call for facilities to prepare and submit to the Department their "intended practices plan" for reducing moisture in aggregate stockpiles by March 1, 2011. The regulations, however, do not specify which practices are available and allowable. How will this part of the regulations be enforced without any specific requirements? Commenter: 1

Response: In the Regulatory Impact Statement (RIS) for the Part 212 re-proposal, the Department indicates that the "primary ways by which aggregate moisture content could be reduced are by covering the stockpile to shield it from rain, either with a tarp or physical structure, or by paving under and sloping the pile to allow water to drain away." These methods were specifically mentioned in the comments by the National Asphalt Pavement Association (NAPA) to the Ozone Transport Commission on its original proposal, and also reflect methods discussed in the Astec technical paper (referenced in the RIS) and brought up in communications with the New York Construction Materials Association (NYMaterials). The Department believes that these two methods are practical and effective for the stated purpose of reducing moisture content, should be feasible at most plants, and should therefore be the starting point for HMA plants in drafting their "intended practices plans." The Department decided not to impose specific requirements for reducing moisture in aggregate piles because, as noted by NAPA, "Best Practices are plant- and geographic locale-specific." The Department is relying on each HMA facility to inform us of the best approach for their plant.

Comment: As currently proposed, the requirements for the "intended practices plan" are too vague and would subject regulated facilities to widespread variety in enforcement, interpretation, etc., by the Regions as well as different inspectors in the same Region. Facilities could be at a competitive disadvantage or unknowingly be in violation, if one region or inspector requires a particular management practice (e.g., paving or covering) and another region does not. Commenter: 1

Response: As stated in the regulation, RIS, and in the comment above, the Department is not enforcing a particular management practice such as paving or covering a stockpile. The interpretation and enforcement of this requirement will be based on the plan submitted by each HMA facility. The Department therefore expects each plant to be thorough in its description of their intended practice, and to follow its stated practice thereafter. In doing so, the Department and its Regional staff will be able to successfully enforce such requirements.

Comment: The regulations should be more specific to indicate the acceptable moisture reduction practices, but should provide for operational flexibility. For example, it may be physically and/or operationally infeasible to cover stockpiles, pave beneath them, etc. Therefore, these should not be mandatory requirements. Commenter: 1

Response: The Department understands the commenter's concerns, and avoided the inclusion of mandatory requirements in Part 212 for these reasons. While the Department suggested two of the most oft-cited and effective means in the RIS as a starting point, it must defer to industry experts to determine what means are most reasonable in instances where covering or paving under stockpiles are not feasible. Because effective reduction of moisture in aggregate stockpiles can be directly beneficial to an HMA plant (potentially reducing fuel use by 10 to 15 percent, according to NAPA), the Department believes facilities will identify methods that can most appropriately be tailored to their plant, thus reducing NOx emissions while resulting in fuel savings for the plant.

Comment: Due to the wide variability in site and operational conditions, as well as the moisture reduction options available from site to site, the requirement for an "intended practices plan" and submittal

of an associated permit modification should be removed from the regulations. As many facilities currently employ some form(s) of moisture management, this component seems better suited for a guidance document rather than a vague regulation that will be extremely difficult to comply with and enforce uniformly throughout New York State because of its ambiguity. Commenter: 1

Response: As noted by the commenter, many facilities currently employ some form(s) of moisture management. Such measures result in the burning of less fuel, and are therefore accepted means of reducing NOx emissions where feasible. Placing this requirement in a regulation form will encourage those operators who do not presently practice moisture management to assess whether this is a feasible means of reducing emissions. Placing the requirement in a guidance document will carry less weight.

Comment: The re-proposed regulations state that a permit modification application must be submitted by March 1, 2011, presumably for the "intended practices plan." The preparation and implementation of management practices for moisture control in aggregate stockpiles does not appear to be a significant facility modification that requires a modification to an air permit or registration under the existing regulations. Since the new requirements will apply uniformly to all current permitted facilities, the Department should issue a Department-initiated modification to all existing permits rather than create unnecessary paperwork, as well as eliminate the unneeded time-consuming process of preparing and reviewing the numerous applications throughout New York State. Commenter: 1

Response: The revisions to Section 212.12 will be submitted to the United States Environmental Protection Agency (EPA) for inclusion in New York's State Implementation Plan (SIP). As such, it becomes a federal applicable requirement and will need to be addressed in each facility's permit (depending on the type it has) as required under 6 NYCRR Part 201. The Department may consider a mechanism by which the new requirements could be applied to multiple facilities to the extent allowed under Part 201.

Comment: Part 212.12(b) goes well beyond the 57 months established in the Final Implementation Rule for Reasonably Available Control Technology (RACT) implementation. New York should tighten the compliance schedule allowed for facilities to implement RACT to a more expeditious timeframe before the 2020 date established in the re-proposed rule (i.e., within 18 months from effective date of regulation or 1 year from when compliance plans are due-whichever is sooner).

Part 212.12(b) is also unacceptable because it does not provide for increments of progress nor sufficient time from when the economic analyses are to be submitted to when controls are to be installed. If New York were to adopt a compliance date beyond 18 months or 1 year from when compliance plans are due then New York should include in the regulation, increments of progress similar to those identified in 40 CFR Part 51, Subpart F-Procedural Requirements, Section 51.100(q), with specific dates.

New York's proposed Part 212 rule contains generic RACT provisions applicable to asphalt production. New York should commit to submit the case-by-case RACT determinations approved by the Department to EPA as SIP revisions by a date certain. In 212.12(b), we understand that facilities will be required to perform an annual tune-up on the dryer-burners and also reduce the moisture content of the aggregate stockpile. While both of these practices will help reduce facility NOx emissions, New York should establish a facility wide NOx reduction level as prescribed RACT (i.e., an overall reduction of 35 percent of NOx emissions at each facility not already equipped with NOx controls). Facilities may achieve this by utilizing the best practices mentioned above in conjunction with installation of a low NOx burner or establish emission limits that reflect the application of the suggested control technology, with the option of alternate RACT (i.e., using warm mix asphalt).[2]

Response: Applying RACT on an approximately six month timeframe isn't feasible for the proposed requirements to hot mix asphalt plants. The Department heard from many commenters on the initial Part 212 proposal on this issue. Commenters' primary concerns were that facilities which had just replaced their burners would potentially

be required to replace them again within a very short timeframe, and that additional time was needed for plants to budget accordingly. The requirements for best practices go into effect as quickly as possible (next operating year), but a longer timeframe for the low NOx burner assessment and installation was necessary.

The commenter refers to the continued application of Clean Air Act Sections 182(b)(2) and 182(f) as the basis for these comments regarding RACT. Section 182(f) specifically refers to major sources of NOx: "The plan provisions required under this subpart for major stationary sources of volatile organic compounds shall also apply to major stationary sources...of oxides of nitrogen." (Section 182(b)(2) refers only to volatile organic compound sources.) Because these requirements target minor sources of NOx, the Section 182(f) requirements do not apply. Hot mix asphalt plants that are major sources of NOx would already have been captured by the general RACT requirements under the Department's Section 212.10.

Comment: 212.12(c) should be revised to read as follows: The RACT determinations, including the economic feasibility analyses, which are acceptable to the Department will be submitted to the United States Environmental Protection Agency for review and approval as a revision to the State Implementation Plan. Commenter: 2

Response: In their comments on the initial proposal of Part 212 in December, 2009, EPA suggested the addition of a clause very similar to the above. Because the Department already incorporated EPA's language into the rule for the re-proposal, EPA's suggested revisions to their own statement will not be made.

List of Commenters

1. Hanson Aggregates New York LLC
2. United States Environmental Protection Agency, Region 2

NOTICE OF ADOPTION

Emissions of Ozone Precursor VOCs From Commercial and Industrial Adhesives and Sealants

I.D. No. ENV-51-09-00010-A

Filing No. 902

Filing Date: 2010-08-31

Effective Date: 30 days after filing

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

Action taken: Amendment of Parts 200 and 228 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0305, 71-2103 and 71-2105

Subject: Emissions of ozone precursor VOCs from commercial and industrial adhesives and sealants.

Purpose: To lower levels of ozone in New York State and decrease adverse public health and welfare effects.

Substance of final rule: 6 NYCRR Part 228 is being renumbered as Subpart 228-1. Internal references in the existing Part are being revised to reflect this renumbering. 6 NYCRR Part 200.9 is being amended to include documents incorporated by reference in new Subpart 228-2 and to reflect the renumbering of existing Part 228.

The addition of 6 NYCRR Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and its associated references in Part 200, General Provisions, applies to any person who sells, supplies, offers for sale, or manufactures commercial or industrial adhesives, sealants and primers, three months after the effective date of this rule, for use in the State of New York. Subpart 228-2 does not apply to: any commercial or industrial adhesive, sealant or primer manufactured in New York State for shipment and use outside of New York State, or units of any adhesive, sealant or primer product, packing excluded, which weigh less than one pound and consist of less than 16 ounces.

The revisions are based on the Ozone Transport Commission (OTC) 2006 model rule for commercial and industrial adhesives and sealants, which, in turn, is based on the reasonably available control technology (RACT) and best available retrofit control technology (BARCT) determination by the California Air Resources Board (CARB) developed

in 1998. In addition, the proposed rule incorporates EPA recommendations contained in its Control Technique Guidelines (CTG) document released in 2008 entitled, "Control Technique Guidelines for Miscellaneous Industrial Adhesives" (EPA 453/R-08-005), including adhesive application methods, and work practices for adhesive-related handling activities and cleaning materials. The proposed revisions have the following requirements:

A. Regulates the application of commercial and industrial adhesives, sealants, adhesive primers and sealant primers by providing options for applicators either to use a product with a VOC content equal to or less than a specified limit or to use add-on controls;

B. Sets forth work practices for mixing and handling operations for adhesives, thinners and adhesive-related waste materials;

C. Establishes a VOC limit for surface preparation solvents;

D. Establishes an alternative add-on control system requirement of at least 85 percent overall control efficiency (capture and destruction efficiency), by weight;

E. Requires that VOC containing materials must be stored or disposed of in closed containers;

F. Prohibits the sale of any commercial or industrial adhesive, sealant, adhesive primer or sealant primer which exceeds the VOC content limits listed in the rule;

G. Establishes that manufacturers must label containers with the maximum VOC content as supplied, as well as the maximum VOC content on an as-applied basis when used in accordance with the manufacturer's recommendations regarding thinning, reducing, or mixing with any other VOC containing material;

H. Prohibits the specification of any commercial or industrial adhesive, sealant or primer that violates the provisions of the rule; and

I. The reproposal adds provisions allowing for process-specific RACT determinations.

Several adhesive and sealant applications and products are exempt from this model rule: tire repair, testing and evaluation associated with research and development, solvent welding operations for medical devices, plaque laminating operations, products or processes subject to other New York State rules, low-VOC products (less than 20 g/l), and adhesives subject to the New York State rules based on the OTC 2001 consumer products model rule. Additionally, the model rule provides an exemption for adhesive application operations at emissions sources that use less than 55 gallons per year (12-month rolling average) of non-complying adhesives and for emissions sources that emit not more than 200 pounds of VOCs per year from adhesives operations.

Until alternative low VOC products become available, a phased-in seasonal implementation shall be provided for the use and sale of adhesives, sealants, and primers for use with single-ply roofing membranes and permissible time periods for the manufacture, sale and distribution of the existing adhesives, sealants, and primers.

On and after the effective date of this rule, a 15 month sell-through period will allow the sale and use of non-compliant industrial and commercial adhesives, sealants and primers.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 228-2.1(a),(b), 228-2.3(a),(b), 228-2.4(g)(1),(2), 228-2.7(a), 200.9 Table 1 and 228-2.6(a).

Revised rule making(s) were previously published in the State Register on June 16, 2010.

Text of rule and any required statements and analyses may be obtained from: Ralph F. Itzo, New York State Department of Environmental Conservation, Division of Air Resources, 625 Broadway, 2nd Floor, Albany, NY 12233, (518) 402-8403, email: airregs@gw.dec.state.ny.us

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

Summary of Revised Regulatory Impact Statement

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 1997 8-hour ozone national ambient air

quality standard (8-hour ozone NAAQS). For the various nonattainment areas in New York State, the Department of Environmental Conservation (Department) is required to submit revisions to the State Implementation Plan (SIP) that show that New York State will attain the 8-hour ozone NAAQS by the applicable date, and that the state is making reasonable progress toward this goal. 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). The Department has listed this proposed regulatory revision for commercial and industrial adhesives, sealants and primers as a measure that would help progress toward attainment. The adoption of the proposed Subpart 228-2 amendment, Commercial and Industrial Adhesives and Sealants, and attendant revisions to Part 200, General Provisions, marks the latest action in a sustained series of actions undertaken by New York State, in concert with EPA and other States, in an effort to control emissions of ozone precursors, NOx and VOCs, so that the New York State may attain the ozone NAAQS.

Implementation of the proposed Subpart 228-2 amendment and attendant revisions to Part 200 will, in concert with counterpart programs established by other States and Federal Implementation Plans (FIPs) imposed by EPA, lower levels of ozone in New York State and will decrease adverse public health and welfare effects. In enacting the Title I ozone control requirements of the 1990 CAA amendments, Congress recognized the hazards of ozone pollution and mandated that States, especially those in the Northeast U.S. Ozone Transport Region (OTR), implement stringent regulatory programs in order to meet the ozone NAAQS.

The cost of the proposed regulation will affect any person who sells, manufacturers or buys applicable commercial or industrial adhesives, sealants and primers in New York State. The cost per ton of VOC reduced and cost increase per unit will vary, depending on the specific adhesive category and compliance strategy chosen. It should be noted that a number of products already comply with the OTC model rule for VOC content limits, and would not require reformulation. An EPA analysis of the impacts of implementing the recommended levels of controls in its Control Technology Guidelines (CTG) for Miscellaneous Industrial Adhesives, based on CARB developed cost estimates, assumes that all facilities will choose the low-VOC adhesive materials compliance alternate. With the belief that low-VOC adhesives that can meet the recommended CTG control levels are already available at a cost that is not significantly greater than the cost of adhesives with higher VOC contents, the cost effectiveness is estimated to be relatively low, in a range of \$265 to \$2,320 per ton of VOC emission reduction. EPA also anticipates that work practice recommendations will result in a net cost savings, but these savings could not be accurately estimated.

There are no direct costs to state and local governments associated with this proposed regulation. However, state and local governments, like other consumers, will need to pay the increased prices for consumer products that are manufactured using commercial and industrial adhesives, sealants and primers resulting from compliance with the new, more restrictive VOC content limits. No additional record keeping, reporting, or other requirements will be imposed on local governments under the rulemaking. The authority and responsibility for implementing and administering the proposed Subpart 228-2 resides solely with the Department. Requirements for record keeping, reporting, etc. are applicable only to the person(s) who manufactures, sells, supplies, or offers for sale industrial and commercial adhesives, sealants and primers. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

The OTC workgroup assigned to the adhesives and sealants area source rule development evaluated four alternatives in its model rule. These are:

1. No action taken.
2. VOC content limits by product category.
3. Add-on air pollution control equipment.
4. Work practices to reduce VOC emissions.

Alternatives 2, 3 and 4 are proposed in this rulemaking because these alternatives will allow industrial and commercial users of the

regulated adhesives and sealants greater flexibility in reducing VOC emissions. Facilities presently operating control equipment in their operations can continue to use this alternate for compliance with the proposed rules. At the same time, to achieve compliance, affected facilities can also pursue the use of reduced VOC or low-VOC adhesives and sealants, add-on control equipment, as well as adoption of prescribed work practices.

In addition, the proposed rule incorporates EPA recommendations contained in its Control Technique Guidelines (CTG) document released in 2008 entitled, "Control Technique Guidelines for Miscellaneous Industrial Adhesives" (EPA 453/R-08-005), including adhesive application methods, and work practices for adhesive-related handling activities and cleaning materials. Facilities using less than 55 gallons of noncompliant commercial or industrial adhesives, sealants, primers and cleanup solvents in a 12-month period are exempt from the product VOC content requirements of the proposed rule.

The compliance schedule for this rulemaking specifies that three months after the effective date of this rule, no person shall sell, supply, offer for sale, or manufacture for sale in New York State any commercial or industrial adhesive, sealant, adhesive primer or sealant primer manufactured on or after that date, unless it complies with the applicable VOC content limits specified in the rule.

To assure the continuation of the achievement of quality construction in the State of New York until alternative low VOC products become available, a phased-in seasonal implementation shall be provided for the use and sale of adhesives, sealants, and primers for use with single-ply roofing membranes and an additional twelve-month permissible time period for the distribution, sale and/or use of the existing adhesives, sealants, and primers.

Revised Regulatory Flexibility Analysis

1. Effects on Small Businesses and Local Governments. No small businesses or local governments will be directly affected by the proposed amendment to 6 NYCRR Part 228, Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and attendant revisions to 6 NYCRR Part 200, General Provisions. Small businesses that manufacture affected products must comply with the VOC content limits, labeling and reporting requirements of Subpart 228-2. Since this can represent a small portion of their total business and the burden of reformulation falls on the major manufacturers, the impact on small businesses will be minimal, if any. For any cases where changes are made to products through reformulation, there is the possibility that these same small businesses would be able to provide the required alternative products. Three months after the effective date of this rule, small businesses may not sell, supply, offer for sale, or manufacture for sale in New York State, any commercial or industrial adhesive, sealant, adhesive primer or sealant primer manufactured on or after that date, unless it complies with the applicable VOC content limits specified in the rule. Small businesses and local governments that purchase affected products will be affected by the increased prices of affected commercial and industrial adhesives, sealants and primers resulting from the Subpart 228-2 amendment.

2. Compliance Requirements. Local governments will not be directly affected by the revisions to 6 NYCRR Part 228. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source. Small businesses directly affected by Subpart 228-2 will need to comply with the provisions of the program, as described below. Small businesses that manufacture commercial or industrial adhesives, sealants and primers generally only manufacture one or a small number of affected products.

Small businesses that manufacture affected products will need to comply with the VOC content limits and regulatory standards of Subpart 228-2. The proposed amendment regulates commercial and industrial adhesives, sealants and primers primarily by imposing reduced VOC content limits. The affected manufacturers, including small businesses, must document that their commercial and industrial adhesive, sealant and primer products comply with the VOC content limits contained in the Subpart 228-2 amendment. This is done through the equations and test methods referenced in the amendment.

Small businesses that manufacture commercial or industrial adhesives, sealants and primers products must also comply with the

labeling requirements of Subpart 228-2. This entails displaying the maximum VOC content (as supplied and as applied when used in accordance to the manufacturer's recommendations) on the label, lid or bottom of the container.

Small businesses that use commercial or industrial adhesives, sealants and primers must comply with certain reporting requirements contained in Subpart 228-2. Affected users must maintain a list of each adhesive, sealant, adhesive primer, sealant primer, cleanup solvent and surface preparation solvent in use and in storage, and also record the monthly volume of each adhesive, sealant, adhesive primer, sealant primer, cleanup or surface preparation solvent used.

3. Professional Services. It is not anticipated that small businesses that manufacture or use commercial or industrial adhesives, sealants and primers will need to contract out for professional services to comply with this regulation.

4. Compliance Costs. The California Air Resources Board (CARB) determined that most manufacturers and users of commercial or industrial adhesives, sealants and primers would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or users of subject products. The available compliance alternatives in the proposed rule are: VOC content limits by product group; add-on control equipment; and work practice procedures. CARB developed cost estimates with the assumption that all facilities will choose the low-VOC adhesive materials alternate. The vast majority of facilities may use low-VOC adhesives that can meet the recommended control levels. These low-VOC adhesives are believed to be already available at a cost that is not significantly greater than the cost of adhesives with higher VOC content. The cost effectiveness of the amended Part 228-2 rule is estimated to be in a range of \$265 to \$2,320 per ton of VOC emission reduction.

There is a limited possibility that some facilities may need to install add-on controls, which is a more costly alternative. Add-on devices include, for example, oxidizers, adsorbers, and concentrators. For some industrial manufacturing applications, low-VOC adhesives do not meet performance requirements, and add-on controls must be employed. Facilities may elect to comply with the proposed rule's requirements by using add-on control equipment. It is expected that most users will not select this option due to the availability of compliant adhesives, especially those that will meet the rule's standards, and due to the high cost of installing and operating the control equipment. At a cost-effectiveness of \$9,000 to \$110,000 per ton of VOC reduced, the use of add-on control equipment to comply with the requirements of the proposed rule may be a cost-effective option for only a few facilities. In the event a facility cannot economically achieve compliance with this rule by the use of low VOC adhesive products or by the installation of add-on controls, an available hardship exemption may be granted to the facility in accordance with a process-specific RACT demonstration provision included in the reproposal.

A negligible impact on affected business owners' equity (BOE) is anticipated. A decrease of 10 percent or more in BOE indicates a potentially significant impact on profitability. The impact of this proposed amendment is negligible, and noticeable changes in employment, business creation, elimination or expansion, and business competitiveness are not expected.

The Department of Environmental Conservation (Department) undertook no special cost analysis for small business and local government because the costs associated with Subpart 228-2 are not expected to vary for them. Small businesses and local governments will need to pay the increased prices for affected commercial and industrial adhesives, sealants and primers resulting from compliance with the new, more restrictive VOC content limits.

5. Minimizing Adverse Impact. The promulgation of Subpart 228-2 does not particularly affect small business or local government. The regulation has statewide applicability. Therefore, small businesses and local governments are not particularly impacted, adversely or otherwise, by this regulation.

To further mitigate adverse impacts, Ozone Transport Commission (OTC) implementation options were included in Subpart 228-2 to

minimize the impact of this regulation on the regulated parties, including manufacturers that are small businesses. In addition, the proposed implementation date allows additional time for manufacturers to reformulate their products to comply with the new VOC content limits. This will be especially helpful to small manufacturers who have limited research and development budgets.

6. Small Business and Local Government Participation. The OTC workgroup that developed the OTC model rule, which the Subpart 228-2 amendment is based, held informal regulatory development meetings with stakeholders and other interested parties, such as the National Adhesive and Sealant Council, the National Paint and Coatings Association, and the EPDM Roofing Association. These associations and its member companies provided the OTC workgroup comments during the development of both the OTC model rules and the individual regulations of participating OTC states. The OTC Stationary/Area Source Committee established a public comment period and held a public stakeholder meeting to take comment on the draft model rules. Since this regulation does not particularly affect small businesses and local governments, no special outreach efforts were made. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

7. Economic and Technological Feasibility. As mentioned above, the Department undertook no independent cost analysis. The Department utilized the work performed by EPA in its 'Control Techniques Guidelines for Miscellaneous Industrial Adhesives,' dated September 2008, to identify and incorporate the most cost-effective control technologies and work processes. In the document, EPA concluded that most manufacturers or marketers of commercial and industrial adhesives, sealants and primers would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. The estimated overall cost-effectiveness of the proposed amendment to Part 228 is relatively low, in a range from \$265 to \$2320/ton of VOC reduced. Nevertheless, not all the potential costs can be captured in any analysis, as economic analyses are inherently imprecise. Also adding to the uncertainty is the potential for pollution control innovations that can occur over time. It is impossible to estimate how much of an impact, if any, emerging technologies may have in lowering compliance costs. There also is the uncertainty regarding future costs that exists due to the flexibility that is allowed under the proposed regulation.

Revised Rural Area Flexibility Analysis

On April 30, 2004, the United States Environmental Protection Agency (EPA) published a final rule designating and classifying all nonattainment areas for the 1997 8-hour ozone national ambient air quality standard (8-hour ozone NAAQS). For the various nonattainment areas in New York State, the Department of Environmental Conservation (Department) is required to submit revisions to the State Implementation Plan (SIP) that show that New York State will attain the 8-hour ozone NAAQS by the applicable date, and that the state is making reasonable progress toward this goal. 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). The Department has listed this regulatory amendment, Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, and attendant revisions to Part 200, General Provisions, as a measure that would help progress toward attainment in SIPs already submitted to EPA for the New York-New Jersey-Long Island, NY-NJ-CT and Poughkeepsie nonattainment areas. This rule revision will also be included in the SIPs for the Jamestown and Buffalo-Niagara Falls nonattainment areas. Additionally, these more stringent requirements for production and use of commercial and industrial adhesives, sealants and primers will provide a necessary component of realizing the recently announced 2008 NAAQS for ozone, which will require that ambient concentrations throughout the state meet a 0.075 ppm standard.

This VOC control strategy is an outgrowth of the Ozone Transport Commission's (OTC) ongoing efforts to reduce ground-level ozone. At the June 7, 2006 OTC Annual Meeting, OTC member states adopted Resolution 06-02 which set forth guidelines for emission reduction strategies for six source sectors, including industrial

adhesives, sealants and primers. OTC member states agreed to pursue state rulemakings or other implementation methods to achieve emission reductions consistent with the guidelines. The Department is proposing to develop regulations to require VOC emission reductions consistent with the OTC guidelines for commercial and industrial adhesives, sealants and primers. In addition, the proposed rule incorporates EPA recommendations contained in its Control Technique Guidelines (CTG) document released in 2008 entitled, "Control Technique Guidelines for Miscellaneous Industrial Adhesives" (EPA 453/R-08-005), including adhesive application methods, and work practices for adhesive-related handling activities and cleaning materials. Facilities using less than 55 gallons of noncompliant commercial or industrial adhesives, sealants, primers and cleanup solvents in a 12-month period are exempt from the product VOC content requirements of the proposed rule.

Promulgation of the proposed new Subpart 228-2, Commercial and Industrial Adhesives, Sealants and Primers, is intended to reduce VOC emissions from commercial and industrial adhesives, sealants and primers to address the above emission shortfalls and make progress towards reducing 8-hour ozone levels.

1. Types and estimated number of rural areas: The criteria and procedures in the proposed Subpart 228-2 apply statewide. Rural areas are not particularly affected.

2. Reporting, recordkeeping and other compliance requirements: The criteria and procedures in Subpart 228-2 apply statewide. Reporting requirements are applicable to the company, firm or establishment which is listed on the product's label. If the label lists two or more companies, firms, or establishments, the Responsible Party is the party which the product was manufactured for or distributed by, as noted on the label. For record keeping, as well as labeling, the responsibility will reside with the manufacturers of commercial and industrial adhesives, sealants and primers. Other compliance requirements exist as well that are applicable to any person who sells, supplies, offers for sale, or manufactures these products. One such applicable requirement will be for compliance with the VOC content limits for each of the commercial and industrial adhesives, sealants and primers specified in the proposed Subpart 228-2. Although these products are used in rural areas, rural areas are not particularly affected. Professional services are not anticipated to be necessary to comply with this rule.

3. Costs: The California Air Resources Board (CARB) determined that most manufacturers and users of industrial adhesives, sealants and primers will be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. EPA adopted and incorporated the CARB developed cost analysis in its 'Control Techniques Guidelines for Miscellaneous Industrial Adhesives' (CTG), September, 2008. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or users of subject products. The available compliance alternatives in the proposed rule are: VOC content limits by product group; add-on control equipment; and work practice procedures. CARB developed cost estimates with the assumption that all facilities will choose the low-VOC adhesive materials alternate. With the belief that low-VOC adhesives that can meet the recommended control levels are already available at a cost that is not significantly greater than the cost of adhesives with higher VOC content, the cost effectiveness is estimated to be relatively low, in a range of \$265 to \$2320 per ton of VOC emission reduction. In the event a facility cannot economically achieve compliance with this rule by the use of low VOC adhesive products or by the installation of add-on controls, an available hardship exemption may be granted to the facility in accordance with a process-specific RACT demonstration provision included in the reproposal.

A negligible impact on affected business owners' equity (BOE) is anticipated. A decrease of 10 percent or more in BOE indicates a potentially significant impact on profitability. The impact of this proposed amendment is negligible, and noticeable changes in employment, business creation, elimination or expansion, and business competitiveness are not expected.

The Department undertook no special cost analysis for rural areas as the costs associated with the proposed Subpart 228-2 are not expected to vary for rural areas. However, small businesses and local

governments will need to pay the increased prices for consumer products resulting from compliance with the new, more restrictive VOC content limits. This is not a mandate on local governments. It applies to any entity that owns or operates a subject source.

4. Minimizing adverse impact: The proposed Subpart 228-2 does not particularly affect rural areas. The regulation has statewide applicability. Therefore, rural areas are not particularly impacted, adversely or otherwise, by this regulation.

5. Rural area participation: The OTC workgroup that developed the OTC model rule (from which the proposed Subpart 228-2 is based) held informal regulatory development meetings with stakeholders and other interested parties, such as the National Adhesive and Sealant Council, the National Paint and Coatings Association, and the EPDM Roofing Association. These associations and its member companies provided the OTC workgroup with comments during the development of both the OTC model rules and the individual regulations of participating OTC states. The OTC Stationary/Area Source Committee established a public comment period and held a public stakeholder meeting to take comments on the draft model rules. Since this regulation does not particularly affect rural areas, no special rural area outreach efforts were made.

Revised Job Impact Statement

1. Nature of impact: The New York State Department of Environmental Conservation (Department) proposes to amend 6 NYCRR Part 228 with a new Subpart 228-2, Commercial and Industrial Adhesives and Sealants, and attendant revisions to 6 NYCRR Part 200, General Provisions. This reproposal will not have an adverse impact on job and employment opportunities. The Department expects there to be slightly higher costs associated with the manufacture and/or marketing and the purchase of commercial/industrial adhesives, sealants and primers. Since the proposed Subpart 228-2 reflects the California Air Resources Board (CARB) and the Ozone Transport Commission (OTC) adhesives and sealants products emissions program in most respects, the Department utilized cost information that supported the CARB program. CARB evaluated and quantified the economic impact on affected businesses through the use of three compliance alternatives from their commercial and industrial adhesives and sealants program. A comprehensive analysis was performed by OTC, based on the CARB adhesives and sealants program relating to the proposed Subpart 228-2.

CARB determined that most manufacturers and users of commercial and industrial adhesives, sealants and primers would be able to absorb the cost of the proposed regulation with no significant adverse impacts on profitability. In performing this analysis it is assumed that all of the costs are borne by the manufacturers and/or users of subject products. CARB developed cost estimates, with the assumption that all facilities will choose the low-VOC adhesive materials alternate. With the belief that low-VOC adhesives that can meet the recommended control levels are already available at a cost that is not significantly greater than the cost of adhesives with higher VOC content, the cost effectiveness is estimated to be in a range of \$265 to \$2,320 per ton of VOC emission reduction.

EPA, in its "Control Techniques Guidelines for Miscellaneous Industrial Adhesives" (CTG), September 2008, adopted and incorporated the CARB developed cost estimates. A negligible impact on affected business owners' equity (BOE) is anticipated. A decrease of 10 percent or more in BOE indicates a potentially significant impact on profitability. The impact of this proposed amendment is negligible, and noticeable changes in employment; business creation, elimination or expansion; and business competitiveness are not expected.

2. Categories and numbers affected: Because of the lack of significant impact on BOE and the small increase in the prices of commercial and industrial adhesives, sealants and primers, the Department does not expect this regulation to have any effect on employment.

3. Regions of adverse impact: There is no adverse employment opportunity impact attributable to this rulemaking.

4. Minimizing adverse impact: Although the Department does not expect this regulation to have any effect on employment, flexibility provisions have been included in the regulation to facilitate compliance. These flexibility provisions, including: VOC content

limits by product category; allowing the use of add-on air pollution control equipment for those facilities needing the operational flexibility to use high-efficiency add-on controls instead of low-VOC content adhesives (especially when the use of high VOC adhesives is necessary or desirable for product efficacy); and work practices to reduce VOC emissions, are expected to lower compliance costs and, therefore, mitigate any adverse impacts on employment. In the event a facility cannot economically achieve compliance with this rule by the use of low VOC adhesive products or by the installation of add-on controls, an available hardship exemption may be granted to the facility in accordance with a process-specific RACT demonstration provision included in the reproposal.

To assure the continuation of the achievement of quality construction in the State of New York until alternative low VOC products become available, a phased-in seasonal implementation shall be provided for the use and sale of adhesives, sealants, and primers for use with single-ply roofing membranes; and permissible time periods for the distribution, sale and/or use of the existing adhesives, sealants, and primers.

5. Self-employment opportunities: Not Applicable.

Assessment of Public Comment

Comments received from June 16, 2010 through 5:00PM, July 16, 2010

The Department received three comments to the repropoed revisions to Part 228.

The comments were grouped as follows:

1.) Comment: 228-2.4(g)(2) - should be revised to read as follows: Department approved process specific RACT demonstrations under this subdivision shall be submitted to the EPA Administrator for approval as State Implementation Plan revisions. Commenter: 1.

Response: The Department concurs. The word "Administrator" will be deleted from paragraph 228-2.4(g)(2) of the re-proposed rule.

2.) Comment: NLRA's larger members have tens of thousands of products in their inventories that need to be checked for compliance with the new Part 228 Adhesives rule product requirements, while smaller members do not have the manpower or computerized purchasing and inventory systems to easily check for compliance. Without guidance on the products impacted by the Part 228 regulation beyond the general category list in Table 1, such as a listing of products by UPC code, its members will have difficulty checking their inventory for compliance without spending significant time and manpower. NRLA remains concerned that its members will face penalties for violations of the regulations because they did not receive sufficient guidance on impacted products. Commenter: 2.

Response: Commenter's concerns are duly noted. Although providing guidance to the regulated community for compliance with Department regulations is not part of the scope of its rulemaking activities, the commenter's requests will be taken into consideration during the rule's implementation and enforcement phases.

3.) Comment: Subpart 228-2 should clarify the applicability of the regulations to internal transfers and transactions that occur at hazardous material pharmacy-type operations on military bases. Commenter recommended amendment of the subpart to either include a definition for the term "distributor", or else include a definition for the terms "supplies" or "supply." Commenter: 3.

Response: The Commenter's concerns are duly noted and directs this Commenter to the possible exemptions available pursuant to. 228-2.4(g) of the rule: "Process-specific RACT Demonstrations."

APPENDIX
LIST OF COMMENTERS

Commenter number	Name and Affiliation
1.	Kirk Wieber, EPA Region 2 Air Programs Branch
2.	Thomas Lindberg, Northeastern Retail Lumber Association (NLRA)

3. David A. Glass, USAF Regional
Environmental Office, East Region

NOTICE OF ADOPTION

Emissions Verification, 202-1 Emissions Testing, Sampling, and Analytical Determinations and 202-2 Emission Statements

I.D. No. ENV-08-10-00012-A

Filing No. 901

Filing Date: 2010-08-31

Effective Date: 30 days after filing

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

Action taken: Amendment of Part 202 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 19-0301, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0311, 71-2103, 71-2105 and 72-0303

Subject: Emissions verification, 202-1 Emissions testing, sampling, and analytical determinations and 202-2 Emission Statements.

Purpose: Details the applicability, acceptable procedures, required contents and record keeping for testing and reporting of emissions.

Text or summary was published in the February 24, 2010 issue of the Register, I.D. No. ENV-08-10-00012-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 Miliani, 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.

Assessment of Public Comment

INTRODUCTION

The New York State (NYS) Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Part 202, Emissions Verification. Specifically, in 202-1, the Department is proposing to change the word 'Commissioner' to 'Department' to more accurately represent the Department's ability to require stack tests for inventory purposes as part of the permitting process, and to be more consistent with the language used in 202-2. Within 202-2, the Department is proposing to clarify language and include the reporting of greenhouse gases (GHGs) as part of the existing annual emission statement process. The GHGs include: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF₆).

The GHG reporting requirement under Subpart 202-2 is consistent with EPA's rule and other federal and voluntary programs, and will enable the Department to identify large sources of GHG emissions, establish baseline emission levels, and track trends to determine the effectiveness of Department efforts at reducing GHG emissions.

COMMENTS

1. Comment - NYSDEC should be able to obtain GHG emissions data from US EPA. Facility wide GHG emission information must be reported by facilities to USEPA electronically under 40 CFR Part 98 Mandatory Reporting of Greenhouse Gases rule. Reporting to NYSDEC in addition to US EPA would be an extra cost and burden of time, especially in times of economic crisis and/or recession. (1, 2, 3, 4)

Response - Currently, the timing, format and availability of GHG emissions data collected by EPA are uncertain. Furthermore, the Department collects emissions data in a different format than EPA's Mandatory GHG Reporting Rule will. EPA's rule will collect GHGs aggregated at a facility level in metric tons of carbon equivalents, while the Department collects emissions data at a process level in pounds per year. The emission data reported to EPA would not be at

the level of detail the Department is proposing to collect and would not enable the Department to assess GHG emission levels and reduction needs at a unit or process level. Facility level data is limited, and does not provide sufficient data for analysis. Most of the regulations the Department develops and enforces are based at the unit level and not the facility level. The proposed requirement to report GHGs as part of the annual emission statement may create some duplication between this regulation and EPA's Mandatory GHG Reporting Rule, in that both rules require Title V sources to report annual GHG emissions. However, the facilities subject to the Federal and State rules may differ.

Affected sources have been completing annual emissions statements in NYS for many years. Therefore, the cost of compliance with this regulation is not expected to appreciably increase as a result of the proposed amendments.

For combustion sources, providing GHG emissions data is optional - these emissions can be estimated by the Department. Most of NY's affected sources should be able to utilize an EPA emission factor to calculate GHG emissions from these source types.

2. Comment - NYSDEC should be able to calculate GHG emissions information using the fuel throughput data submitted as a part of emission statements. As there is no direct measurement of GHG emissions, emissions can be calculated for all sources in NYS using fuel throughput and appropriate emission factor. (1)

Response - The Department agrees with this comment and has indicated in the annual emission statement that providing emission estimates of process contaminants is optional for combustion sources. The Department will calculate emissions for combustion processes where actual annual throughput and operational data is provided.

3. Comment - Each subpart in 40 CFR 98 lists the specific greenhouse gases (out of the six gases requiring reporting) that a category of sources is required to report. For example, electric generating stations only report CO₂, N₂O and CH₄. NYSDEC should use the same logic when requesting emissions reporting to be consistent with USEPA 40 CFR Part 98. (1)

Response - The Department agrees that certain GHGs are typically emitted from specific process types. The Department is requesting that facility representatives include any GHG emissions that they are aware of from processes they are reporting for in their annual emission statements. The Department collects emission data at the process level, where USEPA 40 CFR Part 98 collects data at the facility level. The Department is unable to list the specific GHGs for each process in NYS and identify the GHGs that are expected to be emitted from each of those processes.

4. Comment - Although most data in DEC's emission statements is reported in pounds, emissions of CO₂ (especially) should be reported in tons. Reporting CO₂ emissions in pounds a) results in reporting ludicrously large values and b) implies more accuracy to the emission values than is warranted. All GHG emissions should be reported as CO₂e as reported to USEPA. (1)

Response - The Department is requiring GHGs to be reported in pounds to be consistent with the other pollutants collected under Part 202 and for proper management in the database system that is used to maintain emissions information. Large emissions can be reported in scientific notation to provide a more manageable value for inclusion in the annual emission statement submittal.

5. Comment - Any Department rulemaking should permit the submittal to the Department of emissions data provided to either the EPA or The Climate Registry as a valid and acceptable compliance alternative under Part 202. The Department should include language in the final rule to allow it to accept equivalent GHG information, such as information already provided to EPA. (2, 3, 4)

Response - The Department will accept emissions data in the format and level of detail already collected as part of the annual emission statement. This information should be able to be aggregated and converted to meet the reporting requirements identified by EPA.

List of Commenters

1. Christopher Wentlent, AES Eastern Energy
2. Pamela F. Faggert, Dominion Transmission, Inc. (DTI)

3. Radmila P. Miletich, Independent Power Producers of New York (IPPNY)

4. Randolph S. Price, Consolidated Edison Company of New York

Department of Health

EMERGENCY RULE MAKING

Hospital Inpatient Reimbursement

I.D. No. HLT-37-10-00007-E

Filing No. 904

Filing Date: 2010-08-31

Effective Date: 2010-08-31

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

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

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

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

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

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

Subject: Hospital Inpatient Reimbursement.

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire November 28, 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: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in section 2807-c(35) of the Pub-

lic Health Law. In addition, section 2807-c(4)(e-2) of the Public Health Law requires new per diem rates of reimbursement be implemented for certain exempt units and hospitals based on updated reported operating costs. Section 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv) and (v) requires schedules of payment to be set forth in regulations for supplemental indigent care distributions made to certain eligible hospitals.

Legislative Objectives:

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

Needs and Benefits:

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

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

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

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

COSTS:

Costs to State Government:

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

Costs of Local Government:

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

Costs to the Department of Health:

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

Local Government Mandates:

There are no local government mandates.
 Paperwork:
 There is no additional paperwork required of providers as a result of these amendments.
 Duplication:
 These regulations do not duplicate existing State and Federal regulations.
 Alternatives:
 No significant alternatives are available. The Department is required by the Public Health Law sections 2807-c(4)(e-2) and (35); 2807-k(5-b)(a)(ii) and (iv); and (b)(i), (iv), and (v) to promulgate implementing regulations.

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

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

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

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

This rule will have no direct effect on Local Governments.

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

The rule should have no direct effect on Local Governments.

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

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

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

Minimizing Adverse Impact:
 The proposed amendments reflect statutory intent and requirements.

The Legislature considered various alternatives for creating a new Medicaid hospital inpatient reimbursement methodology; however, the enacted budget adopted the APR-DRG methodology.

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

Rural Area Flexibility Analysis

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

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

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

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

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

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

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

Job Impact Statement

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

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

Lead Poisoning Control - Environmental Assessment and Lead Hazard Control

I.D. No. HLT-37-10-00018-P

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

Proposed Action: Amendment of Subpart 67-2 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 206(1)(n) and 1370-a

Subject: Lead Poisoning Control - Environmental Assessment and Lead Hazard Control.

Purpose: To create consistency with Federal regulations and guidelines on environmental assessment and lead hazard control.

Substance of proposed rule (Full text is posted at the following State website: www.health.state.ny.us): The proposed amendment to Subpart 67-2 (Lead Poisoning Control- Environmental Assessment and Lead Hazard Control) will do the following:

1. Add and modify definitions to be consistent with definitions in federal regulations enforced by United States Environmental Protection Agency (EPA). The definition of abatement has been modified and several new definitions added, including interim control, lead hazard control, and definitions of EPA certified workforce disciplines.
2. Add a requirement that all environmental investigations and all remediation work that meets the definition of abatement to be performed by persons certified by EPA.

3. Include a new requirement that all lead hazard control actions including interim controls be performed by firms and persons certified by the EPA or trained in lead-safe work practices. The qualifications for persons engaged in lead hazard remediation would be dependent on the risk of exposure to the occupants.

4. Clarify the circumstances for the issuance of a notice and demand to correct conditions conducive to lead poisoning when lead hazards are identified during a childhood lead exposure investigation.

5. Change the limits for lead in paint to update the definition of lead based paint when sampled by X-ray fluorescence analyzer (XRF), and modify the XRF sampling methodology to account for improvements in technology.

6. Create a requirement for the development of a remediation plan, prior to hazard control. The remediation plan must be reviewed and approved by the enforcement official and must contain the scope of hazard control, the date of remediation commencement, and the qualifications of the person performing the lead hazard controls.

7. Require clearance dust sampling at the conclusion of lead hazard control activities to evaluate the acceptability of final dust cleaning.

8. Create a requirement for the reinspection of remediated rental housing units to assure the continued maintenance of painted surfaces.

9. Clarify that Subpart 67-2 does not supercede or restrict the duties and powers of various other state and local agencies in enforcing these regulations.

Text of proposed 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

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

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

Regulatory Impact Statement

Statutory Authority:

The Commissioner's general powers and duties as authorized by Section 206 (1)(n) of the Public Health Law (PHL) provides that the Commissioner "shall by rule and regulation establish criteria for identification of areas and conditions involving high risk of lead poisoning, specify methods of detection of lead in dwellings, provide for the administration of prescribed tests for lead poisoning and the recording and reporting of the results thereof, and provide for professional and public education, as may be necessary for the protection of the public health against the hazards of lead poisoning." PHL Section 1370-a creates a lead poisoning prevention program to establish and coordinate activities to prevent lead poisoning and to minimize risk of exposure to lead.

Legislative Objectives:

The legislature has enacted provisions of PHL Sections 206 (1)(n) and 1370-a to foster lead poisoning prevention activities. The legislature finds and declares that lead is the number one environmental poison for children and lead poisoning is still one of the most prevalent and preventable childhood health problems in New York State today.

Needs and Benefits:

The existing provisions of Subpart 67-2, are not consistent with U. S. Environmental Protection Agency regulations for Lead Based Paint Activities in Target Housing and Child-Occupied Facilities.

Since Subpart 67-2 was last amended in 1995, federal rules have significantly changed, creating conflicts in the enforcement of the outdated state regulations. Subpart 67-2 is being revised to make language in the State regulation compatible with the language in the federal regulations. Some examples are the definitions of abatement, the introduction of terminology such as interim controls and certified firms, and requirements for the training of contractors performing renovation, repair, and painting practices. Technical changes in the regulation pertain to the operation of x-ray fluorescence analyzer (XRF) equipment used by health officials. The amendments will formalize procedures related to substrate correction, and will officially adopt a level of 1.0 milligram of lead per square centimeter (mg/sq.cm.) for defining lead paint and will clarify the definition of

"condition conducive to lead poisoning." These issues are currently addressed by guidance documents and local protocol. Changes also will clarify the authority of the enforcement official to collect samples of non-paint items suspected of causing exposure in the index child(ren). This includes dust, water, soil, food, ceramics, toys, cosmetics, jewelry, and other suspected materials.

These changes will be more protective of children's health by exceeding the federal standards for environmental lead interventions by requiring:

1. Corrective action be taken when hazards are identified;
2. Remediation plans be developed prior to corrective action;
3. Clearance lead dust sampling standards be met;
4. Reinspection of remediated housing units to assure continued maintenance of painted surfaces.

The new and/or amended rules and regulations will ensure that lead based hazard control activities are done by properly trained and certified individuals. In addition, environmental assessment and control of lead hazards will be conducted in a reliable, effective, and safe manner. The goal of this regulation is to protect the general public, especially the children, from exposure to lead hazards.

Cost/Savings:

Costs to Regulated Parties:

The proposed revisions do not impose any new program or requirement to regulated parties. Revisions to the regulation primarily align state requirements and definitions with existing federal rules promulgated in 1996 and implemented in 2001, and also more recent federal rules, promulgated in 2008, and implemented in 2010.

Costs to State Government:

The cost to the State will include expenses associated with printing and distributing revised inspection report forms. It is expected that these printing costs will not exceed \$5000.

Cost to Local Governments:

The amended rule creates a requirement for the reinspection of remediated rental housing units to assure the continued maintenance of painted surfaces. This will require local health departments to reinspect approximately 700 units per year at an estimated average cost per year of \$315,000 with an estimated range of \$280,000 - \$350,000 based upon the inspection type required. Most local governments have previously upgraded their testing equipment (XRF lead in paint analyzers) which will facilitate compliance with the new regulation. Approximately five local health departments may be using older XRF technology which is still usable but will become cumbersome to use under the new regulation. An upgraded XRF analyzer costs approximately \$12,000. New XRF equipment available to local health departments is expected to be available soon.

Local Government Mandates:

The proposed revisions do not impose a new program but does include new program responsibilities for county and city health departments. The proposed revisions include enhancements to practices and procedures reflecting current regulations used by local health departments when conducting an environmental investigation in response to a report of a child with an elevated blood lead level.

Paperwork:

The newly revised and amended Code requires no new additional forms and/or reporting requirements.

Duplication:

This regulation does not duplicate any existing federal, state or local regulations. The reinspection of the property is done to ensure that the lead based paint hazards that were repaired continue to be in satisfactory condition and that no new lead based paint hazards elsewhere in the dwelling unit have developed. In municipalities that have an established inspection program that is equivalent to our requirements, we would then recommend that the two agencies work together to accept each other's inspections as being equivalent to avoid duplication of efforts. In NYC for example, Local Law 1 concerning lead based paint inspections only pertains to buildings built before 1960, that have 3 or more apartments and has at least one child under 6 years of age present. These regulations would be expected to address areas not covered by the local law.

Alternatives Considered:

One alternative considered was to make no changes in the existing regulation but this was rejected, as the existing regulation is not sufficiently protective of children's health.

Another was a requirement to fully abate identified hazards in all housing units. This was rejected based on comments from city and county health departments, as well as the significant increase in cost related to more extensive construction activity. Also, since only areas with lead paint hazards would be abated, the additional expense of abatement would not eliminate the need for maintenance reinspection.

Federal Standards:

The Code has been amended and revised to make the language compatible with the language in the federal regulations, but does not exceed any federal regulations.

Compliance Schedule:

The proposed amendments and revisions are to be effective upon publication of a notice of adoption in the State Register.

Regulatory Flexibility Analysis**Effect on Small Business and Local Government:**

Environmental assessment and lead hazard control activities are primarily conducted by environmental health personnel in 36 county health departments, the New York City Department of Health and Mental Hygiene, and the Department's nine district offices (which cover 21 upstate counties). New York City and the 36 county health departments will be required by this amended regulation to do additional inspections which will be offset by additional state funding.

Federal regulations require all environmental investigations for lead hazards to be performed by a Certified Lead Inspector or a Certified Risk Assessor. There are approximately 340 firms that EPA certified operating in state. Small business contractors involved in lead hazard abatement work including removal, replacement, enclosure, and/or encapsulation are required to be Certified Abatement Worker(s) or a Certified Supervisor(s). There are approximately 530 firms listed as EPA certified abatement firms operating in the state. Contractors performing renovation, repair and painting activities must be EPA Certified Renovators. There are approximately 12,000 Certified Renovators in the state. Since the federal rules that govern the certification of small businesses are already in effect, there will be no impact on small businesses.

The amended rule creates a new requirement for the reinspection, of remediated rental housing units by city and county health departments to assure the continued maintenance of painted surfaces.

Compliance Requirements:**Reporting and Recordkeeping:**

The amended regulation will not impose any additional recordkeeping.

Other Affirmative Acts:

The amended regulation will not impose any additional affirmative acts unrelated to existing programs.

Professional Services:

No additional professional services will be required.

Compliance Costs:

The proposed revisions do not impose any new program or requirement to regulated parties. Revisions to the regulation primarily align state requirements and definitions with existing federal rules promulgated in 1996 and implemented in 2001. The amended rule enhances the existing practices and procedures reflected in current regulations by including a new requirement for the reinspection of remediated rental housing units by a local health department to assure the continued maintenance of painted surfaces. This will require local health departments to reinspect approximately 700 units per year at an estimated average cost per year of \$315,000 with an estimated range of \$280,000 - \$350,000 based upon the inspection type required.

Economic and Technological Feasibility:

The proposal is technologically feasible because it can be undertaken with existing technology. The proposed is economically feasible because it is anticipated that new costs to city and county health

departments will be offset completely with additional funding. We do not anticipate any negative impact on the funding for existing program activities.

Minimizing Adverse Economic Impact:

The proposed amendment updates standards for environmental lead assessments and lead hazard control to minimize risk to the public health. The amendment does not impose any new requirements and adverse economic impact on small businesses.

It is anticipated that new costs to city and county health departments will be offset completely by additional funding. We do not anticipate any negative impact on the funding for existing program activities.

Small Business and Local Government Participation:

In 2006, four informational meetings were held with county and state health officials in Ballston Spa, New Rochelle, Rochester, and Syracuse to solicit their input.

Advisory Council members provided draft revisions of 67-2 to their constituents.

Extensive comments were subsequently received from the New York Public Interest Research Group (NYPIRG) and numerous physicians, pediatricians and prominent lead poisoning research scientists. Revisions were made as a result of these comments.

The Capital District Coalition for Lead Safety was presented with the revised Code and were asked to provide comments. The revisions to the code were presented at the New York State Conference of Environmental Health Directors at their annual meeting in Chautauqua. Comments were solicited from the environmental health directors, and revisions were made as a result.

In 2007 and 2008, members of the New York State Lead Poisoning Prevention Advisory Council were presented with the revised Code on three occasions and were requested to review and comment on the proposed regulation. Significant comments were received and revisions were made in response to those comments. On August 28, 2009, the Advisory Council, NYSACHO, The Conference of Environmental Health Directors and real estate industry representatives were provided with proposed regulatory language for their comment. Extensive comments were received from the city and county health departments and NYSACHO in September. Subsequently in 2009 and in 2010, on three occasions, the Advisory Council and NYSACHO were provided with a detailed flow chart depicting regulatory changes and were requested to provide input. Revisions were made in response to comments received from participants. A representative from NYSACHO provided a letter of support indicating: she represents the combined input of the local Public Health Commissioners and Directors and their Environmental Public Health staff members; they have had multiple opportunities to comment on the proposed revisions through written submission and in person following a Center for Environmental Health presentation; comments are reflected in this most recent version; and recommending it be forwarded for public comment.

Rural Area Flexibility Analysis**Types and Estimated Numbers of Rural Areas:**

Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. There are 44 counties in New York State with a population less than 200,000. Nine counties have certain townships with population densities of 150 persons or less per square mile. All housing built prior to 1978 possibly contains lead-based paint, and older homes may have plumbing consisting of lead pipes, including housing in rural areas, however, incidence of childhood lead poisoning is concentrated primarily in urbanized area. Data from 2005 indicate that 90% of lead poisonings occur in 18 counties and New York City, primarily in 48 urban zip codes.

Reporting, Recordkeeping and Other Compliance Requirements:**Reporting and Recordkeeping:**

The amended regulations will not impose any additional amount of reporting, record keeping and other compliance requirements. Revisions to the regulation primarily align state requirements and definitions with federal rules already in force.

Professional Services:

The amended regulations will not require any additional professional services.

Costs:

The proposed revisions do not impose any new program or requirement to regulated parties. No additional costs for professional services are anticipated as a result of this revision. The proposed revisions to the regulations create consistency with existing federal rules.

Minimizing Adverse Economic Impact on Rural Areas:

The proposed amendment updates standards for environmental lead assessments and lead hazard control to minimize risk to the public health. The amendment creates conformity with existing federal rules and does not impose any new requirements therefore there is no adverse economic impact on rural areas.

Rural Area Participation:

Four informational meetings were held with county and state health officials in Ballston Spa, New Rochelle, Rochester, and Syracuse to solicit their input. Draft versions of the regulation were sent electronically to all local health departments, New York Association of County Health Officials (NYSACHO) and representatives of the real estate industry. Extensive comments were received from the local health departments and NYSACHO. Revisions were made in response to comments received from participants. Members of the New York State Lead Poisoning Prevention Advisory Council were presented with the revised Code on three occasions and were requested to review and comment on the proposed regulation. Significant comments were received and revisions were made in response to those comments.

Advisory Council members provided draft revisions of 67-2 to their constituents. Extensive comments were subsequently received from the New York Public Interest Research Group (NYPiRG) and numerous physicians, pediatricians and prominent lead poisoning research scientists. Revisions were made as a result of these comments.

The Capital District Coalition for Lead Safety was presented with the revised Code and were asked to provide comments. The revisions to the code were presented at the Conference of Environmental Health Directors at their annual meeting in Chautauqua. Comments were solicited from the environmental health directors, and revisions were made as a result.

Job Impact Statement

No job impact is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent from the nature of the proposed amendment that it will not have a substantial adverse impact on jobs and employment opportunities.

Text of rule and any required statements and analyses may be obtained from: George M. Kazanjian, Esq., New York State Higher Education Services Corporation, 99 Washington Avenue, Room #1350, Albany, New York 12255, (518) 473-1581, email: regcomments@hesc.org

Assessment of Public Comment

The agency received no public comment.

Insurance Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Credit for Reinsurance

I.D. No. INS-37-10-00016-P

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

Proposed Action: Amendment of Part 125 of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 110, 201, 301, 307(a), 308, 332, 1301(a)(9), (c) and 1308

Subject: Credit For Reinsurance.

Purpose: Establish rules governing when an authorized ceding insurer may take credit on its balance sheet for a reinsurance recoverable.

Substance of proposed rule (Full text is posted at the following State website: <http://www.ins.state.ny.us>): Sections 125.1, 125.2 and 125.3 are repealed to delete redundant and dated insolvency clause requirements.

The new Section 125.1 is an applicability clause. It provides that this Part shall apply to reinsurance ceded by an insurer authorized to do business in this State, provided that where the state of domicile of a foreign ceding insurer is an NAIC-accredited state, or has financial solvency requirements substantially similar to the requirements necessary for NAIC accreditation, and recognizes credit for reinsurance for the insurer's ceded risk, then the foreign ceding insurer may take credit for the reinsurance.

The new Section 125.2 defines certain terms used in this Part.

A new Section 125.3 is proposed to apply principles of prudent reinsurance credit risk management to all licensed ceding insurers subject to the Part.

Section 125.4 is amended to include a new Section 125.4(h) to provide alternative credit for cessions to unauthorized assuming insurers. This section adjusts the credit that the ceding insurer may take in its financial statement based upon the financial strength of the unauthorized assuming insurer. In order to allow the ceding insurer to take full credit for the reinsurance without the assuming insurer posting 100% collateral, the unauthorized assuming insurer in the transaction must:

- 1) maintain a minimum net worth of \$250 million;
- 2) be authorized and meet the standards of solvency and capital adequacy in its domiciliary jurisdiction;
- 3) have a credit rating from at least two rating agencies;
- 4) file documents with the Superintendent evidencing its financial condition; and
- 5) have been assigned a rating from the Superintendent authorizing the ceding insurer to take credit for the reinsurance without the assuming insurer posting 100% collateral.

Moreover, to qualify for the reduced credit with respect to cessions to an unauthorized assuming insurer, the Superintendent and the domiciliary regulator of the unauthorized assuming insurer must have in place an executed memorandum of understanding pursuant to this Part. Further, the domiciliary jurisdiction of an unauthorized assuming insurer shall allow U.S. assuming insurers access to the market of that jurisdiction on terms and conditions that are at least as favorable as those provided in New York laws and regulations for unauthorized assuming insurers.

Ceding insurers seeking alternative credit for cessions to unauthorized assuming insurers must maintain audited financial statements

Higher Education Services Corporation

NOTICE OF ADOPTION

Continental Airlines Flight 3407 Memorial Scholarship Program

I.D. No. ESC-27-10-00004-A

Filing No. 900

Filing Date: 2010-08-31

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 section 2201.12 to Title 8 NYCRR.

Statutory authority: Education Law, sections 653, 655 and 668-g

Subject: Continental Airlines Flight 3407 Memorial Scholarship Program.

Purpose: Implementation of the Flight 3407 Memorial Scholarship Program.

Text or summary was published in the July 7, 2010 issue of the Register, I.D. No. ESC-27-10-00004-P.

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

for the unauthorized assuming insurers for the last three years, and maintain satisfactory evidence that an unauthorized assuming insurer meets the requirements mentioned above.

The reinsurance contract itself must contain an insolvency clause, a designation of a person in New York or the ceding insurer's domestic state for service of process, a requirement that any disputes will be subject to United States courts and laws, and a requirement that the unauthorized assuming insurer will notify the ceding insurer of any changes in its license status or any change in its rating from a credit rating agency.

While this alternative credit for cessions to unauthorized assuming insurers will reduce the collateral requirement in a manner that corresponds to the financial strength of the unauthorized assuming insurer, where an order of rehabilitation, liquidation or conservation is entered against the ceding insurer, the unauthorized assuming insurer must, as a general matter, post full collateral for all outstanding liabilities owed to the ceding insurer.

Section 125.5 is amended to correct various references to other sections.

Section 125.6 is amended to correct various references to other sections.

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

Data, views or arguments may be submitted to: Joseph Fritsch, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2299, email: jfritsch@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Sections 110, 201, 301, 307(a), 308, 332, 1301(a)(9), 1301(c), and 1308 of the Insurance Law.

The above-cited Insurance Law sections establish the Superintendent's authority to promulgate regulations governing when an authorized ceding insurer (i.e., an insurer authorized or licensed to do business in New York) may take credit on its balance sheet for a reinsurance recoverable from an assuming insurer not authorized in this state.

Section 110 of the Insurance Law authorizes the Superintendent to share documents, materials and other information with other state, federal and international regulatory agencies and the National Association of Insurance Commissioners (NAIC).

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

Section 307(a) requires an insurer doing business in the state to file an annual statement, in a form and containing such matters as shall be prescribed by the Superintendent, in the office of the Superintendent.

Section 308 vests the Superintendent with the authority to require an authorized insurer to file reports relating to the insurer's transactions, financial condition or any matter connected therewith.

Sections 1301(a)(9) and (c) and 1308 authorize the Superintendent to prescribe, by regulation, the conditions under which an authorized ceding insurer may be allowed credit, as an asset or a deduction from loss and unearned premium reserves, for a reinsurance recoverable from an assuming insurer not authorized to do an insurance business in this state.

2. Legislative objectives: Article 13 of the Insurance Law establishes minimum standards for the assets of insurers, including when an authorized ceding insurer may take credit on its balance sheet for reinsurance recoverable from an assuming insurer not authorized to do an insurance business in this state.

3. Needs and benefits: Reinsurance is insurance for an insurer. It is a means of redistributing risk throughout the global insurance industry. Often, an insurer will transfer (or "cede") part or all of its risk to another party (the "assuming insurer"). The assuming insurer is ultimately responsible for paying its part of those ceded claims. The ceding insurer is given credit on its balance sheet for the business

ceded to an assuming insurer recognized by New York. This allows the ceding insurer to reduce its reserves and increase the number of policies it can write. Under the existing regulation, however, the ability to take a credit for ceded claims applies on a very limited basis when the assuming insurer, irrespective of its financial strength, is not authorized to do business in New York.

Under the current regulation, when a ceding insurer cedes risk to an unauthorized assuming insurer, it generally may take credit on its balance sheet only if the unauthorized assuming insurer posts collateral equal to 100 percent of the transferred policyholder claims. There is a seldom-utilized section of the regulation that allows a ceding insurer to take credit of up to 85% on its balance sheet for cessions to unauthorized companies, provided the ceding insurer maintains documentation demonstrating that the unauthorized insurer meets financial requirements similar to those of New York authorized insurers.

Alien assuming insurers posted an estimated \$120 billion in collateral in the U.S. in 2005, the latest year for which there is available data, on which they pay about \$500 million per year in transaction costs. The Insurance Department has seen no negative fiscal impacts on U.S. ceding insurers in instances where the collateral levels have been reduced. It therefore makes sense, with appropriate safeguards in place, to build on this precedent and allow the most highly-rated alien assuming insurers to reduce their collateral postings further.

Adoption of this amended rule will reduce these transactional costs and increase reinsurance capacity. It also will bring New York in line with global insurance markets and worldwide accounting standards governing reinsurance contracts. Most jurisdictions outside the U.S. do not require non-domestic assuming insurers to post collateral in order for authorized ceding insurers to take credit. Under the amendment, the most financially healthy assuming insurers need not post collateral, or at least not 100% collateral. The amendment will level the playing field among assuming insurers by predicated credit for reinsurance principally on financial strength, not geography. Assuming insurers with strong credit ratings will, under the amendment, post less collateral than those with weak ratings.

In addition, this proposed rule imposes principles-based credit risk management on the authorized ceding insurers, by putting the onus on ceding insurers to ensure that the assuming insurers with whom they do business have the financial wherewithal to meet their obligations.

The proposed rule extends the Department's efforts to keep New York competitive while bringing the U.S. into the 21st century of financial services regulation. Insurers ceding risk to assuming insurers will be responsible for vetting their assuming insurers and developing risk management plans for their reinsurance placements. The amendment thus represents a move to let the market decide whether the posting of collateral is appropriate by eliminating the across-the-board regulatory mandate that requires even the strongest reinsurance companies to post collateral. Nevertheless, under the amendment, nothing prevents an authorized ceding insurer from negotiating its own collateral requirements with an assuming insurer or from choosing to do business with an assuming insurer that is willing to post collateral, should the authorized ceding insurer so insist. The rule amends the existing collateral requirements on a prospective basis, which will prevent any disruption to the existing reinsurance market, while giving the Department the opportunity to assess the effectiveness of the rule.

The National Association of Insurance Commissioners ("NAIC") Reinsurance Task Force has been developing a Model Law on Reinsurance Collateral Requirements. The Department has been a participant in the Task Force. The amendment is consistent with the Model Law, to the extent it is consistent with the needs of the New York insurance market.

The proposed rule also reflects the purpose of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Public Law 111-203; 7/21/10] (hereinafter, the Dodd-Frank Act) which preempts certain state laws relating to reinsurance ceded by authorized non-domestic insurers.

4. Costs: The proposed rule requires an initial application fee of \$10,000 for assuming insurers applying for a rating from the Superintendent that will allow ceding insurers to take credit for reinsurance

without the assuming reinsurer having to post 100% collateral. Assuming insurers are required to pay a renewal fee every year, in the amount of \$5,000.

In developing the rating application and renewal fees for assuming insurers, it was considered that Insurance Law, Section 332 provides that the expenses of the Department for any fiscal year, including all direct and indirect costs, shall be assessed by the Superintendent pro rata upon all domestic insurers and licensed United States branches of alien insurers domiciled in New York. Alien assuming insurers are not subject to this assessment. As a result, these expenses will be borne by insurers through the Section 332 assessments, since fees collected by the Superintendent are turned over to the State's general fund, and do not directly reimburse the expenses of the Department. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal fees charged to assuming insurers to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this regulation. Renewal fees are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

The rule does not impose additional costs to the Insurance Department or other state government agencies or local governments. Nor is it expected that either the Insurance Department or regulated entities will directly incur additional costs. Nevertheless, with the adoption of the amendment, authorized ceding insurers must vet the financial wherewithal of their assuming insurers and develop appropriate risk management plans for reinsurance placements. However, even under the current regulation, authorized ceding insurers should be performing these functions as a matter of prudent risk management.

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

6. Paperwork: As set forth in Section 125.3(b), an authorized ceding insurer shall notify the Superintendent within 30 days after a reinsurance recoverable from any single assuming insurer, or group of affiliated assuming insurers, exceeds 50% of the authorized ceding insurer's last reported surplus to policyholders, or after it is determined that a reinsurance recoverable from any single assuming insurer, or group of affiliated assuming insurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the authorized ceding insurer. In addition, an authorized ceding insurer shall notify the Superintendent within 30 days after ceding to any single assuming insurer, or group of affiliated assuming insurers, more than 20% of the ceding insurer's gross written premium in the prior calendar year, or after it has determined that the reinsurance ceded to any single assuming insurer, or group of affiliated assuming insurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the authorized ceding insurer. In addition, if a ceding insurer wishes to take credit for reinsurance ceded to an unauthorized assuming insurer, it must include certain provisions within the reinsurance contract.

Assuming insurers applying for a rating from the Superintendent that will allow ceding insurers to take credit for reinsurance without the assuming reinsurer having to post 100% collateral must file certain documents annually with the Superintendent. However, these documents should be readily available, since they serve purposes relating to regulation of the unauthorized assuming insurers by other entities.

7. Duplication: This amendment will not duplicate any existing state or federal rule. The NAIC Reinsurance Task Force has been developing a Model Law on Reinsurance Collateral Requirements. The Department has been a participant in the task force. It is the Department's intent to make the rule consistent with the Model Law, to the extent it is consistent with the needs of the New York insurance market.

8. Alternatives: The Department conducted extensive outreach to entities representing authorized ceding insurers, and to assuming insurers both authorized and unauthorized to do business in New York. The Department received comments from seventeen entities. A complete discussion of the comments submitted can be found at the Department's website (<http://www.ins.state.ny.us>).

9. Federal standards: There are no minimum standards of the federal

government for the same or similar subject areas. The regulation is amended, however, to include language from the Dodd-Frank Act inasmuch as that legislation preempts the state from denying credit for reinsurance of a ceding insurer whose state of domicile is an NAIC-accredited state, or has financial solvency requirements substantially similar to the requirements necessary for NAIC accreditation, and recognizes credit for reinsurance for the insurer's ceded risk. See Pub. Law 111-203, § 532.

10. Compliance schedule: Once the amended regulation is adopted, regulated parties will be able to comply immediately. This proposal will apply to new or renewed reinsurance contracts effective on or after July 1, 2011.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule would not impose reporting, recordkeeping or other requirements on small businesses. This rule applies to ceding insurers and assuming insurers authorized to do business in New York State, as well as unauthorized assuming insurers. The rule establishes certain requirements for ceding insurers domiciled in New York and for foreign authorized ceding insurers that are domiciled in a state that is neither NAIC-accredited nor has financial solvency requirements substantially similar to the requirements necessary for NAIC accreditation, and does not recognize credit for reinsurance for the insurer's ceded risk. The rule also establishes standards for assuming insurers, in order to enable ceding insurers to take credit on their balance sheets for risks ceded to assuming insurers.

The Insurance Department has reviewed the filed Reports on Examination and Annual Statements of authorized insurers and the trusted surplus of alien insurers subject to this amendment, and believes that none of them comes within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because there are none which are both independently owned and have under 100 employees.

This rule also is not expected to have any adverse economic impact on local governments, and does not impose reporting, recordkeeping or other compliance requirements on local governments. The basis for this finding is that this rule is directed at ceding insurers and assuming insurers, none of which is a local government.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This amendment applies to insurers authorized to do business in New York State and addresses whether a ceding insurer may take credit on its balance sheet, as an asset or deduction from reserves, for reinsurance recoverable from an unauthorized reinsurer. The amendment establishes certain requirements for ceding insurers and reinsurers, and puts the onus on ceding insurers to prudently manage their risk. The ceding insurers and reinsurers do business in every county in this state, including rural areas as defined under State Administrative Procedure Act, Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: Section 125.3(b) of the regulation requires a ceding insurer to notify the Superintendent within 30 days after a reinsurance recoverable from any single reinsurer, or group of affiliated reinsurers, exceeds 50% of the ceding insurer's last reported surplus to policyholders, or after it is determined that a reinsurance recoverable from any single reinsurer, or group of affiliated reinsurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the domestic ceding insurer. In addition, a domestic ceding insurer shall notify the Superintendent within 30 days after ceding to any single reinsurer, or group of affiliated reinsurers, more than 20% of the ceding insurer's gross written premium in the prior calendar year, or after it has determined that the reinsurance ceded to any single reinsurer, or group of affiliated reinsurers, is likely to exceed this limit. The notification shall demonstrate that the exposure is safely managed by the ceding insurer.

In addition, if a ceding insurer wishes to take credit for reinsurance ceded to an unauthorized assuming insurer, it must include certain provisions within the reinsurance contract.

Assuming insurers applying for a rating from the Superintendent that will allow ceding insurers to take credit for reinsurance without the assuming reinsurer having to post 100% collateral must file certain

documents annually with the Superintendent. However, these documents should be readily available, since they serve purposes relating to regulation of the unauthorized assuming insurers by other entities.

There are no other additional paperwork requirements specific to ceding insurers and reinsurers that are based in rural areas.

3. Costs: This rule imposes no additional costs for ceding insurers, including those based in rural areas. Of course, the rule requires ceding insurers to vet the financial wherewithal of the reinsurers with whom they do business, but even under the current regulation, ceding insurers should be performing this function as a matter of prudent risk management.

The rule requires an initial application fee of \$10,000 for assuming insurers applying for a rating from the Superintendent that will allow ceding insurers to take credit for reinsurance without the assuming reinsurer having to post 100% collateral. Assuming insurers are required to pay a renewal fee every year, in the amount of \$5,000.

4. Minimizing adverse impact: The current regulation requires a strongly capitalized non-New York (unauthorized) reinsurer to tie up capital by posting collateral while not imposing a similar burden on a New York (authorized) reinsurer. The proposed rule requires ceding insurers to assume full responsibility for credit risk management and compliance in entering into reinsurance arrangements.

This rule applies uniformly to regulated parties that do business in both rural and nonrural areas of New York State. This rule levels the playing field for all reinsurers, mitigates the risk that may exist under the present regulatory structure, and continues the Department's efforts to keep New York competitive while bringing the state into the 21st century of financial services regulation.

5. Rural area participation: In developing this rule, the Department conducted extensive outreach by contacting insurers, reinsurers, trade groups, other regulators, and other interested parties, including those located or domiciled in rural areas.

Job Impact Statement

The proposed amendment should have no negative impact on jobs or economic opportunities in New York State. The amendment applies to reinsurance contracts, and establishes a framework by which a ceding insurer may take credit on its balance sheet, as an asset or deduction from reserves, for a reinsurance recoverable from any unauthorized assuming insurer that maintains, on a stand-alone basis separate from its parent or any affiliated entities, an interactive financial strength rating from at least two rating agencies. In addition, the Superintendent must evaluate the unauthorized assuming insurer and determine the proper amount of collateral to be maintained by the assuming insurer for the ceding insurer to take credit on its balance sheet. The regulation also imposes principles-based credit risk management on the ceding insurers, by putting the onus on cedents to ensure that the assuming insurers with whom they do business have the financial wherewithal to meet their obligations. Moreover, private parties may, as a matter of contract, require an assuming insurer to post collateral.

While ceding insurers may change their choice of assuming insurers to ensure that they receive credit as an asset or deduction from reserves for such reinsurance, the amendment will not change the fact that authorized insurers need to obtain such reinsurance.

The proposal requires unauthorized assuming insurers applying for a rating from the Superintendent that will allow ceding insurers to take credit for reinsurance without the assuming reinsurer having to post 100% collateral to file certain documents annually with the Superintendent.

Thus, there should be no negative impact on jobs or economic opportunities in New York State.

Department of Labor

NOTICE OF ADOPTION

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

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

Filing No. 905

Filing Date: 2010-08-31

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 Part 921 to Title 12 NYCRR.

Statutory authority: Labor Law, section 860-f

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

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

Text or summary was published in the March 3, 2010 issue of the Register, I.D. No. LAB-09-10-00005-EP.

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

Revised rule making(s) were previously published in the State Register on July 28, 2010.

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

Assessment of Public Comment

The agency received no public comment.

Division of the Lottery

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Video Lottery Gaming Capital Award Program Relating to Depreciation of Capital Improvements and to Increase Hours of Operation for VLG

I.D. No. LTR-37-10-00004-P

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

Proposed Action: This is a consensus rule making to amend sections 2836-20.9 and 2836-24.1 of Title 21 NYCRR.

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

Subject: Video Lottery Gaming capital award program relating to depreciation of capital improvements and to increase hours of operation for VLG.

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

Text of proposed rule: Section 2836-20.9 is amended to read as follows:
2836-20.9 Hours of Operation.

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

Section 2836-24.1 is amended to read as follows:
2836-24.1

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

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

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

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

Consensus Rule Making Determination

Sections 1604 and 1617-a of the New York State Lottery for Education Law (Article 34 of the Tax Law) establish the Division of the Lottery's authority to promulgate regulations governing its games and the operation of Video Lottery Gaming ("VLG").

Chapter 57 of the Laws of 2009 amended Tax Law Section 1612 to make a technical correction a provision of the VLG capital award program relating to depreciation of capital improvements. Chapter 57 of the Laws of 2010 amended Tax Law Section 1617-a to increase the hours of VLG operation. The Division of the Lottery's regulations must be amended to conform to these amendments.

No person is likely to object to this amendment of the Division of the Lottery's regulations as written because the amendments are being made to conform to the enabling sections of the Tax Law upon which the regulations are based and authorized.

Job Impact Statement

The proposed amendment of 21 NYCRR sections 2836-20.9 and 2836-24.1 does not require a Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State.

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

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

Office of Parks, Recreation and Historic Preservation

NOTICE OF ADOPTION

Public Access to Records

I.D. No. PKR-27-10-00005-A

Filing No. 893

Filing Date: 2010-08-25

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: Repeal of Part 461 and Appendix I-2; and addition of new Part 461 to Title 9 NYCRR.

Statutory authority: Parks, Recreation and Historic Preservation Law, section 3-09(8); Public Officers Law, section 87(1)

Subject: Public Access to Records.

Purpose: To update the agency's Freedom of Information Law (FOIL) regulation.

Text or summary was published in the July 7, 2010 issue of the Register, I.D. No. PKR-27-10-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Kathleen Martens, NYS Office of Parks, Recreation and Historic Preservation, Empire State Plaza, Agency Building 1, 19th Floor, Albany, NY 12238, (518) 486-2921, email: rulemaking@oprhp.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Second Stage Gas Rate Increase by Corning Natural Gas Corporation

I.D. No. PSC-37-10-00009-P

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

Proposed Action: To review Corning Natural Gas Corporation's request to implement a second stage gas rate increase pursuant to the terms of the Gas Rates Joint Proposal dated March 27, 2009 and approved by the Commission on August 20, 2009.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Second stage gas rate increase by Corning Natural Gas Corporation.

Purpose: To consider Corning Natural Gas Corporation's request for a second stage gas rate increase.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, a request by Corning Natural Gas Corporation to implement a second stage gas rate increase pursuant to the terms of the Gas rates Joint Proposal dated March 27, 2009 and approved by the Commission on August 20, 2009.

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

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

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

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

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

(08-G-1137SP3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minor Rate Filing

I.D. No. PSC-37-10-00010-P

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

Proposed Action: The Commission is considering a proposed filing by the Village of Richmondville to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 1—Electricity.

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

Subject: Minor Rate Filing.

Purpose: To increase annual electric revenues by approximately \$98,923 or 8.3%.

Substance of proposed rule: The Commission is considering a proposal filed by the Village of Richmondville (Richmondville) which would increase its annual electric revenues by about \$98,923 or 8.3%. The

proposed filing has an effective date of January 1, 2011. The Commission may adopt in whole or in part, modify or reject Richmondville's proposal.

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

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

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

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

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

(10-E-0418SP1)

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

Street Lighting

I.D. No. PSC-37-10-00011-P

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

Proposed Action: The Commission is considering a proposed filing by Central Hudson Gas & Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service, P.S.C. No. 15—Electricity.

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

Subject: Street Lighting.

Purpose: To add an LED street lighting fixture option.

Substance of proposed rule: The Commission is considering a proposal filed by Central Hudson Gas & Electric Corporation (Central Hudson) to add an LED street lighting fixture option under rate C (customer owned and maintained; delivery only) of Service Classification No. 8 - Public Street and Highway Lighting. The proposed filing has an effective date of December 1, 2011. The Commission may adopt in whole or in part, modify or reject Central Hudson's proposal and may apply its decision to other companies in the state.

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-0420SP1)

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

Corning's Request for Approval for Certain Stock Acquisitions

I.D. No. PSC-37-10-00012-P

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

Proposed Action: To consider Corning Natural Gas Corporation's (Corning) rehearing request on behalf of its CEO to exercise rights on options for the remaining 56,000 shares of Corning Natural Gas Company stock.

Statutory authority: Public Service Law, section 70

Subject: Corning's request for approval for certain stock acquisitions.

Purpose: To review Corning's request for approval for certain stock acquisitions.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, Corning Natural Gas Corporation's rehearing petition of the Commission's August 20, 2010 order in Case 10-G-0224 regarding the exercise of certain stock options on behalf of its CEO.

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

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

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

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

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

(10-G-0224SP2)

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

Lightened Regulation of Norse' Natural Gas Gathering Pipelines and Operations

I.D. No. PSC-37-10-00013-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 petition from Norse Pipeline LLC (Norse) requesting that its New York natural gas gathering pipelines and operations in Chautauqua and Cattaraugus Counties be lightly regulated.

Statutory authority: Public Service Law, sections 2(11), 5(1)(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: Lightened regulation of Norse' natural gas gathering pipelines and operations.

Purpose: Consideration of lightened regulation of Norse' natural gas gathering pipelines and operations.

Substance of proposed rule: The Public Service Commission is considering a petition from Norse Pipeline LLC (Norse) requesting that its New York natural gas gathering pipelines and operations be lightly regulated. The natural gas gathering system Norse owns and operates consists of 330 miles of pipeline located in Chautauqua and Cattaraugus Counties in New York and Erie, Crawford and Warren Counties in Pennsylvania that interconnects to interstate pipelines owned by Tennessee Gas Pipeline Company at Mayville, New York and National Fuel Gas Supply Corporation at Little Valley, New York. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

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

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

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

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

(10-G-0364SP1)

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

Application of Recent Budget Authorizations to Prior Program Budget Over Expenditures

I.D. No. PSC-37-10-00014-P

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

Proposed Action: The Commission is considering New York State Electric and Gas and Rochester Gas and Electric’s proposal to apply recently authorized funding to prior program overages for their residential gas energy efficiency programs.

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

Subject: Application of recent budget authorizations to prior program budget over expenditures.

Purpose: To allow the companies to recover costs that exceeded original authorizations due to the success of the initial programs.

Substance of proposed rule: The Commission is considering whether to approve or reject, in whole or in part, or to take any other action with respect to New York State Electric and Gas Corporation and the Rochester Gas and Electric Corporation’s (companies) petition dated August 23, 2010 seeking approval to apply a portion of its Commission-authorized residential gas energy efficiency program (a/k/a heating, ventilation and air-conditioning (HVAC) “Fast Track” program) budget authorization to the companies’ previous program budgets. Allocating a portion of the authorized budget to their previous program budget overage would allow the companies to recover costs that exceeded original budgeted amounts as a result of the success of the initial programs.

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.

(09-G-0363SP5)

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

Waiver of 16 NYCRR Sections 894.1 Through 894.4(b)(2)

I.D. No. PSC-37-10-00015-P

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

Proposed Action: The PSC is considering whether to approve, in whole or in part, a petition by the Town of Dickinson (Franklin County) for a waiver of 16 NYCRR sections 894.1 through 894.4(b)(2) pertaining to the franchising process.

Statutory authority: Public Service Law, section 216(1)

Subject: Waiver of 16 NYCRR sections 894.1 through 894.4(b)(2).

Purpose: To allow the Town of Dickinson to waive certain preliminary franchising procedures to expedite the franchising process.

Substance of proposed rule: The Public Service Commission is considering whether to approve or reject, in whole or in part, a petition by the Town of Dickinson (Franklin County) for a waiver of 16 NYCRR sections 894.1 through 894.4(b)(2) pertaining to the franchising process.

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-V-0414SP1)

Department of State

**EMERGENCY
RULE MAKING**

Electrical Bonding of Gas Piping, and Protection of Gas Piping Against Physical Damage

I.D. No. DOS-16-10-00012-E

Filing No. 894

Filing Date: 2010-08-25

Effective Date: 2010-08-25

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

Action taken: Amendment of sections 1220.1 and 1224.1 of Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

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

Specific reasons underlying the finding of necessity: At its meeting held on June 16, 2010, the State Fire Prevention and Building Code Council determined that adopting this rule on an emergency basis is necessary to preserve public safety by clarifying requirements for electrical bonding of gas piping, clarifying requirements for protection of gas piping against physical damage, and adding new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST), which will increase protection against fires caused by lightning strikes in the vicinity of buildings equipped with CSST gas piping and fires caused by accidental punctures of CSST gas piping.

Subject: Electrical bonding of gas piping, and protection of gas piping against physical damage.

Purpose: To clarify requirements for electrical bonding of gas piping, to clarify requirements for protection of gas piping against physical damage, and to add new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST).

Substance of emergency rule: This rule amends several existing provisions in, and adds several new provisions to, the 2007 edition of the Residential Code of New York State (the “2007 RCNYS”), the publication which is incorporated by reference in 19 NYCRR Part 1220, and the 2007 edition of the Fuel Gas Code of New York State (the “2007 FGCNYS”), the publication which is incorporated by reference in 19 NYCRR Part 1224. The new and amended provisions in the 2007 RCNYS and 2007 FGCNYS:

(1) Clarify the situations in which a gas piping system that contains no corrugated stainless steel tubing (“CSST”) will be considered to be “likely to become energized” and, therefore, required to be bonded to an effective ground-fault current path;

(2) Specify that a gas piping system that contains no CSST may be bonded in any manner described in Section E3509.7 of the 2007 RCNYS, in cases where the 2007 RCNYS applies, or in any manner described in Section 250.104(B) of NFPA 70-2005, in cases where the 2007 FGCNYS applies;

(3) Require gas piping systems that contain any CSST to be electrically continuous and bonded to the electrical service grounding electrode system at the point where the gas service enters the building or structure;

(4) Specify standards for the installation and bonding of CSST,

including standards for the size of the bonding jumper, standards for bonding clamp, standards for the place and manner of attachment of the bonding clamp, and standards for separation of the CSST from other electrically conductive systems;

(5) Specify standards for protection of piping other than black or galvanized steel from physical damage, including standards for the types of shield plates to be used, standards for determining the location where shield plates are required, and additional standards for protection of piping made of CSST; and

(6) Clarify the situations in which section E3509.7 in the RCNYS (entitled "Bonding other metal piping") will apply.

This rule also provides that the 2005 edition of standard NFPA 70, entitled "National Electrical Code" shall be deemed to be one of the standards incorporated by reference into 19 NYCRR Part 1224.

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. DOS-16-10-00012-EP, Issue of April 21, 2010. The emergency rule will expire October 23, 2010.

Text of rule and any required statements and analyses may be obtained from: Joseph Ball, Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-6740, email: Joseph.Ball@dos.state.ny.us

Summary of Regulatory Impact Statement

1. STATUTORY AUTHORITY.

Executive Law section 377(1) authorizes the State Fire Prevention and Building Code Council to periodically amend the provisions of the New York State Uniform Fire Prevention and Building Code ("Uniform Code").

Executive Law section 378(1) directs that the Uniform Code shall address standards for safety and sanitary conditions.

2. LEGISLATIVE OBJECTIVES.

Executive Law section 371(2) provides that it is the public policy of the State of New York to provide for the promulgation of a uniform code addressing building construction and fire prevention in order to provide a basic minimum level of protection to all people of the state from hazards of fire and inadequate building construction.

The Legislative objectives sought to be achieved by this rule are to provide uniform requirements for the installation of gas piping made of corrugated stainless steel tubing (CSST); to reconcile inconsistencies among the installation instructions provided by CSST manufacturers; to require extra protective measures in all cases where CSST is used; to prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping; to require the use of shield plates whenever gas piping made of any material other than black or galvanized steel is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1.75 inches from the nearest edge of such member; and to provide a basic minimum level of protection to all people of the state from the hazard of fires caused by punctures of gas piping made of material other than black or galvanized steel.

3. NEEDS AND BENEFITS.

CSST piping can be punctured by nails and other fasteners driven into walls containing concealed CSST piping. It can also be punctured when arcing of electrical currents from a nearby lightning strike burns a hole in the wall of the piping.

CSST manufacturers have provided installation instructions that require (1) the use of shield plates and other means of protecting CSST from the puncturing caused by nails and other fasteners driven into walls containing concealed CSST piping and (2) electrical bonding of CSST piping to protect against the puncturing caused by the lightning-induced current and arcing phenomena. However, the manufacturers' installation instructions are not uniformly consistent with each other.

The Uniform Code currently requires that materials such as CSST piping be installed in accordance with manufacturer's instructions. The purposes of this rule are to provide uniform requirements for the installation of CSST piping and, by doing so, to reconcile inconsistencies among the installation instructions provided by CSST manufacturers; to require certain extra protective measures which are called for by some, but not all, of such installation instructions; to prohibit

certain practices which may reduce the effectiveness of the electrical bonding of CSST piping and which are prohibited by some, but not all, of such installation instructions; and to provide a basic minimum level of protection to all people of the state from the hazard of fires caused by the puncturing of CSST gas piping.

Gas piping made of other materials other than black or galvanized steel (such as copper, brass or aluminum-alloy pipe or copper, brass or aluminum tubing) can also be punctured by nails and other fasteners driven into walls containing concealed gas piping. The Uniform Code currently requires the use of shield plates to protect non-steel gas piping when it is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1 inch from the nearest edge of such member. This rule will require the use of shield plates whenever non-steel gas piping is installed through a hole or notch in a wood stud, joist, rafter or similar member less than 1.75 inches from the nearest edge of such member, which will decrease the instances where a nail or other fastener driven into an unprotected member, and penetrating that member by more than 1 inch, will puncture concealed non-steel gas piping.

The report or study that served as a basis for this rule is Corrugated Stainless Steel Tubing for Gas Distribution in Buildings and Concerns Over Lightning Strikes, dated August 2007, published by The NAHB Research Center, Inc., which is summarized as follows: "In the case of proximity lightning, a high voltage can be induced in metallic piping that may cause arcing; and for CSST there is concern that arcing may cause perforation of the CSST wall and therefore cause gas leakage. The fuel gas code, electric code, plumbing code, product standards, and manufacturer installation instructions have different methods of providing dissipation of electrical energy through techniques called bonding and grounding. Since the codes, product standards, and installation requirements are not harmonized, builders and contractors may find differing and possibly conflicting requirements. Generally, the local jurisdiction having authority and code official will rely upon the manufacturer's installation recommendations in lieu of other requirements."

This report was used to determine the necessity for and benefits derived from this rule in the following manner: CSST manufacturers have always required that CSST systems be bonded to the electrical system in accordance with the local codes. Based on this report, the bonding methods prescribed within such local codes are minimum requirements and are designed to protect the consumer against ground-faults from the premise wiring system only. The intent of this rule is to harmonize the requirements for bonding of metallic piping while providing protection from proximity lightning strikes.

4. COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule.

The Department of State ("DOS") estimates the cost of the bonding jumper required in a typical installation to be between \$200 and \$300; the cost of the clamp and 4-inch section of schedule 40 pipe (including the cost of installing the clamp and pipe section) to be \$31; the cost of purchasing and installing the shield plates required in a typical installation to be between \$15.50 and \$77.50; and the cost of the protective metal pipe required in a typical installation to be \$135.50. Based on the foregoing, DOS estimates that the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe in a typical installation will be between \$382 and \$544. However:

(1) The installation instructions provided by each of the major CSST manufacturers already require the use of the same bonding jumper required by this rule; accordingly, with regard to the use of bonding jumper, this rule adds no new requirement and no new cost.

(2) Attaching the bonding jumper to the brass hexagonal nut on the CSST fitting is "unlisted," and this method of clamping could decrease the effectiveness of the electrical bonding of the CSST gas piping, which would reduce the protection that the bonding requirement is intended to provide. In this context, the extra cost (\$31) is negligible.

(3) The failure to use shield plates and/or protective metal pipe in

all situations specified in this rule could increase the chances that non-steel gas piping will be punctured by nails driven into walls that contain concealed gas piping. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

(4) CSST piping, even if not physically constrained, can be punctured by a nail driven by a power nail gun. In light of the almost universal use of power nail guns and other similar devices on construction sites, it is the opinion of DOS that failure to require the use of shield plates and/or protective metal pipe to protect CSST gas piping running parallel to, and within 1.75 inches of, a stud, joist, rafter or other member will increase the chances that such CSST gas piping will be punctured. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

There are no costs to DOS for the implementation of this rule. DOS is not required to develop any additional regulations or develop any programs to implement this rule.

There are no costs to the State of New York or to local governments for the implementation of this rule, except as follows:

First, if the State or any local government constructs a building equipped with non-steel gas piping, or installs any such piping in an existing building, the State or such local government, as the case may be, will be required to bond the piping (in the case of CSST piping) and protect the piping from physical damage in the manner required by this rule.

Second, the authorities responsible for administering and enforcing the Uniform Code will have additional items to verify in the process of reviewing building permit applications, conducting construction inspections, and (where applicable) conducting periodic fire safety and property maintenance inspections. It is anticipated that verifying compliance with this rule will add only a negligible amount to the already existing duties associated with reviewing permit applications and conducting inspections.

5. PAPERWORK.

This rule will not impose any new reporting requirements. No new forms or other paperwork will be required as a result of this rule.

6. LOCAL GOVERNMENT MANDATES.

This rule will not impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district, except as follows:

First, any county, city, town, village, school district, fire district or other special district that constructs a building equipped with n-n-steel gas piping, or installs any such piping in an existing building, will be required to comply with the electrical bonding and physical protection provisions amended and/or added by this rule.

Second, most cities, towns and villages, and some counties, are responsible for administering and enforcing the Uniform Code; since this rule amends provisions in the Uniform Code, the aforementioned local governments will be responsible for administering and enforcing the requirements of the rule along with all other provisions of the Uniform Code. It is anticipated that verifying compliance with this rule will add only a negligible amount to the already existing duties associated with reviewing permit applications and conducting inspections.

The rule does not otherwise impose any new program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

7. DUPLICATION.

The rule does not duplicate any existing Federal or State requirement.

8. ALTERNATIVES.

The alternative of making no change to the Uniform Code provisions relating to electrical bonding and physical protection of gas piping was considered. However, it was determined that the existing pro-

visions of the Uniform Code could be construed as permitting inadequate electrical bonding and inadequate physical shielding of gas piping, particularly in the case of gas piping made of CSST. Therefore, this alternative was rejected.

The alternative of banning the use of CSST was considered. However, the weight of expert opinion appears to be that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that the principal concerns about the use of CSST piping (viz., puncturing of CSST gas piping caused by electrical arcing induced by lightning strikes in the vicinity of buildings equipped with CSST or by nails or other fasteners driven into walls containing concealed CSST gas piping) could be adequately addressed by the increased electrical bonding and physical protection requirements to be added by this rule. Therefore, this alternative was rejected.

9. FEDERAL STANDARDS.

There are no standards of the Federal Government which address the subject matter of the rule.

10. COMPLIANCE SCHEDULE.

Regulated persons will be able to achieve compliance with this rule in the normal course of operations, either as part of the installation or construction of a new building or the renovation of an existing building.

Summary of Regulatory Flexibility Analysis

1. EFFECT OF RULE:

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions add new requirements for installation and electrical bonding of gas piping made from corrugated stainless steel tubing (CSST), and for protection of gas piping made of any material other than black or galvanized steel against physical damage. Specifically, in a case where gas piping made of CSST is installed, this rule will (1) require the electrical bonding of CSST gas piping to the building's grounding electrode system; (2) prohibit certain practices which may reduce the effectiveness of the electrical bonding of CSST piping, such as using the brass hexagonal nut on the CSST fitting as the attachment point for the bonding jumper; and (3) require certain protective measures, such as using strike plates or other protective coverings, in certain situations where CSST gas piping runs parallel to, a stud, joist, rafter or similar member. Additionally, in a case where gas piping made of CSST or any other material other than black or galvanized steel is installed, this rule will require the use of strike plates in situations where the gas piping passes through a stud, joist, rafter or similar member and is within 1.75 inches of the edge of such member (the Uniform Code currently requires the use of strike plates only where the non-steel gas piping is located within 1 inch of the edge of the member). Any small business or local government that constructs a building equipped with gas piping made of CSST (or any other material other than black or galvanized steel), or that installs any such gas piping in an existing building, will be affected by this rule. Small businesses that manufacture, sell or install gas piping, bonding jumpers, bonding clamps, shield plates, and other related equipment may also be affected by this rule.

Since this rule amends provisions in the Uniform Code, each local government that is responsible for administering and enforcing the Uniform Code will be affected by this rule. The Department of State (DOS) estimates that approximately 1,604 local governments (mostly cities, towns and villages, as well as several counties) are responsible for administering and enforcing the Uniform Code.

2. COMPLIANCE REQUIREMENTS:

No reporting or record keeping requirements are imposed upon regulated parties by the rule. Small businesses and local governments subject to the rule will be required to install gas piping in accordance with the rule's provisions. In most cases, the local government responsible for administering and enforcing the Uniform Code will be required to consider the requirements of this rule when reviewing plans and inspecting work.

3. PROFESSIONAL SERVICES:

No professional services will be required to comply with the rule.

4. COMPLIANCE COSTS:

When gas piping made of CSST is installed, this rule will require the use of a bonding jumper, a bonding clamp, and shield plates and/or protective metal pipe. DOS estimates the costs in a typical installation to be:

(1) approximately 30 to 50 feet of bonding jumper, at \$6.00 per foot: \$200 to \$300.

(2) clamp and 4-inch section of schedule 40 pipe (including the cost of installing the clamp and pipe section): \$31.

(3) 1 to 5 shield plates, at a cost (including the cost of installation) of \$15.50 per shield plate: \$15.50 and \$77.50.

(4) approximately 10 linear feet or protective metal pipe (schedule 40 steel or iron pipe), at a cost (including the cost of installation) of \$13.55 per linear foot: \$135.50.

Based on the foregoing, DOS estimates that in the case of a typical installation of gas piping made of CSST, the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe required by this rule will be between \$200 and \$530. However:

(1) The installation instructions provided by each of the major CSST manufacturers already require the use of the same bonding jumper required by this rule; accordingly, with regard to the use of bonding jumper, this rule adds no new requirement and no new cost.

(2) The installation instructions provided by two of the four major CSST manufacturers permit attaching the bonding jumper to the brass hexagonal nut on the CSST fitting, and do not require the clamp and 4-inch section of schedule 40 pipe required by this rule. In the case of installation of CSST piping made by either of the two manufacturers whose installation instructions permit attaching the bonding jumper to the brass hexagonal nut, this rule may be viewed as adding a new requirement (use of the clamp and 4-inch section of schedule 40 pipe) and as adding an additional cost (estimated to be \$31). However, attaching the bonding jumper to the brass hexagonal nut on the CSST fitting is not "listed" and, in the opinion of DOS, this method of clamping could decrease the effectiveness of the electrical bonding of the CSST gas piping which, in turn, could reduce the protection that the bonding requirement is intended to provide. In this context, the extra cost (\$31) is viewed as negligible.

(3) The installation instructions provided by each of the four major CSST manufacturers already require the use of shield plates and/or protective metal pipe in places where CSST piping passes through holes or notches in wood studs, joists or rafters. However, the installation instructions provided by three of the four major manufacturers do not require the use of shield plates and/or protective metal pipe in all situations specified in this rule. In the case of installation of CSST piping made by any of the three manufacturers whose installation instructions do not require the use of shield plates and/or protective metal pipe in all situations specified in this rule, this rule may be viewed as adding a new requirement (the use of shield plates or protective metal pipe in situations where neither method of protection would have been required by the manufacturer's installation instructions) and as adding an additional cost (the cost of installing the additional shield plates or protective metal pipe). Additionally, where gas piping made of CSST or copper, brass or aluminum tubing is installed, this rule will require the use of shield plates where such piping is within 1.75 inches, rather than 1 inch, of the edge of a stud, rafter, joist or other member. However, in the opinion of DOS, the failure to use shield plates and/or protective metal pipe in all situations specified in this rule will increase the chances that gas piping made of CSST, or copper, brass or aluminum tubing will be punctured by nails driven into walls that contain concealed gas piping. In this context, the extra cost (\$15.50 per shield plate, \$13.55 per linear foot of protective piping) is viewed as negligible.

Compliance with this rule will occur when gas piping is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule.

Any variation in costs of complying with this rule for different types or sizes of small businesses and local governments will be attributable to the size and configuration of the gas piping installed by such enti-

ties, and not to nature or type or sizes of such small businesses and local governments. To the extent that larger businesses and larger local governments may tend to own larger buildings, or more than one building, the total costs of compliance would be higher for larger businesses and larger local governments.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

It is economically and technologically feasible for regulated parties to comply with the rule. This rule imposes no substantial capital expenditures. No new technology need be developed for compliance with this rule.

6. MINIMIZING ADVERSE IMPACT:

The economic impact of this rule on small businesses and local governments will be no greater than the economic impact of this rule on other regulated parties, and the ability of small businesses and local governments to comply with the requirements of this rule should be no less than the ability of other regulated parties to comply. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

DOS notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by DOS and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry.

In addition, DOS held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. Participants in the conference calls included members of the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee, representatives of CSST manufacturers, and local government representatives. DOS also participated in several meetings on this topic, including a meeting with local fire official and electrical inspectors held on June 26, 2007 in East Meadow, NY, and a meeting with code officials, plumbing inspectors, a utility company representative and a CSST manufacturer representative held on January 21, 2009 in Hicksville, NY. Finally, speakers provided comments at the Code Council meetings where earlier versions of this rule were considered for adoption by the Code Council as emergency rules. Comments received in the conference calls, meetings, and Code Council meetings described above include:

(1) A comment suggesting that all metal gas piping, and not just CSST piping, should be subject to the bonding requirements. This alternative has not been incorporated into the proposed rule, because the data available at this time do not support the need for more robust bonding of gas piping made of material other than CSST.

(2) A comment suggesting that non-CSST metal piping should be considered to be bonded when it is connected to appliances that are connected to the appliance grounding conductor of the circuit supplying that appliance. This alternative is reflected in the proposed rule. This rule continues the existing rule regarding the circumstances under which non-CSST gas piping is considered to be "bonded."

(3) A comment suggesting changes to the wording of the proposed rule, to clarify its intent. These alternatives have been incorporated, in whole or in substantial part, into the proposed rule.

(4) A comment suggesting that earlier versions of the proposed rule may have confused the concept of bonding with grounding. DOS believes that the current version of the proposed rule eliminates any such confusion.

(5) A comment suggesting that it is inappropriate to attempt to address concerns about lightning damage to CSST by requiring bonding of CSST systems, since that shifts responsibility from CSST manufacturers to electrical inspectors. DOS believes that the weight of expert opinion is that with appropriate bonding, CSST can be as safe from lightning damage as non-CSST metal piping, and that given a choice between banning the use of CSST or permitting its use but requiring that it be bonded, the better choice is to permit its use and require that

it be bonded. The alternative of banning the use of CSST was considered. However, it was determined that the principal concerns about the use of CSST piping (viz., puncturing of CSST gas piping caused by electrical arcing induced by lightning strikes in the vicinity of buildings equipped with CSST or by nails or other fasteners driven into walls containing concealed CSST gas piping) could be adequately addressed by the increased electrical bonding and physical protection requirements to be added by this rule. Therefore, this alternative was rejected.

DOS has posted the full text of this rule on its website.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS.

This rule amends provisions in the Uniform Fire Prevention and Building Code ("Uniform Code"). The amended provisions add new requirements for installation and electrical bonding of gas piping made from corrugated stainless steel tubing (CSST), and for protection of gas piping made of CSST, or any material other than black or galvanized steel, against physical damage. Since the Uniform Code applies in all areas of the State (other than New York City), this rule will apply in all rural areas of the State.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS.

The rule will not impose any reporting or recordkeeping requirements.

The rule will add new requirements relating to the installation and electrical bonding of gas piping made of CSST, and new requirements relating to protection of gas piping made of CSST (or any other material other than black or galvanized steel) against physical damage. No professional services are likely to be needed in a rural area in order to comply with such requirements.

3. COMPLIANCE COSTS.

The initial capital costs of complying with the rule will include the cost of purchasing and installing the bonding jumpers and clamps, shield plates and protective metal piping required by the rule.

When gas piping made of CSST is installed, this rule will require the use of a bonding jumper, a bonding clamp, and shield plates and/or protective metal pipe.

The Department of State estimates the cost of the bonding jumper required by this rule in most situations (6 AWG copper wire) to be \$ 6.00 per foot. In a typical installation, approximately 30 to 50 feet of bonding jumper may be required. Therefore, the Department of State estimates that the cost of bonding jumper required in a typical installation to be between \$200 and \$300.

The Department of State estimates the cost of the clamp and 4'' section of schedule 40 pipe, when required by this rule, (including the cost of installing the clamp and pipe section) to be \$31.

The Department of State estimates the cost of the shield plates required by this rule (including the cost of installing the shield plates) to be \$15.50 per shield plate. In a typical installation, approximately 1 to 5 shield plates may be required. Therefore, the Department of State estimates that the cost of shield plates required in a typical installation to be between \$15.50 and \$77.50.

The Department of State estimates the cost of the protective metal pipe (schedule 40 steel or iron pipe) required in certain instances by this rule (including the cost of installation) to be \$13.55 per linear foot. In a typical installation, approximately 10 linear feet of protective metal pipe may be required. Therefore, the Department of State estimates that the cost of protective metal pipe required in a typical installation to be \$130.55.

Based on the foregoing, the Department of State estimates that in the case of a typical installation of gas piping made of CSST, the cost of the clamp, bonding jumper, section of schedule 40 pipe, shield plates and protective metal pipe required by this rule will be between \$200 and \$530.

It should be noted, however, that in most cases, the bonding jumper, clamp, and shield plates required by this rule are also required by the CSST manufacturer's installation instructions. Accordingly, these materials would be required even in the absence of this rule, and this rule has little actual impact on the cost of installing CSST piping.

Additionally, in the case of installation of gas piping made of copper, brass or aluminum tubing, this rule may be viewed as adding a new requirement (using shield plates where such tubing is within 1.75 inches, rather than 1 inch, of the edge of a stud, rafter, joist or other member) and as adding an additional cost (the cost of installing shield plates in areas where the tubing is more than 1 inch, but less than 1.75 inches, from the edge of a stud, rafter, joist or other member). As noted above, the Department of State estimates the cost of shield plates required in a typical installation to be between \$15.50 and \$77.50.

Compliance with this rule will occur when gas piping or is initially installed; therefore, it is anticipated that there will be no annual costs of complying with the rule. Any variation in costs of complying with this rule for different types of public and private entities in rural areas will be attributable to the size and configuration of the gas piping installed by such entities, and not to nature or type of such entities or to the location of such entities in rural areas.

4. MINIMIZING ADVERSE IMPACT.

The economic impact of this rule in rural areas will be no greater than the economic impact of this rule in non rural areas, and the ability of individuals or public or private entities located in rural areas to comply with the requirements of this rule should be no less than the ability of individuals or public or private entities located in non-rural areas. Providing exemptions from coverage by the rule was not considered because such exemptions would endanger public safety.

5. RURAL AREA PARTICIPATION.

The Department of State notified interested parties throughout the State of proposed text of this rule by posting a notice on the Department's website, and publishing a notice in Building New York, an electronic news bulletin covering topics related to the Uniform Code and the construction industry which is prepared by the Department of State and which is currently distributed to approximately 7,000 subscribers, including local governments, design professionals and others involved in all aspects of the construction industry in all areas of the State, including rural areas.

In addition, the Department of State held three conference calls, open to the public, specifically devoted to developing proposed code text involving CSST. Participants in the conference calls included members of the Code Council's Plumbing, Mechanical and Fuel Gas Technical Subcommittee, representatives of CSST manufacturers, and local government representatives. The Department of State also participated in several meetings on this topic, including a meeting with local fire official and electrical inspectors held on June 26, 2007 in East Meadow, NY, and a meeting with code officials, plumbing inspectors, a utility company representative and a CSST manufacturer representative held on January 21, 2009 in Hicksville, NY. Finally, speakers provided comments at the Code Council meetings where earlier versions of this rule were considered for adoption by the Code Council as emergency rules. Comments received in the conference calls, meetings, and Code Council meetings described above included:

(1) a suggestion that all metal gas piping, and not just CSST piping, should be subject to the bonding requirements, since all metal piping could be susceptible to damage from nearby lightning strikes (this suggestion has been incorporated into the proposed rule);

(2) a suggestion that non-CSST metal piping should be considered to be bonded when it is connected to appliances that are connected to the appliance grounding conductor of the circuit supplying that appliance (this suggestion was not incorporated into the proposed rule);

(3) suggested changes to the wording of the proposed rule, to clarify its intent (these suggestions have been incorporated, in whole or in substantial part, into the proposed rule);

(4) a suggestion that earlier versions of the proposed rule may have confused the concept of bonding with grounding (the Department of State believes that the current version of the proposed rule eliminates any such confusion); and

(5) a suggestion that it is inappropriate to attempt to address concerns about lightning damage to CSST by requiring bonding of CSST systems, since that shifts responsibility from CSST manufacturers to electrical inspectors (the Department of State believes that the weight of expert opinion is that with appropriate bonding, CSST can

be as safe from lightning damage as non-CSST metal piping, and that given a choice between banning the use of CSST or permitting its use but requiring that it be bonded, the better choice is to permit its use and require that it be bonded).

The Department of State has posted the full text of this rule on the Department's website.

Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

The rule adds new paragraphs (9), (10), (11), and (12) to subdivision (d) of section 1220.1, amends subdivision (b) of section 1224.1, and adds new paragraphs (2), (3), and (4) to subdivision (c) to section 1224.1 of Title 19 NYCRR. New paragraphs (9), (10), (11), and (12) of subdivision (d) of section 1220.1 and new paragraphs (2), (3), and (4) of subdivision (c) of section 1224.1 will clarify requirements in the Uniform Fire Prevention and Building Code ("Uniform Code") relating to electrical bonding of gas piping and protection of gas piping against physical damage, and will add new requirements relating to installation of gas piping made of corrugated stainless steel tubing (CSST).

It is anticipated that builders will be able to comply with the electrical bonding and physical protection requirements, as clarified and added by this rule, by using equipment that is currently available and techniques that are currently known. It is also anticipated that any increase costs of compliance resulting from this rule will be negligible. Therefore, it is anticipated that this rule will have no significant adverse impact on jobs or employment opportunities in the building industry, or in businesses that manufacture or install gas piping, other metal piping, or CSST piping.

Assessment of Public Comment

Comment 1: A comment was received indicating that the rule may prohibit or limit the use of corrugated stainless steel tubing (CSST) outdoors. The party making this comment noted that CSST is listed for outdoor use in accordance with performance requirements contained within Sections 1.1.2; 1.8(n); and 2.14 of the listing standard ANSI LC-1 (2005).

Response to Comment 1: Neither the existing provisions of the Uniform Code nor the provisions of this rule expressly prohibit the use of CSST outdoors. However, this rule does require that CSST be bonded at a point which is inside the building, and this may limit the ability to use CSST outdoors.

The Department of State believes that additional information must be obtained in order to evaluate fully the merits of this comment and the revisions to the rule that would be necessary to address this comment. However, the Department of State believes that the current emergency rule should not be allowed to lapse pending a further investigation of the merits of this comment. Accordingly, no change will be made to the rule to address this comment at this time, and the current emergency rule will be re-adopted as an emergency rule, to be effective for a period of 60 days following the filing of the Notice of Emergency Adoption. In the meantime, the Department of State will attempt to obtain additional information that may support a revision to the rule to permit the bonding point to be located outside the building, or to otherwise address this comment. If the Department of State obtains additional information that supports such a revision, this rule may be revised prior to its final adoption as a permanent rule.

Comment 2: A comment was received indicating that the requirements for bonding CSST to be added to the Residential Code of New York State (Section 2411) and the Fuel Gas Code of New York State (Section 310) should be revised by adding additional provisions which would eliminate or modify the bonding requirements in a case where a specific product, which is listed by ICC ES-PMG 1058, is used. The party making this comment asserts that the product "has proven to be effective in the field" and should be "considered to be bonded where it is connected to the appliances that are connected to the equipment grounding conductor of the circuit supplying that appliance."

Response to Comment 2: The Department of State believes that ad-

ditional information must be obtained in order to evaluate fully the merits of this comment and the revisions to the rule that would be necessary to address this comment. However, the Department of State believes that the current emergency rule should not be allowed to lapse pending a further investigation of the merits of this comment. Accordingly, no change will be made to the rule to address this comment at this time, and the current emergency rule will be re-adopted as an emergency rule, to be effective for a period of 60 days following the filing of the Notice of Emergency Adoption. In the meantime, the Department of State will attempt to obtain additional information that may support a revision to the rule to eliminate or modify the bonding requirements when a CSST product of the type described in this comment is used, or otherwise to address this comment. If the Department of State obtains additional information that supports such a revision, this rule may be revised prior to its final adoption as a permanent rule.

NOTICE OF ADOPTION

Bedding

I.D. No. DOS-27-10-00011-A

Filing No. 899

Filing Date: 2010-08-27

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 Part 199 to Title 19 NYCRR.

Statutory authority: General Business Law, section 385 and 387; Executive Law, section 91

Subject: Bedding.

Purpose: To specify label requirements for new and used bedding and to specify sanitization requirements for used bedding.

Text or summary was published in the July 7, 2010 issue of the Register, I.D. No. DOS-27-10-00011-P.

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

Text of rule and any required statements and analyses may be obtained from: Whitney Clark, NYS Department of State, Division of Licensing Services, Alfred E Smith Office Building, 80 South Swan Street, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

Assessment of Public Comment

The Department of State received one public comment after the proposed rule was published in the State Register. The comment supported the need for the regulation and argued that the regulations should expressly authorize the use of 'dry heat sanitization' and permit the adoption of local laws to address additional sanitization methods.

Under the regulations as proposed, alternative methods such as 'dry heat sanitization' may be approved by the Department if the applicant proposing to use said method can demonstrate that the alternative method will sanitize the bedding and protect a consumer from pathogens, allergens and pest infestation that may be present inside bedding. As such, the Department has determined that the regulations, as proposed, provide the flexibility necessary to permit other sanitization methods.

Whether local governments have the authority to promulgate local laws to prescribe sanitization methods is a matter of statutory interpretation. Article 25-A does not give the Department of State the authority to promulgate rules and regulations on issues of local law authority or preemption. If such authority exists, the regulation would enable the Department to consider the sanitization method being used and, if appropriate, approve the use of said method.

The Department of State received a second public comment prior to the rule being published in the State Register. These comments were considered while the rule was being developed and were considered again after the rule was proposed. One of the issues raised was enforcement. It was argued that the regulation would need to be enforced and that the statute would need to be amended to permit the authority to impose penalties for non-compliance. Article 25-A of the General Business Law provides for effective enforcement of the proposed regulations. The Department has authority to inspect the sanitization of all articles of used bedding and materials including the

authority to open and examine the contents of bedding and the power to seize and hold for evidence an article of bedding with the department has reason to believe is made or sold or held in violation of the article. The Department also has authority to revoke or suspend a registration upon proof that the registrant has violated the rules and instant regulations.

The comment also noted that the regulations would need to clearly define the articles of bedding which must be sanitized. As proposed, the regulation provides this clarity and applies to 'used bedding' as defined in section 383 of the General Business Law.

It was requested that the regulation be revised to permit sanitization through the use of a NYS registered pesticide product labeled for use on bedding and mattresses, which purportedly kills insects and disinfects. It was determined that permitting the use of such a product by itself would not be appropriate insofar as it would provide no protection against allergens that may be present inside the bedding. To provide necessary flexibility, the regulations were drafted so as to permit the use of alternative methods if it can be demonstrated that the alternative method will both sanitize the bedding and protect a consumer from pathogens, allergens and pest infestation.

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

Local Government Efficiency Grant Program

I.D. No. DOS-37-10-00008-P

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

Proposed Action: This is a consensus rule making to add Part 816 to Title 19 NYCRR.

Statutory authority: State Finance Law, section 54(10); and Executive Law, section 91

Subject: The Local Government Efficiency Grant Program.

Purpose: To amend certain definitions within the LGE grant program to conform to recent statutory changes.

Text of proposed rule: A new Part 816 entitled Local Government Efficiency Award is added to Title 19 to read as follows:

The purpose of this regulation is to implement the requirements of State Finance Law, section 54(10)(o) which established the Local Government Efficiency grant program. The Secretary of State is directed to adopt rules and regulations to implement the program.

Section 816.2 Definitions.

As used in this Part, the following words and terms shall have the stated meaning:

(a) Consolidation means either (1) the combination of two or more municipalities resulting in the termination of the existence of each of the entities to be consolidated and the creation of a new municipality which assumes jurisdiction over all of the terminated municipalities, or (2) the combination of two or more municipalities resulting in the termination of the existence of all but one of the municipalities which shall absorb the terminated municipality or municipalities.

(b) Cooperative Agreement means an agreement entered into by two or more municipalities pursuant to article 5-G of the General Municipal Law or other authorizing statutes for the performance among themselves or one for the other of their respective functions, powers and duties on a contract or cooperative basis.

(c) Dissolution means the termination of the existence of a municipality.

(d) Efficiency Implementation Grant means a competitive grant to two or more municipalities to cover costs associated with consolidations, dissolutions, cooperative agreements and shared services, where demonstrable financial savings would result.

(e) Functional Consolidation means one municipality completely providing a service or function for another municipality, which no longer engages in that service or function.

(f) General Efficiency Planning Grant means a competitive grant to two or more municipalities to cover costs associated with plans that evaluate potential financial savings and management improvements, associated with functional consolidation or shared services involving two or more municipalities.

(g) High Priority Planning Grant means a grant to provide funding for plans, which shall include an examination of the potential savings and management improvements, for:

(1) A single municipality to conduct city or county charter revision

plan to implement functional consolidation or increased shared services which will achieve savings and management improvements;

(2) A single village to study village dissolution and develop a village dissolution plan;

(3) Two or more municipalities to consolidate or dissolve;

(4) Two or more municipalities to transfer functions to be performed on a countywide basis;

(5) Two or more municipalities to conduct services on a multi-county or regional basis;

(6) Additional types of grants as may be identified by the Secretary of State, and included in a request for applications.

(h) Municipality mean counties, cities, towns, villages, special improvement districts, fire districts, public libraries, association libraries, water authorities, sewer authorities, regional planning and development boards, school districts, and boards of cooperative educational services; provided, however, that for the purposes of this definition, a board of cooperative educational services shall be considered a municipality only in instances where such board of cooperative educational services advances a joint application on behalf of school districts and other municipalities within the board of cooperative educational services region; provided, however, that any agreement with a board of cooperative educational services:

(1) Shall not generate additional state aid;

(2) Shall be deemed not to be a part of the program, capital and administrative budgets of the board of cooperative educational services for the purposes of computing charges upon component school districts pursuant to subparagraph seven of paragraph b of subdivision four of section 1950 and subdivision one of section 1950 and subdivision one of section 1951 of the Education Law;

(3) Shall be deemed to be a cooperative municipal service for purposes of subparagraph two of paragraph d of subdivision four of section 1950 of the Education Law.

(i) Secretary means the New York State Secretary of State.

(j) Shared services means the joint provision, performance or delivery of a service, facility, activity, project, or undertaking by two or more municipalities which each may lawfully undertake separately.

(k) Twenty-first Century Demonstration Project Grant means a competitive grant to municipalities to cover costs associated with a functional consolidation or shared services agreement with great potential to achieve financial savings and serve as a model for other municipalities, including the consolidation of services on a multi-county basis, the consolidation of certain services countywide, the creation of a regional entity empowered to provide multiple functions on a countywide or regional basis, the creation of a regional or city-county consolidated municipal government, the consolidation of school districts or supporting services for school districts encompassing the area served by a Board of Cooperative Educational Services, or the creation of a smart growth compact or program.

Section 816.3 Eligibility.

(a) Applications for assistance under this Part may be made by one or more municipalities which submit requests on forms established by the Secretary.

(b) Grants may be used to cover costs associated with and including, but not limited to:

(1) High Priority Planning and General Efficiency Planning grants - legal and consultant services and other necessary expenses;

(2) Efficiency Implementation Grants and Twenty-first Century Demonstration Project Grants - legal and consultant services, transitional personnel costs essential for the implementation of an approved work plan integral to coordinated or consolidated service delivery, capital improvements and joint equipment purchases only where integral to coordinated or consolidated service delivery, and other necessary expenses.

Section 816.4 Grant awards.

(a) Subject to annual appropriations by the Legislature, grants will be made to successful applicants pursuant to the review and approval criteria set forth herein, in amounts not to exceed:

(1) Fifty thousand dollars for High Priority Planning grants,

(2) Twenty five thousand dollars for two municipalities with an additional one thousand dollars for each additional municipality participating in the application, the maximum grant award not to exceed thirty five thousand dollars, for General Efficiency Planning Grants,

(3) Two hundred thousand dollars per municipality, the maximum grant award not to exceed one million dollars, for Efficiency Implementation Grants,

(4) Four hundred thousand dollars per municipality for Twenty-First Century Demonstration Project Grants.

(b) Applicants will be required to provide matching funds, equal to ten percent of the total cost of activities approved by the Department of State, as follows:

(1) Ten percent matching funds for High Priority Planning Grants,

(2) Ten percent local matching funds for General Efficiency Planning Grants,

(3) Ten percent local matching funds for Efficiency Implementation Grants, except that in the event an applicant is implementing a project that the applicant developed through a successfully completed planning grant funded under the local government efficiency grant program (this Part or Part 815 of this Title) or the shared municipal services incentive grant program (Part 814 of this Title), the local matching funds required shall be reduced by the local matching funds required by such successfully completed planning grant.

(4) Ten percent local matching funds for Twenty-first Century Demonstration Project Grants.

(c) State assistance shall be available on a reimbursement basis. Grantees shall submit periodic invoices and requests for payment as work is performed and costs incurred. No part of a grant shall be used by the grantee for recurring expenses such as salaries, utilities and fuel, except that for Efficiency Implementation Grants and Twenty-first Century Demonstration Project Grants the salaries of certain personnel essential for the effectuation of the joint activity shall be eligible for a period not to exceed three years.

(d) Prior to the final reimbursement payment, grant recipients shall submit to the Secretary copies of studies, agreements and other products resulting from the grant award.

Section 816.5 General review and approval criteria.

(a) All applications for General Planning, Efficiency Implementation, and Twenty-first Century Demonstration Project grants will be rated in accordance with the rating system established by the Secretary. Different weighting and additional criteria may be applied for Twenty-first Century Demonstration Project grant applications. Criteria used to rate applications will generally include the following:

(1) Demonstrated need for the project;
 (2) The likelihood of timely completion of the project;
 (3) The potential for ongoing municipal cost savings, enhanced productivity, or streamlined administration;
 (4) The number of municipalities involved or the size of the service area;

(5) The likelihood of instituting permanent changes to municipal structure or service delivery resulting in cost savings, enhanced productivity, or streamlined administration over the long term;

(6) The ability of the project to serve as a demonstration program for other municipalities to reduce costs, enhance productivity, or streamline administration;

(7) Whether the project would advance other State or municipal programs for municipal efficiency and cost savings;

(8) The geographic distribution of other fundable projects in any given application cycle.

(b) High Priority Planning Grants are not subject to the above general review and approval criteria.

(1) In awarding High Priority Planning Grants, the secretary may reserve portions of the money allocated for different categories of plans or studies in order to provide for a variety of types of applications to be funded.

(2) Applicants for High Priority Planning Grants will be required to meet deadlines for actions on development of work plans and execution of contracts with the state in order to retain the grant award. Funding awarded to applicants who do not meet established deadlines may be returned to the funding pool for use by other eligible applicants. Applicants who lose eligibility may reapply for available funds.

(c) In the selection of General Efficiency Planning grant awards, priority shall be given to applications that:

(1) Would result in the complete functional consolidation of a municipal service.

(2) Includes a municipality that meets at least three of the fiscal distress indicators pursuant to paragraph c of subdivision ten of section 54 of the State Finance Law.

(3) Would result in contractual services between two or more municipal highway departments or the consolidation of two or more municipal highway departments; provided, however, an applicant shall indicate that an objective of the plan is to realize financial savings upon implementation.

(4) Consolidate health benefit plans offered by two or more municipalities.

(d) In the selection of Efficiency Implementation Grant awards, priority shall be given to applications that:

(1) Would implement the dissolution or consolidation of municipalities.

(2) Would result in the complete functional consolidation of a municipal service.

(3) Are submitted by applicants that successfully completed a high priority planning grant or a planning grant under the shared municipal services incentive grant program for one of the identified high priority activities.

(4) Include a municipality that meets three of the fiscal distress indicators as described in this Part.

(5) Would result in contractual services or a cooperative agreement between two or more municipal highway departments, or the consolidation of two or more municipal highway departments.

(6) Consolidate health benefit plans offered by two or more municipalities.

(e) Awards shall be granted only for services that would otherwise be individually provided by each grantee and for which demonstrable financial savings result from such sharing, unless awards are for feasibility studies.

Section 816.6 Application procedure.

(a) Application for assistance shall be on forms prescribed by the Secretary.

(b) The Department of State will provide outreach services to inform municipalities of the availability of funding and provide information to applicants concerning application preparation and submission.

(c) Project time periods and work programs may be adjusted by the Department of State as a condition of entering into a contract for State assistance to ensure the timely and successful completion of a project for which funds are awarded. The Department of State may, at its discretion, choose not to enter into contracts and cancel grant awards which do not contain mutually established time periods and work programs.

(d) All projects must be undertaken pursuant to a contract with the Department of State which shall require, in addition to the requirements of the Department of State, Attorney General, and State Comptroller, that all contracts not to be performed by the officials and employees of the grantee be entered into in accordance with sections 103 and 104-b of the General Municipal Law. Requested grant amounts may be reduced in order to fund a greater number of projects or in order to reflect eligible costs.

Text of proposed rule and any required statements and analyses may be obtained from: Darrin B. Derosia, Associate Counsel, NYS Department of State, Office of the General Counsel, One Commerce Plaza, 99 Washington Ave., Suite 1120, Albany, NY 12231-0001, (518) 474-6740, email: darrin.derosia@dos.state.ny.us

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

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

Consensus Rule Making Determination

The intent of the addition of Part 816 to Title 19 is to amend certain definitions within the Local Government Efficiency Grant Program to conform with recent statutory changes pursuant to the New NY Government Reorganization and Citizen Empowerment Act. The Department has considered the proposed addition of Part 816 and has determined that this rule making is a consensus rule making within the meaning of section 102(11) of the State Administrative Procedure Act (SAPA), in that no person is likely to object to its adoption because it merely amends definitions from Part 815 that refer to statutes that were repealed under the above-referenced Act, and conforms those definitions to the new General Municipal Law Article 17-A. The new Part also differs slightly from Part 815 by eliminating unnecessary or superfluous language. The new Part is being added, rather than amending Part 815, in order to apply only to new grants under the program, going forward.

Job Impact Statement

The proposed addition of Part 816 to Title 19, regarding the Local Government Efficiency Grant Program for 2010-2011 and going forward, will not have a substantial adverse impact on jobs or employment opportunities. There will be no impact on jobs or employment opportunities as the proposed addition is only intended to amend definitions from Part 815 that refer to statutes that were repealed under the New NY Government Reorganization and Citizen Empowerment Act, and to conform those definitions to the new General Municipal Law Article 17-A. The new Part also differs slightly from Part 815 by eliminating unnecessary or superfluous language. The new Part is being added, rather than amending Part 815, in order to apply only to new grants under the program, going forward.

Department of Transportation

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Transportation publishes a new notice of proposed rule making in the NYS Register.

Regulation of the Use of Highways by Large Trucks, Reasonable Access Highways

I.D. No.	Proposed	Expiration Date
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TRN-34-09-00021-P August 26, 2009 August 26, 2010

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

Access of Over Dimensional/Overweight Vehicles to a Segment of Highway in the Vicinity of I-26 of Thruway, Rotterdam/Glenville I.D. No. TRN-37-10-00005-P

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

Proposed Action: This is a consensus rule making to amend Part 8160 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, section 385(16)(r); and Transportation Law, section 14(18)

Subject: Access of over dimensional/overweight vehicles to a segment of highway in the vicinity of I-26 of Thruway, Rotterdam/Glenville.

Purpose: To formalize NYSDOT's determination that over dimensional/overweight vehicles can operate safely on the above mentioned route.

Text of proposed rule: Section 8160.00 of Part 8160 of Title 15 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended by adding a new subdivision (c) to read as follows:

(c) Over a route extending east and west from the Exit 26 toll plaza of the New York State Thruway (I 90) to Exit 1B of I 890, and west and east on NY 890, and east and west on NY 5, and north and south on 7th Street into the Scotia-Glenville Industrial Park, a distance of approximately 2.25 miles in the Towns of Rotterdam and Glenville, Schenectady County.

Text of proposed rule and any required statements and analyses may be obtained from: Yvie Dondes, Esq., New York State Department of Transportation, 50 Wolf Road, Albany, NY 12232, (518) 457-2411, email: ydondes@dot.state.ny.us

Data, views or arguments may be submitted to: David Woodin, New York State Department of Transportation, 50 Wolf Road, Albany, NY 12232, (518) 457-1793, email: dwoodin@dot.state.ny.us

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

Consensus Rule Making Determination

The Department of Transportation proposes the adoption of a new subdivision (c) to section 8160.00 of part 8160 of Title 15 of the Official Compilation of Codes, Rules and Regulations of the State of New York as a consensus rule. No person is likely to object because the proposed rule making merely implements a provision of the Vehicle and Traffic Law based upon specific determinations made by the Department. The statutory authority for this proposal is paragraph (r) of subdivision 16 of section 385 of the Vehicle and Traffic Law and subdivision 18 of section 14 of the Transportation Law. Section 385(16) (r) of the Vehicle and Traffic Law provides for the use of any route, such as a 2.25 mile section of highway in the Towns of Rotterdam and Glenville, Schenectady County, which is within a radius of 6,600 feet of designated Interchange 26 of the New York State Thruway, "where the commissioner of transportation determines that the vehicle or combination of vehicles could operate safely along the designated route and that no applicable federal law, regulation or other requirement prohibits the operation of such vehicle or combination of vehicles on such route." Section 14(18) of the Transportation Law authorizes the Department of Transportation to promulgate regulations related to the functions of the Department under State law.

The Vehicle and Traffic Law generally provides that vehicle combinations, such as tractor and tandem-trailer combinations, cannot exceed sixty-five feet in length and cannot exceed certain weight limitations. (Vehicle and Traffic Law, section 385 (4) & (10). The Public Authorities Law authorizes the New York State Thruway Authority to permit the use of the New York State Thruway by vehicle combinations exceeding these general limitations. (Public Authorities Law section 361; Vehicle and Traffic Law section 1630) An example of such vehicle combinations permitted by the Thruway Authority is the "thruway tandem" (a tractor towing twin forty-eight foot trailers). Subdivision 16 of section 385 of the Vehicle and Traffic Law provides that the dimensional limitations do not apply to vehicles "proceeding to or from the New York State Thruway" which are "in

compliance with the maximum dimension and weight limitations applicable to New York State Thruway". Subdivision 16 of section 385 of the Vehicle and Traffic Law sets forth State and local highways on which such vehicles may travel. Paragraph (r) of subdivision 16 of section 385 of the Vehicle and Traffic Law provides that vehicles authorized to use the Thruway may also use "any route designated by the commissioner of transportation within a radius of six thousand six hundred feet of any exit or entrance designated interchange 26 of the New York state thruway, where the commissioner of transportation determines that the vehicle or combination of vehicles could operate safely along the designated route and that no applicable federal law, regulation or other requirement prohibits the operation of such vehicle or combination of vehicles on such route." This rule is proposed as the Department has determined that vehicles authorized to use the Thruway may safely traverse this specific additional 2.25 mile segment of highway which satisfies the aforesaid statutory parameters and the use of such additional highway segment is not prohibited by applicable Federal requirements.

As referenced above, Thruway tandem-trailers are authorized to use the New York State Thruway. When such tandem-trailers leave the Thruway and proceed on state or local routes that are not designated for their use, the trailers must be separated and towed by individual tractors. Such separation and separate towing increase costs of operation, as the individual trailers must be separated and moved by the use of two separate tractors. Accordingly, in the circumstances where roads adjacent to the Thruway may accommodate the use of tandem-trailers, the Legislature has authorized such use. By allowing the tandem-trailers to directly proceed to the Thruway to and from terminals, costs of operation are reduced.

The Department is not aware of any costs that this rule will impose on any governmental or other entities. Tandem-trailers are authorized under current law to use any additional routes within established statutory parameters which the Commissioner of Transportation determines could be operated safely. This regulation, consistent with the State law, would establish a limited 2.25 mile segment within those parameters and determined by the Commissioner of Transportation to be where such vehicles could be operated safely. While some additional tandem-trailers would travel over the new 2.25 mile segment where they have previously not been authorized, the wear and tear on the highway is not expected to increase because their loads are currently carried over that highway by separate tractors. The authorization could result in marginal loss of Thruway Authority toll revenue, but such loss would be minimal as only a limited number of Thruway tandem-trailers would utilize the additional 2.25 mile segment.

The Department is not aware of any program, service, duty or responsibility that this will impose upon any county, city, town, village, school district, fire district or other special district.

The Department is not aware of any need for any reporting requirements that would be created by this rule.

The Department is not aware of any duplication of this regulation with other State or Federal requirements. Federal requirements currently prohibit states from expanding the use of interstate highways, or highways designated as national network highways by the Federal Highway Administration pursuant to Federal law, for use by longer combination vehicles. Said highway segment is not an interstate highway and is not on the national network as designated by the Federal Highway Administration pursuant to 23 CFR Part 658, Appendix A.

The alternative to this rule making would be not to authorize those vehicles permitted to use the Thruway to use the additional 2.25 mile segment of highway in the statutorily allowed vicinity of New York State Thruway Interchange 26 in the Towns of Rotterdam and Glenville, Schenectady County. Pursuant to paragraph (r) of subdivision 16 of section 385 of the Vehicle and Traffic Law, the only basis for this alternative would be a finding by the Commissioner of Transportation that such vehicles could not safely operate on the highway or that Federal requirements prohibit their use. As the Department has determined that the vehicles may operate safely on this route and that their operation would be consistent with Federal requirements, there would be no basis for this alternative.

Federal standards set forth in 49 U.S.C. § 31112 (b) and 23 CFR 658.23(a) provide that states may not expand the use of interstate and national network highways by longer combination vehicles, such as Thruway tandems. Additionally, 23 U.S.C. 127(d) prohibits states from expanding the use of interstate highways by longer combination vehicles with excess weights. Since said highway segment is not an interstate highway and has not been designated as a national network highway by the Federal Highway Administration, these standards do not apply. The Department is not aware of any applicable Federal standards or requirements in this matter.

This rule making would become effective upon adoption. Thruway tandems, and other vehicles permitted to operate on the Thruway, would be permitted to utilize the additional 2.25 mile segment of highway at that time.

Job Impact Statement

A Job Impact Statement is not submitted because the proposed rule, by its nature, would not have a substantial adverse impact on jobs and employment opportunities. Prior to examining drivers' work patterns, one might expect the rule to cause marginal impact by requiring fewer driver hours than are now necessary to haul the trailers to alternative, less convenient locations for separation and assembly. However, any marginal adverse impact on employment is negated since adoption of the proposed rule would likely allow drivers to use those same driver hours to earn commensurate or increased compensation while performing over-the-road duties.

We expect that implementation of the proposed rule would expedite service, timeliness and customer benefits. Increased company efficiencies would result in commensurate increases in capacity, which could create opportunities for additional qualified drivers and support personnel.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Payment of Moving and Related Expenses to Displaced Persons Vacating Property Acquired by the Commissioner of Transportation

I.D. No. TRN-37-10-00006-P

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

Proposed Action: Amendment of Part 101 of Title 17 NYCRR. This rule was previously proposed as a consensus rule making under I.D. No. TRN-26-06-00004-P.

Statutory authority: Highway Law, sections 29, 30, 85 and 347; Transportation Law, sections 14(18) and 228; Canal Law, section 40

Subject: Payment of moving and related expenses to displaced persons vacating property acquired by the Commissioner of Transportation.

Purpose: Clarify and conform State regulations to Federal regulations with respect to payment of relocations assistance benefits to displaced persons.

Text of proposed rule: Part 101 of Title 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby repealed and a new Part 101 is added to read as follows:

PART 101

PAYMENTS TO AN OWNER OR TENANT OF RESIDENTIAL PROPERTY OR COMMERCIAL PROPERTY UPON THEIR APPLICATION FOR ALLOWANCE OF MOVING EXPENSES IN VACATING PROPERTY ACQUIRED BY THE COMMISSIONER OF TRANSPORTATION, FOR SUPPLEMENTAL RELOCATION PAYMENTS, FOR INCREASED INTEREST COSTS AND FOR CLOSING COSTS

Section 101.1 Purpose.

The purpose of this part is to promulgate rules in accordance with the following objectives:

(a) To ensure that owners of real property to be acquired for either State, Federal or federally-assisted projects are treated fairly and consistently, to encourage and expedite acquisition by agreements with such owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in State, Federal, and federally-assisted land acquisition programs;

(b) To ensure that persons displaced as a direct result of either State, Federal, or federally-assisted projects are treated fairly, consistently, and equitably so that such displaced persons will not suffer disproportionate injuries as a result of projects designed for the benefit of the public as a whole; and

(c) To ensure that State and Federal Agencies implement these regulations in a manner that is efficient and cost effective.

(d) To ensure fair housing, open to all persons regardless of race, color, religion, sex, age, disability or national origin.

Section 101.2 General.

The Commissioner of Transportation adopts Sections 24.1 through 24.9 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.3 Appeals.

(a) The provisions included in this section shall apply to all displaced persons who express dissatisfaction with the determination of the New York State Department of Transportation ("the Department") of eligibility or reimbursement for moving expenses, replacement housing payments or other incidental and/or litigation costs connected with the property owner's conveyance of title of the acquired property to the State. At the request of the displaced person, the Department shall permit the person to inspect and copy all material pertinent to that person's appeal, except that materials which are classified as confidential, shall be subject to such reasonable conditions as the Department may impose.

(b) If the displaced person is not satisfied with the Department's determination, the person may, within 18 months of vacating or six months after final award, request an informal conference to contest the determination. Upon request, such a conference shall be scheduled in the Department's regional office and conducted by the Department's Regional Real Estate Supervisor. The displaced person may have representation at such conference. After all relevant information has been analyzed, the Department's Regional Real Estate Supervisor shall promptly notify the displaced person of the decision in writing. The written notice shall include an adequate explanation of the claim and describe how the decision is supported.

(c) In the event the displaced person is not satisfied with the results achieved at the Department's regional level, an appeal to the Director of the Department's Main Office Real Estate (the "Director") may be taken within 60 days of the written notice referred to in subdivision (b) above. The Director shall then make an independent determination according to the data submitted by the displaced person and the Department's Regional Real Estate Supervisor. The determination of the Director shall be made in writing to the displaced person, or representative, and shall include an explanation of how it is supported.

(d) In the event the displaced person is not satisfied with the results achieved at the level of the Director, a written request for a formal hearing must be made to said Director within 60 days of receiving the Director's decision. A formal hearing will be conducted by a hearing officer designated by the Commissioner of the Department (the "Commissioner" or the "Commissioner of Transportation"), to be held at a time and place to be determined by the hearing officer. Minutes of the proceedings shall be taken. Based upon all of the evidence produced at the hearing, the hearing officer shall make a recommendation to the Commissioner who shall then make a final determination regarding the claim. If the matter is still contested, the displaced person may then seek appropriate judicial review.

(e) In addition to the provisions of this Section, the Commissioner of Transportation adopts Section 24.10 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.4 General Relocation Requirements.

(a) The Commissioner of Transportation adopts Sections 24.201 through 24.203(a) (3) and 24.203 (a) (5) through 24.207, and adopts Section 24.209 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length with the following additional provision that any "comparable replacement dwelling" must be fair housing, which is open to all persons regardless of race, color, religion, sex, age, disability, or national origin.

(b) Displaced persons not eligible for relocation payments.

(1) Eligibility. Except as provided in paragraph (2) of this subdivision, a displaced person shall not be eligible to receive relocation payments or any other assistance under this Part if the displaced person is an alien not lawfully present in the United States.

(2) Exceptional and extremely unusual hardship. If the Department determines by clear and convincing evidence that a determination of the ineligibility of a displaced person under paragraph (1) of this subdivision would result in exceptional and extremely unusual hardship to an individual who is the displaced person's spouse, parent, or child and who is a citizen of the United States or an alien lawfully admitted for permanent residence in the United States, the Department shall provide relocation payments and other assistance to the displaced person under this Part if the displaced person would be eligible for the assistance but for paragraph (1) of this subdivision.

Section 101.5 Payments for Moving and Related Expenses.

(a) The Commissioner of Transportation adopts Sections 24.301 and 24.303 through 24.306 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

(b) The Commissioner of Transportation adopts Section 24.302 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length with the following additional provision that the Department may pay such other amounts consistent with Federal reimbursement rates if the Commissioner determines such amounts to be appropriate for use by the Department.

Section 101.6 Replacement Housing Payments.

The Commissioner of Transportation adopts Sections 24.401 through 24.404 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.7 Mobile Homes.

The Commissioner of Transportation adopts Sections 24.501 through 24.503 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.8 Certification.

The Commissioner of Transportation adopts Sections 24.601 through 24.603 and Appendices A and B of Part 24 of Title 49 of the Code of Federal Regulations with the same force and effect as though herein fully set forth at length.

Section 101.9 Hardship Cases.

(a) Notwithstanding any other provisions contained in this Part, in hardship cases, the Commissioner may make advance payments in anticipation of a displaced person's actually moving or actually purchasing or renting and occupying decent, safe and sanitary replacement housing. The Commissioner may authorize the advance payment of the amount determined to represent reasonable and necessary moving expenses or the amount of the approved replacement housing payment deemed necessary to purchase or rent decent, safe and sanitary replacement housing. In the case of a replacement housing payment, payment shall be made only if there is a signed contract for the purchase of a replacement housing property or, in the case of a replacement rental unit, if there is a signed lease or some other firm commitment. In both instances, the proposed replacement housing shall be inspected prior to payment to determine whether it is decent, safe and sanitary.

(b) When the Commissioner determines that an unusual or hardship situation exists and it is determined to be in the public interest to do so, the Commissioner may authorize relocation payments even though the strict requirements of eligibility and reimbursement specified in this Part are not met.

Section 101.10 Incorporation by Reference.

The provisions of the Code of Federal Regulations which have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publication so filed being the booklet entitled Code of Federal Regulations, Title 49, Part 24, revised as of October 1, 2008, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the Federal Register. The regulations incorporated

by reference may be examined at the Office of the Department of State, 41 State Street, Albany, NY 12231, at the law libraries of the New York State Supreme Court, the Legislative Library, the New York State Department of Transportation, Office of Counsel or Main Office Real Estate, 50 Wolf Road, Albany, NY 12232. They may also be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

Text of proposed rule and any required statements and analyses may be obtained from: Kayla Biltucci, Director of Acquisitions Management Bureau, NYSDOT, Pod 41, 50 Wolf Road, Albany, NY 12232, (518) 457-2430, email: kbiltucci@dot.state.ny.us

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

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

Consensus Withdrawal Objection

A critical comment was received when this proposal was published in the State Register on January 16, 2008. This comment was basically that the proposed consensus rule making would effectively repeal the current language of § 101.2(c)(9) that requires a "comparable replacement dwelling" to be "fair housing, open to all persons regardless of race, color, religion, sex or national origin."

The consensus rule making text language was amended to address this objection in this current standard rulemaking submission.

Regulatory Impact Statement

1. Statutory Authority: Subdivision 10 of Section 30 of the Highway Law authorizes the Commissioner of Transportation to establish, and from time to time amend, rules and regulations authorizing the payment of actual reasonable and necessary moving expenses of occupants of property who must be relocated as a result of the acquisition of such property by eminent domain by the Department of Transportation for a highway project. Subdivision 12 of Section 30 of the Highway Law authorizes the Commissioner of Transportation to establish, and from time to time amend, rules and regulations providing for supplemental relocation payments or replacement housing. Section 85 of the Highway Law authorizes, empowers and directs the Commissioner of Transportation to perform such acts as are necessary to comply with federal-aid highway and transportation acts and the rules and regulations promulgated by the federal government thereunder.

Subdivision 18 of Section 14 of the Transportation Law authorizes the Commissioner of Transportation to make and prescribe rules and regulations in relation to the discharge of the Commissioner's functions, powers and duties and those of the Department of Transportation.

2. Legislative Objectives: The proposed amendment adds the requirement that the number of occupants occupying habitable rooms for sleeping purposes is not to exceed the number permitted by local housing codes; provides that advisory assistance may be provided to unlawful occupants not displaced; revises utility costs to include electricity, gas and other heating and cooking fuels; adds the definition of "mobile home"; increases maximum reimbursement for searching fees; adds refundable security and utility deposits to the list of ineligible moving and related expenses; adds professional home inspection, certification of structural soundness, and termite inspection as eligible incidental expenses and otherwise clarifies and conforms state regulations to federal regulations relating to relocation assistance as a result of the acquisition of property by eminent domain by the Department of Transportation for a highway project.

3. Needs and Benefits: These regulations conform state regulations to federal regulations for highway projects that are funded wholly or partially with federal resources. The Federal Highway Administration (FHWA) has enacted Part 24 of Title 49 of the Code of Federal Regulations entitled Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs (Uniform Act). Currently, state highway projects that are federally funded either partially or wholly, must use the federal standards for calculating the reimbursement of moving expenses incurred by a party that is displaced through eminent domain process. The state regulations are

not up to date and do not reflect the federal standards and reimbursement formulas. Currently, if the Department utilizes the non conforming state formulas rather than the federal formulas, compliance with the Uniform Act would not be met. The state would be at risk for citation and could lose millions of dollars in federal aid. This rule amends Part 101 of NYCRR Title 17 to conform to the Uniform Act by incorporating by reference various provisions of the federal regulations. These changes will facilitate uniformity to federal requirements with respect to the payment of relocation assistance benefits to displaced persons.

One example of uniformity updates the Room-Count Schedule. See 49 CFR 24.302. Under current regulation, Section 101.4(b) of NYCRR Title 17 does not reflect the federal standards regarding reimbursement rates and number of rooms to be considered for reimbursement. However, current regulations do provide for the ability to use the federal schedule even if the project does not utilize any federal funds. The state regulations state, “ provided, however, that the Department may pay such other amounts consistent with federal reimbursement rates if the Commissioner determines such amounts to be appropriate for use by the Department.” In practice, most projects do utilize some source of federal funding. However in the instance when the project is wholly state funded, the Department utilizes the federal room count schedule because of the provision cited above in the current regulations. This practice can create confusion for departmental personnel facilitating the program. Uniformity will eliminate that confusion.

Another example where the regulation would eliminate non conformance would be reimbursement for non-residential relocation searching. Both the federal government and the Department recognize that a relocation search incurs expenses and are eligible for reimbursement during the eminent domain process. The federal commercial reimbursement rate is \$2,500. See 49 CFR 24.301 (g)(17) . The Department’s regulations under Section 101.4(c)(xiii) of Title 17 allows for reimbursement of \$1,000. If federal funds are used for any purpose in a project then the state must use the federal standard of \$2500 for search fees. Some projects are funded solely with state monies. In these cases, search reimbursement rates may not exceed \$1,000. This conflict can create confusion when implementing the program. By updating the state regulations, confusion can be eliminated by creating uniformity and ensuring that all moving expenses are reimbursed according to the federal regulations.

4. Costs:

(a) Cost to State Government: No new costs will be incurred by the implementation of this rule. Currently total reimbursable expenses have a ceiling of \$10,000 for re-establishment expenditures for each eligible non-residential claimant. There will be no increased costs associated with the ceiling; this rule does not change that ceiling limit. Additionally the commercial relocation searching fees are set by the federal standard at \$2,500. If federal funds are used for any purpose in a project then the state must use the federal standard of \$2500 for search fees. The rule will have no increased costs on searching limits.

(b) Cost to Local Governments: None.

(c) Cost to Private Parties: None.

(d) Cost to Department of Transportation: No new costs to the Department will be incurred as a result of this rulemaking.

5. Paperwork: No additional paperwork is required to implement these amendments. There are no changes in reporting requirements forms and other paperwork attributable to the rule.

6. Local Government Mandates: None.

7. Duplication: None.

8. Alternative Approaches: The Department considered taking a no action alternative. However this was rejected because the purpose of this proposal is to bring relocation benefits provided to displacees of Department highway projects into uniformity with those benefits mandated by federal regulations. We must be in compliance with the Uniform Act in order to not risk being cited and lose millions of dollars in federal funds. Uniformity in the regulations will ensure we are following the proper federal guidelines.

9. Federal Standards: Does not exceed federal regulations.

10. Compliance Schedule: Upon adoption of rule.

Regulatory Flexibility Analysis

Although substantive changes were made to the proposed rule, a regulatory flexibility analysis is not necessary because the changes do not impose an adverse economic impact on small business or local governments nor do they impose reporting, record keeping or other compliance requirements on small business or local governments.

The rule merely reflects amendments to federal regulations pursuant to which displacees to be relocated as a result of a Department of Transportation highway project are provided moving and relocation benefits. Any reporting, record-keeping or compliance requirements for eligible small businesses are the same as those in effect prior to the amendments.

Rural Area Flexibility Analysis

Although substantive changes were made to the proposed rule, a regulatory flexibility analysis is not necessary because the changes do not impose an adverse impact on public or private sector interests located in rural areas, nor does it impose reporting, record keeping or other compliance requirements on public or private sector interests located in rural areas of the state.

The rules as adopted reflect amendments to federal regulations pursuant to which displacees to be relocated as a result of a Department of Transportation highway project are provided moving and relocation benefits. Any reporting, record keeping or compliance requirements for eligible public and private sector interests located in rural areas of the state are the same as those in effect prior to the amendment.

Job Impact Statement

This rule provides conformity of state regulations to federal regulations relating to relocation assistance benefits that are available to displacees to be relocated as a result of a Department of Transportation highway project. It is determined that the rule will have no impact on jobs and employment opportunities.