

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.

Office for the Aging

EMERGENCY RULE MAKING

Expanded In-Home Services for the Elderly Program (EISEP) Consumer Directed In-Home Services

I.D. No. AGE-38-10-00002-E

Filing No. 918

Filing Date: 2010-09-09

Effective Date: 2010-09-09

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

Action taken: Amendment of sections 6654.15, 6654.16 and 6654.17 of Title 9 NYCRR.

Statutory authority: Elder Law, sections 201(3) and 214

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

Specific reasons underlying the finding of necessity: Consumer direction is the service delivery model that is strongly encouraged by both the Administration on Aging (AoA) and the Centers for Medicare and Medicaid Services. By allowing consumers to direct their own care, consumers are more satisfied, have better outcomes and tend to stay out of nursing homes for a longer period of time. By staying out of nursing homes, consumers can age in the least restrictive setting and protect their assets by not having to spend down to Medicaid in order to be able to afford institutional care. Furthermore, the State of New York saves money as consumers either delay or avoid relying on Medicaid to pay for their long term care. While not mandating that states implement consumer directed care into their programs, the AoA is strongly encouraging it in the OAA. In addition, to further encourage states to develop consumer

directed service delivery models, the AoA is offering several federal grant programs that expect states to continue to provide consumer directed services after the federal grant money ends.

NYSOFA has received two federal grants, the Nursing Home Diversion Modernization Program (NHDMP) and the Community Living Program (CLP) grant which are tied to the adoption and implementation of state funded consumer directed in-home services. Thus far, three counties (Broome, Onondaga and Oneida) are participating in the NHDMP and are required to transition the federally funded consumer directed in-home services portion of this grant to state funded consumer directed in-home services under EISEP by the end of September 2010, when the grant expires. Additionally, there are seven counties participating in the CLP grant (Albany, Cayuga, Dutchess, Orange, Otsego, Tompkins and Washington) who need to be positioned to begin implementing consumer directed in-home services under EISEP in September 2010.

The Notice of Emergency Adoption is necessary to enable NYSOFA to meet its obligations under both grants by ensuring that there is no interruption of the consumer directed in-home services currently being provided to consumers located in the three counties participating in the NHDMP and to ensure that consumer directed in-home services will be provided to consumers located in the seven counties participating in the CLP. Accordingly, it would only apply to the ten counties participating in the two grants and would expire when the regulations are published for final adoption in the State Register.

Subject: Expanded In-Home Services for the Elderly Program (EISEP) Consumer Directed In-Home Services.

Purpose: The purpose of the proposed rule is to incorporate the Consumer Directed In-Home Services delivery model into EISEP.

Substance of emergency rule: The purpose of this rule is to allow consumers the opportunity to manage their own in-home services under the Expanded In-home Service for the Elderly Program (EISEP). The proposed amendments to 9 NYCRR sections 6654.15, 6654.16 and 6654.17 incorporate a consumer directed in-home services delivery model into EISEP.

The amendments to § 6654.15 add consumer directed in-home services eligibility criteria and definitions. Specifically, the amendments address the requirements an individual or their representative must meet in order to participate in the consumer directed in-home services delivery model. In addition, several terms have been defined in order to provide the regulated parties with clear direction as to what is meant when each of the defined terms are used in the regulations. Some of these terms are new to EISEP (e.g., Consumer, Consumer Representative, Consumer Directed In-home Services and Fiscal Intermediary) and others are not, though they had not been defined previously (e.g., In-home Services, In-home Services Agency and In-home Services Worker).

In addition, for purposes of this emergency adoption the eligibility criteria for those who can participate in Consumer Directed In-home Services found in § 6654.15, is limited to individuals who may be served by the ten counties currently participating in the two federal grants, the Nursing Home Diversion Modernization Program (NHDMP) and the Community Living Program (CLP) which are tied to the adoption and implementation of state funded consumer directed in-home services, currently being administered by New York State Office for the Aging.

Section 6654.16 of the regulations was amended so that the consumer directed in-home services delivery model could be incorporated into the EISEP regulations. Specifically, NYSOFA clearly delineated those tasks that are the responsibility of the case manager in traditional EISEP but which are the responsibility of the consumer or the consumer representative under consumer directed in-home services. This section of the regulations also articulates that while case managers will work with and assist consumers and/or consumer representatives who receive services under the consumer directed in-home services model, responsibility for the interviewing, selecting, scheduling, training, supervising and dismissing the in-home services worker lays with the consumer or the consumer rep-

representative and not the case manager. NYSOFA also made several technical amendments in this section that brought the regulations up to date with current practice.

NYSOFA also amended § 6654.17 of the regulations to incorporate the consumer directed in-home services model into EISEP. Again, the major focus of the changes in this section of the regulations was to identify the tasks and responsibilities of the consumer and/or consumer representative under consumer direction, including those that are the responsibility of the agency that is providing home care in the traditional services delivery model. NYSOFA also clearly establishes training responsibilities for all parties involved in consumer directed in-home services. The amendments to this section also establish the role and responsibilities of the fiscal intermediary, an entity responsible for many of the administrative tasks including financial transactions. NYSOFA clarified when a criminal background check is required and the type of criminal background check that is required. NYSOFA also made some technical amendments to this section to bring the regulations in line with current practice and enhance the consistency with the New York State Department of Health's (DOH) regulations for the Medicaid funded Personal Care Program and regulations for licensed home care services agencies. Among the amendments in this category are the changes to the guidelines regarding the qualifications needed by the nurse who supervises the in-home services worker who is providing home care under EISEP. Section 6654.17 provides guidance as to the type and content of records that must be maintained by the fiscal intermediary that is providing the administrative functions under consumer directed in-home services. The amendments also incorporate by reference the DOH's regulations regarding criminal background checks, health status and training of in-home services workers. NYSOFA's regulations have always mirrored the DOH's requirements regarding these three subjects and incorporating the DOH's requirements into the EISEP regulations by reference will facilitate regulatory compliance for regulated parties.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 7, 2010.

Text of rule and any required statements and analyses may be obtained from: Stephen Syzdek, New York State Office for the Aging, Two Empire State Plaza, Albany, NY 12223-1251, (518) 474-5041, email: stephen.syzdek@ofa.state.ny.us

Regulatory Impact Statement

1. Statutory Authority - Section 201(3) of the New York State Elder Law allows the Director of the New York State Office for the Aging (NYSOFA) with the advice of the advisory committee for the aging to promulgate, adopt, amend or rescind rules and regulations necessary to carry out the provisions of Article II of the Elder Law.

New York State Elder Law Section 214 governs the administration of the Expanded In-home Services for the Elderly Program (EISEP).

2. Legislative Objectives - The legislative objectives of the statute that created EISEP are to increase the availability of in-home support services to non-Medicaid eligible elderly persons in need of assistance and improve access to and management of appropriate care through the use of comprehensive case management. In addition, the legislative intent of EISEP is to foster the use of non-medical supports to avoid the inappropriate use of more costly forms of care at home and in institutional settings; improve the targeting of aging network resources to those most in need and make optimal use of informal caregivers; and assist elderly clients to remain in their homes and communities. One of the ten main objectives found in the Older Americans Act (OAA) is to enable older people to secure equal opportunity to the full and free enjoyment of the following: freedom, independence and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect and exploitation (Subsection 10 of Section 101 of the OAA).

3. Needs and Benefits - The purpose of this rule is to allow consumers the opportunity to manage their own in-home services under EISEP. NYSOFA has received two federal grants, the Nursing Home Diversion Modernization Program (NHDMP) and the Community Living Program (CLP) which are tied to the adoption and implementation of state funded consumer directed in-home services. Three counties (Broome, Onondaga and Oneida) are participating in the first NHDMP and are required to transition the federally funded consumer directed portion of this grant to state funded consumer directed services - EISEP - by the end of September, when the grant expires.

Additionally, there are seven counties participating in the CLP (Albany, Cayuga, Dutchess, Orange, Otsego, Tompkins and Washington) who need to be positioned to begin implementing consumer directed services under EISEP in September. The Notice of Emergency Adoption would only ap-

ply to the ten counties that are participating in the federal grants referenced above and would expire when the regulations are published for final adoption in the State Register.

NYSOFA is filing a Notice of Emergency Adoption in order to ensure that it is able to meet its obligations under both grants by ensuring that there is no interruption of the consumer directed in-home services currently being provided to consumers located in the three counties participating in the NHDMP and to ensure that consumer directed in-home services will be provided to consumers located in the seven counties participating in the CLP.

Consumer direction is a service delivery model that provides consumers with more control and choice in the delivery of the care that they receive than the traditional models of care. Consumer direction has many variations and the scope of what is included within the construct of consumer direction varies from program to program. However, all consumer directed programs stem from the idea that individuals with needs should be empowered to make decisions about their care. Depending on the parameters established by a program, consumers select, train, schedule, supervise and dismiss their in-home services workers; decide what services and goods to spend their budget on and which providers or workers (other than for in-home services) to hire and when work will be performed.

Consumer direction is the service delivery model that is strongly encouraged by both the Administration on Aging (AoA) and the Centers for Medicare and Medicaid Services. By allowing consumers to direct their own care, consumers are more satisfied, have better outcomes and tend to stay out of nursing homes for a longer period of time. By staying out of nursing homes, consumers can age in the least restrictive setting and protect their assets by not having to spend down to Medicaid in order to be able to afford institutional care. Furthermore, the State of New York saves money as consumers either delay or avoid relying on Medicaid to pay for their long term care. While not mandating that states implement consumer directed care into their programs, the AoA is strongly encouraging it in the OAA. In addition, to further encourage states to develop consumer directed service delivery models, the AoA is offering several federal grant programs that expect states to continue to provide consumer directed services after the federal grant money ends. New York State is participating in two such grant programs.

EISEP services are provided to seniors through the Area Agencies on Aging (AAA's). Under the traditional EISEP model, case managers use the assessment and care planning process to determine the type, amount and the delivery method for the services to be provided. In-home services are provided by an agency, which is usually either a licensed home care services agency or a certified home health agency.

Under the consumer directed in-home services delivery model, consumers will have much more control, authority and decision-making capacity regarding the home care services that they receive. They will determine who will provide their home care, how the care will be provided and when it will be provided. They will establish the worker's schedule, deciding when each task will be performed. The consumer will do so within the context of the assessment and care plan that is developed by the case manager with the consumer. However, the participation of the consumer in this process will be stronger and their role enhanced as a strength based and person centered approach is adopted.

By creating the consumer directed in-home services delivery model under EISEP, New York State continues to move toward the AoA's objective that states incorporate consumer directed models of service delivery into their programs. Moving in this direction allows for innovative, creative, flexible and cost saving options to meet the needs of older New Yorkers.

AAA's will not be mandated to implement consumer directed in-home services under EISEP. Each AAA will decide if, when and how to implement consumer direction. However, it is anticipated that over time all of New York State's AAA's will choose to implement the consumer directed model. It should also be noted that the traditional home care services delivery model remains the same and unchanged by these regulations. AAA's and clients will be free to continue to provide and receive traditional home care services.

This rule making amends three sections (9 NYCRR §§ 6654.15, 6654.16 and 6654.17) of the EISEP regulations to accommodate consumer direction.

The amendments to § 6654.15 add consumer directed in-home services eligibility criteria and definitions. As a result of extensive outreach to interested parties, NYSOFA learned that the eligibility criteria and terms needed to be expanded and clarified. As a result, NYSOFA clearly lays out who is eligible to participate in consumer directed in-home services and defines key terms so that regulated parties can better understand the regulations.

Section 6654.16 of the regulations was amended so that the consumer directed in-home services delivery model could be incorporated into the

case management regulations. Specifically, NYSOFA clearly delineates those tasks that are the responsibility of the case managers in traditional EISEP but which are the responsibility of the consumer or the consumer representative under consumer directed in-home services. NYSOFA also made several technical amendments in this section that made the regulations more reflective of the way that EISEP is currently administered.

NYSOFA also amended § 6654.17 to incorporate the consumer directed in-home services model into the in-home services regulations. Again, the major focus of these changes was to identify the tasks and responsibilities of the consumer and/or consumer representative under consumer direction, including those that are usually the responsibility of the agency that is providing home care in the traditional services delivery model. NYSOFA also clearly establishes training responsibilities for all parties involved in consumer directed in-home services. These amendments also establish the role and responsibilities of the fiscal intermediary, an entity responsible for many of the administrative tasks including financial transactions. NYSOFA has also made some technical amendments to this section to more accurately reflect the current administration of EISEP. The amendments also incorporate by reference the New York State Department of Health's (DOH) regulations regarding criminal background checks, health status and training of in-home services workers. NYSOFA's regulations have always mirrored the DOH's requirements regarding these three subjects and NYSOFA has decided that incorporating the DOH's requirements into the EISEP regulations will facilitate regulatory compliance for regulated parties.

4. Costs - This proposed rule imposes no additional costs to the regulated parties, NYSOFA or state and local governments to implement and to continue to comply with this proposed rule. It should be noted that as mandated by the new 9 NYCRR section 6654.19(d), EISEP continues to be the payer of last resort and any services that are able to be provided through another source or program may not be provided through EISEP.

5. Paperwork - The proposed rule does not change any of the reporting requirements, forms or other paperwork from what is already required of the AAAs administering the program. However, for those AAA's that do decide to undertake consumer directed in-home services there will be some additional paperwork such as authorizations and releases that will need to be completed.

6. Local Government Mandates - The proposed rule does not impose any program, service, duty or responsibility upon any city, county, town, village, school district or other special district other than what is already required of the AAAs administering the program.

7. Duplication - There are no laws, rules or other legal requirements that duplicate, overlap or conflict with this proposed rule.

8. Alternatives - NYSOFA's internal workgroup discussed several significant programmatic alternatives during the development of this proposal. Some in the community of aging services providers believe that older adults will not have their needs met and be at greater risk of fraud and abuse under the consumer direction service model. NYSOFA rejected these notions as studies continue to demonstrate that older adults who manage their own care are more satisfied with the services that they receive, effective managers, less likely to be subjected to fraud and/or abuse at the hands of their caregivers and remain out of long term care facilities for a longer period of time. As a result, NYSOFA made the decision to allow for consumer directed in home services to be provided under EISEP. NYSOFA also considered limiting who could participate in the consumer directed in-home services program. Again, some are of the opinion that older adults with physical or mental disabilities should not be allowed to direct their own care. After discussing this concern with advocacy groups and other state units on aging that have implemented consumer directed care, NYSOFA believes that as long as the AAA delivering services is able to confirm that the consumer or the consumer's representative is able to assume responsibility for managing the consumer's care, these individuals should be given an opportunity to attempt to do so. Additionally, there were suggestions that the regulations place too much responsibility on the fiscal intermediary. NYSOFA, in drafting these amendments, discovered that there are varying degrees to which fiscal intermediaries involve themselves in the administrative duties and/or the support they provide to consumers who direct their own care. As a result, NYSOFA has rejected suggestions that limit the role of the fiscal intermediary and decided that the level of involvement of the fiscal intermediary will be determined by the AAA and particular fiscal intermediary involved in the consumer's care plan.

9. Federal Standards - This rule does not exceed Federal standards.

10. Compliance Schedule - AAAs will be able to comply with this proposed rule immediately after promulgation.

Regulatory Flexibility Analysis

This proposed rule will not have an adverse economic impact on small businesses or local governments nor will it impose reporting, recordkeeping or compliance requirements above those already required under EISEP

on small businesses or local governments. This proposed rule simply changes the way in which EISEP is administered. The proposed rule only affects the AAA's, in-home services providers and the clients served by EISEP by allowing consumers or their representatives to direct and manage the in-home services portion of their own care plans.

Rural Area Flexibility Analysis

This proposed rule will not have an adverse economic impact on public or private entities in rural areas nor will it impose reporting, recordkeeping or compliance requirements above those already required under EISEP on public or private entities in rural areas. This proposed rule simply changes the way in which EISEP is administered. The proposed rule only affects the AAA's, in-home services providers and the clients served by EISEP by allowing consumers or their representatives to direct and manage the in-home services portion of their own care plans.

Job Impact Statement

The New York State Office for the Aging has determined that this proposed rule will not have a substantial adverse impact on jobs. This proposed rule simply changes the way in which EISEP is administered. The proposed rule only affects the AAA's, in-home services providers and the clients served by EISEP by allowing consumers or their representatives to direct and manage the in-home services portion of their own care plans.

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Species of Ash Trees, Parts Thereof and Products and Debris Therefrom Which Are at Risk to Infestation by the Emerald Ash Borer

I.D. No. AAM-38-10-00010-E

Filing No. 928

Filing Date: 2010-09-07

Effective Date: 2010-09-07

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

Action taken: Amendment of Part 141 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: Species of ash trees, parts thereof and products and debris therefrom which are at risk to infestation by the Emerald Ash Borer.

Purpose: To extend the Emerald Ash Borer quarantine to prevent further spread of the beetle to other areas.

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 Mapleview Heights; extending south on Mapleview Heights to its intersection with Wright Road; extending east on Wright Road to its intersection with Dutch Street Road; extending south on Dutch Street Road to its intersection with Lasher Road; extending south on Lasher Road to its intersection with Wilson Road; extending west on Wilson Road to its intersection with Brown Road; extending south on Brown Road to its intersection with Salter Road; extending west on Salter Road and becoming Clinton Avenue; continuing west on Clinton Avenue to its intersection with Route 414; extending south on Route 414 to its intersection with Catch Pole Road; extending west on Catch Pole Road to its intersection with Covell Road; extending south on Covell Road to its intersection with Wayne Center Rose Road; extending west on Wayne Center Rose Road and becoming Ackerman Road; continuing west on Ackerman Road to its intersection with Route 14; extending south on Route 14 to its intersection with Burton Road; extending west on Burton Road to its intersection with Middle Sodus Road; extending north on Middle Sodus Road to its intersection with Maple Street Road; extending north on Maple Street Road to its intersection with McMullen Road; extending northwest on McMullen Road to its intersection with Deneef Road; extending south on Deneef Road to its intersection with Zurich Road; extending west on Zurich Road to its intersection with Arcadia-Zurich-Norris Road; extending south on Arcadia-Zurich-Norris Road to its intersection with Henkle Road; extending west on Henkle Road to its intersection with Heidenreich Road; extending south on Heidenreich Road to its intersection with Fairville Station Road; extending northwest on Fairville Station Road to its intersection with Maple Ridge Road; extending northwest on Maple Ridge Road to its intersection with Decker Road; extending west on Decker Road to its intersection with Sand Hill Road; extending north on Sand Hill Road to its intersection with Smith Road; extending west on Smith Road to its intersection with Newark Road; extending south on Newark Road to its intersection with Desmith Road; extending west on Desmith Road to its intersection with Schilling Road; extending northwest on Schilling Road to its intersection with State Route 21; extending south on state Route 21 to its intersection with Cole Road; extending west on Cole Road to its intersection with Parker Road; extending south on Parker Road to its intersection with LeRoy Road; extending west on LeRoy Road to its intersection with Maple Avenue; extending north on Maple Avenue to its intersection with Marion Road; extending west on Marion Road to its intersection with Ontario Center Road; extending north on Ontario Center Road to its intersection with Atlantic Avenue; extending west on Atlantic Avenue to its intersection with Lincoln Road; extending north on Lincoln Road to its intersection with Haley Road; extending west on Haley Road to its intersection with County Line Road; extending north on County Line Road to its intersection with Lake Ontario.

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

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

(b) That area of Niagara County bordered on the [east] west by Porter Center Road starting at its intersection with Route 104 (Ridge Road) and extending north-northeast on Porter Center Road to its intersection with Langdon Road; extending east on Langdon Road to its intersection with Dickersonville Road; extending north on Dickersonville Road to its intersection with Schoolhouse Road; extending east on Schoolhouse Road to its intersection with Ransomville Road; extending south on Ransomville Road to its intersection with Route 104 (Ridge Road); [extends east] extending northeast on Route 104 (Ridge Road) to its intersection with Simmons Road; extending south on Simmons Road to its intersection with Albright Road; extending east on Albright Road to its intersection with Townline Road; extending south on Townline Road to its intersection with Lower Mountain Road; extending west on Lower Mountain Road to its intersection with Meyers Hill Road; extending south on Meyers Hill Road to its intersection with Upper Mountain Road; extending west on Upper Mountain Road to its intersection with Indian Hill Road; extending 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, west on Drake Settlement Road to its intersection with Transit Road; extending north on Transit Road to its intersection with Route 18 (Lake Road); extending west on Route 18 (Lake Road) to its intersection with Lockport Olcott Road; extending north on Lockport Olcott Road to the border with Lake Ontario.

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 5, 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.

Department of Audit and Control

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Audit and Control publishes a new notice of proposed rule making in the NYS Register.

Official Station and Limitations of Traveling Expenses

I.D. No.	Proposed	Expiration Date
AAC-35-09-00010-P	September 2, 2009	September 2, 2010

Division of Criminal Justice Services

EMERGENCY RULE MAKING

Handling of Ignition Interlock Cases Involving Certain Criminal Offenders

I.D. No. CJS-31-10-00014-E

Filing No. 921

Filing Date: 2010-09-07

Effective Date: 2010-09-07

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

Action taken: Addition of Part 358 to Title 9 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 1193(1) and 1198(5)(a); L. 2009, ch. 496 and L. 2010, ch. 56

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

Specific reasons underlying the finding of necessity: Significantly, Chapter 496 of the Laws of 2009 greatly expanded the former Division of Probation and Correctional Alternatives (DPCA) regulatory oversight with respect to mandatory ignition interlock compliance in a strategic effort to combat and deter drunk driving and better safeguard the welfare of child passengers. Pursuant to Chapter 56 of the Laws of 2010, the former DPCA has been merged with the Division of Criminal Justice Services (DCJS) which has resulted in the complete transfer of the former agency's functions and continuation of its rules and regulations and contractual agreements and transfer of rulemaking authority to the Commissioner of DCJS. Previously, A Notice of Second Emergency Adoption and Proposed Rule Makings, was published on August 4, 2010. The public comment period with respect to that proposed rule ends on September 18, 2010.

In light of the above, DCJS is promulgating this regulation again on an emergency basis to safeguard the public, optimize traffic safety, and better guarantee accountability with respect to new penalties. In order to ensure timely implementation of the provisions which require DWI misdemeanants and felons sentenced on or after August 15, 2010 be subject to statewide ignition interlock conditions and State regulations governing monitoring standards, handling of cases involving judicial waiver of costs, and to assure availability of devices in every jurisdiction, it is imperative that these regulations which establish a planning framework and core responsibilities of qualified manufacturers, installation/service providers, monitors, and operators be enacted immediately to continue implementation and ensure compliance.

Subject: Handling of Ignition Interlock Cases Involving Certain Criminal Offenders.

Purpose: To promote public/traffic safety, offender accountability and quality assurance through the establishment of minimum standards.

Substance of emergency rule: This second emergency rule, entitled Handling of Ignition Interlock Cases Involving Certain Criminal Offenders, adds a new Part 358 to 9 NYCRR, and is necessitated by Chapter 496 of the Laws of 2009, commonly referred to as Leandra's Law and Chapter 56 of the Laws of 2010 which now empowers the Division of Criminal Justice Services (DCJS) to promulgate rules and regulations with respect to ignition interlock devices and judicial waiver of costs and establishing monitoring standards relative to any defendant sentenced for a DWI misdemeanor or felony. Chapter 56 specifically merged the former Division of Probation and Correctional Alternatives (DPCA), which originally had such rulemaking authority, with DCJS and transferred and assigned to DCJS former DPCA rules and regulations. Below is a brief summary of the regulatory provisions.

Section 358.1 sets forth the Objective which is to promote public/traffic safety, offender accountability, and quality assurance through the establishment of minimum standards for the usage and monitoring of ignition interlock devices following a conviction of a violation of Vehicle and Traffic Law (VTL) § 1192(2), (2-a), and (3) or any crime defined by the VTL or Penal Law of which an alcohol-related violation of any provision of § 1192 is an essential element.

Section 358.2 governs applicability and establishes that it shall be

applicable to every county, monitor, and operator, and shall govern qualified manufacturers and installation/service providers as to use, installation, and reporting with respect to ignition interlock devices imposed upon the aforementioned criminal court population within New York State and be effective immediately, except sections 358.6 through 358.10 which shall be effective August 15, 2010.

Section 358.3 is the definitional section. This section defines over twenty-five key operational terms to ensure consistency statewide with respect to language interpretation. Among these are the definition of "county" to clarify that it refers to every county outside of the city of New York, and the city of New York, and that a "qualified manufacturer" shall mean a manufacturer or distributor of an ignition interlock device certified by the New York State Department of Health who has satisfied the specific operational requirements herein and has been approved as an eligible vendor by DCJS in the designated region where the county is located.

Additionally, other terms, such as "failed tasks", "failed tests" "lockout mode", and "monitor" are defined to ensure there is universal understanding of what is meant by these terms in New York State.

Section 358.4 sets forth parameters of a county ignition interlock program plan which must be submitted by every county executive to DCJS by June 15, 2010. Rule procedures require consultation with certain officials or individuals as to plan development which will ensure that procedures are in place prior to the effective date to foster statutory and regulatory compliance and timely notification of critical information. In an effort to provide greater uniformity with respect to similar cases, yet provide certain flexibility where consistent with public safety and offender accountability, additional language distinguishes between probation and conditional discharge cases in terms of monitor and decision-making as to specific classes and features of devices required. Additional language states that where any available funding is earmarked for such purpose, the plan shall establish a distribution formula for probation supervision and /or monitoring purposes. This language contemplates DCJS efforts in securing federal grant monies to support local programmatic and/or administrative staff resources to perform monitoring functions for this offender population.

Section 358.5 governs the approval process and responsibilities of qualified manufacturers. It sets forth a procedural application mechanism for a manufacturer of ignition interlock devices to become a qualified manufacturer and requires at the outset that a manufacturer must have a certified ignition interlock device approved by the Department of Health as necessitated by VTL § 1198. Other noteworthy provisions require that any interested applicant agree to adhere and certify that they and their installation/service providers will abide by all germane regulatory procedures governing their devices and services (including specific technical device provisions with respect to vehicle operation), reporting requirements that must be met to safeguard the public and promote greater offender accountability, submission of specific documentation, selection of one or more regions of the state to conduct business, adherence to training and enhanced service delivery requirements, establishment of maximum fee/charge schedules, pay for the cost of devices where a judicial waiver has been granted, and willingness to enter into a three-year contractual agreement with DCJS. On or after August 15, 2010, only a qualified manufacturer may conduct business in New York State with respect to any operator. While an initial application deadline of May 12, 2010 is established for those seeking to do business on August 15, 2010 and thereafter, DCJS permits an open-ended application process for manufacturers seeking to do business in New York State after August 15, 2010, in consideration of the time required for device certification, application approval and contract execution.

Section 358.6 enumerates factors which may lead to cancellation, suspension, and revocation of qualified manufacturers, and installation/service providers, and certified ignition interlock devices.

Section 358.7 establishes monitoring standards. Monitoring functions associated with DWI operators with ignition interlock devices are statutorily required pursuant to the aforementioned 2009 Chapter law. DCJS' regulatory language has been carefully streamlined to af-

ford considerable flexibility where feasible, yet emphasizes that upon learning of specific events, that the applicable monitor shall take appropriate action consistent with public safety. Where under probation supervision, the county probation department shall adhere to DCJS' Graduated Sanctions and Violation of Probation rule. With respect to any operator sentenced to conditional discharge, the monitor shall take action in accordance with the provisions of its county ignition interlock program plan, consistent with the goals of public safety. At a minimum, however in all cases, it necessitates swift and certain notification to the sentencing court and district attorney as to specific failed tasks and failed tests. Overall, DCJS' rule places specific responsibilities upon qualified manufacturers, installation/service providers, as well as operators to provide timely information and/or reports to monitors so as to assist them in managing their caseload and to better guarantee offender accountability and safeguard the public. Other language establishes parameters with respect to case records and record sharing and establishes more stringent access requirements and confidentiality protections surrounding particular records.

Section 358.8 governs costs and maintenance. It recognizes that any operator shall pay the cost of installing and maintaining the ignition interlock device, unless the operator has been determined by the sentencing court to be financially unable to afford the cost of the device, whereupon such cost may be imposed pursuant to a payment plan or waived. If an operator claims financial inability to pay for the device, regulatory provisions establish that the operator shall submit three copies of a financial disclosure report on a form prescribed by DCJS to the sentencing court which shall distribute copies to the district attorney and defense counsel. This report enumerates factors to assist the sentencing court with respect to financial inability of the operator to pay for the device and whether to impose a payment plan or waive the fee/charge.

Section 358.9 governs record retention and disposition and establishes that records retention and disposition of all records of the county, any qualified manufacturer, and installation/service provider with respect to this rule Part shall be in accordance with the applicable Records Retention and Disposition Schedule promulgated by the State Education Department.

Section 358.10 relates exclusively to liability and establishes that nothing contained in this Rule Part shall impose liability upon DCJS, the State of New York, or any county for any damages related to the installation, monitoring or maintenance of an ignition interlock device or an operator's use or failure to use such devices.

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. CJS-31-10-00014-EP, Issue of August 4, 2010. The emergency rule will expire November 5, 2010.

Text of rule and any required statements and analyses may be obtained from: Linda J. Valenti, OPCA Counsel, Division of Criminal Justice Services, 80 Wolf Road - Suite 501, Albany, New York 12205, (518) 485-2394, email: linda.valenti@dcjs.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Chapter 496 of the Laws of 2009 (Leandra's Law), was a Governor's Program Bill that unanimously passed by both houses of the State Legislature. New York State joins nine other states mandating the use of ignition interlocks for all individuals sentenced for Driving While Intoxicated (DWI) misdemeanor or felony offenses. Significantly, this measure greatly expanded the former Division of Probation and Correctional Alternatives (DPCA) regulatory oversight with respect to mandatory ignition interlock compliance in a strategic effort to combat and deter drunk driving and better safeguard the welfare of child passengers. Pursuant to Chapter 56 of the Laws of 2010, the former DPCA has been merged with the Division of Criminal Justice Services (DCJS) which has resulted in the complete transfer of the former agency's functions and continuation of its rules and regulations and contractual agreements and transfer of rulemaking authority to the Commissioner of DCJS. Specifically, Vehicle and Traffic Law (VTL) § 1193(1)(g) directs said agency "to promulgate regulations governing the monitoring of compliance by persons ordered to install and maintain ignition interlock devices to provide standards for moni-

toring by departments of probation, and options for monitoring of compliance by such persons, that counties may adopt as an alternative to monitoring by a probation department." While VTL § 1198(5)(a) authorizes a court to allow the costs of the ignition interlock device to be paid through a payment plan or to waive the costs, upon a determination of "financial unaffordability" of the defendant, it further states that in the event of such waiver, the cost of the device shall be borne in accordance with DCJS regulations "or pursuant to such other agreement as may be entered into for provision of the device." Thus, it is the intent that DCJS address the method of payment if the costs of the ignition interlock device were waived or if the DWI offender was afforded a payment plan.

2. Legislative objectives:

This rule serves both the Governor's and the State Legislature's underlying objective of Leandra's Law, to further strengthen DWI laws and penalties through statewide implementation of ignition interlock conditions so as to better enhance public/traffic safety, achieve greater offender accountability, and guarantee quality assurance through the establishment of minimum standards for the usage and monitoring of ignition interlock devices following a conviction of a violation of VTL § 1192(2), (2-a), (3) or any crime defined by the VTL or Penal Law of which an alcohol-related violation of any provision of § 1192 is an essential element.

3. Needs and benefits:

This rule is needed to achieve successful implementation of Leandra's Law and address the challenges in achieving statewide implementation of ignition interlock conditions upon the DWI offender population, and establish minimum statewide monitoring standards to achieve uniformity in handling of certain failed tasks and failed tests, better safeguard the public, especially child passengers, and better guarantee operator accountability. DCJS' guidance in providing options for monitoring of compliance in lieu of probation, in conditional discharge cases and plan development and structure provisions will foster better collaboration and communication within jurisdictions and enable alternative monitoring arrangements so as to not burden probation departments with monitoring the entire DWI population subject to ignition interlock restrictions.

Its intent is to safeguard the public, optimize traffic safety, and guarantee accountability with respect to new penalties. In order to ensure timely implementation of the provisions which require DWI misdemeanants and felons sentenced on or after August 15, 2010 be subject to statewide ignition interlock conditions and DCJS regulations governing monitoring standards, handling of cases involving judicial waiver of costs, and to assure availability of devices in every jurisdiction, it is imperative that these regulations which establish a planning framework and core responsibilities of qualified manufacturers, installation/service providers, monitors, and operators be enacted immediately to guarantee implementation, establish training, and ensure compliance.

4. Costs:

a. It is anticipated that there will be some fiscal impact arising from Leandra's law. Chapter 496 of the Laws of 2009 requires monitoring of all DWI defendants subject to ignition interlock devices as a result of sentencing on and after August 15, 2010. This chapter requires, in addition to any other disposition that may be imposed, that a defendant receive a sentence of probation or conditional discharge with an ignition interlock condition. Where probation is imposed, probation departments are responsible for monitoring. Jurisdictions may designate alternative monitors for conditional discharge cases in lieu of probation. Thus, this Chapter and not DCJS rule is the source of any increased administrative costs. DCJS rule provides every jurisdiction with the flexibility to select one or more persons or entities responsible for monitoring conditional discharge cases. A variety of potential designees are listed for consideration so probation departments will not absorb such responsibilities by omission. Due to the former DPCA, DCJS, DMV and the State's efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, the former DPCA was invited and submitted a one year seed grant application to the Governor's Traffic Safety Committee in an amount of three (3) million dollars in National Highway Safety Traf-

fic Administration (NHTSA) monies to offset local government costs in performing monitoring services. The application which is pending and is anticipated to be approved on or about September 1, 2010 will enable DCJS, which former DPCA has been merged with, to distribute monies pursuant to a formula of DWI convictions to support local monitoring responsibilities for activities occurring on and after October 1, 2010.

b. DCJS' regulatory requirements with respect to qualified manufacturers or their installation/service providers will not impose costs upon either beyond normal operating costs. A qualified manufacturer may incur additional costs associated with providing payment plans or devices at no charge where judicial waiver has occurred as provided in law. It is not possible to determine precisely such costs. The new law establishes that the court, upon determining financial "unaffordability" to pay the cost of the device, may impose a payment plan with respect to the device or waive the fee. New Vehicle and Traffic law statutory provisions require that where the cost is waived, DCJS through its regulation shall determine who bears the costs of the device or through such other agreement which may be entered into. Accordingly, DCJS' regulation requires qualified manufacturers, and not local governments or taxpayers to bear such costs. Effective August 15, 2010, while the decision to waive the fee is reserved to the court, DCJS speculates based upon experience of other states that approximately ten (10) percent of cases will result in waivers. In view of the significant market and profit for ignition interlock manufacturers qualified to do business in New York State, it is reasonable to require manufacturers supply devices free of charge where a judicial waiver has been ordered. Accordingly, interested manufacturers in their applications must provide a maximum fee/charge schedule taking into consideration an estimated 10% waiver.

Statutory provisions require that operators are responsible for costs of installation and maintenance of the ignition interlock devices where no judicial waiver has been granted due to financial inability. DCJS documentation of fee structure received from interested qualified manufacturers indicates an average \$75-\$100 installation charge and a similar monthly maintenance charge.

c. Although DCJS must approve each county plan, it is anticipated that this approval process will be accomplished using existing staff and resources. As the former statewide oversight agency, with extremely limited staffing resources, the former DPCA pursued some administrative monies in connection with the aforementioned grant to better manage compliance with the statutory and regulatory requirements of this new law.

5. Local government mandates:

This rule establishes that every jurisdiction must submit for DCJS approval an ignition interlock plan for monitoring the use of ignition interlock devices by June 15, 2010. The County Plan content is straightforward, simple, and largely prescriptive to ease any burden on localities. Monitoring functions associated with DWI operators with ignition interlock devices are statutorily required. DCJS' rule has been carefully streamlined to afford considerable flexibility, yet guarantee swift and certain sentencing court and district attorney notification as to certain failed tasks and failed tests. Additionally, it places specific responsibilities upon qualified manufacturers, installation/service providers, as well as operators to provide timely information and/or reports to monitors so as to assist them in managing their caseload. Nationally, fewer than 10% of persons with an ignition interlock installed on their motor vehicle violate the conditions relating to the ignition interlock program.

6. Paperwork:

This rule establishes that every jurisdiction submit an ignition interlock program plan to DCJS for approval meeting certain regulatory requirements. The former DPCA distributed a model simple form, largely prescriptive, to assist jurisdictions in satisfying this requirement. A manufacturer wishing to conduct business in New York State relative to ignition interlock devices will be required to apply to DCJS. The former DPCA distributed and posted an application for interested manufacturers. Other data report requirements imposed upon qualified manufacturers and installation/service providers are routine business activities and essential to offender accountability and

community safety. The former DPCA developed approximately fifteen (15) reporting forms to facilitate exchange of information and promote consistency, which will greatly benefit all jurisdictions in implementation and compliance with this new law. The former DPCA solicited considerable input from constituents, including the Courts in developing the financial disclosure report required of operators applying for judicial waiver. Further efforts at the state level will lead to the availability of Spanish forms.

7. Duplication:

This proposal does not duplicate any other existing State or federal requirements. While the Department of Health (DOH) certifies ignition interlock devices, DOH through regulations has transferred certain regulatory responsibilities to DCJS to achieve a more workable solution with respect to oversight of key areas.

8. Alternatives:

The former DPCA and DCJS weighed several approaches with respect to rule-making, but were required at a minimum to include certain aforementioned statutory components. A plan submission process was viewed essential to ensure that all jurisdictions are prepared to fulfill statutory requirements. An application process for manufacturers with stronger operational requirements was also determined critical to improve statewide service delivery and promote public safety and operator accountability. In crafting rule content and developing the financial disclosure report, a workgroup which included local prosecutorial and probation representation was formed, with representation from former DPCA, DCJS and various other local and state agencies. DPCA had publicized and convened a manufacturer's roundtable in March 2010 to solicit additional information from probation departments and manufacturers. The Office of Court Administration (OCA), Department of Motor Vehicles, the Office of Alcoholism and Substance Abuse Services, the former DPCA, and DCJS, were all actively involved in rule formation and implementation. Further, the Offices of General Services, State Comptroller, Attorney General, and Division of the Budget were consulted as to the request for application. The former DPCA provided the State Probation Commission, probation departments, and manufacturers two separate draft regulations in this area which incorporated numerous suggestions. The regulation reflects many other recommendations to minimize impact, clarify the law, and achieve more sound workable provisions, consistent with public safety.

9. Federal standards:

There are no federal standards governing the monitoring of convicted DWI offenders ordered to use an ignition interlock device although the National Highway Traffic Safety Administration (NHTSA) published model specifications for breath alcohol ignition interlock devices in the Federal Register on April 7, 1992 (57 FR 11772) and this rule requires that any device used meets these standards. Both the former DPCA and DCJS, in consultation with DOH and the Traffic Research Injury Foundation, incorporated additional device operation and monitoring standards that are consistent with good professional practice and have been well-received and which are likely to be embraced as future model provisions.

10. Compliance schedule:

Every county and the city of New York were required to submit an ignition interlock program plan to the former DPCA for approval by June 15, 2010 to ensure smooth and successful implementation of the mandatory ignition interlock statutory and regulatory provisions on August 15, 2010. DCJS is in the process of reviewing these applications. DPCA distributed two earlier regulatory drafts to probation departments and disseminated these to the New York State Association of Counties and conducted a web air conference on the subject.

The State's efforts in conducting a preliminary roundtable for manufacturers and sharing draft regulations and draft request for application and incorporating many business comments has proven beneficial in terms of advance notification of regulatory terms and conditions, making the application process manageable to interested manufacturers, and readiness to achieve timely compliance with regulations.

To foster better understanding and guarantee compliance of the law

and its regulations, DCJS is undertaking OCA training initiatives to ensure the judiciary and other interested parties are sufficiently knowledgeable on the new law and regulatory features.

The majority of feedback with respect to the rule has been well-received and it is expected that all affected parties will be able to comply with the rule.

Additionally, all interested qualified manufacturer's applications have been reviewed and approved and all seven (7) State contracts have been signed, approved by the Attorney General, and are in the process of final execution by the Office of the State Comptroller.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule will affect every county and the city of New York as a whole, ignition interlock manufacturers and their approved installation/service providers. As of April 2010 there were approximately thirteen (13) manufacturers of ignition interlock devices currently established in the United States and six (6) doing business in New York State with approximately 175 installation/service providers within the state. The latter are typically automobile repair businesses and automobile sound system installers. Since then, seven (7) have been approved as qualified manufacturers and there has been an increase of approximately fifty (50) additional installation/service providers, with more anticipated in the immediate future.

2. Compliance requirements:

This rule would require that every jurisdiction submit an ignition interlock program plan to the Division of Criminal Justice Services (DCJS) for approval relative to usage of ignition interlock devices and monitoring the compliance of operators subject to such device as directed by the sentencing court. The regulation enumerates parameters with respect to the development, scope, and content of the plan so as to promote consistent application, foster greater local collaboration and coordination within the criminal justice system, guarantee monitoring of all operators subject to the installation of such devices on their motor vehicles, and optimize compliance with Chapter 496 of the Laws of 2009, commonly referred to as Leandra's law, which strengthens various laws to combat and deter drunk driving. The County Plans required by DCJS will be simple and largely prescriptive to ease any burden on localities.

Further, a manufacturer wishing to do business in New York State would be required to apply to DCJS to become a qualified manufacturer, agree to meet our regulatory requirements as to service delivery and enter into a contractual agreement with DCJS. Among relevant information sought in the application are a description of the certified ignition interlock device approved by the New York State Department of Health (DOH), maximum fee/charge schedules, specific service performance measures, a commitment to conduct business in one or more of the four designated regions of the state, certification of installation/service providers, verification of liability coverage and a signed statement that the manufacturer or its representative will indemnify and hold harmless the State of New York and local government from particular claims, demands and actions which might arise out of any act or omission with respect to installation, service, inspection, maintenance, repair, use and/or removal of the device. While DCJS requires that any qualified manufacturer provide for a payment plan or in certain cases agree to provide a device free of charge to an operator who has been determined financially unable to afford the device, this language is consistent with Vehicle and Traffic Law § 1198(5)(a). Further, there exist certain compliance requirements which installation/service providers must satisfy with respect to installation, service delivery, training, and reporting. Moreover, the majority of qualified manufacturer and installation/service provider requirements are similar in nature to what has been previously required by DOH regulations. Due to the new leadership role with respect to ignition interlock programmatic implementation, the former Division of Probation and Correctional Alternatives, which subsequently has been merged with DCJS, jointly worked with DOH to strengthen existing DOH regulations in this area, including transfer of certain regulatory responsibilities to DCJS.

DCJS has incorporated other expanded requirements consistent with other state's best practices and operational provisions to improve ser-

vice delivery, ensure availability throughout the state, and promote greater accountability. At the same time, DCJS has afforded greater flexibility in certain pre-existing DOH requirements and other new regulatory provisions wherever feasible without compromising ignition interlock performance integrity and public safety. DCJS has recognized differences in technology through special provisions which reflect classification categories and features, and operational differences with respect to servicing certain devices.

3. Professional services:

It is not anticipated that any particular professional services will be required to comply with the rule.

4. Compliance costs:

Chapter 496 of the Laws of 2009 requires monitoring of all defendants subject to ignition interlock devices as a result of sentencing on and after August 15, 2010 involving a DWI misdemeanor or felony. This chapter requires, in addition to any other disposition that may be imposed, that a defendant receive a sentence of probation or conditional discharge with an ignition interlock condition. Where probation is imposed, probation departments are responsible for monitoring. It further permits designation of an alternative person with respect to conditional discharge cases in lieu of probation. The rule provides each county and the city of New York as a whole, with the flexibility to choose one or more persons or entities responsible for monitoring conditional discharge cases where a defendant has been required to install and maintain a functioning ignition interlock device in any vehicle which they own or operate. Potential designees are listed to better guarantee active consideration and not result in probation departments absorbing such responsibilities by omission. Due to the State's and national efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, the former DPCA advocated and was invited to submit a grant application to the Governor's Traffic Safety Committee in an amount up to three (3) million dollars in National Highway Safety Traffic Administration (NHTSA) monies to offset local government costs in performing monitoring services. The application which is pending and is anticipated to be approved on or about September 1, 2010 will enable DCJS, which former DPCA has merged with pursuant to Chapter 56 of the Laws of 2010, to distribute monies to jurisdictions pursuant to a formula of DWI convictions to support local programmatic and/or clerical staff resources to perform monitoring functions for this offender population.

DCJS believes that the regulatory requirements with respect to qualified manufacturers or their installation/service providers will not impose costs upon either beyond normal operating costs. The manufacturer wishing to do business in the State may incur some additional business associated with the regulatory requirement that such manufacturer provide devices at no charge or through a payment plan when ordered by a court. It is not entirely possible to estimate such costs. Currently, any operator subject to the installation of an ignition interlock device is required to pay such costs. Noteworthy, the aforementioned Chapter law establishes that the court, upon determining financial "unaffordability" to pay the cost of the device, may impose a payment plan with respect to the device or waive the fee. New Vehicle and Traffic law statutory provisions require that where the cost is waived, DCJS through its regulation shall determine who bears the costs of the device or through such other agreement which may be entered into. It was decided preferable to require qualified manufacturers, and not local governments to bear such costs. While the decision to waive the fee is reserved to the court and will take effect on August 15, 2010, DCJS speculates based upon other state's experience in this area that approximately ten (10) percent of cases will result in waivers. Due to the significant potential of increase in profits for a manufacturer due to the expansion of the use of ignition interlock devices, DCJS believes that it is reasonable to hold manufacturers responsible for supplying the device free of charge where a judicial waiver has been secured. Further, as interested manufacturers in their applications must provide a maximum fee/charge schedule taking into consideration an estimated 10% waiver, the costs in this area will likely be absorbed in the fee/charge schedule submitted to DCJS.

5. Economic and technological feasibility:

From feedback that former DPCA received with respect to the proposed and finalized application and regulation which was sent to all ignition interlock manufacturers throughout the nation, manufacturers currently providing certified ignition interlock devices for use in New York State (with respect to offenders already subject to ignition interlock condition as part of their sentence or release) expressed willingness to satisfy compliance with the emergency regulation and all including one additional manufacturer applied and were approved as qualified manufacturers. Moreover, it should be noted that the majority of manufacturers of ignition interlock devices are located in other states. At this time, only two (2) qualified manufacturers are located in New York State. All current installation/service providers within New York State were previously required to satisfy specific installation, training and reporting requirements established in DOH regulations in the area of ignition interlock devices and the transfer of these regulatory requirements to DCJS have resulted in continuation of similar provisions. As to any additional requirements, qualified manufacturers have assured the state through their respective applications and contractual agreements that installation/service providers which they have selected will be able to comply with regulatory requirements.

As to specific technological feasibility features in this rule, the former DPCA and DCJS reviewed other states requirements and existing and anticipated future national standards, worked with DOH to update its regulations with respect to best practices, and incorporated several programmatic and legal suggestions obtained from feedback of manufacturers, probation practitioners with ignition interlock caseloads, prosecutors, along with various professional associations and organizations, including the Council of Probation Administrators, the NYS STOP-DWI Coordinators Association, and the Traffic Safety Research Foundation.

6. Minimizing adverse impact:

Both the former DPCA and DCJS were steadfast in its efforts to minimize adverse impact of this proposed regulation upon small business and local government. As noted earlier, a DCJS application, earlier submitted by former DPCA, is pending to secure federal funding to reduce any local government costs associated with monitoring as a result of Leandra's Law statutory responsibilities and our related regulations. The regulations have been crafted to offer guidance and structure in plan development and implementation. Other features with respect to monitoring have carefully balanced substantive provisions to afford considerable flexibility as to particular actions where feasible, yet ensure swift and certain action where necessary to achieve uniformity in handling of certain failed tasks and failed tests, safeguard the public and better guarantee offender accountability. There has been added several regulatory provisions as to operator responsibility to assist the judiciary's consideration of financial "unaffordability" and minimize unnecessary waivers, and to ensure operators convey timely information to monitors, the courts, and installation/service providers.

With respect to manufacturers, former DPCA and DCJS examined other state's statutory and/or regulatory requirements, sought input of DOH authorities, the Traffic Safety Research Foundation, and experience of other states as to their laws in this area and convened a roundtable for manufacturer participation which was well-attended that provided a candid and meaningful dialogue and exchange as to issues and concerns.

Overall, through circulating two prior draft regulations in this area and a draft of the request for application, the former DPCA received additional feedback which led to numerous edits to address concerns and provide where appropriate greater flexibility. Additionally, the Director of Probation and Correctional Alternatives and program and legal staff of the former DPCA participated in a web air conference with the New York State Association of Counties to foster better understanding of Leandra's Law and our draft regulation.

7. Small business and local government participation:

Interested small businesses and local government participated in several ways in crafting and refining this rule. Specifically, a workgroup which included local prosecutorial and probation representation was formed along with representation from former DPCA, DCJS and

various other state agencies. DPCA had publicized and convened a manufacturer's roundtable in March 2010 to solicit more information from probation departments and manufacturers of ignition interlock devices and establish a meaningful dialogue of issues and concerns with implementation of Leandra's Law provisions governing ignition interlock. The Office of Court Administration, Department of Motor Vehicles, the Office of Alcoholism and Substance Abuse Services, former DPCA, and DCJS, were all actively involved in rule formation and implementation to gain their professional insight. Further, the Office of General Services, the Office of State Comptroller, the Attorney General's office and the Division of the Budget have been consulted as to the request for application which mirror key regulatory provisions. DPCA provided probation departments and manufacturers two separate draft regulations in this area which incorporated numerous suggestions. The final emergency regulation reflects many other recommendations to minimize impact, clarify the law, and achieve more sound workable provisions.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Forty-four of the 57 local probation departments outside of New York City are located in rural areas and will be affected by the regulation.

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

The proposed regulation implements Chapter 469 of the Laws of 2009, commonly referred to as Leandra's Law, in relation to the monitoring of the use of court-ordered ignition interlock devices ordered upon defendants sentenced for a DWI misdemeanor or felony. Rule provisions require that each county and the city of New York adopt an ignition interlock program plan for the monitoring of such devices and successful implementation of this new law. Such plan must be submitted to the Division of Criminal Justice Services (DCJS) for approval and contain certain enumerated components to ensure a smooth transition, uniformity in handling of similar cases, and optimize compliance with statutory and regulatory provisions to combat and deter drunk driving. For example, such plan must designate the agency or entity that will monitor conditional discharge cases, establish certain procedures to ensure the monitor receives timely notification of those defendants subject to interlock conditions, including advance notification of DWI defendants when released from state or local imprisonment, judicial waiver of cost of devices, intrastate transfers, and interstate transfers. Specific regulatory provisions govern monitoring services. Flexibility is provided to local jurisdictions to establish other procedures governing failure report recipients, including method and timeframe and specific notification and circumstances. In the interest of public safety and offender accountability, other regulatory provisions require court and district attorney notification by all monitors when certain failed tasks or failed tests occur and appropriate notification with respect to intrastate transfers and interstate transfers. Monitors have been given the authority to issue certificates of completions and letters of de-installation. Consistent with state laws governing record retention and disposition, regulatory language requires that all local governmental records shall be retained and disposed of in accordance with the applicable Records Retention and Disposition Schedule promulgated by the New York State Education Department. Lastly, it is not anticipated that any special professional services will be required to adopt and administer such plan.

3. Costs:

Chapter 496 of the Laws of 2009 requires monitoring of all defendants subject to ignition interlock devices as a result of sentencing on and after August 15, 2010 involving a DWI misdemeanor or felony. This chapter requires, in addition to any other disposition that may be imposed, that a defendant receive a sentence of probation or conditional discharge with an ignition interlock condition. Where probation is imposed, probation departments are responsible for monitoring. It further permits designation of an alternative person with respect to conditional discharge cases in lieu of probation. The rule provides each county and the city of New York as a whole, with the flexibility to choose one or more persons or entities responsible for monitoring conditional discharge cases where a defendant has

been required to install and maintain a functioning ignition interlock device in any vehicle which they own or operate. Potential designees are listed to better guarantee active consideration and not result in probation departments absorbing such responsibilities by omission. Due to the State's and national efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, the former Division of Probation and Correctional Alternatives (DPCA) advocated and was invited to submit a grant application to the Governor's Traffic Safety Committee in an amount up to three (3) million dollars in National Highway Safety Traffic Administration (NHTSA) monies to offset local government costs in performing monitoring services. The application which is pending and is anticipated to be announced on or about September 1, 2010 will enable DCJS, which former DPCA has merged with pursuant to Chapter 56 of the Laws of 2010, to distribute monies to jurisdictions pursuant to a formula of DWI convictions to support local programmatic and/or clerical staff resources to perform monitoring functions for this offender population.

Currently, any operator subject to the installation of an ignition interlock device is required to pay such costs. Noteworthy, Chapter 496 of the Laws of 2009 establishes that the court, upon determining financial "unaffordability" to pay the cost of the device, may impose a payment plan with respect to the device or waive the fee. New Vehicle and Traffic law statutory provisions require that where the cost is waived, DCJS through its regulation shall determine who bears the costs of the device or through such other agreement which may be entered into. DCJS regulations require qualified manufacturers, and not local governments to bear such costs. Moreover, DCJS does not foresee substantial cost variances between rural, suburban, and urban jurisdictions as costs associated with this new law will be impacted upon number of sentenced DWI misdemeanants and DWI felons and this does not necessarily correspond to population size of a jurisdiction.

4. Minimizing adverse impact:

Both the former DPCA and DCJS were steadfast in its efforts to minimize adverse impact of this proposed regulation upon local government, especially rural counties. As noted earlier, a DCJS application, earlier submitted by former DPCA, is pending to secure federal funding to reduce any local government costs associated with monitoring as a result of Leandra's Law statutory responsibilities and our related regulations. The regulations have been crafted to offer guidance and structure in plan development and implementation. Other features with respect to monitoring have carefully balanced substantive provisions to afford considerable flexibility as to particular actions where feasible, yet ensure swift and certain action where necessary to achieve uniformity in handling of certain failed tasks and failed tests, safeguard the public and better guarantee offender accountability. There has been added several regulatory provisions as to operator responsibility to assist the judiciary's consideration of financial "unaffordability" and minimize unnecessary waivers, and to ensure operators convey timely information to monitors, the courts, and installation/service providers. Further, our regulatory language requires that in the event of judicial waiver of the cost of the device, the qualified manufacturer not the county government bears the costs associated with installation and maintenance of the ignition interlock device for any person convicted of a DWI misdemeanor or felony and required to have installed a functioning ignition interlock device on any vehicle which he/she owns or operates.

DCJS does not anticipate that these new regulations will have any adverse impact on rural areas. Although rural counties may have fewer resources at their disposal than more populated counties, many rural counties also have the advantage of a smaller population and typically a correspondingly smaller number of operators required to install an ignition interlock device. Further, through the establishment of regions, which include both rural and non-rural counties, this regulation will require that a manufacturer doing business with a non-rural county must do business with rural counties within the region upon the same favorable terms which will ensure service availability and further that installation/service providers be available to operators within 50 miles of their homes statewide.

Lastly, at the state level there has been developed approximately fifteen model forms which will greatly benefit all jurisdictions in

implementation and compliance with this new law, especially numerous rural counties with limited staff resources to undertake form development. These forms have been disseminated to all jurisdictions and have been well-received.

5. Rural area participation:

This rule was developed by the former DPCA prior to its merger with DCJS with the input of a number of entities including probation departments from rural counties. Specifically, a workgroup which included rural probation representation was formed along with representation from former DPCA, DCJS and various other state agencies. DPCA had publicized and convened a manufacturer's roundtable in March 2010 to solicit more information from probation departments and manufacturers of ignition interlock devices and establish a meaningful dialogue of issues and concerns with implementation of Leandra's Law provisions governing ignition interlock. Several rural probation departments attended this roundtable meeting. DPCA provided all probation departments two separate draft regulations in this area which incorporated numerous suggestions. The Council of Probation Administrators (COPA), the statewide professional association of probation executives in New York State, selected two rural probation directors to be part of our aforementioned workgroup. Additionally a separate committee within COPA, comprised of rural probation director membership, reviewed the last regulatory draft and DPCA originally incorporated certain/several amendments that were consistent with public safety, statutory language and intent, and/or otherwise feasible. Additionally, the Director of Probation and Correctional Alternatives directly communicated with officials within the New York State Association of Counties (NYSAC) as to the new law and disseminated the last draft regulatory revision, prior to finalizing the first emergency regulation, for feedback and he previously conducted a NYSAC web air conference on the subject which had large representation from jurisdictions across the state. The final emergency regulation reflects many other recommendations to minimize impact, clarify the law, and achieve more sound workable provisions which will greatly assist rural jurisdictions on implementation of the new law and this rule.

Job Impact Statement

1. Nature of impact:

This rule will increase employment opportunities for manufacturers of ignition interlock devices certified by the New York State Department of Health and approved as a qualified manufacturer by the Division of Criminal Justice Services (DCJS) and for businesses in New York State which are designated installation/service providers of these devices. Based on arrest and conviction rates from 2008, the number of convicted drivers who will be required to install an ignition interlock device is projected to be approximately 25,000 per year. As of April 2010, approximately 2,400 ignition interlock devices are in use in New York State and there were approximately 175 approved installation/service providers, mainly small automotive shops specializing in the installation of automobile stereo systems, mufflers, automobile repair, and automobile dealers. Since seven (7) manufacturers are now approved as qualified manufacturers to conduct business in New York State, the demand for devices and installation and maintenance-related services has grown dramatically and is anticipated to continue, leading to increased employment opportunities in our state.

2. Categories and numbers affected:

This rule will affect manufacturers of certified ignition interlock devices and their respective installation/service providers. Based on the projected number of defendants who will be required to install an ignition interlock device as a sentencing condition upon any vehicle which they own or operate, the number of current ignition interlock users and installation/service providers, the requirement that a manufacturer commit to servicing one or more designated region(s), and the anticipated geographical distribution of future defendants sentenced on Driving While Intoxicated (DWI) misdemeanor(s) and/or felony(ies), subject to such devices, it is projected that there will be increased employment opportunities for manufacturers and installation/service providers. In April 2010, prior to the first emergency rule, there were six (6) manufacturers in New York State and

thirteen (13) throughout the nation, and subsequently, seven (7) have been approved as qualified manufacturers. It is anticipated that others doing business outside of New York may apply in the future to conduct business in New York State. As a result of being approved as qualified manufacturers, which includes a commitment to service one or more designated region(s) of New York State, DCJS is aware that approximately fifty (50) additional installation/service providers have been selected by manufacturers to handle the increased service demand resulting from this new law, and more are expected in the near future. This has resulted and will continue to result in corresponding increase in employment opportunities throughout the state.

While counties and New York City, in particular probation departments and other alternative monitors who may be designated to handle conditional discharge cases may be affected by this regulation, the regulation is designed to provide a flexibility wherever feasible consistent with public safety and accountability in order to minimize the effect of the regulation upon local government. Under this new law, where probation is imposed, probation departments are responsible for monitoring. It further permits designation of an alternative person with respect to conditional discharge cases in lieu of probation. The rule itself provides every jurisdiction with the flexibility to choose one or more persons or entities responsible for monitoring conditional discharge cases. A variety of potential designees are listed to better guarantee active consideration and not result in probation departments absorbing such responsibilities by omission. Due to the State's and national efforts to strengthen ignition interlock laws to deter drunk driving and promote greater offender accountability, DCJS has advocated and been invited to submit a grant application to the Governor's Traffic Safety Committee in an amount up to three (3) million dollars in National Highway Safety Traffic Administration (NHTSA) monies to offset local government costs in performing monitoring services. DCJS is in the process of submitting a grant application which will enable our agency to distribute monies pursuant to a formula of DWI convictions to support local programmatic and/or clerical staff resources to perform monitoring functions for this offender population. In some jurisdictions, new employment opportunities may be available with respect to monitoring services.

3. Regions of adverse impact:

This rule will have no adverse or disproportionate impact on jobs or employment opportunities.

4. Minimizing adverse impact:

This rule will have no adverse impact on jobs or employment opportunities. As noted in paragraph 2, this rule will instead increase employment opportunities throughout the State. With respect to jobs, the new law specifically requires monitoring be performed at the local level. DCJS' rule in this area has provided considerable flexibility and options to local government with respect to monitoring. Further, our rule places specific responsibilities upon qualified manufacturers, installation/service providers, as well as operators to provide timely information and/or reports to monitors so as to assist them in managing their caseload.

5. Self-employment opportunities:

Many manufacturers of ignition interlock devices are independent businesses and designated installation/service providers are typically small, owner-operated businesses. The increase in the number of qualified manufacturers has led to increased installation/service providers throughout the state and it is anticipated that there is a potential for self-employment opportunities where such businesses can meet manufacturer agreements and State regulatory requirements governing training, installation, maintenance of services, and other operational provisions.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

EMERGENCY RULE MAKING

Probation State Aid Block Grant Funding

I.D. No. CJS-38-10-00009-E

Filing No. 923

Filing Date: 2010-09-07

Effective Date: 2010-09-07

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

Action taken: Repeal of Part 345 and addition of new Part 345 to Title 9 NYCRR.

Statutory authority: Executive Law, sections 243 and 246; L. 2010, chs. 50 and 56

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

Specific reasons underlying the finding of necessity: In order to promote public safety, probation State aid block grant monies must be readily available to local governments for probation department operations to ensure continuity of probation services to the criminal justice and juvenile justice system and timely implementation of Chapter 56 of the Laws of 2010 with respect to probation State aid grants. Funding of probation services is viewed as a critical component to promote the effective application of the probation system and the new emergency regulation will avoid potential disruption of probation services caused by delayed funding attributed to late enactment of the Executive Budget and recent statutory change in funding of probation departments which have rendered the past rule in this area obsolete. The new regulatory provisions are consistent with Chapters 50 and 56 of the Laws of 2010, which merged the former Division of Probation and Correctional Alternatives with the Division of Criminal Justice Services, and empowered the Acting Commissioner of DCJS with the authority to timely adopt and implement new regulations with respect to probation funding. This emergency regulation will help maintain and improve service delivery to the criminal and juvenile justice systems with respect to the probation population in general, as well as for specialized high-risk populations for which targeted grant monies have been statutorily earmarked for distribution.

Subject: Probation State Aid Block Grant Funding.

Purpose: To conform probation state aid rule with new statutory provisions with respect to block grant funding.

Text of emergency rule: Part 345 of 9 NYCRR is REPEALED and a new Part 345 is added to read as follows:

(Statutory authority Chapters 50 and 56 of the Laws of 2010, Executive Law Sections 243 and 246)

Part 345

Probation State Aid Block Grant

Section 345.1 Objectives.

To provide for the distribution of State aid to county probation services and to the probation services of New York City and to provide State financial assistance to local governments for regular and/or specialized probation programming to promote offender accountability, rehabilitation, and enhance public safety.

Section 345.2 Definitions.

When used in this Part:

(a) "Division" shall mean the Division of Criminal Justice Services.

(b) "Commissioner" shall mean the Commissioner of the Division of Criminal Justice Services.

(c) "Office" shall mean the Office of Probation and Correctional Alternatives located within the Division of Criminal Justice Services.

(d) "Director" shall mean the Director of the Office of Probation and Correctional Alternatives within the Division.

(e) "Department" shall mean a county probation department or the City of New York probation department.

Section 345.3 State Aid Plan Application Submission and Eligibility for State Aid.

Every county outside of the City of New York and the City of New York shall annually file a probation state aid plan application with the Office pursuant to the format, timeframe and schedule prescribed by the Commissioner in consultation with the Director.

(a) Applications shall include a detailed plan with cost estimates covering probation services for the fiscal year or portion thereof for which aid is requested. Included in such estimates shall be clerical costs, maintenance and operation costs, salaries of probation personnel and other pertinent information including an overview of probation program services relating to staff training, investigation, supervision, and intake.

(b) An approved plan and compliance with standards relating to the administration of probation services, promulgated by the Commissioner in consultation with the Director, shall be a prerequisite to eligibility for State Aid.

(c) A county outside of the City of New York and the City of New York may apply for additional state aid as part of a block grant award for enhanced program services with respect to specific populations, including aid for Intensive Supervision Programs, Enhanced Specialized Services for Sex Offenders, Juvenile Risk Intervention Coordination Services or any other specific population determined by the Commissioner.

(d) The Commissioner shall allocate block grant monies based upon a review of all approved plans and their respective budgets and pursuant to a plan prepared by the Commissioner and approved by the Director of the Division of the Budget. All state aid shall be granted by the Commissioner after consultation with the State Probation Commission and the Director.

(e) State aid monies received by the Division during 2010 shall be, to the greatest extent possible, distributed in a manner consistent with the prior year distribution amounts and thereafter as authorized by law.

Section 345.4 Plan approval, funding, and reporting.

(a) State aid grants shall not be used for expenditures for capital additions or improvements, or for debt service costs for capital improvements.

(b) Each plan shall:

(1) ensure adherence to all applicable laws and rules and regulations governing probation services;

(2) ensure that the Integrated Probation Registrant System will be maintained by the Department in a timely and accurate manner and that the proportion of active but closable adult supervision cases will be maintained at less than five (5) % of the total active Department caseload and whenever in excess, immediate steps will be undertaken to reduce percentage to less than five (5) %;

(3) ensure that the Department will timely collect DNA from individuals under their supervision who have not yet submitted DNA as agreed upon pursuant to a plea, as required by law, or as otherwise ordered by the court and routinely review the "DNA Owed" report on the Division's Probation Services Suite for such purposes;

(4) ensure that the Department will facilitate timely compliance with the Sex Offender Registration Act (registration, submission of photographs, completion of annual address verification form, change of address forms, and 48-hour forms) by the Department and by any registered sex offender subject to supervision by the Department and conduct quarterly address checks of registerable sex offenders under probation supervision as requested by the Division to verify compliance;

(5) ensure that all line probation officers have access to the Division's eJusticeNY;

(6) ensure that the Department uses a Division approved fully validated Risk/Need Assessment instrument for juvenile and adult offender populations;

(7) if application is made for Intensive Supervision Program service funding, make the following assurances:

(i) defendants will be screened at the earliest/appropriate stage in the dispositional process for program participation using Division eligibility criteria, and any additional criteria developed by the Department;

(ii) the Department will maintain and update, when applicable, local eligibility criteria that will further limit the unnecessary incarceration of certain high risk offenders. These criteria shall be in

accordance with Division rules and regulations and such criteria and any update shall be forwarded to the Division;

(iii) the Department will use an approved Division assessment process or instrument to identify and target those with greatest risk and needs for program participation;

(iv) the Department will reduce the number of defendants who may be unnecessarily incarcerated by diverting them into the program by facilitating a probation sentence with the condition of program participation for suitable high risk defendants who would otherwise have been incarcerated and probationers who violate the original order and conditions of probation who will be continued under probation supervision with the condition of program participation, as an alternative to incarceration;

(v) the Department will complete a full assessment of all probationer program participants' criminogenic risks and needs, using a Division approved instrument and establish a supervision plan in a timely manner;

(vi) the Department will refer all such probationers to appropriate service providers based on the case planning assessment in the supervision plan; and

(vii) the Department will ensure that all such probationer's participate and engage in all service programs, and monitor their progress.

(8) if application is made for Enhanced Specialized Services for Sex Offenders funding, make the following assurances:

(i) the Department will ensure that all Level 2 or 3 registered sex offenders under probation supervision are subject, where applicable, to the mandatory sex offender condition(s) set forth in Penal Law § 65.10(4-a), and the sex offender is subject to other specialized sex offender conditions which may include, but are not limited to, the internet restriction condition under Penal Law § 65.10 (5-a) and/or other local conditions specific to sex offenders;

(ii) the Department will ensure that all such sex offenders are assigned to the caseload of an experienced probation officer/probation unit who either solely or primarily supervises sex offenders, or has a significant concentration of sex offenders on the caseload, and who has received specialized training on sex offender management;

(iii) the Department will perform enhanced field work (i.e. surveillance, collateral contacts, employment visits, as well as use of electronic monitoring, global positioning systems, computer scanning, internet usage monitoring, and other enforcement initiatives) in supervising such sex offenders;

(iv) the Department will conduct at least one visit to a Level 2 or 3 sex offender's home each quarter during which, at a minimum, a plain view search for prohibited items and/or substances is completed;

(v) the Department will ensure that all such sex offenders are assessed by a probation officer or treatment provider using a sex-offender specific assessment instrument approved by the Division;

(vi) the Department will ensure that all such sex offenders are referred to, participate in, or successfully complete Association for the Treatment of Sexual Abusers (ATSA)-compliant clinical evaluation and/or treatment;

(vii) the Department will maintain and implement a policy which provides for collaboration with other law enforcement and service agencies on: warrant execution sweeps, home visits, surveillance, searches, treatment planning, housing, and other activities related to general sex offender management;

(viii) the Department will maintain and implement a policy which provides for officers to independently or in concert with law enforcement execute warrants on Sex Offenders, including apprehending absconders who are found, pursue extradition where appropriate, and secure warrants and retake interstate sex offenders where required and/or necessitated; and

(ix) the Department will utilize polygraph examinations for the management of certain sex offenders consistent with the goals of community safety.

(9) If application is made for Juvenile Risk Intervention Coordination Services funding, make the following assurances:

(i) the Department will use an approved Division risk and needs assessment process or instrument, refer alleged and/or adjudicated Persons In Need of Supervision (PINS) and Juvenile Delinquent (JD) youth who are determined to be high risk and appropriate for program services and conduct reassessments as necessary; and

(ii) the Department will assign juvenile probation officers trained in family intervention and cognitive behavioral techniques, youth supervision and delinquency prevention to perform program services and/or work collaboratively with evidence-based intervention provider(s) to achieve reductions in dynamic risk for JRISC youth and to achieve successful program completion.

(10) Ensure adherence to other program goals, objectives, and performance target requirements set forth by the Division for additional state aid with respect to special/specific populations other than the populations specified in paragraphs seven, eight and nine of this subdivision.

(c) The Commissioner may require modification of the plan in order to obtain approval. Any modification of a plan requires Commissioner approval.

(d) Vouchers and program reports shall be in a format established by the Division and shall be submitted on a schedule established by the Division.

(e) Division or other governmental findings by audit or program analysis and review which show that the Department has not adhered to the approved plan of operation and/or standards governing probation practice, may be the basis for withholding the payment of State aid or recouping monies. A county or the City of New York may request reconsideration of the decision to withhold payment or recoup monies to the Office and shall submit information as to their respective position and specific details in support of its position and such other information as may be requested by the Director. After consultation with the Director, the Commissioner will render a final determination which may include the steps that are necessary to obtain funding.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 5, 2010.

Text of rule and any required statements and analyses may be obtained from: Linda J. Valenti, OPCA Counsel, NYS Division of Criminal Justice Services, 80 Wolf Road - Suite 501, Albany, New York 12205, (518) 485-2394, email: linda.valenti@dcjs.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

Pursuant to Chapter 56 of the Laws of 2010, the former Division of Probation and Correctional Alternatives (DPCA) was merged within the Division of Criminal Justice Services (DCJS) and are now the Office of Probation and Correctional Alternatives. Section 8 of Part A of this Chapter specifically transferred all rules and regulations of DPCA to DCJS and established that such shall continue in full force and effect until duly modified or abrogated by the Commissioner of DCJS. Additionally, section 17 of Part A of this Chapter amended Executive Law Section 243(1) to make conforming changes and establish in pertinent part that the Commissioner of DCJS has authority to "adopt general rules which shall regulate methods and procedure in the administration of probation services..." so as to secure the most effective application of the probation system and the most effective enforcement of the probation laws throughout the state." Such rules are binding with the force and effect of law. Further, section 10 of Part D of such Chapter amended Executive Law Section 246 to revamp probation state aid funding from approvable expenditures to block grant distribution and authorize within such grant monies funding for other specific enhanced program services related to specific probation populations.

2. Legislative objectives:

These regulatory amendments are consistent with legislative intent to maintain State financial assistance to local governments for regular and/or specialized probation programming while at the same time establishing a new streamlined mechanism for local government to apply for and receive probation state aid block grant monies and af-

ford greater flexibility to probation departments with respect to managing probation operations. The amendments will help guarantee probation service delivery consistent with state law, rules and regulations, and additional specific state programmatic requirements and promote offender accountability, rehabilitation, and enhance public safety.

3. Needs and benefits:

The need for an emergency regulation in this area replacing the existing probation state aid rule with a new probation state aid block grant is necessitated by recent statutory changes in the enacted 2010 Executive Budget (L. 2010, Chapters 50 and 56). Immediate regulatory changes must be implemented to ensure the timely distribution of probation funding to local governments to guarantee that there is no disruption of service delivery. This regulation will provide local probation departments mandate relief with respect to the manner which they may apply for state monies for probation management operations. The proposed regulation has been designed to streamline application procedures, reduce program standards to core components in order to achieve fiscal efficiencies, and provide greater flexibility as to local probation department service delivery consistent with law, and good professional practice.

4. Costs:

This regulation will not result in increased costs. Greater flexibility in utilization of probation state aid should improve fiscal efficiencies and program operations, and reduce State and local costs associated with contractual processing.

a. This regulation will not impose a cost on probation departments. In prior years departments would apply to DPCA for re-imbursement after expenses were incurred. This regulation will allow for a single application for funding prior to incurring expenses and will likely result in savings to a probation department by reducing staff effort in securing re-imbursement.

b. Although DCJS must approve each plan, it is anticipated that this approval can be accomplished using existing staff and resources. Therefore no additional costs will be incurred. As noted above, it is anticipated that the costs to each local government may be reduced through the streamlined funding plan.

c. This cost analysis is based on the prior experience of former DPCA employees in consultation with DCJS.

5. Local government mandates:

The regulatory changes do not impose any new mandates upon probation departments with respect to probation state aid funding. In prior years probation departments seeking State funding were required to apply to DPCA. This regulation will require that the application be made to DCJS.

6. Paperwork:

No additional paperwork is necessary for implementation of these regulatory changes.

7. Duplication:

These amendments do not duplicate any State or Federal law or regulation.

8. Alternatives:

Because Chapter 56 of the laws of 2010 and Executive Law Section 246 establishes that state aid block grant funding shall be pursuant to DCJS rules and regulations no alternative to this rule is authorized.

9. Federal standards:

There are no federal standards governing probation state aid.

10. Compliance schedule:

This regulation is similar to prior year state aid application procedures with respect to state aid probation monies. Dissemination of the new regulation to local probation departments will enable such departments to comply with the regulation and apply for State funds without delay.

Regulatory Flexibility Analysis

1. Effect of Rule:

This new rule Part sets forth parameters governing probation state aid block grant distribution.

The regulatory changes will better assist probation departments in funding and managing their own probation operations. They will afford relief to probation departments by streamlining state aid plan application procedures with respect to provision of State financial assistance to local governments for probation programming to achieve fiscal efficiencies and provide greater flexibility in usage of state aid monies consistent with Chapters 50 and 56 of the Laws of 2010 and state aid block grant provisions. Changes will expedite receipt of grant monies as once approved there is no need to enter into formal contractual processing.

The amendments do not affect small business.

2. Compliance Requirements:

In order to comply with this rule, a local probation department will be required to apply to the Division of Criminal Justice Services prior to receiving State financial assistance. This regulation is similar to prior year state aid application procedures with respect to state aid probation monies and the reporting, recordkeeping and compliance requirements are similar to those of prior years. This regulation has no effect on small businesses.

3. Professional Services:

No professional services are required to comply with this regulation.

4. Compliance Cost:

The regulatory changes will not result in probation departments incurring any compliance costs. The regulatory amendments mirror prior year application procedures with respect to state aid probation monies, yet will provide local probation departments mandate relief with respect to the manner which they can distribute state monies for probation management operations consistent with other statutory provisions.

5. Economic and Technological Feasibility:

There are no economic or technological issues or problems arising from. A probation department will be able to apply for State financial assistance pursuant to this rule using existing staff and technology.

6. Minimizing Adverse Impacts:

DCJS foresees that these regulatory amendments will have no adverse impact on any local government. As noted in more detail below, the former DPCA, now the Office of Probation and Correctional Alternatives within DCJS pursuant to Chapter 56 of the Laws of 2010, collaborated with jurisdictions across the state, including rural, suburban, and urban counties, and probation professional associations in soliciting feedback as to regulatory changes in order to provide probation state aid block grant funding, the emergency regulation was designed to streamline application procedures, reduce program standards to core components, and provide greater flexibility as to local probation department service delivery consistent with law, and good professional practice.

As the probation state aid block grant rule does not have any impact upon small business, the regulatory changes have no negative impact upon small business operations.

7. Small Business and Local Government Participation:

Pursuant to Executive Order No. 17, the former DPCA prepared initial Rule Review Findings in October 2009 of all of its rules and regulations and disseminated the findings to all probation departments, the Council of Probation Administrators (COPA) (the statewide professional association of probation directors), the New York State Probation Officers Association (NYSPOA), the New York State Association of Counties (NYSAC), the State Probation Commission, and the Division of the Budget (DOB). Additionally, DPCA convened an October 26, 2009 meeting in Albany which was attended by over a dozen probation departments (urban, suburban, and rural counties), COPA and NYSPOA Presidents, NYSAC, and DOB representatives. DPCA staff went over all rules and regulations and reviewed them individually, discussed proposed regulatory changes, and solicited feedback from the audience.

There was considerable interest by some probation professionals across the state from rural, urban, and suburban jurisdictions, which gained legislative and Executive support, for legislation which would

change the distribution of probation state aid from reimbursed expenditures to probation State aid block grants to achieve greater fiscal efficiencies and provide greater flexibility in probation management operations. This block grant concept was incorporated in the 2010 Public Protection appropriation portion of the Executive Budget which was subsequently signed into law.

As this rule does not impact upon small businesses, there was no business involvement with respect to the regulatory changes.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Forty-four local probation departments, which are located in rural areas, will be affected by the emergency rule.

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

The regulation imposes no new reporting, recordkeeping, other compliance requirements. This regulation is similar to prior year state aid application procedures with respect to state aid probation monies and the reporting, recordkeeping and compliance requirements are similar to those of prior years. No professional services will be necessary to comply with the regulation.

3. Costs:

The new regulatory Part will not result in increased costs.

4. Minimizing adverse impact:

DCJS foresees that these regulatory amendments will have no adverse impact on any jurisdiction, including rural areas. As noted in more detail below, the former Division of Probation and Correctional Alternatives (DPCA), now the Office of Probation and Correctional Alternatives within DCJS, collaborated with jurisdictions across the state, including rural areas, and probation professional associations with rural membership in soliciting feedback as to agency regulations in order to provide sound probation mandate relief. The new statutory and appropriation language with respect to probation state aid block grant is consistent with recent suggestions raised by many probation departments and communicated by the Council of Probation Administrators, the statewide professional association of probation administrators. The regulatory amendments have been designed to streamline application procedures, reduce program standards to core components, and provide greater flexibility as to local probation department service delivery consistent with law, public safety, and good professional practice.

5. Rural area participation:

Pursuant to Executive Order No. 17, the former DPCA prepared initial Rule Review Findings in October 2009 of all of its rules and regulations and disseminated the findings to all probation departments, the Council of Probation Administrators (COPA) (the statewide professional association of probation directors), the New York State Probation Officers Association (NYSPOA), the New York State Association of Counties (NYSAC), the State Probation Commission, and the Division of the Budget (DOB). Additionally DPCA convened an October 26, 2009 meeting in Albany which was attended by over a dozen probation departments (rural, urban, and suburban counties), COPA and NYSPOA Presidents, NYSAC, and DOB representatives. DPCA staff went over all rules and regulations and reviewed them individually, discussed proposed regulatory changes, and solicited feedback from the audience. There was considerable interest by some probation professionals across the state from rural, urban, and suburban jurisdictions, which gained legislative and Executive support, for legislation which would change the distribution of probation state aid from reimbursed expenditures to probation State aid block grant to achieve greater fiscal efficiencies and provide greater flexibility in probation management operations. This block grant concept was incorporated in the 2010 Public Protection appropriation portion of the Executive Budget which was subsequently signed into law. The proposed regulation which implements the new statutory provisions will achieve greater fiscal efficiencies and provide greater flexibility in probation management operations.

Job Impact Statement

The emergency regulation will have no adverse effect on private or public jobs or employment opportunities. The revisions are technical and

procedural in nature and consistent with new State law probation State aid block grant language.

New York State Energy Research and Development Authority

NOTICE OF ADOPTION

Green Residential Buildings Program

I.D. No. ERD-51-09-00024-A

Filing No. 917

Filing Date: 2010-09-03

Effective Date: 2010-09-22

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

Action taken: Addition of Part 508 to Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1855 and 1872(4)

Subject: Green Residential Buildings Program.

Purpose: To establish incentives for new and substantially renovated residential buildings meeting green building criteria.

Substance of final rule: New Part 508 would establish a Green Residential Building Program. Under Section 508.1, the Part applies to the construction and substantial renovation of residential buildings with less than twelve dwelling units incorporating design and building techniques intended to: (i) promote smart growth and smart site planning; (ii) reduce greenhouse gas emissions; (iii) achieve energy efficiency and reduce energy consumption; (iv) facilitate the incorporation of environmentally responsible products; (v) promote the efficient use of natural resources; (vi) promote the conservation of materials and resources; (vii) reduce waste; and (viii) create a healthy indoor living environment.

The purpose of this Part is to promote the construction and renovation of “green” or “sustainable” residential buildings by providing incentives.

Section 508.2 prescribes definitions for the various technical requirements included in the building standards. In addition, substantial renovations is defined to mean significant improvements or restorations to, or substantial replacement of, materials, systems, or components of, a residential building, which shall include installation or replacement necessary to effect aligned, continuous, and complete air and thermal barriers and must include installation or replacement, of two of the three following building systems: electrical; heating, ventilation, and air conditioning; and plumbing.

Section 508.3 prescribes the eligibility requirements. An Owner is eligible for a Program incentive, upon submission of a complete Application for a structure meeting the green residential building standards and is either a new residential building that has completed construction or an existing residential building that has completed substantial renovation and has received a Certificate of Occupancy or Certificate of Completion, or other comparable documentation, on or after January 1, 2010, but before October 31, 2013.

Section 508.4 prescribes the Green Residential Building Standards. For purposes of the Program, green residential building standards shall mean the use of design and building techniques sufficient: (a) (1) to receive a second level or higher Leadership in Energy and Environmental Design (LEED) certification using the LEED for Homes Rating System, or using the LEED 2009 for New Construction and Major Renovations; or (2) to receive a second level or higher level certification using the National Green Building Standard - ICC 700-2008 (NGBS); and (b) (1) to achieve at least 500 kilowatt hour (kWh) annual electrical savings per dwelling unit, by installing equipment, lighting and household appliances meeting or exceeding the minimum efficiency standards set forth in the regulations and which exceed applicable minimum efficiency standards prescribed in 10 Code of Federal Regulations (CFR) Part 430, for CFLs and other lighting fixtures and lamps in high usage areas, including primary living spaces, finished basements, walk-in closets, and outdoor areas, but excluding non-walk-in closets and unfinished basements; any dishwashers; refrigerators, refrigerator-freezers, and freezers; furnace(s) and heat pumps, and central air conditioners.

Section 508.5 prescribes additional requirements for residential buildings of not more than 3 stories, containing 4 or fewer dwelling units:

energy efficiency specifications and performance specifications. Such residential buildings must achieve either an Expanded Home Energy Rating System (HERS) Score of 86 or higher or a HERS Index of 70 or lower, using a rating software tool that has been approved by the Authority. Minimum efficiency requirements are also prescribed for ceiling fans, light kits, central air conditioners, domestic water heaters, heat pumps, furnaces, and ventilation fans.

Performance specifications are also prescribed with respect to the building envelope, duct leakage, and automatically controlled mechanical ventilation systems.

Section 508.6 prescribes the Program Incentives, subject to the availability of funds:

Program Incentive by Number of Dwelling Units		
Number of Dwelling Units	Program Incentive Award/ Qualified Occupied Sq. Ft.	Maximum Program Incentive Award
1	\$3.75/sq. ft.	\$5,125
2	\$3.75/sq. ft.	\$6,125
3	\$3.75/sq. ft.	\$7,125
4	\$3.75/sq. ft.	\$8,125
5	\$3.75/sq. ft.	\$8,875
6	\$3.75/sq. ft.	\$9,625
7	\$3.75/sq. ft.	\$10,375
8	\$3.75/sq. ft.	\$11,125
9	\$3.75/sq. ft.	\$11,875
10	\$3.75/sq. ft.	\$12,625
11	\$3.75/sq. ft.	\$13,375

No Owner may receive more than one hundred twenty thousand dollars in Program incentive payments during any calendar year.

Section 508.7 prescribes the inspection and compliance procedures. Inspections are required with respect to combustion boilers and furnaces, that at least 500 kilowatt hour (kWh) annual electrical savings per dwelling unit are achieved or that only equipment, lighting, and household appliances meeting or exceeding the minimum efficiency standards required by Section 508.4 are installed; that a Technician determines if all minimum LEED or NGBS measures required to be installed prior to installation of drywall or interior wall surfaces or prior to re-enclosure on insulated building cavities have been installed; if air sealing measures are complete, if insulation is aligned properly within the air barrier, and if the air barrier and thermal envelope are continuous; if insulation is installed in the building envelope and uniformly fills each cavity without gaps, voids, or compressions, has a continuous air barrier in contact with its surface, and is in substantial contact with either the interior or exterior sheathing material; and determine the number of LEED or NGBS points attributable to foundation and framing materials; insulation; windows; doors; heating, ventilating, and air conditioning system; plumbing system; and site planning and preparation construction techniques used, including clearing, grading, soils management, and erosion and sedimentation control; and to efficient use of natural resources, conservation of materials and resources, waste reduction, installation of environmentally responsible products, including, but not limited to, interior finish materials and trim, including paints and coatings; cabinets, casework, and carpets; yearly heating, ventilation, and air conditioning and hot water heating equipment efficiency; household appliances and lighting efficiency; and plumbing fixture efficiency.

For a newly constructed residential building of 3 or fewer stories containing 4 or fewer dwelling units (not including a manufactured home or modular home), after construction of the building envelope is complete and after installation of all heating, ventilating and, if applicable, central air conditioners and associated pipes and ducts, a Technician must inspect such residential building to determine if the energy efficiency specifications and performance specifications prescribed by Section 508.5 have been met.

For all newly constructed residential buildings, a Technician must determine if air sealing measures are complete, the insulation is aligned properly with the air barrier; the air barrier and thermal envelope are continuous; determine if insulation is installed in the building envelope and uniformly fills each cavity without gaps, voids, or compressions, has a continuous air barrier in contact with its surface, and is in substantial contact with either the interior or exterior sheathing material; and determine if factory-installed measures qualify for LEED or NGBS points, including measures prescribed by Section 508.5. At the site of permanent installation of the various types of residential buildings, a Technician must determine if minimum LEED or NGBS requirements and the minimum site develop-

ment activities with respect to the foundation and field-completed framing materials; heating, ventilating, and air conditioning system; plumbing system; and site preparation construction techniques used, including clearing, grading, soils management, and erosion and sedimentation control have been met; and, for components and seams not inspected at the manufacturing factory, determine if air sealing measures are complete, the insulation is aligned properly with the air barrier, and thermal envelope are continuous; and excluding measures inspected at the manufacturing factory, determine if any additional energy efficiency and performance specifications prescribed by Section 508.5 have been met.

For a substantially renovated residential building, a Technician must, after any removal or replacement of electrical, plumbing, or heating, ventilation, and air-conditioning systems, and after any removal of interior wall surfaces but prior to re-enclosure of insulated building cavities determine if all minimum LEED or NGBS measures required to be installed prior to re-enclosure of insulated building cavities have been met; determine if air sealing measures are complete, the insulation is aligned properly with the air barrier; and the air barrier and thermal envelope are continuous; determine if insulation, if installed in the building envelope, uniformly fills each cavity without gaps, voids, or compressions, has a continuous air barrier in contact with its surface, and is in substantial contact with either the interior or exterior sheathing material; determine if the energy efficiency specifications and performance specifications prescribed by Section 508.5 have been met, if applicable; and determine the number of LEED or NGBS points attributable to, including but not limited to, the following: repair or replacement of foundation and framing materials; windows; doors; electrical; heating, ventilating, and air conditioning systems; and plumbing systems. After re-enclosure of insulated building cavities, and any installation or replacement of flooring, household appliances, heating, ventilation, and air conditioning equipment, plumbing, and electrical wiring, determine if all minimum LEED or NGBS requirements have been met, and the number of LEED or NGBS points attributable to efficient use of natural resources, conservation of materials and resources, waste reduction, installation of environmentally responsible products, including, but not limited to, interior finish materials and trim, including paints and coatings; cabinets, casework, and carpets; and yearly heating, ventilation, and air conditioning and hot water heating equipment efficiency; household appliances and lighting efficiency; and plumbing and irrigation fixture efficiency.

Section 508.8 prescribes builder and Technician training and qualifications. A Technician is an individual who has at least 12 hours of design or installation training by an accredited education institution or a professional builders association or affiliate, or other comparable and Authority approved training course, in one or more of the following: site planning and development for building green; heating systems, cooling systems, creating healthful indoor air quality environments; building envelopes, building materials; water use reduction techniques, green construction techniques, multi-family green construction techniques, multi-family energy analysis, building energy analysis, energy modeling and building performance testing; has professional experience with respect to the construction or substantial renovation of a residential building meeting these green residential building standards within the last 3 years and has participated, or agrees to participate, in at least 15 hours of training every 2 years since completion of such construction or substantial renovation; has one year management and supervisory builder experience in green residential building construction; or has 5 years of field experience in green or sustainable residential construction, or in a combination of both.

A builder must have 15 hours of green building training by an accredited education institution or a professional builders association or affiliate, or other comparable and Authority-approved training course, which shall include a review of the National Green Building Standard or LEED Rating Systems and one or more of the following: site planning and development for building green, principles of energy, water and resource efficiency; indoor air and environmental quality; building performance and building performance testing; or is the builder of record for constructing residential buildings that have met the green residential building standards meeting this Part for at least 2 years or is the builder of record for constructing a minimum of two residential buildings meeting the requirements of this Part; and has agreed to participate, and participates, in at least 8 additional hours of green building or energy efficiency training by an accredited education institution or a professional builders association or affiliate, or other Authority-approved comparable organization for every 2 years of Program participation.

Section 508.9 prescribes the process for submitting an application in order to receive a Program incentive and requires documentation showing compliance with the regulations.

Section 508.10 lists exceptions to specific requirements contained in this Part that may be obtained from the Authority on a limited and case-by-case basis, if compliance would be inconsistent with public health or safety; would not be in compliance with Federal, State, or local law, rule or

regulation, administrative or judicial order, or other such requirement; or, with respect to an historic building eligible for or listed on the State or National Register of Historic Places, would be incompatible or significantly inconsistent with the historic, aesthetic, cultural, or archeological character of the building.

Section 508.11 prescribes the Authority's reporting process on the Program and includes furnishing annual written reports to the Governor, the Temporary President of the Senate, and the Speaker of the Assembly concerning specified activities under this Part.

Section 508.12 lists the regulation's referenced materials and where they may be obtained.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 508.2, 508.4, 508.5, 508.7 and 508.12.

Text of rule and any required statements and analyses may be obtained from: Jacquelyn L. Jerry, New York State Energy Research and Development Authority, 17 Columbia Circle, Albany, New York 12203, (518) 862-1090, email: jlj@nysrerda.org

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

No changes to the Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are required because the changes that have been made since the publication of the proposed regulations are typographical and grammatical corrections, clarifying and consistency changes, and technical amendments such as conforming titles and references to the titles and references requested by, or consistent with, the publisher's designations and allowing the purchase of energy efficient water heaters more closely aligned with market availability.

Assessment of Public Comment

1. Section 508.5(b)(2)(ii) of the proposed regulations states that air leakage from ducts and air handling equipment in conditioned space must be 3 air changes per hour (ACH) or less, but new homes constructed by builders can often have less than half an ACH, and the building airflow standard (BAS) as stated by the Building Performance Institute (BPI) is 0.35 ACH. In the Home Performance with ENERGY STAR® residential program few buildings have more than 3 ACH, and ACH is often reduced post-project to less than 1 ACH. A more aggressive target for air leakage reduction at least for new buildings of less than 4 units is recommended.

Response: The 0.35 ACH Building Airflow Standard referenced from the Building Performance Institute (BPI) is the minimum building air leakage rate at natural (atmospheric) air pressure for existing residential buildings undergoing energy-efficiency retrofits.

The three air changes per hour (3 ACH50) maximum leakage requirement is applicable to residential buildings with three or fewer stories and 1-4 dwelling units. It applies only when the ducts and air handling equipment are located within the building's conditioned space, and is measured while the building is depressurized to 50 Pascals with respect to outside air pressure using a blower door. This requirement is consistent with both the Federal ENERGY STAR® Homes Program and the New York ENERGY STAR® Homes (NYESH) Program. In addition, a menu of options can be used to meet the energy efficiency requirements thus allowing an Owner to tailor construction techniques based on individual needs.

2. Section 508.5(b)(1) The proposed regulations prescribe 5 Air Changes Per Hour (ACH) at 50 Pascals of pressure (5 ACH 50) as a requirement for building envelope air leakage. This allows too much air leakage, and some buildings are tighter. Basements in existing homes are typically unconditioned or partially conditioned, generally not well insulated, and poorly air-sealed from the rest of the building. A basement cannot be separated from the house and should be considered conditioned, which increases the total air volume in the house, typically by 1/2 to 1/3. This makes the current standard for tightness measured in ACH inaccurate. A more accurate measurement would be cubic feet per minute (cfm) at 50 Pascals per square foot (sf) of living space, where an unfinished basement is not "living space," even though it may be "conditioned space." A tight building could then be defined as less than or equal to 0.8 cfm50/sf, an average building as less than or equal to 1 cfm50/sf, and a leaky building as anything over 1 cfm50/sf.

Response: The Program applies to the construction of new and substantially renovated residential buildings. The Authority assumes that this comment primarily relates to substantially renovated residential buildings, but these buildings must also meet LEED or NGBS certification requirements as well as the energy efficiency requirements of newly constructed structures, so that the residential building will be well insulated and air-sealed at completion. Further, neither the New York State Residential Building Code, nor the guidelines for Residential Energy Services Network's (RESNET's) Home Energy Rating System (HERS) allow the use of "living space" for energy use evaluations of a residential building (both refer to "conditioned space" for this purpose). In addition, the 5

ACH50 requirement is consistent with the Federal ENERGY STAR® Homes Program and the NYESH Program.

Section 508.4(b)(1)(4) Heating, ventilation, and air-conditioning (HVAC) equipment should not be installed in garages or in attics unless the space is conditioned space.

The Authority agrees that this is one technique that may increase the energy efficiency of residential buildings. However, this is not required by the New York State Residential Building Code, the NYESH Program, LEED, or NGBS.

3. General. Commenter operates a home performance contracting company that participates in the Home Performance with ENERGY STAR® Program, and is concerned that the proposed regulations take market-based Comprehensive Home Assessment work away from small contractors. The commenter also states that Davis-Bacon wage regulations would not serve the home performance contracting industry in the New York City metropolitan area.

Response: These comments appear to apply to the Green Jobs - Green New York Act of 2009. Accordingly, no changes were made as a result of the comment.

4. Section 508.4 Change this section to read:

“For purposes of the Program, green residential building standards shall mean the use of design and building techniques “leading to award certification from an approved third party rating system including” [sufficient]:

(a)(1) [to receive] a second level or higher LEED certification using the LEED for Homes Rating System, or using the LEED for New Construction Rating System; or

(2) [to receive] a second level or higher level certification using the NGBS; and

“(b) meets all requirements of and attains ENERGY STAR® Certification; and”

Response: The Authority has revised Section 508.4 to make clear that a certification must be received.

The suggested language “...from an approved third party rating system including” is unnecessary since the process for receiving a certification is prescribed by LEED and NGBS, they both include a third-party rating system.

The specific efficiency requirements for appliances and lighting established by the Federal ENERGY STAR® program are included in the proposed regulations. However, the Program is to be offered Statewide, and the NYESH Program, which provides ENERGY STAR® certification, is available only in utility service territories where the System Benefits Charge is assessed.

Section 508.7 Change this section to read:

An Owner of a residential building being newly constructed or a residential building undergoing substantial renovation shall have such residential building inspected by a Technician, “of appropriate background for each inspection,” and a written record of such inspections obtained by such Owner from such Technician, during and after such construction or renovation.

Response: Since LEED and NGBS certifications must be obtained, and LEED and NGBS determine who is qualified to perform their required inspections as a Technician, this change is not needed. In addition, the Technician is not required to conduct all inspections, but may verify compliance from tests performed by other professionals.

5. Section 508.5(a)(2) Clarify that ceiling fan requirements are applicable at the time of the inspection/rating/closing so that if the Owner modifies the residential building after completion, this does not affect eligibility retroactively.

Response: The Authority agrees that, under the proposed regulations, compliance with ceiling fan requirements is determined at the time of inspection by the Technician and a subsequent Owner is not precluded from replacing a ceiling fan after inspection, nor would such action retroactively affect eligibility. Section 508.5(a)(3) It is not reasonable to purchase water heaters that meet the calculated peak hour demand within one-to-two gallons. First, water heaters are available only in select sizes/performances. Second, more efficient equipment is available in even fewer sizes and the greater efficiency should more than offset the sizing benefits. Third, client needs may dictate varied capacity. Fourth, typical boiler packages would use a high-efficiency indirect water heater and the price for larger or smaller units will vary significantly based on what the distributors stock, with minimal benefit.

Response: The Authority agrees that water heaters are only available in select sizes and has added language to the proposed regulations stating that, if it is not feasible to size the domestic hot water heating system within one to two hours of calculated peak hour demand, based on the Owner’s needs, then the next larger capacity may be used. The Authority’s research indicates that a wide range of energy efficient systems are available throughout New York State, but that the proposed additional language should mitigate this concern as well. Although prices may be somewhat

higher for more efficient equipment, incentives are available through this Program to help offset the higher costs in addition to the homeowner receiving energy cost savings from installation of the more efficient equipment.

Section 508.5(4) Have a requirement that the temperature of the water heater be set to the minimum temperature possible to provide the necessary capacity.

Response: The minimum efficiency factors provided in the proposed regulations are consistent with the requirements of the NYESH Program.

Section 508.5(4) Clarify between tank, direct vent tank, power vent tank, super-high efficiency tank, tankless, and indirect units.

Response: Section 508.5(4) is consistent with the requirements of the Federal ENERGY STAR® Homes Program and the NYESH Program and establishes minimum energy factors for all types of domestic water heaters.

Section 508.5(5) Provide additional credit for sealed combustion appliances and for condensing and/or modulating gas boilers, not just based on AFUE.

Response: This section of the proposed regulations merely establishes the minimum efficiency requirements. Section 508.5(6) Mechanical vent fans that are always on (remote switch) should be an approved “automatic control.” If a fan runs continuously, the circuit breaker should be acceptable.

Response: Under ASHRAE Standard 62.2-2007, the designated compliance standard, when a mechanical vent fan is always on, it can qualify as having an “automatic control,” if there is a variable speed control, a multi-speed fan, or a timer to vary the run-time; a circuit breaker is not an acceptable control. Section 508.5(6)(b)(3) The “readily available and accessible override control” should be clarified as to purpose.

Response: The Authority agrees and has revised the regulation to state that the purpose of the “readily available and accessible override control” is to “allow the unit to be easily shut off for servicing or replacement.”

Section 508.7 A statement from the manufacturer of a manufactured home, with photos, should be sufficient evidence of items that will not be possible to visually inspect on site by the third-party reviewer.

For inspections done in a modular factory, inspections done by an individual qualified to perform inspections under the New York Department of State approved Quality Control procedures should also be qualified for Program inspections. Where a practice is a standard practice as part of the DOS approved procedures, such as sealing penetrations in the plates, a written statement from the manufacturer should qualify as an inspection.

Response: A goal of the Program is to provide third-party review of installed measures. The intent is to ensure that the Program’s inspection requirements are consistent with LEED and NGBS requirements so that certification is possible. The Authority will work with LEED and NGBS program administrators to ensure consistency of Technician review. In addition, recognizing that the inspection procedures will be different for modular and manufactured structures, the proposed regulations have also been clarified to delineate the type of inspections that need to occur at the manufacturing facility and those inspections that can occur after the residential building is permanently sited.

If the Department of State quality control individual meets the qualification of a Technician, the proposed regulations do not prohibit such an individual from serving in both capacities.

Section 508.8 The NAHB Certified Green Professional should be considered a qualification under the Builder and Technician training section.

Provide a central registration or certificate issued to applicable Technicians to simplify documentation and provide the Owner confidence that the relevant individual is qualified under the Program.

Response: The Authority is not referencing specific courses or certifications required of builders and Technicians in order to accommodate new educational and apprenticeship opportunities that may be developed over the term of the Program. A list of educational and training courses that meet the subject matter and training requirements will be provided in the Program Guidelines and updated as appropriate.

The Authority will also be maintaining a list of Technicians and builders that meet Program requirements and this list will be made available to the public. The Authority expects that NAHB Certified Green Professionals will be included on both lists.

Section 508.9 If the application is incomplete, allow additional time to provide the necessary documentation.

Response: The Authority will inform the Owner within 45 days of receipt of the original application what is missing and needed to complete the Application. If funds are available to pay an incentive once the Application is complete, an incentive will be paid.

Insurance Department

EMERGENCY RULE MAKING

Workers' Compensation Insurance - Independent Livery Driver Benefit Fund

I.D. No. INS-38-10-00003-E

Filing No. 919

Filing Date: 2010-09-08

Effective Date: 2010-09-08

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

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

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

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

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

Insurers authorized to write workers' compensation and employers' liability insurance have expressed interest in writing policies of insurance affording coverage to the Fund. Providing the Fund with alternative choices may lower the costs that will be borne for the coverage and can provide other benefits to the Fund. This regulation was previously promulgated on an emergency basis on December 17, 2009, March 12, 2010, and June 11, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 8, 2010 and the Department is awaiting approval to publish the regulation, however because of the effective date of the relevant provision of the law was January 1, 2010, it is essential that this regulation, which establishes procedures that implement provisions of the law, be continued on an emergency basis.

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

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

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

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

Section 151-5.0 Purpose.

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire December 6, 2010.

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

Regulatory Impact Statement

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

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

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

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

2. Legislative objectives: Chapter 392 of the Laws of 2008 enacted Executive Law Article 6-G, establishing clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases, and establishing the Fund to provide independent contractor livery drivers workers' compensation with benefits in certain circumstances where No-Fault automobile insurance does not provide sufficient coverage. Before passage of this law, the only recourse for independent contractor livery drivers was No-Fault automobile insurance. This resulted in delays in payment as No-Fault insurers ascertained whether livery drivers were independent contractors and eligible for coverage.

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

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

4. Costs: No costs will be imposed by the proposed rule. Executive Law

Article 6-G permits the Fund to purchase insurance from SIF or, if the Superintendent authorizes it by regulation, from an insurer licensed to write workers' compensation or employers' liability insurance. This rule authorizes workers' compensation and employees' liability insurers to provide coverage to the Fund for livery drivers dispatched out of independent livery bases pursuant to Insurance Law § 3451 and Executive Law Article 6-G. An insurer may, but is not required to, offer to provide coverage to the Fund. The Fund has a choice of procuring coverage from either SIF or an authorized insurer, which may provide savings to the Fund, and ultimately the livery bases that pay for the coverage.

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

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

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

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

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

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

Regulatory Flexibility Analysis

1. Small businesses:

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

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

2. Local governments:

The rule has no impact on local governments.

Rural Area Flexibility Analysis

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

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

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

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

Job Impact Statement

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

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

NOTICE OF ADOPTION

Charges for Professional Health Services

I.D. No. INS-25-10-00017-A

Filing No. 922

Filing Date: 2010-09-03

Effective Date: 2010-09-22

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

Action taken: Amendment of Part 68 of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2601, 5221 and art. 51

Subject: Charges for Professional Health Services.

Purpose: The proposed amendment adopts the new Workers Compensation Board Dental Fee Schedule.

Text or summary was published in the June 23, 2010 issue of the *State Register*, I.D. No. INS-25-10-00017-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Department of Labor

EMERGENCY RULE MAKING

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

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

Filing No. 920

Filing Date: 2010-09-07

Effective Date: 2010-09-07

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

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

Specific reasons underlying the finding of necessity: The effective date of the regulations coincides with the effective date of their authorizing legislation, the New York Worker Adjustment and Retraining Notification (WARN) Act, a new law that becomes effective February 1, 2009. The Act governs the provision of notice to certain employees who will lose employment through plant closings, mass layoffs, or reductions in work hours. The purpose of the authorizing statute is to ensure that the employees are aware of future actions that will affect their employment so that they can take steps to secure new employment, be retrained for more readily available work, and otherwise make arrangements to provide for their needs and those of their families when their employment ends. The law is also intended to ensure the ability of the Department of Labor and its partner, the Workforce Investment Board, to provide Rapid Response services to the affected employees prior to their employment loss. These services include providing employees with information regarding unemployment insurance, job training, and reemployment services. These regulations fill in gaps found in the law in order to more fully inform employees of their obligations and workers of their rights under the law.

The emergency promulgation of these regulations is necessitated by the dramatic job losses currently being suffered within the state and the need to ensure that the notice requirements detailed in the regulation are available to protect workers affected by such job losses and

return them quickly to work. Between April 2008 (the start of the economic downturn in New York State) and July 2010, New York State's private sector job count (seasonally adjusted) decreased by 282,100, or 3.9 percent, to 7,031,200. The statewide total nonfarm job count (includes both private and public sectors) decreased over the same period by 298,600, or 3.4 percent, to 8,529,700 in July 2010. New York State's unemployment rate (seasonally adjusted) climbed from 4.8 percent in April 2008 to 8.2 percent in July 2010. Over the same time period, New York City's rate doubled from 4.7 percent to 9.4 percent. The number of unemployed state residents increased from 461,100 in April 2008 to 796,700 in July 2010.

The impact of these job losses on workers, their families, and their communities can be staggering, more so if workers are unaware that plant closings and layoffs are coming. The state WARN Act is designed to give workers time to avoid long periods of unemployment by affording them time to search for new work, retrain for more secure long-term employment, and take advantage of reemployment services which will ensure a quick return to work after their former employment ends. The proposed rules will ensure timely notice to the Department and early intervention of Rapid Response teams in situations involving employment losses so that workers can quickly transition into new employment or retraining following the loss of their jobs. Such activities also avoid or shorten periods of unemployment, thereby reducing employer charges associated with the receipt of unemployment insurance by their former employees. On the other hand, employees need to know of the availability of unemployment insurance benefits following these employment losses since the program is designed to provide an economic safety net to the workers and their families. All efforts that will quickly transition workers into new employment when their former jobs end, or that ensure some continued income during unemployment, will allow workers to continue to make needed purchases such as housing, food, heat and other utilities and to maintain the payment of school and property taxes that support their local community.

Enacting emergency regulations, which will immediately clarify the scope, timing, and content of the notice requirements, supports the goals set forth above and protects the general welfare of the state.

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.

Substance of emergency rule: The proposed rule creates a new section of regulations designated as 12 NYCRR Part 921 entitled "New York State Worker Adjustment and Retraining Notification Act" created under Chapter 475 of the Laws of 2008. This Act requires employers of fifty (50) or more employees to provide at least ninety (90) days notice to affected employees and representatives of affected employees, the New York State Department of Labor, and local workforce partners before ordering a plant closing, mass layoff, reduction in work hours that falls within the employment losses covered by the law. At least twenty-five (25) employees must be affected for the notice requirement to be triggered. The rule contains exceptions to the notice requirement for certain employers who are making good faith efforts to avoid employment losses and have reasonable expectation that these efforts will successfully forestall the plant closing, mass layoff, or reduction in work hours.

Many employers in the State are already subject to the federal WARN Act (29 USC §§ 2101 - 2109 and 20 CFR 639.3). The State WARN Act expands the notice requirements to a larger group of employers and, concomitantly, extends its protections to more employees. The State Act also gives the Commissioner of Labor the authority to enforce the law on behalf of affected employees who did not receive appropriate notice of a plant closing, mass layoff, or covered reduction in work hours from their employer in violation of the law. Labor Law § 860-f(1) states that the Commissioner of Labor "shall prescribe such rules as may be necessary to carry out this article."

Subpart 921-1, entitled "Purpose and Definitions" sets forth the purpose and defines the terms used in the part. Section 921-1.1(d) defines "employer" as "any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees within New York State, excluding part-time employees, or fifty (50) or more employees within the state that work in aggregate at least 2,000 hours

per week." Section 921-1.1(a) defines "affected employee" as "an employee who may reasonably be expected to experience an employment loss as the result of a proposed plant closing, mass layoff, relocation, or covered reduction in hours by the employer." The definition of affected employee in section 921-1.1(a) has been expanded to exclude an officer, director or shareholder. Further, the definition of employer has been expanded to clarify that the number of employees is to be measured for the purpose of establishing coverage on the date that notice was first required to be given.

Subpart 921-2, entitled "Notice," requires covered employers to provide notice to affected employees at least 90 calendar days prior to an event that triggers the notice requirement. This section enumerates the factors that trigger the notice requirement. It further spells out the contents of the notice, how notice is to be served and who must receive notice. Further, we have revised the standard statement that must be given to each employee in their WARN Notice to reflect the fact that not all employers give notice when required by law. Some, especially in the financial services arena, give notice on the date of layoff along with the requisite sixty days pay.

Subpart 921-3, entitled "Extension or Postponement of Mass Layoff Period" requires an employer to give additional notice if the triggering event is extended or postponed. Section 921-3.1 states that an "employer that previously announced and carried out a short-term layoff of six (6) months or less which is being extended beyond six (6) months due to business circumstances (e.g., unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff must give notice required under the Act and this Part as soon as it becomes reasonably foreseeable that an extension is required." Section 921-3.2 states that "if, after notice has been given, an employer decides to postpone a plant closing, mass layoff, or covered reduction in work hours for less than ninety (90) days, additional notice shall be given as soon as possible after the decision to postpone." This subpart also prohibits "rolling notice". Also, if, after notice has been given, the employer determines that it will continue operations and that the plant closing, mass layoff, relocation, or reduction in work hours will not occur, the rule now requires employers to provide a notice of rescission. This notice must be given to all affected employees as soon as possible after the employer determines it will continue operations. Information regarding employees who must receive this notice would be in the employer's possession as information regarding the affected employees would have already been compiled by the employer when the initial WARN notice was given.

Subpart 921-4, entitled "Transfers," states that "notice is not required when an employer offers to transfer an employee to a different site of employment within a reasonable commuting distance with no more than a six (6)-month break in employment, regardless of whether the employee accepts such employment, or when an employer offers to transfer the employee to any other site of employment regardless of distance with no more than a six (6)-month break in employment and the employee accepts within thirty (30) days of the offer or of the closing or layoff, whichever is later."

Subpart 921-5, entitled "Temporary Employment," states that "notice is not required if the closing is of a temporary facility, or if the closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking." This subpart also makes clear that the employer must demonstrate that the employee understood the job was temporary either from having received notice or industry practice.

Subpart 921-6, entitled "Exceptions," provides exceptions to the 90-day notice period for which the employer bears the burden of proof. This subpart includes exceptions for faltering companies, unforeseeable business circumstances, natural disasters, strikes or lockouts, and economic strikers. The employer is responsible for providing documentation in support any claimed exception.

Subpart 921-7, entitled "Enforcement by the Commissioner of Labor," describes the administrative procedure followed by the Department when a WARN violation is suspected or alleged. Section 921-7.2 states that an employer who fails to give notice, as required, is subject to a civil penalty of \$500 for each day of the employer's

violation. Paying employees their regular wages and benefits over the period of a violation that exceeds three weeks does not exempt the employer from the civil penalty. Section 921-7.3 states that an employer who fails to give notice is liable to each employee for back pay and the value of any benefits to which the employee would have been entitled. Further this subpart provides for an administrative appeal to the Commissioner and then an appeal under Article 79 of the CPLR.

Subpart 921-8, entitled “Confidentiality of Information Obtained by the Commissioner of Labor,” requires that information obtained by the Commissioner through the administration of this Act be maintained as confidential and not be published or open to public inspection.

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. LAB-09-10-00005-EP, Issue of July 9, 2010. The emergency rule will expire September 15, 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 508, Albany, New York 12240, (518) 457-4380, email: nysdol@labor.ny.gov

Summary of Regulatory Impact Statement

1. Statutory authority:

Labor Law § 860 as added by Chapter 475 of the Laws of 2008 sets forth the requirements of the State Worker Adjustment and Retraining Notification Act. Section 860-f states that the Commissioner of Labor shall prescribe rules necessary to carry out Article 25-A of the Labor Law.

The Department previously published a Notice of Proposed Rule-making on February 18, 2009 and extended several times, which added a new Part 921 to 12 NYCRR entitled the New York State Worker Adjustment and Retraining Notification Requirements. The previously published proposed rulemaking prescribed rules to carry out Article 25-A of the Labor Law. The current proposed rulemaking incorporates much of the prior proposed rulemaking with revisions made based upon comments received from various interested parties.

2. Legislative objectives:

Article 25-A establishes the New York State Worker Adjustment and Retraining Notification (WARN) Act intended to provide more advance notice to a larger number of workers who are laid off from their jobs than under the federal WARN law. Under the State WARN Act, companies with at least 50 employees must provide at least 90 days’ notice to affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where the requisite number of employees will suffer an employment loss. This notice allows the Department to provide workers reemployment and retraining services in advance of their employment loss. This early intervention will reduce or avoid periods of unemployment, ensure that workers are aware of job placement and retraining services, and, if attempts to transition workers into new employment are unsuccessful, make them aware of the availability of unemployment insurance benefits as an economic safety net for them and their families. Under the Act, the Commissioner of Labor is required to enforce the law by recovering back wages and the value of the cost of any benefits to which the employee would have been entitled and by imposing penalties against such employers.

3. Needs and benefits:

Workers whose employment is affected as a result of plant closings, mass layoffs or significant reduction of hours require early and adequate notice to find new employment and prepare for their future. As the downturn in the economy increasingly impacts companies large and small, larger numbers of workers are impacted by such events. At the time of this writing, New York State’s seasonally adjusted unemployment rate fell over the month from 8.8 percent in February to 8.6 percent in March 2010, matching a 26-year high. The number of unemployed state residents increased from 832,200 to 868,600 over the same period.

Certain job sectors in the state, such as manufacturing, continue to decline, signaling a growing need to retrain workers exiting jobs in

this sector. All in all, the current economic climate makes it essential to provide the Department with early access to workers who will be losing employment so that they can receive information and assistance that will return them to work as soon as possible following their job loss. During 2009, the Department received 400 WARN notices involving approximately 41,000 employees. Many of these workers would not have received notice under the federal WARN Act which only applies to larger employers in the state.

Early intervention to assist workers with obtaining new jobs or to help them enroll in training programs is also essential to avoiding the economic impact of large-scale employment losses on workers, their families, and their communities. Large-scale job losses addressed by the state law impact employee spending and lead to the general decline of the local economy. This affects businesses that serve the workforce, adversely impacts local sales and property taxes, housing values, and the like. Early intervention leading to reemployment also reduces dependence upon unemployment insurance benefits for laid-off workers. Although such benefits are a critical economic safety net for workers and their families, reemployment is always preferable and provides greater income to workers. Reemployment reduces UI charges to individual employers and also UI benefit costs. Reduction of UI benefit costs is particularly beneficial to the State at this point in time since the State’s UI Trust Fund has a deficit balance which is expected to last for several years.

Finally, the state Act and regulations also meet a significant need by providing workers with an effective mechanism to seek redress for employer violations of the notice requirements. Currently, the federal WARN law requires aggrieved employees to bring private lawsuits to sue for redress, a remedy that has been infrequently used over the years. The State WARN Act and these regulations give the Commissioner of Labor the authority to recover back wages and benefits on behalf of such workers and to impose civil penalties against employers who fail to provide the required WARN notice.

Since the WARN Act took effect February 1, 2009, the Department has issued four (4) Notices of Violation and collected \$7,500 in penalties. A number of employers also extended their notice period or voluntarily paid back wages and benefits to employees upon being notified of a potential violation by the Commissioner. There are approximately twenty (20) WARN investigations currently underway.

4. Costs:

It is impossible to predict the potential cost of the rule on regulated parties with any certainty. To begin, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. In order to further clarify when a WARN notice is required, we have added language from the federal regulations to make it clear that we make such determinations based upon the workers employed on the day that that notice was due. However, these employers will not be impacted by the rule unless they engage in an employment loss that meets the triggers set forth in the Act and the rule. Additionally, the rule requires employers to provide a notice of rescission to all affected employees if it is determined that the covered event will not occur. While there is a cost associated with providing this notice if applicable, employers are able to provide this notice via electronic mail or by inserting this notice into envelopes containing paychecks or direct deposit statements. Both of these methods will result in minimal costs to the employer. As noted elsewhere in this document, employers with 100 or more employees are already required to provide WARN notice for covered employment losses.

For those employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The rule minimizes costs by permitting delivery of the notice with employee paychecks or direct deposit statements or by employer-sponsored electronic mail. First class mail delivery costs would still be minimal as the notice is a one or two page document. Moreover, for those employers already

required to provide notice under the federal WARN Act, additional costs will be limited to those associated with providing notice to more employees. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as all information required under the rule is included. Additionally, we have changed the standard statement that must be given to each employee in their WARN Notice to reflect the fact that not all employers give notice prior to the date when the notice is due. Some, especially in the financial services arena, give notice on the date of layoff along with the requisite sixty days pay. Further, as set forth above, if an employer is required to serve a notice of rescission, costs can be minimized by serving this notice on the employees via electronic mail or by inserting the notice in envelopes containing paychecks or direct deposit statements. Both of these methods would ensure that the employer does not incur additional postage costs when informing employees that the covered employment loss will no longer occur.

Apart from employee notice, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are required. Where an employer has given notice of a mass layoff and extends the duration of that layoff, or where an employer has given notice of an employment loss and postpones or rescinds that action, that employer must give notice of the extension, postponement or rescission as soon as possible. Finally, an employer who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required notice, must still provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services with the final paycheck or through a separate notice provided at the time of termination. The rule specifically provides the content of the notice for the convenience of regulated parties.

The State WARN Act does allow for certain exceptions to the 90 day notice requirement. Employers who wish to assert an exception to the notice requirement must provide the Commissioner evidence establishing entitlement to such exception. Such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations or be readily available, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay, and other damages, as well as costs associated with their defense. During the first year of its enforcement of the rule, the Department has assessed penalties in only a handful of cases; in most situations, employers who failed to provide notice have either extended the notice period voluntarily to come into compliance or have paid back wages and benefits due under the rule to employees.

5. Paperwork:

The Department's enforcement will require paperwork associated with investigations and, where necessary, hearings to determine violations and to impose appropriate penalties.

Employers charged with violating the law will have to document their entitlement to exemptions from the notice provisions. In the event of appeals, there will be additional paperwork for the Department and employers to reproduce the hearing record and prepare necessary court filings.

6. Local government mandates:

The state WARN Act and the proposed rule do not apply to state, local, or tribal governmental entities except under circumstances where such otherwise exempt entities are engaging in commercial operations, as already provided in federal WARN regulations.

7. Duplication:

There is no duplication of existing state rules or regulations. There is some overlap of the proposed rule with federal WARN regulations. The Department has drafted the state regulations to be consistent with federal rules to the extent possible, while still meeting the spirit and intent of the more stringent state law.

The Department's procedural rules for other Departmental hearings under 12 NYCRR Part 701 will be used for any administrative hear-

ings conducted under the WARN Act, thereby avoiding duplication in this regard.

8. Alternatives:

The Department has considered a number of alternatives to various provisions of the proposed rule and, where possible, has selected those that will minimize the adverse impact of the rule. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations. For example, rather than requiring a separate state and federal notice for employers subject to both notice requirements, the Department allows a single notice to be used so long as it contains all the information required under state regulation. The Department also chose optional methods of delivery of the notice including enclosing notice with employee paychecks or direct deposit slips to avoid costs associated with separate delivery. Notice may also be provided by electronic mail (e-mail), if certain requirements are met.

The Department also considered alternatives regarding the scope of employee notice under the proposed rule. The Department believes it is critical that the notice contain information which employees can use to hasten their return to work following termination of employment. While the Federal WARN rules encourage, but do not require the inclusion of useful information on dislocated worker assistance programs, the Department chose to require the notices to contain information on the potential availability of unemployment insurance and reemployment services. By providing the actual language which employers can use to satisfy this requirement, the Department minimized the impact of the requirement on the regulated community.

The Department recognized that, in computing the average regular rate of compensation, salary and commission employees may not work on a regular schedule. Instead of using the number of days worked to calculate the average regular rate of compensation, the number of days the salary or commission employee was in active employment status will be used. Otherwise, the average regular rate of compensation may be unrepresentative of the actual rate of compensation.

The Department also considered creating a separate enforcement procedure for the state WARN Act, but instead decided to utilize the administrative procedure currently in place for other administrative hearings conducted by the Department.

9. Federal standards:

Federal standards implementing the federal WARN law exist and are found at 29 USC §§ 2101 - 2109 and 20 CFR 639. However, consistent with a less stringent federal law, such regulations provide a shorter period of notice, cover fewer employers, and do not permit administrative enforcement of the law. Since the Commissioner of Labor is required to enforce the Act, additional provisions not contained in the federal WARN regulations were included to ensure that information regarding notice requirements, investigations, and determinations in the state regulations sufficiently inform all affected parties of their rights and obligations and ensure a fair and thorough determination of violations based on the requirements of the Act.

10. Compliance schedule:

The Act took effect February 1, 2009.

Regulatory Flexibility Analysis

1. Effect of rule:

The New York State Worker Adjustment and Retraining Notification (WARN) Act (Chapter of the Laws of 2008, effective February 1, 2009) requires businesses in New York with 50 or more employees to provide notice at least 90 days prior to a plant closing, mass layoff, relocation or covered reduction in work hours where at least 25 of the employees will experience an employment loss from such event. The State WARN notice must be given to the affected employees and their representatives, the New York Department of Labor, and the local Workforce Investment Board(s) where the employment losses occur.

During the 2008-09 fiscal year, the State received 381 Notices covering 45,480 employees. During the 2009-10 fiscal year, the State received 407 Notices covering 35,112 employees. The vast majority of these notices came from small businesses.

All small businesses that meet the triggering requirements of the WARN Act are required to comply with its requirements regard-

less of the type of business in which they are engaged. State, local, and tribal governments are not subject to the requirements of the rule.

2. Compliance requirements:

Employers of 50 or more employees, other than part-time employees, will be required to provide a WARN notice to the required parties under the WARN Act containing information set forth in the rule. Such employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice.

Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state laws relating to wages and unemployment taxes. These records help employers calculate the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. Information regarding employees who will be affected by a plant closing, mass layoff, relocation or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Additionally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open. Employers must also maintain records to support any exception they may claim from the notice requirement so that they may share this information with the Department should it commence an investigation into the employer's failure to provide timely notice.

In cases involving employers with approximately fifty full time employees, the initial question is does the employer meet the definition of Employer under the act, thereby triggering coverage. In order to further clarify this matter, we have added language from the federal regulations that makes it clear that we look the business as it exists on the day that that notice was due for purposes of counting the number of employees.

Finally if, after notice has been given, the employer determines that it will continue operations and that the plant closing, mass layoff, relocation or reduction in work hours will not occur, employers are required to provide a notice of rescission. This notice must be given to all affected employees as soon as possible after the employer determines it will continue operations and may be served in the same manner as the WARN notice as set forth in the rule.

3. Professional services:

Small businesses covered by this rule are not expected to require professional services to comply with the rule. As noted above, state, local, and tribal governments are not subject to the requirements of the rule.

All information that must be included in the notice to the Department, the Workforce Investment Board, employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. The Department has included the content of this notice for employers use in the rule to minimize the impact of the requirement on the employers.

Any employer who is cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

4. Compliance costs:

The adoption of the regulations is expected to result in minimal

initial capital costs to small businesses. Small businesses that trigger the WARN Act requirements will be required to file a WARN notice with the required parties; costs associated with providing the notice will depend upon the number of employees affected and the means of delivery selected by the employer. The rule permits delivery of the notice to be included with employee pay or direct deposit statements or by electronic mail. Notice may also be personally delivered to individual employees at the workplace. Should employers choose to send the notice via first class mail, postage costs would still be minimal as the notice should be no more than a one or two page document.

Apart from employee notice, which must be provided individually to all affected employees, notices to the Department of Labor, employee representatives, and local Workforce Investment Boards are required. Again, postage costs associated with such delivery should be nominal. In some circumstances, employees suffering an employment loss may be represented by different unions. In those cases, notices would be required to be sent to each of the different unions. In rare circumstances where places of employment are served by multiple Workforce Investment Boards, more than one notice may be required. Costs associated with the service of a notice of rescission, if applicable, would be the same as costs associated with service of the original WARN notice as the acceptable forms of delivery of the notices are the same. The rule does allow for this notice to be distributed via electronic mail. If the employer chooses this delivery option the cost to the employer should be negligible.

In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation, or covered reduction in work hours and postpones or rescinds that action for which notice was given, that employer must give notice of the extension, postponement, or rescission as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence that they fit one or more of the various exception categories. Because such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, there should be minimal compliance costs. Should other evidence have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of a unexpected, serious downturn in the economy on the employer's business operation the costs should be minimal as this information should already be in the employer's possession or readily available to the employer.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equivalent to sixty days of pay and benefits to employees within three weeks of termination. Paying employees their regular wages and benefits over the period of the violation, exceeding three weeks, does not exempt the employer from penalties.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, relocations or covered reductions in work hours but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

5. Economic and technological feasibility:

The adoption of these emergency regulations is not expected to create an undue burden on small businesses. Consistent with current federal WARN regulations, notice must be provided using a method that ensures the timely receipt of notice by the required parties, such as first class mail or personal delivery. The rules permit notice to be provided to affected employees along with paychecks or direct deposit receipts and by electronic mail (e-mail). The burden of proof is on the employer to show that each employee received the e-mail. The employee e-mail addresses must be addresses provided to the employees by the employer and used in the conduct of business. The e-mail notice must be identified as "urgent."

6. Minimizing adverse impact:

As previously indicated, state, local, and tribal governments are not subject to the requirements of the rule.

The proposed rule is being promulgated in response to dozens of requests received from employers, their attorneys, workers, and worker representatives seeking clarification and guidance on the scope and requirements of the state WARN statute. The Department has sought to minimize adverse impact upon the regulated community by including provisions in the rule that address the issues and concerns raised in these inquiries. These provisions allow employers to better understand their obligations under the law, and inform employees of their rights under the law. This proposal is intended to assist employers to avoid violations while ensuring that workers receive the notice that will provide them with an opportunity to plan for their futures and support their families following employment termination.

The Department has taken a number of steps to minimize the adverse impact of the rule on all covered small business employers. Wherever state and federal WARN laws contain identical requirements, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. For those employers who are subject to state and federal notice requirements, the Department will allow a single form of notice to be used so long as the notice contains all the information elements required under the state regulation. Where the Department included a requirement that the WARN notice apprise affected employees of the availability of unemployment insurance and reemployment services, the rule contains the actual language to be used by employers for this purpose. The rule allows delivery of the notice along with paychecks or direct deposit slips should the employer choose to do so, in order to avoid costs associated with separate delivery.

One of the main goals of the WARN Act is to require small and medium-sized businesses in the state to provide advance layoff notices and to extend the Department's rapid response to these additional firms, the Department determined that the regulations should be limited to such companies' New York workforce. Accordingly, while the federal regulations count workers based at foreign sites of employment to determine whether an employer's workforce would subject the employer to the federal Act, even though the foreign sites would not be covered, the state WARN Act does not.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

7. Small business and local government participation:

The state WARN Act and the proposed rule does not apply to state, local, or tribal governments.

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the Association of Corporate Counsel. Many individuals attending these meetings likely represent small businesses impacted by the rule. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. All of these activities prompted numerous contacts from businesses, corporate counsel, and worker representatives identifying areas of the statute which they felt required clarification in the regulations. The Department has attempted to address all these requests for clarification in the rule.

The Department also intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor for distribution to their constituency. These information activities will be in addition to the formal publication of the proposed rule in the State Register.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Employers of fifty (50) or more employees in the state who engage in plant closings, mass layoffs, relocations or reductions in work hours covered under the Act and the rule must provide notice of such employment losses under both the statute and the rule to employees, their representatives, the Commissioner of Labor and the Local Workforce Investment Board. Such employers are located throughout the state, including all of the State's rural areas.

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

Covered employers located in rural areas that are engaging in an action constituting an employment loss under the rule will be required to issue notices of such employment loss to the mandatory parties identified in the rule. In order to do so, they will not be required to undertake any additional reporting or recordkeeping requirements. We have changed the standard statement that must be given to each employee in their WARN Notice to reflect the fact that not all employers give notice prior to the date when the termination takes place. Some, especially in the financial services arena, give notice on the date of layoff along with the requisite sixty days pay.

Employers in New York are already required to maintain accurate and complete payroll records in order to comply with state and federal laws relating to the payment of wages, workers' compensation coverage, and tax withholdings. These records identify all persons employed by the employer and allow employers to calculate the size of their workforce and the hours worked by employees in order to determine whether a WARN notice is required. In order to further clarify when a WARN notice is required, we have added language from the federal regulations that make it clear that we make such determinations based upon the workers employed on the day that that notice was due.

Information regarding employees who will be affected by a plant closing, mass layoff, relocation or covered reduction in work hours would have been developed and documented during the planning phase for such actions; therefore necessary information would be readily available to employers to assure compliance with the WARN notice requirements. To the extent that bumping rights might exist in the place of employment, these rights would be established in the employer's collective bargaining agreement with the union representing its workers. The rule acknowledges that information specifically identifying individuals affected by bumping rights may not be available at the time notice is required and simply requires that the notice contain a statement whether bumping rights exist. Additionally, the records required to support a WARN exception claim are records that should already be in the employer's possession as, for example, under the faltering company exception where the employer applied for loans or was seeking clients or capital to keep its business open. Provisions of the WARN Act protect the confidentiality of such information shared with the Commissioner, eliminating employer concerns regarding disclosure of proprietary or financial information that could be damaging to the employer if generally known.

Also, if, after notice has been given, the employer determines that it will continue operations and that the plant closing, mass layoff, relocation, or reduction in work hours will not occur, the rule now requires employers to provide a notice of rescission. This notice must be given to all affected employees as soon as possible after the employer determines it will continue operations. Information regarding employees who must receive this notice would be in the employer's possession as information regarding the affected employees would have already been compiled by the employer when the initial WARN notice was given.

Rural area employers covered by this rule are not expected to require professional services to comply with the rule. As noted above, information that must be included in the notice to the Department, the Workforce Investment Board, affected employees, and their representatives is simple, straightforward, and already available to the employer. It includes information regarding the planned action, the individuals who will be impacted, and employer contact information. The Department has included a requirement that the notice contain a statement for employees and their representatives regarding potential eligibility for unemployment insurance benefits and various reemployment services available from the Department. In an effort to assist

employers with meeting this requirement, the Department has included the content of this notice in the rule.

Any employer who is cited for a violation of the notice requirement may elect to hire legal counsel to defend such action.

3. Costs:

It is impossible to predict the potential initial capital or annual costs of the rule on regulated parties in rural areas with any certainty. As noted elsewhere in this rulemaking, employers with 100 or more employees are already required to provide WARN notice for covered employment losses under the federal WARN Act. The rule extends notification requirements to covered employment losses involving employers with 50 or more employees. There are 9,388 employers in the state who have between 50 and 100 employees. Some of these employers will undoubtedly be located in rural areas. However, these employers will not necessarily be impacted by the rule unless they engage in a plant closing, mass layoff, relocation, or reduction in work hours that meets the numerical notice triggers set forth in the Act and the rule. Moreover, the number of employers set forth above is inflated because it includes employers with part-time employees who are not included in the numerical trigger computations referenced in the rule.

For those rural employers who are subject to the rule, costs of providing notice include preparation of the notice and mailing or delivery of the notice to affected workers, their representatives, the Department, and the local Workforce Investment Boards. The Department has attempted to keep such costs to a minimum by allowing employers to include notices with paychecks or direct deposit statements already provided to affected employees and allowing notification to affected employees by electronic mail. Additionally, the requirements regarding service of a notice of rescission, if applicable, allow employers to include this notice with paychecks and direct deposit statements or via electronic mail, which will keep costs at a minimum. Moreover, for those employers in New York already required to provide notice under the federal WARN Act, additional costs will be associated with providing notice to more employees, i.e. nominal postage costs or somewhat higher costs associated with other delivery methods which the employer may elect to use. However, since the notice will be a one page sheet of information, such postage charges should be minimal. The rule would not preclude an employer from utilizing the same notice to meet both state and federal notice requirements so long as the notice includes all information required under the proposed rule.

Apart from employee notice, which must be provided individually to all affected employees, only three other notices (Department of Labor, employee representatives, and local Workforce Investment Boards) are typically required. The only exceptions to this would involve limited circumstances in which employees may be represented by different unions, or where covered employment sites are served by multiple Workforce Investment Boards. Under these circumstances, more than one notice may be required. In the event an employer has already given notice of a mass layoff and extends the duration of that layoff, or in the event an employer has given notice of a plant closing, mass layoff, relocation or covered reduction in work hours and postpones or rescinds that action for which notice was given, that employer must also give notice of the extension, postponement or rescission as soon as possible.

Employers who wish to assert an exception to the notice requirement will have to provide the Commissioner with documentary and other evidence showing that they fit one or more of the various exception categories. While such evidence should already exist in many circumstances, e.g. copies of loan or grant applications soliciting capital to continue business operations, other evidence may have to be compiled by the employer in response to an investigation of the employer's failure to provide timely notice, e.g. documentation of the effects of an unexpected, serious downturn in the economy on the employer's business operation.

Employers who fail to comply with the regulation would be subject to penalties, back pay and other damages, as well as costs associated with their defense. The rule allows the Commissioner to forego damages and penalties where the employer timely makes payment equiva-

lent to sixty days of pay and benefits to employees within three weeks of termination. Paying employees their regular wages and benefits over the period of the violation, exceeding three weeks, does not exempt the employer from penalties.

Minimal costs may be incurred by labor unions representing employees affected by plant closings, layoffs, relocations, covered reductions in work hours or covered reductions in pay but these costs would typically involve normal representational and information activities. Similarly, costs associated with WIB and Departmental responses to employment losses would be part of regularly funded workforce services and unemployment insurance activities.

To the extent that early intervention and reemployment services offered by the Department through its Rapid Response activities reduce the number of workers who will ultimately claim unemployment insurance benefits as a result of the adverse employment action, covered employers will see UI charges decrease as a result of the rule.

Finally, the rule also requires that an employer, who elects to pay affected employees sixty days of pay and benefits to avoid liability and penalties for failure to provide the required 90-day notice, must provide notice to affected employees notifying them of the potential availability of unemployment insurance and reemployment services. This notice must be provided with the final paycheck or through a separate paper or electronic mail notice provided at the time of termination. As elsewhere, the rule specifically provides the content of the notice for the convenience of regulated parties.

4. Minimizing adverse impact:

The proposed rule is being promulgated in response to additional requests received from employers and their representatives seeking clarification and guidance on the scope and requirements of the statute creating the state WARN program. Employers that meet the triggering requirements of the state WARN Act are not exempted from coverage due to their location in a rural area. However, the Department has taken steps to minimize the adverse impact on all employers whenever feasible by including language in the rule that addresses the issues and concerns raised in these inquiries.

Wherever feasible and desirable, these regulations track federal regulations for the federal WARN which have been in place for more than a decade. The Department will allow a single notice form to be used to satisfy both the state and federal notice requirements so long as the form contains all the information elements required under the state regulation. The Department has also drafted language to be included in the notice informing employees of the availability of Departmental programs and benefits as a service to employers. Service of notice is permitted along with paychecks, direct deposit slips, or via electronic mail should the employer choose to do so in order to avoid costs associated with separate delivery.

The statute and regulation also minimize adverse impact by including exceptions to the notice requirement where the employer can demonstrate that providing the notice would adversely impact the business' efforts to obtain financing, customers, or other financial support that would allow it to remain open or avoid employment losses. Employers who assert this defense to a failure to provide timely notice must be able to demonstrate such efforts to the satisfaction of the Department.

As a whole, the proposed rules ensure the early intervention of the Department in situations involving employment losses in rural areas so that workers can quickly transition into new employment or retraining following the loss of their jobs. Where such activities lead to reemployment, employers will not face benefit charges associated with the receipt of unemployment insurance by their former employees. If such activities do not serve to avoid unemployment, unemployment insurance benefits will provide an economic safety net to the workers and their families. All efforts which will either keep the workers employed, move them quickly into new employment, or ensure some continued income will assist their rural area communities. Income allows workers to continue to make needed purchases including housing, food, utilities, etc. and to maintain the payment of school and property taxes that support their local community. This income is particularly important in rural communities which often have fewer commercial and industrial businesses to support their tax base and

depend upon employed residents to financially support local business and governmental services.

5. Rural area participation:

The Department discussed the WARN Act at the Summer Meeting of the Labor and Employment section of the New York State Bar Association and at the Fall Meeting of the New York Chapter of the State Association of Corporate Counsel. Individuals attending these events likely represent some clients located in rural areas. In addition, the Department published information on its website, issued press releases, and held press conferences regarding the passage of the state WARN Act. These efforts resulted in the Department receiving dozens of phone calls and written requests for clarification of various aspects of the law from all over the state. The Department has attempted to address all these requests for clarification in the emergency rule.

The Department intends to publish a copy of the rule on its website and to mail copies to organizations representing business and labor in all areas of the state, including rural areas, for their comment and distribution to their constituency, including those located in rural areas. These information activities will be in addition to the formal publication of the rule in the State Register.

Job Impact Statement

No job impact statement is submitted with this notice because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment opportunities. Rather, this rule requires notice to be provided to employees and other parties 90 days prior to covered plant closings, mass layoffs, relocations, reductions in work hours and at sites of employment subject to the rule.

Assessment of Public Comment

The agency received no public comment.

Public Service Commission

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Approval of a Financing

I.D. No. PSC-38-10-00004-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 NRG Energy, Inc. requesting approval of a financing in the amount of \$15 billion in corporate debt.

Statutory authority: Public Service Law, section 69

Subject: Approval of a financing.

Purpose: Consideration of approval of a financing.

Substance of proposed rule: The Public Service Commission is considering a petition from NRG Energy, Inc. requesting approval of a financing in the amount of \$15 billion in corporate debt, an increase from the existing approved amount of \$10 billion. The debt would be secured by recourse to generation facility assets located both in New York and elsewhere in the U.S. 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-E-0405SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Niagara Generation, LLC Seeks an Adjustment to the Pricing Levels in the Contract and Potential Future Price Adjustments

I.D. No. PSC-38-10-00005-P

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

Proposed Action: The Commission is considering a petition by Niagara Generation, LLC requesting that the Commission consider modifications to the Renewable Portfolio Standard (RPS) program related to a Main Tier RPS contract entered into by Niagara Generation, LLC.

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

Subject: Niagara Generation, LLC seeks an adjustment to the pricing levels in the contract and potential future price adjustments.

Purpose: To encourage electric energy generation for the State's consumers from renewable resources.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the Renewable Portfolio Standard (RPS) program related to a Main Tier RPS contract entered into between Niagara Generation, LLC and the New York State Energy Research and Development Authority (NYSERDA). In particular, the Commission is considering the "Petition of Niagara Generation, LLC for Restructuring of its RPS Agreement" dated August 19, 2010 wherein Niagara Generation, LLC requests (a) an adjustment to the pricing levels in its particular RPS contract; (b) that such pricing levels be cost-based and established by negotiation with the Staff of the Department of Public Service (Staff) after an examination by Staff of the financial books of Niagara Generation, LLC; (c) that Niagara Generation, LLC be allowed to request future price adjustments every two and one half years during the term of its RPS contract; and (d) that a flexible pricing Contract for Differences (CFD) scenario be considered possibly in the manner, or similar to the manner, set forth in a document identified as "New York State Department of Public Service, Renewable Portfolio Standard Case 03-E-0188 Contract for Differences (CFD) – Straw Proposal, January 8, 2010."

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

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

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

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

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

(03-E-0188SP26)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-38-10-00006-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Driggs Avenue Place LLC to submeter electricity at 475 Driggs Avenue, Brooklyn, New York.

Statutory authority: Public Service Law, sections 2, 4(1), 30, 32-48, 52, 53, 65(1), 66(1), (2), (3), (4), (12) and (14)

Subject: Petition for the submetering of electricity.

Purpose: To consider the request of Driggs Avenue Place LLC to submeter electricity at 475 Driggs Avenue, Brooklyn, New York.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Driggs Avenue Place LLC to submeter electricity at 475 Driggs Avenue, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(10-E-0423SP1)

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

Approval of a Lightened Regulatory Regime in Connection with a 345 Kilovolt Electric Transmission Line

I.D. No. PSC-38-10-00007-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 by Hudson Transmission Partners, LLC for a lightened regulatory regime in connection with a 345 kilovolt electric transmission line between Manhattan, New York and Ridgefield, New Jersey.

Statutory authority: Public Service Law, sections 2(13), 5(1)(b), 18-a, 19, 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-a, 119-b and 119-c

Subject: Approval of a lightened regulatory regime in connection with a 345 kilovolt electric transmission line.

Purpose: Consideration of approval of a lightened regulatory regime for a 345 kilovolt electric transmission line.

Substance of proposed rule: The Public Service Commission (Commission) is considering a petition dated July 13, 2010, from Hudson Transmission Partners, LLC, requesting approval of a lightened regulatory regime in connection with a 345 kilovolt electric transmission line between Manhattan, New York and Ridgefield, New Jersey. 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, NY 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, NY 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-0339SP1)

Workers' Compensation Board

EMERGENCY RULE MAKING

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-38-10-00001-E

Filing No. 909

Filing Date: 2010-09-01

Effective Date: 2010-09-01

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

Action taken: Amendment of section 300.2(d)(11) of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 137

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

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because time is of the essence. Memorandum of Decisions issued by Panels of three members of the Workers' Compensation Board (Board) have interpreted the current regulation as requiring reports of independent medical examinations to be received by the Board within ten calendar days of the exam. Due to the time it takes to prepare the report and mail it, the fact the Board is not open on legal holidays, Saturdays and Sundays to receive the report, and the U.S. Postal Service is not open on legal holidays and Sundays, it is extremely difficult to timely file said reports. If a report is not timely filed it is not accepted into evidence and is not considered when a decision is rendered. As the medical professional preparing the report must send the report on the same day and in the same manner to the Board, the workers' compensation insurance carrier/self-insured employer, the claimant's treating provider, the claimant's representative and the claimant it is not possible to send the report by facsimile or electronic means. The Decisions have greatly, negatively impacted the professionals who conduct independent medical examinations and the entities that arrange and facilitate these exams, as well as the workers' compensation insurance carriers and self-insured employers. When untimely reports are not accepted into evidence, the insurance carriers and self-insured employers are prevented from adequately defending their position in a workers' compensation claim. Accordingly, emergency adoption of this rule is necessary.

Subject: Filing written reports of Independent Medical Examinations (IMEs).

Purpose: To amend the time for filing written reports of IMEs with the Board and furnished to all others.

Text of emergency rule: Paragraph (11) of subdivision (d) of section 300.2 of Title 12 NYCRR is amended to read as follows:

(11) A written report of a medical examination duly sworn to, shall be filed with the Board, and copies thereof furnished to all parties as may be required under the Workers' Compensation Law, within 10 *business* days after the examination, or sooner if directed, except that in cases of persons examined outside the State, such reports shall be filed and furnished within 20 *business* days after the examination.

A written report is filed with the Board when it has been received by the Board pursuant to the requirements of the Workers' Compensation Law.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires November 29, 2010.

Text of rule and any required statements and analyses may be obtained from: Cheryl M. Wood, New York State Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make

administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

2. Legislative objectives:

Chapter 473 of the Laws of 2000 amended Sections 13-a, 13-b, 13-k, 13-l and 13-m of the Workers' Compensation Law and added Sections 13-n and 137 to the Workers' Compensation Law to require authorization by the Chair of physicians, podiatrists, chiropractors and psychologists who conduct independent medical examinations, guidelines for independent medical examinations and reports, and mandatory registration with the Chair of entities that derive income from independent medical examinations. This rule would amend one provision of the regulations adopted in 2001 to implement Chapter 473 regarding the time period within which to file written reports from independent medical examinations.

3. Needs and benefits:

Prior to the adoption of Chapter 473 of the Laws of 2000, there were limited statutory or regulatory provisions applicable to independent medical examiners or examinations. Under this statute, the Legislature provided a statutory basis for authorization of independent medical examiners, conduct of independent medical examinations, provision of reports of such examinations, and registration of entities that derive income from such examinations. Regulations were required to clarify definitions, procedures and standards that were not expressly addressed by the Legislature. Such regulations were adopted by the Board in 2001.

Among the provisions of the regulations adopted in 2001 was the requirement that written reports from independent medical examinations be filed with the Board and furnished to all parties as required by the WCL within 10 days of the examination. Guidance was provided in 2002 to some to participants in the process from executives of the Board that filing was accomplished when the report was deposited in a U.S. mailbox and that "10 days" meant 10 calendar days. In 2003 claimants began raising the issue of timely filing with the Board of the written report and requesting that the report be excluded if not timely filed. In response some representatives for the carriers/self-insured employers presented the 2002 guidance as proof they were in compliance. In some cases the Workers' Compensation Law Judges (WCLJs) found the report to be timely, while others found it to be untimely. Appeals were then filed to the Board and assigned to Panels of Board Commissioners. Due to the differing WCLJ decisions and the appeals to the Board, Board executives reviewed the matter and additional guidance was issued in October 2003. The guidance clarified that filing is accomplished when the report is received by the Board, not when it is placed in a U.S. mailbox. In November 2003, the Board Panels began to issue decisions relating to this issue. The Panels held that the report is filed when received by the Board, not when placed in a U.S. mailbox, the CPLR provision providing a 5-day grace period for mailing is not applicable to the Board (WCL Section 118), and therefore the report must be filed within 10 days or it will be precluded.

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate

on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

By amending the regulation to require the report to be filed within ten business days rather than calendar days, there will be sufficient time to file the report as required. In addition by stating what is meant by filing there can be no further arguments that the term "filed" is vague.

4. Costs:

This proposal will not impose any new costs on the regulated parties, the Board, the State or local governments for its implementation and continuation. The requirement that a report be prepared and filed with the Board currently exists and is mandated by statute. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

5. Local government mandates:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. These self-insured municipal employers will be affected by the proposed rule in the same manner as all other employers who are self-insured for workers' compensation coverage. As with all other participants, this proposal merely modifies the manner in which the time to file a report is calculated, and clarifies the meaning of the word "filed".

6. Paperwork:

This proposed rule does not add any reporting requirements. The requirement that a report be provided to the Board, carrier, claimant, claimant's treating provider and claimant's representative in the same manner and at the same time is mandated by WCL Section 137(1). Current regulations require the filing of the report with the Board and service on all others within ten days of the examination. This rule merely modifies the manner in which the time period to file the report is calculated and clarifies the meaning of the word "filed".

7. Duplication:

The proposed rule does not duplicate or conflict with any state or federal requirements.

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

The Medical Legal Consultants Association, Inc., suggested that the Board provide for electronic acceptance of IME reports directly from IME providers. However, at this time the Board cannot comply with this suggestion as WCL Section 137(1)(a) requires reports to be submitted by the practitioners on the same day and in the same manner to the Board, the insurance carrier, the claimant's attending provider and the claimant. Until such time as the report can be sent electronically to all of the parties, the Board cannot accept it in this manner.

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

It is expected that the affected parties will be able to comply with this change immediately.

Regulatory Flexibility Analysis

1. Effect of rule:

Approximately 2511 political subdivisions currently participate as

municipal employers in self-insured programs for workers' compensation coverage in New York State. Any independent medical exams conducted at their request must be filed by the physician, chiropractor, psychologist or podiatrist conducting the exam or by an independent medical examination (IME) entity. Workers' Compensation Law § 137(1)(a) does not permit self-insured employers or insurance carriers to file these reports, therefore there is no direct action a self-insured local government must or can take with respect to this rule. However, self-insured local governments are concerned about the timely filing of an IME report as one filed late will not be admissible as evidence in a workers' compensation proceeding. This rule makes it easier for a report to be timely filed as it expands the timeframe from 10 calendar days to 10 business days. Small businesses that are self-insured will also be affected by this rule in the same manner as self-insured local governments.

Small businesses that derive income from independent medical examinations are a regulated party and will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

Individual providers of independent medical examinations who own their own practices or are engaged in partnerships or are members of corporations that conduct independent medical examinations also constitute small businesses that will be affected by the proposed rule. These individual providers will be required to file reports of independent medical examinations conducted at their request within ten business days of the exam, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding.

2. Compliance requirements:

This rule requires the filing of IME reports within 10 business days rather than 10 calendar days. Prior to this rule medical providers authorized to conduct IMEs and IME entities hired to perform administrative functions for IME examiners, such as filing the report with the Board, had less time to file such reports. Self-insured local governments and small employers, who are not authorized or registered with the Chair to perform IMEs or related administrative services, are not required to take any action to comply with this rule. As noted above, WCL § 137(1)(a) does not permit self-insured employers or insurance carriers to file IME reports with the Board. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Professional services:

It is believed that no professional services will be needed to comply with this rule.

4. Compliance costs:

This proposal will not impose any compliance costs on small business or local governments. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

5. Economic and technological feasibility:

No implementation or technology costs are anticipated for small businesses and local governments for compliance with the proposed rule. Therefore, it will be economically and technologically feasible for small businesses and local governments affected by the proposed rule to comply with the rule.

6. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impacts due to the current regulations for small businesses and local governments. This rule provides only a benefit to small businesses and local governments.

7. Small business and local government participation:

The Board received input from a number of small businesses who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule applies to all claimants, carriers, employers, self-insured employers, independent medical examiners and entities deriving income from independent medical examinations, in all areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

Regulated parties in all areas of the state, including rural areas, will be required to file reports of independent medical examinations within ten business days, rather than ten calendar days, in order that such reports may be admissible as evidence in a workers' compensation proceeding. The new requirement is solely the manner in which the time period to file reports of independent medical examinations is calculated.

3. Costs:

This proposal will not impose any compliance costs on rural areas. The rule solely changes the manner in which a time period is calculated and only requires the use of a calendar.

4. Minimizing adverse impact:

This proposed rule is designed to minimize adverse impact for small businesses and local government that already exist in the current regulations. This rule provides only a benefit to small businesses and local governments.

5. Rural area participation:

The Board received input from a number of entities who derive income from independent medical examinations, some providers of independent medical examinations and the Medical Legal Consultants Association, Inc. which is a non-for-profit association of independent medical examination firms and practitioners across the State.

Job Impact Statement

The proposed regulation will not have an adverse impact on jobs. The regulation merely modifies the manner in which the time period to file a written report of an independent medical examination is filed and clarifies the meaning of the word "filed". These regulations ultimately benefit the participants to the workers' compensation system by providing a fair time period in which to file a report.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Medical, Podiatry, Chiropractic and Psychology Fee Schedules

I.D. No. WCB-38-10-00008-P

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

Proposed Action: Amendment of sections 329.3, 333.2, 343.2, 348.2, 401.2, 401.4, 401.5, 401.6, 411.2, 411.4, 411.5 and 411.6 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13(a), 13-k, 13-l, 13-m, 117(a) and 157(4); and Volunteer Firefighters' Benefit Law & Volunteer Ambulance Workers' Benefit Law, sections 16, 57 and 58

Subject: Medical, Podiatry, Chiropractic and Psychology Fee Schedules.

Purpose: Adopt updated Medical, Podiatry, Chiropractic and Psychology Fee Schedules.

Text of proposed rule:

Section 329.3 of Title 12 NYCRR is amended to read as follows:

(a) The medical fee schedule for medical, physical therapy and occupational therapy services shall be the Official New York Workers' Compensation Medical Fee Schedule, updated [April 1, 2006] *December 1, 2010*, prepared by the Board and published by Ingenix, Inc., which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Medical Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, [41 State Street] *One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the Board. Copies may be purchased from Ingenix, Inc., by writing to New York Workers' Compensation Medical Fee Schedule, c/o Ingenix, Inc., PO Box 27116, Salt Lake City, UT 84127-0116, or by telephone at 1-800-464-3649.

Section 333.2 of Title 12 NYCRR is amended to read as follows:

(a) The psychology fee schedule for psychology services shall be the Official New York Workers' Compensation Psychology Fee Schedule, updated [April 1, 2006] *December 1, 2010*, prepared by the Board and published by Ingenix, Inc., which is hereby incorporated herein by reference.

(b) The Official New York Workers' Compensation Psychology Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, [41 State St.] *One Commerce Plaza, 99 Washington Avenue*, Albany, New York 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the Board. Copies may be purchased from Ingenix, Inc., by writing to New York Workers' Compensation Medical Fee Schedule, c/o Ingenix, Inc., PO Box 27116, Salt Lake City, UT 84127-0116, or by telephone at 1-800-464-3649.

Section 343.2 of Title 12 NYCRR is amended to read as follows:

(a) The podiatry fee schedule for podiatry services shall be the Official New York Workers' Compensation Podiatry Fee Schedule, updated [April 1, 2006] *December 1, 2010*, prepared by the Board and published by Ingenix, Inc., which is hereby incorporated herein by reference.

(b) The Official New York Workers' Compensation Podiatry Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, [41 State Street] *One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the Board. Copies may be purchased from Ingenix, Inc., by writing to New York Workers' Compensation Medical Fee Schedule, c/o Ingenix, Inc., PO Box 27116, Salt Lake City, UT 84127-0116, or by telephone at 1-800-464-3649.

Section 348.2 of Title 12 NYCRR is amended to read as follows:

(a) The chiropractic fee schedule for chiropractic services shall be the Official New York Workers' Compensation Chiropractic Fee Schedule, [First Edition, August 1996, amended September 1997] *updated December 1, 2010*, prepared by the Workers' Compensation Board and published by *Ingenix, Inc.* [Medicode Publications], which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Chiropractic Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, [41 State Street] *One Commerce Plaza, 99 Washington Avenue*, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the Workers' Compensation Board [in Albany, Binghamton, Brooklyn, Buffalo, Hempstead, Rochester and Syracuse]. Copies may be purchased from [Medicode] *Ingenix, Inc.*, by writing to New York Workers' Compensation Medical Fee Schedule, c/o *Ingenix, Inc.*, PO Box 27116, Salt Lake City, UT 84127-0116, or by telephone at 1-800-464-3649 [Medicode, Inc., Dept. CH 10928, Palatine, IL 60055-0928, or by telephone at 1-800-765-6023].

Section 401.2 of Title 12 NYCRR is amended to read as follows:

The fee schedule for medical treatment and care rendered under the Volunteer Firefighters' Benefit Law shall be the medical fee schedule in effect under the Workers' Compensation Law of the State of New York applicable to medical services, as set forth in sections 329.1 through 329.3 of this Title, on the date on which the medical services were rendered, regardless of the date of accident [on or after October 1, 1997 shall be the schedule of fees for medical treatment and care under the Workers' Compensation Law of the State of New York applicable to medical services rendered on or after October 1, 1997, as set forth in sections 329.1 through 329.3 of this Title]. This medical fee schedule is applicable in accordance with section 329.1 of this Title. [The fee schedule for medical treatment and care rendered under the Volunteer Firefighters' Benefit Law on a date prior to October 1, 1997 shall be the schedule of fees for medical treatment and care under the Workers' Compensation Law of the State of New York in effect on the date on which the medical services were rendered, regardless of the date of accident.]

Section 401.4 of Title 12 NYCRR is amended as follows:

The fee schedule for podiatry treatment and care rendered under the Volunteer Firefighters' Benefit Law [on or after October 1, 1997] shall be the schedule of fees for podiatry treatment and care under the Workers' Compensation Law of the State of New York [applicable to podiatry services rendered on or after October 1, 1997], as set forth in sections 343.1 and 343.2 of this Title, on the date on which the podiatry services were rendered, regardless of the date of accident. This podiatry fee schedule is applicable in accordance with the provisions of section 343.1 of this Title. [The fee schedule for podiatry treatment and care rendered under the Volunteer Firefighters' Benefit Law on a date prior to October 1, 1997 shall be the schedule of fees for podiatry treatment and care under the Workers' Compensation Law of the State of New York in effect on the date on which the podiatry services were rendered, regardless of the date of accident.]

Section 401.5 of Title 12 NYCRR is amended to read as follows:

The fee schedule for chiropractic treatment and care rendered under the

Volunteer Firefighters' Benefit Law [on or after October 1, 1997] shall be the schedule of fees for chiropractic treatment and care under the Workers' Compensation Law of the State of New York [applicable to chiropractic services rendered on or after October 1, 1997], as set forth in sections 348.1 and 348.2 of this Title, on the date on which the chiropractic services were rendered, regardless of the date of accident. This chiropractic fee schedule is applicable in accordance with the provisions of section 348.1 of this Title. [The fee schedule for chiropractic treatment and care rendered under the Volunteer Firefighters' Benefit Law on a date prior to October 1, 1997 shall be the schedule of fees for chiropractic treatment and care under the Workers' Compensation Law of the State of New York in effect on the date on which the chiropractic services were rendered, regardless of the date of accident.]

Section 401.6 of Title 12 NYCRR is amended to read as follows:

The fee schedule for psychological treatment and care rendered under the Volunteer Firefighters' Benefit Law [on or after October 1, 1997] shall be the schedule of fees for psychological treatment and care under the Workers' Compensation Law of the State of New York [applicable to psychology services rendered on or after October 1, 1997], as set forth in sections 333.1 and 333.2 of this Title, on the date on which the psychological services were rendered, regardless of the date of accident. This psychology fee schedule is applicable in accordance with the provisions of section 333.1 of this Title. [The fee schedule for psychological treatment and care rendered under the Volunteer Firefighters' Benefit Law on a date prior to October 1, 1997 shall be the schedule of fees for psychological treatment in effect on the date on which the psychological services were rendered, regardless of the date of the accident.]

Section 411.2 of Title 12 NYCRR is amended to read as follows:

The fee schedule for medical treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law [on or after October 1, 1997] shall be the schedule of fees for medical treatment and care under the Workers' Compensation Law of the State of New York [applicable to medical services rendered on or after October 1, 1997], as set forth in sections 329.1 through 329.3 of this Title, on the date on which the medical services were rendered, regardless of the date of accident. This medical fee schedule is applicable in accordance with section 329.1 of this Title. [The fee schedule for medical treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law on a date on or after January 1, 1989 and prior to October 1, 1997 shall be the schedule of fees for medical treatment and care under the Workers' Compensation Law of the State of New York in effect on the date on which the medical services were rendered, regardless of the date of accident.]

Section 411.4 of Title 12 NYCRR is amended to read as follows:

The fee schedule for podiatry treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law [on or after October 1, 1997] shall be the schedule of fees for podiatry treatment and care under the Workers' Compensation Law of the State of New York [applicable to podiatry services rendered on or after October 1, 1997], as set forth in sections 343.1 and 343.2 of this Title, on the date on which the podiatry services were rendered, regardless of the date of accident. This podiatry fee schedule is applicable in accordance with section 343.1 of this Title. [The fee schedule for podiatry treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law on a date prior October 1, 1997 shall be the schedule of fees for podiatry treatment and care under the Workers' Compensation Law of the State of New York in effect on the date on which the podiatry services were rendered, regardless of the date of accident.]

Section 411.5 of Title 12 NYCRR is amended to read as follows:

The fee schedule for chiropractic treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law [on or after October 1, 1997] shall be the schedule of fees for chiropractic treatment and care under the Workers' Compensation Law of the State of New York [applicable to chiropractic services rendered on or after October 1, 1997], as set forth in sections 348.1 and 348.2 of this Title, on the date on which the chiropractic services were rendered, regardless of the date of accident. This chiropractic fee schedule is applicable in accordance with section 348.1 of this Title. [The fee schedule for chiropractic treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law on a date on or after January 1, 1989 and prior to October 1, 1997 shall be the schedule of fees for chiropractic treatment and care under the Workers' Compensation Law of the State of New York in effect on the date on which the chiropractic services were rendered, regardless of the date of accident.]

Section 411.6 of Title 12 NYCRR is amended to read as follows:

The fee schedule for psychological treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law [on or after October 1, 1997] shall be the schedule of fees for psychological treatment and care under the Workers' Compensation Law of the State of New York [applicable to psychological services rendered on or after October 1, 1997], as set forth in sections 333.1 and 333.2 of this Title, on the date on which the psychological services were rendered, regardless of the date of accident. This psychology fee schedule is applicable in accordance with

section 333.1 of this Title. [The fee schedule for psychological treatment and care rendered under the Volunteer Ambulance Workers' Benefit Law on a date prior to October 1, 1997 shall be the schedule of fees for psychological treatment in effect on the date on which the psychological services were rendered, regardless of the date of accident.]

Text of proposed rule and any required statements and analyses may be obtained from: Cheryl M Wood, NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory Authority

The Chair of the Workers' Compensation Board (WCB) is authorized to promulgate fee schedules governing the charges for medical treatment and care within the workers' compensation system. Workers' Compensation Law (WCL) § 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the WCL and the Labor Law. WCL § 13(a) requires employers to promptly provide medical, surgical, and other attendance or treatment, and nurse and hospital services, among other things to injured workers for as long as the nature of the injury requires. Subdivision (a) mandates that the Chair prepare and establish a schedule for the state, or schedules for different regions of the state, of the fees and charges for the medical treatment and care employers must provide. Such schedule or schedules must be promulgated by regulation. WCL §§ 13-k, 13-l, and 13-m authorize treatment by podiatrists, chiropractors and psychologists, respectively, within the appropriate scope of practice for injuries covered by the WCL and require the Chair to prepare and establish fee schedules for podiatry, chiropractic, and psychological services, respectively, through regulation.

WCL § 157(4) defines "this chapter" to include the Volunteer Firefighters' Benefit Law (VFBL) and Volunteer Ambulance Workers' Benefit Law (VAWBL). Section 16 of both the VFBL and VAWBL incorporates the provisions of WCL §§ 13 through 13-m and makes them applicable to injured volunteer firefighters, volunteer ambulance workers, and political subdivisions. Section 57 of both the VFBL and VAWBL provides that the provisions of WCL Article 7, of which WCL § 117 is part, are applicable to the VFBL and VAWBL as if fully set forth in those laws. Finally, section 58 of both the VFBL and VAWBL provides that all the powers and duties conferred upon the Chair by the WCL which are necessary to administer those laws are applicable to the VFBL and VAWBL.

2. Legislative Objectives

The WCL, and the VFBL and VAWBL through incorporation, require the Chair to set fee schedules for medical treatment provided to injured workers, volunteer firefighters, and volunteer ambulance workers. The proposed regulations incorporate by reference the latest versions of the workers' compensation fee schedules for medical, podiatry, chiropractic, and psychological treatment of injured or ill workers, volunteer firefighters, and volunteer ambulance workers. The updated fee schedules accomplish the following: (1) increase the fees for Evaluation and Management (E&M) service by 30%; (2) change the Chiropractic fee schedule to allow for separate billing of treatment modalities rather treating such treatment as part of E&M services; (3) modify ground rules to be consistent with the Medical Treatment Guidelines which will be effective at approximately the same time; (4) adjust for new, modified, and deleted Current Procedural Terminology (CPT) codes; and (5) minor typographical clarifications to the previous fee schedules.

3. Needs and Benefits

The workers' compensation fee schedules regulate the amount that providers can charge for medical treatment and care in the workers' compensation system. The Chair, in conjunction with Ingenix which publishes the fee schedules, periodically reviews and revises the fee schedules to reflect changes to the CPT codes made by the AMA and to make such other changes as deemed necessary or desirable.

The proposed regulations are necessary to implement the revisions to the fee schedules and to make them applicable to treatment provided under the WCL, VFBL, and VAWBL. Several Board regulations refer to the most recent workers' compensation fee schedule as the applicable fee schedule. The proposed regulatory amendments simply replace the April 1, 2006 version of the medical, podiatry, and psychology fee schedules, and the August 1996 version, amended September 1997, of the chiropractic fee schedule with the updated December 1, 2010, versions.

The increase to the Evaluation and Management (E&M) fee schedule in the updated December 1, 2010, versions is critical to ensuring high quality medical care in the workers' compensation system. E&M compensates all

providers for office visits. The E&M services are critical to effective diagnosis, treatment, and recovery from workplace injuries. New York's E&M rates for workers' compensation have not increased in more than fifteen years, are the lowest in the country, and significantly below Medicare. A 30% increase will make workers' compensation rates more competitive and help retain and attract quality providers.

The existing Chiropractic fee schedule includes the following ground rule: "Fees for chiropractic treatment and modalities are included in the evaluation and management service billed." As a result, chiropractors do not have to identify the types of treatment and modalities provided in their billing. New Medical Treatment Guidelines that are proposed to go into effect this year set a mandatory standard of care for treatment of the back, neck, shoulder and knee. The guidelines recommend treatment, including limitations on the number and frequency of chiropractic treatment, according to treatment modality. In order to effectively monitor compliance with the medical treatment guidelines, the Chiropractic fee schedule must change from the current office visit-based billing to modality-based billing. Modality-based billing is used currently for physical medicine (including physical and occupational therapists) in New York and is the norm for reimbursement of chiropractic services in other states.

The medical treatment guidelines contain other recommendations and requirements that are inconsistent with existing fee schedule ground rules. For example, the guidelines include specific standards for when it is appropriate to repeat particular diagnostic tests. They also provide specific standards for when evaluation and reevaluation of a patient is recommended. The December 1, 2010, fee schedule modifies a number of fee schedule ground rules to make them consistent with the medical treatment guidelines and adds a ground rule clarifying that the medical treatment guidelines are to be followed unless a variance is approved. This will ensure consistent application and ease of use of both the guidelines and the fee schedule.

The schedules utilize standard CPT codes, which are developed by the American Medical Association (AMA). The AMA regularly reviews and revises its CPT codes to accurately reflect changes in medical procedures. The most recent revisions to the fee schedules will become effective December 1, 2010. The updated fee schedules add 283 new CPT codes, change 115 CPT codes, and delete 145 CPT codes, compared to the 2008 fee schedules.

The schedules make several changes to clarify existing ground rules. For example, the updated fee schedules add "relative value" to "units" in Ground Rule 8 of the Physical Medicine schedule to clarify the meaning of units. For each procedure, there is a Relative Value Unit (RVU) that is multiplied by a Conversion Factor (CF) to get a fee for the treatment. For example, 15 minutes of electrical stimulation is worth 2.45 RVU, or \$15.90 in Region 1. In Physical Medicine, there is a Ground Rule that limits the provider to 8 RVUs per session (\$51.92 in region 1), but it uses the term 8 "units." The term unit is sometimes misunderstood to mean a unit of treatment (i.e. one 15 minute "unit" of electrical stimulation). If that were the case, one could bill 8 units (120 minutes) of electrical stimulation for 19.6 RVUs or \$127.20.

4. Costs

The increase in E&M fees is estimated to cost approximately \$45 million throughout the system, but those costs are expected to be more than offset by cost reductions from reduced medical costs elsewhere in the system as a result of a number of changes including diagnostic treatment networks, medical treatment guidelines, and changes to the frequency of medical reports required for ongoing disability payments. Using the New York State Insurance Fund's medical payment data an estimate was developed of what the 30% increase would cost if there was no change in utilization. However, with the medical treatment guidelines, less utilization is expected.

The changes to the Chiropractic fee schedule allow chiropractors to bill for treatment modalities performed during the visit. Currently, chiropractors only bill by office visit. During a visit a chiropractor may perform more than one modality, which may result in higher maximum payments for a particular date of service, depending on the treatment modalities that are used. The maximum rates range between 30% and 42% higher than the corresponding rates in the previous fee schedule. The medical treatment guidelines include limits on chiropractic treatments that are expected to reduce the overall system cost of chiropractic care, notwithstanding the fee increases.

Medical providers, self-insured employers, insurance carriers, the State Insurance Fund, and third-party administrators will have to purchase the new fee schedules from Ingenix. The cost for all of the new fee schedules in hard copy is \$85.00 plus the cost of shipping and tax, while the cost for the individual version of the chiropractic, podiatry, or psychology fee schedule will cost \$25.00 plus the cost of shipping and tax for a hard copy version. The fee schedules can also be purchased on CD for \$400.00 plus the cost of shipping and tax.

5. Local Government Mandates

The rule only imposes mandates on local governments, including some volunteer fire departments, which are self-insured. The mandates on local governments are the same as those imposed on private self-insured employers, insurance carriers, the State Insurance Fund, and third party administrators. Self-insured local governments will need to incorporate the new fee schedules into their processes to properly reimburse medical providers for services rendered.

6. Paperwork

There is no additional paperwork to be completed as a result of the proposed changes however payers and medical providers will need to acquire a copy of the new fee schedules.

7. Duplication

The proposed regulation does not duplicate or conflict with any state or federal requirements.

8. Alternatives

The Chair is required to set fee schedules by statute. The Chair considered increasing the E&M services by a smaller or greater amount. The Chair determined that 30% was the optimal increase for next year based on a balance of trying to keep workers' compensation rates reasonable while also ensuring that medical providers are paid a fair rate and continue to treat injured workers.

One alternative would be to continue to have chiropractors bill for an office visit rather than for the modalities performed during such visit. However, chiropractors would not be reporting the modalities performed and as the Medical Treatment Guidelines recommend treatment by modality, it would be impossible to track compliance with the guidelines. The Chair could have imposed an alternative reporting mechanism for treatment modalities that would not be tied to the reimbursement rate, but it would create additional burdens on both provider and payer.

Another alternative would have been to move to a relative value based fee schedule, such as Medicare, and increase reimbursements. Such a move requires careful study and consideration to ensure it provides appropriate reimbursements and its effects on the entire workers' compensation system. Over the next 12 to 18 months the entire fee schedule will be reviewed to determine the proper reimbursement to attract highly qualified providers and promote appropriate care of injured workers, without raising workers' compensation insurance rates to unreasonable levels. At this time the Chair does not have the information necessary to make such a change.

9. Federal Standards

There are no federal standards applicable to reimbursement amounts and ground rules for services to treat injuries and illnesses covered by the New York WCL. The Board's medical, podiatric, psychological, and chiropractic fee schedules rely on CPT codes, which are the standard medical procedure codes used for health care fee schedules. Medicare uses the Healthcare Common Procedure Coding System (HCPCS), which is also based on CPT codes. The actual reimbursement levels and the ground rules for calculating such fees are not identical to Medicare or any other system.

10. Compliance Schedule

The revised fee schedule will go into effect December 1, 2010.

Regulatory Flexibility Analysis

1. Effect of Rule:

Small businesses and local governments whose only involvement with the workers' compensation system is that they are employers and are required to have coverage will not be affected by this rule. Small businesses and local governments are required to maintain workers' compensation coverage, either through an insurance policy or by self-insurance, as either a stand-alone self-insured employer or as a member of a group self-insurance trust. Generally, small businesses cannot afford to meet the requirements to be individually self-insured but rather purchase workers' compensation coverage from the State Insurance Fund or a private insurance carrier authorized to write workers' compensation insurance in New York or join a group self-insured trust. It is the entity providing coverage for the small employer that must comply with all of the provisions of this rulemaking, not the covered employer. Group self-insured trusts and third party administrators hired by private insurance carriers and group self-insured trusts may be small businesses impacted by this regulation. Medical Providers authorized by the Chair to treat claimants, some of whom may be small businesses, will be affected by this rule. The Chair authorizes over 20,000 medical providers to treat claimants.

The State Insurance Fund and all private insurance carriers are not small businesses and therefore the effect on them is not discussed in this document.

Approximately 2,511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. Those local governments who are not self-insured and do not own and/or operate a hospital will not be affected by this rule.

The proposed rule updates the medical, podiatric, psychological, and

chiropractic fee schedules ("fee schedules") that apply to all medical providers, insurers, self-insured employers, group self-insurance trusts, and third-party administrators. The updated fee schedules accomplish the following: (1) increase the fees for Evaluation and Management (E&M) service by 30%; (2) changing the Chiropractic fee schedule to allow for separate billing of treatment modalities rather than treating such treatment as part of E&M services; (3) modifying ground rules to be consistent with the Medical Treatment Guidelines that are expected to be adopted in October 2010; (4) adjusting for new, modified, and deleted Current Procedural Terminology (CPT) codes; and (5) minor typographical clarifications to the previous fee schedules.

2. Compliance Requirements:

The workers' compensation fee schedules are mandatory for all medical providers, insurance carriers, self-insured employers, group self-insurance trusts, and third-party administrators. Medical providers will be required to bill in accordance with the updated fee schedules and payers will be required to pay according to them. Chiropractors will now be required to bill by modalities.

3. Professional Services:

It is not expected that the updated fee schedules will create any additional need for professional services. Many self-insured local governments and group self-insurance trusts already utilize third party administrators or other professional services to assist with the calculation of payments under the fee schedules. The updated fee schedules do not significantly change the nature of the medical fee schedules and do not impose any greater need for professional services.

4. Compliance Costs:

The updated fee schedules entail some additional costs for medical services in the form of higher Evaluation and Management and modified chiropractic fees. The additional costs are expected to be more than offset by savings from other workers' compensation medical reforms, including medical treatment guidelines and diagnostic imaging networks. In addition, competitive reimbursement rates are essential to attracting high quality medical providers, which are necessary to prevent over utilization of medical care and speed return to work.

The changes to the Chiropractic fee schedule allow chiropractors to bill for the modalities performed during the visit, up to a cap set in the fee schedule. During a visit a chiropractor will usually perform more than one modality. Under the new fee schedule the chiropractor will bill for each modality up to the set caps which will result in higher maximum payments for a particular date of service, depending on the treatment modalities that are used. The maximum rates range between 30% and 42% higher than the corresponding rates in the previous fee schedule, which only allowed for billing for an office visit. The medical treatment guidelines include limits on chiropractic treatments that are expected to reduce the overall system cost of chiropractic care, notwithstanding the fee increases.

Medical providers, self-insured employers, insurance carriers, the State Insurance Fund, and third-party administrators will have to purchase the new fee schedules from Ingenix. The cost for all of the new fee schedules in hard copy is \$85.00 plus the cost of shipping and tax, while the cost for the individual version of the chiropractic, podiatry, or psychology fee schedule will cost \$25.00 plus the cost of shipping and tax for a hard copy version. The fee schedules can also be purchased on CD for \$400.00 plus the cost of shipping and tax.

5. Economic and Technological Feasibility:

There are no additional implementation or technology costs to comply with this rule. Small businesses and local governments are already subject to the fee schedules and the changes to the fee schedules do not impose any significant implementation or technological burdens. Ingenix produces the workers' compensation fee schedule for the Board and will have updated fee schedules available for purchase before the effective date.

6. Minimizing Adverse Impact:

The Chair considered increasing the reimbursement for E&M services by a smaller and greater amount. The Chair determined that 30% was the optimal increase for next year based on a balance of trying to keep workers' compensation rates in check while also ensuring that medical providers are paid a fair rate and continue to treat injured workers.

Due to the provisions in the medical treatment guidelines, the Chiropractic Fee Schedule must be modified to alter the manner in which chiropractors bill for their services. Allowing chiropractors to bill by treatment modality enables providers and payers to effectively track compliance with the treatment guidelines. The Chair could have imposed an alternative reporting mechanism for treatment modalities that would not be tied to the reimbursement rate, but it would create additional burdens on both provider and payer.

The proposed regulations should have no adverse impact on medical providers, self-insured employers, group self-insured trusts, and third-party administrators who are small businesses or local governments. The additional cost associated with higher reimbursement rates should be more than offset by the elimination of unnecessary and ineffective treatment as

a result of the medical treatment guidelines. Also, competitive reimbursement rates are necessary to retain and attract high quality providers who are cost-efficient because they assist injured workers to recover and return to work without prescribing unnecessary treatment for their own personal gain.

7. Small Business and Local Government Participation:

The Chair solicited input from the Business Council of the State of New York (BCSNY), the state AFL-CIO, the Medical Society of the State of New York (MSSNY), the New York State Chiropractic Association (NYSCA). Many of the members of the MSSNY, BCSNY, and NYSCA are small businesses. The Chair also solicited input from the New York State Association of Counties (NYSAC), Association of Towns of the State of New York, New York Conference of Mayors (NYCOM), New York State Association of Self-Insured Counties (NYSASIC), and New York City Law Department.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule incorporating the medical, podiatric, psychological, and chiropractic fee schedules ("fee schedules") will apply to all medical providers authorized to treat workers' compensation claimants, insurance carriers, the State Insurance Fund, self-insured employers, self-insured local governments, group self-insured trusts, and third party administrators across the state. These individuals and entities exist and do business in all rural areas of the state.

2. Reporting, recordkeeping and other compliance requirements:

The workers' compensation fee schedules are mandatory for all medical providers, insurance carriers, self-insured employers, group self-insurance trusts, and third-party administrators, including those in rural areas. Medical providers will be required to bill in accordance with the updated fee schedules and payers will be required to pay according to them. Chiropractors will now be required to bill by modalities. The new fee schedules do not create any new reporting, recordkeeping or other compliance requirements.

3. Costs:

The fee schedules break the state into four regions. The reimbursement rate is different for each region. The rural areas of the state are in Region I which provides the lowest reimbursement, while NYC comprises Region IV which provides the highest reimbursement. The proposed regulations raise the reimbursement level for Evaluation and Management (E&M) services 30%, including those provided in rural areas, and change the reimbursement methodology for chiropractic services. The additional costs are estimated at approximately \$45 million per year and are expected to be more than offset by savings from additional workers' compensation medical reforms, including medical treatment guidelines and diagnostic imaging networks.

The proposed regulations would modify the billing and reimbursement methodology for chiropractic services, including those in rural areas. Currently, chiropractors bill by office visit and not by the treatment modalities performed. The new Chiropractic Fee Schedule allows chiropractors bill for each modality performed, up to the set cap. This change increases the maximum reimbursement for a single office visit by 30-42%, depending on the type of visit (initial evaluation, reevaluation, or treatment only), but will be more than offset by the reduction in unnecessary chiropractic services as a result of the medical treatment guidelines.

Medical providers, self-insured employers, insurance carriers, the State Insurance Fund, and third-party administrators, including those in rural areas, will have to purchase the new fee schedules from Ingenix. The cost for all of the new fee schedules in hard copy is \$85.00 plus the cost of shipping and tax, while the cost for the individual version of the chiropractic, podiatry, or psychology fee schedule will cost \$25.00 plus the cost of shipping and tax for a hard copy version. The fee schedules can also be purchased on CD for \$400.00 plus the cost of shipping and tax.

4. Minimizing adverse impact:

The Chair considered increasing the reimbursement for E&M services by a smaller and greater amount. The Chair determined that 30% was the optimal increase for next year based on a balance of trying to keep workers' compensation rates in check while also ensuring that medical providers are paid a fair rate and continue to treat injured workers. The 30% increase is the same across all of the state, including rural areas. The Chair did not consider increasing the reimbursement for E&M by different percentages due to location because the fee schedules are already divided into four regions with greater reimbursements for suburban and urban areas.

Due to the provisions in the medical treatment guidelines, the Chiropractic Fee Schedule must be modified to alter the manner in which chiropractors bill for their services. Allowing chiropractors to bill by treatment modality enables providers and payers to effectively track compliance with the treatment guidelines. The Chair could have imposed an alternative reporting mechanism for treatment modalities that would not be tied to the reimbursement rate, but it would create additional burdens on both provider and payer.

The proposed regulations should have no adverse impact on claimants, carriers, self-insured employers, and medical providers in any part of the state, including rural areas. The additional cost associated with higher reimbursement rates should be more than offset by the elimination of unnecessary and ineffective treatment as a result of the medical treatment guidelines. Also, competitive reimbursement rates are necessary to retain and attract high quality providers who are cost-efficient because they assist injured workers to recover and return to work without prescribing unnecessary treatment for their own personal gain.

5. Rural area participation:

The Chair solicited input from the Medical Society of the State of New York (MSSNY) and the New York State Chiropractic Association (NYSCA). Both organizations have members all across the state, including rural areas. MSSNY has indicated that an E&M increase is critical to retaining quality medical providers, particularly in rural areas. The Chair also sought input from the Business Council of the State of New York (BCSNY) and the state AFL-CIO, both of which represent organizations and members in rural areas. Finally, the Chair solicited input from the New York State Association of Counties (NYSAC), Association of Towns of the State of New York, New York Conference of Mayors (NYCOM), and New York State Association of Self-Insured Counties (NYSASIC), which have members in rural areas of the state.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. This rule incorporates updated medical, psychological, podiatric, and chiropractic fee schedules as the controlling fee schedules for all treatment provided under the Workers' Compensation Law, the Volunteer Firefighters' Benefit Law and the Volunteer Ambulance Workers' Benefit Law. The updated fee schedules include an increase of 30% for the reimbursement of Evaluation & Management (E & M) services, except for chiropractic and physical medicine services, and modifies the ground rules to permit chiropractors to bill by modalities rather than just for an office visit. The increase in the reimbursement for E & M services is necessary as the reimbursement rate is the lowest workers' compensation fee schedules in the United States and is significantly lower than Medicare. Competitive reimbursement rates are necessary to retain and attract high quality providers who are cost-efficient because they assist injured workers to recover and return to work without prescribing unnecessary treatment for their own personal gain. The medical treatment guidelines being adopted by the Chair reference chiropractic services by modalities not by office visit. Therefore, so that the chiropractic fee schedule is consistent with the medical treatment guidelines, it must be modified to permit chiropractors to report and bill by modality rather than by office visit alone. While these changes are expected to increase costs by approximately \$45 million, such increase will be more than offset by savings from other changes such as the implementation of medical treatment guidelines and diagnostic networks.