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.

Banking Department

EMERGENCY RULE MAKING

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. BNK-39-10-00009-E
Filing No. 944
Filing Date: 2010-09-03
Effective Date: 2010-09-06

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

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

Statutory authority: Banking Law, art. 12-D

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

Specific reasons underlying the finding of necessity: Chapter 472 of the Laws of 2008, which requires mortgage loan servicers to be registered with the Superintendent, goes into effect on July 1, 2009. These regulations implement the registration requirement. It is therefore necessary that servicers be informed of the details of the registration process sufficiently far in advance to permit applications for registrations to be prepared, submitted and reviewed by the effective date.

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

Purpose: To require that persons or entities which service mortgage loans on residential real property on or after July 1, 2009 be registered with the Superintendent of Banks.

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

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

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

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

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

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

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

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

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

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

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

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

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

The Superintendent is empowered to waive, reduce or modify the financial responsibility requirements for certain servicers who service not more than 12 mortgage loans or an aggregate amount of loans not exceeding $5,000,000, whichever is less.

Section 418.13 applies similar financial responsibility requirements to

''Exempted Persons'' who are not subject to the requirement to register as servicers. Such persons include mortgage bankers, mortgage brokers and most banking institutions and insurance companies.

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

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

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires December 1, 2010.

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

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Legislative Objectives.

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

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

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

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

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

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

3. Needs and Benefits.

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

Currently, the Department regulates the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also may act as agents for owners of mortgages in negotiations relating to modifications. As ''middlemen,'' moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

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

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

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

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

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

4. Costs.

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

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

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

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

5. Local Government Mandates.

None.

6. Paperwork.

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

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

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

7. Duplication.

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

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

8. Alternatives.

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

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

9. Federal Standards.

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

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

10. Compliance Schedule.

The emergency regulations will become effective on September 23, 2009. Substantially similar emergency regulations have been in effect since July 1, 2009.

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

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

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

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

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

7. Small Business and Local Government Participation:

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

Rural Area Flexibility Analysis

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

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

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

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

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

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

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

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

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

Job Impact Statement

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

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

The registration process itself should not have an adverse effect on

employment. The regulations require the use of the internet-based National Mortgage Licensing System and Registry, developed by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators. This system uses a common on-line application for servicer registration in New York and other participating states. It is believed that any remaining adverse impact would be due primarily to the nature and purpose of the statutory registration requirement rather than the provisions of the emergency regulations.

EMERGENCY RULE MAKING

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

I.D. No. BNK-39-10-00010-E

Filing No. 945

Filing Date: 2010-09-03

Effective Date: 2010-09-06

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

Action taken: Repeal of Part 420 and Supervisory Procedures MB 107 and MB 108; and addition of new Part 420 and Supervisory Procedure MB 107 to Title 3 NYCRR.

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

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

Specific reasons underlying the finding of necessity: Article 12-E of the Banking Law provides for the regulation of mortgage loan originators (MLOs). Article 12-E was recently amended in order to conform the regulation of MLOs in New York to new federal legislation (Title V of the Housing and Economic Recovery Act of 2008, known as the ''SAFE Act'').

The SAFE Act authorized the federal Department of Housing and Urban Development (''HUD'') to assume the regulation of MLOs in any state that did not enact acceptable implementing legislation by August 1, 2009. In response, the Legislature enacted revised Article 12-E.

The emergency rulemaking revises the existing MLO regulations, which implement the prior version of Article 12-E, to conform to the changes in the statute.

Under the new legislation, MLOs, including those already engaged in the business of originating mortgage loans, must complete new education, testing and bonding requirements prior to licensure. Meeting these requirements will likely entail significant time and effort on the part of individuals subject to the revised law and regulations.

Emergency adoption of the revised regulations is necessary in order to afford such individuals sufficient advance notice of the new substantive rules and licensing procedures for MLOs that they will have an adequate opportunity to comply with the new licensing requirements and in order to protect against federal preemption of the regulation of MLOs in New York.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 107.5 covers inactive status.

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

Supervisory Procedure MB 108 is hereby repealed.

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 1, 2010.

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

Regulatory Impact Statement

1. Statutory Authority.

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

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

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

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

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

Section 599-d sets out the process for obtaining an MLO license. It also sets out the Department's authority for imposing fees, the authority of the NMLS to collect such fees, the ability of the Superintendent to modify the requirements of Article 12-E in order to ensure compliance with the SAFE Act, the requirement that filings be made electronically and required background information from all applicants.

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

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

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

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

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

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

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

2. Legislative Objectives.

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

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

1. The definition of a mortgage loan originator is broadened to include any individual who takes a mortgage application or offers or negotiates the terms of the mortgage with a consumer.
2. Individuals who originate loans on manufactured homes will be subject to the regulation for the first time.
3. If licensing of individuals who work for mortgage loan servicers and who engage in loan modification activities is required by the U.S. Department of Housing and Urban Development, such individuals may be subject to the licensing requirements of the new law and to the new regulation.
4. Individuals who have applied for ''authorization'' under the prior version of Article 12-E and Part 420 have a simplified process for becoming licensed and may continue to originate loans until they are licensed under the revised regulation or their applications are denied.
5. Individuals with a felony conviction within the last seven years or a felony conviction for fraud at any time are now prohibited from being licensed as MLOs in New York State.
6. Individuals must satisfy new pre-license education and testing requirements. There also are new bonding requirements and continuing education requirements.
7. A license automatically terminates if the licensee does not pay his or her annual license renewal fee or take the requisite amount of continuing education credits. The authority of the Superintendent to suspend an individual for good cause also has been clarified.

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

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

3. Needs and Benefits.

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

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

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

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

4. Costs.

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

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

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

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

5. Local Government Mandates.

None.

6. Paperwork.

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

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

7. Duplication.

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

8. Alternatives.

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

9. Federal Standards.

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

10. Compliance Schedule.

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

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

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

7. Small Business and Local Government Participation:

See response to Item 6 above.

Rural Area Flexibility Analysis

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

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

Costs. Some mortgage businesses in rural areas may choose to pay the increased costs associated with the continuing education requirements and the fees associated with licensing and annual renewal of their MLOs, but are not required to do so. The regulation sets forth a background investigation fee of $125.00, an initial license processing fee of $50.00 and an annual license renewal fee of $50.00. There will also be a fee for the processing of fingerprints and fees to cover the cost of third party processing of the application. The latter two fees will be posted on the Department's website. Costs associated with electronic filing of quarterly employment reports and retaining for six years evidence of completion by MLOs of required continuing education courses are expected to be minimal. The cost of continuing education is estimated to be approximately $500 every two years. The Department's increased effectiveness in fighting mortgage fraud and predatory lending will lower costs related to litigation and will decrease losses to consumers and the mortgage industry by hundreds of millions of dollars.

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

The revised regulations implement revised Article 12-E of the Banking Law, which in turn closely tracks the provisions of Title V of the federal Housing and Economic Recovery Act of 2008, also known as the S.A.F.E. Mortgage Licensing Act (the ''SAFE Act''). Hence, the licensing and regulation of mortgage loan originators in New York now closely tracks

the federal standard. If New York did not adopt this standard, the SAFE Act requires that the federal Department of Housing and Urban Development assume the licensing of MLOs in New York State.

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

Job Impact Statement

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

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

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

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

Office of Children and Family Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Amendment of the Definition of a Child for the Purpose of Adoption Subsidy and the Criteria for the Continuation of Subsidies

I.D. No. CFS-39-10-00003-P

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

Proposed Action: This is a consensus rule making to amend section 421.24 of Title 18 NYCRR.

Statutory authority: Social Services Law, sections 20(3)(d), 34(f), 450-458; L. 1997, ch. 436

Subject: Amendment of the definition of a child for the purpose of adoption subsidy and the criteria for the continuation of subsidies.

Purpose: To implement amendments required by Chapter 518 of the Laws of 2006.

Text of proposed rule: Paragraph (1) of subdivision (a) of section 421.24 is amended to read as follows:

(a) Definitions. (1) Child means a person under the age of 21 years whose guardianship and custody have been committed to a social services official or a voluntary authorized agency, or whose guardianship and custody have been committed to a certified or approved foster parent pursuant to a court order prior to such person's 18th birthday, *except as provided in section 384-b(3)(g) of the Social Services Law and section 631 of the Family Court Act,* or a person under the age of 21 whose care and custody have been transferred prior to such person's 18th birthday to a social services official or a voluntary authorized agency pursuant to section 1055 of the Family Court Act or section 384-a of the Social Services Law, whose parents are deceased or where one parent is deceased and the other parent is not a person entitled to notice of an adoption pursuant to sections 111 and 111-a of the Domestic Relations Law, and where such official or agency consents to the adoption of such person in accordance with section 113 of Domestic Relations Law.

Paragraph (18) of subdivision (c) of section 421.24 is amended to read as follows:

(18) *(i)* Upon the death of the person(s) who adopted the child prior to the 21st birthday of the child, payments made pursuant to this subdivision must continue and must be made to the legal guardian *or custodian* of the child *under the age of 18 upon the issuance of letters of guardianship or order of custody* until the child has attained the age of 21. *If the guardian or custodian was the caretaker of the child under the age of 18 prior to the issuance of letters of guardianship or order of custody, such payments must be made retroactively from the death of the adoptive parent or parents.* All provisions of this section applicable to maintenance payments made to the person(s) who adopted the child will be applicable to maintenance payments made to the legal guardian *or custodian* of the child.

(ii)(a) Upon the death of the sole or surviving adoptive parent or both adoptive parents after the 18th birthday and before the 21st birthday of the adopted child, where such adoptive parent or parents were receiving adoption subsidy payments at the time of death, such subsidy payments must continue, but must be made to the guardian of the child on behalf of such child, where the child consents to the appointment of a guardian. Such subsidy payments must be made retroactively from the death of the adoptive parent or parents to the appointment of a guardian, and must continue until the 21st birthday of the child. If, however, there is no willing or suitable person to be appointed as guardian, or the child does not consent to the appointment of a guardian, such subsidy payments must be made retroactively from the death of the adoptive parent or parents and must continue to be made until the 21st birthday of the child: (1) through direct payments to the child, if the social services official determines that the child demonstrates the ability to manage such direct payments; or (2) to a representative payee certified by the social services official.

(b) Upon receipt of notification of the death of the sole or surviving adoptive parent or both adoptive parents after the 18th birthday and before the 21st birthday of the adopted child, where such adoptive parent or parents were receiving adoption subsidy payments at the time of death, the social services official must notify the child of (1) the processes available to continue subsidy payments until the 21st birthday of the child including appointment of a guardian under the Surrogate's Court Procedure Act, application to be approved for direct subsidy payments, or the appointment of a representative payee; and (2) the right of the child to be involved in all such processes.

(c) Where the social services official has determined that the child does not demonstrate the ability to manage direct subsidy payments, the social services official must certify payment to a representative payee on behalf of the child. Subsidy payments received by the representative payee must be held and used strictly for the use and benefit of the child. Designation of the appropriate entity or individual and investigation of an individual for certification as a representative payee must be conducted by the social services official responsible for payment of the adoption subsidy pursuant to this section.

(1) The social services official may designate an employee of the social services district to be the representative payee responsible for receipt of the adoption subsidy on behalf of the child only where the official determines that such employee has no conflict of interest in performing the duties and obligations as representative payee. If the child resides in a social services district other than the district responsible for payment of the adoption subsidy, the social services district in which the child resides may be designated the representative payee and a social services official of such district must select an employee of such social services district to be responsible for receipt of the adoption subsidy as the representative payee, only where the official determines that such employee has no conflict of interest in performing the duties and obligations as a payee. Where a voluntary authorized agency has a prior relationship with a child, or where the social services district does not have sufficient or appropriate staff available to perform the functions of the representative payee, the social services district may contract with a voluntary authorized agency as the representative payee on behalf of the child where the social services district determines it would be in the best interests of the child to do so.

(2) The social services official may designate an individual for certification as a representative payee who must perform the functions

and duties of a representative payee in accordance with the best interests of the child. In determining whether an individual is appropriate to be certified as the representative payee, the social services official must first consult with the child and must give the child's preferences significant weight. The child's preference must be determinative of the representative payee only where such preference does not conflict with the best interests of the child. Prior to designation of an individual by the social services official for certification as a representative payee, the social services official must:

(i) collect proof of identity and a verifiable social security number of the nominated representative payee;

(ii) conduct an in-person interview of the individual; investigate any potential conflicts of interest that may ensue if such individual is certified and;

(iii) determine the capabilities and qualifications of the individual to manage the subsidy payment for the child.

(3) (i) If, after completion of the investigation, the social services official is satisfied that the individual is qualified, appropriate and will serve the best interests of the child, the social services official must certify the selected individual as the representative payee for the child.

(ii) If the 21st birthday of the child occurs while awaiting the certification of a representative payee, the child is entitled to retroactive direct payment of subsidy payments since the death of the adoptive parent or parents after the 18th birthday of the child.

(4) The representative payee must submit reports to the social services official no less than once a year describing the use of the payments in the preceding year. Such reports must be submitted by December 31st of each year. The social services official may also request reports from time to time from the representative payee. If a representative payee fails to submit a report, the social services official may require that the representative payee appear in person to collect payments. The social services official must keep a centralized file and update it periodically with information including the addresses and social security or tax-payer identification numbers of the representative payee and the child.

(5) The social services official must revoke the certification of a representative payee upon:

(i) determining that the representative payee has misused the payments intended for the benefit of the child;

(ii) the failure of the representative payee to submit timely reports or appear in person as required by the social services official after such failure; or

(iii) the request of the child upon good cause shown.

(6) The social services official must notify the child of the contact information of the representative payee within 5 days of making a decision.

(7) A child may appeal the refusal of the social services official to certify the individual preferred by the child for certification as the representative payee or revoke the certification of a representative payee upon request of the child pursuant to section 455 of the Social Service Law.

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

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

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

Consensus Rule Making Determination

The proposed regulations are intended for the sole purpose of implementing statutory changes enacted by Chapter 518 of the Laws of 2006 and Chapter 469 of the Laws of 2007. The content for the proposed regulations is taken from those statutory changes. The proposed regulations do not reflect any other changes. It is not anticipated that there will be any objection to the proposed regulations.

Job Impact Statement

A full job statement has not been prepared for the proposed regulations dealing with the definition of a child for adoption subsidy purposes and when adoption subsidy payments may continue after the death of the adoptive parent(s). The proposed regulations would not result in the loss of any jobs.

Department of Civil Service

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-51-09-00014-A
Filing No. 929
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Appendix 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To delete a position from and classify a position in the exempt class.

Text or summary was published in the December 23, 2009 issue of the Register, I.D. No. CVS-51-09-00014-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-04-10-00001-A
Filing No. 933
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Appendix 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To delete a position from and classify a position in the exempt class.

Text or summary was published in the January 27, 2010 issue of the Register, I.D. No. CVS-04-10-00001-P.

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

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-04-10-00002-A
Filing No. 930
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Appendix 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To classify a position in the non-competitive class.

Text or summary was published in the January 27, 2010 issue of the Register, I.D. No. CVS-04-10-00002-P.

Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us
Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-04-10-00003-A
Filing No. 935
Filing Date: 2010-09-10
Effective Date: 2010-09-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of Appendix 1 of Title 4 NYCRR.
Statutory authority: Civil Service Law, section 6(1)
Subject: Jurisdictional Classification.
Purpose: To classify a position in the exempt class.
Text or summary was published in the January 27, 2010 issue of the Register, I.D. No. CVS-04-10-00003-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us
Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-04-10-00004-A
Filing No. 934
Filing Date: 2010-09-10
Effective Date: 2010-09-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of Appendix 1 of Title 4 NYCRR.
Statutory authority: Civil Service Law, section 6(1)
Subject: Jurisdictional Classification.
Purpose: To delete a position from and classify a position in the exempt class.
Text or summary was published in the January 27, 2010 issue of the Register, I.D. No. CVS-04-10-00004-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us
Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Supplemental Military Leave Benefits

I.D. No. CVS-05-10-00005-A
Filing No. 939
Filing Date: 2010-09-10
Effective Date: 2010-09-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of sections 21.15 and 28-1.17 of Title 4 NYCRR.
Statutory authority: Civil Service Law, section 6(1)
Subject: Supplemental military leave benefits.
Purpose: To extend the availability of supplemental military leave benefits for certain New York State employees until December 31, 2010.
Text or summary was published in the February 3, 2010 issue of the Register, I.D. No. CVS-05-10-00005-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us
Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-06-10-00006-A
Filing No. 936
Filing Date: 2010-09-10
Effective Date: 2010-09-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of Appendix 1 of Title 4 NYCRR.
Statutory authority: Civil Service Law, section 6(1)
Subject: Jurisdictional Classification.
Purpose: To classify positions in the exempt class.
Text or summary was published in the February 10, 2010 issue of the Register, I.D. No. CVS-06-10-00006-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us
Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-06-10-00007-A
Filing No. 938
Filing Date: 2010-09-10
Effective Date: 2010-09-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of Appendix 1 of Title 4 NYCRR.
Statutory authority: Civil Service Law, section 6(1)
Subject: Jurisdictional Classification.
Purpose: To delete a position from and classify positions in the exempt class.
Text or summary was published in the February 10, 2010 issue of the Register, I.D. No. CVS-06-10-00007-P.
Final rule as compared with last published rule: No changes.
Text of rule and any required statements and analyses may be obtained from: Shirley LaPlante, NYS Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, email: shirley.laplante@cs.state.ny.us
Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-06-10-00008-A
Filing No. 937
Filing Date: 2010-09-10
Effective Date: 2010-09-29

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Amendment of Appendix 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To classify positions in the non-competitive class.

Text or summary was published in the February 10, 2010 issue of the Register, I.D. No. CVS-06-10-00008-P.

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

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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-06-10-00009-A
Filing No. 932
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Appendix 1 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To delete a position from and classify a position in the exempt class.

Text or summary was published in the February 10, 2010 issue of the Register, I.D. No. CVS-06-10-00009-P.

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

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

Assessment of Public Comment
The agency received no public comment.

NOTICE OF ADOPTION

Jurisdictional Classification

I.D. No. CVS-06-10-00010-A
Filing No. 931
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Appendix 2 of Title 4 NYCRR.

Statutory authority: Civil Service Law, section 6(1)

Subject: Jurisdictional Classification.

Purpose: To delete positions from the non-competitive class.

Text or summary was published in the February 10, 2010 issue of the Register, I.D. No. CVS-06-10-00010-P.

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

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

Assessment of Public Comment
The agency received no public comment.

Department of Economic Development

EMERGENCY RULE MAKING

Excelsior Jobs Program

I.D. No. EDV-39-10-00001-E
Filing No. 927
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 Parts 190-196 to Title 5 NYCRR.

Statutory authority: Economic Development Law, art. 17; and L. 2010, ch. 59

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

Specific reasons underlying the finding of necessity: Regulatory action is needed immediately to implement the Excelsior Jobs Program which was created by Chapter 59 of the Laws of 2010. The Excelsior Jobs Program will provide job creation and investment incentives to firms that create and maintain new jobs or make significant financial investment. The Excelsior Jobs Program is one of the State's key economic development tools for ensuring that businesses in the new economy choose to expand or locate in New York State. It is imperative that this Program be implemented immediately so that New York remains competitive with other States, regions, and even countries as businesses make their investment and location decisions. Helping existing New York businesses create new jobs and make significant capital investments with the financial incentives of the Excelsior Jobs Program is equally important and needs to happen now.

The emergency rule is necessary because it establishes the application process, standards for application evaluation and procedures for businesses claiming the tax credit under this Program. Immediate adoption of this rule will enable the State to begin achieving its economic development goals.

It bears noting that section 356 of the Economic Development Law directs the Commissioner of Economic Development to promulgate regulations and explicitly indicates that such regulations may be adopted on an emergency basis.

Subject: Excelsior Jobs program.

Purpose: To create the process by which businesses may apply for and receive the tax credits provided by the Excelsior Jobs Program.

Substance of emergency rule: The regulation creates new Parts 190-196 in 5 NYCRR as follows:

1) The regulation adds the definitions relevant to the Excelsior Jobs Program (the ''Program''). Key definitions include, but are not limited to, certificate of eligibility, certificate of tax credit, industry with significant potential for private sector growth and economic development in the State, preliminary schedule of benefits, regionally significant project and significant capital investment.

2) The regulation creates the application and review process for the Excelsior Jobs Program. In order to become a participant in the Program, an applicant must submit a complete application and agree to a variety of requirements, including, but not limited to, the following: (a) allowing the exchange of its tax information between Department of Taxation and Finance and Department of Economic Development (the ''Department''); (b) allowing the exchange of its tax and employer information between the Department of Labor and the Department; (c) agreeing to be permanently decertified from the empire zones program if admitted into the Excelsior Jobs Program; (d) providing, if requested by the Department, a plan outlining the schedule for meeting job and investment requirements as well as providing its tax returns, information concerning its projected investment, an estimate of the portion of the federal research and development tax credits attributable to its research and development activities

in New York state, and employer identification or social security numbers for all related persons to the applicant.

3) Applicants must also certify that they are in substantial compliance with all environmental, worker protection and local, state and federal tax laws.

4) Upon receiving a complete application, the Commissioner of the Department shall review the application to ensure it meets eligibility criteria set forth in the statute (see 5 below). If it does not, the application shall not be accepted. If it does meet the eligibility criteria, the Commissioner may admit the applicant into the Program. If admitted into the Program, an applicant will receive a certificate of eligibility and a preliminary schedule of benefits. The preliminary schedule of benefits may be amended by the Commissioner provided he or she complies with the credit caps established in General Municipal Law section 359.

5) The regulation sets forth the eligibility criteria for the Program. To be a participant in the program, an applicant must be operating predominantly in a strategic industry and meet the respective job requirements for strategic industries or be a regionally significant project. The strategic industries are specifically delineated in the regulation as follows: (a) financial services data center or a financial services back office operation; (b) manufacturing; (c) software development; (d) scientific research and development; (e) agriculture; (f) back office operations in the state; (g) distribution center; or (h) in an industry with significant potential for private-sector economic growth and development in this state. When determining whether an applicant is operating predominantly in a strategic industry, or as a regionally significant project, the commissioner will examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity.

6) In addition, a business entity operating predominantly in manufacturing must create at least twenty-five net new jobs; a business entity operating predominately in agriculture must create at least ten net new jobs; a business entity operating predominantly as a financial service data center or financial services customer back office operation must create at least one hundred net new jobs; a business entity operating predominantly in scientific research and development must create at least ten net new jobs; a business entity operating predominantly in software development must create at least ten net new jobs; a business entity creating or expanding back office operations or a distribution center in the state must create at least one hundred fifty net new jobs; or a business entity must be a Regionally Significant Project; or a business entity operating predominantly in one of the industries referenced above but which does not meet the job requirements must have at least fifty full-time job equivalents, and must demonstrate that its benefit-cost ratio is at least ten to one (10:1).

7) A business entity must be in substantial compliance with all worker protection and environmental laws and regulations and may not owe past due state or local taxes. Also, the regulation explicitly excludes: a not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, and a business entity engaged predominantly in the retail or entertainment industry, and a company engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity from eligibility for this program.

8) The regulation sets forth the evaluation standards that the Commissioner can utilize when determining whether to admit an applicant to the Program. These include, but are not limited to, the following: (1) whether the Applicant is proposing to substantially renovate contaminated, abandoned or underutilized facilities; or (2) whether the Applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or (3) the degree of economic distress in the area where the Applicant will locate the project identified in its application; or (4) the degree of Applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or (5) the degree to which the project identified in the Application supports New York State's minority and women business enterprises; or (6) the degree to which the project identified in the Application supports the principles of Smart Growth; or (7) the estimated return on investment that the project identified in the Application will provide to the State; or (8) the overall economic impact that the project identified in the Application will have on a region, including the impact of any direct and indirect jobs that will be created; or (9) the degree to which other state or local incentive programs are available to the Applicant; or (10) the likelihood that the project identified in the Application would be located outside of New York State but for the availability of state or local incentives.

9) The regulation requires an applicant to submit evidence of achieving job and investment requirements stated in its application in order to become a participant in the Program. After such evidence is found sufficient, the Department will issue a certificate of tax credit to a participant. This certificate will specify the exact amount of the tax credit components a participant may claim and the taxable year in which the credit may be claimed.

10) A participant's increase in employment, qualified investment, or federal research and development tax credit attributable to research and development activities in New York state above its projections listed in its application shall not result in an increase in tax benefits under this article. However, if the participant's expenditures are less than the estimated amounts, the credit shall be less than the estimate.

11) The regulation next delineates the calculation of the tax credits as described in statute.

12) The tax credit components are refundable. If a participant fails to satisfy the eligibility criteria in any one year, it loses the ability to claim the credit for that year.

13) The regulation requires participants to keep all relevant records for their duration of program participation plus three years.

14) The regulation requires a participant to submit a performance report annually and states that the Commissioner shall prepare a program report on a quarterly basis for posting on the Department's website.

15) The regulation calls for removal of a participant in the Program for failing to meet the application requirements or failing to meet the minimum job or investment requirements of the statute. Upon removal, a participant will be notified in writing and have the right to appeal such removal.

16) The regulation lays out the appeal process for participant's who have been removed from the Program. A participant will have thirty (30) days to appeal to the Department. An appeal officer will be appointed and shall evaluate the merits of the appeal and any response from the Department. The appeal officer will determine whether a hearing is necessary and the level of formality required. The appeal officer will prepare a report and make recommendations to the Commissioner. The Commissioner will then issue a final decision in the case.

The full text of the emergency rule is available at the Department's website at http://www.esd.ny.gov/BusinessPrograms/Excelsior.html.

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: Thomas P. Regan, NYS Department of Economic Development, 30 South Pearl Street, Albany NY 12245, (518) 292-5123, email: tregan@empire.state.ny.us

Regulatory Impact Statement

STATUTORY AUTHORITY:

Chapter 59 of the Laws of 2010 established Article 17 of the Economic Development Law, creating the Excelsior Jobs Program and authorizing the Commissioner of Economic Development to adopt, on an emergency basis, rules and regulations governing the Program.

LEGISLATIVE OBJECTIVES:

The emergency rulemaking accords with the public policy objectives the Legislature sought to advance because they directly address the legislative findings and declarations that New York State needs, as

a matter of public policy, to create competitive financial incentives for businesses to create jobs and invest in the new economy. The Excelsior Jobs Program is created to support the growth of the State's traditional economic pillars including the manufacturing and financial industries and to ensure that New York emerges as the leader in the knowledge, technology and innovation based economy. The Program will encourage the expansion in and relocation to New York of businesses in growth industries such as clean-tech, broadband, information systems, renewable energy and biotechnology.

The emergency rule is specifically authorized by the Legislature.

NEEDS AND BENEFITS:

The emergency rule is required in order to immediately implement the statute contained in Article 17 of the Economic Development Law, creating the Excelsior Jobs Program. The statute directed the Commissioner of Economic Development to adopt regulations with respect to an application process and eligibility criteria and authorized the adoption of such regulations on an emergency basis notwithstanding any provisions to the contrary in the state administrative procedures act.

New York is in the midst of a national economic slowdown that some predict could become a double dip recession or worse. The impact of the national financial crisis and resulting slowed economic growth was particularly devastating to New York State and is having severe consequences on New York's immediate fiscal health and could harm its economic future. The Excelsior Jobs Program will be one of the State's key economic development tools for ensuring that businesses in the new economy choose to expand or locate in New York State. It is imperative that this Program be implemented immediately so that New York remains competitive with other States, regions, and even countries as businesses make their investment and location decisions. Helping existing New York businesses create new jobs and make significant capital investments with the financial incentives of the Excelsior Jobs Program is equally important and needs to happen now.

This rule will establish the process and procedures for launching this new Program in the most efficient and cost-effective manner while protecting all New York State taxpayers with rules to ensure accountability, performance and adherence to commitments by businesses choosing to participate in the Program.

COSTS:

A. Costs to private regulated parties: None. There are no regulated parties in the Excelsior Jobs Program, only voluntary participants.

B. Costs to the agency, the state, and local governments: The Department of Economic Development does not anticipate any significant costs with respect to implementation of this program. There is no additional cost to local governments.

C. Costs to the State government: None. There will be no additional costs to New York State as a result of the emergency rule making.

LOCAL GOVERNMENT MANDATES:

None. There are no mandates on local governments with respect to the Excelsior Jobs Program. This emergency rule does not impose any costs to local governments for administration of the Excelsior Jobs Program.

PAPERWORK:

The emergency rule requires businesses choosing to participate in the Excelsior Jobs Program to establish and maintain complete and accurate books relating to their participation in the Excelsior Jobs Program for a period of three years beyond their participation in the Program. However, this requirement does not impose significant additional paperwork burdens on businesses choosing to participate in the Program but instead simply requires that information currently established and maintained be shared with the Department in order to verify that the business has met its job creation and investment commitments.

DUPLICATION:

The emergency rule does not duplicate any state or federal statutes or regulations.

ALTERNATIVES:

No alternatives were considered with regard to amending the regulations in response to statutory revisions. The Department conducted outreach with respect to this rulemaking. Specifically, it contacted the Citizens Budget Commission, Partnership for New York City, the Buffalo Niagara Partnership and the New York State Economic Development Council and received comments from them. The Department carefully considered all comments made with respect to the regulation. Certain comments were incorporated into the rulemaking while others deemed inappropriate were not.

FEDERAL STANDARDS:

There are no federal standards in regard to the Excelsior Jobs Program. Therefore, the emergency rule does not exceed any Federal standard.

COMPLIANCE SCHEDULE:

The period of time the state needs to assure compliance is negligible, and the Department of Economic Development expects to be compliant immediately.

Regulatory Flexibility Analysis

1. Effect of rule

The emergency rule imposes record-keeping requirements on all businesses (small, medium and large) that choose to participate in the Excelsior Jobs Program. The emergency rule requires all businesses that participate in the Program to establish and maintain complete and accurate books relating to their participation in the Program for the duration of their term in the Program plus three additional years. Local governments are unaffected by this rule.

2. Compliance requirements

Each business choosing to participate in the Excelsior Jobs Program must establish and maintain complete and accurate books, records, documents, accounts, and other evidence relating to such business's application for entry into the program and relating to annual reporting requirements. Local governments are unaffected by this rule.

3. Professional services

The information that businesses choosing to participate in the Excelsior Jobs Program would be information such businesses already must establish and maintain in order to operate, i.e. wage reporting, financial records, tax information, etc. No additional professional services would be needed by businesses in order to establish and maintain the required records. Local governments are unaffected by this rule.

4. Compliance costs

Businesses (small, medium or large) that choose to participate in the Excelsior Jobs Program must create new jobs and/or make capital investments in order to receive any tax incentives under the Program. If businesses choosing to participate in the Program do not fulfill their job creation or investment commitments, such businesses would not receive financial assistance. There are no other initial capital costs that would be incurred by businesses choosing to participate in the Excelsior Jobs Program. Annual compliance costs are estimated to be negligible for businesses because the information they must provide to demonstrate their compliance with their commitments is information that is already established and maintained as part of their normal operations. Local governments are unaffected by this rule.

5. Economic and technological feasibility

The Department of Economic Development (''DED'') estimates that complying with this record-keeping is both economically and technologically feasible. Local governments are unaffected by this rule.

6. Minimizing adverse impact

DED finds no adverse economic impact on small or large businesses with respect to this rule. Local governments are unaffected by this rule.

7. Small business and local government participation

DED is in compliance with SAPA Section 202-b(6), which ensures that small businesses and local governments have an opportunity to participate in the rule-making process. DED has conducted outreach within the small and large business communities and maintains continuous contact with small and large businesses with regard to their participation in this program. Local governments are unaffected by this rule.

Rural Area Flexibility Analysis

The Excelsior Jobs Program is a statewide business assistance program. Strategic businesses in rural areas of New York State are eligible to apply to participate in the program entirely at their discretion. Municipalities are not eligible to participate in the Program. The emergency rule does not impose any special reporting, record keeping or other compliance requirements on private entities in rural areas. Therefore, the emergency rule will not have a substantial adverse economic impact on rural areas nor on the reporting, record keeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The emergency rule relates to the Excelsior Jobs Program. The Excelsior Jobs Program will enable New York State to provide financial incentives to businesses in strategic industries that commit to create new jobs and/or to make significant capital investment. This Program, given its design and purpose, will have a substantial positive impact on job creation and employment opportunities. The emergency rule will immediately enable the Department to fulfill its mission of job creation and investment throughout the State and in economically distressed areas through implementation of this new economic development program. Because this emergency rule will authorize the Department to immediately begin offering financial incentives to strategic industries that commit to creating new jobs and/or to making significant capital investment in the State during these difficult economic times, it will have a positive impact on job and employment opportunities. Accordingly, a job impact statement is not required and one has not been prepared.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Minority and Women Business Enterprise Program

I.D. No. EDV-39-10-00021-P

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

Proposed Action: Repeal of Parts 140 through 144; and addition of new Parts 140 through 145 to Title 5 NYCRR.

Statutory authority: Executive Law, sections 312(2), (2-a) and 313-a

Subject: Minority and Women Business Enterprise Program.

Purpose: Implement the 2010 Business Diversification Act and provide MWBEs with a fair opportunity to compete for contracts in NY state.

Substance of proposed rule (Full text is posted at the following State website:http://www.esd.ny.gov/MWBE.html): The proposed regulation makes extensive changes to the existing regulations governing the Division of Minority and Women's Business Development (''DMWBD''). For the purposes of clarity, the regulation repeals existing Parts 140 to 144 of 5 NYCRR and replaces them with new Parts 140 to 145. New Part 144 dealing with statewide certification makes only minor modifications to the previous Part 144, including, but not limited to, deleting old Section 144.3 which is no longer applicable and adding a new section to address acceptance municipal certifications on a fast track basis as well as articulating the Division's new annual reporting requirement.

The following is a brief summary of the substantive changes made in the new Parts 140-144.

1) The regulation adds several new definitions to Part 140, including the definitions of the terms ''chief diversity officer'', ''diversity practices'', ''joint venture'' ''lessee'', ''personal net worth'', ''significant business presence'', ''small business'' ,"substantially fails'', ''mentor-protege agreement'', ''value added'' and ''2010 disparity study.'' Importantly, the regulation amends the definition of ''minority-owned business enterprise'' and ''woman owned business enterprise'' to include the requirements that these entities are owned, operated and controlled by individuals whose net worth does not exceed $3.5 million and are small businesses. It also amends the definition of ''minority group member'' to make clear it includes person of Latin American origin and amends the definition of to include expenditures made pursuant to a state contract, purchase order, invoice or non-personal services.

2) The regulation requires that the DMWBD Director provide all state agencies with a copy of the 2010 disparity study. In addition, all state agencies are required to submit to the Director agency goals for contracts made directly or indirectly to MBEs or WBEs in each of the categories referenced in the 2010 disparity study. The regulation then lists the percentage goals established by the 2010 disparity study per industry.

3) The regulation clarifies that if an agency in good faith determines that it cannot achieve the goals listed in the 2010 disparity study the agency shall develop agency specific goals expressed as a percentage of aggregate agency expenditures and a justification for such goals to submit to the Director. The regulation also provides agencies with a list of factors which may allow them to adjust agency specific goals.

4) The regulation next clarifies that the Director has discretion in his or her acceptance of agency goals plans and describes the agency goal plan submission procedure.

5) The regulation requires state agencies to include a summary of waivers received its compliance reports to the Director. Agency compliance reports shall now also include whether the agency has been required to prepare a remedial plan and to what extent the agency has complied with such plan. In addition, the regulation reiterates the statutory requirement that agencies in their annual report to the Governor and Legislature shall include certain MWBE related information.

6) The regulation creates state agency remedial plans and requires that state agencies that substantially fail to meet the goals supported by the disparity study (meaning they achieve less than 60%) shall be required to submit this plan to the Director. State agencies should consider maximizing discretionary awards to certified MWBEs as a way of reaching their goal. If the Director determines that the agency has failed to act in good faith to implement the remedial plan within one year, the Director will provide written notice of this finding and direct the following remedial actions to take place: 1) expand sufficient and effective solicitation efforts to MWBEs; 2) review of all procurement opportunities to determine if procurements can be unbundled into smaller quantities that will expand MWBE participation; 3) eliminate extended experience or capitalization requirements, or bonding requirements when feasible; and 4) identify specific expenditures as appropriate for MWBE participation. If the Director finds the agency has not implemented the remedial plan and followed his remedial actions, and there is no objective progress toward agency goals, the Director may require that some or all of the agency procurements be placed under the control of a different state agency.

7) The regulations add a section stating that agencies shall make a good faith effort to meet the maximum feasible portion of the agency's goals. It then delineates that the Director may consider criteria he or she determines relevant, as well as information the state agency submits, to document the agency's good faith efforts but he or she must consider: (1) whether there are certified minority- and women-owned business enterprises that could participate in the type of procurement opportunitites that the agency has to offer as prime contractors or subcontractors; (2) whether the State agency has attempted to unbundle State contracts and solicit bids from the certified minority- and women-owned businesses; (3) whether there are certified minority- and women owned business enterprises outside of the State agency's region that could participate in procurement opportunities; (4) whether the state agency has considered encouraging joint ventures, teaming agreements, partnerships, or other similar arrangements between prime contractors and minority and women owned business enterprises to participate in the State agency's procurement opportunities; (5) the number of opportunities that the State agency had for discretionary purchases, and the number of times the State agency did so; (6) whether the State agency developed selective bidder lists that included minority- and women-owned business enterprises; (7) the number of times that the State agency negotiated with minority- and women-owned businesses directly and the number of times and amounts the State agency awarded a discretionary contract to a certified business; and (8) any other information submitted by the State agency or other criteria that the director deems relevant to determining whether the State agency exercised good faith.

8) The regulation deletes old section 141.5 dealing with directory fees as it is antiquated. Currently, the directory is an online resource only which is available to the public free of charge.

9) The regulation requires that state agencies establish separate goals for participation of certified minority and women owned businesses enterprises on all state contracts, where appropriate, and shall consult with the 2010 disparity study when calculating the specific goals. Contractors shall be notified in procurement documents of the goals established on state contracts and state agencies must provide a link to the current list of certified MWBEs to each prospective contractor. The regulation goes on to state the factors an agency shall consider when setting goals, including potential subcontract opportunities available in a prime contract.

10) The regulation introduces the concept of diversity practices into the procurement process by stating that, in any contract awarded by a state agency based on best value only, that is a response to a rfp and/or a request for qualification, is anticipated to result in an award of $250,000 or more, and is not a contract for commodities or those otherwise based on lowest price, an agency shall determine whether it is practical, feasible and appropriate to assess the diversity practices of all contractors making submissions. The regulation articulates what factors should be considered by agencies in their diversity practice assessments and such assessment shall be used as one of the factors in determining the award of a contract.

11) The regulation next addresses the submission and review of utilization plans. It allows a state agency to accept a utilization plan when: (1) the State agency determines that the goals set forth in the solicitation or bid are to be provided by one or more MWBEs; (2) the contractor submits an alternative plan utilizing certified MWBEs equivalent to those set forth in the solicitation; (3) the utilization plan submitted by the contractor partially satisfies the goals set forth in the solicitation but is supported by the contractor's documented good faith efforts to submit a utilization plan as requested; (4) the contractor is a joint venture, teaming agreement, or other similar arrangement with a MWBE whose value or participation is equal to the percentage of the goals set forth in the solicitation; or (5) the contractor submits a mentor-protege agreement acceptable to the agency, which does not meet the goals set forth in the solicitation, but reflects an investment by the mentor in the protege roughly equal to the difference between the goal set forth in the solicitation and the percentage of value added participation provided by the protege.

12) The regulation now prohibits a state agency from granting automatic waivers of goal requirements on a state contract.

13) With respect to the disqualification of contractors, the regulation next enables a state agency to conclude a contractor is non-responsible (and therefore proceed with the next ranked bidder or proposal) if it determines, after giving the contractor a notice of deficiency, that the contractor has failed to submit an acceptable utilization plan or satisfactorily document its good faith efforts. Upon such finding, the regulation sets up a process for the contractor to request a meeting with the State agency to discuss the determination before it becomes final. Final determination shall be reviewable by an Article 78 proceeding.

14) With respect to contractor compliance, the regulation now allows an agency to determine that a contractor is meeting its goals if the contractor itself is responsible for 100% of the contract performance or if the agency has verified that the goals are being achieved by subcontractors partnering in a joint venture.

15) With respect to issues surrounding contractor and state agency complaints, the regulation eliminates the existing arbitration process for disputes in these areas and replaces it with the administrative hearing process. The regulation adds the new enforcement penalty that a contractor who either fraudulently or intentionally misrepresents or displays willful or intentional disregard of the MWBE participation requirements in a contract, may be barred for up to one year on bidding on state contracts or up to five years (if a subsequent violation occurring within five years of the first violation).

16) The regulation requires that every contracting state agency include a provision in their contracts stating that a contractor who willfully and intentionally fails to comply with MWBE participation requirements shall be liable for liquidated damages.

17) The regulation next makes clear that if a state contract is entered into on an emergency basis or where an amendment or change order has been added to a state contract providing for total expenditures in excess of $25,000, the contracting agency may require the contractor to submit an EEO policy statement and comply with the post award requirements of the regulation during the life of the contract.

18) The regulation next clarifies that with respect to contractor compliance for EEO opportunities, contracting agencies are responsible for monitoring EEO compliance, and if a contractor fails to provide information requested by a contracting within 10 days of the request, this failure shall be deemed a breach of contract and trigger an administrative hearing.

19) With respect to EEO dispute resolution procedures, the regulation eliminates the existing arbitration process for disputes in these areas and replaces it with the administrative hearing process.

20) The regulation clarifies that MWBE certification lasts for three years (conforms to existing law).

21) The regulation creates a fast track process for New York municipal corporations parallel to that of the existing federal process.

23) The regulation requires the Division to submit an annual report to the Chief Diversity Officer on or before November 1.

24) The regulation requires the Division to distribute annually a written guidelines and best practices manual complying with the provisions of Article 15(a) of the Executive Law and calculating credits towards achieving agency MWBE goals to every State agency on or before December 15.

Text of proposed rule and any required statements and analyses may be obtained from: Thomas P Regan, New York State Department of Economic Development, 30 S. Pearl Street, Albany, NY 12245, (518) 292-5123, email: tregan@empire.state.ny.us

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

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

Regulatory Impact Statement

Statutory Authority: Chapter 175 of the Laws of 2010, the 2010 Business Diversification Act amends the Executive Law and State Finance Law concerning the State's Minority and Women-Owned Business Enterprise program.

Executive Law § 310(20) broadly defines ''Small Business'' for purposes of the Act and authorizes the Director of the Division of Minority and Women Business Development in the Department of Economic Development (Director) to adopt rules concerning the construction of terms in such definition.

Executive Law § 313(2) authorizes the Director to adopt rules, consistent with the participation goals prescribed in the Act, to maximize procurement opportunities for minority and women-owned enterprises.

Executive Law § 313(2-a) authorizes the Director to adopt rules to, among other things, certify and decertify minority and women-owned enterprises, require contract solicitation documents to identify the expected degrees of participation by minority and women-owned enterprises, maximize participation in contracts and subcontracts involving the State agencies, and require verification of minority and women-owned enterprise participation in State contracts. Executive Law § 313(5) requires such rules to include provisions concerning utilization plans to be submitted by contractors related to the participation of minority and women-owned businesses in sub-contractors in the performance of State procurement contracts.

Executive Law § 313-a authorizes the Director to adopt rules setting forth measures and procedures to require contracting agencies to assess the diversity practices of contractors submitting bids or proposals in connection with the award of State contracts.

Executive Law § 315(6) authorizes the Director to adopt rules concerning the circumstances when a contracting agency may be determined to have substantially failed in meeting participation goals for minority and women-owned enterprises.

Section 14 of the Act authorizes the Director to promulgate rules prior to its effective date.

Legislative Objectives: The purpose of the 2010 Business Diversification Act is to promote, encourage and increase the participation of women and minority-owned businesses in State contracting.

Needs and Benefits: The State's Minority and Women-Owned Business Enterprise program is prescribed in Executive Law Article 15-A Participation by Minority Group Members and Women with respect to State Contracts. The statute provides a preference in procurement opportunities for minority and women-owned businesses which, because of historical evidence of discrimination, have been denied full and fair access to State contracts.

In 2006, the Empire State Development Corporation commissioned a disparity study to evaluate whether minority and women-owned businesses had a full and fair opportunity to participate in state contracting. The study included an examination of the existing statutes and regulations to identify weaknesses and possibilities for improving opportunities for minority and women-owned businesses in the State. The results of that study were published on April 29, 2010, under the title ''The State of Minority and Women-Owned Business Enterprises: Evidence from New York.'' The report found evidence of statistically significant disparities between participation of MWBEs in the New York market and the availability of such businesses. It concluded that these disparities could not be explained by factors untainted by discrimination.

The 2010 Business Diversification Act was enacted to address the findings of the disparity study, to remedy the results of past discrimination and to provide MWBEs with a full and fair opportunity to compete for contracting opportunities in New York State. The legislation also addresses recommendations of the task force created by Governor Paterson under Executive Order 10, to increase the utilization of minority and woman-owned business enterprise underwriters for State debt offerings (referred to as the ''MWBE Task Force''). The MWBE Task Force, which issued its final report on March 24, 2010, also considered other sectors of professional services (legal, banking, financial brokers, and insurance) and made recommendations regarding the procurement of these services to level the playing field and to help ensure that firms in these sectors were given fair and adequate opportunity to participate in State business. As part of its report, the Task Force recommended that legislation be enacted to increase accountability on the part of State agencies and public authorities regarding their compliance with existing provisions of law pertaining to participation by MWBEs and to promote the State's utilization of MWBE and non-MWBE firms that have sound diversity practices.

The legislation is also intended to provide a framework so that State agencies and public authorities can be held accountable for their commitment to MWBE participation and diversity in the area of procurement. Specifically, it would provide for agency-specific goals based on the disparity study; establish a road map for agency efforts to meet those goals, including the adoption of remedial plans for substantial failure to do so; grant the Director various tools to alter agency contracting practices when there is a lack of good faith efforts to implement the remedial plan; create a new process for resolution of disputes and new sanctions for bad faith actions by contractors.

Finally, the legislation also prescribes several measures to focus Article 15-A on the goal of remedying the discrimination as set forth in the disparity study, by assisting those businesses that have been historically excluded, and place the statute on firm constitutional footing. It would impose a net worth cap on the ownership of certified MWBEs, require that such certification be limited to small businesses, provide that Article 15-A sunset two years earlier, in December 2016, and authorize a new disparity study to determine the status of the market and any evidence of continuing discrimination at the time the statute comes up for reauthorization.

The legislation is intended to strengthen existing tools to promote participation by MWBE firms in state contracts and the utilization of contractors, suppliers and consultants with sound diversity practices. Furthermore, the legislation will help keep the State and its constituent entities accountable for their actions in this regard. In sum, it will create a process for remedying the past discrimination uncovered by the disparity study, and establish equal opportunity for all businesses in New York.

The rules are necessary to implement the provisions of this legislation related to the Minority and Women-Owned Business Enterprise Program.

Local Government Mandates: The rules impose no mandates, responsibilities or programs on local governments, or school, fire or other special districts.

Duplication: The rules do not duplicate any State or federal statutory or regulatory requirements. Rather, the rules, which will implement the 2010 Business Diversification Act, are intended to build upon and improve existing regulations related to procurement opportunities for minority and women-owned business enterprises in the State.

Alternative Approaches: Although no regulatory action was considered, this alternative was rejected since the legislation, enacted in response to ''The State of Minority and Women-Owned Business Enterprises: Evidence from New York'' disparity study, specifically directs that rules be adopted as are necessary to implement the statutory provisions. The legislation required further definition, clarification and specific detail to implement its provisions and fulfill its intent to encourage and increase the participation of women and minority-owned businesses in State contracting.

The proposed rules were developed by staff from the Department of Economic Development, Division of Minority and Women Business Enterprises, in consultation from the Dormitory Authority of the State of New York and Office of General Services. In addition, input was received from the Governor's Office of Regulatory Reform as well as the Executive Chamber.

The work group also sought comments from the Office of the State Comptroller, the Authorities Budget Office, and interested parties including the US Hispanic Advocacy Association, Professional Women inConstruction, the Women Builders Council, the NYS Hispanic Chamber of Commerce, the Bronx Chamber of Commerce, Strive International, the Albany/Capital Region of Hispanic and Minority Chamber of Commerce, the Hempstead Hispanic Civic Association, Fordworks Associates, the US Hispanic Chamber of Commerce, Ramirez Asset Management, Accion USA, Cabrera Capital Markets, Partnership for NYC, the New York and New Jersey Minority Supplier Development Council, the Women President's Educational Organization, the Council of Urban Professionals, the Upstate New York Minority Supplier Development Council, and the Upstate Hispanic Chamber of Commerce to assist in developing the rules.

In accord with Executive Law Section 313-a, the diversity practices portion of the rules were drafted in consultation with the State Procurement Council.

Federal Standards: The rules do not exceed any minimum standards of the federal government. Federal statutes and regulations concerning minority and women-owned enterprises concern procurement opportunities by the federal government. These regulations concern contracting opportunities for minority and women-owned businesses for the State procurements.

Compliance Schedule: It is expected that agencies and regulated parties will be able to comply with the proposed regulations upon their adoption.

Costs:

To the division:

In order for the Division to implement the provisions of the regulation, it is anticipated that a shared staffing model will be created in which State employees already working in relevant MWBE-related State positions throughout all State agencies will be reassigned to an office of diversity management as specialists in specific industries to effectively cover additional workload created by this regulation.

Therefore, the Division estimates that compliance with new requirements of the regulation will not result in the need for additional staff.

To contractors:

Under the regulation, applicants will now be required to provide additional information to the Division, including, but not limited to, proof that they fall under the net worth cap and proof they are a small business. The transmittal of such evidence will have certain nominal costs associated with it (e.g. mailing or fedex costs) but these costs are not anticipated to be significant or greater than normal business opportunity costs.

To State contracting agencies:

Given the tightening of accountability on state agencies with respect to setting and achieving their agency goals, the Division believes that agencies will, in many cases, also need to avail themselves of the aforementioned shared State employee shared staffing model to fulfill the requirements and avoid any costs associated with hiring new employees.

The cost estimates above were produced by Counsel's consultation with Division staff familiar with implementation procedures necessary to effectuate the new legislation.

Paperwork:

The regulation will have paperwork implications on the Division. First, the Division will need to amend its current certification application to require documentation substantiating the applicant as a small business under the net worth cap. In addition, the current fast track documents for DEDs will need to be amended to accept municipal certification. Also, general guidance documents will need to be created to help instruct agencies on compliance issues. Finally, the regulation imposes a mandate on the Division to create an annual report to be submitted to the Legislature and Governor which, among other things, is to include a summary of the State agency reports the Division has received for that year. With respect to applicants, additional information will be required of applicants as they apply for certification (e.g. proof of net worth, small business, etc.). With respect to State contracting agencies, the new regulation requires State agencies to submit an annual report concerning its goals to the Governor and legislature.

The paperwork estimates above were produced through Counsel's consultation with appropriate Division staff.

Regulatory Flexibility Analysis

Application to the minority and women business enterprise program is entirely at the discretion of each eligible business enterprise. Neither Executive Law Article 15-A nor the proposed regulations impose an obligation on any local government or business entity to participate in the program. The proposed regulation does not impose any adverse economic impact, reporting, recordkeeping, or other compliance requirements on small businesses and/or local governments. In fact, the proposed regulations may have a positive economic impact on small businesses as the changes created in the proposed regulations may increase the number of certified small businesses that are able to access contracting opportunities throughout New York State. An argument could be made that the proposed regulations may negatively affect non-MWBE businesses wishing to contract with the State, as preference will now be given to certified MWBE entities. However, it is impossible to determine with any precision if this outcome will occur. The changes are anticipated to produce a positive impact by increasing competition between small businesses seeking to contract with the State, thus enabling contracting agencies to obtain a better value, while at the same time increasing the number of MWBEs who have access to contracting opportunities.

For clarification purposes, the changes crafted in the proposed regulation do not affect local governments. Because it is evident from the nature of the proposed rule that it will have either no substantive impact, or a positive impact, on small businesses and local governments, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local government is not required and one has not been prepared.

Rural Area Flexibility Analysis

The minority and women business enterprise program is a statewide program. There are eligible businesses in rural areas of New York State. However, participation in the program is entirely at the discretion of eligible business enterprises. The program does impose some responsibility on those businesses which participate such as submitting applications and reports. However, the rule will not impose any substantial reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Therefore, the regulation will not have a substantial adverse economic impact on rural areas and will not have impose reporting, recordkeeping or other compliance requirements on public or private entities in such rural areas. Accordingly, a rural area flexibility analysis is not required and one has not been prepared.

Job Impact Statement

The proposed regulation implements historic legislative changes to the minority and women business enterprise (MWBE) Program. The regulation will not have a substantial adverse impact on jobs and employment opportunities. In fact, the proposed regulation will have either a positive impact or no impact on job growth throughout the State. The proposed regulation is designed to address the findings of the recently completed 2010 disparity study, remedy the results of past discrimination and provide MWBEs with a full and fair opportunity to compete for contracting op-

portunities in New York State. In addition, the proposed regulation contain provisions to create a streamlined MWBE certification process for certain companies that will enhance and increase these companies' contracting opportunities in the State. This could invariably lead to more business opportunities for these companies and ultimately job growth for New York state. Because it is evident from the nature of the proposed regulations that it will have either no impact, or a positive impact, on job and employment opportunities, no further affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

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

I.D. No. EDU-39-10-00011-P

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, Education Building Annex, 89 Washington Avenue, 9th Floor, Albany, New York 12234, (518) 473-6090, email: privers@mail.nysed.gov

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:

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

Subdivision (2) of section 602 of the Education Law empowers the Commissioner of Education to promulgate regulations establishing requirements for the president to follow in determining student eligibility for State student aid relating to full-time study, part-time study, accelerated study, matriculation, loss of good academic standing, and permissible use of general and academic performance awards and loans. Subdivision (1) of section 602 of the Education Law empowers the Commissioner of Education to select qualified recipients of academic performance awards.

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

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

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

2. LEGISLATIVE OBJECTIVES:

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

3. NEEDS AND BENEFITS:

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

The intent of the new law is to ensure that students receiving TAP funds

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

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

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

For purposes of the new standards of academic progress established in Chapter 53 of the Laws of 2010, a student shall be deemed to be in a program approved by the Commissioner for remedial study if he/she: (1) is enrolled in the Higher Education Opportunity Program (HEOP), the Education Opportunity Program (EOP), The Search for Education, Elevation and Knowledge (SEEK) program or the College Discovery (CD) program; (2) takes six credit hours of remedial instruction the first semester and at least nine credit hours of remedial instruction in the first year; or (3) takes three credit hours of remedial instruction in the first semester and six credit hours of remedial instruction in the second semester. Remedial courses taken in the summer session preceding the first academic year may count towards the required nine or more credits of remedial instruction for the purpose of program approval by the Commissioner for remedial study. In addition, for students first becoming eligible for TAP in the 2010-2011 academic year due to a change in their financial circumstances, remedial courses taken in a previous academic year may also be counted. For the 2010-11 academic year only, a student who first received an award prior to the 2010-2011 academic year and does not meet the eligibility requirements to be certified for TAP under the 2010-2011 SAP shall be deemed to be in an approved program of remedial study for the 2010-11 academic year solely for the purpose of defining which standards of academic progress apply for the 2010-11 academic year. This includes students who become ineligible for TAP in the Spring 2010 term because they have insufficient time to adjust their schedule in the Fall term to carry the required number of credits under the new standards of academic progress due to courses becoming unavailable, full or because the add/drop period has ended. The Department will issue guidance on this issue to the colleges.

4. COSTS:

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

b. Costs to local government. None.

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

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

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

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

7. DUPLICATION:

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

8. ALTERNATIVES:

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

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

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

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

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

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

3. COSTS:

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

4. MIMINIZING ADVERSE IMPACT:

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

5. RURAL AREA PARTICIPATION:

A copy of the proposed amendment was shared with public and nonpublic colleges and universities, education opportunity centers, and other postsecondary institutions that are eligible to participate in the tu-

ition assistance program (TAP) in New York State. These institutions are located in all areas of the State, including rural areas.

Job Impact Statement

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

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

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Limited Permits and Experience, Supervision, and Endorsement Requirements for Licensure as a LCSW in New York

I.D. No. EDU-26-10-00007-RP

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

Proposed Action: Amendment of sections 74.3, 74.4, 74.5, 74.6, 74.7; and addition of section 74.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 212(3), 6501 (not subdivided), 6504 (not subdivided), 6506(6), 6507(2)(a), 6508(1), 7704(2)(c), 7705(1) and 7706(1)-(5)

Subject: Limited permits and experience, supervision, and endorsement requirements for licensure as a LCSW in New York.

Purpose: To expedite the processing of applications for licensure & to provide clarity regarding acceptable supervised experience.

Substance of revised rule: The Commissioner of Education proposes to promulgate regulations, relating to licensure as a licensed master social worker (LMSW) and a licensed clinical social worker (LCSW), limited permits for applicants in these professions, the practice of clinical social work by a LMSW under supervision, the requirements for insurance reimbursement pursuant to the Insurance Law, the supervised practice of licensed master social work by certain social workers, and the endorsement of a license as a LCSW in another jurisdiction for practice in New York State. The following is a summary of the substance of the regulations.

Supervised experience for licensure as a LCSW

Section 74.3(a) requires an applicant to complete three years of full-time, supervised experience in diagnosis, psychotherapy and assessment-based treatment planning, or the part-time equivalent, over a period of at least 36 months and not more than six years, in accordance with the requirements of section 74.6. The full-time experience shall consist of not less than 2,000 client contact hours.

Section 74.3(a)(1) requires that experience completed in New York must be completed as a Licensed Master Social Worker (LMSW) or permit holder, except in limited circumstances, and provides that experience in another jurisdiction may be accepted if completed in an authorized setting under a qualified supervisor, as determined by the department.

Section 74.3(a)(2) requires an applicant to complete the experience in an acceptable setting, as defined in subdivision (a) of section 74.6.

Section 74(a)(3) requires an applicant to complete the experience under a qualified supervisor, as defined in paragraph (2) of subdivision (c) of section 74.6.

Section 74.3(a)(4) requires the supervisor to retain records of the applicant's supervised experience and to submit documentation of the supervised experience on forms prescribed by the department. The department may request clarification of the supervisor's qualifications or the authority of the setting to provide professional services. If the supervisor is deceased or not available, a licensed colleague may submit verification of the applicant's experience.

Limited Permit for LMSW and LCSW applicant

Section 74.4(a)(1) is amended to clarify that the applicant for a permit to practice licensed master social work must meet the moral character and education requirements to be eligible for a permit.

Section 74.4(a)(2) is amended to clarify that the permit is issued for a specific setting, as defined in subdivision (a) of section 74.6.

Section 74.4(a)(3) is amended to clarify that the supervisor shall be responsible for appropriate oversight of services provided by the permit holder and no supervisor shall supervise more than five permit holders at one time.

Section 74.4(b)(1) is amended to clarify that the applicant for a permit to practice licensed clinical social work must meet the moral character requirements, in addition to clinical education and supervised experience requirements, to be eligible for a permit.

Section 74.4(b)(2) is amended to clarify that the permit is issued for a specific setting, as defined in subdivision (a) of section 74.6, and may not be issued for a private practice owned or operated by the applicant.

Section 74.4(b)(3) is amended to clarify that the supervision of a LCSW permit holder must meet the requirements in subdivision (c) of section 74.6. In addition, the supervisor shall be responsible for appropriate oversight of services provided by the permit holder and no supervisor shall supervise more than five permit holders at one time.

Authorization qualifying certain LCSW for insurance reimbursement

Section 74.5(a) is amended to increase the application fee from $85 to $100 and to clarify that a licensed clinical social worker must meet the requirements in section 3221(l)(4)(d) or 4303(n) of the Insurance Law to qualify for insurance reimbursement.

Section 74.5(c) is amended to clarify that the LCSW must complete 2,400 client contact hours of psychotherapy experience over a period of not less than three years. The amendment allows applicants who started their experience to qualify for insurance reimbursement prior to January 1, 2011 to submit any experience obtained prior to licensure as a licensed clinical social worker provided that such experience, in the determination of the department, satisfies the experience requirements for such reimbursement and is obtained after the experience used to satisfy the experience requirements for licensure as an LCSW. The amendment also clarifies that experience to qualify for insurance reimbursement commenced on or after January 1, 2011 shall be obtained only after licensure as a licensed clinical social worker in New York.

Section 74.5(c)(1) defines an acceptable setting for experience toward the psychotherapy privilege, which may include a private practice owned or operated by the applicant, who is licensed as a LCSW and authorized to practice psychotherapy.

Section 74.5(c)(2) requires the LCSW to submit for review and approval by the State Board for Social Work a plan for supervised experience that meets the requirements for the privilege. The plan shall be submitted to the State Board for Social Work before the applicant starts the experience for the privilege. Section 74.5(c)(2)(i) requires the plan to specify individual or group consultation of no less than two hours a month or enrollment in a program authorized to provide psychotherapy that is offered by an institution of higher education or a psychotherapy institute chartered by the Board of Regents. The amendment eliminates peer supervision for the privilege.

The amendment to 74.5(c)(2)(ii) clarifies that a qualified supervisor includes a LCSW who holds the privilege or the equivalent as determined by the department, a licensed psychologist competent in psychotherapy, or a licensed physician who is qualified to practice psychiatry, as determined by the department.

Supervision of certain qualified individuals providing clinical social work services

Section 74.6 is amended to clarify the supervision required for a LMSW or other qualified individual to practice clinical social work under supervision, in a setting acceptable to the Department.

Section 74.6(a)(i) defines an acceptable setting for the supervised practice of licensed clinical social work as including a professional business entity authorized to provide services in licensed clinical social work, a sole proprietorship or professional partnership owned by licensees who provide services that are within the scope of practice of licensed clinical social work, a hospital or clinic authorized under the Public Health law, a program or facility authorized under the Mental Hygiene law, a program or facility authorized under federal law or an entity defined as exempt or otherwise authorized to provide services that are within the scope of licensed clinical social work.

Section 74.6(a)(2) defines a qualified individual authorized to provide licensed clinical social work services under supervision as a LMSW, an individual with a limited permit to practice licensed clinical social work in New York, or an individual otherwise authorized to provide clinical social work services in a setting acceptable to the department and under appropriate supervision.

Section 74.6(b) allows a qualified individual to submit to the State Board for Social Work a plan for supervised experience in New York toward licensure as a LCSW for review and approval. The plan shall include a copy of documentation establishing that the agency or setting is an acceptable setting, as defined in section 74.6(a); a copy of the license of the qualified supervisor, as defined in section 74.6(c); a plan for supervision of the qualified individual accompanied by an attestation by the supervisor that he or she is responsible for services provided by the qualified individual; and, if a third-party is supervising the qualified individual, an affirmation from a designated representative of the setting that the setting is authorized to provide clinical social work services and the setting will ensure appropriate supervision of the qualified individual who is providing such services.

Section 74.6(c) is amended to clarify the supervision of a qualified individual seeking licensure as a LCSW to include at least 100 hours of in-person individual or group supervision, distributed appropriately over the period of the supervised experience. In addition, the qualified individual shall be under the general supervision of a qualified supervisor who shall review the qualified individual's diagnosis and treatment of each client, discuss the cases, provide oversight to the qualified individual in developing skills as a licensed clinical social worker, and regularly review and evaluate the professional work of the qualified individual.

There are no changes to section 74.6(c)(2), which requires the supervisor to be licensed and registered as a licensed clinical social worker, licensed psychologist or physician who is competent as a psychiatrist, in the determination of the department.

Section 74.6(d) defines the supervision of a LMSW who is providing clinical social work services under supervision but who is not using the experience to satisfy the experience requirements for licensure as a LCSW.

Section 74.6(d)(1) defines the supervision to be contact between the LMSW and supervisor during which the LMSW apprises the supervisor of the diagnosis and treatment of each client; the LMSW's cases are discussed; the supervisor provides the LMSW with oversight and guidance in diagnosing and treatment clients; the supervisor regularly reviews and evaluates the professional work of the LMSW; and the supervisor provides at least two hours per month of in-person individual or group clinical supervision.

Section 74.6(d)(2) requires the supervisor to meet the definition of a qualified supervisor in section 74.6(c)(2).

Section 74.6(e) requires the supervisor to maintain records of client contact hours in diagnosis, psychotherapy and assessment-based treatment planning and supervision hours provided to the qualified individual and to produce a log of hours, if requested.

Supervision of certain social workers providing licensed master social work services

The title of section 74.7 is amended and section 74.7 is amended to authorize a person with a bachelor of social work or master of social work degree, acceptable to the department, to perform activities and services within the scope of practice of a licensed master social worker as defined in paragraphs (a) and (b) of subdivision (1) of section 7701 of the Education Law, under the supervision of a LMSW or LCSW. The amendment clarifies that nothing in this section authorizes the use of the title ''LMSW'' or ''LCSW'' or the practice of licensed clinical social work, as defined in the Education Law.

Endorsement of certain LCSW applicants

A new section 74.9 is added to the Regulations of the Commissioner of Education to establish requirements for endorsement of a license to practice licensed clinical social work issued by another jurisdiction. The applicant must demonstrate licensure in good standing as a LCSW in another jurisdiction(s) and at least 10 years of practice in the 15 years preceding the application, submit the application and fee established in law for licensure and initial registration, and complete coursework in the identification and reporting of suspected child abuse or neglect.

Revised rule compared with proposed rule: Substantial revisions were made in section 74.5(c), (2)(ii).

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

Data, views or arguments may be submitted to: Frank Munoz, Deputy Commissioner of Office of Professions, New York State Education Department, 89 Washington Avenue, 2nd Floor, Albany, NY 12234, (518) 474-3817, email: opopr@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on June 30, 2010, the following substantial revisions were made to the proposed rule:

Subdivision (c) of section 74.5 of the Regulations of the Commissioner of Education is amended to insert the following language: ''except as provided in subdivision (d) of this section''.

Clause (d) of subparagraph (ii) of paragraph (2) of subdivision (c) of section 74.5 of the Regulations of the Commissioner is amended to allow an applicant who started their experience to qualify for insurance reimbursement prior to January 1, 2011 to submit any experience obtained prior to licensure as a licensed clinical social worker provided that such experience, in the determination of the department, satisfies the experience requirements for such reimbursement and is obtained after the experience used to satisfy the experience requirements for licensure as a licensed clinical social worker. This amendment also clarifies that experience to qualify for insurance reimbursement commenced on after January 1, 2011 shall be obtained only after licensure as a licensed clinical social worker in New York.

The above revisions to the proposed rule require the following revisions to the Needs and Benefits Section of the previously published Regulatory Impact Statement:

3. NEEDS AND BENEFITS:

Section 7704(2) of the Education Law requires an applicant seeking licensure as a LCSW to complete three years of full-time supervised post-graduate clinical social work experience in diagnosis, psychotherapy and assessment-based treatment planning, or its part-time equivalent obtained over a period of not more than six years. The law does not require the applicant to complete any other social work experience, although the practice of licensed clinical social work includes other activities, including case management, advocacy, and testing. Such activities are not acceptable toward completion of the experience requirement under the current law. The proposed amendments to the regulations require an applicant to complete 2,000 client contact hours in diagnosis, psychotherapy, and assessment-based treatment planning over a period of not less than 36 months and not more than 72 months under a qualified supervisor. While this is a 30 percent reduction from the current requirement of 2,880 client contact hours over the same period of time, it is still among the highest requirements for clinical hours in the U.S., and the Department believes 2,000 client contact hours provides sufficient experience to ensure client protection once the applicant is licensed.

The proposed amendment to section 74.3 of the Commissioner's regulations clarifies the experience requirements for licensure as a LCSW in New York. The amendments require an applicant for licensure to complete the required experience as a LMSW or permit holder in New York, except in certain limited circumstances. For experience completed in another jurisdiction, the experience must be obtained after the applicant completes his or her master's degree. The amendment requires the applicant to complete the experience in an acceptable setting under a qualified supervisor, as defined in section 74.6 of the Commissioner's regulations. The proposed amendment requires the supervisor to maintain records of the applicant's client contact hours and supervision and to submit verification of the client contact hours and supervision on forms prescribed by the Commissioner.

The proposed amendment also amends section 74.4 of the Commissioner's regulations to clarify that limited permit applicants must be of good moral character and that the permit may only be issued for work in an authorized setting under a qualified supervisor. In addition, the amendment strengthens the requirement that the supervisor is responsible for the services provided by the permit holder and limits a licensee to supervising no more than five permit holders at any one time. Since the permit holder is only authorized to practice under supervision, this restriction is appropriate for public protection and consistent with the requirements in other professions. A LMSW or LCSW permit holder who is practicing clinical social work under supervision must be under general supervision as defined in the proposed amendment.

Currently, section 74.5 of the Commissioner's regulations establishes the fee and experience requirements for a LCSW to qualify for the insurance privilege established in section 3221(l)(4)(D) or 4303(n) of the Insurance Law. The proposed amendments increase the application fee from $85 to $100 and continue the requirement that the applicant complete 2,400 client contact hours of psychotherapy.

The proposed amendment clarifies that an applicant who commences their experience to qualify for insurance reimbursement prior to January 1, 2011 may submit any experience obtained prior to licensure as a licensed clinical social worker provided that such experience, in the determination of the department, satisfies the experience requirements for such reimbursement and is obtained after the experience used to satisfy the experience requirements for licensure as a licensed clinical social worker. However, the proposed amendment provides that any experience commenced on after January 1, 2011 to qualify for the insurance privilege, may only be obtained after licensure as a clinical social worker. The purpose of the amendment is to clarify the intent of the law that experience for the insurance privilege must obtained after licensure as an LCSW over a period of not less than three years.

Under the proposed amendment, the applicant would also have to have no less than 400 client contact hours in any one year in order to qualify for the privilege. In order to clarify the process of meeting the requirements in Insurance Law, the proposed amendment also defines an acceptable setting for the practice of licensed clinical social work and requires a LCSW to submit for approval by the State Board for Social Work a plan for appropriate supervision. The amendment also defines acceptable supervision for the privilege as two or more hours per month of individual or group consultation or enrollment in a program in psychotherapy offered by an institution of higher education or by a psychotherapy institute chartered by the Board of Regents. This amendment eliminates peer supervision, which is not authorized by the Insurance Law, and clarifies the pathway to the insurance privilege.

The proposed amendments to section 74.6 of the Commissioner's regulations establish the supervision requirements for a licensed master social worker providing clinical social work services. A LMSW who has submitted an application for licensure as a LCSW must maintain registration as a LMSW in New York and may only practice under supervision until licensed as a LCSW. The amendments clarify what constitutes an acceptable setting for the practice of clinical social work and require the supervisor to provide at least 100 hours of individual or group supervision to the LMSW, distributed appropriately over a period of at least 36 months. The LMSW would also be able to submit a plan for supervised experience toward licensure as a LCSW, for review and approval by the State Board for Social Work. By obtaining such approval prior to starting a position, an applicant would be able to avoid working for three years in a position which cannot be accepted toward meeting the experience requirements for licensure as a LCSW because the setting or supervisor was not authorized by law and/or regulation. The State Board's review and approval of the voluntary plan would both protect the public and provide assurances to the LMSW that the setting and supervisor are authorized to engage in the practice of clinical social work in New York. Since a LMSW may provide diagnosis, psychotherapy and assessment-based treatment planning under supervision without seeking licensure as an LCSW, the amendment requires such a LMSW to receive at least two hours per month of in-person individual or group clinical supervision.

Section 7706(2) of the Education Law provides an exemption from licensure for an individual with a bachelor's degree in social work, if the person is under the general supervision of a LMSW or LCSW and engages in non-supervisory and non-clinical activities only. The proposed amendments to section 74.7 of the Commissioner's regulations provide standards for an individual with a BSW or MSW degree to provide licensed master social work services, under supervision. In order to clarify the boundaries of practice, the amendment clearly states that the individual may not provide administrative supervision or engage in the practice of licensed clinical social work or use the title ''LMSW'' or ''LCSW.''

The proposed amendment adds a new section 74.9 to allow the Department to endorse for practice in New York the license of an LCSW licensed in another jurisdiction. The applicant would have to have at least 10 years of licensed practice during the 15 years immediately preceding the application for licensure in New York. In addition, the applicant must demonstrate: licensure as a LCSW on the basis of an a master's degree in social work from an acceptable school, post-degree supervised clinical experience, and the passage of a clinical examination in social work acceptable to the department. The applicant must also be of good character, complete coursework in the identification and reporting of suspected child abuse, and submit the application for licensure and fee established in law and regulation.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on June 30, 2010, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement herewith.

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

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on June 30, 2010, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule require the following revisions to the Reporting, Recordkeeping and Other Compliance Requirements, and Professional Services section previously published Rural Area Flexibility Analysis.

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

Section 7704(2) of the Education Law requires an applicant seeking licensure as a LCSW to complete three years of full-time supervised post-graduate clinical social work experience in diagnosis, psychotherapy and assessment-based treatment planning, or its part-time equivalent obtained over a period of not more than six years. The law does not require the applicant to complete any other social work experience, although the practice of licensed clinical social work includes other activities, including case management, advocacy, and testing. Such activities are not acceptable toward completion of the experience requirement under the current law. The proposed amendments to the regulations require an applicant to complete 2,000 client contact hours in diagnosis, psychotherapy, and assessment-based treatment planning over a period of not less than 36 months and not more than 72 months under a qualified supervisor. While this is a 30 percent reduction from the current requirement for 2,880 client contact hours over the same period of time, it is still among the highest requirements for clinical hours in the U.S., and the Department believes 2,000 client contact hours provides sufficient experience to ensure client protection once the applicant is licensed.

The proposed amendment to section 74.3 of the Commissioner's regulations clarifies the experience requirements for licensure as a LCSW in New York. The amendments require an applicant for licensure to complete the required experience as a LMSW or permit holder in New York, except in certain limited circumstances. For experience completed in another jurisdiction, the experience must be obtained after the applicant completes their master's degree. The amendment requires the applicant to complete the experience in an acceptable setting under a qualified supervisor, as defined in section 74.6 of the Commissioner's regulations. The proposed amendment requires the supervisor to maintain records of the applicant's client

contact hours and supervision and to submit verification of the client contact hours and supervision on forms prescribed by the Commissioner.

The proposed amendment also amends section 74.4 of the Commissioner's regulations to clarify that limited permit applicants must be of good moral character and that the permit may only be issued for work in an authorized setting under a qualified supervisor. In addition, the amendment strengthens the requirement that the supervisor is responsible for the services provided by the permit holder and limits a licensee to supervising no more than five permit holders at any one time. Since the permit holder is only authorized to practice under supervision, this restriction is appropriate for public protection and consistent with the requirements in other professions. A LMSW or LCSW permit holder who is practicing clinical social work under supervision must be under general supervision as defined in the proposed amendment.

Currently, section 74.5 of the Commissioner's regulations establishes the fee and experience requirements for a LCSW to qualify for the insurance privilege established in section 3221(l)(4)(D) or 4303(n) of the Insurance Law. The proposed amendments increase the application fee from $85 to $100 and continue the requirement that the applicant complete 2,400 client contact hours of psychotherapy.

The proposed amendment clarifies that an applicant who commences their experience to qualify for insurance reimbursement prior to January 1, 2011 may submit any experience obtained prior to licensure as a licensed clinical social worker provided that such experience, in the determination of the department, satisfies the experience requirements for such reimbursement and is obtained after the experience used to satisfy the experience requirements for licensure as a licensed clinical social worker. However, the proposed amendment provides that any experience commenced on after January 1, 2011 to qualify for the insurance privilege, may only be obtained after licensure as a clinical social worker. The purpose of the amendment is to clarify the intent of the law that experience for the insurance privilege must obtained after licensure as an LCSW over a period of not less than three years.

Under the proposed amendment, the applicant would also have to have no less than 400 client contact hours in any one year in order to qualify for the privilege. In order to clarify the process of meeting the requirements in Insurance Law, the proposed amendment also defines an acceptable setting for the practice of licensed clinical social work and requires a LCSW to submit for approval by the State Board for Social Work a plan for appropriate supervision. The amendment also defines acceptable supervision for the privilege as two or more hours per month of individual or group consultation or enrollment in a program in psychotherapy offered by an institution of higher education or by a psychotherapy institute chartered by the Board of Regents. This amendment eliminates peer supervision, which is not authorized by the Insurance Law, and clarifies the pathway to the insurance privilege.

The proposed amendments to section 74.6 of the Regulations of the Commissioner of Education establish the supervision requirements for a licensed master social worker providing clinical social work services. A LMSW who has submitted an application for licensure as a LCSW must maintain registration as a LMSW in New York and may only practice under supervision until licensed as a LCSW. The amendments clarify what constitutes an acceptable setting for the practice of clinical social work and require the supervisor to provide at least 100 hours of individual or group supervision to the LMSW, distributed appropriately over a period of at least 36 months. The LMSW would also be able to submit a plan for supervised experience toward licensure as a LCSW, for review and approval by the State Board for Social Work. By obtaining such approval prior to starting a position, an applicant would be able to avoid working for three years in a position which cannot be accepted toward meeting the experience requirements for licensure as a LCSW because the setting or supervisor was not authorized by law and/or regulation. The State Board's review and approval of the voluntary plan would both protect the public and provide assurances to the LMSW that the setting and supervisor are authorized to engage in the practice of clinical social work in New York. Since a LMSW may provide diagnosis, psychotherapy and assessment-based treatment planning under supervision without seeking licensure as an LCSW, the amendment requires such a LMSW to receive at least two hours per month of in-person individual or group clinical supervision.

Section 7706(2) of the Education Law provides an exemption from licensure for an individual with a bachelor's degree in social work, if the person is under the general supervision of a LMSW or LCSW and engages in non-supervisory and non-clinical activities only. The proposed amendments to section 74.7 of the Commissioner's regulations provide standards for an individual with a BSW or MSW degree to provide licensed master social work services, under supervision. In order to clarify the boundaries of practice, the amendment clearly states that the individual may not provide administrative supervision or engage in the practice of licensed clinical social work or use the title ''LMSW'' or ''LCSW.''

The proposed amendment adds a new section 74.9 to allow the Department to endorse for practice in New York the license of a LCSW licensed in another jurisdiction. The applicant would have to have at least 10 years of licensed practice during the 15 years immediately preceding the application for licensure in New York. In addition, the applicant must demonstrate: licensure as a LCSW on the basis of an a master's degree in social work from an acceptable school, post-degree supervised clinical experience, and the passage of a clinical examination in social work acceptable to the department. The applicant must also be of good character, complete coursework in the identification and reporting of suspected child abuse, and submit the application for licensure and fee established in law and regulation.

Revised Job Impact Statement

Since publication of the Notice of Proposed Rule Making in the State Register on June 30, 2010, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as so revised, relates to limited permits for licensed master social workers (LMSW) and licensed clinical social workers (LCSW) and experience, supervision, and endorsement requirements for licensure as a LCSW in New York. The revised rule will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the revised rule that it will have no impact on jobs or employment opportunities, no further measures were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on June 29, 2010, the State Education Department received the following comments.

COMMENT: Several commenters expressed concern with the requirement that a candidate applying for the psychotherapy privilege must complete the supervised experience requirement after becoming a licensed clinical social worker (''LCSW''), as opposed to the prior regulations which allowed an individual to complete the experience prior to licensure stating this change could eliminate a year or more of supervised experience completed while the applicant was under supervision and taking the licensure examination.

RESPONSE: The Department will revise its regulations to allow individuals who started their experience for the insurance privilege prior to January 1, 2011 to meet the experience requirements under the prior requirements, which allowed applicants to complete their experience before licensure.

COMMENT: Several commenters strongly support the amendments related to supervised experience for licensure as an LCSW and the supervision of a BSW or MSW providing certain services, as the amendments provide a level of flexibility that reflects the settings in which social workers practice while maintaining appropriate standards for licensure as an LCSW.

RESPONSE: The Department appreciates the response and support.

COMMENT: The proposed amendment to 74.6 would allow a Licensed Master Social Worker to provide diagnosis, psychotherapy, and assessment-based treatment planning under supervision. Would you want your child to be treated by an LMSW who was not required

to study differential diagnosis and to understand the DSM-IV-TR, academically?

RESPONSE: Section 7701(c) of the Education Law authorizes an LMSW to practice clinical social work, including diagnosis, psychotherapy and assessment-based treatment planning, under supervision in a setting acceptable to the Department. The proposed regulation requires the LMSW to be under supervision and is consistent with the Education Law; therefore, no change is needed.

COMMENT: SED should consider amending the regulations to include the Licensed Mental Health Counselor as an acceptable supervisor for a LMSW who is providing clinical social work services.

RESPONSE: Section 7704(2)(c) of the Education Law specifically defines a qualified supervisor as a LCSW, licensed psychologist or a psychiatrist. The law does not allow the Department to define in regulation any other supervisor for the LMSW practicing clinical social work.

COMMENT: Section 74.3(a) should be amended to allow the Department to approve interruptions for good cause in the requirement for supervised experience to be completed in no more than six continuous years.

RESPONSE: Section 7704(2)(c) of the Education Law requires an applicant to have at least three years full-time supervised experience over a continuous period not to exceed six continuous years and does not provide for interruptions in supervised experience.

COMMENT: Please amend 74.3(a)(4) to require the verification of supervised experience to be submitted by a licensed colleague of the supervisor, not the applicant, if the supervisor is deceased or not available.

RESPONSE: The regulation provides flexibility when an applicant's former supervisor cannot be located. The suggested change is not necessary.

COMMENT: Please amend the regulations to establish a time limit for the Department to respond to limited permit applications.

RESPONSE: Applications are processed in a timely manner when the applicant has submitted all necessary information. It is not necessary to establish this timeline in regulation.

COMMENT: Is the limit on supervising 5 permit holders at one time enforced across disciplines (e.g., LMSW, LMHC) and does the limit include clinical supervision of LMSWs?

RESPONSE: The proposed amendment restricts a licensed professional to supervising no more than five permit holders, in any combination of professions that he/she is competent to practice and supervise and does not include clinical supervision of licensees.

COMMENT: Section 74.6 establishes a process by which an LMSW may file a supervision plan for prior review but does not address a change in supervisor and how will this impact the supervision and experience accrued?

RESPONSE: If the LMSW or supervisor should leave the setting, a new plan may be submitted to the State Board and the LMSW could complete the experience under the new approved plan. Once the new plan is approved by the Department, the LMSW could complete the reminder of the experience under the new plan.

COMMENT: Please define good moral character and how a supervisor or applicant can demonstrate good moral character or respond to any questions about his/her moral character.

RESPONSE: Section 28-1 of the Regents Rules sets out the process by which a question of the applicant's moral character is investigated and reviewed to determine if the applicant has met the requirement.

COMMENT: Please clarify the process for obtaining a permit, including information on where to obtain the permit, cost, and the application.

RESPONSE: Applications, instructions and other information about permits, including costs, are available on our website: www.op.nysed.gov/prof/sw/.

COMMENT: Language in 74.4(a)(2) and 74.4(b)(2) should be amended to allow a LMSW or LMSW permit holder to provide services in a private practice that he or she owns and operates.

RESPONSE: The Department disagrees with the comment, as the permit holder and the LMSW are only authorized to provide services under supervision, in a setting that is authorized to provide professional services to a public and this does not include a setting owned by an LMSW permit holder or LMSW.

COMMENT: A commenter applauded the Department's proposal to allow for the submission of a supervision plan by an LCSW seeking the psychotherapy privilege and for qualified individuals seeking to provide clinical social work services under supervision.

RESPONSE: The Department appreciates the comment.

COMMENT: Is the new form for supervisors different than the current log and can it be used for permit and non-permit holders?

RESPONSE: The Office of the Professions is revising existing applications. In the meantime, an applicant may use the existing forms and the supervisor may use the log that is part of Form 4B to maintain a record of the client contact and supervision hours.

COMMENT: Comments about the manner and effectiveness of clinical group supervision for LCSW licensure included a suggestion that the regulation require more individual supervision and the possibility of waivers from stricter requirements in the event of hardship.

RESPONSE: There is no evidence that individual supervision provides a more qualified or competent entry level practitioner than does group supervision. The regulation provides appropriate flexibility and no change is needed.

COMMENT: A supervisor should be responsible for no more than four individuals or four members of a group to ensure appropriate supervision.

RESPONSE: This level of specificity is not required in the regulation, as the supervisor is responsible for accepting no more supervisees than he or she can supervise appropriately.

COMMENT: Sections 74.6(c)(1) and 74.6(d)(1) should be amended, similar to amendments in section 74.4, to clarify the supervisor's responsibility for appropriate oversight of all services provided under his or her supervision.

RESPONSE: A change is not required as the supervisor is responsible under Part 29 of the Regents Rules for appropriate oversight of an individual who is only authorized to practice under his/her supervision.

COMMENT: Is Child Welfare Services authorized under law or regulation to provide services that are within the scope of licensed clinical social work?

RESPONSE: An entity must be authorized by law to provide professional services. The entity should discuss any questions about its authority to provide professional services with its attorney to ensure compliance with applicable laws.

COMMENT: Commenters suggested that 74.5(c)(1)(v) and 74.6(a)(v) should be amended to ''specify a program or facility authorized under articles 16, 31 or 32 of the mental hygiene law…'', an OCFS program exempt until July 1, 2013, or a psychotherapy institute granted a waiver under section 6503-a be defined as acceptable settings.

RESPONSE: The regulations clearly provide that if the facility or program is authorized under the Mental Hygiene Law, it is an acceptable setting. A program that is exempt or issued a waiver is considered ''otherwise authorized'' under the regulations, Therefore, this level of specificity is not needed in the regulations.

COMMENT: Social workers perform many tasks that are not included in diagnosis, psychotherapy, and assessment based treatment planning and this makes it difficult to ensure enough time in those areas and counting hours becomes a challenge.

RESPONSE: The amendments are intended to provide flexibility to supervisors in assuring that applicants complete appropriate experience in diagnosis, psychotherapy and assessment-based treatment planning, even if these are not provided in 60-minute sessions.

COMMENT: ''Diagnosis'' and ''assessment-based treatment planning'' involve work that does not happen 'face-to-face' with the client; does this count toward experience hours for these tasks?''

RESPONSE: It depends on the situation. Generally, to count toward experience hours, these tasks should happen 'face-to-face' with

the client. However, a minimal amount of time that does not happen 'face-to-face' may be counted towards this experience. For example, a 50 minute face-to-face client session followed by 10 minutes of non-face-to-face documentation and recordkeeping, including treatment planning, would be acceptable by the Department for this experience.

COMMENT: It would be helpful to have some more clarity regarding assessment based treatment planning and if this is the same as a treatment plan or behavior plan?

RESPONSE: Assessment-based treatment planning is defined in subparagraph (d) of paragraph (2) of section 7701 of the Education Law, in the context of LCSW practice. It depends on the plan and whether or not a treatment plan or behavior plan meets the definition of assessment based treatment planning.

COMMENT: What does the supervised plan for the ''R'' psychotherapy privilege look like and what happens when there are changes over time?

RESPONSE: The LCSW will submit a plan for prior review by the State Board, to ensure the supervisor and setting are legally authorized and acceptable toward the privilege. If there are changes in the supervisor or setting, a new plan may be submitted for review.

COMMENT: The client contact hours required in 74.5(c) for the privilege should be reduced from 2,400 to 2,000, consistent with the changes for licensure as a LCSW.

RESPONSE: The Department disagrees with the recommendation. The psychotherapy privilege is intended to recognize those LCSWs who provide psychotherapy and therefore, the required hours are appropriate for the privilege.

COMMENT: Several commenters object to requirements in 74.5(c)(2) that an LCSW submit the proposed plan for meeting the privilege requirement prior to starting such experience, as this may prevent the LCSW from providing psychotherapy services that he/she can legally provide and the regulation suggests the privilege is required to provide psychotherapy services.

RESPONSE: The Department disagrees with the comments. The law does not restrict an LCSW from providing psychotherapy, if competent, nor require the LCSW to apply for or receive the privilege. A requirement for prior approval ensures public protection as well as providing assurances to the LCSW that the plan for meeting the privilege is consistent with the laws and regulations.

COMMENT: The amendment to 74.5(c)(2)(ii)(a) eliminates the possibility of peer supervision for the privilege, although this was allowed under the previous regulations. Several commenters believe that the Department's reading of the Insurance Law, requiring the supervisor to hold the privilege, does not apply for experience in certain settings and the regulations should be amended to allow peer supervision.

RESPONSE: The Department disagrees with the comment and believes that there should not be different standards for oversight of psychotherapy practice in facilities than for practice in other settings. The supervising LCSW who holds the privilege has demonstrated competence in psychotherapy, consistent with the Insurance Law and therefore a regulatory change is not warranted.

COMMENT: What exactly counts as acceptable experience in clinical social work for endorsement of a license issued in another state.

RESPONSE: The new section 74.9 allows the Department to endorse a license issued to an LCSW in another jurisdiction if the applicant met appropriate clinical requirements for licensure, although these may vary among states, and has at least 10 years of licensed practice in the 15 years prior to application for endorsement in New York. The State Board should not need to review experience or education, if acceptable in other states.

COMMENT: I support the new 74.9 to allow the Department to endorse for licensure as an LCSW in New York, certain individuals who are licensed as an LCSW in other states.

RESPONSE: No response is required.

COMMENT: I support the proposed amendments to 74.7 relating to the supervised practice of a person with a BSW degree.

RESPONSE: No response is required.

Department of Health

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Hospital Minimum Standards and Appropriateness Review

I.D. No. HLT-39-10-00004-P

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

Proposed Action: Amendment of sections 405.6, 405.7, 405.19 and 708.5 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803(2)(a)

Subject: Hospital Minimum Standards and Appropriateness Review.

Purpose: To decrease look-back period for credentialing from 10 to 5 years; extend the physician coverage time for EDs from 20 to 30 minutes.

Text of proposed rule: Subparagraph (iii) and (iv) of paragraph (7) of subdivision (b) of Section 405.6 is amended to read as follows:

(iii) prior to granting or renewing privileges or association to any physician, dentist, or podiatrist, or hiring a physician, dentist or podiatrist, the hospital shall request from*:*

(a) any hospital with or at which such physician, dentist or podiatrist, has or had privileges, was associated or was employed during at least the preceding [10] *5* years the following information concerning the physician, dentist or podiatrist:

[(a)] *(1)* any pending professional misconduct proceedings or any professional malpractice actions in New York or another state;

[(b)] *(2)* any judgment or settlement of a malpractice action and any finding of professional misconduct in New York or another state; and

[(c)] *(3)* any information required to be reported by hospitals pursuant to section 405.3(e) of this Part; *and*

(b) the National Practitioner Data Bank or any successor database, any information available concerning:

(1) payments for the benefit of the physician, dentist or podiatrist in settlement of, or in satisfaction of, in whole or in part, a claim or a judgment against such physician, dentist or podiatrist for medical malpractice;

(2) licensure actions by any medical or professional board relating to the physician, dentist, or podiatrist;

(3) adverse actions affecting clinical privileges of the physician, dentist or podiatrist; and

(4) other actions or information relevant to the professional competence and conduct of the physician, dentist or podiatrist.

(iv) The provision by the hospital, within 45 days, in response to requests from any other hospital or facility performing credentials review for medical staff appointment or reappointment, of information related to the physician's, dentist's or podiatrist's professional practice within the facility for at least [ten] *5* years;

Paragraph (2) of subdivision (b) of Section 405.7 is amended to read as follows:

(2) treatment without discrimination as to race, color, religion, sex, national origin, disability, sexual orientation, *age,* or source of payment;

Paragraph (2) of subdivision (c) of section 405.7 is amended to read as follows:

(2) Receive treatment without discrimination as to race, color, religion, sex, national origin, disability, sexual orientation, *age,* or source of payment.

Subparagraph (ii) of paragraph (1) of subdivision (d) of section 405.19 is amended to read as follows:

(ii) There shall be at least one emergency service attending physician on duty 24 hours a day, seven days a week. For hospitals that exceed 15,000 unscheduled visits annually the attending physician shall be present and available to provide patient care and supervision in the emergency service. As necessitated by patient care needs, additional attending physicians shall be present and available to provide patient care and supervision. Appropriate subspecialty availability as demanded by the case mix shall be provided promptly in accordance with patient needs. For hospitals with less than 15,000 unscheduled emergency visits per year, the supervising or an attending physician need not be present but shall be available within [twenty] *thirty* minutes*, provided that at least one physician, nurse practitioner, or registered physician assistant shall be on duty in the emergency service 24 hours a day, seven days a week.*

Paragraph (4) of section 708.5 is amended to read as follows:

(4) The following standards shall apply to emergency services

(i) A person presenting to the emergency service for emergency care shall be promptly seen by a physician (or *a nurse practitioner or a* physician's assistant operating under the direction of the emergency services physician director), or evaluated by a registered nurse and seen by a physician*, nurse practitioner,* or physician's assistant prior to discharge.

* * *

(iii) At least one physician, *nurse practitioner,* or [a] registered physician assistant shall be on duty in the emergency service 24 hours a day, seven days a week. In addition, a licensed physician shall be available within [20] *30* minutes, when a registered physician assistant *or nurse practitioner* is on duty in the absence of a licensed physician.

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

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

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

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

Regulatory Impact Statement

Statutory Authority:

The authority for the proposed revision to Title 10 NYCRR Part 405 is section 2803 of the Public Health Law (PHL), which authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner of Health, to effectuate the provisions and purposes of Article 28 of the PHL with respect to minimum standards for hospitals.

Legislative Objectives:

This package of amendments is part of an effort, in conjunction with Executive Order 25, to update hospital regulations that have become obsolete, that may have the unintended result of limiting access to services, or that impose substantial burdens without providing a material benefit in terms of patient safety, quality or integrity. Executive Order 25 charged agencies with identifying rules and regulations that impose unnecessary, burdensome or excessive costs, paperwork, reporting or other requirements. Hospital industry representatives recommended amendments to various regulations. As an initial response to those recommendations, three amendments are proposed: (1) decreasing the look-back period associated with credentialing and privileging health care providers; and (2) extending the physician coverage response time for rural emergency departments. In addition, the Department proposes to add 'age' to the types of prohibited discrimination under the New York Patient Bill of Rights, as required by recently enacted legislation.

Current Requirements:

The existing regulations governing credentialing, patients' rights, and physician coverage in emergency departments are:

Credentialing and Privileging:

The Department's regulations at section 405.6 require hospitals to request, with respect to each physician, dentist or podiatrist seeking privileges, from each hospital at which he or she was employed in the previous ten (10) years (known as the ''look-back period'') any: (1) pending professional misconduct or malpractice proceedings; (2) judgments, settlements or findings related to malpractice or professional misconduct; and (3) reports to the Office of Professional Medical Conduct concerning impairment, misconduct, voluntary resignation or withdrawal of privileges to avoid disciplinary measures, or criminal convictions.

Patients' Rights:

Current regulations prohibit hospitals from discriminating against patients on the basis of race, color, religion, sex, national origin, disability, sexual orientation, or source of payment. Discrimination based on age is not specifically prohibited.

Physician Coverage in Emergency Departments:

State regulations at 405.19 allow hospitals with less than 15,000 emergency department visits a year to staff their emergency departments with a supervising or attending physician who is not present, but is available within 20 minutes, provided that a nurse practitioner or physician assistant is on site.

Needs and Benefits:

State regulations governing hospitals should safeguard and promote patient safety, while also allowing hospitals to operate efficiently and maintain access to services. The health care environment is evolving, federal regulations are changing, and electronic information systems have made certain requirements outdated. The Department's goal is to keep pace with the health care environment, while assuring patient safety and quality of care.

Credentialing and Privileging:

When the existing regulation was first promulgated, it was deemed necessary to verify a practitioner's 10-year history through the hospitals with which the practitioner had been affiliated. Today, with the establishment of the National Practitioner Data Bank (NPDB), the requirement to seek a practitioner's 10-year history via communications with other hospitals imposes a significant burden without providing a concomitant benefit.

The requirement to request information from each hospital with which a practitioner has been affiliated in the past 10 years is particularly onerous for hospitals in areas with physician shortages. Such hospitals rely on professional service vendors to provide physician coverage. Physicians retained through such venders typically work as contracted professionals at multiple facilities, making it necessary for hospitals to seek credentialing information from all such facilities. As a result, individual hospitals retaining contract physicians must employ staff to conduct the ten (10) year look-back reviews for both hospital staff and contractors with multiple hospital affiliations.

The NPDB provides hospitals seeking to verify the professional history of a practitioner with a great deal of information, thereby reducing the information needed from the hospitals at which a practitioner previously practiced. The NPDB started in 1990 and tracks adverse actions against physicians that involve licenses, clinical privileges, professional society memberships and exclusions from participation in Medicare and Medicaid. However, the NPDB does not include information regarding pending privilege, misconduct, or malpractice actions. Thus, certain inquiries of hospitals with which a practitioner has been affiliated continue to be needed.

The Department maintains that it is reasonable to expect hospitals to query the NPDB concerning practitioners seeking privileges. It is also reasonable to expect hospitals to seek information from hospitals with which a practitioner was affiliated in the previous five years. However, requiring the solicitation from other hospitals of information that is more than 5 years old is burdensome and no longer provides a significant added benefit, given the availability of information from the National Practitioner Data Bank. The Department proposes amending regulations to require a five (5) year look-back period to require hospitals to gather more current information not available through the NPDB, while reducing the administrative burden posed by a ten (10) year look-back period.

Patients' Rights:

Chapter 515 of the Laws of 2008 expands the New York Patients' Bill of Rights to prohibit discrimination based on age, in addition to existing prohibitions related to race, color, religion, sex, national origin, disability, sexual orientation and source of payment. This regulation would not supersede any existing statute or constitutional provision or (case law based on such statute or constitutional provision) that provides a basis for different treatment based on age (e.g. age of consent for certain services by minors). Nor would this regulation prohibit the use of pediatric wings or NICUs -- it should not interfere with clinical decisions about the appropriate setting for hospital services or the appropriate treatment based on age. The proposed amendment to the regulations is required to comply with the statute.

Physician Coverage in the Emergency Department:

Providing health care in rural areas continues to be a challenge due to health professional shortages. The Department's regulations governing emergency department staffing recognize this challenge by allowing, in hospitals with less than 15,000 emergency department visits annually, nurse practitioners and physician assistants to cover the emergency department, provided that a physician can respond within 20-minutes if necessary. The 20-minute time frame is difficult for rural hospitals to meet. Extending the physician coverage time for hospitals with less than 15,000 emergency department visits to thirty (30) minutes affords rural hospitals the flexibility they may need to keep their emergency departments accessible, when they cannot meet the current coverage requirements. It is also an opportunity to align state regulations with federal requirements governing Critical Access Hospitals (CAHs) which is thirty (30) minutes.

We propose amending the regulation to extend the response time to 30 minutes, provided that a nurse practitioner or physician assistant is present in the emergency department.

COSTS

Costs to the Department of Health:

The proposed amendment would impose no new costs on the Department.

Costs to Other State Agencies:

There are no costs to other State agencies or offices of State government.

Costs to Local Government:

There are no costs to local government.

Costs to Private Regulated Parties:

Because the proposed amendment imposes no new requirements, duties or responsibilities on any entity subject to Article 28 of the PHL, they do not result in cost increases for private regulated parties.

Local Government Mandates:

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

Paperwork:

The legislation amending the Patients' Bill of Rights required hospitals to print new Patients' Bill of Rights posters and paperwork because 'age' was not included in the previous version. The other proposed amendments impose no new reporting requirements, forms or other paperwork.

Duplication:

There are no relevant State or Federal rules which duplicate, overlap or conflict with the proposed amendment.

Alternatives:

The Healthcare Association of New York State (HANYS) is recommending that the state accept the credentialing review conducted by physician staffing organizations in lieu of credentialing by Article 28 facilities. Greater New York Hospital Association (GNYHA) is recommending that the state decrease to five years the look-back period for privilege inquiries solicited from hospitals and increase reliance on the NPDB. The Department solicited input from the New York State Association of Medical Staff Services (NYSAMSS), a non-profit member association of medical staff professionals. NYSAMSS also suggested that a five (5) year look-back period for privilege inquiries solicited from hospitals is more appropriate, given the availability of the NPDB.

The Department determined that a 5-year look-back period for contacting hospitals, together with queries of the NPDB, is appropriate to gain relevant information that contributes to the credentialing review.

HANYS also requested that hospitals meet the requirement for physician coverage in Emergency Departments through the use of telemedicine. The Department has granted one waiver to Margaretville Hospital to allow the use of telemedicine in lieu of on-site physician coverage. The Department will monitor Margaretville's experience and determine at the end of the waiver period whether allowing broader use of telemedicine in lieu of on-site physician coverage would be appropriate.

Federal Standards:

The proposed amendment does not exceed any minimum standards of the federal government. One of the proposed amendments seeks to align state regulations with federal requirements.

Compliance Schedule:

The proposed amendment will be effective immediately after publication of a Notice of Adoption in the New York State Register. A compliance schedule is not needed as the regulations do not impose any new requirements on regulated entities.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is required pursuant to section 202-(b)(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse impact on facilities in rural areas, and it does not impose reporting, record keeping or other compliance requirements on facilities in rural areas. The proposed amendment to extend physician coverage time seeks to maintain access to health care in rural areas.

Job Impact Statement

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

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Post Anesthesia Evaluations at Free-Standing and Hospital Off-Site Ambulatory Surgery Centers (ASCs)

I.D. No. HLT-39-10-00005-P

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

Proposed Action: Amendment of section 755.6 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2803

Subject: Post Anesthesia Evaluations at Free-Standing and Hospital Off-Site Ambulatory Surgery Centers (ASCs).

Purpose: Authorize those individuals who can administer anesthesia in Free-Standing and Hospital Off-Site ASCs to do post anesthesia evaluations.

Text of proposed rule: The title of Part 755 is amended to read as follows:

PART 755

FREE-STANDING *AND OFF-SITE HOSPITAL BASED* AMBULATORY SURGERY SERVICES

Subdivision (d) of Section 755.6 of Part 755 is amended to read as follows:

(d) each patient is evaluated by a physician *or by an individual qualified to administer anesthesia as set forth in subdivision (c) in Section 755.4 of this Part* for proper anesthesia recovery, and discharged upon the written order of a physician;

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

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

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

Regulatory Impact Statement

Statutory Authority:

The statutory authority for the promulgation of this regulation is contained in Public Health Law (PHL) section 2803(2) which authorizes the State Hospital Review and Planning Council (SHRPC) to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities.

Legislative Objectives:

The legislative objective of PHL Article 28 includes the protection and promotion of the health of the residents of New York State by requiring the efficient provision and proper utilization of health services, of the highest quality at a reasonable cost.

Needs and Benefits:

Currently only a physician is authorized to evaluate each patient for proper anesthesia recovery in free-standing and hospital off-site ambulatory surgery centers (ASCs) in New York State. A recent federal regulatory change (42 Code of Federal Regulations (CFR) Section 416.42) specifies that in the ASC setting the post anesthesia assessment must be completed and documented by a physician or anesthetist, certified registered nurse anesthetist (CRNA) or an anesthesiologist's assistant.

Section 755.4 of Title 10 of the New York Codes Rules and Regulations (10 NYCRR) sets forth the anesthesia services provisions for free-standing and hospital off-site ASCs in New York State. These provisions specify that anesthesia can be administered only by a qualified anesthesiologist, or a physician or dentist qualified to administer anesthesia, or a certified registered nurse anesthetist. As dentists (the federal definition of a physician pursuant to Section 1861 of the Social Security Act includes dentists) and CRNAs can conduct the post anesthesia requirements pursuant to federal regulation, current provisions in Section 755.6 (Patient Admission and Discharge) need to be updated to conform to the recent federal changes. The language in Section 755.6 of Title 10 NYCRR should mirror the language in Section 755.4 of Title 10 NYCRR. The same individuals who are qualified to administer anesthesia in ASCs in New York State should be the same individuals who are qualified to conduct the post anesthesia assessments.

The Title of Part 755 has been amended to accurately reflect the types of facilities applicable to Part 755 as specified in the ambulatory surgery definition set forth in Section 755.1.

Costs:

This provision would not increase costs to State or local governments, the State or local health departments or providers. This measure would allow the same individuals who are able to administer anesthesia in New York State free-standing or hospital off-site ASCs also to do the post evaluation anesthesia assessment.

Local Government Mandates:

This provision does not impose any additional mandates on local governments.

Paperwork:

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

Duplication:

This regulation does not duplicate any other State or federal regulation.

Alternatives:

One option considered was not to make any changes to these provisions. The Department chose, however, to amend these provisions to conform to federal changes in 42 CFR Section 416.42.

Federal Standards:

This measure does not exceed any minimum standards of the federal

government for the same or similar subject areas. It conforms to changes in 42 CFR Section 416.42. 42 CFR Section 416.42 also allows anesthesiologist assistants to do post anesthesia assessments. New York State does not recognize anesthesiologist assistants. New York State does allow dentists qualified to administer anesthesia.

Compliance Schedule:

This proposed amendment will become effective upon publication of a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

Effect of Rule:

This regulation impacts 92 free-standing and 20 hospital off-site ASCs in New York State. All of the 92 free-standing ASCs are small businesses.

Compliance Requirements:

This proposal allows practitioners, in addition to physicians, who are already authorized to administer anesthesia in the free-standing and hospital off-site ASC setting pursuant to Title 10 Section 755.4 to also do a post anesthesia assessment.

Professional Services:

There are no additional professional services required to comply with this proposal.

Compliance Costs:

None.

Economic and Technological Feasibility:

This proposal is economically the technologically feasible.

Minimizing Adverse Impact:

There is no adverse impact.

Small Business and Local Government Participation:

Outreach to the affected parities is being conducted. Organizations who represent the affected parities and the public can also obtain the agenda of the Codes and Regulations Committee of the State Hospital Review and Planning Council (SHRPC) and the proposed regulation on the Department's website. The public, including any affected party, is invited to comment during the Codes and Regulations Committee meeting.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to section 202-bb(4)(a) of the State Administration Procedure Act (SAPA). It is apparent, from the nature of the proposed amendment that it will not impose any adverse impact on rural areas, and the rule does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

No Job Impact Statement is required pursuant to section 201-a (2) (a) of the State Administration Procedure Act (SAPA). It is apparent, from the nature of the proposed amendment, that it will have no impact on jobs and employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Consumer Directed Personal Assistance Program

I.D. No. HLT-39-10-00006-P

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

Proposed Action: Addition of section 505.28 to Title 18 NYCRR.

Statutory authority: Social Services Law, section 365-f

Subject: Consumer Directed Personal Assistance Program.

Purpose: To establish regulations for the administration and operation of the Consumer Directed Personal Assistance Program (CDPAP).

Substance of proposed rule (Full text is posted at the following State website:www.health.state.ny.us): The Consumer Directed Personal Assistance Program (CDPAP) regulations provide local social services districts, CDPAP fiscal intermediaries, consumers, and other long term care stakeholders with a single, standardized operational framework supportive of the program's unique design and philosophy.

The regulations include a description of the program as defined in Social Services Law section 365-f, followed by definitions of terms referenced throughout the regulations.

The regulations also contain the CDPAP eligibility requirements and the assessment/reassessment process used by local social services districts to determine an applicant's eligibility and appropriateness for participation in the program.

As a Medicaid funded home care program administered and prior authorized by the local social services districts, the regulations also include prior authorization and client notification protocols.

As a consumer directed model of home care, the regulations describe the role and responsibilities of program participants and of the fiscal intermediary that acts as the employer of record on behalf of the consumer.

The payment portion of the regulations identifies the Department of Health as being responsible for establishing CDPAP rates. The regulations also identify that a local social services district, with Department of Health approval, may establish an alternative payment methodology for determining a county's CDPAP rates.

The regulations promote state-wide program uniformity and comparability of benefits by providing stakeholders with a clear understanding of their respective roles and responsibilities, the purpose of the program, and procedures to be used in determining program eligibility.

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

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

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

Summary of Regulatory Impact Statement

The Regulatory Impact Statement (RIS) identifies the statutory authority which allows the Department of Health to propose Consumer Directed Personal Assistance Program (CDPAP) regulations and describes the legislature's objectives in directing the Department to establish a CDPAP.

The Needs and Benefits portion of the RIS identify that the CDPAP is administered by local social services districts and that regulations are needed to establish a uniformly administered program with comparable state wide benefits. Standardized application, assessment and authorization protocols will ensure that Medicaid beneficiaries have access to appropriate benefits and that local social services districts, CDPAP fiscal intermediaries, and consumer's roles and responsibilities are governed by a single set of standards.

As an existing Medicaid entitlement, no new costs associated with establishment of the regulations to regulated parties, or to local government are anticipated. The State share of program expenses may be increased as the regulations would expand the types of family members who may provide care and be reimbursed under the CDPAP benefit. The CDPAP was previously operating under the Personal Care Services regulations which bar a consumer's spouse, parent, son, son-in-law, daughter or daughter-in-law from providing Medicaid funded services to the consumer. The proposed CDPAP regulations would no longer bar the consumer's son, son-in-law, daughter, or daughter-in-law from serving as the consumer's assistant. As the Department has no data quantifying the extent to which adult children or children-in-law of Medicaid beneficiaries provide informal non-Medicaid funded care currently, the number of unpaid caregivers converting to Medicaid funded care is unknown.

Although the regulations impose a mandate on local social services districts, local social services districts have been administering the program for nearly two decades and the regulations do not impose any new requirements.

The proposed regulations do not impose any new forms, reporting or other paperwork requirements and do not duplicate or overlap any existing State or federal requirements. Additionally, the proposed regulations do not exceed any minimum federal standards.

As the proposed regulations seek to standardize the administrative and operational environment of the CDPAP and to provide all stakeholders with clearly defined roles and responsibilities of affected parties, social services districts and fiscal intermediaries should be able to comply with the proposed regulations when they become effective.

Regulatory Flexibility Analysis

Effect of Rule:

The proposed rule was developed to standardize administrative and operational requirements for a Medicaid Program that has been in existence for nearly two decades. Small businesses and local governments will not be affected by the proposed rule.

Compliance Requirements:

The proposed rule seeks to standardize the administrative and operational requirements of a Medicaid Program which has been in existence for nearly two decades. The proposed rule does not impact existing reporting, recordkeeping or affirmative action requirements that a small business or local government would have to undertake to comply with the proposed rule. A small business regulation guide is not necessary and has not been prepared.

Professional Services:

There are no professional services that small businesses will need in order to comply with the proposed rule. Local departments of social services currently administer the program that is to be governed by the proposed rule. Local departments of social services currently employ or contract with caseworkers and nurses for several administrative functions related to this program and other home care programs. The proposed rule will not require local departments of social services to increase or alter current staffing of professional services.

Compliance Costs:

As the regulation governs an already existing program, there are no initial capital costs to a regulated business or industry or local government associated with compliance with the proposed rule. Although the regulations govern a publicly funded program, local government costs have been capped and any increase in program expenditures is borne by the State and Federal governments, thus negating any future compliance costs.

Economic and Technological Feasibility:

The regulations govern a publicly funded home health program which has existed for nearly two decades and which has consistently demonstrated economic and technological feasibility.

Minimizing Adverse Impact:

The proposed rule has no adverse economic on small businesses or local governments as it does not establish any new requirements or obligations on businesses or local governments. The proposed rule instead seeks to establish a uniform set of state-wide standards for an existing Medicaid home care program which in the past relied on the use of intermittent issuance of ad hoc policy documents to govern the program.

Small Business and Local Government Participation:

During development of the proposed regulations, the Department of Health's Office of Long Term Care met with a broad range of State Associations and stakeholders representing public and private long term care interests. Draft regulations were shared with stakeholders for comment. Appropriate concerns were incorporated into the regulations being submitted for release for public comment.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

The proposed rule governs a Medicaid State Plan service which is required to be provided state-wide in all counties.

Reporting, Recordkeeping and other Compliance Requirements; and Professional Services:

The proposed rule establishes regulations for a Medicaid Program which has been in existence for nearly two decades. The proposed rule does not impact existing reporting or recordkeeping requirements, nor does it impact the kinds of professional services needed to comply with the proposed rule.

Costs:

As a pre-existing program, there is no initial capital compliance costs associated with the proposed rule; because the local (county) share of Medicaid long term care costs are capped, there is no annual cost increase associated with on-going compliance of the proposed rule.

Minimizing Adverse Impact:

The proposed rule has no adverse impact on rural areas as it does not establish any new requirements or obligations on localities but instead seeks to establish uniform state-wide standards for an existing Medicaid program.

Rural Area Participation:

During development of the proposed regulations the Department of Health's Office of Long Term Care met with a broad range of State Associations and stakeholders representing public and private long term care interests. Draft regulations were shared with stakeholders, including rural county departments of social services, aging and health. Appropriate concerns were incorporated into the regulations being released for public comment.

Job Impact Statement

Nature of Impact:

The proposed regulations are meant to provide a uniform operational framework for a Title XIX home care program that has been in existence for nearly two decades. The proposed regulations reflect the current policies and procedures used in administration of the program with one exception. The proposed regulation expands the types of family members eligible to be reimbursed for provision of Consumer Directed Personal Assistance Program (CDPAP) services to include sons, sons-in-law, daughters, and daughters-in-law. As this change does not increase the number of CDPAP personal assistant jobs, but instead expands the available workforce pool, no job impact is anticipated.

Categories and Numbers Affected:

As indicated above, there are no job categories or numbers of individuals impacted by the proposed regulation.

Regions of Adverse Impact:

There are no regions in the state that will be adversely impacted by the proposed regulation.

Minimizing Adverse Impact:

The proposed regulations will not have any adverse impact on existing jobs. The regulation's expansion of family members eligible to serve as CDPAP personal assistants may help increase the pool of workers available to meet the future service demands.

Self-Employment Opportunities:

N/A.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Standards of Construction for Health Care Facilities

I.D. No. HLT-39-10-00007-P

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

Proposed Action: Amendment of Parts 711, 712, 713, 714, 715 and 716 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 2802 and 2803

Subject: Standards of Construction for Health Care Facilities.

Purpose: Update & clarify construction & physical environment standards for hospital, nursing home & certain ambulatory care facilities.

Substance of proposed rule (Full text is posted at the following State website:www.health.state.ny.us): Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Parts 711, 712, 713, 715 and 716 set forth the architectural, engineering, equipment and construction and other physical environment standards for all health facilities subject to Department of Health oversight pursuant to Public Health Law (PHL) Article 28.

Proposed Revisions to 10 NYCRR Part 711

10 NYCRR Section 711.1 would be revised to more clearly identify the facilities and the standards that are subject to regulation. In addition, language would be added to clearly identify construction related information that must be filed with construction applications. The proposal would clarify the process for submitting a construction application.

10 NYCRR Section 711.2 would be revised to require health care facilities to comply with more current National Fire Protection Association (''NFPA'') standards, including NFPA 101, Life Safety Code, 2000 edition, which is the life safety code currently mandated by the federal government for Medicare and Medicaid certification. In addition, 10 NYCRR Section 711.2 would be revised to require that health care facilities comply with more current national codes ad-

dressing radiation protection, facility heating, cooling and ventilation (HVAC) and gas and vacuum systems. 10 NYCRR section 711.2 would be revised to require that future health care facility construction conform to the 2010 edition of Guidelines for Design and Construction of Health Care Facilities.

10 NYCRR Section 711.3, which establishes general site requirements for health care facilities, would be revised to clarify language, add requirements for facility occupants other than patients and eliminate outdated site requirements. 10 NYCRR Sections 711.4, 711.5, 711.7, 711.8, 711.9 and 711.10 would be repealed. New 10 NYCRR Section 711.9 would set forth specific requirements for obtaining waivers of construction standards.

Proposed Revisions to 10 NYCRR Part 712

The regulatory proposal would repeal existing 10 NYCRR Part 712, which includes standards of construction for some hospitals, and replace it with a new Part 712 (Standards of Construction for General Hospital Facilities). The proposal would consolidate all requirements specific to general hospital construction into 10 NYCRR Part 712. New Part 712 would be divided into two Subparts based on the date when general hospital construction was or is to be undertaken.

New Subpart 712-1 would set forth minimum construction and physical environment standards applicable to general hospitals built and to portions of general hospitals altered or renovated pursuant to Department or commissioner approval granted prior to October 14, 1998 and to general hospital construction projects not requiring such approvals that were completed prior to October 14, 1998. New Subpart 712-1 would include requirements in existing 10 NYCRR Section711.4 and existing 10 NYCRR Part 712.

New Subpart 712-2 would set forth minimum construction and physical environment standards applicable to general hospitals built and to portions of general hospitals altered or renovated pursuant to Department or commissioner approval granted on or after October 14, 1998 and to general hospital construction projects not requiring such approvals that were or will be completed after October 14, 1998. New Subpart 712-2 would require that construction projects comply with Guidelines for Design and Construction of Health Care Facilities and would include some additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 713

The regulatory proposal would repeal existing Part 713, which sets forth construction standards for some nursing homes, and replace it with a new Part 713 (Standards of Construction for Nursing Home Facilities). The proposal would consolidate all requirements specific to nursing home construction into 10 NYCRR Part 713. Part 713 would be divided into four subparts based on the date when nursing home construction was or is to be undertaken.

Subpart 713-1 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing homes facilities renovated or altered prior to August 25, 1975 and to nursing home construction projects approved by the commissioner or Department prior to August 25, 1975. New Subpart 713-1 would include requirements that are in existing 10 NYCRR Section 711.4.

Subpart 713-2 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing homes facilities renovated or altered between August 25, 1975 and July 1, 1990 and to nursing home construction projects approved by the commissioner or Department between August 25, 1975 and July 1, 1990. Subpart 713-2 would include requirements that are in existing 10 NYCRR Section 711.5.

Subpart 713-3 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing homes facilities renovated or altered between July 1, 1990 and December 31, 2010 and to nursing home construction projects approved by the commissioner or Department between July 1, 1990 and December 31, 2010. Subpart 713-3 would incorporate by reference Guidelines for Design and Construction of Health Care Facilities. Additional requirements not addressed in this document would be included in the proposed Subpart.

Subpart 713-4 would set forth minimum construction and physical environment standards applicable to nursing home facilities built, to portions of nursing homes facilities renovated or altered after December 31, 2010 and to nursing home construction projects approved by the commissioner or Department after December 31, 2010. Subpart 713-4 would require that construction projects comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 714

The regulatory proposal would consolidate all requirements specific to adult day health care program facility construction into 10 NYCRR Part 714, including requirements in existing 10 NYCRR Part 713. It would require future adult day health care program facility construction to comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 715

The regulatory proposal would repeal existing 10 NYCRR Part 715 and replace it with a new Part 715 (Standards of Construction for Freestanding Ambulatory Care Facilities). The regulatory proposal would consolidate all requirements specific to freestanding ambulatory care facilities into 10 NYCRR Part 715. New Part 715 would be divided into two Subparts based on the date when ambulatory care facility construction was or is to be undertaken.

New Subpart 715-1 would set forth minimum construction and physical environment standards applicable to: (1) diagnostic center and treatment center facilities built and to portions of such facilities renovated or altered prior to January 1, 2011; (2) general hospital offsite outpatient facilities built and to portions of such facilities renovated or altered prior to January 1, 2011; and, (3) general hospital offsite outpatient facility construction projects and diagnostic center and treatment center facility construction projects approved by the commissioner or Department prior to January 1, 2011. New Subpart 715-1 would include requirements that are in existing 10 NYCRR Section 711.7 and existing 10 NYCRR Part 715.

New Subpart 715-2 would set forth minimum construction and physical environment standards applicable to:(1) diagnostic center and treatment center facilities built and to portions of such facilities renovated or altered after January 1, 2011; (2) general hospital offsite outpatient facilities built and to portions of such facilities renovated or altered after January 1, 2011; and, (3) general hospital offsite outpatient facility construction projects and diagnostic center and treatment center facility construction projects approved by the commissioner or department after January 1, 2011. New Subpart 715-2 would require future ambulatory care construction to comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

Proposed Revisions to 10 NYCRR Part 716

The regulatory proposal would repeal existing 10 NYCRR Part 716 and replace it with a new Part 716 (Standards of Construction for Rehabilitation Facilities). The regulatory proposal would consolidate into New Part 716 all standards of construction specifically applicable to rehabilitation facilities. New Part 716 would include requirements that are in existing 10 NYCRR Section 711.8 and existing 10 NYCRR Part 712. New Part 716 would also require that future rehabilitation facility construction comply with the 2010 edition of the Guidelines for Design and Construction of Health Care Facilities as well as additional regulatory requirements.

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

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

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

Summary of Regulatory Impact Statement

The Department believes that the proposed regulatory amendments offer many benefits to regulated parties and would improve the quality of health care facility construction while reducing construction costs. The proposal to amend these regulations would reorganize, simplify and clarify construction and physical environment requirements applicable to health

care facilities licensed pursuant to PHL Article 28 and would eliminate irrelevant and redundant requirements. It would update state required life safety code standards so that they would be equivalent to the life safety code standards required for Medicaid and Medicare certification; health care facilities would no longer have to comply with two sets of life safety code standards. The proposal would also require health care facilities to comply with updated national codes relating to: radiation protection; facility heating, cooling and ventilation; food service: plumbing; and gas and vacuum systems. The regulatory proposal would require future facility construction to comply with most current nationally recognized architectural guidelines for health facility construction. If promulgated, these regulatory amendments would make it easier for facility staff, design architects and engineers, construction managers, and the Department's regulatory and surveillance staff to ensure the safety and appropriateness of existing facilities as well as the appropriate design and construction of new facilities. The proposed regulatory amendments would also result in cost savings in the construction of facilities.

Regulatory Flexibility Analysis

Finding:

The proposed regulatory amendments do not impose any economic impact on small businesses or local governments that do not operate or propose to operate a health care facility licensed pursuant to Public Health Law (PHL) Article 28. They do not impose reporting, record keeping or other compliance requirements on such entities. The proposed amendments do not impose an adverse impact on small business and local governments that operate or propose to operate a health care facility licensed pursuant to PHL Article 28. The regulatory proposal's reporting, record keeping and compliance requirements are less burdensome than existing reporting, record keeping and compliance mandates.

Reasons for the Finding:

The proposed regulatory amendments are intended to achieve greater consistency between New York State regulations and the American Institute of Architects/U.S. Department of Health and Human Services Guidelines (hereinafter referred to as the Guidelines). Existing inconsistencies between state regulatory requirements and national construction standards have increased construction costs to correct errors and increase consulting and architectural fees. The benefits of consistency and flexibility projected by the original adoption of the Guidelines by New York State in 1998 have been achieved, and this latest proposal to adopt the latest edition of the Guidelines is expected to maintain those advantages. Also, similar to current Guidelines inconsistencies; increased construction costs are necessary to correct errors.

Updating the Life Safety Code 101 to the edition recently adopted by the U.S. Centers for Medicare and Medicaid Services (CMS) is essential to ensure that all existing and future health facility construction is compliant with applicable federal standards. Therefore, the proposed amendments do not impose new compliance requirements on those health care facilities and design and consulting firms that are small businesses, nor on local governments that run medical facilities since they need to conform to such standards in any event.

Measures Taken to Ascertain the Finding:

Consistent with the previous major revision effort in 1998, the Department sought assistance from the Construction Standards Advisory Group (CSAG), which represented health care facilities, architects, engineers, design consultants, construction managers, health care administrators and other organizations and businesses most affected by this proposal. Among the most important factors that influenced the CSAG to recommend a regulatory amendment was that the amendment would not increase the costs of design, construction or operation of health care facilities. After numerous meetings throughout 2008 and 2009 where CSAG members compared the current State Hospital Code with the 2006, and then 2010 edition of the Guidelines, the CSAG concluded in June 2009 that this amendment was the most logical course to take, and would not increase costs to the system.

Department staff deals with architects, construction managers and facility planners on a daily basis in the interpretation and application of construction regulations for individual projects. There have been numerous statements, including high profile media reports that attest to the potential savings of this update with its alignment with federal regulations and national standards. The long-term involvement and input of industry professionals (i.e., architects and engineers) demonstrates the economic and technical feasibility of complying with these new standards.

Rural Area Flexibility Analysis

No Rural Area Flexibility Analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedures Act. The proposed provisions apply uniformly throughout New York State, including in rural areas.

The proposed amendments, if promulgated, would not have an adverse impact on facilities in rural areas. They would not impose reporting, record keeping or other compliance requirement on facilities in rural areas that are not licensed pursuant to PHL Article 28. The additional flexibility in design approval and code enforcement afforded the Department of Health by reliance on the functional program (architectural and design plans for health care facilities) actually facilitate the approval of projects in rural areas, where lower volume and less predictable levels of occupancy and utilization often make it advisable to design and operate services (e. g. nursing units) on a smaller scale than the minimal levels specified in regulation. Similarly, adoption by reference of the 2010 Guidelines for Design and Construction of Health Care Facilities on an expanded basis to include diagnostic or treatment centers will also benefit rural areas due the inclusion of new standards for small primary care clinics and mobile units, which are particularly applicable to rural locations.

Job Impact Statement

Nature of Impact:

The proposed amendments will continue to offer health care providers the opportunity to be more innovative in the designing and functioning of health care facilities, and in tailoring the physical plant and equipment more to individual programs of care. The Department of Health expects that providers will continue to undertake projects necessary to maintain and preserve their existing physical plants, which represent significant investments and capital assets. These circumstances will prompt most facilities to retain staff currently employed in facility planning and design or to continue to rely on design consulting firms for such services. No significant negative impact on employment as a result of the proposed regulations is anticipated. This projection has been borne out by experience subsequent to the original adoption of the Guidelines and updated Life Safety Code 101 in 1998.

Categories and Number Affected:

The categories of jobs most affected by changes in the design and construction of health care facilities are those in the architecture and engineering professions. However, as discussed above, no significant negative effects on employment are anticipated with reference to these or any other occupations. Implementation of the latest edition the Guidelines in future health care facility construction will positively affect health care workers and patients. The enhanced health care environment resulting from these standards suggest increased staff satisfaction and safety, resulting in fewer staff injuries and minimizing workforce turnover. With the proposed expansion of Guidelines use for outpatient facilities and nursing homes, these benefits will be available to a greater number of health care workers.

Regions of Adverse Impact:

The proposed amendments will not impose an adverse impact on any regions of the State.

Minimization of Adverse Impact:

There are no adverse impacts to this rule. Therefore, no measures to minimize adverse impact are necessary.

The proposed amendments are not expected to have a negative effect on self-employment opportunities for architects and engineers who specialize in health care facility design.

Insurance Department

EMERGENCY RULE MAKING

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-39-10-00020-E
Filing No. 948
Filing Date: 2010-09-14
Effective Date: 2010-09-14

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

Action taken: Amendment of Part 83 (Regulation 172) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404; Public Health Law, sections 4403, 4403-a, 4403-c and 4408-a; and L. 2002, ch. 599 and L. 2008, ch. 311

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

Specific reasons underlying the finding of necessity: Certain provisions of the Insurance Law require that insurers file financial statements annually and quarterly with the superintendent. These insurers are subject to the provisions of Sections 307 and 308 of the Insurance Law and are required to file what are known as annual and quarterly statement blanks on forms prescribed by the superintendent. The superintendent has prescribed forms and annual and quarterly statement instructions that are adopted from time to time by the National Association of Insurance Commissioners (''NAIC''), as supplemented by additional New York forms and instructions. To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy procedure and instruction manuals. The latest edition of one of the manuals, the ''Accounting Practices and Procedures Manual as of March 2009"(''Accounting Manual'') includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles (''SSAPs''). This regulation incorporates by reference the Accounting Manual adopted by the NAIC in March, 2009.

The Accounting Manual represents a codification of statutory accounting principles. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. The preamble to the Accounting Manual states that ''this Manual is not intended to preempt states' legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations.'' Section 83.4 of the proposed regulation sets out the ''Conflicts and Exceptions'' to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers. Insurance Law Section 1302 provides a listing of non-admitted assets. Chapter 311 removed ''goodwill'' from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset. Chapter 311 also modified certain limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. Chapter 311 made the changes regarding the treatment of goodwill and EDP equipment subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, ''health insurers'') will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis. As compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small, certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

Absent the amendment being effective immediately, health insurers would be allowed to treat goodwill and EDP equipment, for financial statement purposes, as other regulated insurers do. In other words, the Department is concerned that absent an amendment, the financial statements that health insurers must file with the Department on an annual and quarterly basis may not reflect with sufficient accuracy the true financial condition of such companies.

The proposed rule also adopts SSAP #10R, which was adopted by the NAIC on December 8, 2009. SSAP #10R extends the period over which deferred tax assets (''DTAs'') are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section 1301(a)(16), to 15%. SSAP #10R will be included in the Accounting Manual.

Insurance Law Section 1301(a)(18) provides that the superintendent may, by regulation, modify any requirement of Section 1301(a) to conform to any subsequent amendment to the Accounting Manual as adopted from time to time by the NAIC. SSAP #10R will be effective for the annual statement for the year ending December 31, 2009 and going forward.

Adoption of SSAP #10R will allow New York authorized life insurers to increase the admitted value of deferred tax assets. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on insurers to maintain the high level of risk based capital (''RBC'') ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with raising additional capital.

New York authorized insurers would have been at a competitive disadvantage if SSAP #10R was not adopted. Failure to implement the changes in New York at the same time they were implemented in other states would have make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to report a higher admitted asset value, the lower RBC ratios generated by the lower admitted asset value will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the September 30, 2010 quarterly statement is November 15, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009, March 25, 2010, and June 22, 2010. The proposal was sent to the Governor's Office of Regulatory Reform on January 7, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For the reasons stated above, this rule must be promulgated on an emergency basis for the furtherance of the general welfare.

Subject: Financial statement filings and accounting practices and procedures.

Purpose: To update the regulation to conform to NAIC guidelines, statutory amendments, and to clarify existing provisions.

Substance of emergency rule: Subdivision (c) of Section 83.2 of Part 83 is amended to update the publication dates for the Accounting Practices and Procedures Manual (''Accounting Manual''), which is incorporated by reference in Regulation 172. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles (''SSAPs'').

Subdivision (c) of Section 83.3 is repealed and a new subdivision (c) is adopted to clarify the fact that the Accounting Manual is adopted in its entirety, subject to such conflicts and exceptions as found in Section 83.4 of this part.

Section 83.4 is amended to conform to updates to the Accounting Manual and the provisions of Chapter 311 of the Laws of 2008. Section 83.4 sets out ''Conflicts and Exceptions'' to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control. Section 83.4 is amended as follows:

Subdivision (b) is amended so that the admitted value of gross deferred tax assets is in accordance with SSAP No. 10R.

Subdivision (c) is repealed and a new subdivision (c) is added to require

insurers other than accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans to depreciate electronic data processing equipment and operating system software over three years.

Paragraph (3) of subdivision (e), which permitted insurers to take credit for aircraft as admitted assets, has been deleted.

Subdivision (h) is amended so that insurers may no longer take credit for certain prepaid real estate taxes as admitted assets.

Subdivision (i), which set forth rules different from the rules set forth in the Accounting Manual for valuing investments in common shares of insurers which are not subsidiaries, has been deleted.

Subdivision (j), which set forth rules different from the rules set forth in the Accounting Manual for the calculation of investment income due and accrued has been deleted.

Subdivision (k) is relettered (i).

Subdivision (l), which set forth rules different from the rules set forth in the Accounting Manual for limitations on accrued mortgage loan interest, has been deleted.

Paragraph (1) of subdivision (m), which set forth rules different from the rules set forth in the Accounting Manual, for depreciation of life insurers' investments in real estate, has been deleted.

Paragraph (2) of subdivision (m) has been relettered 83.4(j).

Paragraphs (1) and (3) of subdivision (n) have been renumbered paragraphs (1) and (2) of subdivision (k) respectively.

Paragraph (2) of subdivision (n), which set forth rules different from the rules set forth in the Accounting Manual for valuing investments in common shares of insurers which are subsidiaries, has been deleted.

Subdivision (o) is relettered (l).

Subdivision (p), which required all goodwill from assumption reinsurance transactions pertaining to life, deposit-type and accident and health reinsurance to be non-admitted, has been deleted.

Subdivision (q) is relettered (m).

Subdivision (r) is relettered (n).

Subdivision (s) is relettered (o).

Subdivision (t) has been relettered (p), and has been amended to permit insurers, other than accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans, to admit goodwill in accordance with the Accounting Manual.

Subdivision (u), which set forth rules for declaring and distributing dividends, in the case of the quasi-reorganization of a domestic stock property/casualty insurer, has been deleted.

Subdivision (v) is relettered (q).

Subdivision (w) is relettered (r).

Subdivision (x) is relettered (s).

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 12, 2010.

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

Regulatory Impact Statement

1. Statutory authority: Insurance Law Sections 107(a)(2), 201, 301, 307, 308, 1109, 1301, 1302, 1308, 1404, 1405, 1407, 1411, 1414, 1501, 1505, 3233, 4117, 4233, 4239, 4301, 4310, 4321-a, 4322-a, 4327 and 6404 of the Insurance Law; Sections 4403, 4403-a, 4403-(c)(12) and 4408-a of the Public Health Law; and Chapter 599 of the Laws of 2002 and Chapter 311 of the Laws of 2008.

Insurance Law Section 107(a)(2) defines the term ''accredited reinsurer'', which is used in sections 83.2, 83.3, and 83.5 of Part 83, to mean an assuming insurer not authorized to do an insurance business in this state but which (i) presents satisfactory evidence to the superintendent that it meets the applicable standards of solvency required in this state, (ii) is in compliance with the conditions prescribed by regulation under which a ceding insurer may be allowed credit for reinsurance recoverable from an insurer not authorized in this state, and (iii) has received a certificate of recognition as an accredited reinsurer issued by the superintendent pursuant to such regulation; provided that no insurer shall be an accredited reinsurer with respect to any kind of insurance not provided for in such certificate.

Insurance Law Sections 201 and 301 authorize the superintendent to prescribe forms and regulations interpreting the Insurance Law, and to effectuate any power granted to the superintendent under the Insurance Law.

Insurance Law Sections 307 and 308 require insurers to file annual and quarterly statements on forms prescribed by the superintendent and in accordance with instructions prescribed by the superintendent. Section 307(a)(1) of the Insurance Law requires every insurer authorized in New York to file an annual statement showing its financial condition in such form as prescribed by the superintendent. Section 307(a)(2) permits the use of the annual statement form adopted from time to time by the National Association of Insurance Commissioners (NAIC).

Insurance Law Section 1109(a) provides that an organization complying with the provisions of Article 44 of the Public Health Law is subject to various specified sections of the Insurance Law, including section 308. Section 1109(e) provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Article 13 specifies the requirements regarding the treatment of assets and deposits in determining the financial condition of insurers for the purposes of the Insurance Law.

Insurance Law Sections 1301 and 1302 define which assets are ''admitted'' or ''not admitted'' (only ''admitted'' assets are included in determining an insurer's solvency).

Insurance Law Section 1301(a)(18) provides that the superintendent may, by regulation, modify any requirement of Section 1301(a) to conform to any subsequent amendment to the NAIC's Accounting Practices and Procedures Manual (''Accounting Manual'').

Insurance Law Section 1308 (in conjunction with Insurance Law Section 1301(a)(14)) allows for an authorized insurer to reduce the amount that it must hold in its reserves through the use of reinsurance with another authorized insurer or an accredited reinsurer.

Insurance Law Article 14 establishes the investments that may be used by insurers to satisfy minimum capital, surplus and reserve requirements. It further governs those classes of investments in which insurance companies may invest after satisfying minimum capital, surplus and reserve requirements, and establishes allocation or diversification limits among assets classes. Article 14 also sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Section 1404 establishes the types of reserve investments that may be used by non-life insurers to satisfy reserve requirements.

Insurance Law Section 1405 establishes the types of surplus investments that may be used by life insurers, after minimum capital and reserve requirements have been satisfied.

Insurance Law Section 1407 establishes the types of surplus investments that may be used by property/casualty and certain other insurers, after minimum capital and reserve requirements have been satisfied.

Insurance Law Section 1411 establishes the types of investments that domestic insurers are prohibited from making.

Insurance Law Section 1415 sets forth provisions concerning the valuation of various assets of insurers.

Insurance Law Article 15 contains provisions that govern the establishment and operation of holding company systems, including controlled insurers. Insurance Law Section 1501 provides for an administrative determination of the existence or absence of control to determine whether the insurer is a member of a holding company system. Insurance Law Section 1505 establishes standards for transactions between a controlled insurer and other members of the holding company system to safeguard the interests of the insurer and policyholders.

Insurance Law Section 3233 sets forth provisions concerning stabilization of health insurance markets and premium rates.

Insurance Law Section 4117 sets forth provisions concerning loss reserves and loss expense reserves of property/casualty insurance companies.

Insurance Law Section 4233 sets forth provisions concerning the annual statements of life insurance companies, including a provision that in addition to any other matter that may be required to be stated therein, either by law or by the superintendent pursuant to law, every annual statement of every life insurer doing business in New York shall conform substantially to the form of statement adopted from time to time for such purpose by, or by the authority of, the NAIC, together with such additions, omissions or modifications, similarly adopted from time to time, as may be approved by the superintendent.

Insurance Law Section 4239 sets forth provisions concerning allocation and reporting of income and expenses of life insurers.

Insurance Law Article 43 establishes organizational requirements, investment and reserve requirements for non-profit medical and dental indemnity, or health and hospital service corporations organized in this state. The article also establishes ''stop loss'' funds, from which health maintenance organizations, corporations or insurers may receive reimbursement for claims paid by such entities for members covered under certain contracts.

Insurance Law Section 4301 establishes requirements applicable to the formation and operation of the corporate entity, including composition and term limits of the corporation's board of directors.

Insurance Law Section 4310 sets forth requirements applicable to investments, reserves and the financial condition of not-for-profit health insurers and health maintenance organizations (HMOs).

Insurance Law Sections 4321-a, 4322-a, and 4327 establish state-funded stop loss pools to subsidize claim payments made by HMOs pursuant to policies issued in the individual market and the Healthy NY market.

Insurance Law Section 6404 sets forth provisions concerning the investments that may be used by title insurance corporations. It also sets forth provisions concerning the valuation of various assets of title insurers.

Insurance Law Sections 1109(e) and 4301(e)(5), respectively, provide that the superintendent may promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law pertaining to health maintenance organizations. Public Health Law Article 44 authorizes the superintendent to establish standards governing the fiscal solvency of integrated delivery systems, and requires the filing of financial reports by prepaid health service plans and comprehensive HIV special needs plans.

Pursuant to the above provisions, the superintendent is authorized to implement the Accounting Manual, subject to any provisions in New York law that conflict with particular points in the Accounting Manual. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles (''SSAPs''). The Accounting Manual represents a codification of Statutory Accounting Principles.

Chapter 599 of the Laws of 2002 amended the Insurance Law relating to the treatment of deferred tax assets in the filing of quarterly and annual financial statements by certain insurers.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain insurers. Insurance Law Section 1302 provides a listing of non-admitted assets. Chapter 311 removed ''goodwill'' from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Chapter 311 also modified the limitations on the ability of insurers to take credit for electronic data processing (EDP) equipment as an admitted asset.

2. Legislative objectives: Certain provisions of the Insurance Law provide that authorized insurers, accredited reinsurers, authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations and integrated delivery systems shall file financial statements annually and quarterly with the superintendent. These entities are subject to the provisions of Sections 307 and 308 of the Insurance Law, which require the filing of what are known as Annual and Quarterly Statement Blanks on forms prescribed by the superintendent. Except with regard to filings made by Underwriters at Lloyd's, London, the superintendent has prescribed forms and Annual and Quarterly Statement Instructions that have been adopted from time to time by the NAIC, as supplemented by additional New York forms and instructions. To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy, procedure and instruction manuals. One of these manuals, the Accounting Manual, sets forth Statements of Statutory Accounting Principles. The Accounting Manual is incorporated by reference into this regulation.

The preamble to the Accounting Manual states that ''this Manual is not intended to preempt states' legislative and regulatory authority. It is intended to establish a comprehensive basis of accounting recognized and adhered to if not in conflict with state statutes and/or regulations.'' Section 83.4 of the proposed regulation sets out the ''Conflicts and Exceptions'' to the Accounting Manual, and makes clear that in instances of conflict or deviation, New York statutes and regulations control.

3. Needs and benefits: Section 83.3 of the regulation provides that the financial statements of all authorized insurers, accredited reinsurers (except Underwriters at Lloyd's, London), authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans (collectively, to as ''regulated insurers'') shall be completed in accordance with statutory accounting practices and procedures as prescribed by applicable provisions of the Insurance Law and regulations.

The purpose of this Part is to enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by regulated insurers, by clearly setting forth the accounting practices and procedures to be followed in completing annual and quarterly financial statements that must be filed with the Department.

The NAIC has most recently adopted a new Accounting Manual as of March 2009. The Accounting Manual represents a codification of statutory accounting principles, presented in the form of the SSAPs. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. Codification provides examiners and analysts with uniform accounting rules against which insurers' financial statements can be evaluated.

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers. Section 1302 provides a listing of non-admitted assets. Chapter 311 removed ''goodwill'' from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, ''health insurers'') will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis. As compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

Chapter 311 also modified the limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small, certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

On December 8, 2009, the NAIC adopted a new accounting guidance relating to Deferred Tax Assets (SSAP #10R) which will be effective for the annual statement for the year ending December 31, 2009. The accounting guidance will be included in the Accounting Manual.

The proposed rule adopts SSAP #10R. SSAP #10R extends the period over which deferred tax assets (''DTAs'') are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section 1301(a)(16), to 15%.

4. Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs $465 for a hard copy, or $395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states' requirements as much as New York's.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies' net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers' overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC's Accounting Practices and Procedures Manual and adopted in other states.

There is no cost to the Insurance Department for the Accounting Manual, since the Department may obtain it free of charge from the NAIC.

5. Paperwork: To the extent that this rule makes changes in accounting principles, regulated insurers will need to familiarize themselves with this regulation. To the extent that the rule conforms New York's requirements to those of other states, the need for separate New York filings will be reduced. Once insurers are familiar with the changes, there should be no increase in required paperwork or a net decrease because of the reduced necessity for separate New York filings in other states.

6. Local government mandate: This rule does not impose any obligations on local governments.

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

8. Viable alternatives: Chapter 311 amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent. Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively,

''health insurers'') will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis.

The superintendent determined that, as compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

The Department also contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department's request and none of the four raised any objections.

9. Federal standards: There are no minimum standards of the federal government in the same or similar areas.

10. Compliance schedule: Regulated insurers already should be aware of the need to comply with the provisions of the Accounting Manual, since the NAIC issued the most recent version of the accounting Manual in March, 2009. In addition, the NAIC publishes changes to accounting guidance during the interim period before issuance of the new Accounting Manual. Regulated insurers use the Accounting Manuals in preparing their Quarterly Statements and the Annual Statements.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule will have no adverse economic impact on local governments, and will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis of this finding is that this rule is directed at regulated insurers, as defined under section 83.3 of this regulation, none of which are local governments.

The Insurance Department is not aware of any adverse impact that this rule will have on small businesses or of any reporting, recordkeeping or other compliance requirements that it will impose on small businesses. This rule is directed at regulated insurers, most of which do not come within the definition of ''small business'' found in Section 102(8) of the State Administrative Procedure Act, because none is independently owned and operated, and employs less than one hundred individuals.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: This rule applies to regulated insurers doing business or resident in every county in the state, including those that are, or contain, rural areas, as defined under Section 102(13) of the State Administrative Procedure Act. Some of the home offices of these insurers are located within rural areas.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment does not impose new reporting or recordkeeping requirements. To the extent that the rule conforms New York filings to other states' requirements, the need for separate New York filings will be reduced. To the extent that the rule renders changes in accounting principles, insurers will need to familiarize themselves with the principles themselves.

3. Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs $465 for a hard copy, or $395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states' requirements as much as New York's.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies' net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers' overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC's Accounting Practices and Procedures Manual and adopted in other states.

The Accounting Manual specifies substantive changes to eight of the ninety-six ''Statements of Statutory Accounting Principles'' contained therein. Affected parties will have the opportunity to assess the changes and provide comments to the Department.

4. Minimizing adverse impact: This rule applies to regulated insurers that do business in New York State. It does not impose any unique adverse impact on rural areas. The impact(s) are discussed in items 2 and 3 above.

5. Rural area participation: The Department contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department's request and none of the four raised any objections. All affected parties, including those doing business in rural areas of the State, will have the opportunity to comment upon and discuss the rule after the proposal is published in the State Register.

Job Impact Statement

The Insurance Department has no reason to believe that this rule will have any impact on jobs and employment opportunities. The rule codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

Niagara Frontier Transportation Authority

NOTICE OF ADOPTION

Smoking

I.D. No. NFT-21-10-00009-A
Filing No. 952
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Part 1151 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1299-e(14), 1299-f(4) and (7)

Subject: Smoking.

Purpose: To clarify where smoking is prohibited at NFTA locations.

Text or summary was published in the notice of proposed rule making, I.D. No. NFT-21-10-00009-P, Issue of May 26, 2010.

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

Text of rule and any required statements and analyses may be obtained from: Ruth A. Keating, Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York 14203, (716) 855-7398, e-mail: Ruth__Keating@nfta.com

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

NFTA's Procurement Guidelines

I.D. No. NFT-21-10-00013-A
Filing No. 954
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Part 1159 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1299-e(5) and 1299-t

Subject: The NFTA's Procurement Guidelines.

Purpose: To amend the NFTA's Guidelines to make technical changes and conform to State law.

Text or summary was published in the notice of proposed rule making, I.D. No. NFT-21-10-00013-P, Issue of May 26, 2010.

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

Text of rule and any required statements and analyses may be obtained from: Ruth A. Keating, Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York 14203, (716) 855-7398, e-mail: Ruth__Keating@nfta.com

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

NFTA's Vehicle and Traffic Regulations

I.D. No. NFT-29-10-00001-A
Filing No. 953
Filing Date: 2010-09-10
Effective Date: 2010-09-29

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

Action taken: Amendment of Part 1152 of Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1299-e(14), 1299-f(4) and (7)

Subject: The NFTA's Vehicle and Traffic regulations.

Purpose: To add additional sections regarding the use of open containers, mobile telephones and other wireless devices and seatbelts.

Text or summary was published in the notice of proposed rule making, I.D. No. NFT-29-10-00001-P, Issue of July 21, 2010.

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

Text of rule and any required statements and analyses may be obtained from: Ruth A. Keating, Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York 14203, (716) 855-7398, e-mail: Ruth__Keating@nfta.com

Assessment of Public Comment

The agency received no public comment.

Office for People with Developmental Disabilites

NOTICE OF ADOPTION

Revision of the Reimbursement Methodologies for Various Facilities and Services Provided Under the Auspices of OPWDD

I.D. No. MRD-28-10-00017-A
Filing No. 946
Filing Date: 2010-09-14
Effective Date: 2010-10-01

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

Action taken: Amendment of sections 635-10.5, 671.7, 679.6, 681.14, 686.13 and 690.7 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b) and 43.02

Subject: Revision of the reimbursement methodologies for various facilities and services provided under the auspices of OPWDD.

Purpose: To implement Health Care Adjustment (HCA) VI.

Substance of final rule: The regulations for Health Care Adjustment (HCA) VI represent the most recent in an annual series of initiatives to continue the momentum to support and sustain provider agencies in addressing the health care needs of their staff. OPWDD recognizes the essential role staff, especially direct support workers, play in developing and maintaining a high quality service delivery system. These funding initiatives will enable providers to sponsor or continue to sponsor attractive employee health care related benefits and may simultaneously serve to facilitate recruitment and retention efforts.

Medicaid funded services covered by these initiatives at various funding levels include Residential Habilitation, Day Habilitation, Supported Employment, Prevocational Services, Respite, Community Residential Habilitation, Article 16 Clinics, ICF/DDs, Day Treatment, Plan of Care Support Services and Family Education and Training.

OPWDD has determined a benchmark of health care coverage and has identified provider agencies that meet or exceed the benchmark criteria. In recognition of health care costs being incurred and to serve as a model toward which all providers should strive, providers which offer coverage at or above the benchmark will receive either a 3.0 percent increase to their allowable operating costs per trended program or a 1.0 percent increase to their allowable operating costs per all covered programs. Providers not in this category may apply to OPWDD to receive funding equivalent to 1.0 percent of their allowable operating costs in their rates or prices in the covered programs. The application must specify the intended use of the funds which are, first, to offset health care premium increases and, if any funds remain, to establish health care related benefits or to reduce employee out-of-pocket health care related expenses. Non-benchmark providers must assure board authorization and agree to maintain records to substantiate distribution of these funds consistent with their applications.

In all instances, the increases will be calculated based on the rates, prices or fees in effect on April 1, 2010 and will be a fixed amount thereafter. There will also be Health Care Adjustment VI payments in the amounts providers would have received if the increase had become effective on April 1, 2010.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 635-10.5, 671.7, 679.6, 681.14, 686.13 and 690.7.

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, barbara.brundage@omr.state.ny.us

Additional matter required by statute: Pursuant to the requirements of the State Environmental Quality Review Act, OMRDD, as lead agency, has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

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

Chapter 168 of the Laws of 2010 changed the name of the submitting agency from the Office of Mental Retardation and Developmental Disabilities (OMRDD) to the Office for People with Developmental Disabilities (OPWDD). The text of the regulations was amended to reflect the agency's name change. This minor change does not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Efficiency Adjustment for Residential Habilitation Services in Supervised IRAs and Supervised CRs

I.D. No. MRD-28-10-00018-A
Filing No. 947
Filing Date: 2010-09-14
Effective Date: 2010-10-01

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

Action taken: Amendment of sections 635-10.5(b), 671.7(a) and 686.13(k) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.09(b) and 43.02

Subject: Efficiency adjustment for residential habilitation services in supervised IRAs and supervised CRs.

Purpose: To implement an efficiency adjustment by modifying the IRA price.

Text of final rule: Paragraph 635-10.5(b)(18) is amended as follows:

(18) Determination of the efficiency adjustment for individualized residential alternatives (IRAs)*:* [effective January 1, 2003.]

(i) Effective January 1, 2003, there shall be an efficiency adjustment for IRAs as follows:

[(i)] *(a)* The efficiency adjustment shall be a percentage reduction applied to the allowed administration operating reimbursements for residential habilitation services and room, board and protective oversight (see section 686.13[k][1] of this Title) in the IRA price in effect on December 31, 2002.

[(ii)] *(b)* The efficiency adjustment described herein will not apply to:

Clauses (a)-(c) of the current subparagraph 635-10.5(b)(18)(ii) are renumbered to be subclauses (1)-(3)

Subparagraphs (iii)-(viii) of the current paragraph 635-10.5(b)(18) are renumbered to be clauses (c)-(h) and the new clauses (c) and (d) are amended as follows:

(c) Reimbursement for administration operating costs for IRAs newly certified on or after January 1, 2003, except those described in [clauses (ii)(a) and (b)] *subclauses (b)(1) and (2)* of this [paragraph] *subparagraph*, will reflect the percentage reductions determined in [subparagraph (vii)] *clause (g)* of this [paragraph] *subparagraph*.

(d) All information used to determine the efficiency adjustment percentage described in [subparagraph (vii)] *clause (g)* of this [paragraph] *subparagraph* is based on allowed IRA administration operating reimbursements for the calendar 2001 or the 2001-2002 price period.

Paragraph 635-10.5(b)(18) is amended by the addition of a new subparagraph (ii) as follows:

(ii) Effective October 1, 2010, for providers in all regions there shall be an efficiency adjustment applied to the IRA price for the residential habilitation services provided in supervised IRAs and supervised Community Residences.

(a) There shall be three components of the efficiency adjustment as follows:

(1) Non-Personal Services (NPS). Providers which demonstrate a level of NPS at or above the benchmark described in item (ii) of this subclause shall be subject to a reduction in the supervised IRA price.

(i) For the purposes of this efficiency adjustment, NPS includes site Other Than Personal Services (OTPS), transportation, and expensed equipment as contained in the supervised IRA price. NPS does not include Personal Services, contracted personal services, Fringe benefits, total program administration, total agency administration, Health Care Adjustments (HCA), capital costs and State paid items.

(ii) The benchmark is predicated on the value of all NPS contained in a provider's supervised IRA price in effect on June 30, 2008 for Region I reporting providers and on December 31, 2007 for Region II and Region III reporting providers. This value is expressed as a percentage of the total operating costs including transportation and HCA but exclusive of capitalized property contained in a provider's supervised IRA price on the respective date. The percentages for each provider offering residential habilitation services are ranked ordinally. OPWDD has established the benchmark at the 15th percentile. All providers below the 15th percentile in the ordinal ranking are exempt from the NPS reduction.

(iii) For all providers ranked at or above the benchmark, the reduction shall be applied to NPS operating costs contained in the supervised IRA price in effect on October 1, 2010.

(iv) The percentage reduction shall be 18 percent.

(2) Administration. Providers which demonstrate a level of Administration contained in the supervised IRA price at or above the benchmark described in item (ii) of this subclause shall be subject to a reduction in the supervised IRA price.

(i) For the purposes of this efficiency adjustment Administration includes Total Program Administration and Total Agency Administration contained in the supervised IRA price. Both Total Program Administration and Total Agency Administration include components representing personal services, administrative contracted services, administrative OTPS and administrative fringe benefits.

(ii) The benchmark is predicated on the combined value of Total Program Administration and Total Agency Administration contained in a provider's supervised IRA price in effect on June 30, 2008 for Region I reporting providers and on December 31, 2007 for Region II and Region III reporting providers. This value is expressed as a percentage of the total operating costs including transportation and the HCA but exclusive of capitalized property contained in a provider's supervised IRA price on the respective date. The percentages for each provider offering residential habilitation services are ranked ordinally. OPWDD has established the benchmark at the 15th percentile. All providers below the 15th percentile in the ordinal ranking are exempt from the Administration reduction.

(iii) For all providers ranked at or above the benchmark, the reduction shall be applied to Total Program Administration and Total Agency Administration operating costs contained in the supervised IRA price in effect on October 1, 2010.

(iv) The percentage reduction shall be 5 percent.

(3) Residual Adjustment. For providers subject to either one or both of the reductions described in subclauses (1) and (2) of this clause, a residual adjustment shall be implemented as described in items (i) and (ii) of this subclause. The residual adjustment shall confine the aggregate effect of this efficiency adjustment and an offset factor of $44 per unit of service to a range between a minimum of 1.5 percent and a maximum of 3.5 percent of the total supervised IRA price on October 1, 2010.

(i) For providers which would realize a reduction in the total supervised IRA price less than 1.5 percent after combining the effects subclauses (1) and (2) of this clause and $44 per unit of service, the total efficiency adjustment shall be increased to 1.5 percent of the total supervised IRA price in effect on October 1, 2010.

(ii) For providers which would realize a reduction in the total supervised IRA price greater than 3.5 percent after combining the effects of subclauses (1) and (2) of this clause and $44 per unit of service, the total efficiency adjustment shall be held to 3.5 percent of the total supervised IRA price in effect on October 1, 2010.

(b) New sites: To the extent that a provider is subject to this efficiency adjustment, a corresponding correction to approved budgeted costs for new sites shall be made so that the percentage offsets in effect before inclusion of the new site—18% NPS, 5% Administration and any residual adjustment thereto—shall be preserved when the new site's budgeted costs are included in the calculation of the supervised IRA price.

(c) For purposes of requesting a price adjustment, the effects of this efficiency adjustment resulting from the NPS and Administrative reductions as described in subclauses (a)(1) and (2) of this subparagraph as well as any subsequent residual adjustment thereto per subclause (a)(3) of this subparagraph shall not be construed as a basis for loss. In processing a price adjustment, any revised price will be offset by the monetary effects of the NPS and Administrative reductions including the residual adjustment thereto, if any.

Paragraph 671.7(a)(10) is amended as follows:

(10) The price as computed in accordance with this subdivision for a community residence of 16 or fewer beds shall be offset as follows:

(i) [For s]*S*upervised community residences*:*

(a) Effective January 1, 2010, the offset shall be $1,404 (or a prorated portion thereof for facilities which opened after April, 2009) and beginning January 1, 2010, $156 per month.

(b) Effective October 1, 2010, the offset shall be $200 per month.

(ii) For supportive community residences the offset shall be $1,134 (or a prorated portion thereof for facilities which opened after April, 2009) and beginning January 1, 2010, $126 per month.

Subdivision 671.7(a) is amended by the addition of a new paragraph (11) as follows and the existing paragraphs (11) and (12) are renumbered to be (12) and (13):

(11) *Effective October 1, 2010, for providers in all regions there shall be an efficiency adjustment applied to the IRA price for residential habilitation services provided in supervised IRAs and supervised Community Residences.*

(i) There shall be three components of the efficiency adjustment as follows:

(a) Non-Personal Services (NPS). Providers which demonstrate a level of NPS at or above the benchmark described in subclause (2) of this clause shall be subject to a reduction in the supervised IRA price.

(1) For the purposes of this efficiency adjustment, NPS includes site Other Than Personal Services (OTPS), transportation, and expensed equipment contained in the supervised IRA price. NPS does not include Personal Services, contracted personal services, Fringe benefits, total program administration, total agency administration, Health Care Adjustments (HCA), capital costs and State paid items.

(2) The benchmark is predicated on the value of all NPS contained in a Community Residence provider's supervised IRA price in effect on June 30, 2008 for Region I reporting providers and on December 31, 2007 for Region II and Region III reporting providers. This value is expressed as a percentage of the total operating costs including transportation and HCA but exclusive of capitalized property contained in a provider's supervised IRA price on the respective date. Alternatively, for Community Residence providers which did not operate supervised IRAs at these times, the NPS costs and the total operating costs shall be extracted from the CFR filed for the period ending either on December 31, 2007 or June 30, 2008 as appropriate in order to calculate a comparable value. The percentages for each provider offering residential habilitation services are ranked ordinally. OPWDD has established the benchmark at the 15th percentile. All providers below the 15th percentile in the ordinal ranking are exempt from the NPS reduction.

(3) For all providers ranked at or above the benchmark, the reduction shall be applied to NPS operating costs contained in the supervised IRA price in effect on October 1, 2010.

(4) The percentage reduction shall be 18 percent.

(b) Administration. Providers which demonstrate a level of Administration contained in the supervised IRA price at or above the benchmark described in subclause (2) of this clause shall be subject to a reduction in the supervised IRA price.

(1) For the purposes of this efficiency adjustment Administration includes Total Program Administration and Total Agency Administration contained in a provider's supervised IRA price. Both Total Program Administration and Total Agency Administration include components representing personal services, administrative contracted services, administrative OTPS and administrative fringe benefits.

(2) The benchmark is predicated on the combined value of Total Program Administration and Total Agency Administration contained in a Community Residence provider's supervised IRA price in effect on June 30, 2008 for Region I reporting providers and on December 31, 2007 for Region II and Region III reporting providers. This value is expressed as a percentage of the total operating costs including transportation and HCA but exclusive of capitalized property contained in a provider's supervised IRA price on the respective date. Alternatively, for Community Residence providers which did not operate supervised IRAs at these times, the Administrative costs and the total operating costs shall be extracted

from the CFR filed for the period ending either on December 31, 2007 or June 30, 2008 as appropriate in order to calculate a comparable value. The percentages for each provider offering residential habilitation services are ranked ordinally. OPWDD has established the benchmark at the 15th percentile. All providers below the 15th percentile in the ordinal ranking are exempt from the Administration reduction.

(3) For all providers ranked at or above the benchmark, the reduction shall be applied to Total Program Administration and Total Agency Administration operating costs contained in the supervised IRA price in effect on October 1, 2010.

(4) The percentage reduction shall be 5 percent.

(c) Residual Adjustment. For providers subject to either one or both of the reductions described in clauses (a) and (b) of this subparagraph, a residual adjustment shall be implemented as described in subclauses (1) and (2) of this clause. The residual adjustment shall confine the aggregate effect of this efficiency adjustment and an offset factor of $44 per unit of service to a range between a minimum of 1.5 percent and a maximum of 3.5 percent of the total supervised IRA price on October 1, 2010.

(1) For providers which would realize a reduction in the total supervised IRA price less than 1.5 percent after combining the effects of clauses (a) and (b) of this subparagraph and $44 per unit of service, the total efficiency adjustment shall be increased to 1.5 percent of the total supervised IRA price in effect on October 1, 2010.

(2) For providers which would realize a reduction in the total supervised IRA price greater than 3.5 percent after combining the effects clause (a) and (b) of this subparagraph and $44 per unit of service, the total efficiency adjustment shall be held to 3.5 percent of the total supervised IRA price in effect on October 1, 2010.

(ii) New sites: To the extent that a provider is subject to this efficiency adjustment, a corresponding correction to approved budgeted costs for new sites shall be made so that the percentage offsets in effect before inclusion of the new site—18% NPS, 5% Administration and any residual adjustment thereto—shall be preserved when the new site's budgeted costs are included in the calculation of the supervised IRA price.

(iii) For purposes of requesting a price adjustment, the effects of this efficiency adjustment resulting from the NPS and Administrative reductions as described in clauses (i)(a) and (b) of this paragraph as well as any subsequent residual adjustment thereto per clause (i)(c) of this paragraph shall not be construed as a basis for loss. In processing a price adjustment, any revised price will be offset by the monetary effects of the NPS and Administrative reductions including the residual adjustment thereto, if any.

Paragraph 686.13(k)(1) is amended by the addition of a new subparagraph (ix) as follows and the existing subparagraphs (ix) and (x) are renumbered to be (x) and (xi):

(ix) *The total reimbursable operating costs derived through the application of the above methodology shall be subject to efficiency adjustments in paragraph 635-10.5(b)(18) of this Title.*

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 635-10.5(b) and 671.7(a).

Text of rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OPWDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, barbara.brundage@omr.state.ny.us

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

Chapter 168 of the Laws of 2010 changed the name of the submitting agency from the Office of Mental Retardation and Developmental Disabilities (OMRDD) to the Office for People with Developmental Disabilities (OPWDD). The text of the regulations was amended to reflect the agency's name change. This minor change does not necessitate revision to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Business and Local Governments, Rural Area Flexibility Analysis or Job Impact Statement.

Assessment of Public Comment

Public Comments:

OPWDD received three comments in opposition to the proposed regulation.

A Provider Association's executive director, on behalf of the Provider Association, asserts that OPWDD's contention that the Medicaid trend factor will mitigate the reduction is ''misleading and inaccurate'' because the trend factor is used for recruitment and retention and to benefit direct support professionals. She disputes that efficiencies are possible because rates established at a point in time do not accommodate a population as it ages and consequently as its needs increase. She states that the proposed regulation not only penalizes agencies that operate efficiently, ''it gives the impression that providers seek to undercut staff, when in fact… providers seek to bolster and serve as the champion of the direct support professional.'' She further asserts that ''the overly prescriptive nature of the proposed regulations'' will force reductions in critical areas such as food, fuel, and utilities. She urges OPWDD to reverse the efficiency adjustment.

A voluntary provider agency's executive director expressed concern that the quality and efficacy of services will be jeopardized by this efficiency adjustment. He explained that the agency's historically low residential rates and its aging population with its growing medical needs have already caused its program to operate at a deficit. Further, he faults the rate appeal process as not adequately addressing the sustained losses.

A second voluntary provider agency identified that it works with hard to place individuals and states that it has a highly efficient administrative structure. If it experiences administrative cuts, it fears that programs will be jeopardized. This provider agency was represented by two individuals who presented testimony at a public hearing on the proposed regulations.

All three comments alluded to reductions in other programs that compound the fiscal stress.

OPWDD's Response:

OPWDD recognizes that these are difficult times for its providers of service and it asks that they strive in concert with OPWDD to deal with the fiscal challenges.

A trend factor when issued is allocated across the board to all operating expenses-- personal services as well as non-personal services so that it is not necessarily used, or intended to be used, exclusively for recruitment and retention of direct support professionals. OPWDD does encourage providers to utilize trend factor monies to increase the salaries and/or benefits of direct support professionals. Additionally, OPWDD has consistently implemented initiatives to provide compensation opportunities for direct support professionals.

By the end of the 2010 or the 2010/2011 reporting year, providers will have realized an 8.2% increase (3.06% for 2009 or 2009/2010, 3.06% for 2010 or 2010/2011 and 2.08% for 2010 or 2010/2011) in revenue attributable to the trend factors in every operating cost category over the prior year. The residual adjustment aspect of the efficiency adjustment limits the impact of the reduction to an annual maximum of 3.5% of the total supervised IRA price. The Health Care Adjustment VI initiative further augments provider revenues. This initiative-the sixth in a series--assists providers with the enhancement of health care benefits offered to employees by enriching operating revenues by another 1% beginning in April, 2010.

Upon further review, OPWDD is amending the efficiency adjustment regulation to allow partial exemption for a provider that can demonstrate that the adjustment would jeopardize its ability to continue providing services. OPWDD expects to adopt this as an emergency regulation to go into effect concurrently with the efficiency adjustment. It will be available to all providers.

The provider which felt its administrative structure was vulnerable was not subject to a reduction in administration by virtue of this efficiency adjustment.

The rate appeal process is designed to address all critical care concerns and to limit awards in certain areas in which providers exceed prescribed parameters such as in administrative costs.

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for Waiver from the Requirement to Hire 30 Additional Line Department Personnel in 2010

I.D. No. PSC-39-10-00013-P

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

Proposed Action: The PSC is considering a petition filed by Niagara Mohawk Power Corporation d/b/a National Grid, requesting a partial waiver of the provisions of Section XI.C.2 of the 7/6/07 joint proposal approved on 8/23/07.

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

Subject: Petition for waiver from the requirement to hire 30 additional line department personnel in 2010.

Purpose: Consideration of the waiver request.

Substance of proposed rule: By letter dated June 7, 2010, Niagara Mohawk Power Corporation d/b/a National Grid (company) sought approval for a partial waiver from the provisions of Section XI.C.2 of the July 6, 2007 Merger and Gas Revenue Requirement Joint Proposal approved by the Commission on August 23, 2007. National Grid requests waiver from the requirement to hire thirty additional linemen during 2010 because it believes staffing the additional positions is not necessary for the company to provide safe and adequate service, and would increase costs unnecessarily. The Commission is considering whether to grant or deny, in whole or in part, the waiver request.

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

Data, views or arguments may be submitted to: Jaclyn A. Brilling, 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.

(06-M-0878SP5)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Con Edison's Proposed New Targeted Demand Side Management Program

I.D. No. PSC-39-10-00014-P

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

Proposed Action: The Commission is considering whether to approve, deny, or modify, in whole or in part, Consolidated Edison Company of New York, Inc.'s (Con Edison) proposed new Targeted Demand Side Management Program filed on September 1, 2010.

Statutory authority: Public Service Law, sections 5(1), (2), 65(1), (5), 66(1), (12) and (14)

Subject: Con Edison's proposed new Targeted Demand Side Management Program.

Purpose: Con Edison's proposed new Targeted Demand Side Management Program.

Substance of proposed rule: The Commission is considering whether to approve, deny, of modify, in whole or in part, the proposed new Targeted Demand Side Management Program submitted by Consolidated Edison Company of New York, Inc. on September 1, 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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

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

(09-E-0115SP6)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Inter-Carrier Telephone Service Quality Standards and Metrics

I.D. No. PSC-39-10-00015-P

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

Proposed Action: The PSC is considering modifications to existing inter-carrier telephone service quality measures and standards as proposed by the Carrier Working Group and recommended by Staff.

Statutory authority: Public Service Law, section 94(2)

Subject: Inter-carrier telephone service quality standards and metrics.

Purpose: To review recommendations from the Carrier Working Group and incorporate appropriate modifications to the existing Guidelines.

Substance of proposed rule: The specific modifications to the Inter-Carrier Service Quality Guidelines being considered by the Commission in this action are process changes to MR-2-01- 3200 (Network Trouble Report Rate UNE Specials) and to MR-01, product code 6060 (Response Time OSS Maintenance Interface EBTA). The most recent version of the C2C Guidelines is available in at: http://www.dps.state.ny.us/carrier.htm. The Commission may adopt these modifications in whole or in part and may make other changes to the guidelines.

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. Brilling, 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.

(97-C-0139SP32)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Petition for the Submetering of Electricity

I.D. No. PSC-39-10-00016-P

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

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by 4615 East Coast LLC to submeter electricity at 4615 Center Boulevard, Long Island City, 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 4615 East Coast LLC to submeter electricity at 4615 Center Boulevard, Long Island City, 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 4615 East Coast LLC to submeter electricity at 4615 Center Boulevard, Long Island City, 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. Brilling, 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-0430SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

National Grid's Procedures, Terms and Conditions for an Economic Development Plan

I.D. No. PSC-39-10-00017-P

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

Proposed Action: The Commission is considering a petition from Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) detailing its procedures, terms and conditions for an economic development plan.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10), (12) and (12-b)

Subject: National Grid's procedures, terms and conditions for an economic development plan.

Purpose: Consideration of National Grid's procedures, terms and conditions for an economic development plan.

Substance of proposed rule: The Commission is considering a filing dated August 31, 2010 from Niagara Mohawk Power Corporation d/b/a National Grid detailing its procedures, terms and conditions for an economic development plan. 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. Brilling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.state.ny.us

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

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

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

(10-M-0429SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Consideration of a Petition for Rehearing

I.D. No. PSC-39-10-00018-P

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

Proposed Action: The Commission is considering whether to approve, reject or modify, in whole or in part, the Petition for Rehearing of the Retail Energy Supply Association filed in Case 98-M-1343 on August 17, 2010.

Statutory authority: Public Service Law, section 66(1)

Subject: Consideration of a petition for rehearing.

Purpose: Consideration of a petition for rehearing.

Substance of proposed rule: On August 10, 2010 the Retail Energy Supply Association (RESA) filed a petition seeking rehearing of the Public Service Commission (Commission) Order Concerning Remote Customer Access to Customer Account Information, which was issued on July 19, 2010. RESA seeks rehearing of the Commission's determination that any costs of providing customers with access to their utility account numbers via enhancements to the affected utilities' respective Integrated Voice Response (IVR) systems should be recovered from Energy Service Companies rather than utility ratepayers. The Commission will consider approving, rejecting or modifying, in whole or in part, the petition for rehearing, and may also consider related matters.

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. Brilling, 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.

(98-M-1343SP19)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Implementation of General Business Law Section 349-d

I.D. No. PSC-39-10-00019-P

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

Proposed Action: The Commission is considering modifications to the Uniform Business Practices (UBP) necessary to implement the requirements of General Business Law (GBL) Section 349-d and adopting an ''ESCO consumers bill of rights'' as required by GBL Section 349-d.

Statutory authority: Public Service Law, section 66(1); and General Business Law, section 349-d

Subject: Implementation of GBL Section 349-d.

Purpose: Implementation of GBL Section 349-d.

Substance of proposed rule: On August 31, 2010 the Governor signed legislation creating a new General Business Law (GBL) Section 349-d concerning an energy services company (ESCO) consumers bill of rights. The Public Service Commission (Commission) is considering modifications to the Uniform Business Practices necessary to implement the provisions of GBL Section 349-d. Additionally, as required by GBL Section 349-d, the Commission is considering adoption of an ''ESCO consumers bill of rights'' to be distributed to potential residential customers or to potential customers sought through door-to-door sales. The Commission may also consider related matters.

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. Brilling, 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.

(98-M-1343SP20)

Department of State

NOTICE OF ADOPTION

Efficient Utilization of Energy Expended in the Construction, Use and Occupancy of Buildings

I.D. No. DOS-02-10-00011-A
Filing No. 950
Filing Date: 2010-09-14
Effective Date: 2010-12-28

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

Action taken: Amendment of section 1240.1 of Title 19 NYCRR.

Statutory authority: Energy Law, section 11-103(2)

Subject: Efficient utilization of energy expended in the construction, use and occupancy of buildings.

Purpose: To amend the State Energy Conservation Construction Code to assure that it effectuates the purposes of Energy Law Article 11.

Text of final rule: Subdivision (a) of section 1240.1 of Title 19 NYCRR is amended to read as follows:

(a) [2007] *2010* ECCCNYS. Requirements for the design of building envelopes for adequate thermal resistance and low air leakage and for the design and selection of mechanical, electrical, service water heating and illumination systems and equipment which enables effective use of energy in new building construction are set forth in a publication entitled Energy Conservation Construction Code of New York State, publication date: August [2007] *2010*, published by the International Code Council, Inc. [Copies of said] *Said* publication (hereinafter referred to as the [2007] *2010* ECCCNYS) *is incorporated herein by reference. Copies of the 2010 ECCNYS* may be obtained from the publisher at the following address:

International Code Council, Inc.
500 New Jersey Avenue, NW, 6th Floor
Washington, D.C. 20001.

Said publication is available for public inspection and copying at:

New York State, Department of State
[Codes Division]
99 Washington Avenue
Albany, NY 12231-0001

Paragraph (1) of subdivision (b) of section 1240.1 of Title 19 NYCRR is amended to read as follows:

(1) Certain published standards are denoted in the [2007] *2010* ECCCNYS as incorporated by reference into 19 NYCRR Part 1240. Such standards are incorporated by reference into this Part 1240. Such standards are identified in the [2007] *2010* ECCCNYS, and the names and addresses of the publishers of such standards from which copies of such standards may be obtained are specified in the [2007] *2010* ECCCNYS. Such standards are available for public inspection and copying at the office of the New York State Department of State specified in subdivision (a) of this section.

Paragraph (2) of subdivision (b) of section 1240.1 of Title 19 NYCRR is repealed.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 1240.1(a).

Text of rule and any required statements and analyses may be obtained from: Raymond J. Andrews, New York State Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Raymond.Andrews@dos.state.ny.us

Revised Regulatory Impact Statement

Changes made to the rule text since the publication of the Notice of Proposed Rule Making are described below. None of the changes affects the issues addressed in the Regulatory Impact Statement and, therefore, a Revised Regulatory Impact Statement is not required.

The original version of the portion of the rule text that will appear in the NYCRR would have incorporated by reference the January 2010 versions of the Energy Conservation Construction Code of New York State (ECCCNYS). Non-substantive changes were made to the ECCCNYS; the revised version is dated August 2010. The portion of the rule text that will appear in the NYCRR was changed (1) to provide for incorporation by reference of the August 2010 version of the ECCCNYS in Part 1240 of Title 19 NYCRR; and (2) to change the address of the Department of State where the publications are available for inspection and copying.

The changes made to the ECCCNYS include the following:

Table 402.1.1, note ''f'': Added ''If 100 percent continuous structural panel sheathing is used on a 2x4 wall, then R-5 continuous insulated sheathing must also be applied over the structural sheathing.'' (The same sentence was also added to note ''f'' in Table N1102.1.1 of the RCNYS.)

Sections 403.10.1 and 504.7.1: Revised to provide that pool heaters fired by natural gas or LPG shall not have continuously burning pilot lights.

Section 502.4.3: Added text (from the 2009 International Energy Conservation Code [the ''IECC'']) requiring (1) continuous air barriers to be sealed with caulking materials or closed with gasketing systems compatible with the construction materials and location; (2) joints and seams to be sealed in the same manner or taped or covered with a moisture vapor-permeable wrapping material; and (3) sealing materials spanning joints between construction materials to allow for expansion and contraction of the construction materials.

Table 402.1.1: Revised note ''f'' for continuous structural panel sheathing by replacing ''may'' with ''shall'' in two places.

Table 502.1.2: Changed the U-factor for Group R metal framed above grade walls to U=0.064.

Table 502.2(1): Changed the R-value for Group R wood framed above grade walls to R-13+7.5.

Sections 402.1.5 and 502.2.8: Revised to provide prescriptive guidance to contractors and building designers on proper attachment of siding over continuous insulation.

Section 403.6: Revised to directly reference ACCA Manual J (7th Edition) within the Residential Code of New York State.

Section 101.5.1: Revised to provide that software programs used to show compliance must indicate compliance with the 2010 ECCCNYS and must reflect the actual requirements of the 2010 ECCCNYS.

Section: 402.4.4: Added this new section (from the 2009 IECC), which deals with fenestration air leakage and which was inadvertently omitted from the first draft of the 2010 ECCCNYS. (A similar provision was added to the RCNYS as new Section 1102.6.)

Section 103.2, line 8: Added ''horsepower'' before ''(hp).''

Section 103.2.2: Revised to provide that in New York City, energy code inspections shall be special or progress inspections and shall be performed by approved agencies.

Section 104.2: Revised to add reference to Sections 109.3.5 and 190.9 of the New York City Construction Code.

Section 104.8.1: Typographical error corrected (''of'' changed to ''or'').

Chapter 1: Renumbered Sections 106, 107 and 108 and 105, 106 and 107.

Section 108.7: Added this new section, which deals with interpretation of local code provisions.

Section 202: Revised definition of CONDITIONED SPACE by adding fossil fuel or electricity to the list of energy sources.

Section 202: Deleted definitions of REGISTERED DESIGN PROFESSIONAL and F-FACTOR.

Section 303.1.4: Added section (from the 2009 IECC), which deals with insulation product rating.

Section 303.2: Changed reference to the ''International Building Code'' to reference to the ''Uniform Fire Prevention and Building Code, and in NYC, the New York City Construction Codes.''

Section 401.3: Changed ''type and efficiency'' to ''types and efficiencies.''

Table 402.1.1, titles: Added superscripts ''b'' to ''Fenestration U-Factor'' and ''g'' to ''Mass Wall R-Value.''

Minor typographical errors / omissions corrected in Table 402.1.1, Footnote d; Section 402.1.4; Section 402.2.1; Section 402.2.1.1; Section 402.2.1.1(5); Section 402.2.11; Section 405.6; Table 502.2(1), Walls, Above Grade, Metal building; and Table 502.2(1), Footnote e.

Section 402.2.1.1: Deleted ''(Reprinted from section 806.4)'' from title.

Section 402.2.4: Added ''above-grade'' before ''walls of concrete block.''

Section 402.2.4: Deleted last sentence (was redundant of first sentence).

Section 402.2.5: Corrected reference to Table 402.2.5.

Section 402.2.7: Corrected reference to Sections 402.1.1 and 402.2.6.

Section 402.4.3: Corrected ''1.57 psi'' to ''1.57 psf.''

Section 403.2.2(1): The metric conversions in lines 1 and 2 made consistent.

Section 403.9: Added ''(Mandatory)'' to section title.

Sections 404 and 405: Added title.

Table 502.2(2): Deleted ''Metal Buildings'' from Title.

Section 502.4.4: Corrected ''(250 Pa)'' to ''(1250 Pa).''

Section 503.2.3: Clarified symbols in equation.

Tables 503.2.3(1) and 503.2.3(2): Added reference to Chapter 6 in title.

Tables 503.2.3(1) 503.2.3(2), 503.2.3(4), 503.2.3(5), 503.2.3(6): Formatted symbols in Size Category column.

Tables 503.2.3(1) and 503.2.3(2), column titled Minimum Efficiency: Deleted all tabular equipment values applicable before January 1, 2010, and deleted ''(as of Jan 1, 2010)'' throughout.

Table 503.2.3(7), under Equipment Type: Corrected to ''electrically operated.''

Table 503.2.3(7), under Size Category, Water-cooled, electrically operated, centrifugal: Changed ''>300 tons'' to ''>= 150 tons.''

Table 503.2.3(7): Deleted title ''As of 1/1/2010'' from title line and deleted columns entitled ''Before 1/1/2010.''

Table 503.2.3(7), Footnote a, line 2: Changed ''#40 degrees F'' to ''< 40 degrees F.''

Section 503.2.4.2: Deleted delta symbol before 2.8 degrees C.

Section 503.2.4.5: Inserted space to read ''the potential for snow or ice….''

Section 503.2.6(5): Deleted exception for climates that may have less than 3,600 HDD.

Section 503.2.7: Deleted last two sentences after the exceptions.

Table 503.2.8, Footnote b: Required spaces added in text of footnote.

Table 503.2.8, Footnote b: In equation, indicated K/k as a superscript.

§ 503.2.9.1: Added ''Chapter 6 of the'' before ''Mechanical Code.''

Sections 503.2.10 and 503.2.10.1(2): Added kW equivalents after horsepower specifications.

Table 503.2.10.1(1), lines 1 and 2, column 3, and in legend below table: Indicated ''S'' in CFMS as subscript.

Table 503.2.10.1(1), legend for A: Indicated ''D'' in CFMD as subscript.

Section 503.4.3.2, lines 3 and 6: Deleted delta symbol before centigrade conversions.

Section 503.4.3.3.2.1(3): Added ''If an open- or closed-circuit cooling tower….''

Section 503.4.5.4, exception 3: Corrected to read ''(142L/s)''.

Table 504.2, columns 2 and 3: Replaced <= and >= for other symbols as applicable.

Table 504.2, column 4, lines 5, 6, 9, 11, 14, 16, 17: Changed second line in each cell to ''(Q/800 + 110 times square root V)''.

Table 504.2, column 4: Last line in cell, symbols corrected to indicate multiplication within parentheses to read ''(h x ft squared x degrees F)/Btu''.

Section 505.1: Added prerequisite for the exception.

Section 505.2.2.1(3): Changed as follows: ''Switching the middle luminaire lamps independently of the outer lamps;''

Section 505.2.2.2.1, exception 2: Changed ''may'' to ''shall.''

Section 505.5.1: Deleted redundant ''Exceptions'' text.

Section 505.5.1, exception 1.2: Changed ''Guestroom'' to ''Sleeping unit.''

Section 505.5.1, exception 1.4: Inserted comma between ''visually impaired'' and ''visual impairment.''

Section 505.5.1, exception 5: Added ''and is installed by the manufacturer.''

Section 505.5.1, exception 12: Added hyphen in ''glass-enclosed.''

Section 505.6.2, line 4: Corrected reference (changed to ''Table 505.6.2(2)'').

Table 505.6.2: Deleted (it was redundant of Table 505.6.2(2)).

Section 506.5.2, line 2: Corrected reference (changed to ''Section 506.5.2.1'').

Sections 503.3.1 and 503.4.1: Removed exemption for HVAC cooling equipment.

Section 101.2: Added ''buildings'' after ''residential.''

Section 101.2.1: Added ''the'' before ''Counties.''

Section 101.4.1: Deleted final sentence (the topic is now addressed in Section 101.4.6).

Section 101.4.3: Added sentence referencing the 2009 IECC and ASHRAE 90.1-2007; added breaks to final sentence for clarity; and added ''with the provisions of this code'' after ''need not comply'' in the exception.

Section 101.4.4: Renumbered former section 101.4.4 as 101.4.5, added new section 10104.4, which relates to changes in occupancy or use.

Section 101.4.5: Deleted (the topic is now covered in Section 101.5).

Section 101.4.6: Deleted (the topic is now covered by Section 101.4).

Section 101.4.6: Added this new section, which related to the affect of Article 11 of the Energy Law, and future amendments of Article 11 of the Energy Law, on provisions in Chapter 1 of the ECCCNYS.

Section 101.5: Added a sentence clarifying the applicability of Chapters 4 and 5.

Section 202: Added definitions of AREA WEIGHTED AVERAGE (a term used in Sections 402.6 and 502.2) and GROUP R BUILDINGS (a term used in Chapter 5), and revised definition of RESIDENTIAL BUILDING (made definition consistent with definition in the 2007 ECCCNYS).

Section 401.2: Added section 404.1 (relating to lighting equipment) to the list of sections with which compliance is mandatory.

Section 101.3.1: Condensed and clarified the statement pertaining to the American Recovery and Reinvestment Act (ARRA).

Section 101.4.3: Deleted ''repairs'' from the section title and text.

Section 202: Corrected definition of ''Vapor Retarder Class'' (Class II perm rating range should begin with 0.1, not 01).

Table 402.1.1: Deleted column titled ''Glazed Fenestration SHGC)'' because Solar Heat Gain Coefficient (SHGC) is not applicable in NYS Climate Zones.

Section 402.1.5: Tables in this Section corrected for furring spacing, for referencing of Exterior Insulation Finishing Systems (EIFS), and reference to AISI S200 (should be S230).

Table 402.2.5: Removed framed wall ''R'' values of 19, and 21; added ''R'' values for framed wall equivalent of ''R-20;'' removed ''R'' values of 13 for wood framed floor; added ''R'' values of ''R-30'' for wood framed floors.

Section 402.2.12: Changed title from ''Common walls, party walls, and fire walls (Mandatory)'' to ''Tenant separation walls (Mandatory).''

Section 402.4.2.1: Changed ''33.5 psf (50 Pa)'' to ''1.0 psf (50 PA).''

Section 402.5: Added ''above grade'' before ''framed walls'' (vapor retarders are not utilized in below grade applications).

Section 502.5.3: Revised to make this section consistent with the corresponding section (402.5.3) in the residential chapter (Chapter 4).

Table 503.2.3(2): Changed title from ''Unitary and Applied Heat Pumps'' to ''Unitary Air Conditioners and Condensing Units.''

Sections 505.1 and 505.5.3: Revised to permit use of the prescribed lighting power density determined using Table 505.5.2, or, in the alternative, to have a minimum of 50 percent of the permanently installed interior light fixtures fitted with high-efficacy lamps.

Sections 503.3.1 and 503.4.1 (''Economizers''): Removed the exemptions for HVAC cooling equipment. These exemptions were included in the January 2010 version of the ECCCNYS by mistake, and the regulatory impact (if any) that have resulted from the inclusion of these exemptions in the ECCCNYS was not addressed in the original RIS. Therefore, removal of these exemptions from the ECCCNYS does not necessitate any change to the original RIS.

Chapter 6: Changed the list of referenced standards as follows: changed the publication dates for ASTM-84 from 2004 (does not exist) to 2005; removed ASTM-F1667, CTI-ATC-105, CTI-STD-201, UL-181A, and UL-181B; and added AF&PA-NDS, AISI-S230, ANSI-Z21.50, ANSI-Z21.60, ASHRAE-140, ASHRAE-183; US FTC-16 CFR 460; and ICC-NYSRC.

Various sections: Minor typographical errors / omissions corrected.

Various sections: References to the Administrative Codes of New York City, and the New York City Building, Fire, Electrical, Plumbing, Mechanical and Fuel Gas Codes, have been replaced by reference to the New York City Construction Codes, and references to the ''Residential Code of New York City'' have been removed (since it is nonexistent).

Revised Regulatory Flexibility Analysis

The changes made to the rule text since the publication of the Notice of Proposed Rule Making are described in the annexed document entitled ''Statement Explaining Why Revised Regulatory Impact Statement is not Required.''

None of the changes affects the issues addressed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments and, therefore, a Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required.

Revised Rural Area Flexibility Analysis

The changes made to the rule text since the publication of the Notice of Proposed Rule Making are described in the annexed document entitled ''Statement Explaining Why Revised Regulatory Impact Statement is Not Required.''

None of the changes affects the issues addressed in the Rural Area Flexibility Analysis and, therefore, a Revised Rural Area Flexibility Analysis is not required.

Revised Job Impact Statement

The Department of State has determined that it is apparent from the nature and purpose of the proposed rule making that it will not have a substantial adverse impact on jobs and employment opportunities. The rule making will amend the State Energy Conservation Construction Code (the ''State Energy Code'') to make the State Energy Code (1) a building energy code for residential buildings which is based on the 2009 edition of the International Energy Conservation Code (the ''2009 IECC''), a model code developed and published by the International Code Council (''ICC''), and (2) a building energy code for commercial buildings which is based on the 2007 edition of ASHRAE-90.1 (the ''2007 ASHRAE 90.1''), a standard published by the American Society Of Heating and Refrigeration and Air Conditioning Engineers. Both the 2009 IECC and the 2007 ASHRAE 90.1 incorporate more current technology in the area of energy

conservation. In addition, as a performance-based, rather than a prescriptive, code, the 2009 IECC provides for alternative methods of achieving code compliance, thereby allowing regulated parties to choose the most cost effective method. As a consequence, the Department of State and the State Fire Prevention and Building Code Council conclude that regulations based upon the 2009 IECC and the 2007 ASHRAE 90.1 will provide a greater incentive for the construction of new buildings and the rehabilitation of existing buildings than exists with the current State Energy Code. Therefore, this amendment will not have a substantial adverse impact on jobs and employment opportunities within New York. In fact, the proposed amendment may result in an increase in employment opportunities for those involved in testing and inspecting buildings for compliance with the building air sealing requirements of the amended State Energy Code.

Assessment of Public Comment

The following is a summary of the Assessment of Public Comments. Paragraph numbers correspond to the Comment number in the full Assessment. Responses to the comments are indicated in parenthetical sentence at the end of each paragraph. See the full Assessment for a more complete description.

1. ECCCNYS 402.4.5 should require new wood-burning fireplaces to have gasketed doors and outdoor combustion air. (No change; issue covered by ECCCNYS 303.1.4.)

2. Note ''f'' in RCNYS Table N1102.1.1 should be consistent with note in ECCCNYS Table 402.1.1. (Requested change made.)

3. IECC Section 402.4.4 (''Fenestration Air Leakage'') omitted from ECCCNYS. (Omission was inadvertent; section added to ECCCNYS.)

4 and 8. ECCCNYS 403.10.1 and 504.7.1 should provide that pool heaters fired by natural gas OR LPG shall not have continuously burning pilot lights. (Requested change made.)

5. Part of IECC 502.4.3 (''Continuous air barrier'') omitted from ECCCNYS 502.4.3. (Missing language added to ECCCNYS.)

6. In ECCCNYS 402.1.1, replace ''may'' with ''shall'' and add reference to wall bracing. (Requested change made, added requirement for installation of continuous R-5 insulated sheathing over a fully structural sheathed exterior wall.)

7. ECCCNYS 403.1 should require programmable thermostat in each zone. (No cost/benefit information provided; no change made.)

9. ECCCNYS 503.2.6: Change threshold from 5000 cfm to 1000 cfm. (No cost/benefit information provided; no change made.)

10. There is no ''global warming.'' Back off punitive new requirements in a revised energy code that will additionally burden taxpayers and businesses. (Revision to Energy Code is not based on global warming; it is intended to reduce energy consumption and reduce energy costs. No change.)

11. ECCCNYS 402.2 should require R-38 is ceilings with attic spaces, without exception. (As written, 402.2 encourages use of the ''energy truss.'' No change made.)

12. U-factor values in ECCCNYS Table 502.1.2 and R-values in ECCCNYS Table 502.2(1) should correspond with each other. (Changed R-value for Group R wood framed above grade walls to R-13+7.5.)

13. The U-factors for buildings in climate zone 4 specified in ECCCNYS Table 502.2(1) creates a large discrepancy between the thermal performance requirements for metal and wood framed walls. (The difference reflects the effects of thermal bridging. Requested change would make ECCCNYS less restrictive than the model codes identified in ARRA. No change made.)

14. ECCCNYS 405.5.2 should have an exception relating to a trade-off for equipment efficiency. (Adding trade-off would make the ECCCNYS less restrictive than the model codes identified in ARRA. No change made.)

15. ECCCNYS 402.1 and 502.2 should be revised to provide prescriptive guidance on installation of siding over continuous insulation. (Requested change made.)

16. ECCCNYS 403.6 should reference ACCA Manuals S and J. (Section revised to reference Manual J directly.)

17 (first comment). ECCCNYS 105.1 should require software used to confirm compliance to be keyed to the 2009 IECC. (Section revised to provide that compliance software must be keyed to the 2010 ECCCNYS.)

17 (second comment). Fenestration air leakage requirement (IECC 402.4.2 and IRC 1102.4.2) should be added to the ECCCNYS and RCNYS. (Sections added as requested.)

18 and 19. Code compliance software (REScheck) should include HVCA trade-offs. Also, REScheck for the 2009 IECC is stricter than REScheck for the 2007 ECCCNYS. (No change made. DOS will work with DOE to develop REScheck for the 2010 ECCCNYS having greater flexibility than the REScheck for the 2009 IECC, without jeopardizing NYS's compliance with ARRA.)

20. Question regarding qualifications of person performing blower door testing under ECCCNYS 402.4.2.1. (ECCCNYS permits inspection or blower door test. Certified HERS raters not required by ECCCNYS; however, inspection or blower door test must be performed by person acceptable to the code official.)

21. ECCCNYS should require both air infiltration test and thermal bypass check list. (2009 IECC provides the option. No cost/benefit information justifying change provided; no change made.)

22. Section 1102.6 (''Maximum fenestration U-factor (Mandatory)'') from the 2006 IRC should be added to Chapter 11 of the 2010 RCNYS. (Section added to 2010 RCNYS as requested.)

23. ECCCNYS 101.1.2: Question meaning of ''a comparable occupancy classification.'' (When comparing building codes outside that are not model codes, the closest definition to those in Model Code language would be utilized.)

24. Consider not exempting interiors of historic buildings in which interiors are not registered by the Local, State or Federal Government. (No change made. The IECC exempts the entire building and does not distinguish between interior-exterior.)

25. IECC 101.4.4 omitted. (Section now included in ECCCNYS.)

26. Additional language in ECCCNYS 101.4.6 is confusing. (No change. Additional language included to assure compliance with ARRA.)

27. ECCCNYS 103.1 should refer to ''registered design professional.'' (No change. See definition of Design Professional.)

28. ECCCNYS 103.2: change to ''fan motor horsepower (hp) and controls.'' (Requested change made.)

29. ECCCNYS 103.2.2 should provide that inspections in NYC shall be special or progress inspections and shall be performed by approved agencies. (Requested change made.)

30. ECCCNYS 104.2: add reference to section 109.3.5 of NYC Building Code. (Requested change made.)

31. ECCCNYS 104.8.1: Typographical error. (Corrected.)

32, 33, 34. ECCCNYS 106, 107, 108 should be renumbered as 105, 106, and 107. (Requested changes made.)

35. Add new Section108.7, relating to interpretation of local code provisions, to ECCCNYS. (Section added as requested.)

36, 37, 38, 39, 40, 41 and 42. ECCCNYS 202: Revise definition of CONDITIONED SPACE (requested change made); delete definition of DESIGN PROFESSIONAL (not deleted, but ''registered design professional'' was be deleted); revise definition of ENTRANCE DOOR (requested change made); delete definition of F-FACTOR (requested deletion made); revise definition of FAN SYSTEM MOTOR NAMEPLATE (requested change made); question regarding definition of RESIDENTIAL BUILDING (any building exceeding three stories is considered to be a commercial building); revise definition of VAPOR RETARDER CLASS. (Requested change made).

43. IECC 303.1.4 omitted from ECCCNYS. (Omission was unintentional; section added.)

44. ECCCNYS 303.2: ''IBC'' should be ''Uniform Fire Prevention and Building Code, and in NYC, the New York City Building Code.'' (Requested change made.)

45, 47 to 58, 70, 72, 73, 94, 95, 96, 99, 100, 105, 106, 107, 113, 117, and 125. Minor typographical errors / omissions in ECCCNYS Section 401.3; Table 402.1.1, Footnote d; Table 402.1.3, Footnote c; Section 402.1.4; Section 402.2.1; Section 402.2.1.1; Section 402.2.1.1; Section 402.2.1.1(5); Section 402.2.4; Section 402.2.4; Section 402.2.5; Section 402.2.7; Section 402.2.11; Section 405.6; Table 502.2(1); Table 502.2(1), Footnote e; Table 503.2.3(7); Section 503.2.4.2; Section 503.2.4.5; Table 503.2.8, Footnote b; Table 503.2.10.1(1); Table 503.2.10.1(1); and Table 503.2.10.1(2); Section 503.4.3.3.2.1(3); and Table 504.2; and 505.5.1, exception 12. (Corrections made.)

46. ECCCNYS Table 402.1.1: Make note ''b'' applicable to ''Fenestration U-Factor'' column and note ''g'' applicable to ''Mass Wall R-Value'' column. (Requested changes made.)

59. Questions omission of IECC 402.3.2. (Section omitted because solar heat gain co-efficient [SHGC] is not applicable in Climate Zones 4, 5 and 6.)

60. Questions formatting of ECCCNYS Table 402.4.2. (Table formatted in 2010 ECCCNYS.)

61 and 62. Questions deletion of IECC 402.4.3 and 402.4.4. (Section 402.4.3 not omitted; moved to Chapter 3. Section 402.4.4 not omitted. No change made.)

63. ECCCNYS 402.4.3: ''1.57 psi'' should be ''1.57 psf.'' (Requested change made.)

64. ECCCNYS 402.5: Questions applicability of section. (Section relates only to Zones 5 and 6.)

65. ECCCNYS 403.2.2(1): Metric conversions are not consistent. (Corrections made.)

66. ECCCNYS 403.9 should expressly indicate that it is mandatory. (Requested change made.)

67. ECCCNYS 403.10: Questions references to 403.10.1 and 403.10.3. (No change; references are correct.)

68 and 69. Titles missing from ECCCNYS 404 and 405. (Titles added.)
71. ECCCNYS Table 502.2(1): Change values in Zone 4. (Requested changes made.)
74. ECCCNYS Table 502.2(2): Title should not be limited to metal buildings. (Requested change made.)
75. ECCCNYS 502.4.3 omits IECC's requirement for allowing for expansion and contraction of construction materials. (No change.)
76. ECCCNYS 502.4.4: Correct ''(250 Pa)'' to ''(1250 Pa).'' (Requested change made.)
77. Questions if ECCCNYS 502.5 is limited to Zones 5 and 6. (Answer: yes.)
78. ECCCNYS 503.2.3: Typographical errors in equations. (Corrected.)
79 and 83. Tables 503.2.3(1) and 503.2.3(2): Make note ''a'' applicable to ''Test Procedure'' columns. (Requested change made.)
80, 84, 86, 87, and 88. Tables 503.2.3(1), 503.2.3(2), 503.2.3(4), 503.2.3(5), and 503.2.3(6), columns titled Size Category: Correct symbols to >= where applicable. (Requested changes made.)
81 and 85. ECCCNYS Tables 503.2.3(1) and 503.2.3(2), columns titled Minimum Efficiency: Delete all values for before January 1, 2010, and delete ''(as of Jan 1, 2010)'' throughout. (Requested changes made.)
82. ECCCNYS Table 503.2.3(2): change title. (Requested change made.)
89. ECCCNYS Table 503.2.3(7), under Equipment Type: Correct to ''electrically operated.'' (Requested change made.)
90 and 91. ECCCNYS Table 503.2.3(7), Size Category: change ''>= 300 tons'' to ''>=150 tons'' in line 10 and change ''>= 150'' tons to ''>=300 tons'' in line 11. (Requested changes made.)
92. ECCCNYS Table 503.2.3(7): Delete columns entitled ''Before 1/1/2010.'' (Requested changes made.)
93. ECCCNYS Table 503.2.3(7): Delete title ''As of 1/1/2010'' but leave columns. (Requested changes made.)
97. ECCCNYS 503.2.6(5) should be deleted (all climate zones in NYS are 4910 HDD or greater). (Requested change made.)
98. ECCCNYS 503.2.7: Delete last two sentences (they are repeated after the exceptions). (Requested changes made.)
101. ECCCNYS 503.2.9.1: ''Chapter 6 of the'' Mechanical Code was omitted. (Phrase added.)
102 and 103. ECCCNYS 503.2.10 and 503.2.10.1(2): Add kW equivalent for stated horsepower values. (Requested changes made.)
104. ECCCNYS Table 503.2.10.1(1) is cut off at right side. (Correction made.)
108, 109 and 110. ECCCNYS 503.3.1, exception 1: Questions omission of portion of prerequisite in ECCCNYS 503.3.1, exception 1, and ECCCNYS 503.4.1, exceptions 2 and 3, and omission of IECC Table 503.3.1(2). (No change made. Zone 4B is only found in the western USA.)
111. ECCCNYS 503.4.3.2: Delete delta symbol before centigrade conversions. (Requested changes made.)
112. ECCCNYS 503.4.3.3.1, lines 3 and 4 and exception line 3: Replace the boxes with degree symbol. (No change made. Section will read correctly when printed.)
114. ECCCNYS 503.4.5.4, exception 3: Correct to read ''(142L/s).'' (Requested change made.)
115. ECCCNYS Table 504.2, columns 2 and 3: Replace <= and >= for other symbols as applicable. (Requested changes made.)
116. ECCCNYS Table 504.2, column 4, lines 5, 6, 9, 11, 14, 16, 17: Second line in each cell should read ''(Q/800 + 110 times square root V).'' (No change made.)
118. ECCNYS 505.1, exception: Prerequisite for exception has been omitted. (Prerequisite added as requested.)
119. ECCCNYS 505.2.2.1(3): Change ''middle lamp luminaires'' to ''middle luminaire lamps.'' (Requested change made.)
120. ECCCNYS 505.2.2.2.1, exception 2: Change ''may'' to ''shall.'' (Requested change made.)
121. ECCCNYS 505.5.1: Delete text after ''Exceptions'' (redundant of Exception 1 immediately following). (Requested change made.)
122. ECCCNYS 505.5.1, exception 1.2: Change ''Guestroom'' to ''Sleeping unit'' (a defined term). (Requested change made.)
123. ECCCNYS 505.5.1, exception 1.4: Insert comma to read, ''…needs including the visually impaired, visual impairment and other medical ….'' (Requested change made.)
124. ECCCNYS 505.5.1, exception 5: Restore IECC text, which is retained in same exception in 505.6.2. (Requested change made.)
126. ECCCNYS 505.6.2: Change reference to read ''Table 505.6.2(2), Tradable Surfaces section.'' (No change made. Section reference is correct.)
127. ECCCNYS Table 505.6.2 following Table 505.6.2(2): Delete as redundant of Table 505.6.2(2). (Redundant Table deleted.)
128. ECCCNYS 506.5.2: Correct reference to read ''Section 506.5.2.1, 506.2.2 or 506.5.2.3.'' (Requested change made.)
129. ECCCNYS Sections 503.3.1 and 503.4.1 ''Economizers.'' The exemption for economizer requirements for HVAC cooling equipment should be removed. (Exceptions removed as requested.)

NOTICE OF ADOPTION

Standards for the Construction and Maintenance of Buildings and Structures and for Protection from the Hazards of Fire and Inadequate Building Construction

I.D. No. DOS-02-10-00012-A
Filing No. 949
Filing Date: 2010-09-14
Effective Date: 2010-12-28

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

Action taken: Repeal of Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227 and 1228; and addition of new Parts 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227 and 1228 to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

Subject: Standards for the construction and maintenance of buildings and structures and for protection from the hazards of fire and inadequate building construction.

Purpose: To amend the New York State Uniform Fire Prevention and Building Code to assure that it effectuates the purposes of Executive Law Art. 18.

Substance of final rule: Section 377 of the Executive Law directs the State Fire Prevention and Building Code Council (the ''Code Council'') to review the entire New York State Uniform Fire Prevention and Building Code (the ''Uniform Code'') from time to time to assure that it effectuates the purposes of the Law, and authorizes the Code Council to amend the Uniform Code from time to time to achieve that end. This rule repeals the existing version of the Uniform Code (which is now found in 19 NYCRR Parts 1220 to 1228, inclusive, and in the publications incorporated by reference in Parts 1220 to 1227, inclusive) and replaces it with a new version of the Uniform Code, contained in new 19 NYCRR Parts 1220 to 1228, inclusive, and the new publications incorporated by reference in new Parts 1220 to 1227, inclusive.

The new version of the Uniform Code includes eight components: the Residential Code, the Building Code, the Fire Code, the Plumbing Code, the Mechanical Code, the Fuel Gas Code, the Property Maintenance Code, and the Existing Building Code.

The Residential Code addresses one-and two-family dwellings and townhouses not more than three stories in height with a separate means of egress and their accessory structures.

The Building Code establishes life safety construction requirements for assembly, business, educational, factory industrial, high hazard, institutional, mercantile, multi-family residential, storage and utility and miscellaneous buildings.

The Fire Code provides requirements for life safety and property protection from the hazards of fire, explosion or dangerous conditions in new and existing buildings.

The Plumbing Code, Mechanical Code and Fuel Gas Code addresses the erection, installation, alteration, repairs, relocation, replacement, addition to, use or maintenance of plumbing systems, mechanical systems and fuel gas systems.

The Property Maintenance Code provides minimum requirements to safeguard public safety, health and general welfare insofar as they are affected by the occupancy and maintenance of structures and premises.

The Existing Building Code provides minimum requirements to safeguard public safety, health and general welfare insofar as they are affected by the repair, alteration, change of occupancy, addition and relocations of existing buildings.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 1220.1(a), 1221.1(a), 1222.1(a), 1223.1(a), 1224.1, 1225.1, 1226.1(a) and 1227.1.

Text of rule and any required statements and analyses may be obtained from: Raymond J. Andrews, New York State Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Raymond.Andrews@dos.state.ny.us

Additional matter required by statute: Executive Law section 378 (15)(b) authorizes the State Fire Prevention and Building Code Council (the Code Council) to provide that during the period between the adoption of changes to the Uniform Fire Prevention and Building Code (the Uniform Code) and the date on which such changes become effective, a person shall have the option of complying either with the provisions of the Uniform Code as changed or the provisions of the Uniform Code as they existed immediately prior to adoption of the change.

At its meeting held on September 14, 2010, the Code Council voted to adopt this rule amending the Uniform Code. The Code Council also voted to provide that during the transition period between the adoption of this rule and the date on which the changes made to the Uniform Code by this rule become effective, a person shall have the option of complying with either the provisions of the Uniform Code as changed by this rule or with the provisions of the Uniform Code as in effect immediately prior to the adoption of this rule.

Revised Regulatory Impact Statement

Changes made to the rule text since the publication of the Notice of Proposed Rule Making are described below. None of the changes affects the issues addressed in the Regulatory Impact Statement (RIS) and, therefore, a Revised RIS is not required.

The original version of the portion of the rule text that will appear in the NYCRR (the ''NYCRR portion'' of this rule) would have incorporated by reference the January 2010 versions of the following publications (the ''Code Books''): the Residential Code of New York State (RCNYS), the Building Code of New York State (BCNYS), the Plumbing Code of New York State (PCNYS), the Mechanical Code of New York State (MCNYS), the Fuel Gas Code of New York State (FGCNYS), the Fire Code of New York State (FCNYS), the Property Maintenance Code of New York State (PMCNYS), and the Existing Building Code of New York State (EBCNYS).

Non-substantive changes were made to each of the Code Books. The revised versions are dated August 2010. The NYCRR portion of this rule was changed:

(1) to provide for incorporation by reference of the August 2010 versions of the Code Books in Parts 1220 to 1227, inclusive, of Title 19 NYCRR;

(2) to change the address of the Department of State where the Code Books are available for inspection and copying; and

(3) to make changes to certain provisions that appear in the August 2010 versions of the Code Books.

The changes made to the Code Books, and the changes made to the August 2010 version of the Code Books by the NYCRR portion of this rule, include the following:

RCNYS

Section 408.7: Deleted the exception, which referenced FEMA/FIA TB.11-2001 (an interim bulletin, not applicable to the New York region).

Section AG106.1: Added new Section AG106.1.1, to provide that swimming pool suction outlets may be designed and installed in accordance with ANSI/APSP7 as an alternative to compliance with main part of Section AG106.1.

Section AG109: Added ANSI/APSP7-2006 to the list of standards referenced in RCNYS Appendix G.

Section 2411: Removed the requirement that the bonding clamp on a gas piping system that contains corrugated stainless steel tubing (CSST) must be inside the building, and revised to provide that the bonding clamp must as close as practicable to the point where the bonding jumper is connected to the grounding electrode system (rather than the point where the gas service enters the building).

3509.7: Added exception requiring gas piping systems containing CSST to be installed and bonded in accordance with Section G2411.2.

Section 2415.7: Revised to clarify that CSST may be installed outdoors.

Section 313.2: Added reference to FCNYS Section 610.

Sections 3108.1, 3104.4 and 3109.2: Added references to Figures 3108.1(1), (2), (3), (4), (5) and 3109.2, for informational purposes on typical vent configurations.

Appendix J, Section J102.6: Added provision relating to lead-based paint.

Chapter 43: Changed the list of standards as follows; changed the publication date of ASTM 84 from 2004 to 2005; removed ACI-530.1/ASCE-6/TMS-602 and ASME/ANSI-A112.19.8; and added ANSI-Z21.83, ANSI-Z21.21, CSA-B64.6, NFPA-13D, and UL-651.

Sections N1101.8, 1101.2.2, 1101.3.1, N1102.4, N1102.2.12 and Tables 1102.1 and N1102.2.5: Revised to be consistent with corresponding sections (102.1.1, 101.4.2, 101.4.3, and 402.4) and Tables (402.1.1 and 402.2.5) of the Energy Conservation Construction Code of New York State (the ''ECCCNYS'').

Section 1102.6: Added this new section, which deals with maximum fenestration U-factor and which mirrors the corresponding section (402.6) in the ECCCNYS.

Section 1102.1.5: Added this new section, which deals with direct siding attachment including code text and code tables, which mirrors the corresponding section (402.1.5) in the ECCCNYS.

Revised several sections relating to requirements for water heaters installed in garages, in reference to elevation of ignition source, for consistency with corresponding PCNYS sections.

Section 1416.2: Added this new section (titled ''Approved portable kerosene heater'') for consistency the corresponding MCNYS section and compliance with Real Property Law Article 7A.

Sections 2414.3, 2425.12(3), and 2427.5.2: Revised references to ''approved'' and ''approved materials'' to avoid potential conflict with Section 103.

Deleted references to ''polybutylene piping (existing installations)'' from several RCNYS sections for consistency with corresponding PCNYS sections.

Revised several RCNYS plumbing sections in reference to freezing/climate conditions, as they apply specifically to New York State, for consistency with corresponding PCNYS and MCNYS sections.

BCNYS

Section 101.4.7: Corrected description of the matters regulated by the Energy Conservation Construction Code of New York State.

Section 202: Removed definitions of terms not used in the BCNYS.

Section 1107.2.2: Revised to clarify that the cross-reference to section 1003.11 would apply to Type A dwelling units and the cross-reference to section 1004.11 would apply to Type B dwelling units.

Section 1107.2.1: Revised to clarify that the exception would apply to a room containing only a lavatory and a water closet, provided it does not contain the only lavatory or water closet on the accessible level of the unit.

Section 707.14.1: Revised to clarify that Exception No. 4 does not apply to certain Group I-2 spaces.

Section 1014.2: Revised Exceptions 2 and 3 to Item No. 2. Item No. 2 provides that egress shall not pass through kitchens, storage rooms, closets or similar spaces. Exceptions 2 and 3 were originally written as requirements rather than exceptions; they were revised for clarity.

Sections 1403.2 and 1403.7: Added provisions relating to condensation protection requirements that mirror provisions in the ECCCNYS. These provisions are repeated in the BCNYS as a convenience to the user; these provisions would be applicable by operation of the ECCCNYS even if they were not repeated in the BCNYS.

Table 1704.1: Reference to Section 704.10 changed to a reference to Section 1704.1. Also, this Table appeared in two places in the BCNYS; the duplicate Table was deleted.

Section 907.2.1: Marginal note added at to indicate that the section was modified by deletion of the phrase ''and an automatic fire detection system''.

Section 1007.1: Deleted Exception 1. Exception 1 dealt with alterations, which are addressed in the EBCNYS.

Section 3109.6: Revised to provide that swimming pool suction outlets must be designed and installed in accordance with standard ANSI/APSP7. Also revised provisions relating to entrapment avoidance in a manner which is acceptable to the Department of Health and which satisfies the requirements of the Federal Virginia Graeme Baker Pool and Spa Safety Act.

Section 310.1: Added the term ''multiple dwelling'' to the descriptions of groups R-1 and R-2 residential occupancies, to provide clarity and coordination where the term is used for fire safety inspection requirements in 19 NYCRR Part 1203.

Table 503: Corrected error relating to height and building area limitations for building of Group B occupancy and Type VB construction, where the height limitation of 2 stories appeared on the next line with the building area limitation of 9,000 square feet.

Table 720.1(3): Revised to add a floor/roof construction assembly category as a prescriptive fire-resistance-rated building element in order to provide an additional available assembly having a known fire-resistance rating.

Section 902.1: Added definitions of ''Ceiling Limit'' and ''Clean Agent.''

Sections 903.2.8, 903.3.7, and 3310.3: Added provisions relating to automatic sprinkler systems in Group S-1 occupancies, approval of fire department connections, and temporary stairway floor number signs that mirror provisions in the FCNYS. These provisions are repeated in the BCNYS as a convenience to the user; these provisions would be applicable by operation of the FCNYS even if they were not repeated in the BCNYS.

Sections 907.2.4 and 907.2.9.1.3.1: Deleted exceptions relating to manual fire alarm boxes in certain Group F occupancies and notification devices in certain student housing, to resolve inconsistencies with the FCNYS.

Section 1002.1: Corrected section reference in the definition of ''Merchandise Pad.''

Section 1109.2: Revised to address accessibility in toilet and bathing facilities of a private office and to clarify when doors are permitted to

swing into the clear floor space and under what conditions normal water closet height requirements do not apply.

Table 2308.10.3(4): This Table, which provides prescriptive rafter spans for snow loading conditions, was revised by eliminating the error of duplicate pages providing the same rafter spans for the same 50 psf ground snow loading condition for 19.2'' and 24'' rafter spacings and adding rafter spans for the 50 psf ground snow loading condition for 12'' and 16'' rafter spacings that have been pre-engineered in order to offer additional readily available design options.

Section 3002.4: Clarified provisions concerning the size of elevator car sizes.[1]

Chapter 35: Added ANSI/APSP7-2006, ASTM-F2387, NFPA-654, and NFPA-50 to the list of standards.

PCNYS

Section 412.4: Revised to provide that floor drains are not required in toilet rooms designed for use by a single individual.

Chapter 13: Added ANSI / CSA Z21.10.1 and Z21.10.3; ASME A17.1; ASTM E119 and E814; CSA B125.1; ICC ANSI/ICC A117.1 and PMCNYS; NFPA 288; UL 1479; NYSDEC Design Standards -1988 and NYSDEC GLUMRB WW to the list of standards.

MCNYS

Chapter 1: Changed chapter title from ''Administration'' to ''General Requirements.''

Section 801.20: Added statement that ''joints shall also be made in accordance with ASTM F 402'' for consistency with other sections of the MCNYS, FGCNYS and PCNYS.

Chapter 15: Added ANSI-Z21.50 (CSA 2.22), ANSI-Z21.60 (CSA 2.26), the PMCNYS, NFPA-70, NFPA-288, UL-647, UL-864 and UL-1479 to the list of standards.

FGCNYS

Section 202: Added definition of ''Code.''

Section 310.2: Revised to remove the requirements that the bonding clamp on a gas piping system that CSST must be (1) inside the building and (2) as close as practicable to the point where the gas service enters the building.

Section 404.7: Revised to clarify that CSST may be installed outdoors.

Section 601.2: Added provision relating to combustion air for fireplaces that mirrors a provision in the BCNYS. This provision is repeated in the FGCNYS as a convenience to the user; this provision would be applicable by operation of the BCNYS even if it was not repeated in the FGCNYS.

Chapter 8: Changed the list of standards as follows: removed AWWA-C111 and MSS-SP-69; and added ANSI-Z21.21, ASME-B31.3, ASTM-E119, ASTM-E814, the PMCNYS, NFPA-70, NFPA-288 and UL-1479.

FCNYS

Section 907.2.7: Added exceptions relating to fire alarms in covered mall buildings and removal of manual fire alarm boxes in sprinklered buildings, to resolve inconsistency with the BCNYS.

Section 1103.5: Revised to provide that dispensing, transferring and storage of flammable and combustible liquids in aircraft motor vehicle fuel-dispensing stations shall be in accordance with NFPA 407, rather than Chapter 22.

Section 308.3.8: Revised to prohibit candles, incense and other similar open-flame producing items in sleeping units and dwelling units in Group R-2 dormitory occupancies. The original draft would have prohibited such items in sleeping units only.

Section 807: Added a new provision (Section 807.1) to provide that, subject to certain stated exceptions, curtains, draperies, hangings and other decorative materials suspended from walls or ceilings in occupancies in Groups A, E, I and R1 and dormitories in Group R2 must meet the flame propagation performance criteria of NFPA 701 in accordance with Section 806.2 or be noncombustible.

Section 610: Revised provisions relating to carbon monoxide alarms.

Section 503.1.1: Added the word ''detached'' to Exception #3, to clarify that fire apparatus access roads are not required for detached one and two-family dwellings.

Section 903.2.8: Added new condition (#4) to include commercial trucks or buses where the fire area exceeds 5,000 square feet, to coordinate with an S-2 occupancy which requires a smaller fire area threshold.

Section 907.2.9.1.3.1: Added an exception for the building fire alarm system in high-rise buildings, to coordinate with the specialized alarm reference for high-rise buildings in Section 907.2.12.2.

Section 1001.2: Added exception regarding rehabilitation aspects and manner of egress per the EBCNYS, to coordination between the FCNYS and EBCNYS Sections 705.1 and 902.3.5.

Chapter 45: Changed the list of standards as follows: changed the publication dates of Codes of NYS from 2009 to 2010 and ASTM-84 from 2004 to 2005; removed NFPA-490 and NFPA-498; and added CSA-6.19, the EBCNYS, UL-2034 and UL-2075.

PMCNYS

Sections 304 and 305: Added references to the Federal requirements that may apply to certain activities in buildings that may contain lead-based paint.

PMCNYS smoke alarm provisions: Revised to eliminate the differences between the PMCNYS provisions and the corresponding FCNYS provisions.

Appendix E: Added ''This appendix is informative and is not part of the code.''

Chapter 8: Added NFPA-720 to the list of standards.

EBCNYS

Section 705.3.3: Revised to provide that all buildings with Group A occupancies of 100 or more (instead of 300 or more) must have a main entrance capable of an egress capacity of half the total occupant load. The threshold of 100 (rather than 300) is in the current version of the Uniform Code.

Sections 708.1 and 708.2: Changed references to Chapter 5 to references to Chapter 6.

Section 705.7.3: Changed ''comply with Section 705.7.1 and 705.7.3'' to ''comply with Section 705.7.1 and 705.7.2.''

Section 502.1: Added a reference to the Federal requirements that may apply to certain activities in buildings that may contain lead-based paint.

Chapter 15: Added NFPA-13 to the list of standards.

Appendix A: Changed the list of standards as follows: Changed the publication dates of all Codes of NYS from 2009 to 2010; removed ICC-UBC23.-2; and added ASTM A615.

OTHER

In each Code Book, (1) references to statutory provisions relating to relationship of the Uniform Code to other laws, rules and regulations were added to Section 102.2; (2) language distinguishing between alternative materials, designs and methods of construction and variances was added to Section 103.3; (3) minor typographical errors were corrected; (4) section numbers were changed to eliminate duplications and inconsistencies, without changes to the text; and (5) other changes, such as adding the phrase ''New York State'' before the name of a State agency, changing a reference to an ''International'' code to a reference to the appropriate New York State Code, and changing references to the ''ICC Electrical Code'' to references to BCNYS Chapter 27, were made.

---

[1] The RIS discusses a change made to the current version of BCNYS Section 3002.4 (in the 2007 BCNYS) to increase the size requirement of certain elevators to accommodate ambulance stretchers of a specific size/configuration. The change made to 2010 BCNYS Section 3002.4 clarified the section without the requirements or meaning of that Section; therefore, the change does not necessitate a Revised RIS.

Revised Regulatory Flexibility Analysis

The changes made to the rule text since the publication of the Notice of Proposed Rule Making are described in the annexed document entitled ''Statement Explaining Why Revised Regulatory Impact Statement is not Required.''

None of the changes affects the issues addressed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments and, therefore, a Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required.

Revised Rural Area Flexibility Analysis

The changes made to the rule text since the publication of the Notice of Proposed Rule Making are described in the annexed document entitled ''Statement Explaining Why Revised Regulatory Impact Statement is Not Required.''

None of the changes affects the issues addressed in the Rural Area Flexibility Analysis and, therefore, a Revised Rural Area Flexibility Analysis is not required.

Revised Job Impact Statement

The Department of State has determined that it is apparent from the nature and purpose of the proposed rule making that it will not have a substantial adverse impact on jobs and employment opportunities.

This rule making would repeal the current version of the State Uniform Fire Prevention and Building Code (the AUniform Code@), and add a new version of the Uniform Code. The current version of the Uniform Code, which is found in 19 NYCRR Parts 1220 to 1228, inclusive, and the publications incorporated by reference in 19 NYCRR Parts 1220 to 1227, inclusive, went into effect January 1, 2008 and is based on the 2003 edi-

tions of the International Residential Code, International Building Code, International Plumbing Code, International Mechanical Code, International Fuel Gas Code, International Fire Code, International Property Maintenance Code, and International Existing Building Code, as developed by the International Code Council (ICC). The new version of the Uniform Code will be based on the 2006 editions of corresponding international codes as developed by the ICC.

The International Codes incorporate the most current technology in the areas of building construction and fire prevention. To maintain this currency, the International Codes are updated every three years. As a consequence, the Department of State concludes that this update, which is based upon the newer (2006) versions of the International Codes, will provide a greater incentive to construction of new buildings and rehabilitation of existing buildings than exists with the current Uniform Code. Therefore, this rule making will not have a substantial adverse impact on jobs and employment opportunities within New York.

Assessment of Public Comment

Comment 1: The code format should be revised pages instead of completely new sets of books.

Response: New sets of books are needed because of the thousands of New York modifications made to the ICC codes. Also, DOS was unable to obtain copyright agreement with the ICC to include the codes in 19 NYCRR.

Comment 2: Modify BCNYS 1107.2.2 to make it clearer that the minimum requirement for Type B dwelling units is to have at least one Type A unit toilet and bathing facility and remaining facilities be Type B.

Response: Agree - modifications made.

Comment 3: The term ''accessible'' used in the exception to BCNYS 1107.2.1 is confusing since a Type A or B toilet complies with this chapter and the exception would never apply.

Response: The exception was intended to apply to rooms containing only a lavatory and a water closet based on Section 1004.11.2 of ANSI A117.1, which requires wall reinforcement in Type B for the future installation of grab bars and shower seats. An exception applies to a room containing only a lavatory and toilet, provided it does not contain the only lavatory or toilet on the accessible level of the unit. Minor modifications made.

Comment 4: BCNYS 707.14.1 requires an enclosed elevator lobby at each floor where an elevator shaft connects more than three stories. A modification should be made to clarify that it does not apply to I-2 occupancies because BCNYS 407 requires stories in I-2 occupancies to be subdivided by smoke barriers when they are used by patients for sleeping or treatment or when occupied by 50 or more persons.

Response: Language could be added to Exception #4 to clarify that it does not apply to certain I-2 spaces, however all I-2 uses should not be included because some stories in Group I-2 occupancies are not required to be subdivided by smoke barriers. The section is further simplified by stating it does not apply to high-rise buildings. A modification was made similar to 2009 IBC language.

Comment 5: BCNYS 1014.2, item 2, Exception 2 is inappropriately written as a requirement instead of an exception.

Response: The same can be said for item 2 exception 3. Minor modifications were made based on 2009 IBCNYS text.

Comment 6: BCNYS 1007.1 Exception 1 states ''Accessible means of egress are not required in alterations to existing buildings.'' Requirements for alterations are in the EBCNYS, thus this exception should be deleted.

Response: Agree, exception deleted.

Comment 7: BCNYS 3109.6 should require ANSI/APSP-7, which provides protection from entrapment.

Response: Agree, section revised. In addition, definition of ''unblockable drain'' was clarified to address Department of Health's concern.

Comment 8: EBCNYS 705.3.3 requires buildings with Group A occupancies of 300 or more to have a main entrance capable of an egress capacity of half the total occupant load, and the current New York requirement is 100.

Response: Agree - section revised by substituting 100 for 300 (as in the 2007 EBCNYS).

Comment 9: Delete RCNYS AG106.1 through AG106.5, and replace with AG106.1 of the 2009 ICC RC. The swimming pool and spa industry support the adoption by New York of these ICC revisions. The 2006 revisions fail to guard against all forms of entrapment and will result in the public having a false sense of security. The 2009 ICC revisions also comply with the Virginia Graeme Baker Federal Pool and Spa Safety Act but the 2006 revisions do not.

Response: Agree - changes made. New information and technology has contributed to a new national ANSI/APSP consensus standard that addresses causes of entrapment.

Comment 10: PMC 305.3: Recommend adding requirements for lead based paint based on the Federal Standards that went into effect April 22, 2010.

Response: New language clarifies that federal law does exist and needs to be complied with. Other code sections for this issue were added. This information was added to the PMCNYS 304.2 and 305.4 and in the EBCNYS 502.1.

Comment 11a: FCNYS 1106.1 regarding Aviation Self Service Fueling Facilities should reference NFPA 407, not Chapter 22. Also, a specific reference section should be added that allows for self service fueling stations at airports. This is not possible or practical from an aviation/airport stand point and most states allow NFPA 407 standards.

Comment 11b: FCNYS 2206.8 requires an automatic fire-extinguishing system for all new flammable liquid motor fuel-dispensing systems. FCNYS 2206.8 requires an automatic fire-extinguishing system for aircraft motor vehicle fuel-dispensing stations. It is not practical to provide an automatic system to cover the hazard area associated with aircraft fueling (100 low lead gasoline), especially self-service and is in conflict with FAA FAR Part 77.

Response: Agree - change made to NFPA 407. The requirements for automatic fire suppression system were not intended to apply to aircraft fueling operations.

Comment 12: Change FCNYS 308.3.8 from ''in sleeping units'' to ''in sleeping and dwelling units'' which is clearer and is supported by rules established by most colleges.

Response: Agree - change made.

Comment 13: Add to FCNYS 808.3 that bulletin boards, posters and paper attached directly to the wall shall not exceed 20 percent of the aggregate wall area to which they are applied, which is consistent with NFPA 1 (2009):12.5.6.3. The current code is silent on bulletin boards and paper on walls.

Response: Agree that, with other safeguards in current college housing, lesser restrictions would be appropriate. Instead of the section proposed in the comment, 2009 IFCNYS 807.1 (2 exceptions) is appropriate.

Comment 14: FCNYS 611 text regarding carbon monoxide alarms is difficult to understand.

Response: Revised text more clearly lists the occupancies covered and allows NFPA 720 as an alternative.

Comment 15: PCNYS 412.4 requires a floor drain in all public restrooms, which includes single use restrooms. Normally floor drains are not installed in individual use toilet rooms.

Response: Agree -modification made. Floor drains only intended for larger public restrooms.

Comment 16: CSST should be listed for outdoor use in accordance with performance requirements contained within Sections 1.1.2; 1.8(n); and 2.14 of the listing standard ANSI LC-1 (2005). Other comments received indicate that the bonding jumper should be kept as short as practicable.

Response: Based on other comments received, manufacturer's installation instructions and the applicable listing standard, installing CSST outdoors on the exterior of the building is acceptable. The following sections were modified: RNYSC G2411.2 (310.2), G2411.2.2, and G2415.7; FGNYS 310.2, 404.7, and 310.2.2.

Comment 17: Agree that driveways for residential buildings built to the FCNYS 508.5.1 appropriately require fire department access.

Response: None required.

Comment: Delete reference to FEMA/FIA TB11-2001 from RCNYS 408.7.

Response: Deleted the exception that contains the reference.

DOS also received comments indicating that text in code book(s) should be revised to make the text clearer or more accurate. The following changes were made in response to these comments:

- BCNYS 907.2.1: Margin notations added to indicate that text, as compared to the 2007 version, has been modified.
- BCNYS Table 1704.1: Duplicate Table 1704.1 deleted, and reference to Section 704.10 changed to reference to Section 1704.1.
- EBCNYS 705.7.3: Reference to 705.7.3 changed to reference to 705.7.2.
- EBCNYS 704.2.2 and 804.1.2: Revised text to clarify that the sprinkler requirements for low rise buildings are not more severe than those for high rise, and to relocate and clarify the exception.
- ECBNYS 708.1 and 708.2: Changed reference to Chapter 5 to reference to Chapter 6.
- FCNYS 907 and PMCNYS 704: Revised to make the smoke alarm requirements consistent.

The DOS also received comments on the following topics, but made no changes in response to these comments for the reasons set forth in the full Assessment.

- BCNYS 715.4.7 should have an exception for door closers on classroom doors in schools.
- EBCNYS 704.2.1.1 does not indicate the specific occupancy that is required to comply with this section.
- BCNYS 903.2.9.1 should contain an exception that would allow bus garages of a certain size to not be sprinklered.

- BCNYS 715.4.7 should contain an exception to not require door closers on classroom doors in schools.
- BCNYS 1009.3 should permit sixty degree ships ladders to access the rooftop observation deck above a school press box.
- BCNYS Section 2902.3 should have an exception in for toilet rooms and facilities designated for use by children in daycare.
- BCNYS 308.5.2 should include definitions of ''wall'' and ''room'' in the exception.
- BCNYS 2107.5: Replace the minimum length of lap splices for reinforcing bars of for masonry construction with the minimum lengths required of ACI 530-05.
- Require all R-4 occupancies be built using the BCNYS instead of the RCNYS.
- BCNYS 1002.1: Modify the definition for ''accessible means of egress.''
- BCNYS 1612.4: Change requirements for base flood elevations.
- BCNYS 1026.1 should require better access from rescue windows for school buildings as required by the NYS Department of Education.
- EBCNYS 1002.2 should allow an increase of 10% of the existing building area in educational occupancies.
- RCNYS: Delete Table E3503.1, replace with NFPA 70.
- RCNYS E3401.1: Remove the definition ''Grounded, Effectively.''
- RBCNYS 310: Should not allow emergency escape windows under decks and porches.
- Require community residences to be built under BCNYS, not RCNYS requirements.
- PMCNYS 606.1: Add additional requirements for elevator inspection records.
- FCNYS 903.3.7: Fire Chief (not the CEO) should be the arbiter of fire hose and fittings.
- FCNYS 903.2.1: Eliminate the requirement that A occupancies be sprinklered.
- FCNYS 405.4: Should permit a fire marshal to allow exemptions during a fire drill.
- FCNYS F408.5.5: Strengthen the fire drill evacuation requirements for colleges.
- FCNYS 508.3: Should require use of 2009 edition of NFPA 1.
- FCNYS: Add requirement of on-site review of inspection, testing and maintenance programs documents (as in 2007 FCNYS 901.6.2).
- FCNYS: Add exception for A and B occupancies equipped throughout with quick-response sprinklers (as in 2007 FCNYS 906.1). Presence of portable fire extinguishers in equipped A and B occupancies may lengthen evacuation.
- FCNYS should prohibit smoking in Group R-2 dormitories.
- FCNYS 403.1.2: Clarify that the fire watch is not in lieu of fire alarm and fire sprinkler systems.
- FCNYS 903.2.8(1) allows boat storage up to 12,000 square feet without a sprinkler system, which is too large a space to not require sprinklers.
- FCNYS and BCNYS: Update all NFPA Standards to the newest editions.
- MCNYS 506.3.2.5: Requires a light test for grease ducts; add water pressure test as an alternative.
- MCNYS 507.2.2(4): Provide Panimi makers to the list of appliances exempt from Type II hood requirement.
- MCNYS 507.12: Addresses Type I and Type II Kitchen Hoods; change to ''top horizontal surface'' back to ''cooking surface.''
- PCNYS 1113: Water-powered sump pumps that involve a cross connection between potable water systems should be prohibited.
- PCNYS Table 403.1: Add a footnote to require toilet facilities used for staff and/or visitors to be separate from those used by children in daycare occupancies.
- FGCNYS Appendix D: Change the appliance gas shut-off valve placement for commercial grade 36 inches or above and/or weighting 150 lbs or above.
- FGCNYS: Should require propane copper lines to be coated yellow for identification purpose and orange for fuel oil.
- FGCNYS 623.1: Should not permit portable BBQ units to be hooked to permanent gas lines unless the BBQ unit is permanently mounted to floor or slab.
- RCNYS 2411 and FGCNYS 310: Add text for bonding of corrugated stainless steel tubing (CSST) that recognizes technology which has proven to be effective and is listed by ICC ES-PMG 1058.

NOTICE OF ADOPTION

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

I.D. No. DOS-16-10-00012-A
Filing No. 951
Filing Date: 2010-09-14
Effective Date: 2010-09-29

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

Action taken: Addition of section 1220.1(d)(9), (10), (11) and (12); amendment of section 1224.1(b); and addition of section 1224.1(c)(2), (3) and (4) to Title 19 NYCRR.

Statutory authority: Executive Law, sections 377 and 378

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

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

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

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

(2) Specify that a gas piping system that contains no CSST may be bonded in any manner described in Section E3509.7 of the 2007 RCNYS, in cases where the 2007 RCNYS applies, or in any manner described in Section 250.104(B) of NFPA 70-2005, in cases where the 2007 FGCNYS applies;

(3) Require gas piping systems that contain any CSST to be electrically continuous and bonded to the electrical service grounding electrode system;

(4) Specify standards for the installation and bonding of CSST, including standards for the size of the bonding jumper, standards for bonding clamp, standards for the place and manner of attachment of the bonding clamp, and standards for separation of the CSST from other electrically conductive systems;

(5) Specify standards for protection of piping other than black or galvanized steel from physical damage, including standards for the types of shield plates to be used, standards for determining the location where shield plates are required, and additional standards for protection of piping made of CSST; and

(6) Clarify the situations in which section E3509.7 in the RCNYS (entitled ''Bonding other metal piping'') will apply.

This rule also provides that the 2005 edition of standard NFPA 70, entitled ''National Electrical Code'' shall be deemed to be one of the standards incorporated by reference into 19 NYCRR Part 1224.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 1220.1(d)(10) and 1224.1(c)(3).

Text of rule and any required statements and analyses may be obtained from: Raymond J. Andrews, New York State Department of State, 99 Washington Ave., Albany, NY 12231-0001, (518) 474-4073, email: Raymond.Andrews@dos.state.ny.us

Additional matter required by statute: The Code Council found and determined that making this rule, and the changes to the Uniform Code to be implemented by this rule, effective immediately upon the publication of the Notice of Adoption in the State Register is required to preserve public safety and to protect health, safety and security by clarifying requirements for electrical bonding of gas piping, clarifying requirements for protection of gas piping against physical damage, and adding new requirements for installation of gas piping made of corrugated stainless steel tubing (CSST), which will increase protection against fires caused by lightning strikes in the vicinity of buildings equipped with CSST gas piping and fires caused by accidental punctures of CSST gas piping.

Revised Regulatory Impact Statement

Changes made to the rule text since the publication of the Notice of Proposed Rule Making are as follows: The rule text was revised to remove the requirement that the bonding clamp be located inside the building, and to replace the requirement that the bonding clamp be located as close as practicable to the point where the gas service enters the building with a requirement that the bonding clamp be located as close as practicable to the point where the bonding jumper is connected to the electrical service grounding electrode system.

None of the changes affects the issues addressed in the Regulatory Impact Statement and, therefore, a Revised Regulatory Impact Statement is not required.

Revised Regulatory Flexibility Analysis

The changes made to the rule text since the publication of the Notice of Proposed Rule Making are described in the annexed document entitled "Statement Explaining Why Revised Regulatory Impact Statement is not Required."

None of the changes affects the issues addressed in the Regulatory Flexibility Analysis for Small Businesses and Local Governments and, therefore, a Revised Regulatory Flexibility Analysis for Small Businesses and Local Governments is not required.

Revised Rural Area Flexibility Analysis

The changes made to the rule text since the publication of the Notice of Proposed Rule Making are described in the annexed document entitled "Statement Explaining Why Revised Regulatory Impact Statement is Not Required."

None of the changes affects the issues addressed in the Rural Area Flexibility Analysis and, therefore, a Revised Rural Area Flexibility Analysis is not required.

Revised Job Impact Statement

The Department of State has concluded after reviewing the nature and purpose of the rule that it will not have a "substantial adverse impact on jobs and employment opportunities" (as that term is defined in section 201-a of the State Administrative Procedures Act) in New York.

The rule adds new paragraphs (9), (10), (11), and (12) to subdivision (d) of section 1220.1, amends subdivision (b) of section 1224.1, and adds new paragraphs (2), (3), and (4) to subdivision (c) to section 1224.1 of Title 19 NYCRR. New paragraphs (9), (10), (11), and (12) of subdivision (d) of section 1220.1 and new paragraphs (2), (3), and (4) of subdivision (c) of section 1224.1 will clarify requirements in the Uniform Fire Prevention and Building Code ("Uniform Code") relating to electrical bonding of gas piping and protection of gas piping against physical damage, and will add new requirements relating to installation of gas piping made of corrugated stainless steel tubing (CSST).

It is anticipated that builders will be able to comply with the electrical bonding and physical protection requirements, as clarified and added by this rule, by using equipment that is currently available and techniques that are currently known. It is also anticipated that any increase costs of compliance resulting from this rule will be negligible. Therefore, it is anticipated that this rule will have no significant adverse impact on jobs or employment opportunities in the building industry, or in businesses that manufacture or install gas piping, other metal piping, or CSST piping.

Assessment of Public Comment

Comment 1: A comment was received indicating that the rule may prohibit or limit the use of corrugated stainless steel tubing (CSST) outdoors. The party making this comment noted that CSST is listed for outdoor use in accordance with performance requirements contained within Sections 1.1.2; 1.8(n); and 2.14 of the listing standard ANSI LC-1 (2005).

Response to Comment 1: Neither the existing provisions of the Uniform Code nor the provisions of this rule expressly prohibit the use of CSST outdoors. However, this rule does require (1) that gas pipe systems that contain CSST be bonded at a point which is inside the building and (2) that the bonding clamp be located as close as practicable to the point where the gas service enters the building. These requirements may be construed as limiting the ability to use CSST outdoors. Based on (1) this comment and other comments received by the Codes Division, (2) the manufacturers' installation instructions and (3) the applicable listing standard, installing CSST and the required bonding clamp and bonding jumper either indoors or outdoors is acceptable.

In addition, Codes Division has received comments indicating that the length of the bonding jumper should be kept as short as practicable. The requirement that the bonding clamp be located as close as practicable to the point where the service enters the building was based on the assumption that such location would result in the shortest bonding jumper length. However, that is not always true.

Accordingly, the rule is revised by (1) removing the requirement that the bonding clamp be located inside the building and (2) replacing the requirement that the bonding clamp be located as close as practicable to the point where the gas service enters the building with a requirement that the bonding clamp be located as close as practicable to the point where the bonding jumper is connected to the electrical service grounding electrode system.

Comment 2: A comment was received indicating that the requirements for bonding CSST to be added to the Residential Code of New York State (Section 2411) and the Fuel Gas Code of New York State (Section 310) should be revised by adding additional provisions which would eliminate or modify the bonding requirements in a case where a specific product, which is listed by ICC ES-PMG 1058, is used. The party making this comment asserts that the product ''has proven to be effective in the field'' and should be ''considered to be bonded where it is connected to the appliances that are connected to the equipment grounding conductor of the circuit supplying that appliance.''

Response to Comment 2: The Department of State believes that the information submitted in support of this comment is not sufficient to justify making the change recommended by this comment at this time. The Department of State will attempt to obtain additional information that may support elimination or modification of the bonding requirements when a CSST product of the type described in this comment is used. If the Department of State obtains additional information that supports an elimination or modification of such requirements, the Department of State and the Code Council will consider proposing a new rule making to make such change(s).

State University of New York

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

State University of New York Tuition and Fees Schedule

I.D. No. SUN-39-10-00012-P

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

Proposed Action: Amendment of section 302.1 of Title 8 NYCRR.

Statutory authority: Education Law, section 355(2)(b) and (h)

Subject: State University of New York Tuition and Fees Schedule.

Purpose: To amend the Tuition and Fees Schedule to increase tuition for students in all programs in the State University of New York.

Text of proposed rule: Section 302.1. Tuition and fees at State-operated units of State University.

The payment of tuition and fees in the State-operated units of the State University shall be governed by the following definitions, regulations, and schedule of rates to be charged.

(a) Definitions. For the purpose of establishing rental schedules, tuition fees and other charges, the following definitions shall apply:

(1) Semester. A period of attendance in which the school year is customarily divided in two equal sessions. In some cases an optional third semester is available.

(2) [Quarter. A period of attendance in which the school year is customarily divided in three equal sessions. In some cases a fourth optional quarter is available.

(3)]Student.

[(i)] A student at a college operating on a semester basis is any person registered for 12 or more semester hours of work in a regular program whether on campus or at another location.

[(ii) A student at a college operating on a quarter basis is any person registered for 12 or more quarter hours.]

([4]*3*) Special student.

(i) A special student at a college operating on a semester basis is any person registered for fewer than 12 semester hours of work.

(ii) [A special student at a college operating on a quarter basis is any person registered for fewer than 12 quarter hours.

(iii)]A student attending a summer session, which is not a regular [quarter or]semester, is a special student for the purpose of this definition.

([5]*4*) Change of status. A person who registers and commences classes initially as a student but whose program is later curtailed for academic reasons, does not change status during that [quarter or]semester to that of special student.

([6]*5*) Residence. A person whose domicile has been in the State of New York for a period of at least one year immediately preceding the time of registration for any period of attendance shall be a New York resident for the purpose of determining the tuition rate payable for such period. All other persons shall be presumed to be out-of-state residents for such purpose, unless domiciliary status is demonstrated in accordance with guidelines adopted by the Chancellor or designee.

(b)[(1) Students enrolled in degree-granting undergraduate programs leading to an associate degree and nondegree granting programs of at least one regular academic term in duration which have been approved as eligible for tuition assistance program awards.

Tuition

(i) Students, New York State residents: $2,485 per semester or $1,657 per quarter.

(ii) Students, out-of-state residents: $6,435 per semester or $4,290 per quarter.

(iii) Special students, New York State residents: $207 per semester credit hour or $138 per quarter credit hour.

(iv) Special students, out-of-state residents: $536 per semester credit hour or $358 per quarter credit hour.

(v) The president of a college of technology or a college of agriculture and technology may establish differing rates of tuition for the college for students enrolled in degree- granting programs leading to an associate degree and non-degree granting programs, with the approval of the chancellor or designee, based on considerations which may include but are not limited to time, location, cost, services provided, enrollment management and access, so long as such tuition rates do not exceed the tuition rates specified in this subdivision.

(2) Students enrolled in degree-granting undergraduate programs leading to a baccalaureate degree and non-degree granting programs of at least one regular academic term in duration which have been approved as eligible for tuition assistance program awards.

Tuition

(i) Students, New York State residents: $2,485 per semester or $1,657 per quarter.

(ii) Students, out-of-state residents: $6,435 per semester or $4,290 per quarter.

(iii) Special students, New York State residents: $207 per semester credit hour or $138 per quarter credit hour.

(iv) Special students, out-of-state residents: $536 per semester credit hour or $358 per quarter credit hour except that for non-matriculated students (as defined in section 145-2.4 of this Title), the president of a State-operated institution may establish a differing tuition rate(s), with the approval of the chancellor or designee, in accordance with guidelines to be issued by the chancellor, provided that such tuition rate(s) does not exceed the rate specified in this paragraph and is not lower than 15 percent above the rate in subparagraph (iii) of this paragraph. Tuition and fees charged to such non-matriculated students shall be set to cover total direct instructional costs for such students.

(c)(1) Students enrolled in graduate programs leading to a master's, doctor's or equivalent degree with the exception of those degrees set forth in paragraph (2) of this subdivision.

Tuition

(i) Students, New York State residents: $4,185 per semester or $2,790 per quarter.

(ii) Students, out-of-state residents: $6,625 per semester or $4,417 per quarter.

(iii) Special students, New York State residents: $349 per semester credit hour or $233 per quarter credit hour.

(iv) Special students, out-of-state residents: $552 per semester credit hour or $368 per quarter credit hour.

(2) Students enrolled in graduate programs leading to a master of business administration degree (M.B.A.).

Tuition

(i) Students, New York State residents: $4,305 per semester or $2,870 per quarter.

(ii) Students, out-of-state residents: $6,880 per semester or $4,587 per quarter.

(iii) Special students, New York State residents: $359 per semester credit hour or $239 per quarter credit hour.

(iv) Special students, out-of-state residents: $573 per semester credit hour or $382 per quarter credit hour.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

* * * *

(d) Students enrolled in the professional program of pharmacy.

Tuition

(1) Students, New York State residents: $8,310 per semester or $5,540 per quarter.

(2) Students, out-of-state residents: $14,375 per semester or $9,583 per quarter.

(3) Special students, New York State residents: $693 per semester credit hour or $462 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: $1,198 per semester credit hour or $799 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

* * * *

(e) Students enrolled in the professional program of law (J.D. and LL.M).

Tuition

(1) Students, New York State residents: $8,005 per semester or $5,337 per quarter.

(2) Students, out-of-state residents: $12,130 per semester or $8,087 per quarter.

(3) Special students, New York State residents: $667 per semester credit hour or $445 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: $1,011 per semester credit hour or $674 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

* * * *

(f) Students enrolled in medicine programs.

Tuition

(1) Students, New York State residents: $11,400 per semester or $7,600 per quarter.

(2) Students, out-of-state residents: $20,320 per semester or $13,547 per quarter.

(3) Special students, New York State residents: $950 per semester credit hour or $633 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: $1,693 per semester credit hour or $1,129 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

* * * *

(g) Students enrolled in dentistry programs.

Tuition

(1) Students, New York State residents: $9,825 per semester or $6,550 per quarter.

(2) Students, out-of-state residents: $19,710 per semester or $13,140 per quarter.

(3) Special students, New York State residents: $819 per semester credit hour or $546 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: $1,643 per semester credit hour or $1,095 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(h) Students enrolled in the professional program of physical therapy and students enrolled in the doctor of nursing practice degree program.

Tuition

(1) Students, New York State residents: $6,925 per semester or $4,617 per quarter.

(2) Students, out-of-state residents: $11,095 per semester or $7,397 per quarter.

(3) Special students, New York State residents: $577 per semester credit hour or $385 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: $925 per semester credit hour or $616 per quarter credit hour or equivalent.

Credit Hour Equivalent

The Chancellor shall determine the equivalent of a credit hour.

(i) Students enrolled in optometry programs.

Tuition

(1) Students, New York State residents: $8,260 per semester or $5,507 per quarter.

(2) Students, out-of-state residents: $15,860 per semester or $10,573 per quarter.

(3) Special students, New York State residents: $688 per semester credit hour or $459 per quarter credit hour or equivalent.

(4) Special students, out-of-state residents: $1,322 per semester credit hour or $881 per quarter credit hour or equivalent.

The Chancellor shall determine the equivalent of a credit hour.]

Tuition charges as listed in the following table for categories of students, terms and programs, and as modified, amplified or explained in footnotes 1 and 2 are effective with the 2010 Fall term and thereafter.

		Charge per Semester		*Charge per Semester credit hour[1] Special Students*	
		New York State residents	*Out-of-State residents*	*New York State residents*	*Out-of-State residents*
I.	*Students enrolled in degree-granting undergraduate programs leading to an associate degree and non-degree granting programs of at least one regular academic term in duration which have been approved as eligible for Tuition Assistance Program Awards*	*$2,485*	*$6,690 $4,550[2]*	*$207 $175[3]*	*$558 $379[2] $175[3]*
II.	*Students enrolled in degree-granting undergraduate programs leading to a baccalaureate degree and non-degree granting programs of at least one regular academic term in duration which have been approved as eligible for Tuition Assistance Program Awards*	*$2,485*	*$6,690*	*$207*	*$558*
III.	*Students enrolled in graduate programs (other than Masters of Business Administration) leading to a Master's, Doctor's or equivalent degree*	*$4,185*	*$6,890*	*$349*	*$574*
IV.	*Students enrolled in a graduate program leading to a Masters of Business Administration (MBA)*	*$4,690*	*$7,570*	*$391*	*$631*
V.	*Students enrolled in the professional program of pharmacy*	*$9,060*	*$17,250*	*$755*	*$1,438*
VI.	*Students enrolled in the professional program of law*	*$8,725*	*$14,555*	*$727*	*$1,213*
VII.	*Students enrolled in the professional program of medicine*	*$12,425*	*$24,385*	*$1,035*	*$2,032*
VIII.	*Students enrolled in the professional program of dentistry*	*$10,710*	*$23,650*	*$893*	*$1,971*
IX.	*Students enrolled in the professional program of physical therapy and doctor of nursing practice*	*$7,550*	*$13,315*	*$629*	*$1,110*
X.	*Students enrolled in the professional program of optometry*	*$8,690*	*$16,685*	*$724*	*$1,390*

[1] The Chancellor shall determine the equivalent of a credit hour.

[2] In accordance with chapter 309 of the Laws of 1996, and enabling action by the Board of Trustees, the Colleges of Technology at Alfred, Canton, Cobleskill, Delhi and Morrisville are authorized to charge this lower rate for out-of-state students enrolled in degree-granting programs leading to an associate degree or in non-degree granting programs. This reduced rate does not apply to those students enrolled in degree-granting programs leading to a baccalaureate degree.

[3] In accordance with Chapter 309 of the Laws of 1996, and enabling action by the Board of Trustees, the Colleges of Technology at Alfred, Canton, Cobleskill, Delhi and Morrisville are authorized to charge this lower rate for special students (part-time) enrolled in degree-granting programs leading to an associate degree or in non-degree granting programs, and taking classes at off-campus locations or during the summer or winter intercessions. This reduced rate does not apply to those students enrolled in degree-granting programs leading to a baccalaureate degree.

Text of proposed rule and any required statements and analyses may be obtained from: Lisa S. Campo, State University of New York, State University Plaza, 353 Broadway, Albany, New York 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

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

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

Regulatory Impact Statement

1. Statutory Authority: Education Law, Sections 355(2)(b) and 355(2)(h). Section 355(2)(b) authorizes the State University Trustees to make and amend rules and regulations for the governance of the State University and institutions therein. Section 355(2)(h) authorizes the State University Trustees to regulate the admission of students, tuition charges and other fees and charges, curricula and all other matters pertaining to the operation and administration of each State-operated institution of the University.

2. Legislative Objectives: The present measure will provide essential financial support for the operations of the State University of New York, in furtherance of its statutorily defined mission as set forth in Article 8 of the Education Law.

3. Needs and Benefits: The present measure establishes a series of tuition increases in the degree programs of the State University of New York as necessitated by budget cuts that have been imposed on the University as a result of the dire economic conditions in this State.

The tuition changes authorized by this measure affect out-of-state students in associate, baccalaureate and graduate programs, including the Master of Business Administration, and both resident and out-of-state students in the professional schools within the State University of New York including the Schools of Law and Pharmacy at the State University of New York at Buffalo, the four medical schools of the State University, the Schools of Dental Medicine, the Professional Programs in Physical Therapy and Nursing Practice at State University of New York at Buffalo and Stony Brook, and the College of Optometry.

This measure is needed in order to provide essential financial support for the State-operated campuses of the State University of New York. The present amendment will increase tuition for out-of-state residents enrolled in associate's degree programs to $9,100 per year; for out-of-state resident baccalaureate degree students to $13,380 per year; and for out-of-state resident master's and doctoral degree students to $13,780. For out-of-state resident students enrolled in Master of Business Administration degree programs, a tuition rate of $14,310 per year is established.

Tuition increases at the professional schools within the State University of New York are also affected by this amendment. Tuition for New York State residents at the School of Law will increase to $17,450 per year ($29,110 out-of-state residents), and at the Pharmacy School to $18,120 per year ($34,500 out-of-state residents).

The measure also increases tuition by $2,050 per year to $24,850 for New York State residents and by $8,130 to $48,770 for out-of-state residents enrolled in the four medical schools of the State University of New York.

The amendment also increases tuition for students in the professional dental program (D.D.S.) at the Universities at Buffalo and Stony Brook. Under this measure, tuition will increase $1,770 per year to $21,420 for New York State residents and $7,880 per year to $47,300 for out-of-state residents. Tuition for students enrolled in the Professional Program of Optometry at the College of Optometry is increased by $860 to $17,380 for residents and by $1,650 to $33,370 for out-of-state residents.

Finally, the amendment increases tuition for students pursuing the terminal Professional Degree in Physical Therapy and the Doctorate in Nursing Practice. The new annual rate is $15,100 for New York State residents and $26,630 for out-of-state residents.

4. Costs: Students enrolled in these programs of the State University of New York will be required to pay additional tuition ranging from $350 per year for out-of-state resident associate degrees to $8,130 for out-of-state resident students at the Schools of Medicine. In setting the new tuition

schedule, the State University has examined its appropriation levels, the prevailing tuition rates charged by other public universities and the status of various State and Federal student financial aid programs.

5. Local Government Mandates: There are no local government mandates. The amendment does not affect students enrolled in the community colleges operating under the program of the State University of New York.

6. Paperwork: No parties will experience any new reporting responsibilities. State University of New York publications and documents containing notices regarding costs of attendance will need to be revised to reflect these changes.

7. Duplication: None.

8. Alternatives: Delays in tuition increases as well as higher increases were considered, however, there is no acceptable alternative to the proposed increases. The revenue from these tuition increases is necessary in order for the University to maintain quality of instruction and essential services to students, especially for the high cost professional programs.

9. Federal Standards: None.

10. Compliance Schedule: Compliance with the amendment will go into effect for the Fall 2010 semester. Bills reflecting the increases will be sent out to registered students by the campuses and payment of these bills is due in accordance with State University policy.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on rural areas. The rule will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping, professional services or other compliance requirements on rural areas.

Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs tuition charges for State University of New York and will not have any adverse impact on the number of jobs or employment.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

State University of New York Tuition and Fees Schedule

I.D. No. SUN-39-10-00022-P

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

Proposed Action: Amendment of section 302.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 355(2)(b) and (h)

Subject: State University of New York Tuition and Fees Schedule.

Purpose: To amend the Tuition and Fees Schedule and establish a special tuition rate for certain nonresident students at Maritime College.

Text of proposed rule: Amendments to section 302.5 of Title 8 NYCRR.

Tuition charge for nonresident students at Maritime College.

(a) The chancellor hereby is authorized to execute in the name and under the seal of the State University on behalf of the Maritime College thereof, an agreement with the United States of America, acting through the Maritime Administration of the Department of Transportation, under the Maritime Academy Act of 1958 (Public Law 85-672) and applicable regulations, for annual payments in support of the Maritime College, including agreement to admit students resident in other states, and for subsidy payments with respect to students attending the Maritime College and further including agreements with other states to participate in a regional maritime academy whereby students from participating states are charged [the tuition role for State residents] *a special tuition rate of 150% of* the tuition [role] *rate* for State residents*; provided, however, that students from participating states who have matriculated during or prior to the State University's 2009-10 fiscal year shall be charged a special tuition rate of 125% of the tuition rate for State students,* in accordance with Federal requirements.

(b) The increased annual payment in support of the Maritime College upon condition of admitting students residents in other states shall be received in discharge of such amount of the established nonresident tuition charge rate as shall reduce it to the *special rate described in paragraph (a) above* [rate charged State residents] in the case of such students admitted under Federal requirements.

Text of proposed rule and any required statements and analyses may be obtained from: Lisa S. Campo, State University of New York, State University Plaza, 353 Broadway, Albany, New York 12246, (518) 320-1400, email: Lisa.Campo@SUNY.edu

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

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

Regulatory Impact Statement

1. Statutory Authority: Education Law, Sections 355(2)(b) and 355(2)(h). Section 355(2)(b) authorizes the State University Trustees to make and amend rules and regulations for the governance of the State University and institutions therein. Section 355(2)(h) authorizes the State University Trustees to regulate the admission of students, tuition charges and other fees and charges, curricula and all other matters pertaining to the operation and administration of each State-operated institution of the University. Education Law, Section 352 (3), includes the Maritime College as part of the State University. Since 1997, Maritime College has been recognized by the federal government as a Regional Maritime Academy. See 46 USC, Chapter 515, et seq.

2. Legislative Objectives: The present measure will provide essential financial support for the operations of the State University of New York, in furtherance of its statutorily defined mission as set forth in Article 8 of the Education Law.

3. Needs and Benefits: The present measure will allow Maritime College flexibility in setting tuition rates for nonresident students from States in its region. SUNY Maritime's region is comprised of thirteen states and the District of Columbia. The proposal will allow the president of the College, with the approval of the Chancellor, to adjust the tuition rate for ''in-region'' students to a rate that is greater than the in-state tuition rate and less than the out-of-state tuition rate for the Fall 2010 semester and later.

The amendment to the regional tuition rate will impact an estimated 270 returning students, who will be charged 125% of SUNY's current in-State tuition and 90 new students who will be charged 150% of the current tuition rate.

The increase in tuition is needed to help cover reductions in both State funding and the federal stipend from the U.S. Maritime Administration (MARAD). Funding for State-operated colleges has been reduced by $170 million for 2010-2011. State support for SUNY Maritime College was $11,529,600 in 2008-09; and $10,702,400 in 2009-10 (a reduction of $827,200). In return for agreeing to be a regional maritime college, the College receives a stipend or Direct Payment from MARAD. The amount of the stipend has varied in recent years from $200,000 to $400,000. The amount in the proposed federal budget for Fiscal Year 2011 is $333,333, a reduction of $66,667 from the previous year. Despite the Direct Payments, the ''lost'' tuition opportunity, based upon the 359 regional students currently enrolled, is $2,506,111.

4. Costs: The ''in-region'' tuition rate will be adjusted to a rate that is greater than the in-state tuition rate and less than the out-of-state tuition rate. The in-region rate for current students will be 125 percent of the in-state rate ($6,210). The in-region rate for students enrolling Fall 2010 or later will be 150 percent of the in-state rate ($7,460). The new rates will be effective for the Fall 2010 semester and thereafter. Despite the increase, the students continue to benefit from tuition rates that are lower than tuition for most other maritime colleges as well as other state university schools within the maritime region and other peer level engineering schools.

The tuition at other Maritime Colleges is as follows:

Maritime College	In-State Tuition	In-Region Tuition	Out-of-State Tuition
Massachusetts	$1,342.00 (plus $5,267 in other mandatory fees)	$2,348.00	$14,992.00
California	$4,026.00	N/A	$15,186.00
New York	$4,970.00	$6,210.00 (current students) $7,460.00 (students enrolling Fall 2010 or later)	$12,870.00
Texas	$5,248.20	N/A	$13,558.20
Maine	$8,280.00	$12,420.00	$17,000.00

Great Lakes	$8,290.00 $8,736.00	N/A	$8,649.00 $9,116.00

The in-state/out-of-state tuition at other Engineering Colleges varies as follows:

College	In-State Tuition	In-Region Tuition	Out-of-State Tuition
CCNY	$4,600	N/A	$9,960
SUNY Maritime	$4,970	$6,210 (current students) $7,460 (students enrolling Fall 2010 or later)	$12,870
Purdue	$8,638	N/A	$25,118
Rutgers	$9,546	N/A	$20,178
Penn State	$14,416	N/A	$25,946

The in-state/out-of-state tuition rates for State University Systems that are included within Maritime's region are shown below:

State University System	In-State Tuition	Out-of-State Tuition
Louisiana	$1,996	$6,282
North Carolina	$2,813	$11,757
Connecticut	$3,789	$8,635
Florida	$4,340	$11,700
SUNY Maritime	$4,970	$12,870
District of Columbia	$5,370	$12,300
Mississippi	$5,700	$16,518
Alabama	$6,468	$12,084
Maryland	$7,056	$15,072
Delaware	$8,540	$22,240
South Carolina	$9,517	$19,007
Rhode Island	$9,528	$26,026
New Jersey	$9,546	$20,456
Virginia	$9,870	$31,870
Pennsylvania	$12,708	$18,674

5. Local Government Mandates: There are no local government mandates. The amendment does not affect students enrolled in the community colleges operating under the program of the State University of New York.

6. Paperwork: No parties will experience any new reporting responsibilities. State University of New York publications and documents containing notices regarding costs of attendance will need to be revised to reflect these changes.

7. Duplication: None.

8. Alternatives: The alternative of reducing resources available to the campus by the amount that would accrue by an increase in tuition rates was considered. However, given the reductions in State support imposed on the campus by deficit reduction actions an increase in the tuition rate for ''in-region'' students is the better alternative. A ''town meeting'' regarding proposed increases in tuition and fees was held at the College. Members of the Student Government Association, undergraduate and graduate students, and members of the regiment and regular students were present and voiced support for the increases. The new tuition rate for 2010-2011 is on the College's website.

9. Federal Standards: SUNY Maritime is a regional maritime academy pursuant to 46 USCA Chapter 515, section 51503 (Pub. L 109-304, section 8(b)). This federal law does not require states with regional academies to set any specific tuition levels for in-region students. The requisite agreement between New York State and the participating states in the Maritime region required the designation in writing of the state which was to conduct the affairs of the regional academy and an agreement to admit students from other states to the extent of at least ten percent (10%). The tuition charged to region member states was not specified in the federal law or regulations. This proposal conforms to the federal standards and interstate agreement.

10. Compliance Schedule: Compliance with the amendment will go into effect for the Fall 2010 semester. Bills reflecting the increases will be sent out to affected students by the campus and payment of these bills will be due in accordance with State University policy.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, recordkeeping or other compliance requirements on small businesses and local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on rural areas. The rule will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping, professional services or other compliance requirements on rural areas.

Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs tuition charges for State University of New York and will not have any adverse impact on the number of jobs or employment.

Department of Taxation and Finance

EMERGENCY RULE MAKING

Sales of Cigarettes on Indian Reservations

I.D. No. TAF-35-10-00002-E
Filing No. 941
Filing Date: 2010-09-13
Effective Date: 2010-09-13

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

Action taken: Addition of sections 74.6 and 74.7 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 471(1), (4) and (5); 471-e; 475 (not subdivided); and L. 2010, ch. 134, part D

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

Specific reasons underlying the finding of necessity: New statutory requirements regarding the collection of taxes on sales of cigarettes made on New York State Indian reservations were enacted by Part D of Chapter 134 of the Laws of 2010. This legislation, enacted on June 21, 2010, set forth a dual system to be used on and after September 1, 2010, that ensures adequate quantities of stamped tax exempt cigarettes are available to Indian nations or tribes for the use or consumption of the nations or tribes and their members based on their probable demand. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand used in both systems and the election of the system by the Indian nations and tribes. As amended by Chapter 136 of the Laws of 2010, section 11 of Part D provided that, within 60 days after the effective date, the department "shall promulgate any rules and regulations and take any other actions necessary to fully implement the provisions of subdivision 5 of section 471 and section 471-e of the tax law. . . ." In order to preserve the general welfare as determined by the Legislature by putting the regulatory amendments in place on a timely basis to implement the legislation and to comply with the new statutory requirements as well as the rule making requirements of the State Administrative Procedure Act, this rule was previously adopted as an emergency measure on June 22, 2010, the Notice of Emergency Adoption having been published in the State Register on July 7, 2010. The June 22, 2010, emergency measure is scheduled to expire on September 19, 2010.

The proposal to make the rule permanent was published in the State Register on September 1, 2010. However, the permanent rule will not be effective until the date that the Notice of Adoption is published in the State Register. The earliest date that the Notice of Adoption may be published is November 3, 2010. Accordingly, this emergency readoption is necessary to preserve the general welfare in order to keep the regulations in effect and be in compliance with the new statutory requirements as well as the rule making requirements of the State Administrative Procedure Act, until the proposed rule is adopted as a permanent rule.

Subject: Sales of cigarettes on Indian reservations.

Purpose: To implement certain provisions of recently enacted legislation concerning sales of cigarettes on Indian reservations.

Substance of emergency rule: This rule concerns the collection of taxes on sales of cigarettes made on New York State Indian reservations as required by sections 471 and 471-e of the Tax Law, and provides procedures to be followed by New York State licensed cigarette stamping agents for the certification process required by section 471 of the Tax Law. The rule was previously adopted as an emergency measure on June 22, 2010, and proposed as a permanent rule on August 11, 2010.

Section 1 of the rule adds a new section 74.6 to the cigarette tax regulations to address sales of cigarettes on Indian reservations and to describe the two statutory mechanisms (systems) for the delivery of quantities of tax-exempt cigarettes to Indian nations or tribes for the personal use and consumption of their qualified members based on their probable demand plus the amount needed for official nation or tribal use. Indian nations or tribes may elect to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law, or, if such election is not made, the prior approval system established in section 471(5) of the Tax Law will be used. Under the prior approval system New York State licensed cigarette stamping agents and wholesale dealers that have received prior approval from the Tax Department may sell certain quantities of stamped untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand used in both systems.

Section 2 of the rule adds a new section 74.7 to the cigarette tax regulations relating to the statutory provisions of section 471(4) that require every cigarette stamping agent that purchases unstamped packages of cigarettes intended for resale in New York State to annually provide its supplier and the Tax Department with a certification, under penalty of perjury, that the cigarettes will not be resold in violation of Article 20 of the Tax Law. Procedures to be followed for the certification process are set forth in the rule, such as certification signature and swearing requirements, time periods covered by the certification, and the contents of the certification. With regard to the contents, the certification must specifically provide that the agent will only make sales of tax-exempt stamped packages of cigarettes to Indian nations or tribes or to reservation cigarette sellers that are in accordance with the provisions of new section 74.6 of the rule.

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. TAF-35-10-00002-P, Issue of September 1, 2010. The emergency rule will expire November 11, 2010.

Text of rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax__regulations@tax.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, subdivision First; 471, subdivisions (1), (4), and (5); 471 e; 475 (not subdivided); and Part D of Chapter 134 of the Laws of 2010. Section 171, subdivision First provides general authority for the Commissioner of Taxation and Finance to make reasonable rules and regulations that may be necessary for the exercise of the Commissioner's powers and the performance of his or her duties under the Tax Law. Part D of Chapter 134 of the Laws of 2010, enacted June 21, 2010, and generally applicable beginning September 1, 2010, amended sections 471(1) and 471-e and added section 471(5) to the Tax Law to set forth a dual system for the delivery of quantities of tax exempt cigarettes to Indian nations or tribes for the use or consumption of the nations or tribes and their members up to their probable demand. As amended by Chapter 136 of the Laws of 2010, section 11 of Part D provided that, within 60 days after the effective date, the department ''shall promulgate any rules and regulations and take any other actions necessary to fully implement the provisions of subdivision 5 of section 471 and section 471-e of the tax law. . . .'' Section 471(1), as amended by Chapter 134, imposes the tax on cigarettes, including all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians, and provides for a dual system to ensure that adequate quantities of stamped but tax exempt cigarettes are available for purchase by the nation or tribe and its members for their use or consumption based on their probable demand. Section 471-e, as amended by Chapter 134, establishes the ''Indian tax exemption coupon system'' which Indian nations or tribes may elect to participate in to obtain such tax-exempt cigarettes. Section 471(5), as added by Chapter 134, provides that for any year that this election is not made, the ''prior approval'' system will be used. Section 471(4) provides that cigarette stamping agents must provide their suppliers and the department with a certification, under penalty of perjury, that cigarettes will not be resold in violation of Article 20 of the Tax Law, which imposes the cigarette tax. Section 475 authorizes the Commissioner specifically to administer the tax on cigarettes imposed under Article 20 of the Tax Law.

2. Legislative objective: The rule is being proposed pursuant to such authority to administer statutory amendments made by Part D of Chapter 134 of the Laws of 2010 and to take regulatory action to help enable the department to better ensure compliance with the provisions contained in Article 20 of the Tax Law that call for the imposition of cigarette taxes as well as sales of sufficient quantities of untaxed cigarettes for the use or consumption of Indian nations or tribes and their members up to their probable demand. The rule provides specifics concerning the methodology for the statutorily required calculation of probable demand for cigarettes by qualified Indians and the Indian nations or tribes. The rule also provides procedures for the agent certification process required by section 471(4) of the Tax Law.

3. Needs and benefits: This rule is necessary in connection with the implementation of recently enacted legislation concerning sales of cigarettes on Indian reservations on and after September 1, 2010. The rule details the dual statutory system that provides for adequate quantities of stamped but tax exempt cigarettes to be available for the use or consumption of Indian nations or tribes and their members based on their probable demand. Indian nations or tribes may elect to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law. For any year that such election is not made, the prior approval system established in section 471(5) of the Tax Law will be used. Under the prior approval system New York State licensed cigarette stamping agents and wholesale dealers may sell certain quantities of stamped untaxed packages of cigarettes to Indian nations or tribes and reservation cigarette sellers with the prior approval of the Tax Department. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand used in both systems. The probable demand for tax-exempt use by the Indian nations or tribes and their members is set based on Census data and federal consumption figures. For purposes of this calculation for the twelve-month period beginning September 1, 2010, that is contained in the rule, these figures are derived from the United States Department of Agriculture, Economic Research Service.

The rule also provides procedures to be followed for the agent certification process required by section 471(4) of the Tax Law, such as certification signature and swearing requirements, as well as the time periods covered by the certification.

4. Costs: (a) Costs to regulated parties. The rule applies to approximately 73 New York State licensed cigarette stamping agents and approximately 265 New York State licensed wholesale dealers (including the licensed cigarette agents). Although the implementation of the statutory amendments requiring the use of a dual system to provide adequate quantities of stamped tax-exempt cigarettes to Indian nations and tribes and those requiring the certification of stamping agents will have fiscal consequences in terms of collection and payment of taxes that are already due under the Tax Law, the consequences are the result of the statute imposing the taxes. There is no tax liability impact for the implementation of and continuing compliance with this rule. Requirements for both the use of the dual system and the agent certification process are statutory. The provisions of the rule regarding the calculation of probable demand merely provide greater specificity to the calculation required by the statute, and the provisions regarding agent certification merely set forth procedures to comply with the statute. Any agents or wholesale dealers that make sales involving Indian reservations are required to use the prior ap-

proval system as to the amount of stamped untaxed cigarettes that they may sell to an Indian nation or tribe or reservation cigarette seller on its reservation if the nation or tribe has not timely elected to participate in the Indian tax exemption coupon system. The act of obtaining prior approval from the Tax Department by agents or wholesale dealers under the prior approval system required by statute is simple and accomplished electronically, resulting in minimal administrative costs.

(b) Costs to the State and its local governments including this agency. The costs of obtaining and providing the coupons, processing refunds, developing forms that stamping agents are required to file, and issuing the technical memorandum to explain the rule are all attributable to the implementation of the statutory changes. There will be minimal administrative costs to the department associated with granting prior approval to agents and wholesale dealers to sell stamped untaxed cigarettes to Indian nations or tribes and reservation cigarette sellers. Although the implementation of the statutory amendments regarding the dual system for ensuring adequate quantities of stamped tax-exempt cigarettes to Indian nations or tribes and the certification of stamping agents will have fiscal consequences in terms of collection and payment of taxes that are already due under the Tax Law, the consequences are the result of the statute imposing the taxes. The rule itself does not have any State or local fiscal consequences apart from the statutory amendments.

(c) Information and methodology. This analysis is based on review of the rule and statutory requirements and discussions among personnel from the Department's Office of Tax Policy Analysis, Office of Counsel, Office of Tax Enforcement, and the Office of Budget and Management Analysis, including the Management Analysis and Project Services Bureau.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The rule does not impose any additional reporting or paperwork requirements on agents or wholesale dealers making sales of untaxed cigarettes to an Indian nation or tribe, a reservation cigarette seller, or any other person on a reservation.

7. Duplication: There are no relevant rules or other legal requirements of the federal or state governments in effect that duplicate, overlap, or conflict with this rule.

8. Alternatives: There are no alternatives to the statutory dual system that provides for adequate quantities of stamped tax-exempt cigarettes to be available for purchase for the use or consumption of Indian nations or tribes and their members based on their probable demand. This rule introduces a probable demand formula developed by the department to estimate the demand for cigarettes by Indian nations or tribes and their members. The formula uses federal data because it is the most reliable and consistent source of information regarding cigarette demand. It is noted that the methodology was previously published in the March 10, 2010, issue of the State Register in the department's proposed rule making number TAF-10-10-00004-P, upon which public comments were invited. A medical doctor submitted comments on the proposed rule making stating that the method of computing probable demand of cigarettes by the Indian nations or tribes and their members resulted in a calculation that is too high. The doctor suggested that, rather than basing the calculation on federal data, a survey should be commissioned every five years. The department believes that the rule's reference to widely available federal per capita data is appropriate, and the methodology will ''leave ample room for legitimately tax-exempt sales'' consistent with Department of Taxation and Fin. of N.Y. v Milhelm Attea & Bros., Inc. (512 US 61, 75-76).

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

10. Compliance schedule: There is no time frame necessary for compliance with the provisions of the rule. The rule was previously adopted as an emergency measure that took effect on June 22, 2010, and applies to all cigarettes sold on Indian reservations on and after September 1, 2010, in the manner provided in Part D of Chapter 134 of the Laws of 2010. This emergency readoption of the rule merely ensures that its provisions remain effective until it can be adopted as a permanent rule.

Regulatory Flexibility Analysis

1. Effect of rule: The rule applies to the approximately 73 New York State licensed cigarette stamping agents and the approximately 265 New York State licensed wholesale dealers (including the licensed cigarette stamping agents), some of which may be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule does not distinguish between different business sizes and applies to all stamping agents and wholesale dealers in the same manner, regardless of the size of the business operation. Under the statute, agents or wholesale dealers that make sales involving Indian reservations are required to use either a prior approval system pursuant to section 471(5) of the Tax Law, or, with respect to Indian nations or tribes that timely elect, the Indian tax exemption coupon system under section 471-e of the Tax Law, to determine the amount of stamped untaxed cigarettes they may sell to an Indian nation or tribe or reservation cigarette seller on its reservation. Approximately 10 stamping agents currently make sales involving Indian reservations. The amount of stamped untaxed cigarettes under either system is determined based upon the probable demand of the qualified Indians on the nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand.

The agent certification process described by the rule is applicable to all agents pursuant to section 471(4) of the Tax Law.

2. Compliance requirements: The rule does not impose any adverse economic impact or any additional reporting, recordkeeping, or compliance requirements on local governments.

For any year that an Indian nation or tribe elects to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law, agents and wholesale dealers may make sales of the amount of stamped untaxed cigarettes to that Indian nation or tribe or reservation cigarette sellers on that reservation as allowed on each Indian tax exemption coupon received. For any Indian nation or tribe that does not make such election, agents or wholesale dealers that make sales involving that nation's or tribe's reservation are required to use the prior approval system as to the amount of stamped untaxed cigarettes that they may sell to the Indian nation or tribe or reservation cigarette sellers on its reservation. The act of obtaining prior approval from the Tax Department under this system is simple and accomplished electronically.

Section 471(4) of the Tax Law provides that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the Tax Department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. The rule provides further guidance pertaining to certification requirements.

3. Professional services: The rule imposes no requirements for professional services upon small businesses or local governments. However, an affected stamping agent may decide to use professional services, in addition to those it may already employ to prepare its tax returns, to comply with the certification paperwork required pursuant to the statute and set forth in the rule.

4. Compliance costs: There are no compliance costs to local governments as a result of this rule.

The rule applies to approximately 73 New York State licensed cigarette stamping agents and 265 New York State licensed wholesale dealers (including the licensed cigarette stamping agents). There is no tax liability impact for the continuing compliance with this rule. Any agents or wholesale dealers that make sales involving Indian reservations are required to obtain prior approval from the Tax Department for their sales of untaxed packages of cigarettes involving Indian reservations when the reservation's Indian nation or tribe has not timely elected to participate in the Indian tax exemption coupon system. The act of obtaining prior approval from the Tax Department under this system is simple and accomplished electronically, resulting in minimal administrative costs. The requirement for agents to provide the certification to their suppliers and to the department is statutory.

5. Economic and technological feasibility: The rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: The rule details the dual statutory system that provides for adequate quantities of stamped but tax-exempt cigarettes to be available for the use or consumption of Indian nations or tribes and their members based on their probable demand. While there are no alternatives to this dual statutory system, the rule provides specifics concerning the methodology for the statutorily required calculation of probable demand. This rule also relates to the statutory requirement that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. In this regard the rule provides further guidance pertaining to certification requirements.

7. Small business and local government participation: The following organizations were notified that the Department was in the process of developing this rule and were given the opportunity to participate in its development: the New York State Association of Wholesale Marketers and Distributors; the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. In addition, a copy of the prior emergency rule was sent to all New York State licensed cigarette stamping agents and wholesale dealers.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: The rule applies to the approximately 73 New York State licensed cigarette stamping agents (about 10 of whom currently make sales involving Indian reservations) and the approximately 265 New York State licensed wholesale dealers (including the licensed cigarette agents), some of which are located in rural areas as defined by section 102(10) of the State Administrative Procedure Act. Some of the Indian reservations are located in rural areas. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile). The rule applies to all stamping agents and wholesale dealers in the same way; it does not distinguish between stamping agents and wholesale dealers located in rural, suburban, or metropolitan areas of this State.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Under the statute, agents or wholesale dealers that make sales involving Indian reservations are required to use either a prior approval system pursuant to section 471(5) of the Tax Law, or, with respect to Indian nations or tribes that timely elect, the Indian tax exemption coupon system under section 471-e of the Tax Law, to determine the amount of stamped untaxed cigarettes they may sell to an Indian nation or tribe or reservation cigarette seller on its reservation. Approximately 10 agents currently make sales involving Indian reservations. The amount of stamped untaxed cigarettes under either system is determined based upon the probable demand of the qualified Indians on the nation's or tribe's qualified reservation plus the amount needed for official nation or tribal use. The rule provides specificity concerning the methodology and procedures to be used by the department for the statutorily required calculation of probable demand.

For any year that an Indian nation or tribe elects to participate in the Indian tax exemption coupon system established in section 471-e of the Tax Law, agents and wholesale dealers may make sales of the amount of stamped untaxed cigarettes to that Indian nation or tribe or reservation cigarette sellers on that reservation as allowed on each Indian tax exemption coupon received. For any Indian nation or tribe that does not make such election, agents or wholesale dealers that make sales involving that nation's or tribe's reservation are required to use the prior approval system as to the amount of stamped untaxed cigarettes that they may sell to the Indian nation or tribe or reservation cigarette sellers on its reservation. The act of obtaining prior approval from the Tax Department under this system is simple and accomplished electronically.

Section 471(4) of the Tax Law provides that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the Tax Department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. The rule provides further guidance pertaining to certification requirements.

The rule does not require professional services. An affected stamping agent may decide to use professional services, in addition to those it may already employ to prepare its tax returns, to comply with the certification paperwork required pursuant to the statute and set forth in the rule. The rule does not impose any requirements on public entities in rural areas.

3. Costs: There are no variations in costs for public or private concerns in rural areas. The regulated parties to which this rule is applicable are approximately 73 New York State licensed cigarette stamping agents and approximately 265 New York State licensed wholesale dealers (including the licensed cigarette stamping agents). With regard to the affected agents or wholesale dealers located in rural areas or elsewhere, there is no tax liability impact for the continuing compliance with this rule. Any agents or wholesale dealers that make sales involving Indian reservations are required to obtain prior approval from the Tax Department for their sales of untaxed packages of cigarettes involving Indian reservations when the reservation's Indian nation or tribe has not timely elected to participate in the Indian tax exemption coupon system. The act of obtaining prior approval from the Tax Department by agents or wholesale dealers under the prior approval system required by statute is simple and accomplished electronically, resulting in minimal administrative costs. The requirement for agents to provide the certification to their suppliers and to the department is also statutory.

4. Minimizing adverse impact: The rule does not distinguish between cigarette stamping agents and wholesale dealers located in rural areas and those located elsewhere. The rule details the dual statutory system that provides for adequate quantities of stamped but tax-exempt cigarettes to be available for the use or consumption of Indian nations or tribes and their members based on their probable demand. While there are no alternatives to this dual statutory system, the rule provides specifics concerning the methodology for the statutorily required calculation of probable demand. This rule also relates to the statutory requirement that every cigarette stamping agent that purchases unstamped packages of cigarettes from any person, including, but not limited to, a tobacco product manufacturer, that are intended for resale in or into New York State, must provide that person and the department with a certification on an annual basis under penalty of perjury that the cigarettes will not be resold in violation of Article 20 of the Tax Law. In this regard the rule provides further guidance pertaining to certification requirements.

5. Rural area participation: The following organizations were notified that the Department was in the process of developing this rule and were given the opportunity to participate in the its development: the New York State Association of Wholesale Marketers and Distributors; the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York State Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York Association of Convenience Stores. These organizations include members in rural areas. In addition, a copy of the prior emergency rule was sent to all New York State Indian nations or tribes and all New York State licensed ciga-

rette stamping agents and wholesale dealers, some of which are located in rural areas.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it could have no impact on jobs and employment opportunities.

This rule relates to recently enacted legislation regarding the collection of taxes on cigarettes sold on New York State Indian reservations to non-Indians and non-members of an Indian nation or tribe and methods to make available adequate quantities of tax-exempt cigarettes for the use or consumption of the nation or tribe and its members based on their probable demand. The statute, specifically, section 471(1) of the Tax Law, imposes the tax on cigarettes, including all cigarettes sold on an Indian reservation to non-members of the Indian nation or tribe and to non-Indians, and provides for a dual system to ensure that adequate quantities of stamped but tax-exempt cigarettes are available for purchase by the nation or tribe and its members for their use or consumption based on their probable demand. The rule provides specifics concerning the methodology for the statutorily required calculation of probable demand for cigarettes by qualified Indians and the Indian nations or tribes. The rule also provides procedures to be followed for the agent certification process required by section 471(4) of the Tax Law, such as certification signature and swearing requirements, as well as the time periods covered by the certification.

EMERGENCY RULE MAKING

Cigarette Tax

I.D. No. TAF-35-10-00003-E
Filing No. 942
Filing Date: 2010-09-13
Effective Date: 2010-09-13

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

Action taken: Amendment of Parts 74, 82 and sections 70.1, 80.2; repeal of section 79.2 and addition of new section 79.2 to Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subd. First; 472 (1); 475 (not subdivided); and L. 2010, ch. 134, part D

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

Specific reasons underlying the finding of necessity: Chapter 134 of the Laws of 2010 was enacted on June 21, 2010. Part D of Chapter 134, which increased the rate of excise tax on cigarettes, took effect July 1, 2010, and applied to all cigarettes possessed in the state by any person for sale and all cigarettes used in the state by any person on or after July 1, 2010. Part D of Chapter 134 of the Laws of 2010 also imposed a tax on the inventory of cigarettes possessed for sale in New York State and any unaffixed stamps as of the close of business June 30, 2010, based on the increased rate of tax. This rule relates to the implementation of these statutory provisions. This rule also set the commissions allowable to cigarette agents for affixing cigarette stamps relating to the new rate of tax. Without the amendments, the regulation would not provide a rate of commission for affixing cigarette stamps at the new tax rate. In addition, the rule provided procedures relating to the inventory of cigarettes possessed for sale in New York State and any unaffixed stamps required to be taken by all agents, wholesale dealers and retail dealers as of the close of business on June 30, 2010, and the tax due attributable to the increase.

Due to the statutory effective date of these changes, the rule was previously adopted as an emergency measure on June 29, 2010. The June 29, 2010, emergency measure is scheduled to expire on September 26, 2010. The proposal to make the rule permanent was proposed on August 11, 2010, and will not be effective until the date that the Notice of Adoption is published in the State Register. The earliest date the Notice of Adoption may be published is November 3, 2010. This emergency readoption is effective on the date that the Notice of Emergency Adoption is filed with the Department of State (September 13, 2010) and will remain in effect for a period of 60 days (November 11, 2010.) Accordingly, this emergency readoption is required to ensure that the New York State commission rates remain effective and licensed cigarette agents receive a commission from New York State for their services.

Subject: Cigarette tax.

Purpose: To implement statutory provisions and set commissions to agents for affixing cigarette stamps relating to the new rate of tax.

Substance of emergency rule: This rule amends the Cigarette Tax and the Cigarette Marketing Standards regulations, as published in Title 20 NYCRR, in response to legislative changes enacted on June 21, 2010, by Part D of Chapter 134 of the Laws of 2010.

Part D of Chapter 134 of the Laws of 2010 amended Article 20 of the Tax Law to increase the excise tax on cigarettes from $2.75 for each 20 cigarettes, or fraction thereof, to $4.35, effective July 1, 2010. It also imposes a tax on the inventory of cigarettes possessed for sale in New York State and any unaffixed stamps as of the close of business on June 30, 2010, based on the increased rate of excise tax. The purpose of the rule is to make necessary regulatory changes related to implementation of these provisions and set the rate of commissions allowable to cigarette agents for affixing cigarette stamps relating to the new rate of tax. The amendments also update the calculation of the basic cost of cigarettes for purposes of the Cigarette Marketing Standards Act (CMSA). The rule was previously adopted as an emergency measure on June 29, 2010.

Sections 1, 2, 3 and 5 of the rule make technical and conforming amendments to sections 70.1, 74.1, 74.2 and 74.5, respectively, of the Cigarette Tax regulations to reflect the statutory increase in the excise tax on cigarettes and the new denominations of stamps relating to the new rate of tax.

Section 4 of the rule amends section 74.3 of the regulations, which provides the schedule by which commissions (pursuant to section 472 of the Tax Law) are allowed to licensed cigarette agents as compensation for affixing stamps to packages of cigarettes. The rule amends current language to reflect the change in the amount of tax payment represented by the tax stamps, which is the basis upon which the commissions are computed. The current percentage rates and related threshold used to compute commissions are not amended by this rule, resulting in an increase in the commissions on a per stamp basis.

Section 6 of the rule repeals section 79.2 of the regulations and adds a new section 79.2 to reflect the additional amount of tax on the inventory of cigarettes possessed for sale in New York State and any unaffixed tax stamps as of the close of business on June 30, 2010, based on the increased rate of excise tax. For purposes of taking the required June 30, 2010, close of business inventories, the rule allows dealers that operate vending machines to estimate the contents of such machines at one-half of their normal fill capacities. This provision results from the fact that it may not be possible to take an actual physical inventory of every machine a dealer operates in the State on a given day. The rule also outlines the procedures by which a tax on existing inventories will be reported and paid. Pursuant to the statutory provisions, the additional amount of tax on existing inventories must be paid no later than September 20, 2010.

Section 7 of the rule amends section 80.2 of the regulations to reflect the new rate of tax in the computation of the basic cost of cigarettes for purposes of the CMSA.

Sections 8, 9, 10, and 11of the rule make technical amendments to sections 82.2, 82.3, 82.4 and 82.5 of the Cigarette Marketing Standards regulations, respectively, to reflect the change to the basic cost of cigarettes made by section 7 of the rule. These changes are carried through the illustrations outlining the minimum prices at which cigarettes may be sold at various points in the distribution chain.

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. TAF-35-10-00003-P, Issue of September 1, 2010. The emergency rule will expire November 11, 2010.

Text of rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax__regulations@tax.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Tax Law, sections 171, subdivision First; 472(1); 475 (not subdivided), of the Tax Law; and Part D of Chapter

134 of the Laws of 2010. Section 171, subdivision First of the Tax Law provides for the Commissioner of Taxation and Finance to make reasonable rules and regulations consistent with the law that may be necessary for the exercise of the Commissioner's powers and the performance of the Commissioner's duties under the Tax Law. Section 472(1) of the Tax Law directs the Commissioner to prescribe stamps and authorizes the Commissioner to prescribe commissions. Section 475 (not subdivided) of the Tax Law provides such authority to the Commissioner specifically with respect to the cigarette tax imposed by Article 20 of the Tax Law. Part D of Chapter 134 of the Laws of 2010 amended sections 471(1) and 471-a of the Tax Law to increase the tax on cigarettes from $2.75 to $4.35 for each 20 cigarettes or fraction thereof. In addition, Part D of Chapter 134 imposes a tax on inventories of cigarettes possessed for sale in New York State based on the increased cigarette tax, subject to the terms and conditions as the Commissioner of Taxation and Finance may prescribe.

2. Legislative objectives: The rule is being proposed pursuant to such authority to administer statutory amendments made by Part D of Chapter 134 of the Laws of 2010 to increase the rate of the cigarette tax imposed by Article 20 of the Tax Law. This statutory rate increase was necessary to provide additional revenue for the 2010 - 2011 state fiscal year to support health care programs.

3. Needs and benefits: Part D of Chapter 134 of the Laws of 2010 amended Article 20 of the Tax Law to increase the tax on cigarettes from $2.75 to $4.35 for each 20 cigarettes or fraction thereof effective July 1, 2010. Additionally, Part D of Chapter 134 imposes a tax on the inventory of cigarettes possessed for sale in New York State and any unaffixed stamps as of the close of business June 30, 2010, based on the increased rate of tax.

The purpose of these amendments is to make necessary regulatory changes related to the implementation of these provisions, including providing procedures relating to the tax on the inventory, and to set the commissions allowable to cigarette agents for affixing cigarette stamps based on the new face value of such stamps as of July 1, 2010. In providing for commissions, the rule maintains the current percentage rates per stamp and related threshold amount to which different rates apply. The resulting effect will be an increase in the amount of commission allowable per stamp to take into consideration the amount of the July 1, 2010 tax increase. Finally, the rule updates the calculation of the basic cost of cigarettes.

4. Costs: (a) Costs to regulated persons: The regulated parties directly affected by this rule are 73 licensed cigarettes agents; approximately 265 licensed wholesale dealers (including the licensed cigarette agents), 103 of which are strictly vending machine operators; and approximately 22,000 licensed retail dealers (including approximately 4,500 that have multiple locations). Part D of Chapter 134 of the Laws of 2010 increased the tax on cigarettes imposed by Article 20 from $2.75 to $4.35 for each 20 cigarettes or fraction thereof. The impact of the statutory increase in cigarette tax, which is ultimately borne by consumers, depends on the volumes involved. There is no tax liability impact on the regulated parties for the implementation of and continuing compliance with the rule, as the increased cigarette tax reflected in the rule and the tax on the inventory based on the increased rate of tax are imposed by statute. Regulated parties needed to conduct an inventory of the cigarettes and any unaffixed cigarette tax stamps as of the close of business on June 30, 2010. Based on this inventory, returns are required to be filed and any additional tax on this inventory based on the increased cigarette tax will need to be paid. This is necessitated by Part D of Chapter 134 of the Laws of 2010, which imposes a tax on such inventory and sets the payment date. Amendments to reflect the increased rate of cigarette tax in section 74.3 of the regulations, relating to the commissions allowed to cigarette agents, will affect commissions allowed. The current percentage rates and related threshold for determining commissions are not amended by the rule and will apply to the increased rate of cigarette tax. As a result of the statutory increase and the retention of the current percentage rates and related threshold for determining commissions, annual stamping agent commissions (which are set by regulation and are paid out as a fraction of the applicable tax rate) will increase by approximately $850,000 in the first full year of the increase. Smaller agents will likely receive the benefits of the commission rate applying to the increased tax for a longer period through the calendar year than larger agents because the commission rate is higher for amounts up to a specified dollar amount.

(b) Costs to the State and its local governments including this agency: This rule does not have a revenue impact on New York State or its local governments. As a result of the statutory increase and the retention of the current percentage rates and related threshold for determining commissions, annual stamping agent commissions (which are set by regulation and are paid out as a fraction of the applicable tax rate) will increase by approximately $850,000 in the first full year of the increase. It is estimated that the implementation and continued administration of this rule will have no fiscal impact on the Department of Taxation and Finance.

(c) Information and methodology: These conclusions are based upon the application of the current commission rate to stamps at the higher rate of tax and the anticipated volumes of cigarettes subject to tax, as well as an analysis of the rule from the Department's Taxpayer Guidance Division, Office of Tax Policy Analysis, Office of Counsel, Audit Division, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

5. Local government mandates: The rule imposes no mandates upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork: Under the statute and in accordance with the rule, which has been adopted as an emergency measure, regulated parties need to file a return on or before September 20, 2010, showing the quantity of cigarettes possessed for sale in New York State and any unaffixed cigarette tax stamps, as of the close of business on June 30, 2010. This is necessitated by Part D of Chapter 134 of the Laws of 2010, which imposes a tax on such inventory and sets the payment date. Form CG-11, Cigarette Floor Tax Return, has been mailed to affected parties and is available on the Department's Web site.

The rule provides that the tax should be paid by check or money order. Allowing electronic payments associated with this one-time limited time filing requirement would not be practical.

7. Duplication: These amendments do not duplicate any existing Federal or State requirements.

8. Alternatives: The majority of the amendments made by the rule are a direct result of statutory changes. An alternative to amending section 74.3 of the regulations as is done by the rule would have been to reduce the rates of commissions allowed to agents in order to maintain the same amount of commission per stamp. Retaining the rate of commissions and applying that rate to the higher amount of tax results in an increase in the commissions on a per stamp basis. This is consistent with the handling of commissions for previous rate increases. Section 79.2 of the regulations provides for taking a physical inventory of all cigarettes possessed in the State as of close of business on June 30, 2010. Subdivision (b) of section 79.2 provides for estimating of vending machines that cannot be physically inventoried of close of business on June 30, 2010, rather than requiring each vending machine in the state to be physically inventoried. Allowing commissions to increase and providing an alternative for physical inventorying of each vending machine in the state will have a positive impact on regulated parties.

9. Federal standards: The rule does not exceed any minimum standards of the Federal government for the same or similar subject areas.

10. Compliance schedule: Part D of Chapter 134 of the Laws of 2010, requires all agents, wholesale dealers and retail dealers to pay an amount of tax on all cigarettes and unaffixed cigarette tax stamps in inventory as of the close of business on June 30, 2010, based on the increased rate of tax. This amount of tax due must be paid by September 20, 2010. The rule, which was adopted as an emergency measure, provides for the filing of returns by September 20, 2010, showing the quantity of such cigarettes and unaffixed stamps as of the June 30, 2010, close of business inventory. A notice explaining the cigarette tax increase and the related tax on inventory as of the close of business on June 30, 2010, along with Form CG-11, Cigarette Floor Tax Return, have been mailed to affected parties and are available on the Department's Web site.

Regulatory Flexibility Analysis

1. Effect of rule: There are 73 licensed cigarettes agents; approximately 265 licensed wholesale dealers (including the licensed

cigarette agents), 103 of which are strictly vending machine operators; and approximately 22,000 licensed retail dealers (including approximately 4,500 that have multiple locations), some of which may be small businesses as defined in section 102(8) of the State Administrative Procedure Act, which will be affected by this rule.

2. Compliance requirements: Part D of Chapter 134 of the Laws of 2010, requires all agents, wholesale dealers and retail dealers, including small businesses, to pay an amount of tax on all cigarettes possessed for sale in New York State and unaffixed cigarette tax stamps in inventory as of the close of business on June 30, 2010, based on the increased rate of tax. This amount of tax due must be paid by September 20, 2010. The rule, which has been adopted as an emergency measure, provides that returns must be filed by September 20, 2010, showing the quantity of all cigarettes and unaffixed stamps as of the June 30, 2010, close of business inventory. The rule provides procedures relating to the tax on the inventory, including rules for the physical inventory of cigarettes in vending machines.

3. Professional services: The rule itself imposes no requirements for professional services upon regulated parties that are small businesses. Depending on the nature or volume of a taxpayer's inventory of cigarettes and/or unaffixed tax stamps, a taxpayer may deem it necessary to employ additional professional services in order to comply with the provisions of the floor tax imposed by the statute.

4. Compliance costs: Section 5 of Part D of Chapter 134 of the Laws of 2010 increased the tax on cigarettes imposed by Article 20 from $2.75 to $4.35 for each 20 cigarettes or fraction thereof. While there will be no additional costs imposed on state or local governments, including the department, by the rule, the statutory amendments necessitate some form changes. The impact of the statutory increase in cigarette tax, which is ultimately borne by consumers, depends on the volumes involved. There is no tax liability impact on regulated parties that are small businesses, for the implementation of and continuing compliance with the rule as the increased cigarette tax reflected in the rule and the tax on the inventory based on the increased rate of tax are imposed by statute. Regulated parties that are small businesses needed to conduct an inventory of the cigarettes and any unaffixed cigarette tax stamps as of the close of business on June 30, 2010. Based on this inventory, returns are required to be filed and any additional tax on this inventory based on the increased cigarette tax will need to be paid. This is necessitated by section 13 of Part D of Chapter 134 of the Laws of 2010, which imposes a tax on such inventory and sets the payment date.

Amendments to reflect the increased rate of cigarette tax in section 74.3 of the regulations, relating to the commissions allowed to cigarette agents, will affect commissions allowed. The current percentage rates and related threshold for determining commissions are not amended by the rule and will apply to the increased rate of cigarette tax. As a result of the statutory increase, annual stamping agent commissions (which are set by regulation and are paid out as a fraction of the applicable tax rate) will increase by approximately $850,000 in the first full year of the increase. Smaller agents will likely receive the benefits of the commission rate applying to the increased tax for a longer period through the calendar year than larger agents because the commission rate is higher for amounts up to a specified dollar amount.

5. Economic and technological feasibility: The rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: The majority of the amendments made by the rule are a direct result of statutory changes. An alternative to amending section 74.3 of the regulations as is done by the rule would have been to reduce the rates of commissions allowed to agents in order to maintain the same amount of commission per stamp. Retaining the rate of commissions and applying that rate to the higher amount of tax results in an increase in the commissions on a per stamp basis. This is consistent with the handling of commissions for previous rate increases. Section 79.2 of the regulations provides for taking a physical inventory of all cigarettes possessed in the State as of close of business on June 30, 2010. Subdivision (b) of section 79.2 provides for estimating of vending machines that cannot be physically inventoried of close of business on June 30, 2010, rather than requiring each vending machine in the state to be physically inventoried. Allowing commissions to increase and providing an alternative for physical inventorying of each vending machine in the state will have a positive impact on regulated parties that are small businesses.

7. Small business and local government participation: The following organizations have been given an opportunity to participate in the rule's development: the Association of Towns of New York State; Empire State Development, Division of Small Business; the National Federation of Independent Businesses; the New York Association of Convenience Stores; the New York State Association Counties; the New York Conference of Mayors and Municipal Officials; the New York State Department of State, Office of Coastal, Local Government, and Community Sustainability; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York State Association of Wholesale Marketers and Distributors.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: There are 73 licensed cigarettes agents; approximately 265 licensed wholesale dealers (including the licensed cigarette agents), 103 of which are strictly vending machine operators; and approximately 22,000 licensed retail dealers (including approximately 4,500 that have multiple locations); some of which are located in rural areas as defined in section 102(10) of the State Administrative Procedure Act. There are 44 counties in the State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: Part D of Chapter 134 of the Laws of 2010, requires all agents, wholesale dealers and retail dealers in rural areas to pay an amount of tax on all cigarettes possessed for sale in New York State and unaffixed cigarette tax stamps in inventory as of the close of business on June 30, 2010, based on the increased rate of tax. This amount of tax due must be paid by September 20, 2010. The rule, which has been adopted as an emergency measure, provides that returns must be filed by September 20, 2010, showing the quantity of all cigarettes and unaffixed stamps as of the June 30, 2010, close of business inventory. The rule provides procedures relating to the tax on the inventory, including rules for the physical inventory of cigarettes in vending machines.

The rule itself imposes no requirements for professional services upon regulated parties in rural areas. Depending on the nature or volume of a taxpayer's inventory of cigarettes and/or unaffixed tax stamps, a taxpayer may deem it necessary to employ additional professional services in order to comply with the provisions of the floor tax imposed by the statute.

3. Costs: Part D of Chapter 134 of the Laws of 2010 increased the tax on cigarettes imposed by Article 20 from $2.75 to $4.35 for each 20 cigarettes or fraction thereof. The impact of the statutory increase in cigarette tax, which is ultimately borne by consumers, depends on the volumes involved. There is no tax liability impact on the regulated parties in rural areas for the implementation of and continuing compliance with the rule as the increased cigarette tax reflected in the rule and the tax on the inventory based on the increased rate of tax are imposed by statute. Regulated parties in rural areas needed to conduct an inventory of the cigarettes and any unaffixed cigarette tax stamps as of the close of business on June 30, 2010. Based on this inventory, returns are required to be filed and any additional tax on this inventory based on the increased cigarette tax will need to be paid. This is necessitated by Part D of Chapter 134 of the Laws of 2010, which imposes a tax on such inventory and sets the payment date.

Amendments to reflect the increased rate of cigarette tax in section 74.3 of the regulations, relating to the commissions allowed to cigarette agents, will affect commissions allowed. The current percentage rates and related threshold for determining commissions are not amended by the rule and will apply to the increased rate of cigarette tax. As a result of the statutory increase, annual stamping agent commissions (which are set by regulation and are paid out as a fraction of the applicable tax rate) will increase by approximately $850,000 in the first full year of the increase.

4. Minimizing adverse impact: The majority of the amendments made by the rule are a direct result of statutory changes. An alternative to amending section 74.3 of the regulations as is done by the rule would have been to reduce the rates of commissions allowed to agents in order to maintain the same amount of commission per stamp. Retaining the rate of commissions and applying that rate to the higher amount of tax results in an increase in the commissions on a per stamp basis. This is consistent with the handling of commissions for previous rate increases. Section 79.2 of the regulations provides for taking a physical inventory of all cigarettes possessed in the State as of close of business on June 30, 2010. Subdivision (b) of section 79.2 provides for estimating of vending machines that cannot be physically inventoried of close of business on June 30, 2010, rather than requiring each vending machine in the state to be physically inventoried. Allowing commissions to increase and providing an alternative for physical inventorying of each vending machine in the state will have a positive impact on regulated parties in rural areas.

5. Rural area participation: The following organizations have been given an opportunity to participate in the rule's development: the Association of Towns of New York State; Empire State Development, Division of Small Business; the National Federation of Independent Businesses; the New York Association of Convenience Stores; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the New York State Department of State, Office of Coastal, Local Government, and Community Sustainability; the Small Business Council of the New York State Business Council; the Retail Council of New York State; and the New York State Association of Wholesale Marketers and Distributors.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it will have no impact on jobs and employment opportunities. This rule amends the Cigarette Tax and the Cigarette Marketing Standards regulations, as published in Title 20 NYCRR, in response to legislative changes enacted on June 21, 2010, by Part D of Chapter 134 of the Laws of 2010. Part D of Chapter 134 increases the excise tax on cigarettes and imposes a tax on the inventory of cigarettes possessed for sale in New York State and any unaffixed stamps as of the close of business June 30, 2010, based on the increased rate of excise tax. The purpose of the rule is to make necessary regulatory changes related to the implementation of these provisions and set the rate of commissions allowable to cigarette agents for affixing cigarette stamps relating to the new rate of tax. The amendments also update the calculation of the basic cost of cigarettes. These amendments will have no impact on jobs or employment opportunities.

NOTICE OF WITHDRAWAL

Certification by Cigarette Stamping Agents

I.D. No. TAF-10-10-00004-W

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

Action taken: Notice of proposed rule making, I.D. No. TAF-10-10-00004-P, has been withdrawn from consideration. The notice of proposed rule making was published in the *State Register* on March 10, 2010.

Subject: Certification by cigarette stamping agents.

Reason(s) for withdrawal of the proposed rule: Portions of the proposed rule have been superseded by Part D of Chapter 134 of the Laws of 2010.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

City of New York Withholding Tables and Other Methods Applicable January 1, 2011

I.D. No. TAF-39-10-00002-P

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

Proposed Action: Amendment of section 291.1(b) and Appendix 10-C of Title 20 NYCRR.

Statutory authority: Tax Law, sections 171, subdivision First; 671(a)(1); 697(a); 1309 (not subdivided); 1312(a); Administrative Code of the City of New York, sections 11-1771(a); 11-1797(a); L. 2010, ch. 57, part EE, section 4

Subject: City of New York withholding tables and other methods applicable January 1, 2011.

Purpose: To provide current City of New York withholding tables and other methods.

Substance of proposed rule (Full text is posted at the following State website:www.nystax.gov): Section 1309 of the Tax Law and section 11-1771 of the Administrative Code of the City of New York mandate that employers withhold from employee wages amounts that are substantially equivalent to the amount of City of New York personal income tax on residents reasonably estimated to be due for the taxable year. The provisions authorize the Commissioner of Taxation and Finance to provide for withholding of these taxes through regulations promulgated by the Commissioner.

This rule amends Appendix 10-C of Title 20 NYCRR, replacing pages T-39, T-40, and T-40-A, Method II: Exact Calculation Method (Single, Married, and Examples, respectively) of Appendix 10-C, New York City Personal Income Tax on Residents Withholding Tables and Other Methods of such Title, to provide new City of New York withholding tables and other methods. The amendments to Appendix 10-C reflect the revision of the City of New York tax tables in accordance with the increased rate of New York City personal income tax applicable to income over $500,000 enacted by Part EE of Chapter 57 of the Laws of 2010, implemented over a twelve month period rather than the shorter implementation period required for tax year 2010. This rule also reflects the increase in the City of New York supplemental withholding tax rate to reflect the twelve-month implementation period to be applied to supplemental wage payments, rather than the shorter period applicable for tax year 2010.

The rule applies to wages and other compensation subject to withholding paid on or after January 1, 2011.

Text of proposed rule and any required statements and analyses may be obtained from: John W. Bartlett, Tax Regulations Specialist 4, Department of Taxation and Finance, Taxpayer Guidance Division, Building 9, W. A. Harriman Campus, Albany, NY 12227, (518) 457-2254, email: tax__regulations@tax.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory authority: Tax Law, section 171, subdivision First, generally authorizes the Commissioner of Taxation and Finance to promulgate regulations; section 671(a)(1) provides that the method of determining the amounts of New York State personal income tax to be withheld will be prescribed by regulations promulgated by the Commissioner; section 697(a) provides the authority for the Commissioner to make such rules and regulations as are necessary to enforce the personal income tax; section 1309 (not subdivided) provides that City of New York personal income tax withholding shall be withheld from city residents in the same manner and form as that required by New York State; section 1312(a) provides that any personal income tax imposed on New York City residents by the City of New York shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law, except where noted; Administrative Code of the City of New York, section 11-1771(a) provides that the method of determining the amount of City tax withholding will be prescribed by regulations promulgated by the Commissioner; section 11-1797(a) provides for the Commissioner to make such rules and regulations that are necessary to enforce the provisions of the Administrative Code of the City of New York. Section 4 of Part EE of Chapter 57 of the Laws of 2010 requires the Commissioner to adopt rules to implement changes in the withholding tax tables and methods relating to the personal income tax increases made by Part EE.

2. Legislative objectives: The proposal amends Appendix 10-C related to the exact calculation method (Method II) for City of New York personal income tax on residents withholding purposes to implement the changes necessitated by Chapter 57 of the Laws of 2010 applicable to wages and other compensation paid on or after January 1, 2011. The amendments implement revised City of New York withholding tables and other methods. Specifically, the amendments reflect the increased rate of New York City personal income tax applicable to income over $500,000 provided in Part EE of Chapter 57 over a twelve month period, rather than over the shorter implementation period required for tax year 2010. Because the income tax changes made by Chapter 57 relate to taxpayers with incomes over certain amounts, the wage bracket table method (Method I) tables are not affected. Amendments to provisions regarding withholding on supplemental wages are also made to reflect the new rate of withhold-

ing implemented over a twelve-month period, rather than over the shorter period required for tax year 2010.

3. Needs and benefits: This rule sets forth amendments to the City of New York withholding tables and other methods, applicable to wages and other compensation paid on or after January 1, 2011, reflecting the revision of the tax rates contained in Part EE of Chapter 57 of the Laws of 2010. This rule benefits taxpayers by providing City of New York withholding rates that more accurately reflect the current income tax rates. If this rule is not promulgated, the use of the existing withholding tables would cause some over-withholding for some taxpayers.

4. Costs: (a) Costs to regulated parties for the implementation and continuing compliance with this rule: Since (i) the Tax Law and the Administrative Code of the City of New York already mandate withholding in amounts that are substantially equivalent to the amounts of City of New York personal income tax on residents reasonably estimated to be due for the taxable year, and (ii) this rule conforms Appendix 10-C of Title 20 NYCRR to the rates of the City of New York personal income tax on residents, as required by Chapter 57 of the Laws of 2010, any compliance costs to employers associated with implementing the revised withholding tables and other methods are due to such statutes, and not to this rule.

(b) Costs to this agency, the State and local governments for the implementation and continuation of this rule: Since the need to make amendments to the New York City Personal Income Tax on Residents Regulations and to Appendix 10-C arises due to the statutory changes in the City of New York personal income tax on residents rates applied over a twelve-month period, there are no costs to this agency or the State and local governments that are due to the promulgation of this rule.

(c) Information and methodology: This analysis is based on a review of the statutory requirements and on discussions among personnel from the Department's Taxpayer Guidance Division, Office of Tax Policy Analysis, Office of Budget and Management Analysis, and Management Analysis and Project Services Bureau.

5. Local government mandates: Local governments, as employers, would be required to implement the new withholding tables and other methods in the same manner and at the same time as any other employer.

6. Paperwork: This rule will not require any new forms or information. The reporting requirements for employers are not changed by this rule. Employers will be notified of the amendments to the tables and other methods and directed to the Department's website for the updated tables and other methods.

7. Duplication: This rule does not duplicate any other requirements.

8. Alternatives: Since section 11-1771(a) of the Administrative Code of the City of New York and Chapter 57 of the Laws of 2010 require that withholding tables and other methods be promulgated, there are no viable alternatives to providing such tables and other methods.

9. Federal standards: This rule does not exceed any minimum standards of the federal government for the same or similar subject area.

10. Compliance schedule: The required information will be made available to affected employers in sufficient time to implement the revised City of New York withholding tables and other methods for wages and other compensation paid on or after January 1, 2011.

Regulatory Flexibility Analysis

1. Effect of rule: Small businesses, within the meaning of the State Administrative Procedure Act, that are currently subject to the City of New York withholding requirements will continue to be subject to these requirements. This rule should, therefore, have little or no effect on small businesses other than the requirement of conforming to the new withholding tables and other methods. All small businesses that are employers or are otherwise subject to the withholding requirements must comply with the provisions of this rule.

2. Compliance requirements: This rule requires small businesses and local governments that are already subject to the City of New York withholding requirements to continue to deduct and withhold amounts from employees using the revised City of New York withholding tables and other methods. The promulgation of this rule will not require small businesses or local governments to submit any new information, forms, or paperwork.

3. Professional services: Many small businesses currently utilize bookkeepers, accountants and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of such services.

4. Compliance costs: Small businesses and local governments are already subject to the City of New York withholding requirements. Therefore, small businesses and local governments are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these changes should place no additional burdens on small businesses and local governments. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

5. Economic and technological feasibility: This rule does not impose any economic or technological compliance burdens on small businesses or local governments.

6. Minimizing adverse impact: Section 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1309 of the Tax Law mandates, in part, that the City of New York withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. Section 11-1771(a) of the Administrative Code of the City of New York mandates that City of New York withholding tables and other methods be promulgated. There are no provisions in the Tax Law or the Administrative Code of the City of New York that exclude small businesses and local governments from the withholding requirements. The regulation provides some relief to small businesses and local governments with respect to the methods allowed to comply with the withholding requirements by continuing to provide employers with more than one method of computing the amount to withhold from their employees. Look-up tables are provided for employers who prepare their payrolls manually, and an exact calculation method is provided for employers with computer-based systems.

7. Small business and local government participation: The following organizations were given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Office of Coastal, Local Government, and Community Sustainability of the New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York Association of Convenience Stores; the Tax Section of the New York State Bar Association; the Association of the Bar of the City of New York; the National Tax Committee for the National Conference of CPA Practitioners; and the New York State Society of CPAs. In addition, the changes were developed in consultation with the New York City Office of Management and Budget.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: Every employer, including any public or private employer located in a rural area as defined in section 102(13) of the State Administrative Procedure Act, that is currently subject to the City of New York withholding requirements will continue to be subject to such requirements and will be required to comply with the provisions of this rule. The number of employers that are also public or private interests in rural areas cannot be determined with any degree of certainty. The effect on employers in rural areas is minimized because the changes relate to the New York City personal income tax on residents withholding requirements. There are 44 counties throughout this State that are rural areas (having a population of less than 200,000) and 9 more counties having towns that are rural areas (with population densities of 150 or fewer people per square mile).

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule requires employers that are already subject to the City of New York withholding requirements to continue to deduct and withhold amounts from employees using the revised withholding tables and other methods. The promulgation of this rule will not require employers to submit any new information, forms, or other paperwork.

Further, many employers currently utilize bookkeepers, accountants, and professional payroll services in order to comply with existing withholding requirements. This rule will not encourage or discourage the use of any such services.

3. Costs: Employers are already subject to the City of New York withholding requirements. Therefore, employers are accustomed to withholding revisions, including minor programming changes for federal, state, City of New York, and City of Yonkers purposes. As such, these City of New York changes should place no additional burdens on employers located in rural areas. See, also, section 4(a) of the Regulatory Impact Statement for this rule.

4. Minimizing adverse impact: Section 671(a)(1) of the Tax Law mandates that New York State withholding tables and other methods be promulgated. Section 1309 of the Tax Law mandates, in part, that the City of New York withholding of tax on wages shall be administered and collected by the Commissioner of Taxation and Finance in the same manner as the tax imposed by Article 22 of the Tax Law. Section 11-1771(a) of the Administrative Code of the City of New York mandates that City of New York withholding tables and other methods be promulgated. There are no provisions in the Tax Law or the Administrative Code of the City of New York that exclude employers located in rural areas from the withholding requirements.

5. Rural area participation: The following organizations were given an opportunity to participate in the rule's development: the Association of Towns of New York State; the Office of Coastal, Local Government, and

Community Sustainability of New York State Department of State; the Division for Small Business of Empire State Development; the National Federation of Independent Businesses; the New York State Association of Counties; the New York Conference of Mayors and Municipal Officials; the Small Business Council of the New York State Business Council; the Retail Council of New York State; the New York Association of Convenience Stores; the Tax Section of the New York State Bar Association; the Association of the Bar of the City of New York; the National Tax Committee for the National Conference of CPA Practitioners; the New York State Society of CPAs; and the Business Council of New York State.

Job Impact Statement

A Job Impact Statement is not being submitted with this rule because it is evident from the subject matter of the rule that it would have no adverse impact on jobs and employment opportunities. The purpose of the rule is to amend the City of New York withholding tables and other methods, applicable to wages and other compensation paid on or after January 1, 2011, to implement the changes necessitated by Chapter 57 of the Laws of 2010 over a twelve-month period, rather than the shorter period required for tax year 2010. The rule also reflects adjustments to the City of New York supplemental withholding rate applied to supplemental wage payments.

Workers' Compensation Board

EMERGENCY RULE MAKING

Independent Livery Driver Benefit Fund

I.D. No. WCB-39-10-00008-E
Filing No. 943
Filing Date: 2010-09-13
Effective Date: 2010-09-13

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

Action taken: Amendment of section 300.1(a)(9); and addition of Part 309 to Title 12 NYCRR.

Statutory authority: Executive Law, section 160-eee; and Workers' Compensation Law, sections 2(9), 18-c(2)(a) and 117

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

Specific reasons underlying the finding of necessity: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the Independent Livery Driver Benefit Fund (ILDBF), then the livery base is deemed the employer of the driver pursuant to WCL § 18-c (5). If the livery base is a member of the ILDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. To provide the workers' compensation benefits in the limited situations, the legislation created the ILDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

Since Chapter 392 was enacted the Board has been working to find a carrier willing to write the policy for the ILDBF. Due to the fact that it is not clear what the liability will be it took almost 18 months to secure an insurance carrier willing to write the policy at an affordable price. During this time the Board reviewed claims of livery drivers that have been established to determine an appropriate presumptive wage as required by Workers Compensation Law § 2(9). The Board also worked with the livery industry and the Board of Directors of the ILDBF to develop appropriate criteria that livery bases must meet to be members of the ILDBF.

Workers' Compensation Law (WCL) § 18-c (5) provides that a livery base that is not a member of the ILDBF is deemed the employer of any livery driver it dispatches for purposes of the WCL. This means that a livery base that does not join the ILDBF must purchase and maintain a full workers' compensation insurance policy covering all drivers that it dispatches. The cost to a livery base for a full workers' compensation policy is approximately $1,400.00 per car. A base that dispatches 25 cars will be required to pay approximately $35,000 in premium for the drivers plus premium for any other employees.

In order to join the ILDBF, livery bases must submit an affirmation sworn under penalties of perjury that it meets the prescribed criteria. WCL § 18-c (2) directs the Chair to set by regulation the criteria the livery base must meet. If the Chair fails to act the statute provides default criteria which almost all bases cannot swear are true. For example, the statutory criteria provide that the livery base does not own any of the liveries dispatched. Almost all of the livery bases own one or more of the liveries. In addition, some of the criteria conflict with rules of the Taxi and Limousine Commission that licenses the livery bases and drivers.

The statute does not address the process for terminating membership in the ILDBF. The rule provides such process. It also sets the presumptive wage that will be the basis of the indemnity benefits injured livery drivers will receive.

This rule must be adopted on an emergency basis to ensure that livery bases can submit the required affirmation and join the ILDBF. Without the rule all livery bases would be required to obtain a full workers' compensation policy which most cannot afford and many would normally not be considered the drivers' employer.

Subject: Independent Livery Driver Benefit Fund.

Purpose: To set criteria for membership in Independent Livery Driver Benefit Fund, termination from the Fund and presumptive wage.

Substance of emergency rule: The proposed rule amends paragraph (9) of subdivision (a) of section 300.1 to modify the definition of ''Prima Facie Medical Evidence'' and adds new Part 309 to implement specific provisions regarding the Independent Livery Driver Benefit Fund (ILDBF).

Section 300.1(a) provides definitions of terms. The proposed rule modifies the definition of ''Prima Facie Medical Evidence'' in paragraph (9) to account for the special requirements for claims of independent livery drivers. Specifically, for independent livery drivers Prima Facie Medical Evidence means a medical report referencing an injury covered the ILDBF as provided in Executive Law § 160-ddd or, if the injury results from a crime, a medical report referencing an injury and a police report stating that a crime occurred.

A new Part 309 to govern the implementation of the ILDBF.

Section 309.1 provides definitions of terms used in Part 309. Among the definitions are ''covered services,'' ''crime,'' ''governing Taxi and Limousine Commission,'' ''independent livery base,'' ''independent livery driver,'' ''livery,'' ''livery base,'' ''livery driver,'' and ''New York State Average Weekly Wage.''

Section 309.2 provides rules for who may be members of the ILDBF and how membership is terminated. Subdivision (a) of this section states that only livery bases designated by the Workers' Compensation Board (Board) may join the ILDBF. Subdivision (b) of this section provides that a livery base will only be designated by the Board as an independent livery base if it submits the affirmation required by WCL § 18-c (2) attesting that the base meets the criteria set forth in subdivision (c) of § 309.2 and if it provides written notice in the stated time periods of any inaccuracies in or changes to the information in the affirmation. Subdivision (c) of this section requires a livery base to meet the following criteria:

(1) The livery base is not classified by the governing Taxi and Limousine Commission as a black car base or luxury limousine base and is not a member of the New York Black Car Operators' Injury Compensation Fund, Inc.;

(2) All livery drivers dispatched by the livery base provide and determine their own clothing;

(3) All livery drivers dispatched by the livery base set their own hours and days of work;

(4) All livery drivers choose which dispatches or fares to accept, and no livery driver suffers any consequence by the livery base for failing to respond to its dispatch, except that every livery driver must comply with all requirements of his or her governing taxi and limousine commission regarding acceptance of dispatches, fares, trips, pas-

sengers and destinations and a livery base may temporarily deny access to its dispatches for failing to respond to a dispatch in violation of local and state laws and governing taxi and limousine commission rules and regulations regarding refusing dispatches;

(5) All livery drivers may affiliate with one or more other livery bases, except if prohibited by rules or regulations of the governing taxi and limousine commission;

(6) Either the livery driver or livery base may terminate their affiliation at any time, except that a livery base must terminate its relationship with the livery driver in accordance with any rules and regulations of the governing taxi and limousine commission;

(7) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, the owner or registrant of more than fifty (50) percent of the liveries dispatched by the livery base;

(8) The livery base is not, directly or indirectly, including through any director, shareholder, partner, member or officer, paying or participating in paying for the purchase, maintenance, repair, insurance, licensing, or fuel, of more than fifty (50) percent of the liveries dispatched by the livery base;

(9) No livery driver dispatched by the livery base receives an Internal Revenue Service form W-2 from such base, or is subject to the withholding of any federal income taxes by the livery base, except a livery base that is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base meets the criteria of paragraph (10) of this subdivision;

(10) If the livery base is the owner or registrant of less than fifty (50) percent of the liveries dispatched by that livery base and it issues an Internal Revenue Service form W-2 to a livery driver or livery drivers, or withholds any federal income taxes for a livery driver or livery drivers, such livery base provides workers' compensation coverage for that livery driver or those livery drivers that is separate from the Fund; and

(11) The livery base does not impose any fines or penalties or both on any livery drivers, except the livery base may impose fines or penalties or both on a livery driver for violating the rules and regulations of the governing taxi and limousine commission regarding the conduct of livery drivers while performing their duties as livery drivers and in order to recover the cost of any fines or penalties or both imposed on the livery base by the governing taxi and limousine commission due to the behavior of that livery driver that violated the rules and regulations of the governing taxi and limousine commission.

Subdivision (d) of § 309.2 sets forth the procedures to terminate the membership of a livery base in the ILDBF.

Subdivision (e) of § 309.2 sets forth that any livery base not designated as an independent livery base shall be deemed the employer of any driver it dispatches and will be responsible for providing workers' compensation coverage for such drivers.

Section 309.3 sets forth requirements for livery drivers. Subdivision (a) of this section states that an independent livery driver is a livery driver who is licensed to drive a livery by the appropriate governing taxi and limousine commission and is dispatched by an independent livery base with which he or she is affiliated. This subdivision provides an independent livery driver injured during a dispatch by an independent livery base may be entitled to benefits in accordance with Insurance Law Article 51 and is not entitled to workers' compensation benefits except as set forth in Workers' Compensation Law § 160-ddd and § 309.3(a)(3). Paragraph (3) of § 309.3(a) sets forth when an independent livery driver is entitled to workers' compensation benefits from the ILDBF. Paragraph (4) of this subdivision makes clear that an independent livery driver is not entitled to workers' compensation benefits from the ILDBF if he or she was not performing covered services or was in violation of the rules and regulations of the governing taxi and limousine commission regarding the solicitation or picking up of passengers at the time of death, crime or injury. Paragraph (5) of this subdivision requires independent livery drivers to file all claims in New York with the Board. Paragraph (6) requires an independent livery driver to provide written notice to the ILDBF in accordance with Workers' Compensation Law § 18. Finally, paragraph (7) sets the presumptive wage for independent livery drivers as $13,000 annual wage for an average weekly wage of $250. The presumptive wage may be rebutted by the submittal of competent evidence. Further the presumptive wage will increase each year on July 1st by the percentage increase in the New York State Average Weekly Wage.

Pursuant to subdivision (b) of § 309.3 a livery driver that is not an independent livery driver is the employee of the livery base with which he or she is affiliated.

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 11, 2010.

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

Summary of Regulatory Impact Statement

1. Statutory authority: Chapter 392 of the Laws of 2008 amended the Executive Law and WCL to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage.

Executive Law § 160-eee authorizes the Chair of the Workers' Compensation Board (Board) to adopt regulations necessary to effectuate the provisions of Executive Law Article 6-G.

Workers' Compensation Law (WCL) § 18-c (2) (a) directs the Chair to set by regulation the criteria livery bases must meet in order to be considered an independent livery based eligible to join the ILDBF.

The last paragraph of WCL § 2 (9) provides that the Chair shall set by regulation the amounts livery drivers are presumptively deemed to receive in annual wages.

WCL § 117 authorizes the Chair to make reasonable rule consistent with the WCL and Labor Law.

2. Legislative objectives: Chapter 392 of the Laws of 2008 was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. If the livery base is not a member of, or ineligible to join, the ILDBF, then the livery base is deemed the employer of the driver pursuant to WCL § 18-c (5). If the livery base is a member of the ILDBF, then the driver is an independent contractor and he or she is not covered by workers' compensation insurance for all injuries or illnesses while working. Instead the livery driver is covered by no-fault automobile insurance for most injuries and workers' compensation benefits are only awarded for deaths, injuries resulting from crimes and certain catastrophic injuries arising from covered services performed by independent livery drivers. The legislation created the ILDBF to purchase a workers' compensation insurance policy paid for through annual payments from the member livery bases.

3. Needs and benefits: The purpose of this rule is to implement specific provisions of Chapter 392. While Executive Law Article 6-G and the amendments to the WCL set forth a framework to govern the ILDBF and the benefits it will pays, the amendment to 12 NYCRR § 300.1 and the addition of Part 309 provide the detail and clarification necessary to actually implement the legislation by setting forth: 1) necessary definitions; 2) the criteria to determine which livery bases may join the ILDBF; 3) clarification on when and which benefits are payable from the ILDBF; and 4) the presumptive average weekly wage. Such detail and clarification is necessary to assist the insurance carrier writing the policy, the bases in determining if it is eligible to join the ILDBF, and the drivers in understanding what action they need to take to obtain benefits.

Currently § 300.1 defines ''Prima Facie Medical Evidence'' as ''a medical report referencing an injury, which includes traumas and illness.'' This definition is too broad for claims by independent livery drivers as it encompasses all injuries and not just those listed in Executive Law § 160-ddd and or those caused by the commission of a

crime. This rule amends the definition of ''Prima Facie Medical Evidence'' to encompass such provisions.

Executive Law § 160-aaa sets forth the statutory definitions relating to the ILDBF such as ''independent livery driver,'' ''covered services,'' ''independent livery base,'' ''livery,'' ''livery driver,'' and ''livery base.'' Section 309.1 sets forth necessary definitions to properly understand Part 309 and to clarify the implementation of Chapter 392.

In order to be designated as an independent livery base, WCL § 18-c(2) requires an officer or director of the base to submit an affirmation sworn under penalty of perjury attesting that the criteria set by the Chair in regulation are true with respect to the base. In the absence of regulations setting forth the criteria, the statute lists default criteria.

After consulting with the livery industry and the appropriate TLCs, it was determined that the livery bases cannot meet all of the statutory default criteria, in part due to the rules of the TLCs. In addition the statutory criteria does not comport with how the livery industry operates. The criteria in § 309.2(c) has been drafted to reflect how the livery industry operates. By prescribing the criteria livery bases must meet through regulation, it assures that there are owners of livery bases who can attest to the truth of such criteria and join the ILDBF.

In addition to setting forth the criteria that the livery base must attest to in the affirmation, § 309.2 requires livery bases to provide the Board and ILDBF with written notice of any inaccuracies in the information in the affirmation within 5 business days of discovery or knowledge of the inaccuracies and to provide written notice of any changes in the information in the affirmation within 10 business days of the changes. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is violation of the criteria set forth in WCL § 18-c(2) and § 309.2(c) as required by WCL § 18-c(3).

Article 6-G fails to set forth the procedures and timeframes for termination of a livery base's membership in the ILDBF. Subdivision (d) of § 309.2 covers such termination by setting forth the process when the livery base fails to make the required payments to the ILDBF, when the livery base must leave the ILDBF because it is no longer designated as an independent livery base, and when a livery base decides to leave the ILDBF.

Section 309.3 provides necessary clarification and detail for livery drivers. For example, this section clarifies that a livery driver is an independent livery driver when he or she is appropriately licensed and dispatched by a livery base that is a member of the ILDBF. It also clarifies that the ILDBF only has jurisdiction over claims filed in New York with the Board and that written notice of an injury, illness or death must be provided to the ILDBF in accordance with WCL § 18.

As statutorily mandated § 309.3 sets forth the presumptive wages for livery drivers. After reviewing numerous cases in which a livery driver was found to be an employee and an average weekly wage was set, the Board determined that it was usually set at $250 per week, unless tax returns or other records showed otherwise. Because this is the rate that is set in existing cases for livery drivers, the rule sets $250 as the presumptive wage. To ensure the presumptive wage is current, the regulation also provides for yearly adjustments in accordance with the percentage increase in the New York State Average Weekly Wage.

4. Costs: The rule imposes minimal costs on regulated parties. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur postage if the notice is sent through the United States Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. Livery bases that join the ILDBF will pay $260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately $1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver.

Livery drivers will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

The Board will incur costs to approve the affirmations for membership in the ILDBF and provide written notice of the charges and conduct a hearing with regard to possible revocation of a livery base's designation as an independent livery base. These activities will be performed by existing staff and incorporated into existing procedures.

5. Local government mandates: This rule does not impose any mandates or requirements on local governments.

6. Paperwork: This rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. If a livery base wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked.

Livery drivers must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

The Board is required to send written notice to a livery base of the charges which form the basis for its decision to seek the revocation of the base's designation as an independent livery base.

7. Duplication: This rule does not duplicate any other state or federal rule.

8. Alternatives: One alternative would be to modify the definition of ''covered services'' to require the independent livery base that dispatched the livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term.

Another alternative would be to fail to clarify that claims for benefits from the ILDBF must be filed in New York. This alternative was rejected and the clarification included to ensure drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3).

A third alternative would be to eliminate all criteria to join the ILDBF so all bases could join. This alternative was rejected as the intent was to address those situations where the status of the driver is unclear. Some livery bases own all of the cars that the drivers operate. In such a case the base is the employer and it is inappropriate for such bases to be part of the ILDBF. However, there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c (2) (i) to allow ownership up 50% of the vehicles.

9. Federal standards: There are no federal standards that apply.

10. Compliance schedule: The regulated parties can comply with these requirements upon adoption of the rule.

Regulatory Flexibility Analysis

1. Effect of rule: This rule only governs livery drivers, livery owners and livery bases in New York City (NYC), Westchester County and Nassau County. Therefore, this rule has no impact on small businesses or local governments outside these three areas. Further, the rule only governs livery drivers and bases so it does not impose any requirements or mandates on local governments in NYC, Westchester County or Nassau County. If the rule did govern local governments, it would only govern the NYC Taxi and Limousine Commission (TLC), the Westchester County TLC, the Nassau County TLC and the local governments in Nassau County that license livery bases, livery drivers and/or liveries. The rule will affect the approximately 800 livery bases in the three locations and the owners and drivers of the approximately 25,000 liveries. It is estimated that the majority of livery bases, drivers and livery owners are small businesses. Finally, the rule effects the Independent Livery Driver Benefit Fund (ILDBF) which is a statutorily created non-profit.

2. Compliance requirements: This rule imposes reporting and recordkeeping requirements on small businesses. First the rule reiterates the statutory requirement that livery bases must submit an affirmation sworn under penalties of perjury that the base meets the criteria to be designated an independent livery base and eligible to join the ILDBF. The rule also requires livery bases to submit written notice of any inaccuracies or changes in the information in the affirmation. There is no specific form for the notice, but it does have to be filed within the specified time periods. These requirements are necessary so the Board may take action to revoke a base's status as an independent livery base if it is in violation of the criteria set forth in WCL § 18-c (2) and § 309.2(c). If a livery base that is a small business wants to leave the ILDBF it must submit written notice to the Chair, ILDBF and governing TLC. This notice is necessary to ensure that the ILDBF does not accept liability for any further claims; the Board is informed that the livery base is now required to have full workers' compensation coverage for all drivers, and the TLC ensures the base complies with its rules.

The ILDBF is required to send written notice to a livery base when its membership in the ILDBF is terminated for failing to pay the annual payment or its designation as an independent livery base is revoked. The notice mirrors the required notice when a workers' compensation insurance carrier cancels coverage of an employer.

Livery drivers or their dependents must provide written notice to the ILDBF of an injury or death. There is no set form for this notice and only needs to include limited detail. Livery drivers who are small businesses who seek to have their wages set higher than the presumptive wage must submit tax and business records proving such higher wages.

3. Professional services: Small businesses will not need any professional services to comply with this rule. The affirmation the livery bases must complete is a form created by the Board and does not require any professional services to complete. The same is true of the written notices the livery bases and livery drivers who are small businesses must submit.

4. Compliance costs: The proposed rule will impose minimal costs on small businesses. Livery bases will incur minimal costs to complete and submit the affirmation form. However, this cost is actually imposed by statute. WCL § 18-c (2) (a) requires livery bases, including those that are small businesses, to submit an affirmation sworn under penalty of perjury in order to be designated as an independent livery base. If a livery base needs to notify the Board and ILDBF of any inaccuracies in the information in the affirmation or any changes to such information, it will incur some cost in preparing a letter or email to the Board and ILDBF and will incur the cost of postage if the notice is sent through the U. S. Postal Service. A livery base will also incur minimal costs when sending written notice to the Chair, ILDBF and governing TLC that it is terminating its membership in the ILDBF. The cost will be for postage for the notice to the three entities. Livery bases that join the ILDBF will pay $260 per car but if such bases do not join the ILDBF the cost of a full workers' compensation policy is approximately $1,400 per car. Clearly the minimal costs imposed by this rule are more than offset by the savings from joining the ILDBF.

The ILDBF will incur minimal costs when it sends written notice to a livery base and the Chair that the base's membership will be terminated for non-payment or revocation of its designation as an independent livery base. The ILDBF will incur costs if it challenges the applicability of the presumptive wage for a particular driver. Such costs would include obtaining documentation as to the actual wage the driver earned.

Livery drivers, including those that are small businesses, will incur minimal costs when complying with this rule. If a livery driver is injured he or she must provide written notice to the ILDBF in accordance with WCL § 18. This section of the WCL requires injured or ill workers to submit written notice to their employer, in this case the ILDBF, within 30 days. However, the Board may excuse the lack of notice if there is sufficient reason that the notice could not be given, the employer had actual knowledge, or the employer is not prejudiced by the lack of notice. The notice can be hand delivered or mailed. The cost is mainly postage if mailed and is incurred by all workers injured on the job. Livery drivers who are injured may incur costs to file a claim for benefits with the Board. Injured workers may file claims by calling a toll free number and providing information over the telephone, by completing and submitting the form online, or by completing a paper form and mailing it to the Board. Only if the livery driver completes and mails the paper form will he or she incur costs. Livery drivers may incur some cost if they challenge that the presumptive wage is appropriate. In such cases the drivers will have to produce income tax and business records to support a higher wage. Livery drivers, who are small businesses, may hire a legal representative with respect to a claim for workers' compensation benefits. Such livery drivers will not incur any out of pocket costs as WCL § 24 requires legal representatives to be paid fees awarded by the Board and paid out of any indemnity benefits paid to the livery driver. The acceptance of a fee directly from a livery driver is a misdemeanor.

This rule imposes no costs on local governments as the rule does not impose any requirements on them.

5. Economic and technological feasibility: It is economically and technologically feasible for small businesses to comply with this rule. The affirmation is a form prescribed by the Board and is simple to complete. There are no required forms or formats for the written notices livery bases must submit. Livery drivers who are small businesses can provide the written notice and complete the claim form for benefits without any assistance. However, livery drivers may retain a legal representative with respect to their claim who may assist them when completing the claim form and seeking a higher wage than the presumptive wage. Pursuant to Executive Law § 160-ddd requires the ILDBF to purchase an insurance policy, which it has done. The insurance carrier will handle the claims and payment of benefits and bill and collect the annual payment from the livery bases.

6. Minimizing adverse impact: The rule was drafted to ensure that livery bases would be able to join the ILDBF and livery drivers could access benefits when injured or killed within the provisions of Executive Law § 160-ddd. To minimize adverse impact on both the livery bases and drivers the regulation does not modify the definition of ''covered services.'' It was suggested that ''covered services'' be defined to require the independent livery base that dispatched the injured livery driver to provide documentation of the dispatch and sworn testimony and limit it to a reasonable time after the driver discharges a passenger. The definition would further define reasonable time to be twenty minutes. These modifications to the statutory definition were not incorporated into the rule as they improperly limit the term. The definition of ''covered services'' for the ILDBF is almost the same as the definition for that same term for the Black Car Fund. The Appellate Division, Third Department in Aminov v. N.Y. Black Car Operators Injury Comp. Fund, 2 A.D.3d 1007 (3d Dept. 2003) specifically found that the time waiting for a dispatch is covered. Therefore, modifying the definition as suggested would not be appropriate. Further defining ''reasonable time'' as twenty minutes has no reasonable basis.

To minimize adverse impacts the rule clarifies that claims for benefits from the ILDBF must be filed in New York. This clarification ensures livery drivers know that their claims must be filed in New York. If drivers filed claims in other states, such states may award

benefits other than as allowed in Executive Law § 160-ddd and § 309.3(a)(3). For example, benefits could be awarded for injuries that do not meet the statutory requirements or set an average weekly wage above the presumptive wage without further evidence. When the insurance carrier writing the policy to cover these claims set the cost of the policy it was based on benefits only being paid as provided in statute and regulation. Any awards above the statutory or regulatory levels would cause the premium for the policy to increase, potentially beyond the means of the bases.

The rule sets criteria bases must meet to join the ILDBF to minimize the adverse impact of the default criteria provided in WCL § 18-c (2). Without the criteria in the rule livery bases that own any liveries would be unable to join the ILDBF. While it is inappropriate for the livery base to own all or a majority of the liveries, as such a base would clearly be the employer; there are livery bases that own some of the vehicles used by the drivers that should be able to join the ILDBF. Therefore, the regulation modifies the statutory provision in § 18-c (2) (i) to allow ownership up 50% of the vehicles.

The criteria in the rule account for the rules of the governing TLCs to eliminate adverse impacts from conflicts between the rules and the criteria in the statute. The criteria in WCL § 18-c(2) (iv) provides that livery drivers choose which dispatches or fares to accept, however the governing TLCs have rules prohibiting drivers from refusing to accept certain fares. If this criterion was not modified in the rule, no base would be able to submit the affirmation sworn under penalties of perjury.

7. Small business and local government participation: The rule was drafted after discussions with groups representing the livery bases, the ILDBF Board of Directors, the NYC TLC and the Westchester County TLC. Drafts of the regulation were shared with representatives of livery bases, the ILDBF Board of Directors, the NYC TLC, Westchester County TLC and Nassau County TLC.

Rural Area Flexibility Analysis

This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates a fund to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. The rule only applies to livery bases, livery drivers, livery owners and taxi and limousine commissions in New York City, Westchester County and Nassau County. The seven affected counties do not have populations less than 200,000 and therefore do not fall within the definition of a rural area as provided in Executive Law § 481(7). As the rule does not apply to any rural areas a Rural Area Flexibility Analysis is not required.

Job Impact Statement

The proposed rule will not have an adverse impact on jobs. This rule implements provisions of Chapter 392 of the Laws of 2008, which was enacted to establish clear rules for determining when livery drivers in New York City, Westchester County and Nassau County are employees or independent contractors of livery bases. In addition, the law creates the Independent Livery Driver Benefit Fund (ILDBF) to provide independent contractor livery drivers with workers' compensation benefits in certain circumstances where no fault automobile insurance fails to provide any or sufficient coverage. This rule ensures that livery bases are eligible and can afford to join the ILDBF so that the bases can continue to operate. This rule also implements Chapter 392 so that livery drivers who are killed, injured due to a crime or suffer a catastrophic injury as provided in Executive Law § 160-ddd can obtain workers' compensation benefits.