

# RULE MAKING ACTIVITIES

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

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

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

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## Banking Department

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### EMERGENCY RULE MAKING

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

**I.D. No.** BNK-24-11-00001-E

**Filing No.** 463

**Filing Date:** 2011-05-25

**Effective Date:** 2011-05-31

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 MB107 and 108; addition of new Part 420 and Supervisory Procedure MB107 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 to regulation by the Department.

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

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

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

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

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

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

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

Section 420.12 sets out the requirement that pre-licensing education

and continuing education courses and education course providers must be approved by the Nationwide Mortgage Licensing System and Registry (the "NMLS"). This represents a change from the prior law pursuant to which the Superintendent issued such approvals.

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

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

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

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

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

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

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

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 MB108 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 August 22, 2011.

**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 known as the S.A.F.E. Mortgage Licensing Act (the "SAFE Act") pertaining to the regulation of mortgage loan originators. Hence, the licensing and regulation of mortgage loan regulators in New York now closely tracks the federal standard.

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

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

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

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

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

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

Section 599-f sets 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 business practices by MLOs. Individuals engaging in abusive practices have avoided detection by moving from company to company and in some instances, from state to state. The licensing of MLOs will greatly assist the Department in its efforts to oversee the mortgage industry and protect consumers. The regulation will enable the Department to identify, track and hold accountable those individuals who engage in abusive practices, and ensure continuing education for all MLOs that are licensed by the Department.

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

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

### 4. Costs.

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

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

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

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

### 5. Local government mandates.

None.

### 6. Paperwork.

An application process has been established for MLOs electronically through the NMLS. Over time, the application process is expected to

become virtually paperless; accordingly, while a limited number of documents, including fingerprints where necessary, currently have to be submitted to the Department in paper form, these requirements should diminish with the passage of time.

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

### 7. Duplication.

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

### 8. Alternatives.

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

### 9. Federal standards.

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

### 10. Compliance schedule.

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

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

## Regulatory Flexibility Analysis

### 1. Effect of the Rule:

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

### 2. Compliance Requirements:

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

### 3. Professional Services:

None.

### 4. Compliance Costs:

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

### 5. Economic and Technological Feasibility:

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

### 6. Minimizing Adverse Impacts:

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

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

## 7. Small Business and Local Government Participation:

See response to Item 6 above.

**Rural Area Flexibility Analysis**

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

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

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

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

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

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

**Job Impact Statement**

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

The requirement to comply with the proposed regulations is not expected to have a significant adverse effect on jobs or employment activi-

ties 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.

## EMERGENCY RULE MAKING

### Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

**I.D. No.** BNK-24-11-00002-E

**Filing No.** 464

**Filing Date:** 2011-05-25

**Effective Date:** 2011-05-31

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

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

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

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 August 22, 2011.

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

**Rural Area Flexibility Analysis**

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

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

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

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

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

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

Of the servicers which operate in rural areas, it is believed that most are mortgage bankers, mortgage brokers or exempt organizations. Of the remainder, a number are expected to be exempt from most of the financial

responsibility requirements because they service mortgages for FNMA, GNMA, FHLMC, VA or other federal instrumentalities and comply with net worth and E&O bond requirements of those entities.

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

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

#### **Job Impact Statement**

Article 12-D of the Banking Law, as amended by the Subprime Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. This 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.

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## Department of Corrections and Community Supervision

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

#### **Residential Mental Health Treatment Units**

**I.D. No.** CCS-24-11-00004-P

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

**Proposed Action:** Addition of Part 320 to Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 2, 112, 137 and 401

**Subject:** Residential mental health treatment units.

**Purpose:** To define models of residential mental health treatment units operated by the Department and the Office of Mental Health.

**Text of proposed rule:** The Department of Corrections and Community Supervision is creating a new Part 320 in 7 NYCRR as follows:

Chapter VI. Special Housing Units

Part 320

Residential mental health treatment units

(Statutory authority: Correction Law, §§ 2, 112, 137, 401)

Section 320.1 Purpose

*This Part defines the models of residential mental health treatment units operated jointly by the department and the office of mental health.*

#### *Section 320.2 Residential mental health unit model*

*A residential mental health unit (RMHU) is a program that includes a separate housing location within a correctional facility designed to address the corrections-based therapeutic treatment of inmates currently diagnosed with a serious mental illness who, due to their behavior, would otherwise be serving a confinement sanction in a special housing unit (SHU) or separate keeplock housing unit. These inmates often present with a complex interplay of antisocial behaviors and psychological factors. The unit is designed to meet the therapeutic needs of the inmates, while maintaining appropriate safety and security on the unit. Although an RMHU is not operated as a disciplinary housing unit, in light of the security concerns associated with the behaviors that resulted in their confinement and other sanctions, inmates on the unit are subject to limitations on the quantity and type of property they are permitted to have in their cells and are afforded access to programs that are more restrictive than those afforded general population inmates, in order to maintain security and order on the unit. After a brief orientation period and absent exceptional circumstances, in addition to exercise, inmates are offered four hours of structured out-of-cell therapeutic programming and/or mental health treatment on a daily basis, except on weekends and holidays.*

#### *Section 320.3 Behavioral health unit model*

*A behavioral health unit (BHU) is a program that includes a separate housing location within a correctional facility designed to address the corrections-based therapeutic treatment of inmates currently diagnosed with a serious mental illness who, due to their behavior, would otherwise be serving a confinement sanction in a SHU or separate keeplock housing unit. These inmates have displayed a marked inability to conform their behavior to societal and/or institutional standards of conduct. They present with a complex interplay of antisocial behaviors and psychological factors that have resulted in their not having benefited from habilitation efforts in the community or rehabilitation efforts during a series of institutional placements. The unit is designed to meet the therapeutic needs of these inmates, while maintaining adequate safety and security on the unit. Although a BHU is not operated as a disciplinary housing unit, in light of the security concerns associated with the behaviors that resulted in their confinement and other sanctions, inmates on the unit are subject to limitations on the quantity and type of property they are permitted to have in their cells and are afforded access to programs that are more restrictive than those afforded general population inmates, in order to maintain security and order on the unit. After a brief orientation period and absent exceptional circumstances, in addition to exercise, inmates housed in a BHU are offered four hours of structured out-of-cell therapeutic programming and/or mental health treatment on a daily basis, excluding weekends and holidays; provided, however, the Department may maintain housing for 38 BHU inmates who are offered two hours rather than four hours of structured out-of-cell therapeutic programming and/or mental health treatment. The therapeutic behavioral unit (TBU) is the functional equivalent of the BHU for female inmates.*

#### *Section 320.4 Intermediate care program model*

*The intermediate care program (ICP) is a program that includes a separate housing location within a correctional facility designed to address the corrections-based therapeutic treatment of inmates currently diagnosed with what is, generally, a serious mental illness. The ICP is a therapeutic community which provides rehabilitative services to inmates who are unable to function in general population because of their mental illness. The goal of the program is to improve the inmates' ability to function through programming and treatment so that they may return to general population. In addition to inmates with a mental illness who cannot function in a general population setting, inmates with a mental illness who have a relatively short amount of confinement time to serve may be considered for keeplock in an ICP during non-program hours. After a brief orientation period and absent exceptional circumstances, in addition to exercise, inmates are offered at least four hours of structured out-of-cell therapeutic programming and/or mental health treatment on a daily basis, except on weekends and holidays. Selected ICP inmates are permitted to temporarily leave the unit to receive therapeutic and other programming in a general population setting. An ICP is not operated as a disciplinary housing unit.*

#### *Section 320.5 Intensive Intermediate care program model*

*The intensive intermediate care program (IICP) is a program that includes a separate housing location within a correctional facility designed to address:*

*(a) the corrections-based therapeutic treatment of inmates currently diagnosed with a serious mental illness who, due to their behavior, would otherwise be serving primarily long-term keeplock; and*

(b) the corrections-based therapeutic treatment of other inmates who require alternate placement from an ICP due to a less than satisfactory custodial adjustment.

The unit seeks to address the therapeutic needs of the inmates, while maintaining adequate safety and security on the unit. Although an IICP is not operated as a disciplinary housing unit, in light of the security concerns associated with the behaviors that resulted in their confinement and other sanctions, inmates on the unit are subject to limitations on the quantity and type of property they are permitted to have in their cells and are afforded access to programs that are more restrictive than those afforded general population, in order to maintain security and order on the unit. After a brief orientation period and absent exceptional circumstances, in addition to exercise, inmates are offered at least four hours of structured out-of-cell therapeutic programming and/or mental health treatment on a daily basis, except on weekends and holidays. Programming is similar to an ICP, with additional therapeutic programs centering on increasing behavioral control and future adjustment to the correctional environment.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue - Harriman Campus - Building 2, Albany, NY 12226-2050, (518) 457-1891, email: Rules@DOCS.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

Sections 2, 112, 137 and 401 of Correction Law. Section 112 and 137 authorizes the Commissioner of DOCS in to promulgate rules that will allow for the assignment of each inmate in the Department's care to a program that is most likely to assist him or her to refrain from future violations of the law. Such procedures shall be incorporated into the rules and regulations of the Department and shall require among other things consideration of the physical, mental and emotional state of the inmate; consideration of the danger he or she presents to the community or to other inmates; and the recording of continuous care histories, including notations as to the apparent success or failure or treatment employed; and periodic case review of those histories and treatment methods used.

Section 401 of correction Law authorizes the Commissioner in cooperation with the Commissioner of Mental Health to establish programs in correctional facilities for the treatment of mentally ill inmates who are in need of psychiatric services. Section 2 of Correction Law establishes the definition of Departmental terms, to include the term, "residential mental health treatment unit."

##### 2. Legislative Objective

By vesting the commissioner with the rulemaking authority as listed in these sections, the legislature intended the commissioner, in cooperation with the Commissioner of Mental Health to promulgate such rules and regulations that provide mentally ill inmates with treatment services, including therapy and programming, and access to mental health clinicians, in settings that are appropriate to their clinical needs while maintaining the safety and security of the facility.

##### 3. Needs and Benefits

This proposed rulemaking was determined to be necessary in order to clearly list the different types of residential mental health treatment units that the Commissioner, in cooperation with the Commissioner of the Office of Mental Health, has determined to be the appropriate settings to meet the objective as described above.

##### 4. Costs

a. To agency, state and local government: No discernable costs are anticipated.

b. Cost to private regulated parties: None. The proposed rule changes do not apply to private parties.

c. This cost analysis is based upon the fact that the rule is merely defining units that already in operation and are a required part of the Department's planning and budgeting process moving forward.

##### 5. Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

##### 6. Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments

##### 7. Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

##### 8. Alternatives

No alternatives were considered, the establishment of this rule was nec-

essary in order to describe the residential mental health treatment units that have been established and is required by Correction Law.

##### 9. Federal Standards

There are no minimum standards of the Federal government for this or a similar subject area.

##### 10. Compliance Schedule

The Department of Corrections and Community Supervision will achieve compliance with the proposed rules immediately.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, record keeping or other compliance requirements on small businesses or local governments. This proposal is merely providing clear definitions of the type and purpose of residential mental health treatment units that have already been established within the Department.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal is merely providing clear definitions of the type and purpose of residential mental health treatment units that have already been established within the Department.

#### Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal is merely providing clear definitions of the type and purpose of residential mental health treatment units that have already been established within the Department.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Entrance to a Correctional Facility, Visitation, Disciplinary Hearing, Superintendent Hearing, Minimum Provisions

I.D. No. CCS-24-11-00005-P

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

**Proposed Action:** Repeal of Part 200; amendment of sections 253.7, 254.7 and 1704.7; and addition of new Parts 200 and 201 to Title 7 NYCRR.

**Statutory authority:** Correction Law, sections 112, 137, 138 and 146

**Subject:** Entrance to a Correctional Facility, Visitation, Disciplinary Hearing, Superintendent Hearing, Minimum Provisions.

**Purpose:** To amend policies for the DOCCS Inmate Visitor Program and standards of inmate behavior.

**Substance of proposed rule (Full text is posted at the following State website: [docs.state.ny.us/RulesReg/index.html](http://docs.state.ny.us/RulesReg/index.html)):** The Department of Corrections and Community Supervision repeals Part 200 of Title 7 NYCRR and replaces it with a new Part 200 and adds a new Part 201 and amends Sections 253.7, 254.7, and 1704.7.

Part 200, formerly titled Visitation, which set forth the guidelines for the operation of the Department's visitor program, has been repealed and replaced by Part 200 Entrance to a Correctional Facility and Part 201 Visitation.

Part 200 Entrance to a Correctional Facility is added to provide the rules for persons, other than facility employees, seeking to enter a correctional facility. This sets forth policy, requirements and restrictions for both those seeking entrance and the staff tasked with ensuring the safety and the security of the facility.

200.1 Identification. This section defines and clarifies the acceptable forms of identification required for each person, including visitors and other persons not employed at the facility, seeking entrance to a correctional facility. Under the proposed rules, photographic identification will be required of all adult visitors. Failure to produce adequate identification shall result in the denial of entry.

This section also expands on the required procedures that, upon entering the gate area, visitors and other persons not employed at the facility are required to follow. It provides that each visitor is required to enter and leave by the same gate.

200.2 Search. This section provides that all persons entering a correctional facility are subject to search as a condition of entrance and that any visitor who refuses to comply with any required search procedure shall not be permitted entrance to that facility. This section sets forth the procedures for each type of search that may be required and establishes the effect of a visitor's failure to successfully pass those searches.

The justification and authorization for a consensual strip search of a visitor is outlined. The staff's professional and sensitive conduct during the search is emphasized. A strip search must be reported as an unusual incident. A visitor's refusal of a strip search will result in the denial of entry, but will not adversely impact future visits to the facility.

200.3 Unauthorized item/contraband. This section provides the department's detailed definition of contraband including the types of contraband, the discovery of which will result in confiscation and the contact of law enforcement. A list of items that are prohibited inside a correctional facility and instruction to visitors for declaring and storing such is provided.

Part 201 Visitation is added to provide a uniform manner of the operation of the inmate visitor program for visitors admitted to the facility, inmates participating in and department staff supervising the inmate visitor program. Visiting rules, including the types of misconduct and associated penalties, procedures for the imposition of visiting sanctions and procedures for appealing such sanctions are set forth.

201.1 Purpose. This section provides that appropriate participation in the Department of Corrections and Community Supervision inmate visiting program provides inmates under custody the opportunity to maintain relationships with persons from the outside in order to offer emotional support in adjusting to the prison environment and to promote better community adjustment upon release.

201.2 Procedures. This section outlines the procedures and limitations for the inmate visiting program, including procedures for first-time visitors, the visitor record, cross-visiting and visitors under 18 years of age.

This section also sets forth restrictions for persons on probation or parole, inmates on temporary release, persons with pending or past criminal proceedings, former inmates and former employees who must have prior permission to be allowed to visit. This section also addresses visits to hospitalized inmates.

In addition, this section provides that no inmate is to be visited against his or her will. This section also includes an overview of visiting times established for visiting at maximum, medium, minimum, and work release facilities.

201.3 Guidelines. This section provides that inmates and their authorized visitors abide by the established visiting rules and regulations, posted facility rules and the instructions given by staff. This section sets forth rules including procedures for leaving the visiting room, the exchange of items, leaving packages for the inmate, consumption of food, using lavatories, unacceptable attire and acceptable physical contact during visits. The rules regarding unacceptable attire have been expanded for clarification purposes and to stress that clothing containing metal may cause metal detectors to alert.

201.4 Termination, term of suspension and indefinite suspension. This section provides that a Superintendent may deny, limit, suspend for a term or indefinitely suspend the visitation privileges of any visitor if the Superintendent has reasonable cause to believe that such action is necessary to maintain the safety, security and good order of the facility. It is noted that a loss of visiting privileges may be imposed for an inmate pursuant to the procedures for implementing the standards of inmate behavior under Chapter V of Title 7.

This section provides the standards and the procedures that must be followed by facility staff to enforce visiting rules and for the termination of a visit. The Superintendent is authorized to limit either an inmate or a visitor to non-contact visiting as an alternative to a term of suspension or indefinite suspension of all visiting privileges. Procedures for the imposition of a term of suspension or indefinite suspension are provided. The types and effects of those penalties are outlined, as well as the procedures for notifying the visitors and inmates of the imposition of a visiting sanction and of the available review mechanism. When a visitor is subject to a suspension for a term of less than six months, he or she may appeal in writing to the Commissioner within 60 days and a written decision shall be issued within 45 days of receipt of the appeal. When a visitor is subject to a suspension for a term of over six months or an indefinite suspension, he or she may appeal in writing or by requesting a hearing. This section sets forth the types and effects of visiting penalties and contains a chart detailing types of misconduct, the initial response following an incident of misconduct and the maximum penalties authorized for each offense. A visiting penalty imposed with respect to the visiting privileges of any visitor applies at all Department facilities to all inmates visited. A visiting penalty also precludes participation in the family reunion and special events programs.

201.5 Visitor appeal and hearings. This section outlines the process to be followed when a visitor requests a hearing to appeal from a suspension of visiting privileges for a term of six months or more, including an indefinite suspension of visiting privileges. A hearing officer from outside the correctional facility is appointed and the visitor may be represented by counsel. Procedures for the presentation of witnesses and other evidence are provided, including authority for the hearing officer to determine whether such witnesses or evidence are material, not redundant, and will not jeopardize the safety, security and good order of the facility, or cor-

rectional goals. Hearings are electronically recorded and a written decision is to be issued within 60 days of the hearing. The visitor may appeal to the commissioner within 60 days and a written decision is to be issued within 60 days of the filing of an appeal.

201.6 Reconsideration of suspension in excess of two years. This section provides that if a visitor or inmate's visiting privileges have been suspended for a term over two years or indefinitely suspended, that person may request a reconsideration any time after it has been in effect for one year and annually thereafter. The request is made to the Superintendent of the facility housing the inmate to be visited. The Superintendent evaluates the request and advises the visitor and inmate of the result in writing. If the suspension remains in place without modification for five years, the Superintendent's denial or a request for reconsideration may be appealed to the Commissioner's designee in the fifth year and every five years thereafter.

253.7 Dispositions and mandatory surcharge has been revised to clarify that visiting privileges may not be withheld as the result of a disciplinary hearing, commonly referred to as a Tier II hearing in the Department's three-tiered disciplinary system.

254.7 Dispositions and mandatory disciplinary surcharge has been revised to permit the suspension of an inmate's visiting privileges as the result of a Superintendent's hearing, commonly referred to as a Tier III hearing in the Department's three-tiered disciplinary system. Under the proposed rules, an inmate's visiting privileges may be suspended if an inmate is found guilty of misconduct "as a result of the inmate's presence or conduct in connection with a visiting, family reunion or special events program, or processing before or after participation in such program." Visiting sanctions are available for a wide variety of categories of serious misconduct. Where the conduct is only between the inmate and a visitor, the sanction may be limited to that inmate's ability to receive visits from that visitor. Where the conduct involves other persons, including committing a sexual act where other visitors may witness such misconduct, a visiting sanction would preclude the inmate from all visits for the specified term. Similarly, conduct involving the smuggling of money, alcohol, marijuana, narcotics and other dangerous drugs, weapons, and escape paraphernalia would authorize the hearing officer to suspend visiting privileges with all visitors. Visiting sanctions under this subparagraph fall within the limits set forth in the penalty chart set forth at section 201.4(e).

A number of additional procedural safeguards are included in this rule. Any disposition imposing a loss of visiting privileges with all visitors for two years or more is forwarded to the Superintendent for a discretionary review under section 254.9. Where the sanction is an indefinite suspension of the inmate's visiting privileges, the visiting sanction will be reviewed by the director of special housing and inmate disciplinary program even if the inmate does not appeal. A disciplinary loss of visiting privileges over two years, including an indefinite suspension, is subject to the request for reconsideration procedures set forth at section 201.6. In any case where the hearing officer can impose a loss of visiting privileges; he or she may choose to limit the inmate to noncontact visiting as an alternative.

Section 254.7(a)(1)(iv) provides that an inmate's visiting privileges may be suspended for drug related offenses or for refusing to cooperate with urinalysis testing procedures. These sanctions are authorized without respect to the location of the misconduct. A first offense may be punished by up to 6 months loss of visiting privileges. A second or subsequent offense may be punished by up to one year loss of visiting privileges.

1704.7 Correspondence and visiting has been revised to clarify the limitations on visiting for an inmate confined to a cell or room for more than 30 days, and that further restriction may be imposed under Part 201, Chapter V or section 302.2(i)(1) of Title 7 NYCRR.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Avenue - State Campus - Building 2, (518) 457-4951, email: rules@docs.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**

##### **1. Statutory Authority**

Correction Law §§ 112, 137, 138, 146. Correction Law § 112 vests the Commissioner of the Department of Corrections and Community Supervision with the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof.

Correction Law § 137(2) provides that the Commissioner shall provide such measures as he or she may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein.

Correction Law § 138 requires that all institutional rules and regulations defining and prohibiting inmates misconduct shall be published and posted, and that such rules shall be specified and precise giving all inmates actual notice of the conduct prohibited, as well as the range of disciplinary sanctions that can be imposed for a violation of each rule.

Correction Law § 146 vests certain officials with the authority to visit correctional facilities at their pleasure and provides that no other person not otherwise authorized by law shall be permitted to enter a correctional facility except by authority of the Commissioner of the Department of Corrections and Community Supervision under such regulations as he or she shall prescribe.

#### 2. Legislative Objective

By vesting the Commissioner with the rulemaking authority, the legislature intended the Commissioner to promulgate such rules and regulations as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein. Visitation greatly enhances an inmate's ability to be successful upon release from custody when the privilege is used to maintain a positive relationship. Appropriately disciplining the few inmates who violate the visiting room rules will enhance the benefits to the many who use their visiting privileges in a positive way.

In accordance with Correction Law §§ 137 and 138, the legislature intended the Commissioner to promulgate rules as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein. The suspension of an inmate's visiting privileges is necessary and appropriate as a management technique to enforce rules prohibiting the use, possession and exchange of drugs within the State's correctional facilities.

#### 3. Needs and Benefits

##### Summary

The Commissioner has the authority to prescribe regulations under which persons may be permitted to enter a correctional facility under Correction Law § 146.

The Department's current visitation policies are the result of litigation initiated in 1981 in a class action lawsuit and the resulting Kozlowski consent decree, which was approved in May 1983. The Department successfully vacated the Kozlowski consent decree on November 26, 2001 pursuant to the terms of the Prison Litigation Reform Act (PLRA). The Plaintiffs' filed an appeal to the Second Circuit Court of Appeals, however, that appeal was withdrawn with leave to re-file based on the Department's agreement to promulgate new regulations. Since that time, the Department has conducted research and evaluated numerous variations on the rules before reaching the current proposal.

The United States Supreme Court addressed visitation in *Overton v. Bazzetta*, 539 U.S. 126 (2003), in its review of challenges to significant limitations placed on visitation by the Michigan Department of Corrections. The Court recognized that "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose." *Overton*, at 134.

The Department continues to recognize the importance of visitation for the vast majority of the inmates committed to the Department and their visitors. When used to maintain a positive relationship, visitation greatly enhances the inmate's ability to be successful upon release from custody. Appropriately disciplining the few who violate the visiting room rules will only enhance the benefits to the many who use their visiting privileges in a positive way.

The Department proposes changes to the regulations governing visitation and the standards of inmate behavior that will appropriately balance the above-referenced concerns. These changes permit the exercise of meaningful visitation sanctions against an inmate or visitor who chooses to violate specified rules. Visitation related sanctions may be imposed on an inmate through the existing procedures of a Superintendent's Hearing under the existing disciplinary process as set forth in Chapter V of Title 7. If the disciplinary disposition is against the inmate, the inmate will have the right to appeal and to challenge the entire disciplinary disposition, including any visitation related sanction.

In those cases where a visitor is issued a decision imposing a visitation sanction, he or she will continue to be entitled to notice of the reason for the sanction, the length of the sanction, copies of the documentation concerning the charges, and an appeal to the Commissioner's designee. Where the sanction is a term of suspension for six months or more, or an indefinite suspension, the visitor will still be entitled to a hearing upon request.

Finally, in a case where either an inmate's or a visitor's visiting privileges are suspended for a term of more than two years or indefinitely suspended, that person will continue to have the ability to request reconsideration of the suspension over two years on an annual basis. If the suspension remains in effect, the denial of a request for reconsideration may be appealed to the Commissioner's designee during the fifth year and every five years thereafter if necessary.

#### 4. Costs

a. To agency, state and local government: No discernable costs are anticipated.

b. Cost to private regulated parties: None. The proposed rule changes do not impose any costs on any private regulated parties.

c. This cost analysis is based upon the fact that the rule changes merely clarify and expand upon previously established rules regarding the inmate visiting program. No additional procedures or new staff are necessary to implement the proposed changes.

#### 5. Paperwork

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

#### 6. Local Government Mandates

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

#### 7. Duplication

These proposed amendments do not duplicate any existing State or Federal requirement.

#### 8. Alternatives

The Department considered various alternatives to the proposed rules for available visitation related dispositions upon a determination of guilt following a superintendent's hearing under section 254.7. In order to balance the Department's needs to 1) address serious visit related misconduct; 2) the abuse of drugs in the Department's Correctional Facilities; and 3) make it clear that a lengthy suspension of visiting privileges is seen as a significant penalty, the Department added a number of procedural protections to section 254.7.

The proposed rules allow for a sanction involving the loss of visiting privileges for a wide-range of visit-related misconduct. These sanctions may involve a loss of visiting privileges with specified visitors where the misconduct involved only the inmate and those visitors. Where the misconduct was not limited to a specified visitor or visitors (such as an assault on a staff member or another inmate) and for certain types of misconduct where, in the Department's judgment, other persons such as staff or other visitors are effected (sexual conduct in the presence of other visitors and their children, smuggling of contraband such as drugs, weapons, etc.), the sanction will involve a loss of all visiting privileges.

To ensure the appropriate use of these new penalties, any disposition imposing a loss of visiting privileges with all visitors for two years or more is automatically forwarded to the superintendent for a discretionary review under section 254.9. Where the sanction is an indefinite suspension of the inmate's visiting privileges, the visiting sanction will be reviewed by the director of special housing and inmate disciplinary program even if the inmate does not appeal.

The proposed rules also authorize visiting sanctions for certain types of inmate misconduct that is not directly related to visitation. Although the Department considered making such sanctions available for a wide-range of serious misconduct, it concluded that at this juncture visiting sanctions would be made available only for misconduct involving drug use, drug possession and urinalysis testing procedures. Also, rather than leaving the length of the penalties completely within the discretion of the hearing officer, sanctions are limited to 6 months for a first offense and 1 year for any repeat offense.

During the drafting process, and in connection with ongoing matters related to the Kozlowski litigation, the Department shared a draft of the proposed rules with Prisoners' Legal Services of New York (PLS). PLS in turn shared the draft with the Legal Aid Society, Prisoners' Rights Project. The two organizations submitted joint comments by letter dated September 13, 2010. On November 3, 2010, several representatives of PLS and Legal Aid participated in a meeting with the Department to discuss the proposed rules.

The primary concerns noted involved attorneys and others having difficulty clearing metal detector searches, concerns regarding the substance detection/Ion Scan testing, the authorized visit related penalties and the availability of central office review for "revocations"; and the authorization under the inmate disciplinary rules of a suspension of all visitation privileges when conduct is not limited to a single visitor. Many of these concerns were freely discussed at the meeting.

The current proposal clarifies that certain types of garments, such as underwire bras and clothing containing metal studs, are likely to set off metal detectors resulting in the potential that a more intrusive search will be necessary before visitation will be permitted. With respect to the concerns on attorney visits, the rule has been modified to clarify that the front gate staff should consult with the superintendent before requesting that the attorney consent to a more intrusive search.

In an effort to ease concerns over the potential for the increased use of "revocations" of visiting privileges, a penalty authorized under the current rule, which is available for more categories of misconduct under the proposed rule, the Department has redrafted the penalty to provide for the "indefinite suspension" of visiting privileges. Under either the originally

proposed revocation or an indefinite suspension, the visitor may apply to the superintendent for modification of the penalty on an annual basis. As a result of the discussion with PLS and the Legal Aid Society, the Department created the additional opportunity to appeal the denial of such a request for reconsideration every five years by writing to the Commissioner.

#### 9. Federal Standards

The proposed rules are consistent with United State Supreme Court precedent in *Overton v. Bazzetta*, 539 U.S. 126 (2003) and *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) analyzing visitation privileges in the prison context.

#### 10. Compliance Schedule

The Department of Corrections and Community Supervision will achieve compliance with the proposed rules over a period of six months following adoption.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This proposal amends policies and standards of behavior for the Department of Corrections and Community Supervision inmate visitor program.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal amends policies and standards of behavior for the Department of Corrections and Community Supervision inmate visitor program.

#### Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal merely amends policies and standards of behavior for the Department of Corrections and Community Supervision inmate visitor program.

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## Deferred Compensation Board

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### NOTICE OF ADOPTION

#### Conduct of an Annual Audit of Financial Statements or an Administrative Report

**I.D. No.** DCB-06-11-00003-A

**Filing No.** 495

**Filing Date:** 2011-05-31

**Effective Date:** 2011-06-15

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

**Action taken:** Amendment of section 9005.1 of Title 9 NYCRR.

**Statutory authority:** State Finance Law, section 5

**Subject:** Conduct of an annual audit of financial statements or an administrative report.

**Purpose:** To provide an alternative to smaller deferred compensation plans to meet the annual audit requirement.

**Text of final rule:** Section 9005.1 is repealed and a new Section 9005.1 is added to read as follows:

*Section 9005.1 Financial Statements, Auditing and Agreed-Upon Procedures Reports. The board, with respect to the State plan, and the deferred compensation committee, with respect to any other plan, shall be responsible for causing such plan to be in compliance with this Section 9005 for each plan year.*

*(a) Subject to paragraph (c) of this Section 9005.1, a plan shall be subject to this paragraph (a) for a plan year if the plan has fewer than 100 participants as of the last day of the plan year. If a plan is subject to this paragraph (a) for a plan year, the deferred compensation committee shall:*

*(1) prepare, or cause to be prepared, for the plan year an unaudited financial statement of the net assets available for benefits and the related statements of changes in net assets available for benefits for the plan year-end; and*

*(2) engage, or cause to be engaged, in accordance with the requirements of Part 9003 of this Subtitle, a certified public accountant to conduct a review of the plan's activities during the plan year and to produce an*

*agreed-upon procedures report for the plan year, which report shall specify the procedures and the results of the procedures by such firm of certified public accountants in the review of each of the following items (and any other additional items as may be required by the deferred compensation committee for the plan):*

*(i) whether participant account balances, by investment option and in the aggregate as of the plan-year end, as reported by the administrative service agency for the plan, agree to the value of the assets held by the trustee of the plan by investment option and in the aggregate as of plan-year end;*

*(ii) whether participant deferrals reported by the plan sponsor, by individual participant and in the aggregate, for the plan year agree with the deferrals received by the trustee of the plan for the plan year;*

*(iii) whether participant deferrals for the plan year were properly authorized and accurately remitted to the trustee of the plan in accordance with the timing and other requirements of the plan document (or industry practice if no direction is provided in the plan document);*

*(iv) whether the plan properly and separately accounted for pre-tax and, if applicable, designated Roth contributions deferred or contributed for the plan year;*

*(v) whether maximum contribution limitations and minimum required distribution requirements were properly implemented for the plan year;*

*(vi) whether participant requests for lump sum and installment benefit distributions for the plan year were properly authorized and processed in accordance with the plan document and contractual provisions (or industry practice, if no direction is provided in the plan document or applicable contracts);*

*(vii) whether participant requests for unforeseeable emergency withdrawals during the plan year were processed according to written procedures, properly authorized and properly documented;*

*(viii) whether participant requests for plan loans during the plan year were processed according to written procedures and were properly authorized and documented;*

*(ix) whether participant requests for deferral amount changes and asset allocation changes for the plan year were processed accurately and in a timely manner in accordance with the plan document and applicable contract provisions (or industry practice, if no direction is provided in the plan document or applicable contracts);*

*(x) whether all plan-level and participant-level fees for the plan year were disclosed to participants, were allocated in accordance with written procedures and on a uniform basis and were assessed solely to support operations of the plan; and*

*(xi) whether, for the plan year, employees who were eligible during that plan year to elect to participate in the plan were provided with written notification of the plan and enrollment opportunities.*

*(3) The specific procedures and methods applied to each item covered by paragraph (a)(2) of this Section 9005.1 shall be determined in the professional judgment of the certified public accountant in accordance with generally accepted industry standards in conjunction with the deferred compensation committee for the plan prior to the firm's performance of the agreed-upon procedures on the plan.*

*(b) A plan shall be subject to this paragraph (b) for a plan year if it is the State plan or, subject to paragraph (c) of this Section 9005.1, if the plan has 100 or more participants as of the last day of the plan year. If a plan is subject to this paragraph (b) for a plan year, the board or deferred compensation committee, as applicable, shall:*

*(1) prepare, or cause to be prepared, a financial statement of the net assets available for benefits and the related statements of changes in net assets available for benefits for the plan year-end, which statements shall be prepared in accordance with Governmental Accounting Standards Board Statement 32, "Accounting and Financial Reporting for Internal Revenue Code Section 457 Deferred Compensation Plans", or any successor statement thereto; and*

*(2) engage, or cause to be engaged, in accordance with the requirements of Part 9003 of this Subtitle, a certified public accountant to conduct an audit of the financial statements described in paragraph (b)(1) of this Section 9005.1 in accordance with auditing standards generally accepted in the United States of America.*

*(c) The following rules shall apply to plans that would otherwise become subject to paragraph (a) or (b) of this Section 9005.1 (or cease to be subject to paragraph (a) or (b) of this Section 9005.1) from one plan year to the next succeeding plan year as a result of an increase or decrease in the number of participants in the plan.*

*(1) A plan that (i) was subject to paragraph (a) of this Section 9005.1 for a prior plan year and that has complied with the requirements set forth in paragraph (a) above for that plan year and (ii) becomes subject to paragraph (b) of this Section 9005.1 for the current plan year by virtue of having 100 or more participants as of the last day of the current year, may elect to comply with the provisions of paragraph (a) of this Section 9005.1*

for such current plan year, and, if such election is made, shall not be subject to the requirements of paragraph (b) of this Section 9005.1 for the current year.

(2) A plan that (i) was subject to paragraph (b) of this Section 9005.1 for a prior plan year and (ii) would be subject, but for the operation of this paragraph (c)(2), to paragraph (a) of this Section 9005.1 for the current plan year by virtue of having fewer than 100 participants as of the last day of the current plan year, shall be required to continue to comply with the provisions of paragraph (b) of this Section 9005.1 for such current plan year and shall not become eligible to utilize the procedures in paragraph (a) of this Section 9005.1.

(3) Example: Plan X has 90 participants as of the last day of Plan Year 1, and accordingly, the deferred compensation committee of Plan X causes the plan to comply with the financial statement and agreed-upon procedures requirements described in paragraph (a) of this Section 9005.1 with respect to Plan Year 1. On the last day of Plan Year 2, Plan X has 110 participants. Plan X may elect to continue to comply with the provisions of paragraph (a) of this Section 9005.1 and will not be subject to the audit requirements of paragraph (b) for Plan Year 2.

(4) Example: Plan Y has 110 participants as of the last day of Plan Year 1, and accordingly, the deferred compensation committee of Plan Y causes the plan to comply with the financial statement and audit requirements described in paragraph (b) of this Section 9005.1 with respect to Plan Year 1. On the last day of Plan Year 2, Plan Y has 90 participants. Plan Y must continue to comply with the provisions of paragraph (b) of this Section 9005.1 and will not be permitted to rely on the agreed-upon procedures provisions of paragraph (a) of this Section 9005.1 for Plan Year 2.

(d) The deferred compensation committee for a plan subject to paragraph (a) of this Section 9005.1 for a given plan year may elect to comply with the requirements of paragraph (b) of this Section 9005.1 for such plan year.

(e) For purposes of this Section 9005.1, "participant" means any person who, as of the last day of a plan year, has an account balance under the plan that is greater than zero.

(f) The agreed-upon procedures requirement described in paragraph (a)(2) of this Section 9005.1 and the audit requirement described in paragraph (b)(2) of this Section 9005.1 shall be completed by no later than 6 months following the end of the plan year to which such agreed-upon procedures or audit relates. Provided, however, for a plan year that ended on or after December 31, 2010 and before December 31, 2011, the agreed-upon procedures or audit relating to such plan year shall be completed by no later than 12 months following the end of such plan year.

(g) The board or deferred compensation committee, as applicable, for a plan shall adopt and communicate to plan participants written procedures whereby a plan participant may request in writing or electronically to receive the financial statements and agreed-upon procedures report described in paragraph (a)(2) of this Section 9005.1 and the audited financial statements and accompanying auditors report described in paragraph (b)(2) of this Section 9005.1 at no cost to the participant other than a reasonable charge for copying and postage. The board or deferred compensation committee, as applicable, will be deemed to have satisfied the requirements of this paragraph (g) if participants (i) are able to obtain the applicable reports and financial statements for the plan or (ii) are directed to a web site associated with the plan or the State or local employer sponsor of the plan that contains such information in a readily readable and downloadable format.

(h) The board or deferred compensation committee, as applicable, shall file with the president a complete and accurate copy of the financial statements and agreed-upon procedures report described in paragraph (a)(2) of this Section 9005.1 or the audited financial statements and accompanying auditors report described in paragraph (b)(2) of this Section 9005.1 promptly following delivery of such statements and reports to the board or deferred compensation committee, as applicable.

(i) The provisions of this Section 9005.1 shall be in effect for each plan year of a plan ending on or after December 31, 2010.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 9005.1(a)(2), (c)(3), (4), (f), (g) and (h).

**Text of rule and any required statements and analyses may be obtained from:** Edward J. Lilly, Deferred Compensation Board, PO Box 2103 Empire State Plaza Station, Albany, NY 12220, (518) 473-6619, email: elilly@nysdcp.com

#### Revised Regulatory Impact Statement

1. Statutory authority: State Finance Law, Section 5, authorizes the New York State Deferred Compensation Board to adopt rules and regulations regarding the standards and requirements of all deferred compensation plans established pursuant to Section 5.

2. Legislative objectives: Current Section 9005.1 requires deferred compensation plans to "cause all amounts held under a plan to be audited

by a firm of certified public accountants" annually. This requirement is to assure that the salary that is deferred by public employees is properly invested and accounted within the plan. The proposal is designed to more accurately define the type of audit to be conducted.

3. Needs and benefits: It is a generally accepted principle that retirement savings plans be audited. Local governments have expressed to the Board that the costs associated with the preparation of an audit of financial statements can be expensive in relation to the number of participants in the plan. This proposal maintains the principle of conducting an annual examination of plan procedures and recordkeeping but in a more cost effective manner.

4. Costs: The proposed rule permits deferred compensation plans with fewer than 100 participants to prepare an unaudited financial statement of assets and the change in the amount of assets from the prior year and to employ a certified public accountant to conduct an agreed upon procedures engagement to assure that salary deferrals by employees are properly invested and accounted. The proposed agreed upon procedures report is a less costly alternative to an audit of plan financial statements that the rule currently requires.

5. Local government mandates: This proposed rule will reduce a current mandate.

6. Paperwork: This proposal does not increase any paperwork or reporting requirements.

7. Duplication: This rule will not duplicate, overlap or conflict with any other rule.

8. Alternatives: The Board examined procedures related to audits and agreed upon procedure engagement reports. It was determined that there were no other alternatives to achieving the goal of maintaining the principle of conducting an audit but in a more cost effective manner.

9. Federal standards: There are no federal requirements or standards related to audits to be conducted by public employers who sponsor deferred compensation plans pursuant to Section 457 of the Internal Revenue Code.

10. Compliance schedule: The proposed effective date is for plan years ending on or after December 31, 2010. The proposal provides that the agreed upon procedures engagement or audit must be completed within six months following the end of the plan year. For plan years ending on and after December 31, 2010 and before December 31, 2011, the agree upon procedures engagement or audit must be completed within 12 months following the closed of that specific plan year. This should provide sufficient time to employ a certified public accountant to conduct the administrative procedures report.

#### Revised Regulatory Flexibility Analysis

1. Effect of rule: There are approximately 225 local governments in New York State that sponsor a deferred compensation plan. The New York State Deferred Compensation Board estimates that more than 150 of those plans have fewer than 100 participants.

2. Compliance requirement: This proposed rule will provide local governments that sponsor deferred compensation plans and have fewer than 100 participants with the option to engage a certified public accountant to conduct an agreed upon procedures report related to the administration of the plan rather than an audit of the financial statements of the plan. This is a less costly procedure while maintaining the principle of conducting an annual examination of plan procedures and recordkeeping.

3. Professional services: The current rule requires that the audit of a plan's financial statements be conducted by a certified public accountant. The proper conduct of an agreed upon procedures report will also require the hiring of a certified public accountant.

4. Compliance costs: The proposed rule permits a deferred compensation plan with fewer than 100 participants to prepare an unaudited financial statement of assets and the change in the amount of assets from the prior year and to employ a certified public accountant to conduct an agreed upon procedures report to assure that salary deferrals by employees are properly invested and accounted. The proposed agree upon procedures report is a less costly alternative to an audit of financial statements that the rule currently requires.

5. Economic and technological feasibility: The conduct of an agreed upon procedures engagement is feasible.

6. Minimizing adverse impact: This proposal achieves the goal of maintaining the principle of conducting an annual examination of plan procedures and recordkeeping in a more cost effective manner. Thus, it is minimizing the adverse impact of an existing rule.

7. Small business and local government participation: Local governments that sponsored smaller deferred compensation plans expressed to the Board that conducting an audit of financial statements could be expensive in relation to the number of plan participants. The Board examined procedures related to audits and agreed upon procedures to determine a feasible alternative to the requirement that an audit of the financial statements be conducted.

#### Revised Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: There are approximately 225 local governments in New York State that sponsor a deferred

compensation plan. The New York State Deferred Compensation Board estimates that more than 150 of those plans have fewer than 100 participants. A number of these will be in rural areas.

2. Reporting, recordkeeping and other compliance requirements; and professional services: This proposed rule will provide local governments that sponsor deferred compensation plans and have fewer than 100 participants with the option to conduct an agreed upon procedures engagement related to the administration of the plan rather than an audit of the financial statements of the plan. This is a less costly procedure while maintaining the principle of conducting an annual examination of plan procedures and recordkeeping. The current rule requires that the audit of a plan's financial statements be conducted by a certified public accountant. The proper conduct of an agreed upon procedures report will also require the hiring of a certified public accountant.

3. Costs: The proposed rule permits a deferred compensation plan with fewer than 100 participants to prepare an unaudited financial statement of assets and the change in the amount of assets from the prior year and to employ a certified public accountant to conduct an agreed upon procedures engagement to assure that salary deferrals by employees are properly invested and accounted. The proposed agreed upon procedures report is a less costly alternative to an audit of financial statements that the rule currently requires.

4. Minimizing adverse impact: This proposal achieves the goal of maintaining the principle of conducting an annual examination of plan procedures and recordkeeping in a more cost effective manner. Thus, it is minimizing the adverse impact of an existing rule.

5. Rural area participation: Local governments that sponsored smaller deferred compensation plans expressed to the Board that conducting an audit of financial statements could be expensive in relation to the number of plan participants. The Board examined procedures related to audits and agreed upon procedures engagements to determine a feasible alternative to the requirement that an audit of the financial statements be conducted.

#### Revised Job Impact Statement

1. Nature of impact: This rule change does not have an identifiable impact on jobs or employment opportunities.
2. Categories and numbers affected: None.
3. Regions of adverse impact: None.
4. Minimizing adverse impact: Not applicable.
5. (IF APPLICABLE) Self-employment opportunities: None.

#### Assessment of Public Comment

The Board received two comments regarding the proposed Rule.

The New York State Society of Certified Public Accountants noted that the term "agreed upon procedures report" used in the proposed Rule does not conform to the professional standards of the public accounting profession. The Society proposed that references to an administrative procedures report be changed to the professional term of an agreed upon procedures report. The use of terminology of the professional accounting profession will lessen confusion that may exist with the intent of the proposed Rule. The Board accepted the Society's recommendation to change the terminology to professionally understood terms. The Board does not believe this change is a change of substance.

The Board also received a letter from the Supervisor of the Town of Gorham stating that he believed that an annual independent audit was "ridiculous" because there is trust that the Town has in its employees and that employees enrolled in the program monitor their accounts and would know if there was something wrong. The Board respectfully disagrees with this assertion. An independent audit or agreed upon procedure report is an effective mechanism to assure compliance and protect plan participants. Audits often reveal deficiencies that are not readily apparent.

No other comments were received.

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## Department of Environmental Conservation

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### EMERGENCY RULE MAKING

#### New Source Review Requirements for Proposed New Major Facilities and Major Modifications to Existing Facilities

I.D. No. ENV-12-11-00004-E

Filing No. 473

Filing Date: 2011-05-26

Effective Date: 2011-05-26

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

**Action taken:** Amendment of Parts 200, 201 and 231 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103 and 71-2105; and Federal Clean Air Act, sections 160-169 and 171-193 (42 USC, sections 7470-7479, 7501-7515)

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

**Specific reasons underlying the finding of necessity:** The Department's Division of Air Resources ("DAR") is amending 6 NYCRR Parts 200, 201 and 231. The revisions include two primary components, which are intended to incorporate: (1) key provisions of Environmental Protection Agency's ("EPA's") May 16, 2008 and October 20, 2010 NSR final rules for the regulation of particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers ("PM-2.5"), 73 FR 28321 ("2008 NSR PM-2.5 final rule") and 75 FR 64864 ("2010 NSR PM-2.5 final rule"), respectively; and (2) key provisions of EPA's June 3, 2010 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 FR 31514 ("GHG Tailoring Rule"). As set forth further below, failure to implement the 2008 and 2010 NSR PM-2.5 final rules would have adverse impacts on public health and general welfare in the State and necessitates the adoption of an emergency rule by the Department. Similarly, failure to adopt conforming provisions of the GHG Tailoring Rule as a matter of State law by January 2, 2011 would have adverse impacts on the State's general welfare, and necessitates the adoption of an emergency rule by the Department.

With regard to the first component of the instant action, NSR is a critical tool in meeting the Legislature's air quality objectives and ensuring that healthful air quality is preserved in areas of the State that meet the National Ambient Air Quality Standards ("NAAQS") for PM-2.5 and does not further degrade but actually improves in areas of the State which currently are not in attainment of the PM-2.5 NAAQS. Since the State of New York currently has areas that are designated nonattainment for PM-2.5, the Department must have a nonattainment NSR ("NNSR") program that meets the requirements of Part D of Title I of the Clean Air Act ("CAA") in order to adopt and implement permit programs for the construction, modification and operation of major stationary sources in nonattainment areas of the State.

Subsequent to the promulgation of NAAQS for PM-2.5, EPA designated the New York City metropolitan area as nonattainment for the PM-2.5 standard, 70 FR 944, January 5, 2005. NNSR is now required for new major facilities and major modifications to existing facilities that emit PM-2.5 in significant amounts in the PM-2.5 nonattainment area. NNSR requires that every new major facility and major modification at existing facilities in the PM-2.5 nonattainment area control emissions of direct PM-2.5 through the requirement that such sources achieve Lowest Achievable Emission Rate ("LAER") and obtain emission offsets. On May 16, 2008 and October 20, 2010, EPA published its final rules governing the implementation of the NSR program for PM-2.5. EPA's final rule requires, among other things, that permits address directly emitted PM-2.5 as well as pollutants responsible for secondary formation of PM-2.5, referred to as precursors.

With regard to the second component of the instant action, EPA has recently taken multiple actions regarding the regulation of greenhouse gases ("GHGs") under the CAA: (1) the Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 FR 66496 (December 15, 2009) ("Endangerment Finding"); (2) the Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 FR 25324 (May 7, 2010) ("Tailpipe Rule"); and (3) the Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 FR 17004 (April 2, 2010) ("Trigger Rule"). Taken together, these three EPA actions and interpretations will result in GHGs being "subject to regulation" under the CAA as of January 2, 2011. On that date, because of EPA's actions, GHGs will need to be addressed as part of the CAA's Prevention of Significant Deterioration ("PSD") and Title V permitting programs.

Also, since EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule make GHGs subject to regulation under the CAA, and because current State law uses the same relevant language as federal law, GHGs will automatically become subject to regulation as a matter of State law on January 2, 2011. Therefore, it is necessary to clarify that GHGs are required to be addressed as a matter of federal law and as a result of EPA's actions, rather than as a result of this instant action. However, this action is necessary in order to clarify and conform State law to federal law as it relates to EPA's actions to address GHG regulation under its GHG Tailoring Rule, and therein revise the relevant State applicability thresholds for GHGs under the Department's PSD and Title V programs.

On June 3, 2010, EPA published its GHG Tailoring Rule in order to ad-

dress impacts of GHGs becoming subject to regulation under the CAA as of January 2, 2011. According to EPA, the current statutory mass-based applicability thresholds in the CAA, of 100 or 250 tons per year (tpy), could subject a vast number of small GHG emission sources to PSD and Title V permitting program requirements. This would create a significant burden for smaller sources, many of which would be newly subject to PSD and Title V permitting requirements, as well as cause state and local permitting authorities to be inundated with permitting review. This impact is the result of the fact that the current applicability thresholds for those programs, while appropriate for traditional pollutants such as SO<sub>2</sub> and NO<sub>x</sub>, are not necessarily feasible for GHGs since GHGs are emitted in much higher volumes than traditional pollutants. Because of this, EPA promulgated the GHG Tailoring Rule which 'tailors' the applicability thresholds for GHGs in order to exempt small sources from being newly subject to PSD or Title V permitting program requirements. As stated in the foregoing, since existing State regulations largely track the statutory text of the CAA in terms of the relevant applicability thresholds, smaller sources in New York will be similarly impacted. Thus, irrespective of whether GHG thresholds are tailored under the federal GHG Tailoring Rule, a vast number of small GHG emission sources in New York may likewise become subject to State PSD and Title V requirements as a matter of State law on January 2, 2011.

While the Department intends to follow EPA's approach under the federal GHG Tailoring Rule, the Department needs to immediately incorporate EPA's tailored applicability thresholds into State regulations before January 2, 2011. This is necessary in order to conform State regulations to federal law as it relates to EPA's GHG Tailoring Rule, and to make clear that small sources in the State with GHG emissions below the tailored thresholds of the GHG Tailoring Rule will not be newly subject to the PSD or Title V permitting programs. Without the GHG Tailoring Rule and this action, the State's PSD and Title V permitting program requirements may apply to all stationary sources that emit or have the potential to emit GHGs at or above the CAA statutory thresholds of 100 or 250 tpy on or after January 2, 2011. Absent a State GHG tailoring rule, numerous smaller sources in New York such as schools, restaurants, and small commercial facilities may be negatively impacted by EPA's actions to regulate GHGs.

#### ADVERSE IMPACTS ON PUBLIC HEALTH

Particulate matter is a generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes. EPA first established a NAAQS for PM in 1971 and has since conducted several periodic reviews and revisions to establish both health-based (primary) and welfare-based (secondary) standards.

The health effects associated with exposure to PM-2.5 are significant. Epidemiological studies have shown a significant correlation between elevated PM-2.5 levels and premature mortality. Particulate matter, especially fine particles, contains microscopic solids or liquid droplets that can lodge deep into the lungs and cause serious health problems. Numerous scientific studies have linked particle pollution exposure to a variety of respiratory and cardiovascular problems including: increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty breathing, for example; decreased lung function; aggravated asthma; development of chronic bronchitis; irregular heartbeat; nonfatal heart attacks; and premature death in people with heart or lung disease. People with heart or lung diseases, children and older adults are the most likely to be affected by particle pollution exposure. However, even healthy people may experience temporary symptoms from exposure to elevated levels of particle pollution.

Based on the foregoing, the failure to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules may have far-reaching consequences that will adversely impact public health. Therefore, an emergency rulemaking to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules is necessary in order to preserve public health in New York State.

#### ADVERSE IMPACTS ON THE GENERAL WELFARE

In addition to the adverse public health impacts referenced above due to the State's failure to adopt and implement EPA's 2008 and 2010 NSR final rules incorporating health-based air quality standards for PM-2.5, there may also be significant impacts on the public welfare. New York currently has a PM-2.5 nonattainment area requiring the submittal of a State Implementation Plan ("SIP") revision in accordance with CAA requirements. As a result, the Department is required to submit to EPA a revised SIP incorporating the 2008 federal PM-2.5 NSR requirements prior to May 16, 2011. Since the CAA authorizes the EPA to impose significant sanctions for failure to submit a SIP or failure to implement a federal plan, including the withdrawal of federal highway funds and the imposition of two to one ("2:1") emission offset ratios to applicable new and modified sources in the State [CAA Section 179, 42 USC Section 7509], failure to submit a revised SIP by the May 16, 2011 deadline could

have far reaching consequences which may negatively impact the public welfare. For example, the stricter emissions offset ratios will impose higher costs on State emission sources or, in some cases, possibly deter sources from commencing any new construction or essential modifications. These sanctions, along with the State's lack of authorization to issue permits for new and modified sources, could have a paralyzing effect on State commerce, significantly raising the cost of doing business and effectuating a virtual ban on construction in the State. In addition, the CAA authorizes EPA to withhold funding for certain state air pollution and planning control programs and take control of a state's air permitting programs under a Federal Implementation Plan (FIP).

Based on the foregoing, the failure to submit a revised SIP in accordance with the federal NSR rule for PM-2.5 may have far-reaching consequences that will adversely impact the general welfare. Therefore, an emergency rulemaking to incorporate key provisions of EPA's 2008 and 2010 NSR PM-2.5 final rules, and by May 16, 2011 for purposes of the 2008 NSR final rule, is necessary in order to preserve the general welfare in New York State.

Similarly, the State's failure to implement, by January 2, 2011, revised applicability thresholds which conform to EPA's GHG Tailoring Rule would have significant adverse impacts on the general welfare. As stated in the foregoing, regardless of this action, as of January 2, 2011, the Department will be required to address GHG emissions in its PSD and Title V permitting programs as a result of EPA's actions to regulate GHGs. EPA's GHG Tailoring Rule, which tailors the applicability thresholds under the Title V and PSD programs, is aimed at reducing the anticipated impact on smaller sources and on state and local permitting authorities as a matter of federal law. This action is necessary to clarify and conform State regulations to federal law along with the relevant applicability thresholds as a matter of State law.

Without this action, the State's PSD and Title V permitting program requirements may apply to all stationary sources that emit more than 100 or 250 tpy of GHGs beginning on January 2, 2011. As stated in the foregoing, this is because the State's existing regulations largely track the statutory text in terms of the relevant applicability thresholds. This would result in significant adverse impacts on the general welfare for two primary reasons: (1) a vast number of small stationary sources of GHG emissions in the State would be newly required to comply with significant PSD and Title V operating permit requirements, imposing additional costs on such sources, and resulting in adverse economic impacts; and (2) the Department's PSD and Title V permitting programs would be overwhelmed by the anticipated administrative burden, severely impairing the administrative functioning of these programs, creating significant permitting delays, and resulting in significant adverse economic impact on all sources in the State that require operating permits.

If, as of January 2, 2011, the State's PSD and Title V permitting programs applied to GHGs at the current CAA statutory applicability thresholds, a significant burden would be placed on smaller sources of GHG emissions in the State to comply with PSD or Title V operating permit requirements which would have a significant adverse impact on the general welfare of the State. The statutory applicability thresholds would newly subject a vast number of small GHG emission sources, not traditionally regulated under the CAA, to these permitting program requirements. For purposes of PSD sources that fall within the 250 tpy source categories, the Department has determined that the following source types may be impacted by EPA's regulation of GHGs: gas-fired boilers over 485,000 Btu/hr; oil-fired boilers over 350,000 Btu/hr; and wood-fired boilers over 220,000 Btu/hr. For Title V sources and PSD sources that fall within the existing 100 tpy source categories, GHG regulation would impact: gas-fired boilers over 194,000 Btu/hr; oil-fired boilers over 143,000 Btu/hr; and wood-fired boilers over 89,000 Btu/hr. Based on these projections, most single family residences would not be affected. However, a significant number of facilities that emit GHGs in quantities greater than the existing thresholds, but have never before been subject to either PSD or Title V permitting requirements, would now have to address GHGs under the state's PSD or Title V permitting programs, including many schools, auto-body garages, churches, multi-family residential buildings or dwellings, warehouses, and shopping centers. These smaller sources may be unduly burdened by the cost of new regulatory requirements, particularly individualized technology control requirements under the PSD program and complex permitting review requirements under Title V. This substantial cost on a vast number of new smaller sources would have a significant adverse impact on the State's economy.

Also, if, as of January 2, 2011, the State's PSD and Title V permitting programs applied to GHGs at the current CAA statutory applicability thresholds, the administrative burden on the Department would be overwhelming. EPA estimates that under the current 100 and 250 tpy threshold levels, nearly 82,000 projects per year would become subject to PSD. 75 FR 31514 at 31538. This would result in an estimated \$1.5 billion per year in PSD permitting cost, a 130 times increase in current annual

burden hours for permitting authorities nationwide, and an increase in permit processing time from one to three years. Id. at 31539. For Title V purposes, EPA estimates that six million sources, under the current 100 tpy threshold level, would need Title V operating permits nationwide, representing for permitting authorities an additional 1.4 billion in work hours, an annual cost increase of \$21 billion, and an increase in permit processing time from six months to 10 years. Id. at 31539-31540. In addition, EPA notes that many permitting authorities will need up to two years to hire the necessary staff to handle a 10-fold increase in PSD permits, a 40-fold increase in Title V permits, and that 90 percent of staff would need additional training related to the permitting of GHG sources.

The federal requirement to review and issue a vast number of new CAA operating permits would represent a substantial administrative burden for the Department. This substantial increase would inevitably overwhelm the resources of the Department's permitting program. As a result, it would create a significant permitting backlog, resulting in extensive delays in permit issuance. Under such a scenario, new sources in the State would not be able to begin construction, nor would existing sources be able to make needed modifications, without the necessary PSD review and issuance of a Title V operating permit from the Department. Similarly, a source would not be able to operate in the State without a Title V permit from the Department. If the Department is unable to timely issue the necessary permits, many new projects may be halted for a significant period of time. Thus, particularly given the vast number of smaller sources that would be newly subject to these requirements, a substantial delay in permitting issuance would result in an adverse economic impact to the State.

Based on the foregoing, the failure to implement tailored applicability thresholds for GHGs under the State's PSD and Title V permitting programs as a matter of State law by January 2, 2011 would have significant adverse impacts on the State's permitting programs, numerous smaller sources, and the general economy. Therefore, an emergency rulemaking to incorporate key provisions of EPA's GHG Tailoring Rule prior to January 2, 2011 is necessary in order to preserve the general welfare in New York State.

#### CONCLUSIONS

The normal rulemaking process consists of several rulemaking requirements under SAPA. While the Department prefers to submit a rule through the normal State rulemaking process, compliance with the normal rulemaking requirements would be contrary to public interest since, as explained in the foregoing, the failure to implement the 2008 and 2010 federal NSR PM-2.5 final rules may unnecessarily increase the risk to public health in this State. Also, the failure to submit a revised SIP for purposes of the 2008 federal NSR PM-2.5 final rule prior to the federal deadline of May 16, 2011, and the failure to implement the GHG Tailoring Rule as a matter of State law by January 2, 2011 may have significant adverse impacts on the State's general welfare.

**Subject:** New Source Review requirements for proposed new major facilities and major modifications to existing facilities.

**Purpose:** To comply with 2008 and 2010 Federal NSR rules, correct typographical errors, and clarify existing rule language.

**Substance of emergency rule:** The Department of Environmental Conservation (Department) is proposing to amend Parts 200, 201, and 231 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, entitled "General Provisions," "Permits and Registrations" and "New Source Review for New and Modified Facilities" respectively.

The Part 200 amendments will revise the definitions of potential to emit and PM-2.5 and add definitions for greenhouse gases and CO<sub>2</sub> equivalent. The definition of potential to emit will now state that secondary emissions are not to be included when calculating an emissions source's potential to emit. The definition of PM-2.5 will no longer refer to Appendix L of Part 50 of the Code of Federal Regulations and will now state that PM-2.5 is the sum of filterable PM-2.5 and material that condenses after exiting the stack forming solid or liquid particulates. Greenhouse gases are defined as the aggregate group of carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. The definition of CO<sub>2</sub> equivalent states that each of the six greenhouse gases are multiplied by their global warming potential and summed to obtain emissions in terms of CO<sub>2</sub> equivalents.

The Part 201 amendments revise the definition of major stationary source or major source or major facility to add a CO<sub>2</sub> equivalent based greenhouse gas emission threshold. In addition to the current mass based thresholds applicable to greenhouse gases, the proposed revisions establish a CO<sub>2</sub> equivalent threshold of 100,000 tons per year for the purposes of determining if a stationary source, source, or facility is major. The definition is also revised to state that 201-2.1(b)(21)(iii) is a "Source Category List" and removes municipal waste landfills from the list.

Existing Subpart 231-2 will be revised to insert "February 19, 2009"

in place of "the effective date of Subparts 231-3 through 231-13" in the title of 231-2.

Existing Subpart 231-3 will be revised by changing the title of 231-3.2 and stating in sections 231-3.2 and 3.6 that "complete application" is referring to its definition under section 621.2. Section 231-3.3 will be removed and subsequent sections renumbered.

Existing Subpart 231-4 will be revised by adding the definition of calendar year and renumbering subsequent paragraphs, alphabetically. The definition of contemporaneous will be revised to state that it means different periods of time depending on attainment status of the location. The definitions of baseline area, major facility baseline date, and minor facility baseline date will be revised to include PM-2.5. The definition of nonattainment contaminant will be revised to include PM-2.5 precursors in the PM-2.5 nonattainment area.

Existing Subparts 231-5 and 231-6 will be revised to add regulation of PM-2.5 precursors. As a result, SO<sub>2</sub> will be regulated as a nonattainment contaminant in the PM-2.5 nonattainment area. Interpollutant trading ratios will also be added for PM-2.5 precursors so that direct emissions of PM-2.5 can be offset by reductions in PM-2.5 precursor emissions and PM-2.5 precursors can be offset by reductions in direct PM-2.5 emissions.

Existing Subpart 231-7 will be revised to reference Table 8 of 231-13 in 231-7.4(f)(6) for SO<sub>2</sub> variances.

Existing Subpart 231-8 will be revised to provide an example that shows only the same class of regulated NSR contaminant can be used for netting and reference Table 8 of 231-13 in 231-8.5(f)(6) for SO<sub>2</sub> variances.

Existing Subpart 231-9 will be revised to clarify language and allow CEMS to use performance specifications in 40 CFR 75.

Existing Subpart 231-10 will be revised to state that emission reduction credits (ERCs) must be the same type of regulated NSR contaminant for the purposes of netting. Subdivisions are added to allow interpollutant trading and to state that if a contaminant is regulated as a precursor under multiple programs only one set of offsets is required. The section titled mobile source and demand side management ERCs will be renamed to ERCs for emission sources not subject to Part 201.

Existing Subpart 231-11 will be revised to clarify sections in the 231-11.2 reasonable possibility provisions.

Existing Subpart 231-12 will be revised to include PSD increments for PM-2.5, significant impact levels for PM-2.5, significant monitoring concentration for PM-2.5, and reordering paragraphs 231-12.2(c)(2) and (3).

Existing Subpart 231-13, table 4, will be revised to include significant project thresholds, significant net emission increase thresholds, and offset ratios for PM-2.5 precursors. Table 5 of Subpart 231-13 will be revised to add greenhouse gases to the major facility thresholds for attainment and unclassified areas, and table 6 will be revised to add significant project thresholds and significant net emission increase thresholds for attainment and unclassified areas. The source category list will be removed and in its place will be a table listing global warming potential values.

**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. ENV-12-11-00004-P, Issue of March 23, 2011. The emergency rule will expire July 24, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Robert Stanton, P.E., NYSDEC Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 231nsr@gw.dec.state.ny.us

#### Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is proposing to revise 6 NYCRR Parts 200, General Provisions, 201, Permits and Registrations and 231, New Source Review (NSR) for New and Modified Facilities. First, this proposed rule will incorporate the Environmental Protection Agency's (EPA's) May 16, 2008 NSR final rule for the regulation of particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5). The Department incorporated some of EPA's final PM-2.5 requirements in its February 19, 2009 revisions to its PSD and nonattainment NSR programs (6 NYCRR Part 231). This proposed rulemaking will incorporate the remaining provisions of the federal PM-2.5 final rule which were not previously included in the 2009 revision to Part 231. Second, this proposed rule will incorporate conforming provisions to EPA's June 3, 2010 NSR final rule for the regulation of Greenhouse Gases (GHGs) under its PSD and Title V programs, referred to as the Greenhouse Gas Tailoring Rule (GHG Tailoring Rule). The proposed rule will clarify the regulation of GHGs by establishing major source applicability threshold levels for GHG emissions and other conforming changes under the State's PSD and Title V programs. Third, this proposed rule will incorporate EPA's October 20, 2010 final rule which establishes the PM-2.5 increments, significant impact levels, and significant monitoring concentration. This proposed

rulemaking is not a mandate on local governments. It applies to any entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of this regulation.

#### 1. STATUTORY AUTHORITY

The statutory authority for these regulations is found in the Environmental Conservation Law (ECL) Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 71-2103, and 71-2105, and in Sections 160-169 and 171-193 of the Federal Clean Air Act (42 USC Sections 7470-7479; 7501-7515) (Act or CAA).

#### 2. LEGISLATIVE OBJECTIVES

The Act requires states to have a preconstruction program for new and modified major stationary sources, and an operating permit program for all major sources. This rulemaking is being undertaken to satisfy New York's obligations under the Act and also to meet the environmental quality objectives of the State. This Section discusses the legislative objectives of the rulemaking, including overview of relevant federal and State statutes and regulations.

Articles 1 and 3, of the ECL, set out the overall State policy goal of reducing air pollution and providing clean air for the citizens of New York and provide general authority to adopt and enforce measures to do so. In addition to the general powers and duties of the Department and Commissioner to prevent and control air pollution found in Articles 1 and 3, Article 19 of the ECL was specifically adopted for the purpose of safeguarding the air 'quality' of New York from pollution.

In 1970, Congress amended the Act "to provide for a more effective program to improve the quality of the Nation's air." The statute directed EPA to adopt National Ambient Air Quality Standards (NAAQS) and required states to develop implementation plans known as State Implementation Plans (SIPs) which prescribed the measures needed to attain the NAAQS.

On May 16, 2008, EPA published a final rule regarding the regulation of PM-2.5 in attainment and nonattainment areas ('see' 73 Fed Reg 28321 [2008 federal NSR rule]). The May 16, 2008 federal NSR rule included the following key provisions: PM-2.5 precursors, offset trading ratios, and a SIP submission requirement.

On October 20, 2010, EPA published a final rule regarding PM-2.5 increments, significant impact levels, and significant monitoring concentration ('see' 75 Fed Reg 64864 [October 20, 2010 federal NSR rule]). The October 20, 2010 federal NSR rule included the following key provisions: PM-2.5 increments, PM-2.5 significant impact levels, PM-2.5 significant monitoring concentration, and a SIP submission requirement.

On June 3, 2010, EPA published a final NSR rule tailoring the applicability criteria that determines which stationary sources and modification projects become subject to permitting requirements for GHG emissions under the PSD and Title V operating permit (Title V) programs of the CAA ('see' 75 Fed Reg 31514 [GHG Tailoring Rule]). The GHG Tailoring Rule included key provisions regarding the list of GHGs regulated, the permitting metric used, and the permitting applicability thresholds. In response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA has taken several actions that, taken together, will result in GHGs being "subject to regulation" under the Act as of January 2, 2011. This will occur regardless of the GHG Tailoring Rule or this rulemaking. The GHG component of this rulemaking is necessary because of a number of actions taken by EPA regarding the regulation of GHGs under the CAA. This rulemaking will clarify the applicability thresholds for GHGs under the State's PSD and Title V permitting programs, in order to conform such thresholds to those set forth in the federal GHG Tailoring Rule.

#### 3. NEEDS AND BENEFITS

The Department is undertaking this rulemaking to comply with the May 16, 2008, the June 3, 2010, and the October 20, 2010 federal NSR rules promulgated by EPA, for the regulation of PM-2.5 and GHGs. The May 16, 2008 federal NSR rule modified both the nonattainment NSR and PSD regulations with respect to PM-2.5 at 40 CFR 51.165 and 52.21, respectively, and requires states with SIP approved NSR programs to revise their regulations in accordance with the May 16, 2008 federal NSR rule and submit the revisions to EPA for approval into the SIP. The GHG Tailoring Rule modified the PSD regulations with respect to GHGs at 51.166 and 52.21; the Title V regulations at 70.2, 70.12, 71.2 and 71.13; and requires states with SIP approved NSR programs to revise their regulations in accordance with the GHG Tailoring Rule and submit the revisions to EPA for approval into the SIP. The October 20, 2010 federal NSR rule modified both the nonattainment NSR and PSD regulations with respect to PM-2.5 at 40 CFR 51.165 and 52.21, respectively, and requires states with SIP approved NSR programs to revise their regulations in accordance with the October 20, 2010 federal NSR rule and submit the revisions to EPA for approval into the SIP.

On December 15, 2009, EPA published its Endangerment Finding stating that GHGs contribute to climate change and are a threat to public health and the welfare of current and future generations. 'See', 74 Fed. Reg.

66,496. According to EPA, the combination of six well-mixed GHGs found in the Earth's atmosphere - carbon dioxide (CO<sub>2</sub>); methane (CH<sub>4</sub>); nitrous oxide (N<sub>2</sub>O); hydrofluorocarbons (HFCs); perfluorocarbons (PFCs); and sulfur hexafluoride (SF<sub>6</sub>) - form the "air pollutant" that may be subject to regulation under the CAA. 'Id'.

Following the Endangerment Finding, EPA finalized a rule establishing emission standards for GHGs from passenger cars and light-duty trucks, starting with model year 2012 vehicles. 'See' 75 Fed. Reg. 25,324 (May 7, 2010) ("Tailpipe Rule"). EPA also issued an interpretation that a pollutant is "subject to regulation" if it is subject to a CAA requirement establishing "actual control of emissions." 75 Fed. Reg. 17,004, 17,006 (April 2, 2010) ("Trigger Rule"). Taken together, the Endangerment Finding, Tailpipe Rule, and Trigger Rule will result in GHGs being "subject to regulation" under the CAA as of January 2, 2011. On that date, because of EPA's actions, GHGs will need to be addressed as part of the CAA's PSD and Title V permitting programs, regardless of this rulemaking.

Since many states, including New York, have incorporated identical or federally-conforming provisions into their state PSD and Title V programs, GHGs will also need to be addressed as a matter of State law. However, without this rulemaking, the literal application of the current thresholds under the State's PSD and Title V provisions will have the same adverse impact on State stationary sources and the State's permitting programs as described in the federal GHG Tailoring Rule. This means that, without this rulemaking to clarify and tailor the existing applicability thresholds in a similar manner as the federal GHG Tailoring Rule, a vast number of newly regulated facilities within the State would be required to comply with the State's existing PSD and Title V program requirements as of January 2, 2011.

Once GHGs become subject to regulation under the CAA, necessitating the review and processing of possibly thousands of new permits under the State's PSD or Title V permitting programs, the Department's ability to maintain these programs under the existing thresholds applicable to GHGs will be significantly impaired. This proposed rule incorporates and otherwise conforms to the key provisions of the federal GHG Tailoring Rule, including provisions to "tailor" the existing applicability thresholds under the PSD and Title V permitting programs, in order to reduce the anticipated burdens on newly regulated facilities in the state and to alleviate the projected impairment of the state's PSD and Title V programs.

The Part 200 amendments will revise the definitions of potential to emit and PM-2.5 as well as add definitions for GHG and CO<sub>2</sub> equivalent (CO<sub>2</sub>e). The definition of potential to emit will be changed to specify that secondary emissions are not included in a facility's potential to emit. The definitions of PM-10 and PM-2.5 will now state that condensable emissions are included.

The definition of major stationary source or major source or major facility in Part 201 will be modified for GHGs to clearly establish its threshold at 100,000 tpy CO<sub>2</sub>e in addition to maintaining the current mass based emission thresholds.

The Part 231 amendments will include the remaining provisions from EPA's May 16, 2008 PM-2.5 rule and include provisions for regulating GHGs under PSD. Precursors of PM-2.5, SO<sub>x</sub> and NO<sub>x</sub>, have been added as nonattainment contaminants in the PM-2.5 nonattainment area. New York State has determined that emissions of VOCs and ammonia should not be included as PM-2.5 precursors. Interpollutant trading ratios have been added for PM-2.5 precursors by which direct emissions of PM-2.5 can be offset by reductions of SO<sub>2</sub> and/or NO<sub>x</sub>. For GHGs the major facility threshold and significant project/significant net emission increase threshold have been clearly established as 100,000 tpy CO<sub>2</sub>e and 75,000 tpy CO<sub>2</sub>e, respectively, while maintaining the current mass based thresholds. A table has been added to 231-13 that lists the global warming potential (GWP) of the six individual gases that comprise GHGs and references the table in the federal GHG Mandatory Reporting Rule. For PSD and Title V applicability, a source's GHG emissions must equal or exceed both the mass based and CO<sub>2</sub>e based emission thresholds. In accordance with the October 20, 2010 federal NSR rule PM-2.5 increments, SILs, and SMC have been added to their respective tables in Part 231.

These amendments will also correct existing typographical errors identified after the previous rulemaking (February 19, 2009) was completed and clarify sections of existing Parts 200, 201, and 231.

#### 4. COSTS

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will

cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 related to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO<sub>2</sub> and NO<sub>x</sub>, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO<sub>2</sub> as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO<sub>x</sub> as a precursor will be minimal. NO<sub>x</sub> is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to 1 while the ratio is 1 to 1 from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO<sub>x</sub> for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO<sub>x</sub> would include the application of LAER at 40 tpy instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with inter-pollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO<sub>2</sub> or NO<sub>x</sub> to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHG's "subject to regulation" as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule, which will result in GHGs becoming subject to regulation under the CAA on January 2, 2011. One of the primary purposes of the GHG component of this rulemaking is to alleviate any such new costs by conforming State regulations to the federal GHG Tailoring Rule.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by EPA<sup>1</sup>, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately 6 million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal. As stated previously, the costs associated with complying with PSD and Title V permitting requirements for GHGs are not directly attributable to these proposed amendments. Instead, any such costs are attributable to EPA's actions to regulate GHGs under the CAA.

#### 5. PAPERWORK

The proposed amendments to Part 231 are not expected to entail any significant additional paperwork for the Department, industry, or State and local governments beyond that which is already required to comply with the Department's existing permitting program under Part 201-6 and existing NSR regulations under Part 231.

#### 6. STATE AND LOCAL GOVERNMENT MANDATES

The adoption of the proposed amendments to Part 231 are not expected to result in any additional burdens on industry, State, or local governments beyond those currently incurred to comply with the requirements of the existing NSR process under Part 201-6, and Part 231. The proposed amendments do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of Part 231.

#### 7. DUPLICATION

This proposal is not intended to duplicate any other federal or State regulations or statutes. The proposed amendments to Part 231 will ultimately conform the regulation to the CAA.

#### 8. ALTERNATIVES

##### 1. Take No Action.

The State would be in violation of federal law if no action is undertaken. New York State is required to have a SIP approved permitting program for PM-2.5 for NNSR by May 16, 2011. As for GHGs, absent the relief provided for GHG emission sources and state permitting authorities under the federal GHG Tailoring Rule, the permitting thresholds for GHGs would be set at 100 tpy and 250 tpy under the PSD program and 100 tpy under the Title V program. Under these thresholds, it is anticipated that a massive number of smaller sources, including farms, schools, and apartment buildings, would be required to comply with state PSD and Title V program requirements. Many of these sources have never had to address these types of requirements since most of these sources are too small to meet the applicability thresholds for the traditional pollutants, such as SO<sub>x</sub> and NO<sub>x</sub>, or have been considered exempted activities under current law. Also, as EPA recognized in its GHG Tailoring Rule, these newly subject sources of GHG emissions would undoubtedly inundate and overwhelm state permitting authorities and likely result in significant processing delays, as well as a substantial burden on the state's permitting system in general. While the existing Part 231 provisions allow for the regulation of GHGs consistent with the federal GHG Tailoring Rule, the proposed rulemaking will clarify the new Part 231 GHG requirements for the regulated community and conform Part 231 to the federal GHG Tailoring Rule in order to reduce the anticipated burden on newly subjected sources and the State's PSD and Title V permitting programs.

##### 9. FEDERAL STANDARDS

The proposed amendments to Part 231 are consistent with federal NSR standards.

##### 10. COMPLIANCE SCHEDULE

The proposed amendments do not involve the establishment of any compliance schedules. The regulation will take effect 30 days after publication in the State Register, anticipated to be in May 2011. Current permit renewal schedules for regulated industries will continue and provisions of this regulation will be incorporated at the time of permit renewal. Permits for new facilities and permit modifications for existing facilities will continue to be addressed upon submittal of a permit application by the facility, and subsequent review of such application by the Department.

<sup>1</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

#### Regulatory Flexibility Analysis

##### EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS:

Small businesses are those that are independently owned, located within New York State, and that employ 100 or fewer persons.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide. The proposed Part 231 greenhouse gas (GHG) applicability thresholds for facilities in New York State are high enough so that it is unlikely that any small business or local government that owns or operates a facility would be newly subject to the requirements of Part 231. The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule (75 Fed Reg 31514 [GHG Tailoring Rule]) modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. All of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO<sub>2</sub> and NO<sub>x</sub>) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5 significant impact levels will be added, and greenhouse gases will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate

cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231.

#### COMPLIANCE REQUIREMENTS:

There are no specific requirements in this rulemaking which apply exclusively to small businesses or local governments. As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 51.165, 40 CFR 52.21, and 40 CFR 70. Accordingly, these requirements are not anticipated to place any undue burden of compliance on small businesses and local governments. This proposed rulemaking is not a mandate on local governments. It applies to any entity that owns or operates a source that proposes a project with emissions greater than the applicability thresholds of this regulation.

#### PROFESSIONAL SERVICES:

The professional services for any small business or local government that is subject to Part 231 are not anticipated to significantly change from the type of services which are currently required to comply with NSR requirements. The need for consulting engineers to address NSR applicability and permitting requirements for any new major facility or major modification proposed by a small business or local government will continue to exist.

#### COMPLIANCE COSTS:

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 relating to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO<sub>2</sub> and NO<sub>x</sub>, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO<sub>2</sub> as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO<sub>x</sub> as a precursor will be minimal. NO<sub>x</sub> is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to one while the ratio is one to one from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO<sub>x</sub> for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO<sub>x</sub> would include the application of LAER at 40 tons per year (tpy) instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with interpollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO<sub>2</sub> or NO<sub>x</sub> to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHGs "subject to regulation" under the Clean Air Act as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule ("See", Regulatory Impact Statement). One of the primary purposes of the proposed revisions to Part 231 regarding GHGs is to reduce the anticipated costs that would otherwise have been borne by facilities in New York when GHG emissions become regulated under federal law. This is accomplished by conforming State regulations to the federal GHG Tailoring Rule, and raising the applicability thresholds for GHGs under the federal PSD and Title V permitting programs. By tailoring the applicability thresholds for GHGs, and conforming such thresholds to those set forth in EPA's GHG Tailoring Rule, the proposed rule will ensure that only the largest sources of GHG emissions will be required to comply with new PSD and Title V permitting requirements.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by

EPA<sup>1</sup>, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately 6 million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal.

NSR requirements flow from the State's obligations under the CAA. Therefore, the proposed revisions to the NSR requirements of Part 231 do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates an emission source that proposes a project with emissions greater than the applicability thresholds of this regulation. No specific additional costs will be incurred by state and local governments.

#### MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on any small business or local government. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller facilities with respect to GHGs as a result of the increased permitting thresholds and it is not anticipated that many facilities will be newly subject to Title V and PSD as a result of the regulation of GHGs.

#### SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The Department plans on holding a stakeholder meeting in December 2010 to present the proposed changes to the public and regulated community. The Department will also hold public hearings during the public comment period at several locations throughout the State. Small businesses and local governments will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

#### ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed revisions do not substantially alter the requirements for subject facilities as compared to those requirements that currently exist. The revisions leave intact the major NSR requirements for application of LAER or BACT as appropriate, modeling, and emission offsets. Therefore, the Department believes there are no additional economic or technological feasibility issues to be addressed by any small business or local government that may be subject to the proposed rulemaking.

<sup>1</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

#### *Rural Area Flexibility Analysis*

##### TYPES AND ESTIMATED NUMBERS OF RURAL AREAS AFFECTED:

Rural areas are defined as rural counties in New York State that have populations less than 200,000 people, towns in non-rural counties where the population densities are less than 150 people per square mile and villages within those towns.

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking will apply statewide and all rural areas of New York State will be affected.

The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. All of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO<sub>2</sub> and NO<sub>x</sub>) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5 significant impact levels will be added, and greenhouse gases (GHGs) will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231.

#### COMPLIANCE REQUIREMENTS:

There are no specific requirements in this rulemaking which apply exclusively to rural areas of the State. As described above, the revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State and under 40 CFR 51.165, 40 CFR 52.21, and 40 CFR 70. As such, the professional services that will be needed by any facility located in a rural area are not anticipated to significantly change from the type of services which are currently required to comply with NSR requirements.

#### COSTS:

NSR reviews are conducted for new NSR major facilities or when an existing facility proposes a modification which by itself is major for NSR. NSR reviews are done on a case-by-case basis so the cost of compliance is facility specific. For existing facilities already regulated under Part 231, no new permits, records, or reports will be required by the Department for continued compliance with the proposed revisions. Newly subject facilities will be required to conduct the same case-by-case analysis required in the existing Part 231 as they will be required to conduct in the proposed revisions to Part 231. Therefore, the proposed revisions to Part 231 will cause no additional costs to existing facilities that are already subject to the requirements of NSR and only minimal additional costs to new facilities subject to Part 231.

The proposed amendments to Part 231 relating to PM-2.5 will result in some new requirements and costs for newly subject facilities. Additional costs will be incurred due to the fact that precursors to PM-2.5, SO<sub>2</sub> and NO<sub>x</sub>, will now be regulated as nonattainment contaminants in the PM-2.5 nonattainment area. Emission offsets will now be required for emission increases of SO<sub>2</sub> as well as the application of LAER. There are no new costs for emission offsets of direct emissions of PM-2.5. Any additional costs from the regulation of NO<sub>x</sub> as a precursor will be minimal. NO<sub>x</sub> is already subject to nonattainment review, as an ozone precursor, for the entire PM-2.5 nonattainment area in New York State and requires an offset ratio of at least 1.15 to one while the ratio is one to one from the PM-2.5 rule. In the situation where a pollutant is required to obtain offsets for multiple programs (e.g. NO<sub>x</sub> for ozone and PM-2.5) offsets are only required for the program with the higher ratio which is ozone in all of New York's PM-2.5 nonattainment area. Additional costs for NO<sub>x</sub> would include the application of LAER at 40 tons per year (tpy) instead of 100 tpy for facilities located in upper Orange County. Other costs include those associated with interpollutant offset trading. The current availability of PM-2.5 offsets may require facilities to use reductions of SO<sub>2</sub> or NO<sub>x</sub> to offset increases in PM-2.5 emissions. The offset trading ratios developed by EPA and included in the proposed revisions to Part 231 may increase costs to facilities versus obtaining direct PM-2.5 offsets.

As a result of EPA's actions making GHGs "subject to regulation" under the Clean Air Act as of January 2, 2011 there may be some new requirements and costs for newly subject facilities. However, these new costs, if any, are not directly attributable to this proposed rule, but are a result of EPA's actions under the Endangerment Finding, Tailpipe Rule, and Trigger Rule ("See", Regulatory Impact Statement). One of the primary purposes of the proposed revisions to Part 231 regarding GHGs is to reduce the anticipated costs that would otherwise have been borne by facilities in New York when GHG emissions become regulated under federal law. This is accomplished by conforming State regulations to the federal GHG Tailoring Rule, and raising the applicability thresholds for GHGs under the federal PSD and Title V permitting programs. By tailoring the applicability thresholds for GHGs, and conforming such thresholds to those set forth in EPA's GHG Tailoring Rule, the proposed rule will ensure that only the largest sources of GHG emissions will be required to comply with new PSD and Title V permitting requirements.

As with NSR program requirements in general, the costs associated with the regulation of GHGs are project specific and are determined on a case-by-case basis. With multiple gases being regulated as GHGs, the costs will vary by facility depending on which GHGs are being emitted and which gas or gases is of concern. Based on information collected by EPA<sup>1</sup>, the average permitting costs for an industrial facility due to the regulation of GHGs will be \$46,400 for Title V and \$84,500 for PSD. The Department believes that the cost for State sources to comply with PSD and Title V requirements under the existing applicability thresholds would be consistent with EPA estimates. However, the applicability thresholds at which GHGs will be regulated under the proposed tailoring approach is high enough so that it is not anticipated that many facilities will be newly affected by Title V or PSD program requirements. The proposed amendments to Part 231 will provide regulatory and cost relief for numerous smaller facilities which would otherwise be subject to Title V or PSD under the current thresholds. Nationwide, EPA estimates that approximately six million facilities will avoid Title V permitting and over 80,000 facilities will avoid PSD permitting using the proposed tailored thresholds. For larger facilities that will be subject to PSD and Title V permitting program requirements on or after January 2, 2011, meaning that they will have emission of GHGs in quantities greater than the tailored thresholds, any additional costs imposed on those facilities as a result of EPA's actions to regulate GHGs under the Act, if any, is anticipated to be minimal.

NSR requirements flow from the State's obligations under the CAA. Therefore, the proposed revisions to the NSR requirements of Part 231 do not constitute a mandate on state and local governments. NSR requirements apply equally to every entity that owns or operates an emission source that proposes a project with emissions greater than the applicability thresholds of this regulation. No specific additional costs will be incurred by rural areas of the State.

#### MINIMIZING ADVERSE IMPACT:

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on rural areas. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller facilities with respect to GHGs as a result of the increased permitting thresholds. It is not anticipated that many facilities will be newly subject to Title V or PSD as a result of the regulation of GHGs.

#### RURAL AREA PARTICIPATION:

The Department plans on holding a stakeholder meeting in December 2010 to present the proposed changes to the public and regulated community. The Department will also hold public hearings during the public comment period at several locations throughout the State. Residents of rural areas of the State will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

<sup>1</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule, 75 Fed Reg 31514-31608

#### Job Impact Statement

##### NATURE OF IMPACT:

The New York State Department of Environmental Conservation (Department) proposes to revise 6 NYCRR Parts 200, 201, and 231. The proposed rulemaking revisions will apply statewide. The amendments to the regulations are not expected to negatively impact jobs and employment opportunities in New York State.

The Department is undertaking this rulemaking to comply with 2008 and 2010 federal New Source Review (NSR) and Title V rule revisions. The May 16, 2008 federal NSR rule modified both the Nonattainment New Source Review and Prevention of Significant Deterioration (PSD) regulations at 40 CFR 51.165 and 52.21, respectively. The June 3, 2010 federal NSR rule modified the PSD regulation at 40 CFR 52.21 and Title V at 40 CFR 70. The October 20, 2010 federal NSR rule modified both the Nonattainment New Source Review and PSD regulations at 40 CFR 51.165 and 52.21, respectively. Both of these federal NSR rules require states with a State Implementation Plan (SIP) approved NSR program to revise their regulations and submit the revisions to EPA for approval into their SIP. The Department's existing NSR program at Part 231 is subject to this requirement.

The revisions to Part 231 do not substantially alter the requirements for the permitting of new and modified major stationary sources which are currently in effect in New York State. The revisions leave intact the major NSR requirements for application of Lowest Achievable Emission Rate (LAER) or Best Available Control Technology (BACT) as appropriate, modeling, and emission offsets. As a result of this rulemaking, particulate matter or particles with an aerodynamic diameter less than or equal to 2.5 micrometers (PM-2.5) precursors (SO<sub>2</sub> and NO<sub>x</sub>) will be regulated as nonattainment contaminants in the PM-2.5 nonattainment area, PM-2.5

significant impact levels will be added, and greenhouse gases (GHGs) will be regulated statewide under Title V and PSD. GHG permitting thresholds will be added at increased levels from the current limits resulting in only a small number of facilities newly subject to Title V and/or PSD. Many of the significant requirements are not changing: new or modified major facilities will still have to undertake applicability reviews and in appropriate cases submit permit applications and undertake control technology reviews. These revisions will also correct existing typographical errors identified after the previous Part 231 rulemaking was completed, and clarify specific sections of existing Parts 200, 201 and 231. The Department does not anticipate that any of the proposed rule revisions would adversely affect jobs or employment opportunities in the State.

**CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED:**

Due to the nature of the proposed amendments to Part 231, as discussed above, no measurable negative effect on the number of jobs or employment opportunities in any specific job category is anticipated. There may be some job opportunities for persons providing consulting services and/or manufacturers of pollution control technology in relation to the new requirements.

**REGIONS OF ADVERSE IMPACT:**

There are no regions of the State where the proposed revisions would have a disproportionate adverse impact on jobs or employment opportunities. The existing NSR requirements are not being substantially changed from those that currently exist.

**MINIMIZING ADVERSE IMPACT:**

The proposed rulemaking revisions as described above are not expected to create significant adverse impacts on existing jobs or promote the development of any significant new employment opportunities. The proposed revisions will not alter the way the current regulations are implemented but instead include the regulation of PM-2.5 precursors, increments, significant impact levels, significant monitoring concentration, and GHGs. The proposed revisions to Parts 200, 201, and 231 will provide regulatory relief for smaller sources with respect to GHGs. The current statutory emission thresholds (mass based) for Title V applicability of 100 tons per year (tpy), and PSD applicability of 100 tpy and 250 tpy are "tailored" for GHG emissions under this rulemaking. For purposes of Title V applicability, in addition to the current mass based threshold, this rulemaking establishes a GHG carbon dioxide equivalent (CO<sub>2</sub>e) threshold of 100,000 tpy. For purposes of PSD applicability, in addition to the current mass based thresholds, this rulemaking establishes a GHG CO<sub>2</sub>e major facility threshold of 100,000 tpy and a CO<sub>2</sub>e major modification threshold for existing major facilities of 75,000 tpy. As a result of the increased thresholds proposed in this rulemaking, it is not anticipated that many facilities will be newly subject to Title V and PSD program requirements as a result of EPA's actions to regulate GHGs under the Clean Air Act.

**SELF-EMPLOYMENT OPPORTUNITIES:**

The types of facilities affected by these regulatory changes are larger operations than what would typically be found in a self-employment situation. There may be an opportunity for self-employed consultants to advise facilities on how best to comply with the revised requirements. The proposed revisions are not expected to have any measurable negative impact on opportunities for self-employment.

**Assessment of Public Comment**

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

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## Department of Health

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### EMERGENCY RULE MAKING

**Hospital Temporary Rate Adjustments**

**I.D. No.** HLT-24-11-00008-E

**Filing No.** 496

**Filing Date:** 2011-05-31

**Effective Date:** 2011-05-31

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

**Action taken:** Amendment of section 86-1.31 of Title 10 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** Paragraph (b) of subdivision 35 of section 2807-c of the Public Health Law (as added by Section 2 of Part C of Chapter 58 of the Laws of 2009) specifically provides the Commissioner of Health with authority, effective for periods on and after December 1, 2009, to issue emergency regulations in order to compute hospital inpatient rates as authorized in accordance with the provisions of such subdivision 35.

**Subject:** Hospital Temporary Rate Adjustments.

**Purpose:** No longer require that a merger, acquisition or consolidation needs to occur on or after the year the rate is based upon.

**Text of emergency rule:** Paragraph (1) of subdivision (b) of section 86-1.31 is amended to read as follows:

(1) The commissioner may grant approval of a temporary adjustment to rates calculated pursuant to this section for hospitals subject to mergers, acquisitions or consolidations [occurring on or after the year the rate is based upon,] provided such hospitals demonstrate through submission of a written proposal that the merger, acquisition or consolidation will result in an improvement to:

- (i) cost effectiveness of service delivery;
- (ii) quality of care; and
- (iii) factors deemed appropriate by the commissioner.

Such written proposal shall be submitted to the department 60 days prior to the requested effective date of the temporary rate adjustment. The temporary rate adjustment shall consist of the various operating rate components of [the surviving entity] that portion of the facility originally associated with the surviving provider number and shall be in effect for a specified period of time as approved by the commissioner. At the end of the specified timeframe, the hospital will be reimbursed in accordance with the statewide methodology set forth in this Subpart. *The commissioner may establish, as a condition of receiving such a temporary rate adjustment, benchmarks and goals to be achieved as a result of the ongoing consolidation efforts and may also require that the hospital submit such periodic reports concerning the achievement of such benchmarks and goals as the commissioner deems necessary. Failure to achieve satisfactory progress, as determined by the commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the hospital's temporary rate adjustment prior to the end of the specified timeframe.*

**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 August 28, 2011.

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

**Regulatory Impact Statement**

Statutory Authority:

The statutory authority for this regulation is contained in Section 2807-c (35)(b) of the Public Health Law (PHL) which authorizes the Commissioner to promulgate regulations, including emergency regulations, with regard to Medicaid reimbursement rates for general hospital inpatient services. Such inpatient rate regulations are set forth in Subpart 86-1 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-1 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, Paragraph (1) of subdivision (b) of section 1.31 will be amended to eliminate the requirement that the merger, acquisition or consolidation needs to occur on or after the year the rate is based upon. The current base year for hospital inpatient rate purposes is 2005, as required pursuant to PHL § 2807-c(35)(a). Thus, the proposed amendment will permit temporary rate adjustments in connection regard to mergers, acquisitions and/or consolidations that occurred prior to 2005, provided that the hospital is engaged in an ongoing process of consolidation and/ restructuring related to such merger, acquisition and/or consolidation. The temporary rate adjustment will also be revised to consist of the operating rate components of that portion of the facility originally associated with the surviving provider number and shall be in effect for a specified period of time as approved by the Commissioner. This regulation is necessary in order to provide needed relief to providers who meet the criteria.

The existing section 86-1.31(b) requires hospitals seeking temporary rate adjustments to submit a written proposal demonstrating how the temporary additional reimbursement will be utilized to enhance the facility's long-term efficiency and quality of care. The proposed amendments permits the Commissioner to establish benchmarks and goals concerning the facility's implementation of its proposal as a condition for

receipt of the temporary rate adjustment. Such hospitals may also be required to submit such periodic reports concerning the achieving of such benchmarks and goals as the Commissioner deems necessary. Failure to achieve satisfactory progress, as determined by the Commissioner, in accomplishing such benchmarks and goals shall be a basis for ending the hospital's temporary rate adjustment prior to the end of the specified timeframe.

**Needs and Benefits:**

This regulation can promote the elimination of underutilized services or the consolidation of others. Hospitals can identify the persistent inefficiencies and resource limitations within their system so that scarce health care dollars are not at risk. Teaching programs can be integrated to better serve patients. The combination hospitals licensed under Article 28, where such a combination is consistent with the public need, could create a new, more economical entity and may result in the potential reduction of excess beds and/or improved service delivery. The additional reimbursement provided by this adjustment can support any resulting hospital in achieving these goals, thus improving quality while reducing health care costs.

**Costs:**

**Costs to Private Regulated Parties:**

There will be no additional costs to private regulated parties. Hospitals are currently required to file annual certified cost reports and submit claim forms for Medicaid reimbursement. The only additional data requested from providers would be periodic reports demonstrating progress against benchmarks and goals.

**Costs to State Government:**

The estimated net aggregate increase in gross Medicaid expenditures attributable to this proposed initiative for State fiscal year 2010/2011 is \$2.6 million, which on a full annual basis would increase to \$7.9 million. This estimate is based on current cost projections concerning existing mergers, acquisitions and/or consolidations which may qualify for a temporary rate adjustment in accordance with the specified criteria.

**Costs to Local Government:**

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

**Costs to the Department of Health:**

There will be no additional costs to the Department of Health as a result of this proposed regulation.

**Local Government Mandates:**

The proposed regulation 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:**

Since meeting benchmarks and goals is required in order to receive this temporary rate adjustment, a hospital is required to submit periodic reports, as determined by the Commissioner, concerning the achievement of such benchmarks and goals.

**Duplication:**

This is an amendment to an existing State regulation and does not duplicate any existing federal, state or local regulations.

**Alternatives:**

No significant alternatives are available. Any potential hospital projects that would otherwise qualify for funding pursuant to the revised regulation would, in the absence of this amendment, either not go forward or would have to be attempted with existing facility resources.

**Federal Standards:**

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

**Compliance Schedule:**

The proposed regulation provides the Commissioner of Health the authority to grant approval of temporary adjustments to rates calculated for hospitals subject to mergers, acquisitions or consolidations for inpatient payment rates for rate periods on and after December 2, 2010.

**Regulatory Flexibility Analysis**

**Effect of Rule:**

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

No health care providers subject to this regulation will see a decrease in average per discharge Medicaid funding as a result of this regulation.

This rule will have no direct effect on local governments.

**Compliance Requirements:**

Hospitals that receive the temporary rate adjustment under this regulation will be required to submit periodic reports demonstrating their progress against benchmarks and goals established by the Commissioner.

The rule will have no direct effect on local governments.

**Professional Services:**

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

**Compliance Costs:**

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

**Economic and Technological Feasibility:**

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

**Minimizing Adverse Impact:**

This regulation provides needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

**Small Business and Local Government Participation:**

The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State plan amendment. The Notice further invited the public to review and comment on the related proposed State plan amendment. In addition, contact information for the Department of Health was provided for anyone interested in further information.

**Rural Area Flexibility Analysis**

**Effect on Rural Areas:**

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

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene	Saratoga	

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

**Compliance Requirements:**

For hospitals that receive the temporary rate adjustment, periodic reports must be submitted which demonstrate the achievement of benchmarks and goals set by the Commissioner.

**Professional Services:**

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

**Compliance Costs:**

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

**Minimizing Adverse Impact:**

This regulation provides needed relief to eligible providers, thus a positive impact for small businesses that are eligible and no impact for the remainder. In addition, local districts' share of Medicaid costs is statutorily capped; therefore, there will be no adverse impact to local governments as a result of this proposal.

**Rural Area Participation:**

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

#### **Job Impact Statement**

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rule, that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulation eliminates the requirement that a merger, acquisition or consolidation needs to occur on or after the year the rate is based upon in such cases where a hospital receives a temporary adjustment to rates as a result of a merger, acquisition or consolidation. The proposed regulation has no implications for job opportunities.

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## Public Service Commission

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### NOTICE OF ADOPTION

#### **Standardized Facility and Equipment Transfer (SAFET) Program**

**I.D. No.** PSC-20-10-00006-A

**Filing Date:** 2011-05-25

**Effective Date:** 2011-05-25

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

**Action taken:** On 5/19/11, the PSC adopted an order approving the implementation of a standardized facility and equipment transfer (SAFET) program for all pole owners and attaching entities.

**Statutory authority:** Public Service Law, sections 2(12), (18), 4(1) and 5(1)

**Subject:** Standardized facility and equipment transfer (SAFET) program.

**Purpose:** To approve a standardized facility and equipment transfer (SAFET) program.

**Substance of final rule:** The Commission, on May 19, 2011 adopted an order approving the implementation of a standardized facility and equipment transfer (SAFET) program for all pole owners and attaching entities, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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

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

(08-M-0593SA1)

### NOTICE OF ADOPTION

#### **Staff's Recommendations Relative to Electricity Utility Transmission Right-of-Way Management Practices**

**I.D. No.** PSC-01-11-00013-A

**Filing Date:** 2011-05-27

**Effective Date:** 2011-05-27

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

**Action taken:** On 5/19/11, the PSC adopted an order approving recommendations to clarify and improve an Order Instituting Proceeding issued April 20, 2010 for utility practices regarding High Voltage Transmission Right-of-Way Management practices.

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

**Subject:** Staff's recommendations relative to electricity utility transmission right-of-way management practices.

**Purpose:** To approve staff's recommendations relative to electricity utility transmission right-of-way management practices.

**Substance of final rule:** The Commission, on May 19, 2011 adopted an order approving Public Service Commission Staff's recommendations to clarify and improve an Order Instituting Proceeding issued April 20, 2010 for utility practices regarding High Voltage Transmission Right-of-Way Management practices. Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation (collectively, the "utilities") shall maintain sufficient qualified staff to implement their respective Commission-approved right-of-way (ROW) management plans, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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

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

(10-E-0155SA2)

### NOTICE OF ADOPTION

#### **Method for Calculating Net Metering Credits to Eligible Net Metering Customers**

**I.D. No.** PSC-07-11-00006-A

**Filing Date:** 2011-05-25

**Effective Date:** 2011-05-25

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

**Action taken:** On 5/19/11, the PSC adopted an order directing the six major electric utilities to implement the method for calculating net metering credits beginning on 6/1/11.

**Statutory authority:** Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (5), (12), 66-j and 66-l

**Subject:** Method for calculating net metering credits to eligible net metering customers.

**Purpose:** To approve the method for calculating net metering credits issued to eligible net metering customers.

**Substance of final rule:** The Commission, on May 19, 2011 adopted an order directing the six major electric utilities; Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation d/b/a National Grid; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation to implement the interpretation in performing their calculations of net metering credits beginning on June 1, 2011. The calculation shall be implemented by applying it to bills issued on or after June 1, 2011, subject to the terms and conditions set forth in the order.

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

**Text of rule may be obtained from:** Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann\_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

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

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

(10-E-0645SA1)

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

**To Allow Master Metering of Water to a Multiple Dwelling**

**I.D. No.** PSC-24-11-00006-P

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

**Proposed Action:** The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by Rockland Housing Action Coalition for a waiver to United Water New York tariff requiring installation of individual water meters.

**Statutory authority:** Public Service Law, section 89

**Subject:** To allow master metering of water to a multiple dwelling.

**Purpose:** United Water New York Tariff requires the installation of separate meters in each dwelling.

**Substance of proposed rule:** The Public Service Commission will consider a request by Rockland County Housing Action Coalition, to waive the tariff requirement of United Water New York to install separate water meters for each premise located at Pipetown Hill Road, Hyenga Lake, New York a newly developed low-income senior rental housing complex. The Commission may approve, deny or modify, in whole or in part, this 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, Three Empire State Plaza, Albany, New York 10007, (518) 486-2655, email: [leann\\_ayer@dps.state.ny.us](mailto:leann_ayer@dps.state.ny.us)

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: [Secretary@dps.state.ny.us](mailto:Secretary@dps.state.ny.us)

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

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

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

(11-W-0274SP1)

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

**Revenue Decoupling Mechanism**

**I.D. No.** PSC-24-11-00007-P

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

**Proposed Action:** The Commission is considering a petition filed by Orange and Rockland Utilities, Inc. to revise the revenue decoupling mechanism (RDM) reconciliation methodology.

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

**Subject:** Revenue Decoupling Mechanism.

**Purpose:** To revise the RDM reconciliation methodology.

**Substance of proposed rule:** The Commission is considering a petition filed by Orange and Rockland Utilities, Inc. (O&R) to revise its Rate Year 3 annual revenue decoupling mechanism (RDM) reconciliation methodology. O&R proposes to combine voluntary time-of-use service classifications with their otherwise applicable service classifications. The Commission may adopt in whole or in part, modify or reject O&R's petition, and may apply its decision to other utilities.

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

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

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

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

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

(07-E-0949SP6)

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## Workers' Compensation Board

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**EMERGENCY  
RULE MAKING**

**Filing Written Reports of Independent Medical Examinations (IMEs)**

**I.D. No.** WCB-24-11-00003-E

**Filing No.** 475

**Filing Date:** 2011-05-26

**Effective Date:** 2011-05-27

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

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

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

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

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

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

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

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

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

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires August 23, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Heather MacMaster, Workers' Compensation Board, Office of General Counsel, 20 Park Street, Albany, NY 12207, (518) 486-9564, email: [regulations@wcb.state.ny.us](mailto:regulations@wcb.state.ny.us)

**Regulatory Impact Statement**

1. Statutory authority:

The Workers' Compensation Board (hereinafter referred to as

Board) is clearly authorized to amend 12 NYCRR 300.2(d)(11). Workers' Compensation Law (WCL) Section 117(1) authorizes the Chair to make reasonable regulations consistent with the provisions of the Workers' Compensation Law and the Labor Law. Section 141 of the Workers' Compensation Law authorizes the Chair to make administrative regulations and orders providing, in part, for the receipt, indexing and examining of all notices, claims and reports, and further authorizes the Chair to issue and revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections 13-a, 13-k, and 13-l of the Workers' Compensation Law. Section 137 of the Workers' Compensation Law mandates requirements for the notice, conduct and reporting of independent medical examinations. Specifically, paragraph (a) of subdivision (1) requires a copy of each report of an independent medical examination to be submitted by the practitioner on the same day and in the same manner to the Board, the carrier or self-insured employer, the claimant's treating provider, the claimant's representative and the claimant. Sections 13-a, 13-k, 13-l and 13-m of the Workers' Compensation Law authorize the Chair to prescribe by regulation such information as may be required of physicians, podiatrists, chiropractors and psychologists submitting reports of independent medical examinations.

#### 2. Legislative objectives:

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

#### 3. Needs and benefits:

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

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

Since the issuance of the October 2003 guidance and the Board

Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

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

#### 4. Costs:

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

#### 5. Local government mandates:

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

#### 6. Paperwork:

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

#### 7. Duplication:

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

#### 8. Alternatives:

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

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

#### 9. Federal standards:

There are no federal standards applicable to this proposed rule.

#### 10. Compliance schedule:

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

#### **Regulatory Flexibility Analysis**

##### 1. Effect of rule:

Approximately 2511 political subdivisions currently participate as municipal employers in self-insured programs for workers' compensation coverage in New York State. Any independent medical exams conducted at their request must be filed by the physician, chiropractor, psychologist or podiatrist conducting the exam or by an independent medical examination (IME) entity. Workers' Compensation Law § 137 (1)(a) does not permit self-insured employers or insurance carriers to file these reports, therefore there is no direct action a self-insured local government must or can take with respect to this rule. However, self-insured local governments are concerned about the timely filing of an IME report as one filed late will not be admissible as evidence in a workers' compensation proceeding. This rule makes it easier for a report to be timely filed as it expands the timeframe from 10 calendar days to 10 business days. Small businesses that are self-insured will also be affected by this rule in the same manner as self-insured local governments.

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

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

##### 2. Compliance requirements:

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

##### 3. Professional services:

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

##### 4. Compliance costs:

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

##### 5. Economic and technological feasibility:

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

##### 6. Minimizing adverse impact:

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

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

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

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

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

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

##### 2. Reporting, recordkeeping and other compliance requirements:

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

##### 3. Costs:

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

##### 4. Minimizing adverse impact:

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

##### 5. Rural area participation:

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

#### **Job Impact Statement**

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