

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Ash Trees, Nursery Stock, Logs, Green Lumber, Firewood, Stumps, Roots, Branches and Debris of a Half Inch or More

I.D. No. AAM-01-11-00014-E

Filing No. 218

Filing Date: 2011-03-01

Effective Date: 2011-03-01

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

Action taken: Repeal of Part 141 and addition of new Part 141 to Title 1 NYCRR.

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

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

Specific reasons underlying the finding of necessity: The repeal of Part 141 and the addition of Part 141 of 1 NYCRR is being adopted as an emergency measure because of the threat that the Emerald Ash Borer (EAB) will spread outside the areas it now infests in New York State.

EAB, *Agilus planipennis*, an insect species non-indigenous to the United States, is a destructive wood-boring insect native to eastern Russia, northern China, Japan and the Korean peninsula. The average adult Emerald Ash Borer is $\frac{3}{4}$ of an inch long and $\frac{1}{6}$ of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to $\frac{1}{4}$ inches long and are creamy white in color. Adult insects emerge

in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem tissue, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the Emerald Ash Borer includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree. A tree infested by EAB will die within two years. Ash trees, as well as ash nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are all subject to infestation.

The pest was first discovered in Michigan in 2002, and has since spread to at least 12 other states as well as to two provinces in Canada. In 2009, EAB was detected in New York in Cattaraugus County. This prompted the establishment of a quarantine in Cattaraugus County and adjacent Chautauqua County. In 2010, the pest was detected in Monroe, Livingston, Genesee, Steuben, Greene and Ulster Counties. As a result of these latest findings, on October 1, 2010, the Department, on an emergency basis, repealed Part 141 and adopted a new Part 141, which establishes a quarantine in the following counties: Cattaraugus, Monroe, Livingston, Genesee, Steuben, Greene, Ulster, Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung. Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties will serve as a buffer between counties with known or suspected infestations and those which have no known infestations. Since the current emergency regulation expires on February 28, 2011, this measure will readopt the regulation on an emergency basis.

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

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

Subject: Ash trees, nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more.

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

Text of emergency rule: Part 141 of 1 NYCRR is repealed and a new Part 141 is added thereto, to read as follows:

Part 141

Control of the Emerald Ash Borer

(Statutory Authority: Agriculture and Markets Law sections 18, 164 and 167)

Section 141.1. Definitions

For the purpose of this Part, the following words, names and terms shall be construed respectively, to mean:

(a) *Certificate of inspection.* A valid form certifying the eligibility of products for intrastate movement under the requirements of this Part.

(b) *Compliance agreement.* An approved document, executed by persons or firms, covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement.

(c) *Emerald Ash Borer.* The insect known as the Emerald Ash Borer, *Agrilus planipennis*, in any stage of development.

(d) *Firewood.* This term applies to any kindling, logs, chunkwood, boards, timbers or other wood cut and split, or not split, into a form and size appropriate for use as fuel.

(e) *Infestation.* This term refers to the presence of the Emerald Ash Borer in any life stage or as determined by evidence of activity of one or more of the life stages.

(f) *Inspector.* An inspector of the New York State Department of Agriculture and Markets, or cooperator from the New York State Department of Environmental Conservation (DEC) or the United States Department of Agriculture (USDA), when authorized to act in that capacity.

(g) *Limited permit.* A valid form authorizing the restricted movement of regulated articles from a quarantine area to a specified destination for specified processing, handling or utilization.

(h) *Moved; movement.* Shipped, offered for shipment to a common carrier received for transportation or transported by a common carrier, or carried, transported, moved or allowed to be moved into or through any area of the State.

(i) *Nursery stock.* This term applies to and includes all trees, shrubs, plants and vines and parts thereof.

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

(k) *Regulated article.* This term applies to firewood from any species of tree, and any trees and all host material, living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of the following genera: White Ash (*Fraxinus Americana*); Green Ash (*Fraxinus pennsylvanica*); Black Ash (*Fraxinus nigra*); and Blue Ash (*Fraxinus quadrangulata*), and any wood material that is commingled and otherwise indistinguishable from the regulated article.

Section 141.2. Quarantine area.

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

Section 141.3. Regulated articles.

(a) *Prohibited movement.*

(1) The intrastate movement of living Emerald Ash Borer in any stage of development, whether moved independent of or in connection with any other article, except as provided in section 141.9 of this Part.

(2) The intrastate movement of nursery stock from the quarantine area to any point outside the quarantine area.

(3) The intrastate movement of regulated articles other than nursery stock from the quarantine area to any point outside the quarantine area, except as provided in section 141.5 of this Part.

(b) *Regulated movement.*

(1) Regulated articles shall not be moved from the quarantine area to any point outside the quarantine area, except under a limited permit or unless accompanied by a certificate of inspection indicating freedom from infestation.

(2) Regulated articles may be moved through the quarantine area if the regulated articles originated outside the regulated area and:

(i) the points of origin and destination are indicated on a waybill accompanying the regulated article; and

(ii) the regulated articles, if moved through the quarantined area during the period of May 1 through August 31 or when the ambient air temperature is 40 degrees F or higher, are moved in an enclosed vehicle or are completely covered to prevent access by the Emerald Ash Borer; and

(iii) the regulated articles are moved directly through the quarantined area without stopping, except for refueling and traffic conditions, or have been stored, packed, or handled at locations approved by an inspector as not posing a risk of infestation by the Emerald Ash Borer.

Section 141.4. Conditions governing the intrastate movement of regulated articles

(a) *Movement from quarantine area.* Unless exempted by administrative instructions of the Commissioner of Agriculture and Markets of the State of New York, regulated articles shall not be moved intrastate from the quarantine area to or through any point outside thereof unless accompanied by a valid certificate or limited permit issued by an inspector, authorizing such movement.

Section 141.5. Conditions governing the issuance of certificates and permits

(a) *Certificates of inspection.* Certificates of inspection may be issued for the intrastate movement of regulated articles when they have been inspected and determined to have been:

(1) treated, fumigated, or processed by approved methods; or

(2) grown, produced, manufactured, stored, or handled in such a manner that, in the judgment of the inspector, no infestation would be transmitted thereby, provided that subsequent to certification, the regulated articles shall be loaded, handled, and shipped under such protection and safeguards against reinfestation as are required by the inspector.

(b) *Limited permits.* Limited permits may be issued for the movement of noncertified regulated articles to specified destinations for specified processing, handling, or utilization. Persons shipping, transporting, or receiving such articles may be required to enter into written compliance agreements to maintain such sanitation safeguards against the establishment and spread of infestation and to comply with such conditions as to the maintenance of identity, handling, processing, or subsequent movement of regulated products and the cleaning of cars, trucks and other vehicles used in the transportation of such articles, as may be required by the inspector. Failure to comply with conditions of the agreement will result in its cancellation.

(c) *Cancellation of certificates of inspection or limited permits.* Certificates or limited permits issued under these regulations may be withdrawn or canceled by the inspector and further certification refused whenever in his or her judgment the further use of such certificates or permits might result in the dissemination of infestation.

Section 141.6. Inspection and disposition of shipments

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the quarantine area, which contains, or which the inspector has probable cause to believe may contain, infestations of the Emerald Ash Borer, or articles or things regulated under this quarantine, may be examined by an inspector at any time or place. When articles or things are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he deems necessary to eliminate the danger of dissemination of the Emerald Ash Borer. If found to be infested, such articles or things must be free of infestation without cost to the State except that for inspection and supervision.

Section 141.7. Assembly of regulated articles for inspection

(a) Persons intending to move intrastate any regulated articles shall make application for certification as far in advance as possible, and will be required to prepare and assemble materials at such points and in such manner as the inspector shall designate, so that thorough inspection may be made or approved treatments applied. Articles to be inspected as a basis for certification must be free from matter which makes inspection impracticable.

(b) The New York State Department of Agriculture will not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

Section 141.8. Marking requirements

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid certificate (or limited permit) issued in compliance with these regulations: provided, that:

(a) for lot freight shipments, other than by road vehicle, one certificate may be attached to one of the containers and another to the waybill; and for carlot freight or express shipment, either in containers or in bulk, a certificate need be attached to the waybill only and a placard to the outside of the car, showing the number of the certificate accompanying the waybill; and

(b) for movement by road vehicle, the certificate shall accompany the vehicle and be surrendered to consignee upon delivery of shipment.

Section 141.9. Shipments for experimental and scientific purposes.

Regulated articles may be moved intrastate for experimental or scientific

tific purposes, on such conditions and under such safeguards as may be prescribed by the New York State Department of Agriculture and Markets. The container of articles so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the New York State Department of Agriculture and Markets showing compliance with such conditions.

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. AAM-01-11-00014-P, Issue of January 5, 2011. The emergency rule will expire April 29, 2011.

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

Regulatory Impact Statement

1. Statutory authority:

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

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

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

2. Legislative objectives:

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

3. Needs and benefits:

The rule will repeal Part 141 and add a new Part 141 which will establish an EAB quarantine to the seven counties where EAB has been detected (i.e. Cattaraugus, Monroe, Genesee, Livingston, Steuben, Greene and Ulster Counties), as well as to the following 11 counties: Chautauqua, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties. Each of these additional 11 counties will serve as a buffer between counties with known infestations and those which have no known infestations.

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

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

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

The average adult EAB is $\frac{3}{4}$ of an inch long and $\frac{1}{6}$ of an inch wide and is a dark metallic green in color, hence its name. The larvae are approximately 1 to $1\frac{1}{4}$ inches long and are creamy white in color. Adult insects emerge in May and June and begin laying eggs in crevasses in the bark about two weeks after emergence. One female can lay 60 to 90 eggs. After hatching, the larvae burrow into the bark and begin feeding on the cambium and phloem, usually from late July or early August through October, before overwintering in the outer bark. The larvae emerge as

adult insects the following spring, and the life cycle begins anew. Evidence of the presence of the EAB includes loss of tree bark, S-shaped larval galleries, or tunnels, just beneath the bark, small, D-shaped exit holes through the bark and dying and thinning branches near the top of the tree.

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

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

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

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

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

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

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

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

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

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

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

4. Costs:

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

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

(b) Costs to local government: None, as a result of the quarantine. Some local governments may face expenses in tree maintenance since ash trees have become popular trees to use to line streets. However, the rule does

not require local governments to remove the trees from the quarantine area. Accordingly, local governments within the quarantine area will not incur any additional expenses due to the quarantine.

(c) Costs to private regulated parties: There are 2,768 licensed nursery growers and/or nursery dealers in the quarantined counties which would be affected by the quarantine set forth in the regulations. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol for ash nursery stock. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

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

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

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

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

(d) Costs to the regulatory agency:

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

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

5. Local government mandate:

None.

6. Paperwork:

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

7. Duplication:

None.

8. Alternatives:

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

9. Federal standards:

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

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect on small business.

The small businesses affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Cattaraugus, Chautauqua, Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 2,768 licensed nursery growers and/or dealers within these counties. There are an unknown number of

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

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

2. Compliance requirements.

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

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

3. Professional services.

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

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

4. Compliance costs.

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the rule: None.

(b) Annual cost for continuing compliance with the rule: There are 2,768 licensed growers and/or dealers which would be affected by the quarantine set forth in the regulations. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. There is no approved protocol to diagnose or treat nursery stock, since approved methods (e.g. debarking) would kill the plants.

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

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

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

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

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

5. Minimizing adverse impact.

The Department has designed the rule to minimize adverse economic impact on small businesses. This is done by limiting the quarantine area to only those parts of New York State near or where EAB has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of EAB; and to prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the regulations provide for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the regulations minimize adverse economic impact as much as is currently possible.

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

6. Small business and local government participation.

With the discovery of EAB in Cattaraugus County in 2009, The Department had ongoing discussions with representatives of various nurseries,

arborists, the forestry industry, and local governments regarding the general needs and benefits of the Emerald Ash Borer quarantine.

On June 25, 2009, the Department sent a letter to licensed nursery growers and nursery dealers, providing information regarding the threat the Emerald Ash Borer is posing to the State's ash trees and the State's response to that threat.

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to control the artificial spread of this pest. Representatives of the Empire State Forest Products Association, New York State Nursery Landscape Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

On July 14, 2009, the Empire State Forest Products Association hosted an informational meeting on the Emerald Ash Borer in Randolph, New York. Approximately 90 people attended this informational meeting. A general public meeting on the Emerald Ash Borer was held following the informational meeting. Approximately 150 people attended the public meeting.

These discussions ultimately resulted in the establishment of an EAB quarantine in Cattaraugus and Chautauqua Counties.

With the discovery of EAB in Monroe, Genesee, Livingston, Steuben, Greene and Ulster Counties in 2010, the Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of extending the EAB quarantine.

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

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

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

These discussions ultimately resulted in a consensus to establish an EAB quarantine, not only in Cattaraugus and Chautauqua Counties, but in Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties as well.

Outreach efforts will continue.

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

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

Rural Area Flexibility Analysis

1. Type and estimated numbers of rural areas:

The regulated parties affected by the regulations establishing an Emerald Ash Borer (EAB) quarantine in Cattaraugus, Chautauqua, Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties are the nursery dealers, nursery growers, landscaping companies, loggers, sawmills and other forest products manufacturers located within those counties. There are 2,768 licensed nursery growers and/or dealers within these counties. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. However, it is anticipated that fewer than half of these establishments carry regulated articles. Furthermore, experience has shown that the presence of EAB and its destructive potential will significantly reduce or eliminate the market for ash nursery stock as ornamental, street and park plantings.

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

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

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

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

3. Costs:

There are 2,768 licensed nursery growers and/or dealers in the 18 counties which would be affected by the quarantine. There are an unknown number of loggers, sawmills and forest-products manufacturers using white ash in these counties. According to the Empire State Forest Products Association, white ash accounts for 10 to 15-percent by volume of the total hardwood lumber manufactured in New York, and approximately 7 to 10-percent by value. Forest-based manufacturing provided \$7.4-billion in value of shipments to New York's economy in 2001. Additionally, purchases of white ash stumpage from New York landowners exceeds \$13-million annually.

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

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

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

4. Minimizing adverse impact:

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

5. Rural area participation:

With the discovery of EAB in Cattaraugus County in 2009, The Department had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of the Emerald Ash Borer quarantine.

On June 25, 2009, the Department sent a letter to licensed nursery growers and nursery dealers, providing information regarding the threat the Emerald Ash Borer is posing to the State's ash trees and the State's response to that threat.

On July 9, 2009, the Department hosted an informational meeting on the Emerald Ash Borer and the needs and benefits of a quarantine to control the artificial spread of this pest. Representatives of the Empire State Forest Products Association, New York State Nursery Landscape Association and New York State Arborist Association attended the meeting on behalf of their constituencies, which are regulated parties. Representatives of DEC and USDA also attended the meeting.

On July 14, 2009, the Empire State Forest Products Association hosted an informational meeting on the Emerald Ash Borer in Randolph, New York. Approximately 90 people attended this informational meeting. A general public meeting on the Emerald Ash Borer was held following the informational meeting. Approximately 150 people attended the public meeting.

These discussions ultimately resulted in the establishment of an EAB quarantine in Cattaraugus and Chautauqua Counties.

With the discovery of EAB in Monroe, Genesee, Livingston, Steuben, Greene and Ulster Counties in 2010, the Department has had ongoing discussions with representatives of various nurseries, arborists, the for-

estry industry, and local governments regarding the general needs and benefits of extending the EAB quarantine.

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

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

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

These discussions ultimately resulted in a consensus to establish an EAB quarantine, not only in Cattaraugus and Chautauqua Counties, but in Monroe, Genesee, Livingston, Steuben, Greene, Ulster, Niagara, Erie, Orleans, Wyoming, Allegany, Wayne, Ontario, Yates, Schuyler and Chemung Counties as well.

Outreach efforts will continue.

Job Impact Statement

The repeal of Part 141 of 1 NYCRR and the addition of a new Part 141 will not have a substantial adverse impact on jobs or employment opportunities and in fact, will likely aide in protecting jobs and employment opportunities for now and in the future. Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

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

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

Assessment of Public Comment

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

Office of Alcoholism and Substance Abuse Services

EMERGENCY RULE MAKING

Incident Reporting in Chemical Dependency and Problem Gambling Treatment Provider Services

I.D. No. ASA-03-11-00008-E

Filing No. 217

Filing Date: 2011-02-28

Effective Date: 2011-02-28

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

Action taken: Repeal of Part 306 and addition of Part 836 to Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 19.07, 19.09, 19.21, 19.40, 22.07, 32.01, 32.02, 32.07, 33.16, 33.23 and 33.25; and L. 2008, ch. 323, section 19

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

Specific reasons underlying the finding of necessity: Pursuant to changes in the Social Services Law and Mental Hygiene Law, the agency is required to promulgate rules to establish reporting requirements; section 19 of Chapter 323 of the Laws of 2008 authorizes emergency adoption.

Subject: Incident reporting in chemical dependency and problem gambling treatment provider services.

Purpose: To ensure compliance with state and federal laws regarding reporting of incidents.

Substance of emergency rule: The proposed new regulation for "Incident Reporting in OASAS Certified or Funded Services" replaces the current regulation. Statutory amendments to the Mental Hygiene Law (Chapter 24 of the Laws of 2007, known as "Jonathan's Law") and to the Social Services Law relating to reporting cases of patient abuse or child abuse and neglect are incorporated into the new regulation. The intent of the regulation is to establish and clarify minimum standards for incident management policies required of any chemical dependence or problem gambling service provider certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office").

The regulation establishes guidelines for providers' amendment and implementation of required incident reporting policies developed based on each provider's treatment modality, community location, and client age. Each provider's policy must include an incident management plan to include establishing an incident review committee, provisions for periodic staff training about procedures when an incident occurs, reporting and recording requirements.

Incident management plans are intended to prevent the recurrence of incidents involving and affecting OASAS service providers in order to enhance the quality of care and provide every individual receiving services with humane treatment and a safe environment. The new regulation establishes parameters for a recordkeeping and reporting process. The regulation identifies "serious incidents" that occur within a facility and must be reported to the Office and to other regulatory entities as required by law such as the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQC), the Statewide Central Register of Child Abuse and Maltreatment (Statewide Central Register), as distinguished from incidents which may be recorded internally by the service provider and made available for review by the Office on request. In this context, the new regulation also clarifies the relationship between federal confidentiality law (42 CFR Part 2) and other state reporting requirements.

The regulation identifies serious incidents as those which are or appear to be a crime under state law. The new regulation incorporates specific provisions responsive to recent changes in the Mental Hygiene Law and the Social Service Law that establish procedures consistent with those laws in the area of child abuse, neglect, missing patients, and patient abuse. The regulation address all incident reports in addition to those listed. The regulation outlines an internal incident reporting process, an external incident reporting process, establishing a special review committee, recordkeeping, and the duty to cooperate with inspections by the Statewide Central Register and the CQC to the extent permitted by federal law.

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. ASA-03-11-00008-EP, Issue of January 19, 2011. The emergency rule will expire April 28, 2011.

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

Regulatory Impact Statement

14 NYCRR Part 306, Incidents at Facilities for Alcoholism and Alcohol Abuse, will be repealed and a new Part 836 will replace it. The new Part 836 is submitted for public review and comment. Part 836 will require all providers to amend policies and procedures by which each provider will record and/or report to required authorities all incidents as defined in the regulation and responsive to most recent applicable state and federal laws.

Amendments to the Mental Hygiene Law ("Jonathan's Law, Chapter 24 of the laws of 2007) and the Social Service Law required the Office to promulgate regulations that establish procedures consistent with those laws in the area of child abuse, neglect, missing patients, and patient abuse. The regulation provides guidance for an internal incident reporting process and requirements for an external incident reporting process including:

establishment of an incident review committee; recordkeeping; and to the extent permitted and required by law, compliance with federal confidentiality laws (42 CFR Part 2) protecting drug and alcohol treatment patients and state laws requiring reporting of certain incidents of abuse to the NY Statewide Central Register of Child Abuse and Maltreatment (“Statewide Central Register”), and cooperation with inspections by the Office and the Commission on Quality of Care and Advocacy for Persons with Disabilities (CQC).

1. Statutory Authority:

(a) Section 19.07(c) of the Mental Hygiene Law charges the Office with the responsibility for seeing that persons in need of treatment for chemical dependence receive high quality care and treatment, and that the personal and civil rights of persons receiving care, treatment and rehabilitation are adequately protected.

(b) Section 19.07(e) of the Mental Hygiene Law authorizes the Commissioner (“Commissioner”) of the Office to adopt standards including necessary rules and regulations pertaining to chemical dependence services.

(c) Section 19.09(b) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(d) Section 19.21(b) of the Mental Hygiene Law requires the Commissioner to establish and enforce certification, inspection, licensing and treatment standards for alcoholism, substance abuse and chemical dependence facilities and staff.

(e) Section 19.40 of the Mental Hygiene Law authorizes the Commissioner to issue operating certificates for the provision of chemical dependence services.

(f) Section 22.07(c) of the Mental Hygiene Law authorizes the Commissioner to promulgate rules and regulations to ensure that the rights of individuals who have received, and are receiving, chemical dependence services are protected.

(g) Section 32.01 of the Mental Hygiene Law authorizes the Commissioner to adopt any regulation reasonably necessary to implement and effectively exercise the powers and perform the duties conferred by Article 32 of the Mental Hygiene Law.

(h) Section 32.02 of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary to ensure quality services to those suffering from problem gambling.

(i) Section 32.07(a) of the Mental Hygiene Law authorizes the Commissioner to adopt regulations to effectuate the provisions and purposes of Article 32 of the Mental Hygiene Law.

(j) Section 33.16(a)(6) and 33.16(b)(4) of the Mental Hygiene Law defines a “qualified person” as an individual receiving services, his or her legal guardian, or a parent, spouse or adult child who has authority to provide consent for care and treatment.

(k) Section 33.23 of the Mental Hygiene Law requires directors of facilities certified by OASAS to provide telephone notification to a “qualified person” of an incident involving a client within 24 hours of the initial report.

(l) Section 33.25 of the Mental Hygiene Law requires facilities to release records to “qualified persons”, upon request, relating to allegations and investigations of client abuse or mistreatment.

(m) Section 412-a of the Social Services Law defines “abused child in residential care” and “neglected child in residential care” and includes, within the definition of “residential care” care provided to a child in an inpatient or residential setting certified by OASAS and specifically designated by such Office as serving youth.

(n) Section 45.19 of the Mental Hygiene Law requires reporting of deaths and allegations of abuse or mistreatment to the Commission on Quality of Care and Advocacy for Persons with Disabilities (hereinafter, “CQC”).

(o) Article 6, Title 6 of the Social Services Law requires the reporting of suspected abuse or maltreatment of persons under 18 years of age to the New York Statewide Central Register of Child Abuse and Maltreatment (hereinafter, “Statewide Central Register”).

(p) Section 413 of the Social Services Law identifies persons required to report cases of suspected child abuse or maltreatment to the Statewide Central Register.

(q) Section 415 of the Social Services Law requires suspected child abuse or maltreatment to be reported immediately by telephone and to be followed by a written report on a form supplied by the commissioner of the office of children and family services, and further describes procedures for reporting.

The relevant sections of the Mental Hygiene Law cited above authorize the Commissioner of OASAS to regulate the provision of services to patients, how such chemical dependency services are delivered, and to establish standards for the provision of such services and qualifications of staff. Sections of the Mental Hygiene Law known as “Jonathan’s Law” also require recordkeeping and reporting of certain incidents of abuse to

qualified persons. Provisions of the Social Services law comprise reporting requirements relative to alleged abuse of children in residential care. The proposed regulation will affect the administration of services by requiring each provider to establish updated policies and procedures regarding incident reporting that reflect the requirements of “Jonathan’s Law” and the reporting of child abuse and neglect in residential care.

Establishing policy and procedures with regard to incident reporting will establish a standard for all facilities which is in the best interest of the client providing better health care and a stronger basis of recovery from addiction.

2. Legislative Objectives:

Chapter 558 of the Laws of 1999 (Mental Hygiene Law Article 32) requires the promulgation of rules and regulations to regulate and assure the consistent high quality of services provided within the state to persons suffering from chemical abuse or dependence, their families and significant others, as well as those who are at risk of becoming chemical abusers. Section 19 of Chapter 323 of the laws of 2008 relating to abused children in residential care, permits the Office to promulgate and adopt rules and regulations on an emergency basis for the purpose of implementing the provisions of such act. Establishing a rule requiring treatment providers to create a policy and procedure for incident reporting and clearly identifying the responsibilities of each provider is a best clinical practice which will enhance the treatment experience and is in the best interest of the clients and their families.

3. Needs and Benefits:

The proposed amendments are necessary to enable clinical staff to provide a safe environment where incidents are addressed uniformly and consistent with a clear delineation of reporting responsibilities. Such a policy reflects a best clinical practice for providers of chemical dependency services. Incident reporting is already required of treatment providers pursuant to 14 NYCRR Part 306. However, in addition to requirements to comply with recent statutory amendments, uniformity and consistency may be lacking in the current regulation. The proposed new regulation will require all providers of chemical dependency services to become compliant with the statutory requirements for the reporting of a crime, child abuse or neglect, sexual misconduct and abuse. The purpose of the regulation is to establish guidelines for providers to create a policy setting out all of the responsibilities of providers, compilation of information relevant to reporting an incident, and external reporting procedures such as reporting to the Statewide Central Register, the Office, and the CQC. Each facility/provider shall establish an incident reporting policy consistent with this regulation and consistent with state and federal law.

4. Costs:

a. Costs to regulated parties: Providers are regulated parties. Costs incurred by providers will be minimal, consisting of additional paper and printing materials, and staff time necessary to comply with amendments to state law. Because treatment providers already have an incident reporting policy and are informed of requirements of statutory changes, existing policies will only need to be updated pursuant to this regulation.

b. Costs to the agency, state and local governments: There will be no additional costs to counties, cities, towns or local districts.

5. Local Government Mandates:

There are no new mandates or administrative requirements placed on local governments. However, where local governments operate programs, they may incur minimal costs as indicated in #4 above.

6. Paperwork:

Part 836 will require some additional paperwork for certified and/or funded providers in order to ensure that utilization review requirements are met. However, since utilization control is presently required and providers are already familiar with utilization control recordkeeping, it is not expected that new recordkeeping requirements will be excessive.

7. Duplication:

There is no duplication of other state or federal requirements.

8. Alternatives:

An alternative of establishing a uniform policy and procedure at the agency level required of all providers was explored and it was decided that each provider is in a unique situation and should establish policies and procedure aligned with the special needs and environment of their patients and location. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment. The comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and com-

mented on by CQC and OTDA. Recommendations from both agencies regarding reporting of alleged child abuse and neglect have been incorporated into the proposed regulation.

9. Federal Standards:

42 CFR Part 2 applies to this regulation in that it specifies the confidentiality rules applicable in chemical dependency services which have to be considered for external incident reporting. Most reporting requirements in state law are preempted by the federal statute, with the exception of deaths and initial reports of alleged child abuse and neglect.

10. Compliance Schedule:

Providers are expected to be in compliance with this regulation upon its emergency adoption.

Regulatory Flexibility Analysis

Types/Numbers:

The proposed new Part 836 will impact all approximately 1550 providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office").

Reporting/Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be minimal impact on reporting and recordkeeping and no need for engagement of professional services because providers are already required to maintain an incident reporting policy and comply with current utilization reviews that include such policies.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs for paper and staff time in developing amended policies and procedures and becoming accustomed to new procedures. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic/Technological Feasibility:

Regardless of type, size and location of business (rural, urban or suburban), or operation by local governments or small businesses, the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community. Comments from all, including speculation about economic impact, have been addressed and incorporated into the final regulation wherever necessary.

Participation of Affected Parties:

In anticipation of an emergency promulgation, the proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community and to other state regulatory agencies. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment; the comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OCFS. OASAS worked with counsel from both agencies to incorporate their recommendations regarding definitions and reporting of alleged child abuse and neglect and children in residential facilities have been incorporated into the proposed regulation.

Rural Area Flexibility Analysis

Types/Numbers:

The proposed new Part 836 will impact all (currently 1550) providers of chemical dependence or problem gambling services certified, licensed, funded or operated by the Office of Alcoholism and Substance Abuse Services (OASAS or "Office"). Rural areas are defined as counties with a population less than 200,000 and, for counties with a population greater than 200,000, includes towns with population densities of 150 persons or less per square mile. The following 44 counties have a population less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Reporting/Recordkeeping, Professional Services:

Regardless of type of program, location (rural, urban or suburban), or operation by local governments or small businesses, it is anticipated that there will be minimal impact on reporting and recordkeeping and no need for engagement of professional services because providers are already required to maintain an incident reporting policy and comply with current utilization reviews that include such policies.

Costs:

Regardless of type of program, location or size of business (rural, urban or suburban), or operation by local governments or small businesses, providers may incur minimal costs for paper and staff time in developing amended policies and procedures and becoming accustomed to new procedures. There will be no impact on costs of local governments beyond what may be incurred if a local government is also a provider of services.

Economic/Technological Feasibility:

Regardless of type, size and location of business (rural, urban or suburban), or operation by local governments or small businesses, the proposed amendments require no new equipment or technological improvements.

Minimizing Adverse Economic Impacts:

The proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community. Comments from all, including speculation about economic impact, have been addressed and incorporated into the final regulation wherever necessary.

Participation of Affected Parties:

In anticipation of an emergency promulgation, the proposed amendments were presented to the OASAS Executive Team and Advisory Council and then distributed for comment to members of the provider/stakeholder community and to other state regulatory agencies. The Alcoholism and Substance Abuse Providers (ASAP) of NYS distributed this proposed regulation to all of its members and requested comment; the comments received were addressed and some changes were made. Additionally, these regulations were also sent to the Council of Local Mental Hygiene Directors, Greater New York Hospital Association (GNYHA), the Committee on Methadone Program Administrators, Inc, and Outreach Development Corp., for comment. The GNYHA commented that these regulations might be duplicative with the Department of Health requirements for Article 28 providers. OASAS responded that we incorporated a clause allowing for an addendum in these cases for anything required by the Office that is not currently required by the Department of Health. This regulation has also been reviewed and commented on by CQC and OCFS. OASAS worked with counsel from both agencies to incorporate their recommendations regarding definitions and reporting of alleged child abuse and neglect and children in residential facilities have been incorporated into the proposed regulation.

Job Impact Statement

No change in the number of jobs and employment opportunities is anticipated as a result of the proposed amendments because the amendments either clarify or streamline provider actions which will not be eliminated or supplemented. Treatment providers will not need to hire additional staff or reduce staff size; the proposed changes will not adversely impact jobs outside of the agency; the proposed changes will not result in the loss of any jobs within New York State.

Assessment of Public Comment

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

Banking Department

EMERGENCY RULE MAKING

Registration and Financial Responsibility Requirements for Mortgage Loan Servicers

I.D. No. BNK-11-11-00007-E

Filing No. 222

Filing Date: 2011-03-01

Effective Date: 2011-03-01

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 and 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 May 29, 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 loan 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.

EMERGENCY RULE MAKING

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

I.D. No. BNK-11-11-00008-E

Filing No. 223

Filing Date: 2011-03-01

Effective Date: 2011-03-01

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

Action taken: Addition of Part 420 and Supervisory Procedure MB 107, and repeal of Supervisory Procedure MB 108 of 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 Supervi-

sory Procedure. Importantly, it defines the National Mortgage Licensing System (NMLS), the web-based system with which the Superintendent has entered into a written contract to process applications for initial licensing and applications for annual license renewal for MLOs.

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

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

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

Section 107.5 covers inactive status.

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

Supervisory Procedure MB 108 is hereby repealed.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire May 29, 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 for the findings that the Superintendent must make before a license is issued. These include a finding that the applicant not have any felony convictions within seven years or any fraud convictions at any time, that the applicant demonstrate acceptable character and fitness,

educational and testing criteria and a bonding requirement. An MLO also must be affiliated with an originating entity -- a licensed mortgage banker or registered mortgage broker (or other licensed entity in the case of individuals originating manufactured homes) -- or working for mortgage loan servicers.

Section 599-f sets out the pre-licensing education requirements, and Section 599-g sets forth the pre-licensing testing requirements.

Section 599-h imposes a reporting requirement on entities employing MLOs. Such entities must make annual filings through the NMLS.

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

Section 599-j sets forth the continuing education requirements for MLOs, and Section 599-k sets forth the requirements for a surety bond.

Section 599-l requires the Superintendent to report through the NMLS at least annually on all violations of Article 12-E and all enforcement actions. MLOs may challenge the information contained in such reports.

Section 599-m sets forth the records and reports that originating entities must maintain or make on MLOs employed by, or working for, such entities. This section also requires the Superintendent to maintain on the internet a list of all MLOs licensed by the Department and requires reporting to the Department by MLOs.

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

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

Section 599-p requires that the unique identifier of every originator be clearly shown on certain documents.

Section 599-q provides certain confidentiality protections for information provided to the Superintendent by an MLO, notwithstanding the sharing of such information with other regulatory bodies.

2. Legislative Objectives.

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

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

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

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

3. If licensing of individuals who work for mortgage loan servicers and who engage in loan modification activities is required by the U.S. Department of Housing and Urban Development, such individuals may be subject to the licensing requirements of the new law and to the new regulation.

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

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

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

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

When Part 420 was originally adopted on an emergency basis, the Superintendent also adopted Supervisory Procedures MB 107 and MB 108. Supervisory Procedure MB 107 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 activi-

ties, provided they submit any additional, updated information required by the Superintendent. The transitional period runs until January 1, 2011, in the case of authorized persons, and until July 31, 2010, in the case of applicants (unless their applications are denied or withdrawn as of an earlier date). Applicants are required to complete their applications considerably in advance of these dates under the regulations in order to allow the Department to complete their processing.

Regulatory Flexibility Analysis

1. Effect of the Rule:

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

2. Compliance Requirements:

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

3. Professional Services:

None.

4. Compliance Costs:

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

5. Economic and Technological Feasibility:

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

6. Minimizing Adverse Impacts:

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

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

7. Small Business and Local Government Participation:

See response to Item 6 above.

Rural Area Flexibility Analysis

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

Compliance Requirements. Mortgage loan originators in rural areas must be licensed by the Superintendent to engage in the business of mortgage loan origination. The application process established by the regulations requires an MLO to apply for a license electronically and to submit additional background information to the Mortgage Banking Division of the Banking Department. This additional information consists of fingerprints, a recent credit report, supplementary background information and an attestation as to the truthfulness of the applicant's statements. Mortgage brokers and bankers are required to ensure that all MLOs employed by them have been duly licensed, report four times a year on the MLOs newly employed by them or dismissed for cause, determine that

each MLO employed by or affiliated with them has the character, fitness and education qualifications to warrant the belief he or she will engage in mortgage loan originating honestly, fairly and efficiently; and, finally, retain acceptable documentation as evidence of satisfactory completion of required education courses for each MLO for a period of six years. The Department believes that this rule will not impose a burdensome set of requirements on entities operating in rural areas.

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

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

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

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

Job Impact Statement

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

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

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

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

Department of Environmental Conservation

NOTICE OF ADOPTION

Sanitary Condition of Shellfish Lands

I.D. No. ENV-52-10-00004-A

Filing No. 226

Filing Date: 2011-03-01

Effective Date: 2011-03-16

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

Action taken: Amendment of sections 41.2 and 41.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 13-0307 and 13-0319

Subject: Sanitary Condition of Shellfish Lands.

Purpose: To reclassify underwater lands to allow the harvest of shellfish when appropriate.

Text of final rule: 6 NYCRR Part 41, Sanitary Condition of Shellfish Lands, is amended to read as follows:

Section 41.0 through clause 41.2(b)(4)(ii)(‘e’) remains unchanged.

Existing clause 41.2(b)(4)(ii)(‘f’) is repealed.

Subparagraph 41.2(b)(4)(iii) through clause 41.3(b)(3)(i)(‘n’) remain unchanged.

Existing clause 41.3(b)(3)(ii)(‘a’) is repealed.

New clause 41.3(b)(3)(ii)(‘a’) is adopted to read as follows:

(‘a’) *All that area of Great South Bay, Patchogue Bay and its tributaries lying northerly of a line extending easterly from the southeast corner of the wooden bulkhead located at the foot of Blue Point Avenue, Blue Point, to the southeastern corner of the southeasternmost residence on Rod Street, approximately 100 yards southeast of the foot of Dunton Avenue, West Bellport (said residence is a two-story house, white brick and light grey shingle with light grey roof).*

Existing clause 41.3(b)(3)(ii)(‘b’) through clause 41.3(b)(4)(iv)(‘a’) remain unchanged.

Existing clause 41.3(b)(4)(iv)(‘b’) is repealed.

Existing subparagraph 41.3(b)(4)(‘v’) through clause 41.3(b)(4)(ix)(‘e’) remain unchanged.

Existing clause 41.3(b)(4)(ix)(‘f’) is repealed.

Existing subparagraphs 41.3(b)(4)(x) through 41.3(b)(7)(iii) remain unchanged.

Subparagraph 41.3(b)(7)(iv) is repealed.

New subparagraph 41.3(b)(7)(iv) is adopted to read as follows:

(iv) *Mattituck Inlet and Mattituck Creek*

(‘a’) *During the period April 16 through January 14, both dates inclusive, all that area of Mattituck Creek north of a line extending easterly from the end of West Mill Road to the end of East Mill Road on the opposite shore.*

(‘b’) *During the period January 1 through December 31, both dates inclusive, all that area of Mattituck Creek south of a line extending easterly from the end of West Mill Road to the end of East Mill Road on the opposite shore.*

Subparagraph 41.3(b)(7)(v) through clause 41.3(b)(7)(vi)(‘c’) remains unchanged.

Existing clause 41.3(b)(7)(vii)(‘a’) is repealed.

New clause 41.3(b)(7)(vii)(‘a’) is adopted to read as follows:

(‘a’) *During the period January 1 through December 31, both dates inclusive, all that area of Hashamomuck Pond and Long Creek lying west of a line extending southerly from the orange marker located on the shore at the Terrace Garden Colony Cottages to the opposite shoreline; and lying southerly of the line extending easterly from the orange marker located on the shoreline of the residence at 645 Mill Creek Drive to the orange marker on the opposite shore.*

Existing clause 41.3(b)(7)(vii)(‘b’) through clause 41.3(b)(8)(i)(‘e’) remain unchanged.

Existing clause 41.3(b)(8)(i)(‘f’) is repealed.

Existing subparagraph 41.3(b)(8)(ii) through section 41.5 remain unchanged.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 41.3(b)(3)(i).

Text of rule and any required statements and analyses may be obtained from: Melissa Albino Hegeman, NYSDEC, Bureau of Marine Resources, Shellfisheries Section, 205 N. Belle Mead Rd., Ste. 1, East Setauket, NY 11733, (631) 444-0491, email: maalbino@gw.dec.state.ny.us

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a Negative Declaration and a short Environmental Assessment Form is on file with the Department of Environmental Conservation.

Revised Consolidated Regulatory Impact Statement

This statement explains why a revised consolidated Regulatory Impact Statement is not required to accompany this Notice of Adoption. The change made to the last published rule corrected a typographical error and does not necessitate a revision to the previously published Regulatory Impact Statement.

Revised Consolidated Regulatory Flexibility Analysis

This statement explains why a revised consolidated Regulatory Flexibility Analysis is not required to accompany this Notice of Adoption. The change made to the last published rule corrected a typographical error and does not necessitate a revision to the previously published Regulatory Flexibility Analysis.

Revised Consolidated Rural Area Flexibility Analysis

The change made to the last published rule corrected a typographical error and does not necessitate a revision to the previously published Rural Area Flexibility Analysis statement.

Revised Consolidated Job Impact Statement

The change made to the last published rule corrected a typographical error and does not necessitate a revision to the previously published Rural Area Flexibility Analysis statement.

Assessment of Public Comment

The agency received no public comment.

Department of Health

NOTICE OF ADOPTION

Hospital Inpatient Reimbursement

I.D. No. HLT-49-10-00008-A

Filing No. 225

Filing Date: 2011-03-01

Effective Date: 2011-03-16

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

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

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

Subject: Hospital Inpatient Reimbursement.

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

Text or summary was published in the December 8, 2010 issue of the Register, I.D. No. HLT-49-10-00008-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Insurance Department

NOTICE OF ADOPTION

Audited Financial Statements

I.D. No. INS-02-11-00001-A

Filing No. 227

Filing Date: 2011-03-01

Effective Date: 2011-03-16

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

Action taken: Repeal of Part 89; and addition of new Part 89 (Regulation 118) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 307(b), 1109, 4710(a)(2) and 5904(b)

Subject: Audited Financial Statements.

Purpose: To implement provisions of Insurance Law section 307(b), and add provisions required pursuant to the federal Sarbanes-Oxley Act of 2002.

Substance of final rule: Part 89 (Regulation No. 118) consists of 17 sections addressing the regulation of audits conducted by regulated insurers, fraternal benefit societies and managed care organizations (collectively the "companies").

Section 89.0 states that the purpose of the regulation is to apply audit and reporting standards upon each company.

Section 89.1 lists all definitions needed for the application of the regulation.

Section 89.2 contains the requirement that each company file audited financial statements and also directs each company to its correct filing location.

Section 89.3 sets forth the details of the items to be included in each audited financial statement.

Section 89.4 requires each company to notify the superintendent of the identity of its certified independent public accountant ("CPA") and any replacement.

Section 89.5 details the necessary qualifications for a CPA and restrictions upon employment of the same CPA for an extended period.

Section 89.6 provides rules for consolidated or combined audits of groups of companies.

Section 89.7 describes the scope of the audit and report of the CPA.

Section 89.8 requires both the company and its CPA to notify the superintendent upon the occurrence of a material misstatement or adverse financial condition.

Section 89.9 imposes a duty upon each company to report unremediated material weaknesses in its internal control over financial reporting.

Section 89.10 specifies terms to be included in the contract between a company and its CPA.

Section 89.11 requires each company to ensure that work papers of the CPA will be retained for review.

Section 89.12 contains rules for the appointment and duties of each company's audit committee.

Section 89.13 specifies the rules of conduct to be followed by the company with respect to the preparation of reports and documents.

Section 89.14 describes the requirements for management's report of internal control over financial reporting and incorporates the reports prepared by some of the companies to comply with the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq.

Section 89.15 sets forth special rules needed for Canadian and British insurers.

Section 89.16 contains the effective dates and special rules.

The full text of the regulation may be found at the Department's website (<http://www.ins.state.ny.us/>).

Final rule as compared with last published rule: Nonsubstantive changes were made in section 89.7.

Text of rule and any required statements and analyses may be obtained from: David Neustadt, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5265, email: dneustad@ins.state.ny.us

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

Although changes were made to the proposed 11 NYCRR 89 (Regulation No. 118), they do not necessitate changes to the Regulatory Flexibility

Statement, Regulatory Flexibility Analysis for Small Business and Local Government, Rural Area Flexibility Analysis, or Job Impact Statement.

Assessment of Public Comment

The proposed rule was published in the State Register on January 12, 2011, and the 45-day public comment period expired on February 28, 2011. The Department received comments from one entity.

The entity, a trade association representing accountants, noted that the second and last sentence of proposed Section 89.7 was largely duplicative of proposed Section 89.10(b). The Department agrees and the last sentence in section 89.7 has been deleted.

NOTICE OF ADOPTION

Valuation of Life Insurance Reserves

I.D. No. INS-02-11-00002-A

Filing No. 221

Filing Date: 2011-03-01

Effective Date: 2011-03-16

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

Action taken: Amendment of Part 98 (Regulation 147) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4240 and 4517

Subject: Valuation of Life Insurance Reserves.

Purpose: Remove restrictions on the mortality adjustment factors (known as X factors) in deficiency reserves calculation.

Text or summary was published in the January 12, 2011 issue of the Register, I.D. No. INS-02-11-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: David Neustadt, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5265, email: dneustad@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Determining Minimum Reserve Liabilities and Nonforfeiture Benefits

I.D. No. INS-02-11-00003-A

Filing No. 220

Filing Date: 2011-03-01

Effective Date: 2011-03-16

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

Action taken: Amendment of Part 100 (Regulation 179) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240 and 4517; and arts. 24 and 26

Subject: Determining Minimum Reserve Liabilities and Nonforfeiture Benefits.

Purpose: Extend the use of the 2001 CSO Preferred Structure Mortality Table to policies issued on or after January 1, 2004.

Text or summary was published in the January 12, 2011 issue of the Register, I.D. No. INS-02-11-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: David Neustadt, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5265, email: dneustad@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-02-11-00004-A

Filing No. 224

Filing Date: 2011-03-01

Effective Date: 2011-03-16

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

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

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

Subject: Financial statement filings and accounting practices and procedures.

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

Text or summary was published in the January 12, 2011 issue of the Register, I.D. No. INS-02-11-00004-P.

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

Text of rule and any required statements and analyses may be obtained from: David Neustadt, New York State Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5265, email: dneustad@ins.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Department of Labor

EMERGENCY RULE MAKING

Restrictions on the Consecutive Hours of Work for Nurses as Enacted in Section 167 of the Labor Law

I.D. No. LAB-43-10-00003-E

Filing No. 210

Filing Date: 2011-02-25

Effective Date: 2011-02-25

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

Action taken: Addition of Part 177 to Title 12 NYCRR.

Statutory authority: Labor Law, section 21

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

Specific reasons underlying the finding of necessity: Section 167 of the Labor Law was effective July 1, 2009. However, Section 167 does not provide sufficient details with regard to what is expected of health care providers so as to avoid mandatory overtime for nurses, except in emergency situations. Section 167 was enacted to improve the health care environment for patients and the working environment for nurses.

Subject: Restrictions on the consecutive hours of work for nurses as enacted in Section 167 of the Labor Law.

Purpose: To clarify the emergency circumstances under which an employer may require mandatory overtime for nurses.

Text of emergency rule: A new Part 177 is added to 12 N.Y.C.R.R. to read as follows:

PART 177

RESTRICTIONS ON CONSECUTIVE HOURS OF WORK FOR NURSES

(Statutory authority: Labor Law § 167)

§ 177.1 Application.

In accordance with Labor Law, Section 167, this Part shall apply to health care employers, who shall be prohibited from assigning mandatory overtime to nurses except in certain circumstances as described in this regulation.

§ 177.2 Definitions.

(a) "Emergency" shall mean an unforeseen event that could not be prudently planned for by a health care employer and does not regularly occur, including an unanticipated staffing emergency.

(b) "Health care disaster" shall mean a natural or other type of disaster that increases the need for health care personnel, unexpectedly affecting the county in which the nurse is employed or in a contiguous county, as more fully explained in Section 177.3 of this Part.

(c) "Health care employer" shall mean any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, who provides health care services (i) in a facility licensed or operated pursuant to article twenty-eight of the public health law, including any facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, or (ii) in a facility operated by the state, a political subdivision or a public corporation as defined by section sixty-six of the general construction law, operated or licensed pursuant to the mental hygiene law, the education law or the correction law.

Examples of a health care facility include, but are not limited to, hospitals, nursing homes, outpatient clinics, comprehensive rehabilitation hospitals, residential health care facilities, residential drug and alcohol treatment facilities, adult day health care programs, and diagnostic centers.

(d) "Nurse" shall mean a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the education law who provides direct patient care, regardless of whether such nurse is employed full-time, part-time, or on a per diem basis. Nurses who provide services to a health care employer through contracts with third party staffing providers such as nurse registries, temporary employment agencies, and the like, or who are engaged to perform services for health care employers as independent contractors shall also be covered by this Part.

(e) "On call" shall mean when an employee is required to be ready to perform work functions and required to remain on the employer's premises or within a proximate distance, so close thereto that s/he cannot use the time effectively for his or her own purposes. An employee who is not required to remain on the employer's premises or within a proximate distance thereto but is merely required to leave information, at his or her home or with the health care employer, where he or she may be reached is not on call.

(f) "Overtime" shall mean work hours over and above the nurse's regularly scheduled work hours. Determinations as to what constitutes overtime hours for purposes of this Part shall not limit the nurse's receipt of overtime wages to which the nurse is otherwise entitled.

(g) "Patient care emergency" shall mean a situation which is unforeseen and could not be prudently planned for, which requires nurse overtime in order to provide safe patient care as more fully explained in Section 177.3 of this Part.

(h) "Regularly scheduled work hours" shall mean the predetermined number of hours a nurse has agreed to work and is normally scheduled to work pursuant to the budgeted hours allocated to the nurse's position by the health care employer.

(1) For purposes of this Part, for full-time nurses, "the budgeted hours allocated to the nurses position" shall be the hours reflected in the employer's full-time employee (FTE) level for the unit in which the nurse is employed.

(2) If no such allocation system exists, regularly scheduled work hours shall be determined by some other measure generally used by the health care employer to determine when an employee is minimally supposed to work.

(3) The term regularly scheduled work hours shall be interpreted in a manner that is consistent with any relevant collective bargaining agreement and other statutes or regulations governing the hours of work, if any.

(4) Regularly scheduled work hours shall include pre-scheduled on-call time subject to the exceptions set forth in Section 177.3(b)(1) of this Part and the time spent for the purpose of communicating shift reports regarding patient status necessary to ensure patient safety.

(5) For a part-time nurse, regularly scheduled work hours mean those hours a part-time nurse is normally scheduled to work pursuant to the employer's budgeted hours allocated. If advance scheduling is not used for part-time nurses, the percentage of full-time equivalent, which shall be

established by the health care employer (e.g. a 50% part-time employee), shall serve as the measure of regularly scheduled work hours for a part-time nurse.

(6) For per diem, privately contracted, or employment agency nurses, the employment contract and the hours provided therein shall serve as the basis for determining the nurse's regularly scheduled work hours.

§ 177.3 Mandatory Overtime Prohibition

(a) Notwithstanding any other provision of law, a health care employer shall not require a nurse to work overtime. On call time shall be considered time spent working for purposes of determining whether a health care employer has required a nurse to work overtime. No employer may use on-call time as a substitute for mandatory overtime.

(b) The following exceptions shall apply to the prohibition against mandatory overtime for nurses:

(1) **Health Care Disaster.** The prohibition against mandatory overtime shall not apply in the case of a health care disaster, such as a natural or other type of disaster unexpectedly affecting the county in which the nurse is employed or in a contiguous county that increases the need for health care personnel or requires the maintenance of the existing on-duty personnel to maintain staffing levels necessary to provide adequate health care coverage. A determination that a health care disaster exists shall be made by the health care employer and shall be reasonable under the circumstances. Examples of health care disasters within the meaning of this Part include unforeseen events involving multiple serious injuries (e.g. fires, auto accidents, a building collapse), chemical spills or releases, a widespread outbreak of an illness requiring hospitalization for many individuals in the community served by the health care employer, or the occurrence of a riot, disturbance, or other serious event within an institution which substantially affects or increases the need for health care services.

(2) **Government Declaration of Emergency.** The prohibition against mandatory overtime shall not apply in the case of a federal, state or local declaration of emergency in effect pursuant to State law or applicable federal law in the county in which the nurse is employed or in a contiguous county.

(3) **Patient Care Emergency.** The prohibition against mandatory overtime shall not apply in the case of a patient care emergency, which shall mean a situation that is unforeseen and could not be prudently planned for and, as determined by the health care employer, that requires the continued presence of the nurse to provide safe patient care, subject to the following limitations:

(i) Before requiring an on-duty nurse to work beyond his or her regularly scheduled work hours in connection with a patient care emergency, the health care employer shall make a good faith effort to have overtime covered on a voluntary basis or to otherwise secure nurse coverage by utilizing all methods set forth in its Nurse Coverage Plan required pursuant to Section 177.4 of this Part. The health care employer shall document attempts to secure nurse coverage through use of phone logs or other records appropriate to this purpose.

(ii) A patient care emergency cannot be established in a particular circumstance if that circumstance is the result of routine nurse staffing needs due to typical staffing patterns, typical levels of absenteeism, and time off typically approved by the employer for vacation, holidays, sick leave, and personal leave, unless a Nurse Coverage Plan which meets the requirements of Section 177.4 is in place, has been fully implemented and utilized, and has failed to produce staffing to meet the particular patient care emergency. Nothing in this provision shall be construed to limit an employer's right to deny discretionary time off (e.g., vacation time, personal time, etc.) where the employer is contractually or otherwise legally permitted to do so.

(iii) A patient care emergency will not qualify for an exception to the provisions of this Part if it was caused by the health care employer's failure to develop or properly and fully implement a Nurse Coverage Plan as required under Section 177.4 of this Part.

(4) **Ongoing Medical or Surgical Procedure.** The prohibition against mandatory overtime shall not apply in the case of an ongoing medical or surgical procedure in which the nurse is actively engaged and in which the nurse's continued presence through the completion of the procedure is needed to ensure the health and safety of the patient. Determinations with regard to whether the nurse's continued active engagement in the procedure is necessary shall be made by the nursing supervisor or nurse manager supervising such nurse.

(c) Nothing in this Part shall prohibit a nurse from voluntarily working overtime. A nurse may signify his or her willingness to work overtime by either: a) agreeing to work a particular day or shift as requested, b) agreeing to be placed on a voluntary overtime list or roster, or c) agreeing to

prescheduled on-call time pursuant to a collective bargaining agreement or other written contract or agreement to work.

§ 177.4 Nurse Coverage Plans

(a) Every health care employer shall implement a Nurse Coverage Plan, taking into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors. Such plan should also reflect the health care employer's typical levels and types of patients served by the health care facility.

(b) The Plan shall identify and describe as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of mandatory overtime including contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list or roster of nurses seeking voluntary overtime.

(c) The Plan must identify the Supervisor(s) or Administrator(s) at the health care facility or at another identified location who will make the final determination as to when it is necessary to utilize mandatory overtime. The Plan may not require a nurse to find his or her own shift replacement or to self-mandate overtime.

(d) The Plan shall require documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency and seek alternative staffing through the methods identified in subdivision (b) of this Section. In the event that the health care employer does utilize mandatory overtime, the documentation of such efforts to avoid the use of mandatory overtime shall be made available, upon request, to the nurse who was required to work the mandatory overtime and/or to the nurse's collective bargaining representative, provided, however, that the names and other personal identifying information about patients shall not be included unless authorized under State and federal law and regulations.

(e) The Plan shall be in writing and upon completion or amendment of such plan, it shall:

(i) be made readily available to all nursing staff through distribution to nursing staff, or conspicuously posting the Plan in a physical location accessible to nursing staff, or through other means that will ensure availability to nursing staff, e.g. posting on the employer's intranet site or its functional equivalent.

(ii) be provided to any collective bargaining representative representing nurses at the health care facility.

(iii) be provided to the Commissioner of Labor, or his or her designee, upon request.

(f) Nothing herein shall be read to establish the Nurse Coverage Plans required herein as standards to be used in assessing the health care employer's compliance with any other obligation or requirement, including facility accreditation.

(g) All such Plans were to have been prepared by October 13, 2009 in accordance with emergency regulations that were in effect. For health care employers who were not operating covered facilities on October 13, 2009, a Nurse Coverage Plan shall be in place prior to the time they commence operations.

§ 177.5 Report of Violations

Parties who wish to file complaints of violations of this Part shall follow procedures and utilize the forms set forth for this purpose on the Department's website.

§ 177.6 Conflicts with Law and Regulation; Collective Bargaining Rights Not Diminished

The provisions of this Part shall not be construed to diminish or waive any rights or obligations of any nurse or health care provider pursuant to any other law, regulation, or collective bargaining agreement.

§ 177.7 Waiver of Rights Prohibited

A health care employer covered by this Part may not utilize employee waivers of the protections afforded under Labor Law § 167 or this Part as an alternative to compliance with such law or regulation. A health care employer who seeks such a waiver from a nurse in its employ shall be considered to have violated this Part.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. LAB-43-10-00003-EP, Issue of October 27, 2010. The emergency rule will expire April 25, 2011.

Text of rule and any required statements and analyses may be obtained from: Teresa Stoklosa, NYS Department of Labor, State Office Campus, Building 12, Room 508, Albany, NY 12240, (518) 457-4380, email: teresa.stoklosa@dol.ny.gov

Regulatory Impact Statement

1. Statutory authority:

Section 21 of the Labor Law provides the Commissioner with authority

to issue regulations governing any provision of the Labor Law as she finds necessary and proper. This rule is proposed pursuant to Section 167 of the Labor Law enacted by chapter 493 of the Laws of 2008. The effective date of the law was July 1, 2009.

2. Legislative objectives:

Legislation passed during the 2008 legislative session recognized the physical and emotional toll that mandatory overtime can take on nurses and on patient care. In response to these concerns, the legislation requires that health care employers take steps to prudently plan for adequate nursing staff coverage in their facilities so as to avoid the need to require mandatory overtime of nurses in most instances.

3. Needs and benefits:

Nurses work in a demanding and stressful environment where sound decision-making is a matter of life and death for patients. Limitations on mandatory overtime avoid successive work shifts which take a physical and mental toll on nurse's performance and can impact the quality of patient care. Labor Law Article 6, section 167 places restrictions on consecutive hours of work for nurses, except in emergency situations, while not prohibiting a nurse from voluntarily working overtime and allows an employer who experiences an unanticipated staffing emergency that does not regularly occur, to require overtime to ensure patient safety.

The enabling legislation does not provide sufficient details with regard to what is expected of health care employers so as to avoid mandatory overtime, except in emergency situations. The rule addresses these statutory gaps by requiring that covered employers develop a Nurse Coverage Plan (the Plan), by setting forth the minimum elements to be addressed in the Plan, and by requiring that the Plan be posted and made available to the Commissioner, to nursing staff and their employee representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will allow health care employers to use mandatory overtime to cover nurse staffing needs.

4. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these projected costs – attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime – should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan.

The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and a log of efforts to obtain coverage using the Plan, these costs may be offset through use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Paperwork:

The employer will be required to develop and post the Nurse Coverage Plan discussed above, along with all necessary paperwork to log the efforts to obtain staff coverage in compliance with the Plan. Additionally, the Nurse Coverage Plan may require the drafting of contracts with alternative staffing providers such as per diem agencies and the posting of a list of nurses seeking voluntary overtime. The rule does provide alternative, paperless options to meet this requirement including posting of the Nurse Coverage Plan on the employer's intranet or by sending electronic copies of the Plan to staff and their representatives.

6. Local government mandates:

This rule will have an impact on any county, city, town, village, school district, fire district or other special district that employ nurses. The impact will depend on the size of the facility and nursing staff and the degree to which mandatory, unscheduled overtime is currently being used on a routine basis.

7. Duplication:

This rule does not duplicate any state or federal regulations.

8. Alternatives:

One alternative is to draft regulations which allow the employers to have full discretion to make determinations regarding the existence of an emergency on an ad hoc basis. However, such discretion is inconsistent with the letter and spirit of the statute. Clearly, certain levels of absenteeism based upon sick leave, bereavement, leaves of absences, and breaks during shifts will always exist in all employment settings, including health care facilities. A health care employer must plan to cover for these expected staff absences, based upon patterns that have emerged from operating a facility and must have staffing options that address the need to provide appropriate nursing care. The Department of Labor circulated draft regulations for comment to State Agencies and other employer groups, and to various employee representative groups. In some instances, changes to the regulations were made in response to such concerns. For example, the Department of Corrections (DOCS) requested clarification regarding examples of health care disasters set forth in Section 177.3 of the regulations. The regulations were revised to include such language.

The Department received comments from one employer group, the Healthcare Association of New York State, that the regulations should provide alternatives to healthcare employers regarding the conspicuous posting of the Nurse Coverage Plans. It was suggested that the regulations authorize employers to utilize other means to make the Nurse Coverage Plans available to nursing staff such as the employer's intranet. The Department revised the regulations to allow for the use of other means to make the Nurse Coverage Plan available to nursing staff.

The Department also received a comment from employee representatives about requiring the filing of all Nurse Coverage Plans with the Commissioner of Labor. The Department considered such a filing requirement but decided it was unnecessary since the Commissioner will request such Plans once a complaint has been received about an employer. The Department heard from representatives of public sector nurses that the definition of regularly scheduled work hours should include a reference to regulations governing such typical work hours. The language in relevant sections of the rule has been changed in response to this request.

The representatives of public sector nurses had comments about the Nurse Coverage Plans and the requirement for documentation of all attempts to avoid the use of mandatory overtime during a patient care emergency. The representatives were concerned that some health care employers might have a nurse working alone and if that nurse is unable to find relief through alternative staffing methods, he or she might then have to self-mandate overtime. A Nurse Coverage plan that requires a nurse to find her own shift replacement or to self-mandate overtime is inadequate. The Department added language to Section 177.4(c) (Nurse Coverage Plans) to require the Plan to identify the Supervisor at the health care facility who will make the final determination as to when it is necessary to utilize mandatory overtime.

Parties commenting on behalf of nurses in the public sector also asked that the regulations outline a system of recordkeeping regarding the documentation of all attempts to avoid the use of mandatory overtime. It was suggested that such documentation include information that would already be available in the employer's payroll records. The information provided in a nurse's complaint, the employer payroll records, and the documentation regarding all attempts to avoid mandatory overtime through the use of the Nurse Coverage Plan, should be sufficient for the Department to complete an investigation regarding a violation of Section 167 and 12 NYCRR Part 177. The representatives also suggested that in the event a health care employer utilizes mandatory overtime for a patient care emergency, the documentation regarding the efforts to avoid the use of such mandatory overtime should be available upon request to the nurse who had to work the mandatory overtime and/or the collective bargaining representative. The Department added language to Section 177.4(d) to require that such documentation is made available, upon request, to the nurse or the collective bargaining representative. The representatives also noted that any amendment to Nurse Coverage Plans should be made available to nurses and their collective bargaining representatives. Accordingly, Section 177.4(d) now includes language regarding amendments to the Nurse Coverage Plans.

The representatives of public sector nurses also suggested that Section 177.3(c) be revised to make it clear that an individual nurse must volunteer to remain on-call regardless of any contractual provisions which provide for on-call time for nurses. The Department does not have the authority to modify the terms of collective bargaining agreements. If the

collective bargaining agreement provides for on-call time for nurses, than such on-call time is presumed to be voluntary.

The representatives of public sector nurses all suggest the regulations collapse the separate and independent requirements set forth in Labor Law, Section 167(3)(c) to prudently plan for routine staffing shortages and to make good faith efforts to cover staffing on a voluntary basis before mandating overtime when a patient care emergency exists. The regulations require Nurse Coverage Plans to take into account typical patterns of absenteeism and to reflect the employer's typical levels and types of patients served in the facility. The Nurse Coverage Plan must identify and describe as many alternative staffing methods as are available to the employer to ensure adequate staffing other than by use of mandatory overtime during a patient care emergency. This language clearly requires employers to have a Nurse Coverage Plan that provides sufficient staffing to account for typical patterns of absenteeism and, at the same time, have alternative staffing methods to cover patient care emergencies.

The representatives of public sector nurses also suggest that the regulations provide for enforcement action against a health care employer who fails to develop and implement the required policies and procedures and maintain the required recordkeeping. While the Department does find penalties to be an effective means of encouraging employer compliance with regulations protecting the rights of workers, the implementing legislation does not provide for such penalties.

The representatives of public sector nurses also suggest that the regulations should clearly set forth protections against reprisals for filing a complaint. Such protections already exist under Section 215 of the Labor Law for nurses in private facilities. Civil Service Law, Section 75-b prohibits retaliatory actions by public employers against public employees.

The representatives of public sector nurses also suggest that the regulations set forth that the investigatory process be completed within 90 days and include an informal conference or means by which a Department Investigator, the complainant and/or the collective bargaining representative, and the employer meet to discuss issues arising from the investigation. The representatives also suggest a closing conference and a clearly defined appeal process or mechanism to dispute the Department's issuance of an order in a situation where the complainant employee or collective bargaining representative disputes the Department's decision. In short, the representatives of public sector nurses are requesting a procedural investigatory process similar to that for public employee safety and health complaints pursuant to Labor Law, Section 27-a. However, that investigatory process is clearly detailed in Section 27-a and includes site inspections, where representatives of the employer and an authorized employee representative are given an opportunity to accompany the Department Investigator during an inspection. This type of on-site inspection is needed to view whether safety and health hazards exist.

The representatives of public sector nurses suggest that nurse administrators or employees that have a nursing license, but do not provide direct patient care in their positions be covered under the provisions of Section 167 if the employer mandates them to provide direct patient care. Such a requirement is clearly contrary to the statutory provisions of Section 167. Specifically, Section 167(1)(b) defines a nurse as a registered professional nurse or a licensed practical nurse as defined by article one hundred thirty-nine of the Education Law who provides direct patient care. (Emphasis supplied) The Department does not have the statutory authority to expand the coverage of Section 167 to nurse administrators or other employees that have a nursing license, but do not have regularly scheduled work hours where they provide direct patient care.

During rule development, several parties presented diverse comments on many issues, some of which resulted in modification of this proposal. The Department looks forward to the public comment period, which will provide the opportunity for additional regulated parties and interested parties to explain their different perspectives and share expertise in this area that would help clarify, balance and generally improve the final regulation.

9. Federal standards:

There are no federal standards with like requirements.

10. Compliance schedule:

The rule would be effective on the date of final adoption.

However, emergency regulations have been in place for several months which have established the requirement for Nurse Coverage Plans. The Nurse Coverage Plans were required to be established by October 13, 2009.

Regulatory Flexibility Analysis

1. Effect of rule:

This rule will apply to all health care employers which include any individual, partnership, association, corporation, limited liability company or any person or group of persons acting directly or indirectly on behalf of or in the interest of the employer, which provides health care services in a facility licensed or operated pursuant to Article 28 of the Public Health Law, including any facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction

Law or in a facility operated by the State, a political subdivision or a public corporation as defined by Section 66 of the General Construction Law, operated or licensed pursuant to the Mental Hygiene Law, the Education Law, or the Correction Law. Accordingly, small businesses and local governments may be impacted if they provide health care services in a facility noted above. The Department's Division of Research and Statistics estimates that there are 4,175 health care facilities in the State with fewer than 100 employees. Of these 4,175 employers, 4,143 are private employers and 32 are public employers.

2. Compliance requirements:

The record and reporting requirements contained in the proposed rule are minimal. Healthcare employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. Additionally, the health care employer must make the Nurse Coverage Plan available to: nursing staff by posting the Plan or making it available to nursing staff by the intranet, employee representatives and to the Commissioner upon request. The health care employer must also maintain a log of efforts to obtain staff coverage in compliance with the Plan.

3. Professional services:

Legal services may be required to negotiate, draft and review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

The rule will require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis.

4. Compliance costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. The cost for individual health care employers will depend upon the extent to which the nurse staffing plan relies on these contract workers and the degree of coverage that the health care facility will need. For example, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff because of the need to fill such vacancies with nurses having the same specialized training. At the other end of the spectrum, facilities with very a small staff may find it equally difficult to fill vacancies without having to utilize outside staffing service providers. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs – attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime – should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Nurse Coverage Plan which takes into account typical patterns of staff absenteeism due to illness, leave, bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

5. Economic and technological feasibility:

The proposed rule does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

6. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

7. Small business and local government participation:

The Department solicited input on these regulations from various employer representatives. These employer representatives have members from small businesses and local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

Any rural area where nurses are employed will be affected. The type of affect will depend on the degree to which those areas are currently relying on unscheduled, mandatory overtime to fill staffing requirements.

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

The reporting, recordkeeping and compliance requirements contained in the proposed rule are minimal. The employer will be required to develop a Nurse Coverage Plan which identifies and describes as many alternative staffing methods as are available to the health care employer to ensure adequate staffing through means other than use of overtime, including, but not limited to, contracts with per diem nurses, contracts with nurse registries and employment agencies for nursing services, arrangements for assignment of nursing floats, requesting an additional day of work from off-duty employees, and development and posting of a list of nurses seeking voluntary overtime. The healthcare employer must log all good faith attempts to seek alternative staffing through the methods identified in the health care employers' Nurse Coverage Plan. The Plan must be in writing, and be provided to the nursing staff, to any collective bargaining representative representing nurses at the health care facility and to the Commissioner of Labor upon request.

The rule will also require health care employers to seek alternative sources to obtain the services of nurses other than forcing their current nursing staff to work mandatory overtime shifts. In this respect, the health care employers will be seeking professional nursing services which would have otherwise been performed by their current nursing staff on a mandatory basis. This may necessitate the drafting of contracts with alternative staffing providers such as per diem agencies.

3. Costs:

Employers in both the public and private sectors covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services, and temporary agencies to have a viable source of additional nursing staff to use in lieu of mandating overtime of current staff. The cost for individual health care employers will depend upon the extent to which the Plan relies on these contract workers and the degree of coverage that the health care employer will need. In the current environment of nursing shortages, a major medical center with several special care units requiring specially trained nursing staff may find it more difficult to fill shifts from among their own nursing staff. At the other end of the spectrum, facilities with a very small staff, few resources or in underserved or remote locations may not be able to compete to fill vacancies. At the time this legislation was before the Governor for action in 2008, the Division of Budget estimated compliance would cost approximately \$13 million in its first year. However, these costs – attributable to the hiring of per diem nurses necessary to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime – should have been offset by savings of \$5 million, which otherwise would have been paid for such overtime. Also, it is likely that in the approximately one and a half year period from when Section 167 was enacted into law, employers have been preparing for implementation of the statute and have taken steps to mitigate costs associated with this new law.

Other than staffing needs, costs associated with the rule will be administrative. Health care employers must prepare a Plan which takes into account typical patterns of staff absenteeism due to illness, leave,

bereavement and other similar factors as well as the number and types of patients typically served in the health care employer's facility. The Plan must also identify and describe the alternative staffing methods the employer will use to avoid mandatory overtime. It is not anticipated that any health care employer would have to retain outside professional services to prepare the Nurse Coverage Plan. Although there are administrative costs and time associated with developing and maintaining a written Plan and log, these costs may be offset through the use of a Plan in place that may reduce the need for last-minute supplemental staffing.

Legal services may be required to negotiate, draft or review contracts with alternative staffing providers such as per diem agencies. It is anticipated that a vast majority of health care providers in the state already have such agreements in place or have procurement or legal staff who regularly work on such contracts.

Requirements with regard to the posting of such Plan and the logging of efforts to obtain staff coverage in compliance with the Plan will result in minimal or no additional cost.

4. Minimizing adverse impact:

This rule is necessary to implement Labor Law, Section 167, as enacted by chapter 493 of the Laws of 2008. Although this enabling legislation does not require the promulgation of regulations, it does not provide sufficient details with regard to what is expected of health care employers so as to avoid, to the greatest extent possible, unnecessary mandatory overtime. The rule addresses these statutory gaps by requiring that covered employers develop a staffing plan, by setting forth the minimum elements to be addressed in this plan, and by requiring that the plan be made available to the Commissioner and to nursing staff and their representatives. At the same time, the rule clarifies circumstances under which various types of emergencies will exempt health care employers from the prohibition against mandatory overtime to cover nursing staffing needs that would otherwise apply.

This rule fulfills the legislative objective of chapter 493 by improving the health care environment for patients and the working environments for nurses and their families, while at the same time minimizes the potential impact on the health care employers by allowing them to develop a Nurse Coverage Plan which addresses their specific needs and takes into account all of their specific circumstances.

5. Rural area participation:

The Department sought input on these regulations from various employee representative groups which represent rural area employees. Additionally, the Department received input from various employer representative groups which also represent rural area employers.

Job Impact Statement

Health care employers covered by this rule may have to enter into contracts with nursing staff providers such as nurses' registries, per diem nursing services and temporary agencies to have a viable source of nursing staff to use in lieu of mandatory overtime. At the time Section 167 of the Labor Law (the statutory authority for this rule) was before the Governor for signature, the Division of the Budget estimated compliance would cost approximately \$13 million in its first year, which was attributable to the hiring of per diem nurses to ensure that sufficient nursing care is available for patients in the absence of the availability of mandatory overtime. Accordingly, it is apparent from the nature and purpose of this rule that it will not have any adverse impact on jobs or employment opportunities; in fact it will create more jobs.

Assessment of Public Comment

The Department received written comments on the proposed regulations, 12 NYCRR Part 177, regarding mandatory overtime for nurses from the Public Employees Federation (PEF), the New York State Nurses Association (NYSNA), the New York State Department of Education (State Education) and the New York State Department of Correctional Services (DOCS). The comments related to the following:

- the definition of the term "on call" as set forth in the proposed regulations at Section 177.2(e)
- patient care emergencies as an exception to the prohibition against mandatory overtime
- the use of Nurse Coverage Plans as a "safe harbor" for the good faith effort defense
- voluntary overtime
- who is responsible for making decisions regarding implementation of the Nurse Coverage Plan

The Department of Labor will be contacting PEF, NYSNA, State Education, and DOCS to discuss their concerns and determine whether revisions should be made to the proposed regulations.

Long Island Power Authority

NOTICE OF ADOPTION

Late Payment Charge Under the Authority's Tariff

I.D. No. LPA-49-10-00013-A

Filing Date: 2011-02-25

Effective Date: 2011-02-25

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

Action taken: The Long Island Power Authority ("Authority") adopted a proposal to modify its Tariff for Electric Service ("Tariff") to authorize the application of its existing late payment charge to residential customers.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Late payment charge under the Authority's Tariff.

Purpose: To extend the application of late payment charges to residential customers.

Text or summary was published in the December 8, 2010 issue of the Register, I.D. No. LPA-49-10-00013-P.

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

Text of rule and any required statements and analyses may be obtained from: Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, (516) 222-7700, email: amccabe@lipower.org

Revised Regulatory Impact Statement

A revised regulatory impact statement 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.

Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis 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.

Revised Rural Area Flexibility Analysis

A revised rural area flexibility analysis 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.

Revised Job Impact Statement

A revised job impact statement 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.

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.

NOTICE OF ADOPTION

Daily Service Charges and Monthly Charges Under the Authority's Tariff

I.D. No. LPA-49-10-00014-A

Filing Date: 2011-02-25

Effective Date: 2011-02-25

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

Action taken: The Long Island Power Authority ("Authority") adopted a proposal to modify its Tariff for Electric Service ("Tariff") to increase Daily Service Charges and Monthly Charges to cover increases in the costs of Delivery Service.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Daily Service Charges and Monthly Charges under the Authority's Tariff.

Purpose: To modify the Authority's Tariff to increase Daily Service Charges and Monthly Charges.

Text or summary was published in the December 8, 2010 issue of the Register, I.D. No. LPA-49-10-00014-P.

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

Text of rule and any required statements and analyses may be obtained from: Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, (516) 222-7700, email: amccabe@lipower.org

Revised Regulatory Impact Statement

A revised regulatory impact statement 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.

Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis 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.

Revised Rural Area Flexibility Analysis

A revised rural area flexibility analysis 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.

Revised Job Impact Statement

A revised job impact statement 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.

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.

NOTICE OF ADOPTION

Service Charge Under the Authority's Tariff

I.D. No. LPA-49-10-00016-A

Filing Date: 2011-02-25

Effective Date: 2011-02-25

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

Action taken: The Long Island Power Authority ("Authority") adopted a proposal to modify its Tariff for Electric Service ("Tariff") to create a reduced service charge for qualifying low income residential customers.

Statutory authority: Public Authorities Law, section 1020-f(z) and (u)

Subject: Service charge under the Authority's Tariff.

Purpose: To create a reduced service charge for qualifying low income residential customers.

Text or summary was published in the December 8, 2010 issue of the Register, I.D. No. LPA-49-10-00016-P.

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

Text of rule and any required statements and analyses may be obtained from: Andrew McCabe, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403,, (516) 222-7700, email: amccabe@lipower.org

Revised Regulatory Impact Statement

A revised regulatory impact statement 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.

Revised Regulatory Flexibility Analysis

A revised regulatory flexibility analysis 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.

Revised Rural Area Flexibility Analysis

A revised rural area flexibility analysis 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.

Revised Job Impact Statement

A revised job impact statement 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.

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.

Public Service Commission

NOTICE OF ADOPTION

Lightened Regulation of Norse' Natural Gas Gathering Pipelines and Operations

I.D. No. PSC-37-10-00013-A

Filing Date: 2011-02-23

Effective Date: 2011-02-23

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

Action taken: On 2/17/11, the PSC adopted an order approving the Petition of Norse Pipeline, LLC for Lightened Regulation as a gas corporation.

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

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

Purpose: To approve Lightened regulation of Norse' natural gas gathering pipelines and operations.

Substance of final rule: The Commission, on February 17, 2011, adopted an order approving the Petition of Norse Pipeline, LLC for Lightened Regulation as a gas corporation under the Public Service Law, 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-G-0364SA1)

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-41-10-00014-A

Filing Date: 2011-02-23

Effective Date: 2011-02-23

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

Action taken: On 2/17/11, the PSC adopted an order approving Fairway Water Corporation's amendment to PSC 1 No.—Water, effective January 1, 2011 and postponed to April 1, 2011, to increase its annual revenues by \$4,212 or about 14.1%.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 89-c(1) and (10)

Subject: Water rates and charges.

Purpose: To approve Fairway Water Corporation's amendment to PSC 1 No.—Water, effective January 1, 2011 and postponed to April 1, 2011.

Substance of final rule: The Commission, on February 17, 2011 adopted an order approving Fairway Water Corporation's amendment to PSC 1 No.—Water, effective January 1, 2011 and postponed to April 1, 2011, to increase its annual revenues by \$4,212 or about 14.1%, to become effective March 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-W-0461SA1)

NOTICE OF ADOPTION

Petition for the Submetering of Electricity

I.D. No. PSC-41-10-00019-A

Filing Date: 2011-02-24

Effective Date: 2011-02-24

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

Action taken: On 2/17/11, the PSC adopted an order approving the petition of 175 Kent Avenue, LLC to submeter electricity at 53 North 3rd Street, Brooklyn, New York located in the territory of Consolidated Edison Company of New York, Inc.

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

Subject: Petition for the submetering of electricity.

Purpose: To approve the petition of 175 Kent Avenue, LLC to submeter electricity at 53 North 3rd Street, Brooklyn, New York.

Substance of final rule: The Commission, on February 17, 2011 adopted an order approving the petition of 175 Kent Avenue, LLC to submeter electricity at 53 North 3rd Street, Brooklyn, New York located in the territory of Consolidated Edison Company of New York, Inc., 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-0460SA1)

NOTICE OF ADOPTION

Waiver of the Phase-Out of the Declining Block Rate

I.D. No. PSC-45-10-00016-A

Filing Date: 2011-02-23

Effective Date: 2011-02-23

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

Action taken: On 2/17/11, the PSC adopted an order denying the petition filed on behalf of Dickerson Pond Association at the Valeria Condominiums in Cortland Manor, New York for waiver of the phase-out of the declining block rate.

Statutory authority: Public Service Law, sections 65(1), (2), (4), (5), 66(1), (12) and (14)

Subject: Waiver of the phase-out of the declining block rate.

Purpose: To deny a waiver of the phase-out of the declining block rate.

Substance of final rule: The Commission, on February 17, 2011 adopted an order denying the petition filed on behalf of Dickerson Pond Association at the Valeria Condominiums in Cortland Manor, New York for waiver of the phase-out of the declining block rate under Service Class 7 of Consolidated Edison Company of New York, Inc.'s electric tariff, 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-0498SA1)

NOTICE OF ADOPTION**Policies and Procedures for TOA**

I.D. No. PSC-46-10-00015-A

Filing Date: 2011-02-23

Effective Date: 2011-02-23

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

Action taken: On 2/17/11, the PSC adopted an order granting the Director of the Office of Telecommunications, authority to issue conditional open-ended Temporary Operating Authority certificates.

Statutory authority: Public Service Law, sections 215 and 216

Subject: Policies and procedures for TOA.

Purpose: To authorize the Director of the Office of Telecommunications to issue conditional open-ended TOA certificates.

Substance of final rule: The Commission, on February 17, 2011 adopted an order granting the Director of the Office of Telecommunications authority to issue conditional open-ended Temporary Operating Authority certificates, authorizing continuation of cable television service during cable renewal negotiations that will be effective until issuance of a certificate of confirmation for the cable renewal, 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-V-1289SA2)

NOTICE OF ADOPTION**Petition for the Submetering of Electricity**

I.D. No. PSC-49-10-00012-A

Filing Date: 2011-02-24

Effective Date: 2011-02-24

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

Action taken: On 2/17/11, the PSC adopted an order approving the petition of FC Beekman Associates, LLC to submeter electricity at 8 Spruce Street, New York, New York located in the territory of Consolidated Edison Company of New York, Inc.

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

Subject: Petition for the submetering of electricity.

Purpose: To approve the petition of FC Beekman Associates, LLC to submeter electricity at 8 Spruce Street, New York, New York.

Substance of final rule: The Commission, on February 17, 2011 adopted an order approving the petition of FC Beekman Associates, LLC to submeter electricity at 8 Spruce Street, New York, New York located in the territory of Consolidated Edison Company of New York, Inc., 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-0559SA1)

NOTICE OF ADOPTION**Approval of a Financing**

I.D. No. PSC-50-10-00006-A

Filing Date: 2011-02-23

Effective Date: 2011-02-23

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

Action taken: On 2/17/11, the PSC adopted an order approving Mirant Bowline LLC's petition to incur corporate revolving and term debt up to a maximum amount of \$1.488 billion.

Statutory authority: Public Service Law, section 69

Subject: Approval of a financing.

Purpose: To approve Mirant Bowline LLC's petition to incur corporate revolving and term debt up to a maximum amount of \$1.488 billion.

Substance of final rule: The Commission, on February 17, 2011 adopted an order approving Mirant Bowline LLC's petition to incur corporate revolving and term debt up to a maximum amount of \$1.488 billion, 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-0593SA1)

NOTICE OF ADOPTION**Water Fees Refund**

I.D. No. PSC-52-10-00009-A

Filing Date: 2011-02-23

Effective Date: 2011-02-23

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

Action taken: On 2/17/11, the PSC adopted an order authorizing United Water New York, Inc.'s (UWNY) to revise its water bill credit statement to reflect a total of \$3,541,059 for the Methyl Tertiary Butyl Ether proceeds.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Water fees refund.

Purpose: To authorize UWNY to revise its water bill credit statement.

Substance of final rule: The Commission, on February 17, 2011 adopted an order authorizing United Water New York, Inc.'s to revise its water bill credit statement to reflect a total of \$3,541,059 for the Methyl Tertiary Butyl Ether proceeds, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(09-W-0731SA2)

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Public Service Commission publishes a new notice of proposed rule making in the *NYS Register*.

Amendments to 16 NYCRR Part 7

I.D. No.	Proposed	Expiration Date
PSC-01-10-00020-P	January 6, 2010	February 24, 2011

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Allocation of Customer-Sited Tier, Administration, Outreach, and NYS Cost Recovery; Funding Caps and Capacity Caps

I.D. No. PSC-11-11-00002-P

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

Proposed Action: The Commission is considering a petition by the New York State Energy Research and Development Authority (NYSERDA) requesting the allocation of unencumbered Renewable Portfolio Standard (RPS) funds and other modifications.

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

Subject: Allocation of Customer-Sited Tier, administration, outreach, and NYS Cost recovery; funding caps and capacity caps.

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

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the Renewable Portfolio Standard (RPS) program related to the use of unencumbered Customer-Sited Tier program funding and unencumbered Customer-Sited Tier and Main Tier administrative funding from year 2010 budgets by the New York State Energy Research and Development Authority (NYSERDA) as administrator of the RPS program. In particular, the Commission is considering the "Petition for Modification, Proposal Regarding Unallocated CST Funds" dated January 31, 2011 wherein NYSEDA requests (a) the allocation of unencumbered Customer-Sited Tier program funding and unencumbered Customer-Sited Tier and Main Tier administrative funding from year 2010 budgets into those for 2011; (b) authorization for the Solar Photovoltaic Program to use funds reallocated into the incentive budget in months when demand exceeds the \$2 million per month schedule; (c) clarification or modification of the maximum size cap rule for on-site wind installations; (d) approval to use \$900,000 of Solar Thermal incentive funds for Solar Thermal Awareness and Outreach efforts; (e) approval to use surplus program administration funds and a reallocation of certain Customer-Sited Tier program funds for quality assurance and quality control activities in 2011 and 2012; and (f) an increase in the budget for payment of the New York State Cost Recovery Fee, and authorization to apply accumulated interest earned on RPS funds and a reallocation of Main Tier and Customer-Sited Tier program funds for that purpose.

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

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

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

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

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

(03-E-0188SP27)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Proposed Transfer of 55.42 Acres of Land and \$1.4 Million of Revenues Derived from the Rendition of Public Service

I.D. No. PSC-11-11-00003-P

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

Proposed Action: The Commission is considering whether to approve, deny, or modify, in whole or in part, the petition of Consolidated Edison Company of New York, Inc. and the Town of Cortlandt pursuant to PSL 70 and 107 regarding the transfer of certain real property.

Statutory authority: Public Service Law, sections 2(12), (13), 5(1), 66(1), (9), 70 and 107(1)

Subject: Proposed transfer of 55.42 acres of land and \$1.4 million of revenues derived from the rendition of public service.

Purpose: The proposed transfer of 55.42 acres of land and \$1.4 million of revenues derived from the rendition of public service.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny, or modify in whole or in part, the joint petition of Consolidated Edison Company of New York, Inc. (Con Edison), and the Town of Cortlandt (Town) for authority under Public Service Law (PSL) § 70 and 107 to transfer certain real property and to transfer to the Town \$1.4 million in revenues derived from the rendition of public service to fund the repair of an earthen dam located on the real property to be transferred.

The property to be transferred consists of 55.42 acres of undeveloped land located on the northwest side of Furnace Dock Road at the intersection of Mount Airy Road in the Town of Cortlandt, County of Westchester, New York. The real property is identified on Map 55.19 of the Town as Block 1, Lot 2.

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

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

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

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

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

(11-M-0083SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Minor Rate Filing

I.D. No. PSC-11-11-00004-P

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

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

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

Subject: Minor Rate Filing.

Purpose: To increase annual electric revenues by approximately \$289,561 or 15.2%.

Substance of proposed rule: The Commission is considering a proposal filed by the Village of Spencerport (Spencerport) which would increase its annual electric revenues by about \$289,561 or 15.2%. The proposed filing has an effective date of June 1, 2011. The Commission may adopt in whole or in part, modify or reject Spencerport's proposal.

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

New York 12223-1350, (518) 486-2655, email: leann_ayer@dps.state.ny.us

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

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

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

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

(11-E-0073SP1)

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

Lightened Regulation of Steam Operations

I.D. No. PSC-11-11-00005-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 a petition filed by Syracuse University on February 17, 2011 requesting that the steam service it provides in Syracuse, New York be regulated lightly.

Statutory authority: Public Service Law, sections 2(22), 5(1)(b), 78, 79, 80, 81, 82, 82-a, 83, 84, 85, 88, 89, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-a, 119-b and 119-c

Subject: Lightened regulation of steam operations.

Purpose: Consideration of lightened regulation of steam operations.

Substance of proposed rule: The Public Service Commission is considering a petition filed by Syracuse University on February 17, 2011 requesting that the steam service it provides in the City of Syracuse, New York, to the Veterans Administration Medical Center, Crouse Irving Memorial Hospital, State University of New York Upstate Medical Center, and SUNY College of Environmental Science and Forestry, be subject to lightened regulation. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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

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

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

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

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

(11-S-0069SP1)

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

Energy Efficiency Portfolio Standard Including Utility Incentive Mechanisms

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

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

Proposed Action: The Commission is considering a petition for rehearing and clarification filed by Consolidated Edison Company of New York, Inc. and Orange and Rockland Utilities, Inc. concerning the Commission's order issued December 21, 2010 in Cases 07-M-0548 et al.

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

Subject: Energy Efficiency Portfolio Standard including utility incentive mechanisms.

Purpose: To promote gas and electricity energy conservation programs in New York.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, or to take other action regarding a petition submitted by Consolidated Edison Company of New York, Inc. (Con Edison) and Orange and Rockland Utilities, Inc. (O&R) on January 20, 2010 seeking rehearing of the Commission's December 21, 2010 Order in the Energy Efficiency Portfolio Standard (EEPS) proceeding, Cases 07-M-0548 et al. In their petition, Con Edison and O&R request that the Commission: 1) revise the EEPS program energy savings targets to be applied when calculating utility incentives and assessing portfolio performance; 2) extend the deadline for achieving energy saving targets to December 31, 2012 or waive the incentive mechanism for 2009-2011; 3) provide utilities additional discretion to reallocate funds between EEPS programs and to adjust program targets; 4) clarify the role and operation of the Implementation Advisory Group; 5) clarify the procedures for utilities to request adjusted energy savings targets due to changes in the technical manual savings calculations that are due April 1, 2011; and 6) approve certain proposed EEPS program modifications on an expedited basis. The Commission is also considering whether its resolution of the issues posed by Con Edison and O&R's petition should be applied to other utility-administered EEPS programs.

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

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

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

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

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

(07-M-0548SP32)

Department of Transportation

NOTICE OF ADOPTION

The 2010 Edition of the New York State Supplement to the Manual on Uniform Traffic Control Devices (MUTCD)

I.D. No. TRN-01-11-00003-A

Filing No. 219

Filing Date: 2011-03-01

Effective Date: 2011-03-16

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

Action taken: Repeal of Chapter V; and addition of new Chapter V to Title 17 NYCRR.

Statutory authority: Vehicle and Traffic Law, section 1680(a); and Transportation Law, section 14(18)

Subject: The 2010 Edition of the New York State Supplement to the Manual on Uniform Traffic Control Devices (MUTCD).

Purpose: Repeal the current NYS Supplement to the MUTCD and replace it with the NYS Supplement to the MUTCD - 2010 Edition.

Substance of final rule: This rulemaking makes 441 changes to sections of 17 NYCRR Chapter V ("New York State Supplement"), hereafter referred to as the "Supplement." These changes are being made to make the Supplement match the MUTCD in word use and format, clarify information in the MUTCD that has proven confusing to users and provide additional information in instances where the MUTCD guidance is deficient for the needs of New York State.

The majority of changes in this rulemaking essentially allow for the continuance of traffic control practices already used in New York State. The only changes representing new information are:

- Support to clarify meaning of Standard statements
 - Guidance for use of STOP or YIELD signs
 - Guidance for use of Intersection Lane Control signs
 - Requirement for use of fish-hook arrows on signs and markings at roundabouts
 - Disallowing use of new permissive parking signs
 - Addition of 6 STATE LAW signs that have been in use but were not in the Supplement
 - Guidance for placement of certain warning signs that do not necessarily require deceleration
 - Guidance for use of Stop Ahead and Signal Ahead signs
 - Guidance and Figure for use and placement of Lane Ends signs
 - Guidance and Figure for use of Intersection Warning signs
 - Allow use of Intermediate Reference Location signs with Enhanced Reference Location signs
 - Disallow use of Supplemental Arrow plaques with W20 series construction warning signs
 - Disallow use of yellow on brown signs in the Catskill Park
 - Revised list of signs allowed to be yellow on brown in the Adirondack Park
 - Guidance for use of Changeable Message signs
 - Disallow use of certain alternate sign designs in favor of one preferred style for each type
 - Eliminate option for having beacons mounted within School Speed Limit signs
 - Requirement for use of Regulatory signs with bike lanes
- The changes are grouped by their main purpose as follows:
- A. 10 changes add information to the Supplement that existed in the previous 17 NYCRR or Authorizations.
 - B. 34 changes to graphics/tables that were necessitated by changes to text or to clarify usage.
 - C. 51 changes add information to address deficiencies in the National MUTCD guidance.
 - D. 92 changes deleting NY specific signs and adopting MUTCD signs.
 - E. 138 changes editing text to match word usage and formatting changes in the MUTCD or to correct typographic errors in Supplement text.
 - F. 70 changes that moved text from one section to another to match organizational changes in MUTCD.
 - G. 12 changes to disallow new signs that are in conflict with or not supported by NY law.
 - H. 34 changes to disallow optional sign texts in favor of one preferred style.

Final rule as compared with last published rule: Nonsubstantive changes were made in TOC and sections 2B.39, 2C.26, 2I.02, 2J.07, 3B.01, 6F.61, 7B.15 and SD-W37.

Text of rule and any required statements and analyses may be obtained from: David Woodin, Office of Traffic Safety and Mobility, New York State Department of Transportation, 50 Wolf Road, Albany, NY 12232, (518) 457-7436, email: dwoodin@dot.state.ny.us

Revised Job Impact Statement

Since no comments were received during the 45 day comment period, there is no necessity for revision of the Job Impact Statement.

Assessment of Public Comment

The agency received no public comment.

Workers' Compensation Board

EMERGENCY RULE MAKING

Filing Written Reports of Independent Medical Examinations (IMEs)

I.D. No. WCB-11-11-00001-E

Filing No. 211

Filing Date: 2011-02-25

Effective Date: 2011-02-26

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

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

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

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

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

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

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

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

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

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires May 25, 2011.

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

Regulatory Impact Statement

1. Statutory authority:

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

2. Legislative objectives:

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

3. Needs and benefits:

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

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

Since the issuance of the October 2003 guidance and the Board Panel decisions, the Board has been contacted by numerous participants in the system indicating that ten calendar days from the date of the examination is not sufficient time within which to file the report of the exam with the Board. This is especially true if holidays fall within the ten day period as the Board and U.S. Postal Service do not operate on those days. Further the Board is not open to receive reports on Saturdays and Sundays. If a report is precluded because it is not filed timely, it is not considered by the WCLJ in rendering a decision.

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

4. Costs:

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

5. Local government mandates:

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

6. Paperwork:

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

7. Duplication:

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

8. Alternatives:

One alternative discussed was to take no action. However, due to the concerns and problems raised by many participants, the Board felt it was more prudent to take action. In addition to amending the rule to require the filing within ten business days, the Board discussed extending the period within which to file the report to fifteen days. In reviewing the law and regulations the Board felt the proposed change was best. Subdivision 7 of

WCL Section 137 requires the notice of the exam be sent to the claimant within seven business days, so the change to business days is consistent with this provision. Further, paragraphs (2) and (3) of subdivision 1 of WCL Section 137 require independent medical examiners to submit copies of all request for information regarding a claimant and all responses to such requests within ten days of receipt or response. Further, in discussing this issue with participants to the system, it was indicated that the change to business days would be adequate.

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

9. Federal standards:

There are no federal standards applicable to this proposed rule.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

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

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

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

2. Compliance requirements:

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

3. Professional services:

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

4. Compliance costs:

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

5. Economic and technological feasibility:

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

6. Minimizing adverse impact:

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

7. Small business and local government participation:

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

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

2. Reporting, recordkeeping and other compliance requirements:

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

3. Costs:

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

4. Minimizing adverse impact:

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

5. Rural area participation:

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

Job Impact Statement

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