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Appendix A

Medical Technology and Health

Rochester, NY **September 11, 2013**

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Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

Donald Trump, MD

President of Roswell Park Cancer Institute

SENATE MAJORITY COALITION
PUBLIC FORUMS ON REGULATORY REFORM
Comments from Dr. Donald L. Trump, President and CEO
Roswell Park Cancer Institute

September 11, 2013

Good Morning

First I want to welcome all the Senators from across the state who are here at Roswell Park Cancer Institute today, and a special thank you to Senator Gallivan and his staff who organized this event. We are pleased to have you in Buffalo and to host you on campus. I hope that you have an opportunity to tour some of our facilities, talk to some of our clinicians, researchers and scientists and see the Buffalo Niagara Medical Campus where Roswell Park has been operating for its entire 100 plus year history.

Roswell Park Cancer Institute is a cancer research, treatment and educational facility. We provide care for cancer patients . . . in our laboratories we are searching for cures and new ways to diagnose cancer . . . we educate and facilitate the public in preventing cancer through behaviors and screening . . . and finally we prepare the next generation of scientists, clinicians and allied health professionals.

As a provider of healthcare and a New York State public benefit corporation we deal with a tremendous amount of regulation, and my message today might not be exactly what you want to hear but essentially I would advise a little common sense could go a long way in mitigating what can be a highly regulated environment.

In other words do not use a sledge hammer to kill an ant when something much less would achieve the same goal.

So I would ask you as lawmakers to do two things in the upcoming session:

1. Think about implications and implementation before passing new laws and regulations; and
2. Make the rule, regulation or law fit the problem.

Many good intentioned solutions can quickly get out of hand when common sense is absent from consideration, but the devil is always in the detail - Many times it is not the law or the idea that is flawed but the implementation.

For example 2 pieces of legislation that have been introduced and considered by the legislature but have not yet become law are prime examples.

"Safe Staffing for Quality Care Act" (A.6571/S.3691) and the "Safe Patient Handling Act" (A.2180/S.1123) With titles like that how could you oppose these bills? Clearly as healthcare professionals our patients' safety is of the highest importance, however, the specifics that are in these bills – the requirements if you will, go too far in my opinion. As legislators I respect your role as leaders and policy makers to state the need to eliminate injuries that occur due to the movement of patients, and provide a safe, caring environment - but in turn please trust healthcare professionals to safely staff our facilities and provide the appropriate tools to do so. If there are a few bad actors, I am confident that the capability already exists to address those without imposing an across the board legislative solution.

Hospital and Clinical Operations

I am sure you will hear a lot about the Certificate of Need (CON) process today so I will not dwell on this but suffice it to say the playing field needs to be leveled but it should not be done by adding more regulation to parties in the healthcare industry instead it should be achieved by eliminating some of the burdensome regulations.

The Healthcare Association of New York State, of which Roswell Park is a member, has raised the issue of duplicative laboratory certifications and this would be an area where savings could be achieved with no loss of quality. Our clinical laboratories must be inspected by the Joint Commission which is a national accrediting organization. New York State also inspects our laboratories, this is duplicative, time consuming, costly and there is no added value.

Medical licensure could be significantly streamlined. We have recruited physicians from prestigious places like the Mayo Clinic who have been practicing medicine in the United States for 20 years but were educated at a foreign medical school. The NYS process for verifying education is long, cumbersome and largely unnecessary. We can offer you more details offline if you are interested.

Telemedicine is an important tool in healthcare delivery. As technology permeates and makes this more accessible, our laws and regulations need to progress. In an Institute of Medicine Report "Delivering High-Quality Cancer Care: Charting a New Course for a System in Crisis" released just yesterday notes the anticipated oncology workforce shortage in the face of growing demand for services. Telemedicine is one way to address this shortage. Currently there are rules and regulations in New York that prohibit our physicians from providing care via telemedicine to a patient in another state unless the physician is licensed in that state.

Another issue that is especially difficult for cancer patients is the requirement by some Medicaid managed care plans to obtain specialty medications from CVS Caremark in Connecticut. Using a pharmacy company out of NYS delays our patients getting medications timely. It seems that utilizing a specialty pharmacy in NYS would address two issues: keeping the NYS Medicaid dollars in the state, patronize a NYS company and it might be more timely. I know there are companies in the state and even in our region who can provide these services.

Public Authorities

When the Public Authorities Accountability Act passed in 2009 the goals were transparency and accountability. As a taxpayer I can't argue with that. However, this falls into the category of a universal solution that does not quite fit. Roswell Park Cancer Institute as I said in the beginning of my comments is a public benefit corporation but in accounting standards we are a public healthcare facility so our financials must follow the rules of full-accrual accounting. The Public Authorities Budget Office is looking for standardization, but the accounting methods that apply to our business are not the same that are required in the ABO reporting. So when we submit our year end financials and budget to ABO we have to pay accountants to transform our financial statements into the accrued accounting method. Therefore the public information reported by Roswell does not resemble reality and distorts the intent of public disclosure.

Staying with the Authorities Budget Office and an example of where common sense could be helpful in the application of regulations. There is a requirement for Roswell Park to submit our Mission statement which is to Understand, Prevent and Cure Cancer. It is simple yet descriptive; Management and our Board agree that it accurately describes what we do here on a daily basis. The Public Authority Budget Office informed us that our mission statement does not adequately meet the ABO criteria.

Labor/Human Resources

I am sure you will hear this in other venues but the Triborough Amendment to the Taylor Law which provides for the continuation of bargaining agreement provisions after expiration and prior to the ratification of a new agreement do cause challenges.

This is unique to Roswell but nevertheless challenging – since our employees are members of the statewide public employee unions the contracts are negotiated in Albany by the Governor's Office of Employee Relations and the statewide union leadership. It would be beneficial to have more autonomy in collective bargaining by revising the Public Authorities Law.

Roswell Park currently offers a voluntary defined contribution plan to some employees we would like to expand the benefit to more employees. It would be more portable and could reduce NYS pension costs.

There is an Assembly bill (A.1587) which would repeal the Wage Theft Prevention Act. While complete repeal might be something you would like to examine in particular we would like to see the annual wage notification which is required by NYS Labor Law section 195(1) repealed. This is an administrative burden that requires our research employees to sign off on their salary every year.

With respect to Civil Service Law sections 71 & 73 we would like to see revisions so that the amount of leave would be based on the degree of disability and the likelihood of the employee to return to work.

A couple years ago there was significant worker's compensation reform but one item that might need to be revisited would be section 25 the employee payments and degree of disability table outlined in the Workers' Compensation Reform and Legislation. It is complicated, costly and incentivizes employees to remain out of work.

Thank you for your time and your efforts in trying to create a better climate for doing business in New York State.

I am available for questions and if you need more information on any of these points my staff is available to work with you.

Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

James Kaskie

President & CEO of Kaleida Health

Kaleida Health

TESTIMONY OF JAMES R. KASKIE

PRESIDENT & CEO
KALEIDA HEALTH

PRESIDENT & CEO
GREAT LAKES HEALTH SYSTEM OF WNY

CHAIR, BOARD OF DIRECTORS
GREATER NEW YORK HOSPITAL ASSOCIATION

TO:

THE NEW YORK STATE SENATE MAJORITY COALITION

RE: REGULATORY REFORM

September 11, 2013
Roswell Park Cancer Institute
11:00 A.M.

Good afternoon, my name is Jim Kaskie, the President & CEO for Kaleida Health, the largest healthcare provider and largest private sector employer in Western New York. I am also president of Great Lakes Health System of Western New York, the entity that aligns many of the efforts of Kaleida Health, ECMC and the University at Buffalo School of Medicine and Biomedical Sciences.

On behalf of our 13,000 + employees and the 1 million people we serve each year, thank you for the opportunity to speak today.

Let me first commend the Senate Majority Coalition for the task at hand. Your leadership, vision and planning will hopefully lead to meaningful regulatory reform. Eliminating costly regulations and unnecessary bureaucracies is good government. More importantly, these reforms will drive growth and improve our economy.

We certainly know Western New York could benefit from this type of reform.

We all know that we are living in very challenging times. However, each of us must assume a leadership role to work together to find thoughtful, balanced solutions to the fiscal problems and regulatory challenges facing our State - and us as employers and providers of needed health care services.

Therefore, our organization is committed to being a part of the solution.

We are willing to work with your Majority Coalition and the State if you need a demonstration site to test reforms ... we stand ready to work with you to implement regulatory relief.

We are an organization that has stepped forward to take what we have - which is very good - and make it better for those we serve.

For example, during the Berger Commission, Kaleida Health openly supported the reform agenda. The result? In Western New York, we closed outdated facilities, consolidated others and are building new, more efficient hospitals and nursing homes. We have partnered with public and private organizations to create a better healthcare system and various centers of excellence that have replaced expensive duplication with collaboration. We are working collaboratively to better serve our community.

But, more reform is needed.

As a member of the Greater New York Hospital Association (GNYHA), which represents 250 not-for-profit voluntary and public hospitals and long term care facilities, Kaleida Health supports many of the reform proposals that GNYHA has advanced over the years, to reduce hospitals regulatory burdens as well as the high cost of doing business.

I am proud to serve as the Chair of Greater New York and advocate on behalf of its members today.

With year after year budget cuts coming out of Albany and Washington, DC, healthcare providers face huge challenges. We will not be able to continue to provide high-quality care to all residents throughout the State. Relief is needed.

For the upcoming New York State legislative session, Kaleida Health will work together with Greater New York to advance the following proposals:

Provide hospitals and physicians relief from the high cost of medical malpractice coverage by advancing meaningful tort reform proposals, such as expanding the 2011 medical indemnity fund (MIF) to cover the future medical costs for *all* neurologically impaired individuals, not just neurologically impaired newborns; and preventing the passage of bills that would increase medical malpractice premiums, such as extending New York's current statute of limitations for medical malpractice cases.

Implement the New York State Public Health and Health Planning Council's (PHHPC) recommendations that would further streamline New York's Certificate of Need (CON) program by eliminating construction projects from CON review, regardless of cost, unless the projects include detailed cost drivers or limit access, and rationalize character and competence reviews of new operators and board members.

GNYHA and Kaleida Health also strongly oppose two extremely costly nursing/workforce bills that would 1) mandate minimum nurse-patient staffing ratios, which have not been proven to improve patient outcomes, and 2) require health care facilities to implement an onerous *one-size-fits-all* safe patient handling program. Kaleida Health's own safe patient handling program has been extremely successful but this should be a choice for an organization; not a mandate.

MALPRACTICE REFORM

Regarding medical malpractice, in New York State, as much as 10% of a hospital's non-operating budget comes from the high cost of medical malpractice coverage. Collectively, New York hospitals pay more than $1.6 billion annually in medical malpractice costs—some of the highest in the country. The high costs over time have pushed most commercial insurance carriers out of the market and forced many hospitals to self-insure or go without insurance coverage.

Nationally, there are several reasons medical malpractice coverage costs are so high: the tort system itself has exorbitantly high costs and is lengthy, inefficient, and acrimonious. Consequently, recoveries are often unpredictable, inequitable, and excessive, leading to unnecessarily high premiums, reserves, and settlements. Not surprisingly, many physicians practice extensive "defensive medicine" in an effort to avoid malpractice litigation, which further adds to overall health care system costs.

In New York, the severity of awards (i.e., the dollar amounts awarded), including some of the largest jury awards in the nation, has driven the unsustainably high costs of medical malpractice coverage. However, the number of claims against hospitals has leveled off or, in some areas, declined, which Greater New York attributes to hospitals' patient safety initiatives.

CONCLUSION

In conclusion, I thank you for your time and consideration. I have attached Greater New York Hospital Association's full 2013-2014 Legislative Agenda to my testimony for your review.

We stand ready to help find solutions to the State's challenging issues, costly regulations and mandates. We look forward to working with you on a truly balanced approach in the coming months.

Thank you. I am available to answer any questions that you might have.

Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

Thomas Madejski, MD

Assistant Treasurer for the Medical Society of Erie County

TESTIMONY OF DR. THOMAS MADEJSKI, MD

MEDICAL SOCIETY OF NEW YORK/ERIE & NIAGARA COUNTY MEDICAL SOCIETIES

AT A

NEW YORK STATE SENATE HEARING ON REGULATORY REFORM

SEPTEMBER 11, 2013

BUFFALO, NY

Good morning. My name is Dr. Tom Madejski. I am an internist in Medina and the Assistant Treasurer for the Medical Society of the State of New York. I appreciate the opportunity to testify on behalf of the physician community regarding the ever increasing administrative burden we face, as a result of state mandates, in attempting to deliver care to our patients. We look forward to continuing dialogue with you to eliminate or lessen these burdens.

I think it is important to remind the panel that New York is an exceedingly difficult state in which to deliver the care our patients - your constituents - expect to receive. This is due to confluence of a number of factors, including its extraordinarily high liability insurance costs, as compared to other states, at the same time that the insurance industry continue to impose additional roadblocks to delivering patient care through the continued reduction, denial and delay of payment for necessary care previously delivered. We, as any other small business, also face a ridiculously high tax burden, and ever increasing overhead costs. State government legislative and regulatory mandates significantly add to this burden and take time away from delivering patient care. These problems must be considered and addressed as policymakers hope to assure an adequate health care safety net for the hundreds of thousands of New Yorkers who will be likely be obtaining health insurance coverage for the first time through the State's Health Insurance Exchange.

Recently MSSNY conducted a survey with over 800 physician respondents to gauge physician perspective of a variety of issues relating to New York State's health care delivery stem. Notably, over one-third (34%) of the respondents indicated that they were "seriously considering" retiring from practice in the next two years, and over 37% indicated that they plan to reduce the services they deliver over the next two years.

The study also showed that only 35% of physicians would affirmatively recommend to their children or younger family members that they become physicians and **only 22%** of physicians would affirmatively recommend to medical students that they practice in New York State.

> diminishing returns because of the administrative burden and paperwork. Something is wrong with this equation."

These are just a few of hundreds of very similar comments we received. They reflect a strong frustration on the part of many in the physician community. Yes, we remain very committed to delivering care in our communities, but so much of our time now is taken up by non-medical tasks.

Certainly, many of the changes taking place in the practice of medicine in New York are similarly taking place across the country. State Budget constraints and employers' focus on controlling health care costs exist in every state and are forcing profound changes in the delivery of care, including increased administrative steps to justifying that medical treatment is necessary. But New York policymakers have added to this growing burden with an armada of mandated actions in the last few years. These include required offering of HIV testing, required offering of palliative care, required checking of a prescription drug database, required electronic submission of prescriptions, required reporting of persons under the SAFE Act, and a bill to go to the Governor's office soon that will require the offering of Hepatitis C tests.

New York is unique among the 50 states in imposing many of these mandates on doctors. And, if the doctor fails to take these required actions, they face serious fines and possible licensure action. Certainly the steps required by these mandates should be taken by physicians in many, many patient encounters, but it should be left to the discretion of the physician.

To quote the physician I referenced earlier, "HELP!" If we expect to continue to have a viable health care system to treat our patients, policymakers need to create an environment in New York State that will incentivize physicians to remain in practice here rather than re-locate to states with more welcoming environments for physicians. I would note that a recent report by the Center for Health Workforce Studies concluded that the in-state retention of newly trained physicians has decreased from 53% in 2001 to 44% in 2011.

Certainly, there are wide number of issues that must be taken up to address this problem, but specific to the goals of this hearing among our suggestions to relieve our mandate burden:

- **Changes to the "SAFE Act".** Right now the statute requires a physician (and other health care practitioners) to report to their local mental health director any patient the physician has reasonable cause to believe is "likely to engage" in conduct that will cause serious harm to self or others. While certainly well-intentioned after the horror at Sandy Hook, this reporting standard is, practically speaking, so broad that the physician is compelled to report a broad category of patients. Moreover, a

- **Creating additional exceptions to E-prescribing requirements.** Another component of I-STOP will require physicians with limited exceptions to electronically prescribe all prescriptions as of March 27, 2015. Many physicians have adopted e-prescribing systems. Some have not, however, due to their cost and disruption in the delivery of medical care. There are many physicians approaching retirement, but still in a position to deliver quality care to patients, and many with long-standing treatment relationships with their patients, that may not be able to recoup the investment of an electronic prescribing system. We should assure that these physicians are able to easily avail themselves of the waiver process set forth in the statute.

- **Uniformity in physician claim submission.** Right now New York State Medicaid, Workers Compensation and No-Fault all have their own unique claim submission forms mandated by the State Department of Health, the Workers Compensation Board and Department of Financial Services, respectively. And all these forms are different than the forms physicians submit to commercial health insurers. In some cases, these forms can be incredibly burdensome to complete. For example, in 2010, the Workers Compensation Board decided to withdraw the required use of new injury report forms after a huge number of physicians dropped out of the Workers Compensation program, particularly in the Rochester area, in response to the complexity of the forms. We are pleased to hear that the Board will be undertaking a complete re-evaluation of its claim adjudication process, and hope it will lead to a simplified process that reduces administrative hassles.

  There has been a great push nationally, including as part of the ACA, to create greater uniformity in the burdensome claim submission process. This uniformity should be extended to all forms of insurance coverage for patient health care costs, including Medicaid, Workers Compensation and No-Fault.

- **Stop ICD-10.** While not a state rule, physicians across the country are going to face huge costs associated with complying with a CMS mandate to change their disease coding systems from ICD-9 to ICD-10 on October 1, 2014. Essentially the purpose of including these codes on a claim form is to simplify the reporting of a patient's disease or particular condition. However, implementing the new mandated ICD-10 requires physicians and their office staff to contend with 68,000 outpatient diagnostic codes — a five-fold increase from the current 13,000 codes. This is a massive administrative and financial undertaking for physicians, requiring education, software, coder training, and testing with payers. Physicians will be responsible for all of these costs, which, depending on the

Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

Dennis Galluzzo

Executive Director of the Pharmacists Association of Western New York

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American Society of Consultant Pharmacists
National Alliance of State Pharmacy Associations
National Community Pharmacists Assn

State Affiliates

Bangladeshi-American Pharmacists Ass
Capital Area Pharmacists Society
Hudson Valley Pharmaceutical Society
Indo-American Pharmaceutical Society
Italian-American Pharmacists Society
Korean-American Pharmacists Ass of NY
Long Island Pharmacists Society
Mohawk Valley Pharmacists Society
New York City Pharmacists Society
Northern New York Pharmaceutical Society
Onondaga County Pharmaceutical Society
Pakistani-American Pharmaceutical Assn
Pharmacists Assn of the Southern Tier
Pharmacists Assn of Western New York
Pharmacists Society of Orange County
Pharmacy Society of Rochester
Westchester/Rockland Society of Pharmacists

NYS Colleges of Pharmacy

Albany College of Pharmacy and Health Sciences
Arnold & Marie Schwartz College of Pharmacy and Health Sciences
D'Youville College School of Pharmacy
St John s University College of Pharmacy & Allied Health Professions
Touro College of Pharmacy
University at Buffalo School of Pharmacy & Pharmaceutical Sciences
Wegmans School of Pharmacy St John Fisher College

September, 2013

Thank you for inviting me to represent pharmacists in western New York and to participate in the Senate Majority Coalition forum on regulatory reform. This opportunity is very important because pharmacists and pharmacies are highly regulated.

I am Dennis Galluzzo, Executive Director of the Pharmacists Association of Western New York, a regional affiliate of the Pharmacists Society of the State of New York. PAWNY represents pharmacists in the counties of Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, and Wyoming. I am an independent pharmacy owner and also a member of the Erie County Board of Health. I present this testimony on behalf of PSSNY and PAWNY, focusing on three recommendations:

Change the law to remove the county restriction from immunization orders for pharmacists

Remove the regulation that mandates reporting of invoice prices for hundreds of products on an ongoing basis, and

Make new law to regulate Pharmacy Benefit Managers so that pharmacies have due process protection and are paid at current prices.

I would like to go over each of these points in brief.

County Restriction

Since October, 2008, state law has allowed pharmacists certified by the Education Department to administer certain vaccines to adults. Included in the law are provisions that apply only to pharmacist-immunizers. One of these is that a non-patient specific order written by a physician or nurse practitioner is valid only if the immunizing pharmacist is located in the same county. This county restriction serves no clinical, financial or other reasonable purpose. In some counties, this part of the law is actually a barrier that prevents certified and willing pharmacists from administering vaccines to consumers who ask for them. It stands in the way of state and federal public health goals. In a regular flu season such as the one starting this month, we have certified pharmacists with available vaccine who are being held back by this irrational and highly discriminatory state policy, preventing many patients from accessing preventive health care.

The county restriction is a very real problem here in Western New York. Five pharmacies in Niagara County have flu vaccine available. Members of the public are asking for flu shots, but they cannot be immunized in pharmacies because Niagara County health officials and physicians refuse to write non-patient-specific orders for pharmacists. No such problem exists in any other Western New York county. From a business perspective, five Niagara County businesses have ordered and received this season's flu vaccine. Individual pharmacists have invested time and money to become certified as immunizers. These owners, pharmacists and members of the public have all been disenfranchised by a provision in state law that gives veto power to a few practitioners who simply refuse to authorize pharmacists to give flu shots.

It is important to note that one of Governor Cuomo's Program Bills, Senate 4528 introduced by Senator Hannon, removes the county restriction and includes other important reforms to improve public health. Backed by the Governor and the NYS Health Department, pharmacists are optimistic that this or a similar bill will be passed and be signed into law in 2014.

> ***This issue is included because it is a glaring example of a state policy that is detrimental to pharmacies and also to health insurers that want to save costs by keeping their enrollees healthy during the flu season.***

Mandatory Cost Surveys

In November, 2011, the Health Department published Emergency Regulations that require every pharmacy enrolled in the Medicaid program to complete two surveys. One survey asks for the actual invoice cost for each individual drug product purchased by the pharmacy. The other asks for details about the cost of operating the pharmacy. The first regulation takes its authority from Social Services law that requires the Department to reimburse pharmacies at either "estimated acquisition cost" or "average actual acquisition cost". The emergency regulation allows the Health Department to conduct a survey of the "actual" costs of thousands of products to arrive at an 'average actual' cost for each one. The second survey of the cost of pharmacy operations is based on federal law that requires states to pay pharmacies a dispensing fee that is "reasonable". Pharmacists have always questioned the reasonableness of the current fee of $3.50 per prescription and pharmacy owners welcomed the opportunity to submit business expenses. The cost of dispensing survey was demanding, time-consuming and mandatory, but the data is in and the results are eagerly anticipated and overdue. The issue raised here is the ongoing product cost survey, and not the one-time 'cost of dispensing' survey.

In fact, the product cost survey is ongoing and costly to the state in terms of staff time. During 2012 and 2013, Health Department staff involved in the product survey convened focus groups, conducted meetings, hired an additional contractor, developed a pilot survey, worked through considerable internal and external software problems, and in general took on an extensive and time-consuming project. The survey has also been an arduous assignment for pharmacies because the department requires the pricing information to be presented in a certain format and sent directly from the pharmacy. Pharmacies do not have this data and so were forced to request it from wholesalers in a format that was usable both to the pharmacy and to the department. Because the department did no outreach to wholesalers, pharmacies under the state's mandate to report the prices faced serious logistical problems. The required data is voluminous, the electronic format is challenging and the completing the surveys takes a lot of time. Additionally, the department communicates through e-mails associated with Health Commerce Accounts, a process that is in itself challenging.

The product cost survey began in 2012. According to the published regulation, approximately 4,400 pharmacies (virtually every pharmacy in the state) affected by the mandate were required to complete the initial survey aggregating twelve months of invoice costs for thousands of individual products. These initial reports are followed by monthly reports from selected pharmacies so that every pharmacy is expected to send in one additional cost report a year, again listing the individual invoice cost for thousands of individual products.

This regulation is an excellent example of one that is not useful, not cost-effective, burdensome and wasteful for both the state and the 4,400 affected pharmacies. We strongly recommend repeal.

Consider this:

Duplicative. The NYS product cost survey began at the same time that the federal government (CMS) was conducting a national pricing survey. Pharmacies in NY actually received two cost surveys in the same year. The CMS survey was optional.

Mandatory, not optional. Other states and CMS conduct optional surveys. New York is one of only three states with a mandatory survey. The state, therefore, increased its own burden and the burden on pharmacies exponentially.

Results of Cost of Dispensing Survey are overdue. Pharmacists have always maintained that the Medicaid fee-for-service professional fee falls well below the actual cost of dispensing, especially after the non-mandatory co-pay is subtracted. In fact, many welcomed the opportunity to report actual pharmacy operating costs. The survey was completed one year ago. Product costs fluctuate, but the fee is fixed. Clearly, preliminary results are known to the Department and they should be released.

Unnecessary. What is the value of Medicaid fee-for-service cost surveys when the ultimate goal is to enroll Medicaid patients into managed care?

Regulate Pharmacy Benefit Managers and Require Timely Price Updates

PSSNY supports passage of legislation that will define Pharmacy Benefit Management (PBMs) and allow for regulations. PBMs contract with health insurers to manage the pharmacy benefit. Accordingly, pharmacies contract directly with PBMs and for the most part have an indirect relationship with health plans. State Insurance Law regulates health plans but does not recognize, define or regulate PBMs, leaving pharmacies vulnerable in their relationships with PBMs. (Consumers, too, are directly affected by PBM policies that limit access to medications through tiered formularies, co-payment structure and limited options such as mandatory mail order.)

To bring this recommendation into the focus of today's hearing, please consider:

- Pharmacies that receive below-cost reimbursement but wish to remain in the PBM network have no state-regulated process by which to challenge under-payment;
- The relationship between PBMs and pharmacies is one-sided in which the PBM has all the

power and pharmacies, especially independent pharmacies, are vulnerable in the extreme;

- As benefit managers for health plans or self-insured employers such as the State of New York, PBMs have lawful and direct access to data that can then be used to drive prescription volume to certain pharmacies. In fact, the nation's two largest PBMs, Caremark and Medco, each own both a mail order and a 'specialty' pharmacies. The corporations are very profitable. So far New York law falls far short of protecting local pharmacies that are pressured to accept contracts with large PBMs in order to survive, even if the terms of the contract may be unfavorable.

PBMs are the ONLY entity in the healthcare delivery system that remains unregulated in New York State.

Pharmacies are an important sector in the state's economy as well as the state's healthcare delivery system. Because payments for approximately 95% of prescriptions dispensed in New York flow through third parties, New York State should regulate Pharmacy Benefit Managers to ensure fairness and provide due process protection for pharmacies and patients.

To ensure that local pharmacies remain viable in the era of managed care, state law and regulations should include a process by which pharmacies are able to address PBM issues such as the timely updating of drug costs. Pharmacies purchase inventory from wholesalers at current prices, and pharmacies should be reimbursed at the current prices. PBMs lack the business incentive to update pharmacy reimbursement in a timely manner and pharmacies have no state regulation to cite to hold PBMs accountable. Drug prices fluctuate often and unpredictably, and pharmacies have nowhere to turn. Without state law that addresses pharmacy benefit management services, neither the Health Department or the Department of Financial Services has authority to issue regulations. As a result, pharmacies remain vulnerable to market forces beyond their control. Relief is urgently needed. This recommendation to hold PBMs accountable under state law is more than a self-serving appeal from pharmacists. Prescription drug costs are a large component of healthcare costs overall, and it is in the state's best interest to recognize and regulate pharmacy benefit managers.

On behalf of PSSNY and PAWNY, thank you for the opportunity to speak before this panel today.

Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

Roberta Rifkin

Vice President of Government Affairs for
Independent Health

My name is Roberta Rifkin, and I am the Vice-President of Government Affairs for Independent Health. I am participating in this hearing as a representative of Independent Health and welcome the opportunity to share our suggestions to reduce costs for businesses, while ensuring our members continue to have access to affordable, quality health coverage. Thank you to the Senate Majority Coalition for taking the time to listen to these important issues.

At Independent Health, our business centers on developing coverage options for consumers. The price of our coverage is in part based on the number and type of benefits we include in each product. In New York, we are required to include more than 50 mandated benefits in our products. These include obvious services like maternity and emergency room coverage, as well as more specific benefits, such as the recent mandate related to prescription eye drop refills.

Mandates serve an important role to ensure that NY residents have a standard level of coverage and I am not suggesting that we do away with all mandates. Rather, I am here to recommend that the value of these benefits, both current and future, be routinely evaluated to meet evidence based standards of care and impact to costs.

Senator Gallivan, we applaud your bill, S.3042, which expands the role of the New York State Health Care Quality and Cost Containment Commission to conduct comprehensive reviews of mandated insurance benefits. Your legislation focuses on the three key components of sensible mandate relief:

- reviewing existing mandates to determine if they meet evidence-based medicine standards;
- requiring review of premium impact to eliminate or modify mandates; and
- establishing a process for future reviews of mandated benefits.

Evidence-based Medicine

As medical science has changed over time, some mandates have become less effective and relevant. Recommendations for screenings or treatments that seemed essential years ago may have been replaced by other methodologies that are more effective and less costly. One example of this is the requirement that insurers cover one mammogram per year for women over 40. While mammograms are indisputably essential tools for detecting breast cancer early, there is a body of evidence that annual exams are not necessary for many women who are at low risk before the age of 50. Requiring coverage along a specific timeline could force physicians and insurers to adopt policies that may be outside the scope of established best practices and is not flexible enough to keep pace with developments in medical science. A woman's decision to have an annual mammogram or not is a decision best made between the woman and her doctor. Most insurers would cover this practice when deemed a medical necessity, but the requirement that it be an annual event might encourage doctors to promote routine screening instead of determining what is most appropriate for each individual patient.

Impact on costs

Each mandate adds cost to the insurance premium. There are some required benefits where the state standard exceeds common practice, creating a cost impact where the required benefits exceed standard use. An example of this is the state requirement to "make available" a rider that would allow dependent coverage up to age 29. This rider can add 1-2% to premiums, and currently has very low enrollment. With the federal requirement to provide dependent coverage to age 26 and the new products available through the health benefits exchange for individuals, this "make available" rider has become redundant—adding costs without adding value.

Future Mandates

Another issue to consider is the added cost to the state for new mandates. The Affordable Care Act requires that the additional cost of all new mandates passed by a state after December 31, 2011 must be paid for by the state. This provision of the ACA is to prevent the federal Advance Premium Tax Credit, from being used to subsidize the cost of coverage beyond what is defined as essential health benefits.

Since the Affordable Care Act includes a new mandate to provide a comprehensive package of essential health benefits, it is a good opportunity for the state to invest in other ways to improve the health of our community.

Each mandate has a cost impact to insurance customers and to our health care system as a whole. While mandates may provide important benefits, regular review now and in the future would reduce unnecessary tests and would protect consumers from undergoing treatments or services that could be invasive or stress-creating while providing unclear medical benefits.

These recommendations are a starting point for a longer conversation on an essential issue. We would be happy to participate in additional discussions on these regulatory issues after this hearing. Working together to evaluate health mandates, we can help to ensure that all New Yorkers have access to the care that they need. .

We once again thank the Senate Majority for recognizing the importance of this issue and reaching out to stakeholders. We appreciate having the time at this forum to share our views.

Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

Willie Underwood, MD

Chairman of the Legislative Committee for the Medical Society of Erie County

TESTIMONY OF DR. WILLIE UNDERWOOD, MD

MEDICAL SOCIETY OF NEW YORK

ERIE COUNTY MEDICAL SOCIETY

AT A NEW YORK STATE SENATE HEARING ON REGULATORY REFORM

SEPTEMBER 11, 2013 - BUFFALO, NY

I would like to first thank NYS Senator Gallivan for giving us the opportunity to provide insight into some very complex healthcare policy decisions that you are currently considering, the Erie County Medical Society for allowing me to speak on their behalf and Roswell Park Cancer Institute for providing the venue for this event. I am here to speak in opposition to certificate of need (CON) for some in-office procedures.

My name is Willie Underwood, III; I received my Medical Degree from SUNY Upstate Medical School, Syracuse, NY. I am a previous Robert Woods Johnson Clinical Scholar where I received extensive training in health services research. I received a Master's of Public Health Degree in Health Management and Policy from the University of Michigan. I am a member of the Council on Legislation of the American Medical Association in which we monitor and provide insight into federal healthcare legislation and state policy that may have federal implications, the Health Policy Council and Legislative Committee of the American Urology Association in which we monitor and provide insight into federal and state healthcare legislation that potentially impacts urologic care and Chair of the Erie County Legislative Committee in which we monitor and provide insight into healthcare legislation in New York State. My medical practice is that of urologic oncology, more specifically diagnosis and treatment of prostate cancer, renal and adrenal tumors and I am employed by RPCI.

My remarks today are informed by the work of the professionals in health policy some of whom I have interacted with over the last approximately eighteen years of my involvement in healthcare policy and by studying the literature regarding CON Laws. My interpretation of the insights of experts provided during state and federal hearings on CON laws and the literature were influenced by more than a decade of experience as a health services researcher and a practicing physician.

Background on Certificate of Need

A **Certificate of Need (CON)** is generally defined as a required legal document that must be issued prior to the purchase, expansion or formations of facilities. New York State passed the first Healthcare CON in 1964 (Metclaf-McCloskey Act) and was passed into federal law in 1972. Certificates of need are required in 35 states.[1,2]

Rationale for CON

The goal of Certificate of Need programs is to restrain health care facility costs. This is one mechanism used by state governments to reduce overall health and medical costs. [2] "The basic assumption underlying CON regulation is that excess capacity (in the form of facility overbuilding) directly results in health care price inflation. When a hospital cannot fill its beds, fixed costs must be met through higher charges for the beds that are used. Bigger institutions have bigger costs, so CON supporters say it makes sense to limit facilities to building only enough capacity to meet actual needs".[2

The Rationale Against In-Office Procedure CON

In 2003, the U.S. Department of Justice, Antitrust Division held hearings regarding healthcare competition and policy. They heard 250 panelists, received 62 written submissions and generated 6,000 pages of transcripts. This resulted in an extensive report, entitled Improving Healthcare: Dose of Competition, in July 2004. [3] Mark Botti, Chief Litigation I Section U.S. Department of Justice, Antitrust Division presented a compelling statement opposing CON before A Joint Session of the Health and Human Services Committee of the State Senate and The CON Special Committee of the State House of Representative of the General Assembly of the State of Georgia on February 23, 2007.[4] It is my opinion that expansion of CON to in-office procedure will exacerbate the following well documented unintended consequences that CON laws in general:

1) Create barriers to beneficial competition
2) Impose other costs
3) May facilitate anti-competitive behavior
4) Lead to less competition and higher prices
5) Cost control reasons for CON no longer apply

Create Barriers to Beneficial Competition

To quote Mr. Botti "Our concern over the health and well-being of our fellow citizens, we as government officials should not lose sight of a basic truth -- market forces improve the quality and lower the costs of healthcare services. Increased competition in healthcare markets does not require us to choose between obtaining the benefits of competition or the delivery of high-quality healthcare. Competition drives innovation and ultimately leads to the delivery of better healthcare. Government intervention can undermine the ability of markets to deliver that benefit." [4] In 2003, the U.S. Justice Department determined that competition in the health care sector resulted in lower prices, broader access to health care and non-price competition which can promote higher quality.[4 & 5]. In-office procedures allows for patients to receive care in a non-institutional, friendly and efficient setting. If offices have to obtain and apply for CON to initiate or expand in-office procedures, it will mostly likely result in the patient having limited options as to where they will be able to receive such services and thus limiting access to these service by the vulnerable groups in NYS (poor and rural New Yorkers).

Regarding cost containment rationale for CON Laws expansion, I suggest that the evidence is clear that regarding the economic effects of CON programs demonstrated near-universal agreement among health economists that CON laws were unsuccessful in containing healthcare costs. [6] A major reason CON Laws have been ineffective is because the federal government no longer reimburses on a cost-plus basis as they did in the 1970's. Furthermore the Accountable Care Act is designed to increase access to healthcare; therefore, government should be removing barriers to access to healthcare and not expanding them, such as CON Laws to include in-office procedures.

CON laws were adopted because excessive capital investments, spurred by the then current cost-plus method of reimbursement, were driving up healthcare costs. There was concern that, since patients were not price-sensitive, providers engaged in a "medical arms race" by unnecessarily expanding their services to offer the perceived highest quality services. However the cost-plus payment model has gone by the waste-side and I suggest so should CON Laws.

Impose Other Cost and Anticompetitive Behaviors

The expansion of CON laws to in-office procedures would essentially allow competitors to use the CON process to delay or prevent others from providing certain procedures. Thus, causing the existing competitor and the new entrant to divert significant funds away from delivering healthcare (wasting resources on legal fees, consulting fees, and lobbying efforts).[4] The U.S. Department of Justice discovered that existing competitors at times go further and enter into agreements to avoid the threat of delays from opposition of CON from competitors, thus conspiring with competitors and making deals that had negative consequences to society. [4]

Less Competition and Higher Cost

In short, several studies have concluded that the presence of CON regulations may be responsible for increases in healthcare costs. [4 & 7] These findings were supported by a study by Georgia State University that reported that rigorous CON regulation is associated with less competitive markets and higher prices for private inpatient care. [4&8]

I and other experts think that CON laws impose substantial costs on consumers and healthcare markets. In the State of NY we should be considering whether its CON laws continue to serve the citizens of this state.

The U.S. Department of Justice, Antitrust Division suggested the following [4] be considered and I concur:

"First, the enactment or continuation of CON laws should have a significant, clearly articulated justification, because they are government intervention in the marketplace that creates barriers to entry into healthcare markets. That substantial justification should have a basis in serious and persuasive market studies that demonstrate that the market has failed in some significant way.

Second, any evaluation of a proposed CON law should consider not only the justification for the law but also identify and weigh the harm to consumers that is likely to result from creating the barrier to entry. The consideration of these potential harms should include the ways in which the regulations could distort the market, affect incentives, or diminish competition. A state should enact or maintain a CON law only if it finds that the justification does more good than harm.

Third, in cases where the evidence does show a greater benefit than harm from a CON law, it has been suggested that you consider whether you can address the problem in an alternative fashion that preserves competition, or at least is narrowly tailored to remedy only the demonstrated need and preserve as much competition as is possible. A state should only use CON laws to address some problem if that problem cannot be addressed without government intervention in the form of a barrier to entry. If a state must erect a barrier to entry, select the approach that accomplishes the objective with the least disruptive effect on competition."

Thank you again for the opportunity to provide this testimony.

References

1. Herbert Harvey Hyman, *Health Planning: A Systematic Approach* (1982), p. 253
2. National Conference of State Legislatures Certificate of Need: State Health Laws and Programs Updated January 2011; material added March 2012. available at http://www.ncsl.org/issues-research/health/con-certificate-of-need-state-laws.aspx
3. Improving Health Car: A Dose of Competition (2004) available at http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.
4. Mark Botti Chief, Litigation I Section U.S. Department of Justice, Antitrust Division before A Joint Session of the Health and Human Services committee of the State Senate and The CON Special Committee of the State House of Representative of the General Assembly of the State of Georgia on February 23, 2007. *www.justice.gov/atr/public/comments/223754.htm*
5. *A Dose of Competition*, ch. 3 § VIII and Executive Summary at 4.
6. David S. Salkever, Regulation of Prices and Investment in Hospital in the United States, in 1B Handbook of Health Economics, 1489-90 (A.J. Culyer & J.P. Newhouse eds., 2000) ("there is little evidence that [1970's era] investment controls reduced the rate of cost growth").
7. Daniel Sherman, Federal Trade Commission, "The Effect of State Certificate-Of-Need Laws On Hospital Costs: An Economic Policy Analysis" (1988) (strong CON programs may increase costs); Christopher Connover and Frank Sloan, Evaluation of Certificate of Need in Michigan (2003) (available at http://www.michigan.gov/mdch/ 0,1607,7-132-2945_5106-83771--,00.html) (CON in some instances may have raised costs).

8. The Effect of Certificate of Need Laws on Cost, Quality, and Access (Georgia State University, Oct. 2006); Report of Data Analyses to the Georgia Commission on the Efficacy of the CON Program, at 9 (Nov. 2006).

Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

Marlene Kraft

Vice President of Quality & Marketing Services for Palladian Health

Palladian

URAC
ACCREDITED
HEALTH UTILIZATION
MANAGEMENT

Presented to Senate Majority Coalition Legislative Forum on Regulatory Reform
September 11, 2013

Palladian Health, LLC administers outpatient musculoskeletal health coverage for chiropractic, physical therapy, and occupational therapy service on behalf of Health Plan Sponsors within New York State as well as other States, for commercial, Medicaid, and Medicare lines of business. Palladian has the unique vantage point of seeing where New York State regulations regarding utilization review intersect and differ when compared with other regions within NYS and with other State jurisdictions in addition to Federal regulations such as the Department of Labor regulations issued in 2003 and the Affordable Care Act.

While New York State utilization review regulations (Public Health Law and Insurance Law Article 49 which are identical) seems to have been the springboard for other States' utilization review regulations, New York State governed plans are required to combine the current Article 49 requirements with the Federal requirements and National Accreditation Standards (NCQA; URAC). In order to abide by the most stringent requirement Palladian as well as other UR Agents and Health Plans required to develop intricate nested formulae of rules using 'if, then, else' equations to implement an acceptable process. Some specific provisions appear below.

Public Health Law / Insurance Law
Article 49 Utilization Review and External Appeal
Title 1 Certification of Agents and Utilization Review Process

4901. Registration of utilization review agents

Biennially, utilization review agents (URA) are required to register and submit necessary information to the New York State Department of Health (NYSDOH). Yet, the NYSDOH is unable to process the biennially registrations, notifying URAs that their status is in review and 'in progress' until otherwise notified.

An option to modify this regulation and administrative burden for the State and URAs is to adopt processes defined by other jurisdictions that require registration/licensure within their State through full application or, when the organization is accredited (NCQA; URAC) application through documentation of the accreditation in lieu of full application. It should also be noted that each Health Plan that delegates utilization review services audits the delegate annually through review of all policies, procedures, and UR file audits to comply with other Federal, State, and National Accrediting agency requirements for delegation.

4903. Utilization Review Determinations

Section 4903, 2 requires URAs to issue both telephone and written notice of determinations (Approval and denials) for pre-authorization review.

Options to modify Section 4903, 2 include:

- ○ remove the requirement for notification by telephone to the enrollee or their designee and the health care provider
  - because the determination is provided in writing;
  - 80% of the telephone notification calls to the enrollee or their designee result in unanswered calls, voice messages, line errors due to disconnected numbers and/or technical issues rendering this an ineffective method of communication that results in unnecessary expense;
- ○ remove the requirement for notification by telephone to the health care providers
  - because the decision is provided in writing, often by fax on the determination date or electronically through web services;
  - Network health care providers repeatedly ask to 'opt out' of this telephone notification however the NYSDOH interpretation has indicated that 'opt out' is not allowed within the regulation.

Section 4903, 2 requires URAs to issue both telephone and written notice of determinations (Approval and denials) to the enrollee or enrollee's designee for continued or extended health care services, additional services for an enrollee undergoing a course of continued treatment **which may be satisfied by the notice to the enrollee's health care provider, by telephone and in writing within one business day of receipt**

Options to modify Section 4903, 3:

○ Remove the telephone notification to the enrollee or designee for approval determinations

○ Clarify whether the provider notice is adequate for all determinations or whether the provider must agree to notify the enrollee/designee (Various interpretations exist based upon NYS region.)

Public Health Law

Article 9 Primary Care Education and Training

901. Definitions

7. "Primary care practitioner" means a midwife, nurse practitioner, or physician assistant who is licensed or certified to practice in New York

state and who provides or arranges for coordinated primary care services.

8. "Primary care physician" means a physician specialist in the field of family practice, general pediatrics, primary care internal medicine or primary care obstetrics and gynecology; who provides coordinated primary care services.

It is believed that the definitions included in this regulation may be used by health plans to classify health care professions as 'primary care providers' as a method to designate the applicable copayment, and require the application of the specialist copayment to other ancillary health care professional such as chiropractors, physical therapist, and occupational therapists whose area of expertise involves specific body systems, and who don't meet the threshold of specialist (i.e. Psychiatrist, Neurosurgeon, Neurologist, and Ophthalmologist).

- This current practice is burdensome for the enrollee who may need these ancillary services at a regular frequency for the episode of medically necessary care by requiring the higher specialist copayment for multiple visits within a 6-8 week episode.
- This current practice requiring the specialist copayment for ancillary services eliminates the appearance of creditable coverage because the member is paying the full cost of services when the copayment equals or exceeds the fee. Technically this could be interpreted to mean there is no chiropractic coverage as defined in the mandate.
- Current practice allows different classification of health care professionals to be reimbursed differently when providing the same service, i.e. Doctors of Osteopathy (D.O.) can be considered primary care practitioners and may provide spinal manipulation to their patients at the primary care copayment while chiropractors (and specifically trained physical therapists) must conduct spinal manipulation at the specialist copay.

Options for Section 901:

- Add clarification to regulations regarding copayment practices
- Clarify specialist is a Physician Specialists.

Other areas of duplication in the regulations (variations include use of enrollee versus insured; organization versus insurer):

ISC 4802 ~ PBH 4408-a
ISC 4803 ~ PBH 4406-d

ICD 10: Acknowledging that this coalition has no oversight for this issue, John A Gillespie MD added remarks regarding the upcoming implementation of ICD-10, reiterating remarks made by other witnesses. ICD-10 adds 68,000 new codes many of which will be used in isolated circumstances. System and software upgrades are necessary and costly for an implementation that appears to have little benefit. Delay or discontinuance of this program is crucial.

Respectfully submitted:

Marlene Kraft

Regulatory Reform Hearing: Medical Technology & Health
September 11, 2013
Roswell Park Cancer Institute

Testimony Submitted by:

- **Bill Nowak**
- **Ann Converso**
- **Mary Ann Janicki**
- **Mary Brogcinski**
- **Mary Beth Gallagher**
- **Kristen Rinker**
- **Sarah Buckley**
- **Dana McCarthy**
- **Diana Butsch**
- **Kathleen Whitefield**

Communication Workers of America

QUESTION 2

Every office and directorship held by me in any corporation, firm or enterprise which is subject to the jurisdiction of a regulatory agency**, including the name of such corporation, firm or enterprise, is as follows **(if none, so state)**:

- If you are an officer or director of a corporation which is regulated by a regulatory agency, list the specific position held.

- If you are an officer or director of a firm or enterprise, or hold an equivalent position such as a partner in a partnership, and the business is regulated by a regulatory agency, list the specific position held.

Example:

Offices and Directorships Held	Name of Corporation, Firm or Enterprise
Vice President	Capital District Savings and Loan

QUESTION 3

Any other interests or relationships which I determine in my discretion might reasonably be expected to be particularly affected by legislative action, or in the public interest should be disclosed, are as follows **(if none, so state)**:

Reporting under this section is discretionary. However, legislative employees should list personal or spousal relationships or interests which might be particularly affected by legislative action or which should be disclosed in the public interest. A relationship or interest in any activity that relates substantially to the employee's official duties should be listed here.

IF YOU NEED HELP

The staff of the Legislative Ethics Commission is available to help you with any specific questions you may have about the reporting requirements.

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AESOB, Suite 1431
(518) 455-2142

Mailing Address:
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Memorandum of Support –A.2180A/S.1123A

Support Patient Safe Handling Legislation to Stop Injuries & Save Money

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as of 4/10/13.

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Bill Status: This bill is referred to the Health Committee in the Senate and was reported from Health to Codes in the Assembly on February 4, 2013, and from Codes to Ways & Means on April 23rd. The Assembly (2011) and Senate (2012) have passed slightly different versions of this legislation.

What the Bill Would Do: This bill establishes a statewide safe patient handling policy for health care facilities and creates a task force for implementation.

Background: The traditional method of moving and handling patients is manual lifting which is difficult and heavy manual work. Manual patient lifting causes fear anxiety and discomfort for the patients – and increases slips falls and drops. *In New York State health care workers experience far more strain and sprain injuries than even construction workers or truck drivers.* The top source of these injuries is moving and handling patients.

According to the Bureau of Labor Statistics (U.S.) in 2007 29% of all workplace injuries requiring time away from work were Musculoskeletal disorders (MSDs). The rate of MSD injury for nursing aides orderlies and nursing attendants was seven times higher than the average of all occupations. In 2010 according to OSHA the health care sector reported more injury and illness cases than any other sector. New York State has a severe shortage of trained experienced nurses. Nurses most often cite the physically demanding nature of the work as their reason for leaving the job (too few nurses taking care of too many patients is a major problem).

Safe Patient Handling Policies Reduce Worker Injuries:

Health care workers frequently experience strain and sprain injuries. Even more serious fractures and career-ending injuries also occur. *In Western New York CWA and Kaleida Health collaborated on a model program for safe patient handling.* The program uses better training automation and technology to reduce manual lifting. The Kaleida program delivered a 77% drop in lost work days. In Batavia the NYS Veterans' Home also implemented a safe patient handling program and reduced lost workdays 93%.

Safe Patient Handling Policies Reduce Patient Injuries:

Unfortunately health care workers can and do drop or improperly move patients when they are using their own bodies to do all the lifting and moving. *Patient skin tears friction burns, bruises and fractures are all too often the result of manual patient lifts and moves.* Manual lifting is not a modern "best-practice". Safe patient handling programs reduce patient injuries dramatically. For example Niagara County's Long Term Care Facility experienced a 64% reduction in bone fractures a 37% reduction in skin tears and bruising and the elimination of lower body spiral fractures just one year into implementation of its Safe Patient Handling program.

Safe Patient Handling Policies Save Money – typical payback is within 3 years:

Returns in lower workers' compensation claims and higher productivity have far surpassed the cost of Kaleida Health and CWA's collaborative patient safe program. Safe patient handling programs reduce turnover among nurses and prolong their careers. Evidence shows that Safe Patient Handling programs decrease:

- Patient-handling related workers' compensation injury rates (30-95%)
- Lost workday injury rates (66-100%)
- Restricted workdays (up to 38%)
- Workers compensation costs (30-75%), and
- Insurance premiums (50%).

Co-Sponsor and Pass A.2180A/S.1123A to Protect Patients & Workers & Save Money

For More Information Contact CWA District 1 at 212-344-2515 or 716-824-2042

2013 NY HEALTHCARE WORKERS DAY OF ACTION!

Safe Patient Handling Act A-2180-A / S-1123-A

The New York Healthcare Workers Coalition supports legislation that would create a statewide safe patient handling policy for all healthcare facilities in New York State.

Safe patient handling is a comprehensive approach to reducing the manual movement of patients when lifting, transferring and re-positioning. Safe patient handling policies seek to facilitate patients and residents achieving the highest practical functional level while simultaneously providing for the safety of the patients and the healthcare worker.

Healthcare workers are being injured by unsafe lifting methods.

- The traditional method of moving and handling patients is manual lifting which is difficult and heavy manual work. Manual patient lifting causes fear, anxiety and discomfort for the patients - and increases slips, falls and drops. *In New York State, healthcare workers experience far more strain and sprain injuries than even construction workers or truck drivers.* The top source of these injuries is moving and handling patients.
- According to the Bureau of Labor Statistics (U.S.) in 2007, 29% of all workplace injuries requiring time away from work were Musculoskeletal disorders (MSDs). The rate of MSD injury for nursing aides orderlies and nursing attendants was seven times higher than the average of all occupations. In 2010 according to OSHA the health care sector reported more injury and illness cases than any other sector. New York State has a severe shortage of trained experienced nurses.

Safe patient handling practices reduce injuries for patients and for healthcare workers that result from manual lifting.

- Patients and residents will experience lower levels of depression, higher engagement in activities, greater satisfaction with their care, increased dignity, and improved ambulatory status and range of motion, with the implementation of safe patient handling programs.
- In Western New York CWA and Kaleida Health collaborated on a model program for safe patient handling. The program uses better training, automation, and technology to reduce manual lifting. The Kaleida program delivered a 77% drop in lost work days.
- In Batavia the NYS Veterans' Home, with the help of PEF and CSEA, implemented a safe patient handling program and reduced lost work days 93%.

Safe Patient Handling Policies Reduce Patient Injuries:

- Unfortunately health care workers can and do drop or improperly move patients when they are using their own bodies to do all the lifting and moving. *Patient skin tears friction burns, bruises and fractures are all too often the result of manual patient lifts and moves.* Manual lifting is not a modern "best-practice".
- Safe patient handling programs reduce patient injuries dramatically. For example, Niagara County's Long Term Care Facility experienced a 64% reduction in bone fractures, a 37% reduction in skin tears and bruising, and the elimination of lower body spiral fractures just one year into implementation of its Safe Patient Handling program.

Safe patient handling programs are a sound financial investment

- Healthcare facilities realize a rapid financial return on their investment – generally within 24-36 months – from reduced costs associated with workers' compensation, staff turnover and staff overtime/use of agency.
- In three years, Kaleida Health in Buffalo, NY experienced a 70% reduction in the average workers' compensation cost per claim, from $10,540 per claim to $3,117 per claim.

— continued

District 1199 Healthcare Workers

1199SEIU United Healthcare Workers East NURSES

New York State NURSES ASSOCIATION

PEF

- In three years, Kaleida Health's lost work days related to patient handling injuries were reduced by 49.7%, from 6,207 lost days to 3,122 lost days. This represents facility savings by decreasing the use of agency staff, overtime use by other staff, and avoiding the adverse events that occur when the healthcare staff is understaffed.
- From 2002-2008, the NYS Veteran's Home in Batavia (NYSVHB), NY experienced a 69% decrease in the number of patient handling accidents and a 95.8% decrease in the number of lost work days.
- In 2002 the estimated labor costs of the lost work days due to accidents at NYSVHB was $83,151.77, compared to $8,282.04 in 2008.
- In five years, Glens Falls Hospital reduced total workers' compensation costs by 25%.
- In five years, Glens Falls Hospital experienced a 16% reduction in the average workers' compensation cost per claim.

2013 NY HEALTHCARE WORKERS DAY OF ACTION!

Safe Staffing for Quality Care Act A-6571 / S-3691

New York patients are at risk. Healthcare administrators are forcing nurses to take on 9, 10, or even more patients at once.

There is a solution: legislated safe nurse-to-patient ratios.

The New York Healthcare Workers Coalition supports legislation that will require all acute care facilities to comply with minimum nurse-to-patient staffing ratios. The bill would also require all residential healthcare facilities to comply with minimum care hours for registered nurses, licensed practical nurses and certified nurse aides.

Safe staffing levels will: cut healthcare system costs; reduce the occurrence of avoidable patient deaths; decrease adverse events, including hospital-acquired infections; and decrease readmissions.

Safe Nurse Staffing Saves Lives

- The number of patients assigned to a nurse has a direct impact on the ability of that nurse to appropriately assess, monitor, care for and safely discharge their patients.
- Hospitals which routinely staff with 1:8 nurse-to-patient ratios experience five additional deaths per 1,000 patients than those staffing with 1:4 nurse-to-patient ratios.[1]
- The odds of patient death increases by 7% for each additional patient the nurse must care for at one time.[2]
- Outcomes are better for patients when staffing levels meet those established in California, regardless of where the hospitals are located. Research demonstrates lives saved, improved quality of care and improved readiness for discharge in other states, when hospitals meet the California staffing benchmarks.[3]

Safe Nurse Staffing Reduces Adverse Patient Outcomes

- Hospitals with lower nurse staffing levels have higher rates of pneumonia, shock, cardiac arrest, urinary tract infections and upper gastrointestinal bleeds; all leading to longer hospital stays, increased post-surgical 30-day mortality rates and increased rates of failure-to-rescue, i.e. death of a surgical patient following a hospital-acquired complication.[4]
- When registered nurse staffing is increased by only 5%, the number of adverse events, including pressure ulcers, catheter-associated urinary tract infections, hospital-acquired injuries, air embolism, blood incompatibilities, vascular catheter-associated infections and mediastinitis following coronary bypass graft, are reduced by 15.8%.[5]
- In nursing homes, safe nurse staffing levels have a positive impact on both facility processes and on resident outcomes, for example, fewer facility deficiencies for poor quality and improved functional status of the residents.[6]
- There is a correlation between unsafe staffing and high nurse turnover and in nursing homes, research has also shown that as nurse turnover increases, the quality of resident care declines which results in more frequent use of restraints, urinary catheterization, and psychoactive drugs; increased risk of contractures, pressure ulcers and more survey deficiencies.[6,7]

— continued

[1] Aiken, L.H., Clark, S.P., Sloane, D.M., Sockalski, J., & Silber, J.H. (2002). Hospital staffing and patient mortality, nurse burnout, and job dissatisfaction. *Journal of the American Medical Association*, 288(16), 1987-1993.

[2] Ibid.

[3] Aiken, L.H., Sloane, D.M., Cimiotti, J.P., Clarke, S.P., Flynn, L., Seago, A., Spetz, J & Smith, H.L. (2010). Implications of the California nurse staffing mandate for other states. *Health Service Research*, 45(4), 904-921.

[4] Stanton, M.A. & Rutherofrd, M.K. (2004). Hospital nurse staffing and quality of care. *Agency for Healthcare Research and Quality – Research in Action*, Issue 14. AHRQ Pub. No. 04-0029.

[5] Frith, K.H., Anderson, F., Caspers, B., Tseng, F., Sanford, K., Hoyt, N.G. & Moore, K. (2010). Effects of nurse staffing on hospital-acquired conditions and length of stay in community hospitals. *Quality Management in Health Care* 19(2). 147-55 (April-June 2010)

[6] Collier, E. & Harrington, C. (2008). Staffing characteristics, turnover rates, and quality of resident care in nursing facilities. *Research in Gerontological Nursing*, (1)3, 157-170.

[7] Ibid.

DISTRICT 1 HEALTHCARE WORKERS

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PEF NURSES

- **Safe Staffing is a Cost-Effective Way to Improve Patient Care and Can Lead to Savings for Hospitals and our Healthcare System**
- In California, hospital income rose dramatically after ratios were implemented, from $12.5 billion from 1994 to 2003, to more than $20.6 billion from 2004 to 2010. Not one California hospital closed because of ratio implementation.
- When compared to other 'life-saving' interventions, nurse staffing is a cost-effective way to improve patient care (*Nursing Administration Quarterly*, 2011).
- Safe nurse staffing reduces turnover in hospitals. Inadequate staffing levels are correlated with nursing turnover and poor patient satisfaction. These costs and the negative consequences of poor staffing increase the cost of care (*Nursing Administration Quarterly*, 2011).
- The average cost to replace an RN ranges from approximately $82,000 (if turnover vacancies are filled by experienced RNs who need fewer hours of training) to $88,000 (if vacancies are filled by new RNs who need more hours of training) (*The Journal of Nursing Administration*, 2008).
- Nurse understaffing in hospital intensive care units increases the risk of pneumonia and other preventable infections that can add thousands of dollars to the cost of care and may lead to avoidable deaths. Hospital-acquired pressure ulcers alone are estimated to cost $8.5 billion per year. (*Agency for Healthcare Quality and Research Pub. No. 04-0029*, 2004).
- The Centers for Medicare and Medicaid Services is reducing or eliminating payments for care after adverse events including: hospital-acquired infections, pressure ulcers, falls and avoidable re-admissions. This year, hospitals begin experiencing the effect of Medicare's new Value-Based Purchasing program, with more than 1,400 getting penalized based on quality of care (*CMS.gov*, 2013).
- The number of total nursing assistive personnel increased by 64% in California hospitals since 2005, after the ratios were implemented. That is a rate 59% higher than the rate of increase of hospital nursing assistive personnel nationally. (Institute for Health & Socio-Economic Policy). Ancillary staff continue to be vital to the healthcare team after safe RN staffing ratios are implemented. In fact, the bill requires hospitals to maintain appropriate levels of all caregiver staff.

Research Establishes Ratios and Hours of Care

- The hospital nurse-to-patient ratios specified in the Safe Staffing for Quality Care Act are based on peer-reviewed academic research, evidence-based recommendations from scholarly entities and lessons learned from California's experience implementing nurse staffing ratios.
- The minimum care hours specified for nursing homes are also based on research evidence and the recommendations of the Institute of Medicine's report, *Keeping Patients Safe: Transforming the Work Environment of Nurses* (2004).

FPI

Fiscal Policy Institute

Safe Patient Handling in New York State: An Estimate of the Costs and Benefits of Statewide Implementation

June 13, 2013

Executive Summary

Nurses and other direct patient-care workers in hospitals and nursing homes save lives, and are key to making stays in these institutions healthier, safer and more tolerable. Yet because they repeatedly need to use their bodies in often-awkward ways to move and lift patients, nurses and other health care workers have among the highest rates of on-the-job injuries in New York, including career-limiting and career-ending ones. And these methods of moving patients are risky and demeaning to patients as well.

The costs of medical treatment, workers' compensation and lost workdays related to back injuries in healthcare in New York are an estimated $1.3 billion annually. The high occupational injury rate among nurses leads a significant number to leave the profession, exacerbating a critical nursing shortage.

Safe Patient Handling practices substitute mechanical lifting devices for nurses' and orderlies' arms and backs. Numerous demonstration projects of these practices in New York and around the nation, and full conversions of institutions to these practices, have shown immense improvements in staff safety, retention, and job satisfaction.

But what about cost? In every study of institutions that have switched to safe patient lifting, institutions' savings in personnel costs—replacing workers who lose work days, workers' compensation costs, staff turnover—have allowed them to recover their initial investments in a matter of a few years.

Drawing on the most recent implementations of safe patient lifting practices for which we have adequate data, we estimate the average cost of implementation (equipment purchase and staff training) at $1,275 per bed. Reduced worker injury and turnover costs average about $1,060 per bed per year in the first few years, meaning that institutions recover their initial gross outlays, on average, in less than fifteen months.

Given that there are about 173,000 hospital and nursing home beds in New York State (not counting those already converted to safe patient lifting), statewide implementation of such practices would cost institutions about $220 million. On average, institutions statewide would be expected to save about $183 million per year in the first few years, recovering their gross investments in fewer than fifteen months.

The news on monetary costs and benefits is extremely encouraging. But, in addition, there are immeasurable improvements in staff welfare and job satisfaction, and in patient safety and satisfaction, when nursing staff do not have to grapple with already-uncomfortable patients to move and lift them. Nursing retention is also an important ancillary benefit.

Introduction

Health care is a huge part of our lives and is in the news in a multitude of ways every day. Yet, one of the aspects of health care that rarely gets the attention it deserves is what health care represents as a workplace. Our tendency is to think of hospitals as places where the sick and injured get better, and of nursing homes as places where older people are taken care. Yet, hospitals and nursing homes are also workplaces, and in these workplaces, health care workers sometimes get injured. In fact, nurses and other patient care personnel have among the highest rate of on-the-job injuries, and the costs of those injuries have grown and become a significant problem in New York and around the country.

Many nurses and nurse assistants experience back injuries and other musculoskeletal disorders (MSDs) as a result of moving and turning hospital patients and nursing home residents. There were over 37,000 cases of MSDs among nurses and nursing assistants nationwide in 2011, an incidence rate more than three times the average for all industries; and nearly as high as that for laborers and material movers.[1] The American Nurses Association reports that more than half of all nurses suffer from chronic back pain.[2] Since chronic back pain results from cumulative physical strain over time, occupational injury reported data may not be capturing the full extent of work-related injuries.

Disabling back injuries are a key factor in nurses leaving the profession—an estimated 12 to 18 percent of nurses leave the profession annually due to chronic back pain, and another 12 percent consider a job transfer to reduce their risk of back injury.[3] The National Institute of Occupational Safety and Health (NIOSH) notes that the high occupational injury rate among nurses is exacerbating a critical nursing shortage.[4]

The Occupational Health and Safety Administration (OSHA) reports: "Along with higher employer costs due to medical expenses, disability compensation, and litigation, nurse injuries also are costly in terms of chronic pain and functional disability, absenteeism, and turnover.... Direct and indirect costs associated with only back injuries in the healthcare industry are estimated to be $20 billion annually."[5]

Healthcare is one of the most hazardous industries in New York, as well as nationally. In 2011 (the latest available data), the occupational illness and injury rate among all private industries in the state was 2.7 per 100 full-time employees. Among hospitals, however, the rate was 5.4 per hundred—double the all-industry rate—and 6.6 per hundred (one in 15 workers) among nursing

[1] Bureau of Labor Statistics News Release, Nov. 8, 2012, at http://www.bls.gov/news.release/pdf/osh2.pdf, Table A and Table 18. There were 120.3 MSD injuries per 10,000 full-time-equivalent nurses and nursing assistants, orderlies, and attendants. The all-industry average was 38.5, and the rate for laborers and freight-stock-and material movers was 140.0.

[2] Testimony submitted by the American Nurses Association to the Subcommittee on Employment and Workplace Safety of the Committee on Health, Education, Labor, and Pensions, Hearing on "Safe Patient Handling and Lifting Standards for a Safer American Workforce," United States Senate, May 11, 2010.

[3] Hal Wardell, "Reduction of Injuries Associated with Patient Handling," AAOHN Journal, October 2007, pp. 407-12.

[4] National Academies NIOSH Program Review, *Traumatic Injury Research and Prevention*, Sub-goal 5.1: Reduce Acute Injuries Caused by Patient Handling, March 2007, p. 114.

[5] OSHA, "Safe Patient Handling," accessed on OSHA website, 6/7/2013: http://www.osha.gov/SLTC/healthcarefacilities/safepatienthandling.html.

homes.[6] Based on the state's share of nurses and nursing assistants nationally, direct and indirect costs associated with back injuries in healthcare in New York are an estimated $1.334 billion annually.[7]

With the aging of baby boomers, the share of the population needing hospitalization or nursing home care will rise. The potential for nursing injuries also has been rising because of dramatic increases in adult obesity and extreme obesity ("bariatric" obesity refers to those over 300 pounds). The prevalence of obesity has dramatically increased over the last 20 years. "Over a third of adults are overweight and there is a significant increase in obesity as we age."[8] "Compared to the non-obese population, obese individuals require more frequent and extensive healthcare due to obesity-related health problems, and healthcare personnel are encountering hospitalized and critical-care bariatric patients on an increasingly frequent basis."[9]

This report considers what can be done to reduce patient handling injuries in New York. A number of hospital and nursing home facilities around the country have invested in patient handling equipment that significantly reduces the physical strain on health care practitioners. This equipment results in considerable cost savings in reduced lost work time, reduced turnover and lower workers compensation costs, and means that the equipment costs can be recouped fairly quickly. This report reviews several studies that have evaluated pilot projects where safe patient handling equipment has been put in place, and estimates the costs, benefits and payback period for statewide implementation in New York State of such equipment.

Dangers and costs of "traditional" patient handling

Patients who need to be moved in hospitals and nursing homes have traditionally been lifted by either a "hook and toss" method, in which the caregiver hooks his or her arms under the patient's armpits and lifts; or by the "pivot transfer," which requires that the patient be able to stand and take a step. Both are risky maneuvers, and may put severe strains on the caregiver (leading to muscle or joint injury) or incur drops or falls that can severely damage the patient.[10] While the National Institute for Occupational Safety and Health recommends that no caregiver lift more than 35 pounds of a person's body weight vertically, these methods can lead to a much higher burden. "More than one-third of back injuries among nurses have been associated with the handling of patients and the frequency with which nurses are required to manually move patients."[11]

[6] New York Department of Labor, at http://www.labor.ny.gov/stats/osh/pdfs/2011-table10.pdf

[7] Estimate by Fiscal Policy Institute using OSHA's $20 billion national cost estimate and New York's 6.67 percent share of registered nurses, licensed practical nurses, and nursing assistants.

[8] Back Injuries in Nursing, University of Minnesota blog at http://blog.lib.umn.edu/huew0001/backinjuriesinnursing/, citing Department of Health & Human Services 2012, "Prevalence of obesity in the US 2009"

[9] Centers for Disease Control, 2008, *Preventing Back Injuries in Health Care Settings,* at http://blogs.cdc.gov/niosh-science-blog/2008/09/lifting/

[10] "Safe Lifting and Moving in Healthcare," New Yorkers for Patient and Family Empowerment, at http://patientandfamily.org/files/2012/08/SPH-FAQS.pdf

[11] Kris Siddharthan, *et al.*, "Cost Effectiveness of a Multifaceted Program for Safe Patient Handling," *Advances in Patient Safety* 3:347-58 (2005), at www.ahrq.gov/downloads/pub/advances/vol3/Siddharthan.pdf

What is safe lifting?

Safe lifting—sometimes including a practice called "zero lift"—uses modern mechanical lifts and repositioning devices to transfer and reposition patients. The machinery, rather than the caregiver, bears the patient's weight. Potential harm to workers and patients is greatly reduced, and patient mobilization and activity is enhanced by workers' ability to move patients more frequently.

Experience with Safe Patient Handling

During the 1990s, the National Institute for Occupational Safety and Health looked at the experiences of seven nursing homes and one hospital that had implemented "zero lift" programs over several years.[12] These programs replaced "manual lifting and transferring of patients with modern, battery operated, portable hoists and other patient transfer assistive devices."

In all eight facilities, injuries from patient transfers were greatly reduced (by 62 percent), as were lost workdays (by 86 percent) and workers' compensation costs (by 84 percent); the higher reduction in these costs than in injury counts suggests that those injuries that still occurred were less severe. None of the facilities hired any additional personnel, nor did the "zero lift" program affect employee turnover. Comparing the nursing homes' average workers' compensation savings to their equipment purchase costs, average payback period was 15 months; the hospital's savings in patient transfer-related injury costs paid for its investment in 9 months. Nursing personnel reported less exhaustion and back soreness, and older and pregnant nursing workers were able to work longer. Nursing personnel who were on restricted lifting because of herniated discs were able to perform their full work responsibilities. Injuries to patients from lifting and transferring were nearly eliminated, and patients were able to use the toilet more often than before, as well as feeling more comfortable and secure during transfers.

Another study from that era (1995-2000), covering six nursing homes (part of one hospital corporation) over three years before and three years after implementation of "zero lift" practices, also found significant reductions in resident-handling injury reports (61 percent fewer workers' compensation claims), workers' compensation costs (reduced by 37 percent), and lost-workday injuries.[13] The hospital corporation's initial investment for equipment and training ($158,556) was recouped in less than three years of workers' compensation savings ($55,000 average per year).

"The Veterans Health Administration spends $22 million a year on caregiver injuries associated with patient handling and movement."[14] In 2001, the Veterans Integrated Service Network

[12] Arun Garg, "Long-term Effectiveness of 'Zero-Lift Program' in Seven Nursing Homes and One Hospital," prepared for NIOSH, Contract 460/CCU512089-2 (Aug. 16, 1999), at www.aft.org/pdfs/healthcare/zerolift0899.pdf

[13] J. Collins, *et al.*, "An Evaluation of a 'Best Practices' Musculoskeletal Injury Prevention Program in Nursing Homes," *Injury Prev* 10:206-211(2004), at www.cdc.gov/niosh/awards/hamilton/pdfs/Collins-practices.pdf . The hospital corporation was self-insured for workers' compensation, so savings were direct rather than in reduced insurance costs.

[14] Siddharthan et al, *op cit.*

covering Florida and Puerto Rico (VISN 8) provided funding for a multifaceted patient care ergonomics program, including the installation of manual and mechanical patient-moving machinery. Unlike the two studies above, this was not "zero lift," but a program to evaluate specific types of patient moves and determine the least risky practices, limiting manual lifting to appropriate and necessary situations.[15] Injury rates in the involved nursing homes were significantly reduced after the program was in effect, as were costs of medical care billed to workers' compensation. Not counting indirect benefits from reduced injuries, the initial investment in equipment and training was recovered in 4.3 years. The report points out that savings in costs "related to recruitment and retention of nurses can be substantial," so that the social value of the intervention is much greater than the direct costs (and thus the implied recovery period for investment shorter). Surveys of nursing personnel indicated significant increases in job satisfaction related to professional status and task requirements.[16]

Washington State

In 2006, Washington State enacted legislation requiring all hospitals to implement safe patient handling programs. Swedish Medical Center, the largest non-profit provider in the Greater Seattle area, implemented "Safe Moves" in 2008. Their initial gross investment, including training, was $1.5 million. Based on a conservative estimate of over $2 million in savings in lost work days due to nursing injuries in 2009, there is little question that "the return on investment is undeniable and dramatic when a safe patient handling policy is implemented successfully."[17]

Successful implementation in New York[18]

"Overexertion is the leading cause of injury and claims for workers' compensation" in the healthcare and social assistance sector. These injuries can have severe implications for workplaces: in 2009, in nursing and residential care, one non-fatal injury in 6 led to a loss of 31 or more days of work, and this figure was 31 percent (nearly one in three) in city- and county-run nursing homes. There are clearly significant direct costs to the industry from manual patient lifting, and probably much higher costs in employee morale, turnover, and early retirements. Some observers have argued that without implementation of Safe Patient Handling, the anticipated shortage of nursing professionals would severely endanger patients. In addition, as noted in the literature, patients and nursing-home residents subject to manual lifting are subject to injury, discomfort, and reduced opportunity to move around.

In addition to the experiments reported on above, there have been several programs in New York that have proven the effectiveness—and the cost-effectiveness—of "zero lift" policies.

In 2005, the state Veterans Home at Batavia, in cooperation with the Civil Service Employee Association (CSEA), received a grant toward implementing an effective Zero Manual Lift/Safe Resident Handling Program. After three years, the facility had 93 percent fewer lost workdays

[15] "Lifting teams [as opposed to individual lifters or mechanical systems] are necessary when certain factors, such as the medical condition of the patient, prohibit lifting by mechanical means."

[16] A. Nelson, *et al.*, "Development and evaluation of a multifaceted ergonomics program to prevent injuries associated with patient handling tasks," *International Journal of Nursing Studies* 2006, v.43, pp. 717-733.

[17] June Altaras, RN, in testimony before the Senate Committee on Health, Education, Labor, and Pensions, May 11, 2010, pp. 35-37.

[18] Most of this section extracted from "Safe Patient Handling in New York: Short term costs yield long term results," submitted to the Assembly by Members Rory Lancman, Keith L.T. Wright, and Richard N. Gottfried, and Allison Weingarten, Legislative Director, Subcommittee on Workplace Safety, May, 2011.

due to resident handling injuries, and employee turnover decreased from 17 percent to 3 percent. While the facility cannot report workers' compensation savings, costs directly related to staff turnover decreased by 63.7 percent over these years.

Kaleida Health Network, based in Buffalo, is the largest healthcare provider in Western New York, with ten-thousand employees and one million patients per year. In October, 2004, the network began implementing a safe patient handling program, investing two million dollars. Among other equipment, Kaleida purchased "Sit/Stand Lifts and full mechanical floor lifts to ambulate patients up to 800 pounds," and "friction reducing devices, air mats and ceiling lifts for a comprehensive approach to moving a diverse group of patients." Kaleida saved enough in reduced patient-handling injury costs by 2007 to recoup this entire investment, and by 2011 the total savings amounted to $6 million. Among nursing-home staff, there was a 62 percent reduction in patient-handling injuries from 2006 to 2007, and a 69 percent reduction in lost work days,[19] with a 77 percent reduction in lost work days over all of Kaleida's facilities.[20]

The Service Employees International Union Local 1199 started two pilot safe patient handling and moving programs in 2009, at Riverhead Care Center in Riverhead and at Saint James Healthcare Center in Saint James (more facilities were added in 2010). Joint labor-management committees implemented the programs, which involved purchasing the mechanical lifts. While the report cited here was too early to quantify results, "program participants, including labor, management and patients report that the SPHM has positively affected resident/patient care."

Estimating costs and benefits for statewide implementation of Safe Patient Handling

To estimate the costs and benefits of statewide implementation, we used the results of several studies analyzing the various pilot projects implementing safe patient handling equipment.

There are about 57,000 hospital beds in New York State and 118,000 nursing home beds.[21]

Each of the programs cited in the literature summary in the earlier section reported explicitly on its costs and savings, with some differences in the amount of detail. Costs were sometimes expressed just as a total, without breaking out capital costs from training and other transition costs. Benefits, which could include savings in workers' compensation payments (or estimated reductions in future premiums), payments for injury-related lost work days, and reductions in turnover costs, were also sometimes reported only as totals. We used these data to estimate a range of credible costs and benefits, per hospital bed and per nursing home bed, for implementation of "zero lift."[22] Using estimated costs at implementation and (net) benefits per year afterward, we estimate an average length of time for institutions to recoup their initial investments.

[19] W.F. Wieczorek, *et al.*, "New York State Safe Patient Handling Demonstration Project: Initial Results and Issues for Acute Care," Center for Health and Social Research, State University of New York at Buffalo

[20] New York State Zero Lift Task Force, at http://www.csealocal1000.org/images/womachka/FACTSHEET4.pdf

[21] The hospital bed estimate is based on news reports regarding the implementation of recommendations by the Commission on Health Care Facilities in the 21st Century and the fact that hospital employment has not changed materially since 2010. The nursing home bed figure is from the Centers for Disease Control and Prevention's 2012 Health, United States data book, Table 109.

[22] See the Appendix for technical details

While the data is very limited, and includes no estimates of indirect benefits,[23] we estimate the **cost of implementing Safe Patient Handling at $1,275 per bed, and a savings of $1,060 per bed per year in reduced worker injury and turnover costs, for a recovery period of only fifteen months. Savings would continue after the investment is paid for.**

After adjusting the number of hospital and nursing-home beds statewide for those that we know have already been converted to Safe Patient Handling, implementation would affect about 173,000 beds. Using the estimates from existing projects, then, statewide conversion would cost institutions about $220 million. Institutions statewide could expect to save, in their first few years, an average of $183 million per year, and, on average, to recover their gross investments in only fifteen months. Savings in reduced lost work time, workers' compensation, and turnover would occur beyond the payback period. In addition, immeasurable improvements in staff welfare and job satisfaction, and in patient safety and satisfaction are likely results. The retention of nurses will also benefit.

[23] "indirect costs [reduced under SPH] have been estimated as high as five times the direct costs, though an estimate of twice the direct costs is an accepted measure" (Siddharthan et al, *op cit.*, p. 355)

Appendix: Technical details

Since the cost assessments we reviewed for the programs implementing Safe Patient Handling were several years ago. we needed to adjust costs and benefits to current dollars in order to make them comparable.

Capital costs: No producer price index (which applies to institutional costs for capital equipment) for this type of equipment seemed to be available. Assuming that consumers' costs for durable medical equipment and institutions' costs would rise roughly in parallel, we used the Consumer Price Index for Medical Care Commodities[24] to adjust equipment purchase costs to 2012 dollars. Two of the experiments reported only total implementation costs, and these were adjusted with this index as well, on the assumption that capital equipment costs were the bulk of the total.

Some costs, especially those itemized as training, reflect employment costs. while all the available benefit (savings) data are essentially savings in employment costs (reduced workers' compensation payments, savings in lost work days, reduced turnover). To convert these dollar amounts to 2012 dollars required adjusting them according to an employer cost index. The closest data source we could find was the Total Compensation Index for Education and Health Services, starting in 2001.[25] For the projects initiated in 1996 and 1998, we adjusted to 2012 dollars using the 2001 index value.[26] while the other projects' benefits (and training costs) were inflated according to the year of implementation.[27],[28]

Four of the experimental projects for which we have data took place in nursing homes and in spinal-cord-injury units in VA hospitals, which we treated as nursing homes (on the assumption that patient-handling needs would be similar to those in long-term care units). Since the costs and benefits in the fifth project were not reported separately for hospital and nursing home units, we kept this project (project "A") separate for this estimation step. The average implementation cost per bed for this group was $703 (all dollars here are 2012 dollars), and the average benefit per year per bed after implementation was $393. However, there was a noticeable increase in per-bed costs for the two projects implemented more recently (even accounting for the inflation adjustment); those two averaged $929 per bed, with a moderately lower average benefit per year per bed of $374.

The Centers for Disease Control, in its 2006 working paper on SPH[29], said that, for conversion to mechanical lifts, "an effective combination of both floor and ceiling lifts is generally accomplished with a $50,000 to $60,000 investment per 100 bed facility." Using the intermediate $550 per bed, and adjusting to 2012 dollars, gives us $642 per bed for capital costs. Given that this does not include training and other conversion costs, and that we are attempting to estimate on the conservative side, we stay with the higher cost and lower benefit measures for nursing homes (rounded) of $930 per bed cost and $370 per year per bed benefit.

[24] U.S. Bureau of Labor Statistics, Series CUSR0000SAM1

[25] U.S. Bureau of Labor Statistics, Series CIU1016000000000I

[26] This will understate real benefits, and thus provide a conservative benefit/cost ratio.

[27] For project "A", in which benefits were averaged over 6 years, we used the average index for those years

[28] The index used for capital costs shows a 35% increase since 2001, while the employer cost index rose 38%.

[29] Centers for Disease Control and Prevention, *Safe Lifting and Movement of Nursing Home Residents*, February, 2006, at http://www.cdc.gov/niosh/docs/2006-117/pdfs/2006-117.pdf

Applying these estimates to the nursing homes in project "A," we can estimate the costs and benefits for the hospital beds in that experiment (note that this experiment, by far the largest, may have had unusually high bulk-purchase discounts which we cannot adjust for). These calculations yield costs of $1,690 per bed and benefits of $1,960 per year per bed, for a very low investment recovery period of under a year.

For this reason, given the data limitations, we recalculate the costs and benefits by assuming that they are the same (per bed) for hospitals and nursing homes, now just using the four most recent projects for which we have per-bed data (2004-2008 implementations). This leads to an implementation cost estimate of $1,275 per bed, and a benefit estimate of $1,060 per year per bed, for a recovery period of 1.20 years (14.4 months), well within the range of recovery periods reported in these experiments.

The Fiscal Policy Institute (www.fiscalpolicy.org) is an independent, nonpartisan, nonprofit research and education organization committed to improving public policies and private practices to better the economic and social conditions of all New Yorkers. Founded in 1991, FPI works to create a strong economy in which prosperity is broadly shared.

The Need to Legislate the Healthcare Industry in the State of Washington to Protect Healthcare Workers from Back Injury

William Charney, DOH

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ABSTRACT: There is an epidemic of healthcare worker back injury in the State of Washington. Voluntary programs are not keeping pace with the increasing back injury rates to healthcare workers. Adding all the healthcare industry SIC codes, hospitals, nursing homes, home health and residential care puts healthcare as the leading industry in the State of Washington for back injury. Licensed practical nurses, nurses aides, and registered nurses account for the majority of all claims in the healthcare industry. Self-insured hospitals led the state for lost time compensable back injuries between 1993 and 2001, and combined Washington State Fund and self-insured healthcare hospitals and nursing homes led all other industries for compensable soft-tissue disorders of the neck, back, and upper extremities. Legislation is needed to protect this group of workers in this type of industry. A bill will be re-introduced in the 2006 session that calls for hospitals to implement back injury prevention programs through either the Zero-Lift model, with nursing staff use of lift equipment, or the Lift-Team model, with a specially trained team using lift equipment, or a combination of the two, for all shifts. The State of Washington should provide funding, through savings created by back injury prevention programs, for small rural healthcare institutions to assist them in compliance with the legislation.

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I. INTRODUCTION

There is an epidemic of back injury to healthcare workers in the State of Washington. One of the best-kept secrets is that the healthcare industry has the dubious title as the leading industry for back injury if an aggregate counting of all categories and SIC codes for this type of injury are computed for hospitals, nursing homes, home health, and residential care facilities.

Washington State hospitals are among the most dangerous,[1] with a nonfatal employee injury incidence rate of 14.3, which exceeds the rates for construction (11.1), agriculture (10.7), manufacturing (8.6), and transportation (9.5). One of the leading indicators for these rates is back injury. Licensed practical nurses, registered nurses, health aides, and nursing aides account for the majority of all claims in the healthcare industry. Across all industries statewide, musculoskeletal disorder injuries, many of those incurred in patient lifting, transferring, and repositioning, account for 26% of all claims and 40% of total claim cost. Between 1993 and 2001, self-insured hospitals have led in the state of Washington in compensable lost time for back injury claims and compensable lost time for back, neck, and upper extremity claims.[2] The average cost of sciatica (back injury with radiating disc pain) in the state of Washington is $53,838.[2] In the state fund system, nursing homes and personal care facilities had the highest count of upper-extremity and back disorders, mostly patient triggered, with 19,707 between 1993 and 2001.[2] Back claims for the same facilities were 11,836.[2]

Self-insured hospitals had 4314 lost time compensable back claims between 1993 and 2001, making this the leading industry in the state for lost time from back claims.[2] The combined Washington State Fund and Self Insured Compensable soft tissue disorders of the neck, back, and upper extremities for hospitals and nursing homes leads all other industries, with an aggregate number of 15,419.[2] The closest other industry for these same claim definitions is grocery stores, with 11,016.[2] These numbers do not include home health care injury data or residential treatment centers, which would only increase the above numbers. Healthcare work is the industry in the state of Washington with the highest risk factors for back injury. Practically speaking, almost one healthcare worker in ten experiences a lost-time back injury—just one data set of nursing homes generates 988 claims per 10,000 FTEs.[2]

One of the associative dangers of this injury is that it is having a direct effect on patient mortality outcomes. In a study by the Joint Commission on Hospital Accreditation[3] of 1609 hospitals, the nursing shortage was associated with 24% patient mortality. In this same study, the nursing shortage was directly associated with nursing injury.

II. CAUSES FOR THE EPIDEMIC

The causes for the frequency and severity of back injury in the state healthcare delivery systems are multiple. This injury has long flown "under the radar," having been accepted as part of the cost of doing business, much like needlesticks were an acceptable risk before State and Federal legislation mandated safer devices and practices via legislation, which has reduced the needlesticks rates substantially.[4]

Manual lifting of patients has been computed to put healthcare workers in the 75% risk category for injury each time they lift a patient.[5] Sixty percent of patients that enter healthcare now fit the BMI index for obesity.[6] In one study,[7] nurse/patient ratios were directly connected to nursing injury. Nursing hours per resident day in a nursing home were significantly associated with worker injury rates.

Most healthcare delivery systems in the state of Washington do not have viable back injury prevention plans or programs with enough substance to impact injury rates, despite the fact that back injuries are one of their most expensive injuries. And at present there are no regulations requiring healthcare institutions to provide this type of program. With the repeal of Washington's state ergonomics legislation, there exist no specific codes to obligate healthcare facilities to implement programs. Citations under Labor and

Industry's general duty clause for lack of back injury prevention programs has not been issued on any scale impacting the frequency or severity rates.

The traditional approach of training does not impact this injury at all.[8-10] Healthcare is one of the last industries to mechanize lifting and movement of heavy loads. The average healthcare worker lifts 1.8 tons per shift,[11] and some studies suggest even more. Lifting or repositioning patients manually exceeds biomechanical safety levels with each lift or reposition, according to Marras.[5] With a safety limit of 3400 N of force, a manual lift such as the under-axilla carry, a common manual lift, exerts 4456 to almost 5000 N of force, and a reposition can create between 3819 and 6570 N of force, all exceeding safety limits.

Nurses spend 20–30% of their time bent forward or with the trunk twisted during patient care activities, adding pressure to the discs in the back.[12] The average age in the nursing workforce in the state of Washington is 46.[13] Older RNs are more likely to have neck, back, and foot injuries with reduced capacity to lift patients.[13] Workers compensation premiums are paid as a "cost of doing business," yet the "soft costs," which exceed the medical and compensation dollars by a factor of 1.75, as computed by Labor and Industry,[14] is not well understood by the industry. (The 1.75 factor is conservative. Some researchers, such as Fragala et al.,[15] have shown that the hidden costs for injury to be four times the direct costs)

III. LEGISLATION MODEL

Voluntary implementation programs that do occur in the state of Washington are not keeping pace with the accelerated injury rates for this population of worker in this type of industry. Relying on voluntary implementation will not mathematically change the course of climbing rates or lower incidence of this injury. This is what the data are showing. The majority of Washington's healthcare delivery systems have no back injury prevention programs, and of the programs that do exist, some are not qualitative in practice. Healthcare is seeing prevention only on the cost side, despite numerous references in the literature both for Zero-Lift, with nursing staff use of lift equipment, and Lift-Team programs using lift equipment, which show positive cost/benefit relationships within 12–36 months.[16-17]

In the legislative session of 2005 the United Food and Commercial Workers Local 141 wrote a bill mandating back injury prevention programs and received the support of the Washington State Nurses Association and the Service Employees International Union. The bill, #1672, sponsored by Steve Conway and others in the State Assembly, called for hospitals to enact no-manual-lifting policies for all shifts, using Zero-Lift requiring nursing staff to use lift equipment, Lift-Teams using lift equipment, or a combination of the two (Sect. 4a); to establish a safe patient handling committee (Sect. 3); to establish a written care program that addresses patient handling (Sect. 4), to train staff (Sect. 4d); and to conduct annual evaluations to make sure the program is effective in practice (Sect. 4e). This bill did not make it out of committee in the past session.

Opponents of the legislation based their opposition on two rationales. The first is that this bill was an unfunded mandate. This is an interesting critique. All cost/benefit analyses published after peer review show that these programs actually save money and provide a return on investment (ROI) within 12–36 months of capital expenditure. The second level of opposition was that this bill represented another form of ergonomic regulation, which the voters in Washington repealed in 2003 after a contentious debate.

The supporters of this legislation—labor organizations, the Washington State Labor Council, etc.—see this legislation as a health bill. The status-quo-ante of turning workers into patients is seen as counterproductive. The bill, as its supporters contend, does not belong in the political arena of the regulation vs. deregulation, Republican vs. Democrat, or right vs. left. Rather, protecting workers from disabling injury should be considered a guaranteed right, as stated by the Federal OSHA regulations. In the State of Washington, WAC 296-800-11005 states that employers must provide a workplace free from recognized hazards that are likely to cause serious injury (ref WISHA Safety and Core Rules). Supporters of the legislation believe that protecting healthcare workers also leads to safer patient outcomes.

There are other states that have initiated legislative initiatives. Texas has already passed bill SB 1525, signed into law by Governor Rick Perry. This bill calls for hospitals to "adopt and ensure implementation of a policy to identify, assess, and develop strategies to control risk of injury to patients and nurses associated with lifting, transferring, and repositioning or movement of patients." This bill was supported by the Texas Hospital Association and sponsored by the Texas Nurses Association. California has reintroduced bill SB 353, which was vetoed in 2005; Massachusetts has introduced a bill HB 2662; New Jersey will introduce a bill in the winter of 2005; and Minnesota is preparing a bill.

IV. WHAT LEGISLATION OF BACK INJURY PREVENTION PROGRAMS CAN ACCOMPLISH

One of the best ways for the states and private healthcare delivery systems to save needed dollars is to introduce programs to prevent back injuries, which are among the most expensive compensable injuries in the state. Workers compensation premiums can be reduced, saving millions of dollars both in the State Fund and self-insured systems. Positive outcomes for implemented programs are myriad and have been substantiated by peer reviewed science, both for positive patient outcomes and positive worker outcomes. Garg[18] showed reduced skin tears in nursing homes with zero-lift programs. Nelson[19] talks about decreased pain in patients lifted mechanically, fewer patient falls during transfers, greater patient dignity, and less bruising and injuring of osteoperitic patients.

Studies have shown that lift teams using lift equipment, while reducing compensation dollar costs, also reduce turnover rates and increase retention rates.[20] In 1 year, Australia's zero-lift regulations in Victoria have reduced lost days by 74%, claims by 54%, and costs by 13 million dollars in 1 year.[21] England has a no-manual-lift law. British Colombia, Canada, has passed a Zero Lift Memorandum of Understanding between the Health Employers Association and the Association of Unions, which went into effect in 2001. Since that time they have calculated a 32% decrease in lost time injury rates, with $11 million dollar savings in workers compensation costs. This $11 million does not include any indirect costs, which are estimated to be two to four times the direct claims cost by this system.

Some hospitals in Washington have already implemented programs, such as Harborview Hospital and the University of Washington Medical Center, which have implemented lift teams to address protecting their healthcare workers from back injury. It is important to note that the use of lift teams should not be to transfer manual patient lifting, with the associated high risk of injury, from one group of healthcare workers (the nursing staff) to another (the lift teams). Rather, specially trained, properly run lift teams are protected from injury by the use of safe, mechanical, patient-lift and transfer equipment.

V. DISCUSSION

Legislation is necessary to protect healthcare workers from disabling back injury. Legislation will mandate programs and qualitative evaluations of programs that will reduce lost time from back injuries. These injuries contribute to negative patient outcomes as well as negative worker outcomes. These injuries are expensive and lower overall healthcare delivery efficiencies. According to the Washington Ergonomics Legislation Preamble, after a back injury, a worker will lose 21% productive capacity over his or her working career. Voluntary program implementation has not kept pace, and will not keep pace, with the existing rising injury rates for this industry. Legislation will assist in standardizing program models. In time these programs will reduce turnover rates, which in some nursing homes reaches excessively high levels, and provide a less stressful environment for patients and healthcare providers. A safer working environment in healthcare can directly effect mortality outcomes. Money will be saved that can be re-introduced to clinical care. The sooner we enact this legislation, the sooner healthcare facilities will implement programs, and the sooner the dividends will come to fruition.

The State of Washington should provide a fund for smaller rural hospitals to help them financially comply with the legislation. This fund can be established from the savings that are realized through reduced injury costs.

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What are the Facts about Safe Patient Handling and Movement?

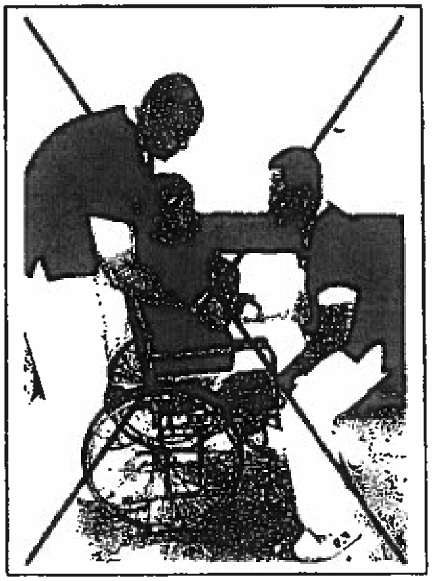
FACT
1

FACT: PATIENTS AND THEIR CAREGIVERS ARE INJURED BY MANUAL LIFTING TASKS

Safe Patient Handling and Movement: A policy and practice that creates a safe environment for patients and healthcare workers by eliminating hazardous manual lifting tasks. Transferring and repositioning patients is accomplished by using new technologies in mechanical lifts and repositioning devices.

Safe Patient Handling...

- Increases quality of care for patients
- Dramatically reduces injuries to healthcare workers
- Decreases patient and worker injury during transfers and handling



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FACT # 2

FACT: QUALITY OF CARE FOR PATIENTS IMPROVES FROM SAFE PATIENT HANDLING PROGRAMS

According to leading experts on safe patient handling:

14 months after eliminating pivot transfers:

- 64% decline in patient fractures
- 37% decline in patient skin tears and bruises
- Elimination of lower extremity spiral fractures
- 26% improvement in upper extremity range of motion

Paula Pless
Director, SPHM Kaleida Health

"I would not even attempt to walk without the assistance of the mechanical stand up lift. I never dreamt I'd be able to walk down the hall. I've been in a wheelchair for three years and this is wonderful. It's just a rush for me."

Resident, Erie Cottage,
NYS Veterans' Home at Batavia

Positive impacts on patients:

- Lower levels of depression
- Improved urinary continence
- Higher engagement in activities
- Lower fall risk
- Higher level of daytime alertness

Audrey Nelson
PhD, RN, FAAN
Director, Patient Safety Center of Inquiry

Negative patient outcomes have been scientifically linked to nursing injury rates, the nursing shortage and less nursing hours at the bedside.

William Charney
Occupational and Environmental Activist

Quality of care improvements:

- Patients feel more secure and less anxious when being transferred
- Reduction in patients being subjected to awkward and forceful handling
- Dignity of patients is better maintained
- Patient autonomy

A. B. de Castro
PhD, MSN, MPH, RN

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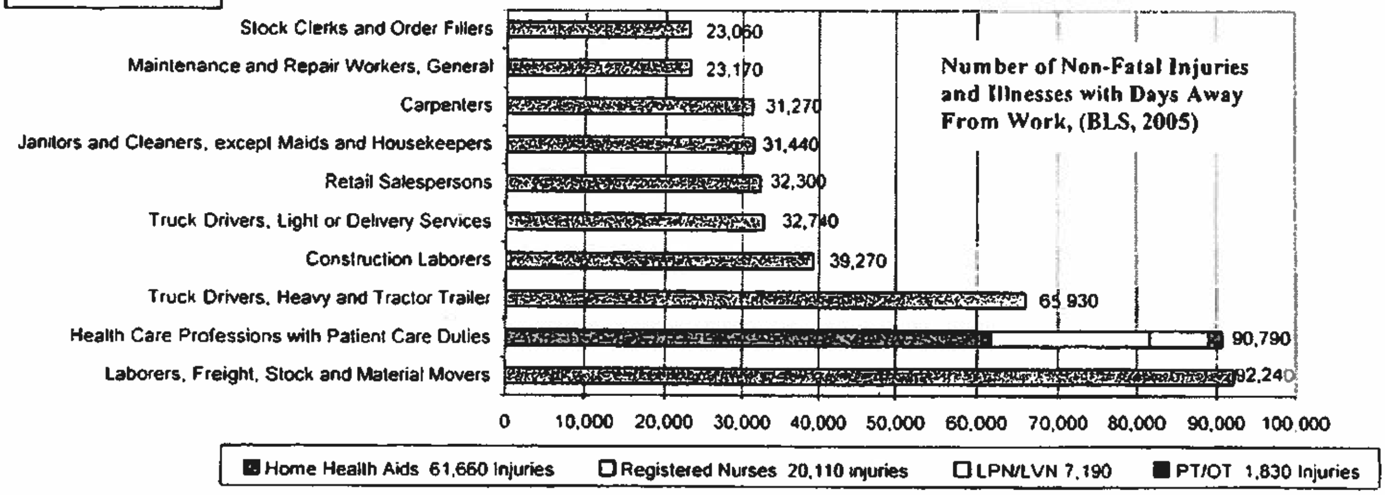
What are the Facts about Safe Patient Handling and Movement?

FACT # 3

FACT: HEALTHCARE WORK IS CONSISTENTLY AMONG THE MOST HAZARDOUS IN THE NATION



- Healthcare workers with patient care duties had **90,790 injuries** in 2005, nearly tied with the leading occupation- Laborers, Freight, Stock and Material Movers.

- The healthcare patient was the source of the injury for **45,630** (50%) **of all the recorded injuries.** **53,270** (59%) of these injuries were **strains and sprains. 48%** of all these injuries cite **overexertion** as the event leading to the injury.

- **91.9%** of these injuries were to **women**. 68% of the injured workers had more than one year of service with the employer.

- This is just the **tip of the iceberg!** According to the CDC (MMWR 1/19/07, 56 (RR01); 1-7) "The national estimates exclude public sector workers…". "Evidence suggests that injuries are underreported" According to one study, up to **68% of occupational injuries and illnesses were not reported.** (JOEM Vol. 48,4, April 2006)

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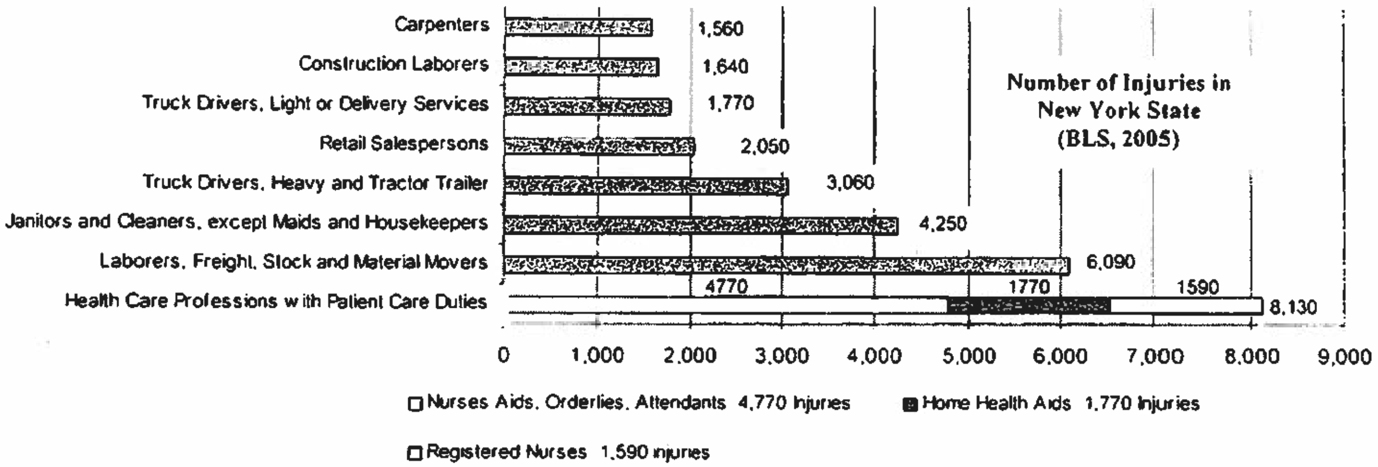
What are the Facts about Safe Patient Handling and Movement?

FACT # 4

FACT: HEALTHCARE WORK IS AMONG THE MOST HAZARDOUS OCCUPATIONS IN NEW YORK STATE



Safe Patient Handling Programs in New York State have dramatically decreased injuries:

- **Kaleida Health** two years post implementation has experienced a **77% decrease** in lost workdays.
- **NYS Veterans' Home at Batavia** three years post implementation, experienced a **93% reduction** in lost workdays.
- **Glens Falls Hospital** five years post implementation has experienced a **56% decrease in injuries** related to patient handling. They have also experienced a **25% decrease** in **total workers' compensation** costs and a **16 % decrease** in the **amount per workers' compensation claim**.
- As of November 2007, **Geneva Living Center North** has gone **387 days** and counting **without an injury** after implementing a safe patient-handling program.

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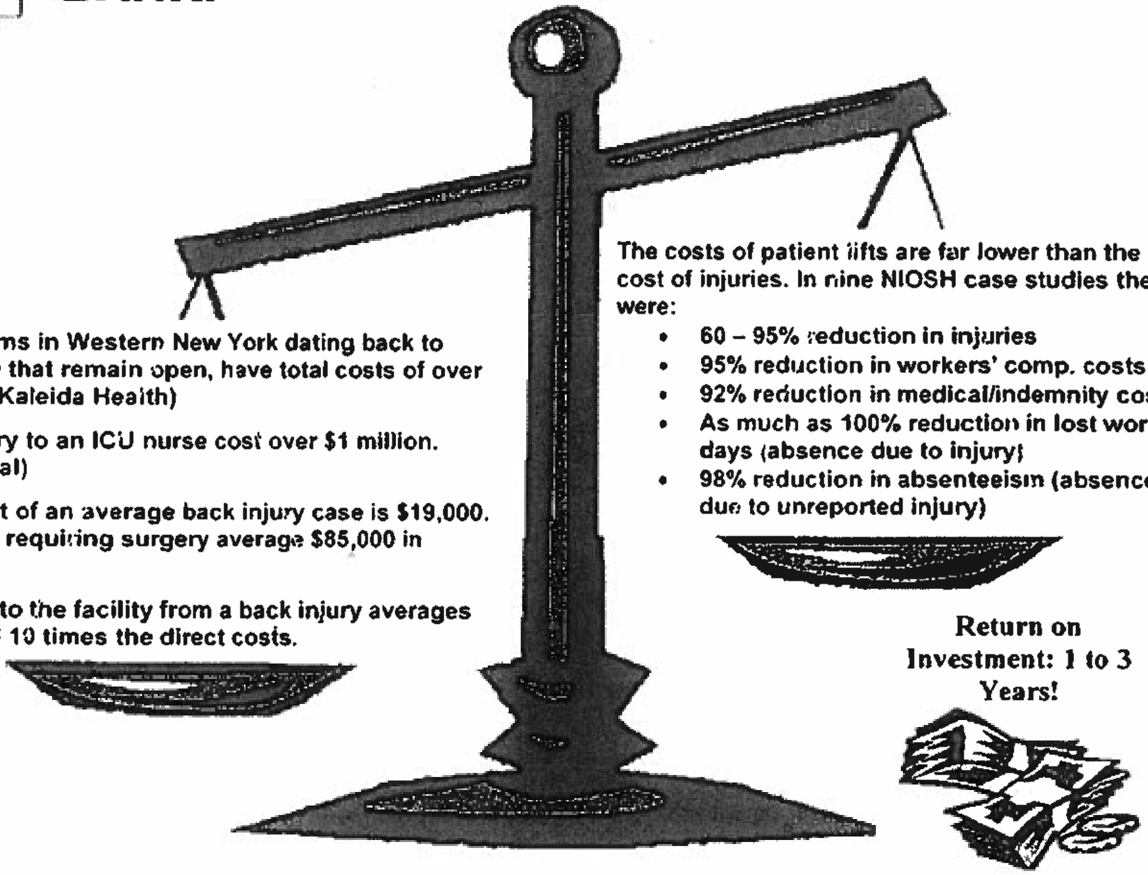
What are the Facts about Safe Patient Handling and Movement?

FACT # 5

FACT: INVESTING IN SAFE PATIENT HANDLING AND MOVEMENT IS MONEY IN THE BANK!



The costs of patient lifts are far lower than the cost of injuries. In nine NIOSH case studies there were:

- 60 – 95% reduction in injuries
- 95% reduction in workers' comp. costs
- 92% reduction in medical/indemnity costs
- As much as 100% reduction in lost work days (absence due to injury)
- 98% reduction in absenteeism (absence due to unreported injury)

Two back claims in Western New York dating back to 1992 and 1999 that remain open, have total costs of over $1.1 million. (Kaleida Health)

One back injury to an ICU nurse cost over $1 million. (Tampa General)

The direct cost of an average back injury case is $19,000. Serious cases requiring surgery average $85,000 in direct costs.

Indirect costs to the facility from a back injury averages between 4 and 10 times the direct costs.

Return on Investment: 1 to 3 Years!

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What are the Facts about Safe Patient Handling and Movement?

FACT # 6

FACT: THE COST OF AN INJURY IS FAR GREATER THAN THE COST OF EQUIPMENT

Cost of Equipment:
(Average)

Full Mechanical Lifts –
$4000 *1 per 8 patients of need*

Sit to Stand Assist Lifts –
$3100 *1 per 8 patients of need*

Ceiling Lifts –
$100 per foot installed, lift $3000

Non-Friction sheets and other positioning devices –
$38 - $3,000

Training or Re-Training-
(minimum 3 hour course)

Costs of an Injury
(Average cost of injury with one month of lost workdays.)

Direct Costs:
Medical- $7,000
Indemnity- $11,108
Allocated Loss of Expenses-$1,411

Indirect Costs:
Replacement Costs- $7,350
($24.50 per hour of productivity loss)
(Overtime & Agency Fees)
Benefit Continuation- $635.48
Incident Investigation- Salary of six individuals per hour to investigate a claim.
Internal Financial Management- Salaries of six individuals per hour.

"Kaleida Health Long Term Care began the implementation of a Safe Patient Handling Program in 2004. Over 800 employees received a three-hour training session. Long Term Care management made a commitment to the program and more importantly to our workforce. We worked with Paula Pless, our Director of Safe Patient Handling and Workforce Ergonomic Safety to ensure our success.

In 2003 we incurred over $604,000 lost wages alone due to injuries, by the end of 2006 lost wages due to compensation injuries were $142,588-a savings of almost $1,000,000 over three years. Our program is successful and Paula and her team continue to work to improve our success rate and provide a safer work environment for our employees. SPH programs provide a solid return on investment."

Maureen Caruana Vice President, Kaleida Health LTC

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What are the Facts about Safe Patient Handling and Movement?

FACT
7

FACT: WE ARE LOSING OUR HEALTHCARE WORKERS

- The national turnover rate for nurses in 2003 was 14.6%. (BLS)
- The national turnover rate for Certified Nurses Aides in 2002 was 71%. (BLS)
- The top reason nurses leave the profession (36%) aside from retirement is to seek a job less physically demanding. (American Nurses Association)
- 55% of nurses noted they were so disheartened with their profession that they would **not** recommend a nursing career. (American Nurses Association)
- Unless this issue is resolved, it's predicted that the demand for nursing services will exceed the supply by nearly 30% in 2020. (2005 *Journal of Nursing Management* –Andrews & Dziegielewski)

Safe Patient Handling is proven to create a safer and more productive work environment and will protect the future of healthcare in New York State. With the aid of Safe Patient Handling equipment, healthcare workers are able to work to retirement age and those previously injured now have the possibility of returning to work.

"If there wasn't a Zero-Lift Policy, I would not be able to continue to work as a Certified Nurse Aide."
Virginia Dolph, CNA, NYS Veterans' Home at Batavia

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FACT
8

FACT: TECHNIQUES TAUGHT THROUGH BODY MECHANICS TRAINING HAS NOT REDUCED BACK INJURIES AMONG HEALTHCARE WORKERS

Good body mechanics (lifting with your legs, keeping back straight) is not enough to prevent injuries.

Manual lifting techniques were based on stable loads that could be held close to the body.

Manual lifting techniques were based on loads that weigh far less than typical patients.

According to NIOSH, the human body can safely lift 35 pounds.

Manual lifting techniques were based on studies that only included men.

IN 2005, OVER 53,000 HEALTHCARE WORKERS WHO WERE TRAINED IN GOOD BODY MECHANICS WERE INJURED FROM MANUALLY LIFTING PATIENTS!

-Bureau of Labor Statistics, 2005

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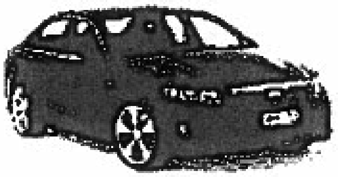
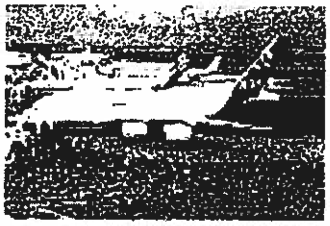
What are the Facts about Safe Patient Handling and Movement?

FACT
9

FACT: THE EXTREME DEMANDS OF MANUAL LIFTING ARE NEEDLESSLY INJURING OUR HEALTHCARE WORKERS!

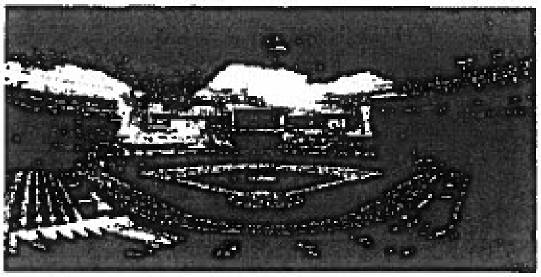
The average healthcare worker manually lifts 1.8 tons per 8-hour shift. That is equal to lifting one sedan per shift.





In one year, healthcare workers lift the equivalent of an airplane that is 50 % loaded.

The number of manual lifting injuries to healthcare workers in one year equals the full capacity of the new Yankee Stadium.



A Safe Patient Handling and Movement Program *eliminates* injuries associated with manual lifting and reduces the risk and strain on those that care for us!

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FACT # 10

FACT: DANGEROUS MANUAL PATIENT TRANSFERS INJURE PATIENTS

The **"Hook and Toss Method"** of transferring a patient involves hooking the caregiver's arm under the armpits of a patient and lifting, using the shoulder joint and momentum to toss the patient to the desired transfer surface.

- ✓ This method is not evidence based and has been found to be unsafe for the patient and the caregiver.
- ✓ It is still widely practiced in the United States; however, it has been ***banned*** in 20 countries.
- ✓ This method can cause nerve damage, skin tearing and bruising to the patient.

Healthcare workers routinely use the **Pivot Transfer** to move patients. This transfer is loaded with risk due to the high level of patient function required to execute it well. Patients and healthcare workers are injured during pivot transfers when patients are unable to stand and take steps, leaving the healthcare worker to bear the patient's full weight.

According to a study done in western New York at a 120-bed long-term care facility:

100% of patient cases where pivot transfers were used for over 90 days showed:

- ✓ Exacerbation of joint disease in shoulders, hips or knees
- ✓ Deterioration or loss of weight bearing skills
- ✓ Below the knee spiral fractures sustained by two patients

90% of patients showed adverse effects **within 30 days**!

Implementing Safe Patient Handling and Movement eliminates consequences of dangerous lifting and repositioning techniques to patients and paves the way to recovery!

*PEF*SEIU*WNYCOSH*NYSAFL-CIO*CSEA*CWA*DC37*NYSUT*NYSNA*NYSDOL*NYCOSH*CNFNY*KALEIDA

NEW YORK STATE
ZERO LIFT
TASK FORCE

PUSH *for...*
Protection Using Safe Handling

Patient Health!

For more information, please visit:
www.zeroliftforny.org

What are the Facts about Safe Patient Handling and Movement?

FACT # 11

FACT: NURSING IS COMPARABLE TO THE MOST PHYSICALLY DEMANDING JOBS

Nurses spend 20-30% of their time bent forward or with the trunk twisted during patient care activities.

Even with " good techniques", it is not possible to lift patients manually without exceeding the NIOSH Action Limit (35 lbs.).

Cumulative trauma from manual lifting, transferring & repositioning patients can lead to career ending musculoskeletal injuries.

According to the National Institute of Health, nearly 40 million American adults can be classified as obese.

As the size of our patients increase so does the average age of our nurses (50+ years).

Healthcare: the only profession that considers 100 lbs. to be "lightweight". Healthcare workers lift an average of 1.8 tons per 8-hour shift.

*WNYCOSH*NYSAFL-CIO*CSEA*CWA*DC37*UFT*NYSUT*NYSNA*NYSDOL*NYCOSH*CNFNY*KALEIDA*PEF*SEIU

NEW YORK STATE
ZERO LIFT
TASK FORCE

PUSH *for...*
Protection Using Safe Handling

Worker Safety!

For more information, please visit:
www.zeroliftforny.org

What are the Facts about Safe Patient Handling and Movement?

FACT # 12

FACT: DANGEROUS MANUAL LIFTING TECHNIQUES ARE STILL A PART OF MANY HEALTHCARE CURRICULA

OLD PRACTICES...

- ➢ EXPECT WORKERS TO ADAPT TO POOR WORK DESIGNS.
- ➢ CAN INJURE THE PATIENT.
- ➢ DEMAND THAT WORKERS EXCEED THE NATURAL LIFTING LIMITS OF THEIR BODIES.
- ➢ ARE TECHNIQUES THAT ARE BASED ON LOADS THAT WEIGH FAR LESS THAN TYPICAL PATIENTS.

EVIDENCE BASED PRACTICES...

- ➢ ARE DESIGNED TO FIT WORKERS AND MAINTAIN SAFETY.
- ➢ APPLY POSTIONING AND MOBILITY TECHNIQUES THAT ARE SAFE FOR PATIENTS AND CAREGIVERS.
- ➢ SHOULD BE INCLUDED IN ALL HEALTHCARE CURRICULA TO ENSURE THAT HEALTHCARE WORKERS ARE TAUGHT PROPER TECHNIQUES TO SELECT AND UTILIZE SAFE PATIENT HANDLING EQUIPMENT.

SEIU*WNYCOSH*NYSAFL-CIO*CSEA*CWA*DC37*NYSUT*NYSNA*NYSDOL*NYCOSH*CNFNY*KALEIDA*1199*

NEW YORK STATE
ZERO LIFT
TASK FORCE

PUSH *for...*

Protection Using Safe Handling

Educating Healthcare Workers for the Future!

For more information, please visit:

www.zeroliftforny.org

Consumer Groups Support Safe Patient Handling Legislation

To: Hon. Andrew M. Cuomo
Hon. Sheldon Silver
Hon. Brian Kolb
Hon. Dean Skelos
Hon. Jeffrey Klein
Hon. Andrea Stewart-Cousins

Re: Safe Patient Handling A2180-B (Cal# 457)/S1123-B

Date: June 17, 2013

As organizations concerned about preventing injury to health care consumers, we urge you to work together to ***enact A2180-B/S1123-B prior to the conclusion of this Legislative Session***. This legislation will promote harm-free transfers and repositioning while preventing injuries to both health care consumers and workers.

The legislation is already the result of extensive discussion and compromise and provides for a significant amount of flexibility while still establishing accountability. The bill creates a work group within the Department of Health to prepare a policy statement and a report to the Commissioner. The Commissioner would then promulgate regulations to institute a statewide policy that would promote harm-free transfers and repositioning. Health care facilities would need to file their plan with the Department, including the development of an internal committee to assist with compliance and training issues. There would be a gradual implementation process, with the Department accepting plans from facilities by July 2018.

This bill is designed to protect health care consumers – especially important to those with limited mobility who are at greatest risk for injury. All too often, hospital patients or nursing home residents are injured when being transferred or repositioned. Lifting patients through the old "hook and toss" method of grasping under the arms and pulling can cause injury and also can result in a debilitation or deadly fall. Using modern equipment that is designed to move health care consumers gradually and gently is proven to prevent injury and provides for enhanced dignity for the person needing assistance. Importantly, the bill also requires training of "front line" health care staff and includes staff representation on internal committees to promote compliance.

Implementing a statewide policy in hospitals and nursing homes would benefit health care consumers, workers and employers. Consumers would realize improved quality of care and satisfaction, through reduced risk of falls, friction burns, dislocated shoulders, skin tears and bruises. Health care workers would also realize reduced risk from musculoskeletal injuries and less pain and fatigue on a daily basis. As a result, staff would be able to work to an older age and have increased job satisfaction. Employers will see reduced worker and consumer injuries, increased worker recruitment and retention and reduced workers compensation medical and indemnity costs. It is important to note that the U.S. Department of Health and Human Services' Center for Disease Control and Prevention/ National Institute for Occupational Safety and Health report on safe lifting and moving of nursing home residents concluded that "the initial investment in the equipment and training is quickly recovered because of the reduced injury costs to caregivers."

The goals of this legislation have been successfully implemented in New York. Niagara County's Long Term Care Facility experienced a 64% reduction in bone fractures and a 37% reduction in skin tears and bruising just one year after implementing its own internal policy to promote harm-free resident transfers and positioning. Kaleida Health experienced a 77% reduction in lost work days. Eight states – California, Illinois, Maryland, Minnesota, New Jersey, Rhode Island, Texas and Washington all require hospitals to establish a system to prevent patient harm during transfers and repositioning. Six of those states also place the same requirement upon nursing homes.

The undersigned organizations representing health care consumers urge you to use your leadership to include this legislation among those you will be championing as this legislative session draws to a close.

1199SEIU Retiree Division, *Lourdes Rodriguez-Dox, Director*
Block Clubs and Neighborhood Associations-EC, *Rich Lee, Executive Director*
Board of Block Clubs of Buffalo and Erie County, *Linda Freidenberg, President*
Brooklyn Center for Independence of the Disabled (BCID), *Joan Peters, JD, MPH, Executive Director*
BWICA Educational Fund, Inc., *Maria Alvarez, Executive Director*
Capital District Chapter of the New York State Alliance for Retired Americans
Cayuga County/Finger Lakes Chapter StateWide Senior Action Council
Central New York Chapter of the New York State Alliance for Retired Americans
Central New York Citizens in Action, Inc., *John Furman, President*
Citizen Action of New York
Commission on the Public's Health System, *Anthony Feliciano, Director*
Communications Workers of America Retired Members' Chapter 1180, *Adelle Rogers, President*
Community Service Center of Greater Williamsburg, *Hindy Kohn, Executive Director*
Consumers Union, *Chuck Bell, Programs Director*
Council of Senior Centers and Services of New York City, Inc. (CSCS), *Igal Jellinek, Executive Director*
Erie-Niagara Chapter of the New York State Alliance for Retired Americans
Gray Panthers, NYC Network
Hispanic Senior Action Council, *Mary Perez, President*
Hunger Action Network of NYS
Institute for the PR/ Hispanic Elderly, *Suleika Cabrera Drinane, President and CEO*
Institute Home Care Services , *Joan Shockness, RN, Director*
Jewish Family Services of Ulster County, Inc., *Sharon Murray-Cohen, LMSW, Executive Director*
Long Island Chapter of the New York State Alliance for Retired Americans
Long Term Care Community Coalition, *Richard Mollot, Executive Director*

***Masten Block Club Coalition**, Ada Hopson Clemons, President*
Metro New York Health Care for All Campaign
***Morningside Retirement and Health Services**, Ron Bruno, Executive Director*
New York City Chapter of the New York State Alliance for Retired Americans
***NYC Chapter - StateWide Senior Action Council**, Lani Sanjek, President*
***New York Memory Center**, Christopher Nadeau, Executive Director*
***New York Public Interest Research Group, Inc. (NYPIRG)** Russ Haven, Esq., Legislative Counsel*
***New York State Alliance for Retired Americans**, Dennis Tracey, President*
***New York StateWide Senior Action Council**, Maria Alvarez, Executive Director*
***New Yorkers for Patient & Family Empowerment**, Suzanne Mattei, Esq., Executive Director*
***North Country Chapter StateWide Senior Action Council**, Linda Wilkinson, President*
NYSUT
Physicians for a National Health Program-NY Metro
***PULSE of NY, Inc.**, Ilene Corina, President*
***Resource Center for Accessible Living, Inc.**, Susan Hoger, Chief Executive Officer*
***Retirees Association of DC37**, Rochelle Mangual, President*
SEBCO Development Inc.
***Seneca-Babcock Community Association**, Art Robinson, President*
Senior Legislative Action Committee of Sullivan County
***Senior Umbrella Network of Brooklyn (SUN-B)**, Vicki Ellner Chair/President*
***Wayne County Senior Citizens Action Council (SCAC)**, Franklin E. Clark, President*
***Western NY Region Erie County Chapter StateWide Senior Action Council**, Helen L. Sanders, President*

cc: Assemblymember Gunther
Senator Maziarz
Senator DeFrancisco
Senator Krueger

Appendix B

Agriculture

Watertown, NY **September 19, 2013**

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Executive Director Behling Orchards

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Owner/Operator North Harbor Dairy Farm, Old McDonald's Farm

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Vice President of Farm Credit

89 - 92 Faye Beckwith
Co-Owner/Operator of A Christmas Tree Farm – Oswego County

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Eric Behling

Co-owner of Behling Farms and Board Member of The Oswego County Farm Bureau

Another example of superfluous and redundant regulation is the NYS Department of Motor Vehicles (DMV) requirement to include the blue "Certified Farm Vehicle Use" form with a farm vehicle's registration. State law limits farm plated vehicles to travel within a 25 mile radius of the farm address that the vehicle is registered to. Currently, the farmer must also designate any travel routes within that 25 mile radius on a blue card that is kept both in the farm vehicle and filed with the NYS Department of Motor Vehicles (DMV). Each time a farmer finds it necessary to travel to a different destination or uses a different route within that 25 mile radius, the "blue card" certification must be amended to reflect that change and be resubmitted to the NYS DMV. The constant revision and maintenance of a farm vehicle's possible itinerary within the allowable 25 mile radius by the farmer and DMV is both unnecessary and a waste of DMV resources which would be better spent on other priorities. NYFB applauds Senate Ag Chair Patty Ritchie and Assembly Ag Chair Bill Magee for sponsoring common sense legislation, S.1951/A.8351 that would eliminate this senseless requirement.

The high cost associated with state regulations and the associated fees and tax compliance makes it extremely difficult to maximize our competitive advantage of being close to New York City and its large nexus of consumers. For example, the majority of New York's farms utilize a LLC, C Corp or S Corp business structure as part of their transition plan to the next generation of family operators. In the eyes of the farm community, the LLC fee is a necessary business tax required for incorporation which feeds into the state's general fund.

If we are to continue to have farms in New York, we have to make it easier for our farmers to form LLC's and, in particular, statutorily restructure existing public policy to assess the LLC fee based on net farm income, as opposed to the current protocol of using gross farm income. LLC's are now assessed a fee based on gross income, not net, and in farming that difference is vast. A farm can easily gross over a million dollars, but earn less than several thousands in profits depending upon how expensive input costs were that particular year or how badly yields were impacted due to weather conditions. Either a flat fee for farm corporations for LLC's, C Corps and S Corps needs to be established or a mechanism put in place that allows farms to provide a Schedule F – a federal tax income form for farmers - to establish net income and pay the fee on this verified net income amount.

Additionally, submission of the LLC application with the associated fee is due by January 31. It would be easier for farmers to file this form and associated fee on March 1 with the farmer's tax return as opposed to submitting them on a separate deadline. Similarly, the publishing requirements for the public notice of the formation of an LLC seem in this day and age to be antiquated. These may seem to be trivial changes, but it is important to recognize that pragmatic minor public policy changes such as these are very meaningful given the wide range of regulatory compliance a family farm must contend with.

These and other practical changes included in the Farmers Regulatory Relief Act, sponsored by Senator Ritchie and Assemblyman Magee, would bring meaningful change to daily operations and business costs for family farms. There are some regulations that can bolster the farm community such as the pending DEC regulations for maple tapping on state land, similar to the State of Vermont. This type of proactive, common sense regulation that brings parity to the marketplace is what family farms like mine need to see more of.

Without question, regulatory requirements raise my cost of production that other competitors do not have to deal with. For example, fresh apple cider is a very popular product with the visitors who come to my farm. I make fresh apple cider from the apples on my farm and, in compliance with New York's mandatory cider pasteurization law, I use an ultraviolet light processing machine to purify our cider before bottling and selling it. State law requires that the ultraviolet light processor be inspected every three years. The cost for my re-inspection this year has tripled from my last inspection three years ago because cider producers like me are forced to use the very few service providers available to meet this regulatory requirement. My only other alternative is to close down my cider business. I am sure other commodity farms have similar examples which I hope they will present at this forum.

As an apple grower, one of the game changing issues for me and my family are farm labor mandates. There has been a strong push in the Assembly for factory style labor mandates to be imposed on family farms. Proponents of legislation that would force these mandates on family farms are based out of New York City and do not understand the realities of providing nutritious food on people's tables.

Attempting to apply overtime and collective bargaining rules that exist for factories are not appropriate or suitable for our state's farms. Simply put, harvesting crops doesn't fit into a typical work week schedule. Rainy weather may keep farm employees out of the fields for a couple of days, and when the sun is out, ripe fruit can't always wait for the next day's 8-hour shift to begin. Farms need flexibility that suits their individual needs in order to get local foods to local tables.

New York's farmers are dependent on quality, skilled agricultural labor, and go through great lengths to ensure safe working, living, and wage conditions for employees. Farm work agreements, required by state law above and beyond the Wage Theft Prevention Act, lay out the work to be performed, wages, work days, and a host of other important arrangements. If farm labor advocates were serious about helping farm employees, they would spend their efforts in Washington, DC advocating for immigration reform to bring migrant workers who are here in this country with questionable documentation out of the shadows where they can lead more open and productive lives.

Family farms like mine are extremely vulnerable to any increase in farm labor expenses relative to other states. New York farmers already spend substantially more on labor than the national average, and especially compared to most of the major farm states which are some of New York's fiercest competitors for our East Coast markets. Per U.S. Census data, for every $100 of production sold, New York farmers paid $13.82 to farm workers compared to the U.S. average of $8.88 (per Farm Credit East).

Thank you, Senators Ritchie and Gallivan, and to your Senate colleagues for keeping these proposed labor mandates at bay. Please continue to oppose such efforts on behalf of your constituents like me and farm families across the State.

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Ron Robbins

Owner/Operator of North Harbor Dairy Farm and Old McDonald's Farm

Ron Robbins
North Harbor Dairy Farm
Old McDonald's Farm

HERE ARE MY COMMENTS:

Intro of farm business:

Comments regarding opportunities in production agriculture:

Comments regarding regulatory oversight and compliance:
what we have to deal with as a business!!
STATE LEVEL:
NYS dept. of Ag and Markets
NYS DEC
NYS DOT
NYS DOL
NYS DOH

FEDERAL LEVEL
Motor carrier compliance-DOT
USDA
EPA
Federal DOL
IRS
OSHA
Federal Health Insp.
Immigration(ICE)

Many NY regulations are not compatable with federal regulations: DOT example!!
Rules change in the middle of the game!!! -EPA and DEC
Staying on top of rule changes becomes more than a full time job!!-Environmental, Safety, DOT, Labor!!!

Farm Viability Institute_ Funding is held up by DOB to the point whole growing seasons are missed in each funding cycle!

Even program implementation such as NYSERDA costsharing programs, are so complex, and burdened with regulations to allow for participation, many producers give up and do not take advantage of the services and programs!!

My question is simple- Are NY citizens better off with all of these regulations, My thought is NO!!

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Kathryn Canzonier

Vice President of Farm Credit East

Farm Credit East
New York State: Agricultural Regulatory Reforms

Farm Credit East is the largest lender to New York agriculture with $2.7 billion in loans to over 8,500 farms, forest products businesses and agricultural processing and marketing businesses. We also provide extensive financial services focused on supporting and growing agriculture.

As a finance cooperative, owned and operated by the very same farmers that we serve, we are well positioned to meet the future credit needs of agriculture.

Farm Credit East has made a commitment to serving all types of agriculture – traditional and non-traditional operations and farms of all sizes.

Farm Credit East is optimistic about New York agriculture – the increased interest in local foods and "know-your-farmer" and the yogurt-dairy expansion provides new market opportunities. An economic analysis prepared by Farm Credit East indicates that New York agriculture generates $38.4 billion in economic activity in the state and is responsible for 196,000 jobs.

Farm Credit East actively works with farms to utilize the Empire State Linked Deposit Program for farm expansions and administers the Farm Worker Housing Loan Program for the state. These programs have been very successful in supporting New York agriculture and should be continued.

As we look at New York State Agriculture the factors that are of utmost concern include:

- Significantly increasing costs of production coupled with national and global market pressures are squeezing margins for many farm businesses. Public sector driven costs contribute to the increased cost of production.

- Farm labor – uncertainty related to farm labor and to some degree farm labor costs are limiting agricultural expansion in New York. This labor uncertainty is even greater when New York farmers consider the on-going debate in the New York State Legislature regarding overtime pay and collective bargaining for farm workers.

- Uncertainty in the regulatory climate – changes relating to labor, health care, environmental and food safety regulations create constant challenges for farm businesses. From a state standpoint, the DEC action on increasing the CAFO threshold from 200 cows to 300 cows was a very positive sign, not just for dairy but to all of NYS agriculture as a positive can-do gesture. The outcome of the current lawsuit against that change is of concern to many farmers.

In a recent "Pulse of Agriculture" survey conducted by Farm Credit East, the results for New York indicated that the following are considered to be the top eight major business challenges:

1. Volatility of prices, costs and my operating margin
2. Changing / shrinking margins for my product(s)
3. Availability of production labor
4. Federal government regulation
5. Environmental compliance

6. State/local government regulations
7. Availability of other labor
8. Changing consumer patterns / not enough consumers for my product

Farm Credit East Position on State Issues

We support the Senate's efforts to look at regulatory relief for New York farmers. Farm Credit East is an Alliance member of New York Farm Bureau and we support their efforts for regulatory and tax relief.

For New York farms to be successful and grow, we need to ensure that New York's regulatory and tax burdens on farm businesses are not greater than those that farmers have in competing states. Furthermore we urge:

- Support for New York State economic development programs that encourage agricultural and dairy processing firms to locate in New York. This creates jobs, allows expanded markets for New York farmers and ensures consumers with products produced locally.

- Avoid passage of any legislative proposals that put New York farmers at a competitive disadvantage with farmers in other states and work to ensure that public sector related costs for New York farmers are not higher than other states. Changes relating to farm labor including the proposed requirement for overtime pay will have a major negative impact on net farm income, reinvestment and competitiveness.

- Support and enhance applied research efforts including those of the New York Farm Viability Institute to ensure future industry competitiveness.

We appreciate the Senate's passage of legislation to cap increases in agricultural value assessment to 2% (pending Governor approval). On average, New York farmers pay significantly higher property taxes than farmers in most other states. Our analysis indicates that average property taxes per acre paid by New York farmers is $26.21 per acre compared to $6.75 per acre as a US average. When viewed as a percentage of net farm income, we find that New York farmers pay 15% of their net income for property taxes compared to 10% for the U.S. average, 8% for Michigan and 7% for Ohio.

Thank you for the opportunity to comment.

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Faye Beckwith

Co-owner/Operator of a Christmas Tree Farm in Oswego County, New York

GROUP 14 HERBICIDE

VALENT PROFESSIONAL PRODUCTS

SureGuard®
HERBICIDE

FOR USE IN CONTAINER AND FIELD GROWN CONIFERS AND DECIDUOUS TREES, AROUND ESTABLISHED WOODY ORNAMENTALS IN LANDSCAPES AND TO MAINTAIN BARE GROUND NON-CROP AREAS

Active Ingredient	By Wt.
*Flumioxazin	51%
Other Ingredients	49%
Total	100%

*(2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2*H*-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1*H*-isoindole-1, 3(2*H*)-dione)

SureGuard® Herbicide is a water dispersible granule containing 51% active ingredient.

EPA Reg. No. 59639-120 EPA Est. 11773-IA-01

KEEP OUT OF REACH OF CHILDREN
CAUTION

SEE BELOW FOR ADDITIONAL PRECAUTIONARY STATEMENTS.

PRECAUTIONARY STATEMENTS

HAZARDS TO HUMANS & DOMESTIC ANIMALS CAUTION

Harmful if inhaled or absorbed through the skin. Causes moderate eye irritation. Avoid breathing dust and spray mist. Avoid contact with skin, eyes or clothing.

FIRST AID

If inhaled: Move person to fresh air.
If person is not breathing, call 911 or an ambulance, then give artificial respiration, preferably by mouth-to-mouth, if possible.
Call a poison control center or doctor for further treatment advice.

If on skin or clothing: Take off contaminated clothing.
Rinse skin immediately with plenty of water for 15-20 minutes.
Call a poison control center or doctor for treatment advice.

(continued)

FIRST AID (continued)

If in eyes: Hold eye open and rinse slowly and gently with water for 15-20 minutes.
Remove contact lenses, if present, after the first 5 minutes, then continue rinsing eye.
Call a poison control center or doctor for treatment advice.

If swallowed: Call a poison control center or doctor immediately for treatment advice.
Have person sip a glass of water if able to swallow.
Do not induce vomiting unless told to do so by the poison control center or doctor.
Do not give anything by mouth to an unconscious person.

HOT LINE NUMBER

Have the product container or label with you when calling a poison control center or doctor or going for treatment. You may also contact **800-892-0099** for emergency medical treatment information.

PERSONAL PROTECTIVE EQUIPMENT (PPE):

Some of the materials that are chemical-resistant to this product are listed below. If you want more options, follow the instructions for category A on an EPA chemical-resistance category selection chart.

Applicators and other handlers must wear: long-sleeved shirt and long pants, chemical-resistant gloves made of any waterproof material such as polyethylene or polyvinyl chloride, shoes and socks. Follow manufacturer's instructions for cleaning/maintaining PPE. If there are no such instructions for washables, use detergent and hot water. Keep and wash PPE separately from other laundry.

USER SAFETY RECOMMENDATIONS

Users should:

- Wash hands before eating, drinking, chewing gum, using tobacco or using the toilet.
- Remove clothing immediately if pesticide gets inside. Then wash thoroughly and put on clean clothing.

ENVIRONMENTAL HAZARDS:

This product is toxic to non-target plants and aquatic invertebrates. Do not apply directly to water, to areas where surface water is present or to intertidal areas below the mean high water mark. Drift and runoff may be hazardous to non-target plants and aquatic organisms in neighboring areas. Do not apply where runoff is likely to occur. Do not apply when weather conditions favor drift from treated areas. Do not contaminate water when disposing of equipment washwaters.

This pesticide is toxic to plants and should be used strictly in accordance with the drift and runoff precautions on this label in order to minimize off-site exposures.

GROUP 14 HERBICIDE

VALENT®

VALOR® SX HERBICIDE

FOR CONTROL AND/OR SUPPRESSION OF CERTAIN WEEDS IN COTTON, DRY BEANS, FIELD CORN, PEANUT, SOYBEAN, SUGARCANE, SWEET POTATO, FALLOW LAND AND TO MAINTAIN BARE GROUND ON NON-CROP AREAS OF FARMS.

Active Ingredient	By Wt.
Flumioxazin*	51%
Other Ingredients	49%
Total	100%

*2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2*H*-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1*H*-isoindole-1,3(2*H*)-dione

Valor® SX Herbicide is a water dispersible granule containing 51% active ingredient.

EPA Reg. No. 59639-99 EPA Est. 11773-IA-01

KEEP OUT OF REACH OF CHILDREN

CAUTION

SEE BELOW FOR ADDITIONAL PRECAUTIONARY STATEMENTS.

PRECAUTIONARY STATEMENTS

HAZARDS TO HUMANS & DOMESTIC ANIMALS CAUTION

Harmful if inhaled or absorbed through the skin. Causes moderate eye irritation. Avoid breathing dust and spray mist. Avoid contact with skin, eyes or clothing.

FIRST AID	
If inhaled:	Move person to fresh air. If person is not breathing, call 911 or an ambulance, then give artificial respiration, preferably by mouth-to-mouth if possible. Call a poison control center or doctor for further treatment advice.
If on skin or clothing:	Take off contaminated clothing. Rinse skin immediately with plenty of water for 15-20 minutes. Call a poison control center or doctor for treatment advice.
If in eyes:	Hold eye open and rinse slowly and gently with water for 15-20 minutes. Remove contact lenses, if present, after the first 5 minutes, then continue rinsing eye. Call a poison control center or doctor for treatment advice.
If swallowed:	Call a poison control center or doctor immediately for treatment advice. Have person sip a glass of water if able to swallow. Do not induce vomiting unless told to do so by the poison control center or doctor. Do not give anything by mouth to an unconscious person.

HOT LINE NUMBER

Have the product container or label with you when calling a poison control center or doctor or going for treatment. You may also contact **800-892-0099** for emergency medical treatment information.

PERSONAL PROTECTIVE EQUIPMENT (PPE):

Some of the materials that are chemical-resistant to this product are listed below. If you want more options, follow the instructions for category A on an EPA chemical-resistance category selection chart.

Applicators and other handlers must wear: long-sleeved shirt and long pants, chemical-resistant gloves made of any waterproof material such as polyethylene or polyvinyl chloride, shoes and socks. **For aerial application to sugarcane, mixer/loaders must also wear:** coveralls, chemical resistant apron and chemical resistant boots.

Follow manufacturer's instructions for cleaning/maintaining PPE. If there are no such instructions for washables, use detergent and hot water. Keep and wash PPE separately from other laundry.

USER SAFETY RECOMMENDATIONS

Users should:

- Wash hands before eating, drinking, chewing gum, using tobacco or using the toilet.
- Remove clothing immediately if pesticide gets inside. Then wash thoroughly and put on clean clothing.

ENVIRONMENTAL HAZARDS

This product is toxic to non-target plants and aquatic invertebrates. Do not apply directly to water, to areas where surface water is present or to intertidal areas below the mean high water mark. Drift or runoff may be hazardous to non-target plants and aquatic organisms in neighboring areas. Do not apply where runoff is likely to occur. Do not apply when weather conditions favor drift from treated areas. Do not contaminate water when disposing [illegible]

Appendix C

Manufacturing

Syracuse, NY **September 20, 2013**

Pages

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103 - 110	Karyn Burns *Vice President of Communications and Government Relations for the Manufacturers Association of Central New York*
111 - 115	Deb Warner *Vice President of Public Policy and Government Relations for Center State CEO*
116 - 117	Laura Miller *General Manager of Darco Manufacturing*
118 - 132	Kipp Hicks *Executive Director of the Madison County Industrial Development Agency*

Regulatory Reform Hearing: Manufacturing
September 20, 2013
Syracuse, NY

Testimony Submitted by:

Brian Sampson

Executive Director of Unshackle Upstate

UNSHACKLE UPSTATE

Testimony to the NYS Standing Committee on Commerce, Economic Development and Small Business and the Administrative Regulations Review Commission (ARRC)

Friday, September 18, 2013
Syracuse, NY

Senator Valesky, Senator Gallivan and respective members of both the Senate Standing Committee on Commerce, Economic Development and Small Business as well as the Administrative Regulations Review Committee, I thank you for the opportunity to testify briefly today.

My name is Brian Sampson. I am the Executive Director of Unshackle Upstate, *a* non-partisan, pro-taxpayer, pro-economic growth, education and advocacy organization dedicated to the revitalization of Upstate New York.

As an organization, our purpose is to achieve reforms in Albany that make Upstate New York a better place to do business and raise a family. To this end, our priorities remain the same as they have since we were founded in 2006:

1. **Reducing State and Local Government Spending**
2. **Reducing Taxes, Fees and Assessments**
3. **Reducing Mandates on Businesses and Unfunded Mandates on Local Governments and School Districts**
4. **Reducing the State's Reliance on Borrowing**

Clearly, we know that the state continues to face many fiscal challenges.

Throughout the last several years, our organization has been largely supportive of the efforts from Gov. Cuomo and the Legislature to improve New York State's economy – especially in many of the struggling communities in Upstate. Additionally, the enactment of consecutive fiscally responsible state budgets, the property tax cap and public employee pension reform have been met with universal praise by our membership.

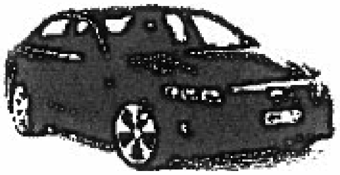
We thank you for your efforts in with respect to those accomplishments.

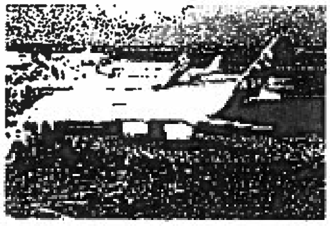
What are the Facts about Safe Patient Handling and Movement?

FACT
9

FACT: THE EXTREME DEMANDS OF MANUAL LIFTING ARE NEEDLESSLY INJURING OUR HEALTHCARE WORKERS!

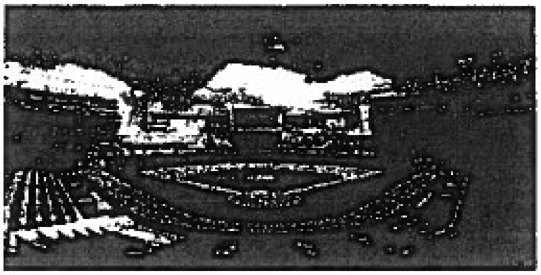
The average healthcare worker manually lifts 1.8 tons per 8-hour shift. That is equal to lifting one sedan per shift.





In one year, healthcare workers lift the equivalent of an airplane that is 50 % loaded.

The number of manual lifting injuries to healthcare workers in one year equals the full capacity of the new Yankee Stadium.



A Safe Patient Handling and Movement Program *eliminates* injuries associated with manual lifting and reduces the risk and strain on those that care for us!

PEF*SEIU*WNYCOSH*NYSAFL-CIO*CSEA*CWA*DC37*NYSUT*NYSNA*NYSDOL*NYCOSH*CNFNY*KALEIDA*

NEW YORK STATE
ZERO LIFT
TASK FORCE

PUSH for...
Protection Using Safe Handling

Safer Working Standards!

For more information, please visit:
www.zeroliftforny.org

FACT
10

FACT: DANGEROUS MANUAL PATIENT TRANSFERS INJURE PATIENTS

The **"Hook and Toss Method"** of transferring a patient involves hooking the caregiver's arm under the armpits of a patient and lifting, using the shoulder joint and momentum to toss the patient to the desired transfer surface.

- ✓ This method is not evidence based and has been found to be unsafe for the patient and the caregiver.
- ✓ It is still widely practiced in the United States; however, it has been ***banned*** in 20 countries.
- ✓ This method can cause nerve damage, skin tearing and bruising to the patient.

Healthcare workers routinely use the **Pivot Transfer** to move patients. This transfer is loaded with risk due to the high level of patient function required to execute it well. Patients and healthcare workers are injured during pivot transfers when patients are unable to stand and take steps, leaving the healthcare worker to bear the patient's full weight.

According to a study done in western New York at a
120-bed long-term care facility:

100% of patient cases where pivot transfers were used for over 90 days showed:

- ✓ Exacerbation of joint disease in shoulders, hips or knees
- ✓ Deterioration or loss of weight bearing skills
- ✓ Below the knee spiral fractures sustained by two patients

90% of patients showed adverse effects **within 30 days!**

Implementing Safe Patient Handling and Movement eliminates consequences of dangerous lifting and repositioning techniques to patients and paves the way to recovery!

PEF*SEIU*WNYCOSH*NYSAFL-CIO*CSEA*CWA*DC37*LIUNA*NYSUT*NYSNA*NYSDOL*NYCOSH*CNFNY*KALEIDA*

NEW YORK STATE
ZERO LIFT
TASK FORCE

PUSH *for...*
Protection Using Safe Handling

Patient Health!

For more information, please visit:
www.zeroliftforny.org

What are the Facts about Safe Patient Handling and Movement?

FACT
11

FACT: NURSING IS COMPARABLE TO THE MOST PHYSICALLY DEMANDING JOBS

Nurses spend 20-30% of their time bent forward or with the trunk twisted during patient care activities.

Even with " good techniques", it is not possible to lift patients manually without exceeding the NIOSH Action Limit (35 lbs.).

Cumulative trauma from manual lifting, transferring & repositioning patients can lead to career ending musculoskeletal injuries.

According to the National Institute of Health, nearly 40 million American adults can be classified as obese.

As the size of our patients increase so does the average age of our nurses (50+ years).

Healthcare: the only profession that considers 100 lbs. to be "lightweight". Healthcare workers lift an average of 1.8 tons per 8-hour shift.

NEW YORK STATE
ZERO LIFT
TASK FORCE

KALEIDA*PEF*SEIU*WNYCOSH*NYSAFL-CIO*CSEA*CWA*DC37*NYSUT*NYSNA*NYSDOL*NYCOSH*CNFNY*

PUSH *for...*
Protection Using Safe Handling

Worker Safety!

For more information, please visit:
www.zeroliftforny.org

FACT
12

FACT: DANGEROUS MANUAL LIFTING TECHNIQUES ARE STILL A PART OF MANY HEALTHCARE CURRICULA

OLD PRACTICES...

- EXPECT WORKERS TO ADAPT TO POOR WORK DESIGNS.
- CAN INJURE THE PATIENT.
- DEMAND THAT WORKERS EXCEED THE NATURAL LIFTING LIMITS OF THEIR BODIES.
- ARE TECHNIQUES THAT ARE BASED ON LOADS THAT WEIGH FAR LESS THAN TYPICAL PATIENTS.

EVIDENCE BASED PRACTICES...

- ARE DESIGNED TO FIT WORKERS AND MAINTAIN SAFETY.
- APPLY POSTIONING AND MOBILITY TECHNIQUES THAT ARE SAFE FOR PATIENTS AND CAREGIVERS.
- SHOULD BE INCLUDED IN ALL HEALTHCARE CURRICULA TO ENSURE THAT HEALTHCARE WORKERS ARE TAUGHT PROPER TECHNIQUES TO SELECT AND UTILIZE SAFE PATIENT HANDLING EQUIPMENT.

*1199*SEIU*WNYCOSH*NYSAFL-CIO*CSEA*CWA*DC37*NYSUT*NYSNA*NYSDOL*NYCOSH*CNFNY*KALEIDA

NEW YORK STATE
ZERO LIFT
TASK FORCE

PUSH *for...*

Protection Using Safe Handling

Educating Healthcare Workers for the Future!

For more information, please visit:

www.zeroliftforny.org

Consumer Groups Support Safe Patient Handling Legislation

To: Hon. Andrew M. Cuomo
Hon. Sheldon Silver
Hon. Brian Kolb
Hon. Dean Skelos
Hon. Jeffrey Klein
Hon. Andrea Stewart-Cousins

Re: Safe Patient Handling A2180-B (Cal# 457)/S1123-B

Date: June 17, 2013

As organizations concerned about preventing injury to health care consumers, we urge you to work together to ***enact A2180-B/S1123-B prior to the conclusion of this Legislative Session***. This legislation will promote harm-free transfers and repositioning while preventing injuries to both health care consumers and workers.

The legislation is already the result of extensive discussion and compromise and provides for a significant amount of flexibility while still establishing accountability. The bill creates a work group within the Department of Health to prepare a policy statement and a report to the Commissioner. The Commissioner would then promulgate regulations to institute a statewide policy that would promote harm-free transfers and repositioning. Health care facilities would need to file their plan with the Department, including the development of an internal committee to assist with compliance and training issues. There would be a gradual implementation process, with the Department accepting plans from facilities by July 2018.

This bill is designed to protect health care consumers – especially important to those with limited mobility who are at greatest risk for injury. All too often, hospital patients or nursing home residents are injured when being transferred or repositioned. Lifting patients through the old "hook and toss" method of grasping under the arms and pulling can cause injury and also can result in a debilitation or deadly fall. Using modern equipment that is designed to move health care consumers gradually and gently is proven to prevent injury and provides for enhanced dignity for the person needing assistance. Importantly, the bill also requires training of "front line" health care staff and includes staff representation on internal committees to promote compliance.

Implementing a statewide policy in hospitals and nursing homes would benefit health care consumers, workers and employers. Consumers would realize improved quality of care and satisfaction, through reduced risk of falls, friction burns, dislocated shoulders, skin tears and bruises. Health care workers would also realize reduced risk from musculoskeletal injuries and less pain and fatigue on a daily basis. As a result, staff would be able to work to an older age and have increased job satisfaction. Employers will see reduced worker and consumer injuries, increased worker recruitment and retention and reduced workers compensation medical and indemnity costs. It is important to note that the U.S. Department of Health and Human Services' Center for Disease Control and Prevention/ National Institute for Occupational Safety and Health report on safe lifting and moving of nursing home residents concluded that "the initial investment in the equipment and training is quickly recovered because of the reduced injury costs to caregivers."

The goals of this legislation have been successfully implemented in New York. Niagara County's Long Term Care Facility experienced a 64% reduction in bone fractures and a 37% reduction in skin tears and bruising just one year after implementing its own internal policy to promote harm-free resident transfers and positioning. Kaleida Health experienced a 77% reduction in lost work days. Eight states – California, Illinois, Maryland, Minnesota, New Jersey, Rhode Island, Texas and Washington all require hospitals to establish a system to prevent patient harm during transfers and repositioning. Six of those states also place the same requirement upon nursing homes.

The undersigned organizations representing health care consumers urge you to use your leadership to include this legislation among those you will be championing as this legislative session draws to a close.

1199SEIU Retiree Division, *Lourdes Rodriguez-Dox, Director*
Block Clubs and Neighborhood Associations-EC, *Rich Lee, Executive Director*
Board of Block Clubs of Buffalo and Erie County, *Linda Freidenberg, President*
Brooklyn Center for Independence of the Disabled (BCID), *Joan Peters, JD, MPH, Executive Director*
BWICA Educational Fund, Inc., *Maria Alvarez, Executive Director*
Capital District Chapter of the New York State Alliance for Retired Americans
Cayuga County/Finger Lakes Chapter StateWide Senior Action Council
Central New York Chapter of the New York State Alliance for Retired Americans
Central New York Citizens in Action, Inc., *John Furman, President*
Citizen Action of New York
Commission on the Public's Health System, *Anthony Feliciano, Director*
Communications Workers of America Retired Members' Chapter 1180, *Adelle Rogers, President*
Community Service Center of Greater Williamsburg, *Hindy Kohn, Executive Director*
Consumers Union, *Chuck Bell, Programs Director*
Council of Senior Centers and Services of New York City, Inc. (CSCS), *Igal Jellinek, Executive Director*
Erie-Niagara Chapter of the New York State Alliance for Retired Americans
Gray Panthers, NYC Network
Hispanic Senior Action Council, *Mary Perez, President*
Hunger Action Network of NYS
Institute for the PR/ Hispanic Elderly, *Suleika Cabrera Drinane, President and CEO*
Institute Home Care Services , *Joan Shockness, RN, Director*
Jewish Family Services of Ulster County, Inc., *Sharon Murray-Cohen, LMSW, Executive Director*
Long Island Chapter of the New York State Alliance for Retired Americans
Long Term Care Community Coalition, *Richard Mollot, Executive Director*

Masten Block Club Coalition, *Ada Hopson Clemons, President*
Metro New York Health Care for All Campaign
Morningside Retirement and Health Services, *Ron Bruno, Executive Director*
New York City Chapter of the New York State Alliance for Retired Americans
NYC Chapter - StateWide Senior Action Council, *Lani Sanjek, President*
New York Memory Center, *Christopher Nadeau, Executive Director*
New York Public Interest Research Group, Inc. (NYPIRG) *Russ Haven, Esq., Legislative Counsel*
New York State Alliance for Retired Americans, *Dennis Tracey, President*
New York StateWide Senior Action Council, *Maria Alvarez, Executive Director*
New Yorkers for Patient & Family Empowerment, *Suzanne Mattei, Esq., Executive Director*
North Country Chapter StateWide Senior Action Council, *Linda Wilkinson, President*
NYSUT
Physicians for a National Health Program-NY Metro
PULSE of NY, Inc., *Ilene Corina, President*
Resource Center for Accessible Living, Inc., *Susan Hoger, Chief Executive Officer*
Retirees Association of DC37, *Rochelle Mangual, President*
SEBCO Development Inc.
Seneca-Babcock Community Association, *Art Robinson, President*
Senior Legislative Action Committee of Sullivan County
Senior Umbrella Network of Brooklyn (SUN-B), *Vicki Ellner Chair/President*
Wayne County Senior Citizens Action Council (SCAC), *Franklin E. Clark, President*
Western NY Region Erie County Chapter StateWide Senior Action Council, *Helen L. Sanders, President*

cc: Assemblymember Gunther
Senator Maziarz
Senator DeFrancisco
Senator Krueger

Appendix B

Agriculture

Watertown, NY **September 19, 2013**

Pages

81 - 83	Eric Behling *Executive Director Behling Orchards*
84 – 85	Ron Robbins *Owner/Operator North Harbor Dairy Farm, Old McDonald's Farm*
86 - 88	Katheryn Canzonier *Vice President of Farm Credit*
89 - 92	Faye Beckwith *Co-Owner/Operator of A Christmas Tree Farm – Oswego County*

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Eric Behling

Co-owner of Behling Farms and Board Member of The Oswego County Farm Bureau

Another example of superfluous and redundant regulation is the NYS Department of Motor Vehicles (DMV) requirement to include the blue "Certified Farm Vehicle Use" form with a farm vehicle's registration. State law limits farm plated vehicles to travel within a 25 mile radius of the farm address that the vehicle is registered to. Currently, the farmer must also designate any travel routes within that 25 mile radius on a blue card that is kept both in the farm vehicle and filed with the NYS Department of Motor Vehicles (DMV). Each time a farmer finds it necessary to travel to a different destination or uses a different route within that 25 mile radius, the "blue card" certification must be amended to reflect that change and be resubmitted to the NYS DMV. The constant revision and maintenance of a farm vehicle's possible itinerary within the allowable 25 mile radius by the farmer and DMV is both unnecessary and a waste of DMV resources which would be better spent on other priorities. NYFB applauds Senate Ag Chair Patty Ritchie and Assembly Ag Chair Bill Magee for sponsoring common sense legislation, S.1951/A.8351 that would eliminate this senseless requirement.

The high cost associated with state regulations and the associated fees and tax compliance makes it extremely difficult to maximize our competitive advantage of being close to New York City and its large nexus of consumers. For example, the majority of New York's farms utilize a LLC, C Corp or S Corp business structure as part of their transition plan to the next generation of family operators. In the eyes of the farm community, the LLC fee is a necessary business tax required for incorporation which feeds into the state's general fund.

If we are to continue to have farms in New York, we have to make it easier for our farmers to form LLC's and, in particular, statutorily restructure existing public policy to assess the LLC fee based on net farm income, as opposed to the current protocol of using gross farm income. LLC's are now assessed a fee based on gross income, not net, and in farming that difference is vast. A farm can easily gross over a million dollars, but earn less than several thousands in profits depending upon how expensive input costs were that particular year or how badly yields were impacted due to weather conditions. Either a flat fee for farm corporations for LLC's, C Corps and S Corps needs to be established or a mechanism put in place that allows farms to provide a Schedule F – a federal tax income form for farmers - to establish net income and pay the fee on this verified net income amount.

Additionally, submission of the LLC application with the associated fee is due by January 31. It would be easier for farmers to file this form and associated fee on March 1 with the farmer's tax return as opposed to submitting them on a separate deadline. Similarly, the publishing requirements for the public notice of the formation of an LLC seem in this day and age to be antiquated. These may seem to be trivial changes, but it is important to recognize that pragmatic minor public policy changes such as these are very meaningful given the wide range of regulatory compliance a family farm must contend with.

These and other practical changes included in the Farmers Regulatory Relief Act, sponsored by Senator Ritchie and Assemblyman Magee, would bring meaningful change to daily operations and business costs for family farms. There are some regulations that can bolster the farm community such as the pending DEC regulations for maple tapping on state land, similar to the State of Vermont. This type of proactive, common sense regulation that brings parity to the marketplace is what family farms like mine need to see more of.

Without question, regulatory requirements raise my cost of production that other competitors do not have to deal with. For example, fresh apple cider is a very popular product with the visitors who come to my farm. I make fresh apple cider from the apples on my farm and, in compliance with New York's mandatory cider pasteurization law, I use an ultraviolet light processing machine to purify our cider before bottling and selling it. State law requires that the ultraviolet light processor be inspected every three years. The cost for my re-inspection this year has tripled from my last inspection three years ago because cider producers like me are forced to use the very few service providers available to meet this regulatory requirement. My only other alternative is to close down my cider business. I am sure other commodity farms have similar examples which I hope they will present at this forum.

As an apple grower, one of the game changing issues for me and my family are farm labor mandates. There has been a strong push in the Assembly for factory style labor mandates to be imposed on family farms. Proponents of legislation that would force these mandates on family farms are based out of New York City and do not understand the realities of providing nutritious food on people's tables.

Attempting to apply overtime and collective bargaining rules that exist for factories are not appropriate or suitable for our state's farms. Simply put, harvesting crops doesn't fit into a typical work week schedule. Rainy weather may keep farm employees out of the fields for a couple of days, and when the sun is out, ripe fruit can't always wait for the next day's 8-hour shift to begin. Farms need flexibility that suits their individual needs in order to get local foods to local tables.

New York's farmers are dependent on quality, skilled agricultural labor, and go through great lengths to ensure safe working, living, and wage conditions for employees. Farm work agreements, required by state law above and beyond the Wage Theft Prevention Act, lay out the work to be performed, wages, work days, and a host of other important arrangements. If farm labor advocates were serious about helping farm employees, they would spend their efforts in Washington, DC advocating for immigration reform to bring migrant workers who are here in this country with questionable documentation out of the shadows where they can lead more open and productive lives.

Family farms like mine are extremely vulnerable to any increase in farm labor expenses relative to other states. New York farmers already spend substantially more on labor than the national average, and especially compared to most of the major farm states which are some of New York's fiercest competitors for our East Coast markets. Per U.S. Census data, for every $100 of production sold, New York farmers paid $13.82 to farm workers compared to the U.S. average of $8.88 (per Farm Credit East).

Thank you, Senators Ritchie and Gallivan, and to your Senate colleagues for keeping these proposed labor mandates at bay. Please continue to oppose such efforts on behalf of your constituents like me and farm families across the State.

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Ron Robbins

Owner/Operator of North Harbor Dairy Farm and Old McDonald's Farm

Ron Robbins
North Harbor Dairy Farm
Old McDonald's Farm

HERE ARE MY COMMENTS:

Intro of farm business:

Comments regarding opportunities in production agriculture:

Comments regarding regulatory oversight and compliance:
what we have to deal with as a business!!
STATE LEVEL:
NYS dept. of Ag and Markets
NYS DEC
NYS DOT
NYS DOL
NYS DOH

FEDERAL LEVEL
Motor carrier compliance-DOT
USDA
EPA
Federal DOL
IRS
OSHA
Federal Health Insp.
Immigration(ICE)

Many NY regulations are not compatable with federal regulations: DOT example!!
Rules change in the middle of the game!!! -EPA and DEC
Staying on top of rule changes becomes more than a full time job!!-Environmental, Safety, DOT, Labor!!!

Farm Viability Institute_ Funding is held up by DOB to the point whole growing seasons are missed in each funding cycle!

Even program implementation such as NYSERDA costsharing programs, are so complex, and burdened with regulations to allow for participation, many producers give up and do not take advantage of the services and programs!!

My question is simple- Are NY citizens better off with all of these regulations, My thought is NO!!

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Kathryn Canzonier

Vice President of Farm Credit East

Farm Credit East
New York State: Agricultural Regulatory Reforms

Farm Credit East is the largest lender to New York agriculture with $2.7 billion in loans to over 8,500 farms, forest products businesses and agricultural processing and marketing businesses. We also provide extensive financial services focused on supporting and growing agriculture.

As a finance cooperative, owned and operated by the very same farmers that we serve, we are well positioned to meet the future credit needs of agriculture.

Farm Credit East has made a commitment to serving all types of agriculture – traditional and non-traditional operations and farms of all sizes.

Farm Credit East is optimistic about New York agriculture – the increased interest in local foods and "know-your-farmer" and the yogurt-dairy expansion provides new market opportunities. An economic analysis prepared by Farm Credit East indicates that New York agriculture generates $38.4 billion in economic activity in the state and is responsible for 196,000 jobs.

Farm Credit East actively works with farms to utilize the Empire State Linked Deposit Program for farm expansions and administers the Farm Worker Housing Loan Program for the state. These programs have been very successful in supporting New York agriculture and should be continued.

As we look at New York State Agriculture the factors that are of utmost concern include:

- Significantly increasing costs of production coupled with national and global market pressures are squeezing margins for many farm businesses. Public sector driven costs contribute to the increased cost of production.

- Farm labor – uncertainty related to farm labor and to some degree farm labor costs are limiting agricultural expansion in New York. This labor uncertainty is even greater when New York farmers consider the on-going debate in the New York State Legislature regarding overtime pay and collective bargaining for farm workers.

- Uncertainty in the regulatory climate – changes relating to labor, health care, environmental and food safety regulations create constant challenges for farm businesses. From a state standpoint, the DEC action on increasing the CAFO threshold from 200 cows to 300 cows was a very positive sign, not just for dairy but to all of NYS agriculture as a positive can-do gesture. The outcome of the current lawsuit against that change is of concern to many farmers.

In a recent "Pulse of Agriculture" survey conducted by Farm Credit East, the results for New York indicated that the following are considered to be the top eight major business challenges:

1. Volatility of prices, costs and my operating margin
2. Changing / shrinking margins for my product(s)
3. Availability of production labor
4. Federal government regulation
5. Environmental compliance

6. State/local government regulations
7. Availability of other labor
8. Changing consumer patterns / not enough consumers for my product

Farm Credit East Position on State Issues

We support the Senate's efforts to look at regulatory relief for New York farmers. Farm Credit East is an Alliance member of New York Farm Bureau and we support their efforts for regulatory and tax relief.

For New York farms to be successful and grow, we need to ensure that New York's regulatory and tax burdens on farm businesses are not greater than those that farmers have in competing states. Furthermore we urge:

- Support for New York State economic development programs that encourage agricultural and dairy processing firms to locate in New York. This creates jobs, allows expanded markets for New York farmers and ensures consumers with products produced locally.

- Avoid passage of any legislative proposals that put New York farmers at a competitive disadvantage with farmers in other states and work to ensure that public sector related costs for New York farmers are not higher than other states. Changes relating to farm labor including the proposed requirement for overtime pay will have a major negative impact on net farm income, reinvestment and competitiveness.

- Support and enhance applied research efforts including those of the New York Farm Viability Institute to ensure future industry competitiveness.

We appreciate the Senate's passage of legislation to cap increases in agricultural value assessment to 2% (pending Governor approval). On average, New York farmers pay significantly higher property taxes than farmers in most other states. Our analysis indicates that average property taxes per acre paid by New York farmers is $26.21 per acre compared to $6.75 per acre as a US average. When viewed as a percentage of net farm income, we find that New York farmers pay 15% of their net income for property taxes compared to 10% for the U.S. average, 8% for Michigan and 7% for Ohio.

Thank you for the opportunity to comment.

Regulatory Reform Hearing: Agriculture
September 19, 2013
Watertown, NY

Testimony Submitted by:

Faye Beckwith

Co-owner/Operator of a Christmas Tree Farm in Oswego County, New York

GROUP 14 HERBICIDE

VALENT PROFESSIONAL PRODUCTS

SureGuard®

HERBICIDE

FOR USE IN CONTAINER AND FIELD GROWN CONIFERS AND DECIDUOUS TREES, AROUND ESTABLISHED WOODY ORNAMENTALS IN LANDSCAPES AND TO MAINTAIN BARE GROUND NON-CROP AREAS

Active Ingredient	By Wt.
*Flumioxazin	51%
Other Ingredients	49%
Total	100%

*(2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2*H*-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1*H*-isoindole-1, 3(2*H*)-dione)

SureGuard® Herbicide is a water dispersible granule containing 51% active ingredient.

EPA Reg. No. 59639-120 EPA Est. 11773-IA-01

KEEP OUT OF REACH OF CHILDREN

CAUTION

SEE BELOW FOR ADDITIONAL PRECAUTIONARY STATEMENTS.

PRECAUTIONARY STATEMENTS

HAZARDS TO HUMANS & DOMESTIC ANIMALS CAUTION

Harmful if inhaled or absorbed through the skin. Causes moderate eye irritation. Avoid breathing dust and spray mist. Avoid contact with skin, eyes or clothing.

FIRST AID

If inhaled: Move person to fresh air. If person is not breathing, call 911 or an ambulance, then give artificial respiration, preferably by mouth-to-mouth, if possible. Call a poison control center or doctor for further treatment advice.

If on skin or clothing: Take off contaminated clothing. Rinse skin immediately with plenty of water for 15-20 minutes. Call a poison control center or doctor for treatment advice.

(continued)

FIRST AID (continued)

If in eyes: Hold eye open and rinse slowly and gently with water for 15-20 minutes. Remove contact lenses, if present, after the first 5 minutes, then continue rinsing eye. Call a poison control center or doctor for treatment advice.

If swallowed: Call a poison control center or doctor immediately for treatment advice. Have person sip a glass of water if able to swallow. Do not induce vomiting unless told to do so by the poison control center or doctor. Do not give anything by mouth to an unconscious person.

HOT LINE NUMBER

Have the product container or label with you when calling a poison control center or doctor or going for treatment. You may also contact **800-892-0099** for emergency medical treatment information.

PERSONAL PROTECTIVE EQUIPMENT (PPE):

Some of the materials that are chemical-resistant to this product are listed below. If you want more options, follow the instructions for category A on an EPA chemical-resistance category selection chart.

Applicators and other handlers must wear: long-sleeved shirt and long pants, chemical-resistant gloves made of any waterproof material such as polyethylene or polyvinyl chloride, shoes and socks. Follow manufacturer's instructions for cleaning/maintaining PPE. If there are no such instructions for washables, use detergent and hot water. Keep and wash PPE separately from other laundry.

USER SAFETY RECOMMENDATIONS

Users should:

- Wash hands before eating, drinking, chewing gum, using tobacco or using the toilet.
- Remove clothing immediately if pesticide gets inside. Then wash thoroughly and put on clean clothing.

ENVIRONMENTAL HAZARDS:

This product is toxic to non-target plants and aquatic invertebrates. Do not apply directly to water, to areas where surface water is present or to intertidal areas below the mean high water mark. Drift and runoff may be hazardous to non-target plants and aquatic organisms in neighboring areas. Do not apply where runoff is likely to occur. Do not apply when weather conditions favor drift from treated areas. Do not contaminate water when disposing of equipment washwaters.

This pesticide is toxic to plants and should be used strictly in accordance with the drift and runoff precautions on this label in order to minimize off-site exposures.

GROUP 14 HERBICIDE

VALENT®

VALOR® SX HERBICIDE

FOR CONTROL AND/OR SUPPRESSION OF CERTAIN WEEDS IN COTTON, DRY BEANS, FIELD CORN, PEANUT, SOYBEAN, SUGARCANE, SWEET POTATO, FALLOW LAND AND TO MAINTAIN BARE GROUND ON NON-CROP AREAS OF FARMS.

Active Ingredient	By Wt.
Flumioxazin*	51%
Other Ingredients	49%
Total	100%

*2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2*H*-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1*H*-isoindole-1,3(2*H*)-dione

Valor® SX Herbicide is a water dispersible granule containing 51% active ingredient.

EPA Reg. No. 59639-99 EPA Est. 11773-IA-01

KEEP OUT OF REACH OF CHILDREN

CAUTION

SEE BELOW FOR ADDITIONAL PRECAUTIONARY STATEMENTS.

PRECAUTIONARY STATEMENTS

HAZARDS TO HUMANS & DOMESTIC ANIMALS CAUTION

Harmful if inhaled or absorbed through the skin. Causes moderate eye irritation. Avoid breathing dust and spray mist. Avoid contact with skin, eyes or clothing.

FIRST AID

If inhaled: Move person to fresh air.
If person is not breathing, call 911 or an ambulance, then give artificial respiration, preferably by mouth-to-mouth if possible.
Call a poison control center or doctor for further treatment advice.

If on skin or clothing: Take off contaminated clothing.
Rinse skin immediately with plenty of water for 15-20 minutes.
Call a poison control center or doctor for treatment advice.

(continued)

FIRST AID (continued)

If in eyes: Hold eye open and rinse slowly and gently with water for 15-20 minutes.
Remove contact lenses, if present, after the first 5 minutes, then continue rinsing eye.
Call a poison control center or doctor for treatment advice.

If swallowed: Call a poison control center or doctor immediately for treatment advice.
Have person sip a glass of water if able to swallow.
Do not induce vomiting unless told to do so by the poison control center or doctor.
Do not give anything by mouth to an unconscious person.

HOT LINE NUMBER

Have the product container or label with you when calling a poison control center or doctor or going for treatment. You may also contact **800-892-0099** for emergency medical treatment information.

PERSONAL PROTECTIVE EQUIPMENT (PPE):

Some of the materials that are chemical-resistant to this product are listed below. If you want more options, follow the instructions for category A on an EPA chemical-resistance category selection chart.

Applicators and other handlers must wear: long-sleeved shirt and long pants, chemical-resistant gloves made of any waterproof material such as polyethylene or polyvinyl chloride, shoes and socks. **For aerial application to sugarcane, mixer/loaders must also wear:** coveralls, chemical resistant apron and chemical resistant boots.

Follow manufacturer's instructions for cleaning/maintaining PPE. If there are no such instructions for washables, use detergent and hot water. Keep and wash PPE separately from other laundry.

USER SAFETY RECOMMENDATIONS

Users should:

- Wash hands before eating, drinking, chewing gum, using tobacco or using the toilet.
- Remove clothing immediately if pesticide gets inside. Then wash thoroughly and put on clean clothing.

ENVIRONMENTAL HAZARDS

This product is toxic to non-target plants and aquatic invertebrates. Do not apply directly to water, to areas where surface water is present or to intertidal areas below the mean high water mark. Drift or runoff may be hazardous to non-target plants and aquatic organisms in neighboring areas. Do not apply where runoff is likely to occur. Do not apply when weather conditions favor drift from treated areas. Do not contaminate water when disposing

Appendix C

Manufacturing

Syracuse, NY **September 20, 2013**

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Regulatory Reform Hearing: Manufacturing
September 20, 2013
Syracuse, NY

Testimony Submitted by:

Brian Sampson

Executive Director of Unshackle Upstate

UNSHACKLE
UPSTATE

Testimony to the NYS Standing Committee on Commerce, Economic Development and Small Business and the Administrative Regulations Review Commission (ARRC)

Friday, September 18, 2013
Syracuse, NY

Senator Valesky, Senator Gallivan and respective members of both the Senate Standing Committee on Commerce, Economic Development and Small Business as well as the Administrative Regulations Review Committee, I thank you for the opportunity to testify briefly today.

My name is Brian Sampson. I am the Executive Director of Unshackle Upstate, *a* non-partisan, pro-taxpayer, pro-economic growth, education and advocacy organization dedicated to the revitalization of Upstate New York.

As an organization, our purpose is to achieve reforms in Albany that make Upstate New York a better place to do business and raise a family. To this end, our priorities remain the same as they have since we were founded in 2006:

1. **Reducing State and Local Government Spending**
2. **Reducing Taxes, Fees and Assessments**
3. **Reducing Mandates on Businesses and Unfunded Mandates on Local Governments and School Districts**
4. **Reducing the State's Reliance on Borrowing**

Clearly, we know that the state continues to face many fiscal challenges.

Throughout the last several years, our organization has been largely supportive of the efforts from Gov. Cuomo and the Legislature to improve New York State's economy – especially in many of the struggling communities in Upstate. Additionally, the enactment of consecutive fiscally responsible state budgets, the property tax cap and public employee pension reform have been met with universal praise by our membership.

We thank you for your efforts in with respect to those accomplishments.

But even with accomplishments of last year and the progress we have made this year, New York's businesses are still facing an uphill challenge. Consider New York's standing when compared to the rest of country.

- 50th in Business Tax Climate (*2013 Tax Foundation*)
- 1st in combined State and Local Tax Burden (*2010 Tax Foundation*)
- 49th Worst State for Business (*2013 Chief Executive Magazine*)

I need to point out that these rankings have a similar source. It is New York's notorious tax and regulatory environment.

But let's move on to why we are here today. Unshackle Upstate is pleased that the state is beginning to recognize that the Upstate economy needs special attention. We support recent efforts to bolster the yogurt, beer and wine industries, as well as the promotion of Upstate tourism. Moreover, we also see the START-UP NY program as an economic development and job creation tool with promise – we hope that it will cultivate numerous public-private partnerships with our fantastic higher education institutions.

But Upstate New York requires much, much more. The Upstate economy needs fundamental change, which we believe is best accomplished with tax reform and relief from burdensome laws and regulations. It should start with the following:

- Energy
  - New York has commercial rates that are 60% higher than the national average
  - We need to remove the Systems Benefit Charge, the Regional Greenhouse Gas Initiative charge and the 18A surcharge. Doing so will help manufacturing firms
  - It is time for New York to move forward with developing the Marcellus Shale.
- Health Insurance
  - There are more than $4.2B in taxes on health insurance
  - New York imposes four forms of taxes on those who purchase health insurance. They are the Covered Lives Assessment, HCRA Surcharge, Section 332 Assessment and a Premium Tax. All of them need to be reduced to make health insurance more affordable.
  - New York needs to seat the Health Care Quality and Cost Containment Commission.
    - In 2007 the Legislature created the Health Care Quality and Cost Containment Commission (Chapter 57 of 2007, Part L). The Commission was put in law to conduct a comprehensive review of all currently mandated benefits and proposed mandates, and to provide an objective cost-benefit analysis of proposed health insurance benefit mandates prior to legislative action.
- Labor Laws
  - Wage Theft Prevention Act – pass legislation that will repeal the annual wage notification standard.
  - New York must continue to fight against bills that will mandate Paid Family Leave and Paid Sick Leave, both of which will add a financial burden to businesses.
  - Workplace Bullying bills should be avoided. Laws already exist to help workers who feel they are being threatened at work
  - New York should adopt AMA and ACOEM guidelines to further strengthen the Workers Compensation system and make it more affordable while still providing critical and consistent care to injured workers.

- Tort Reform
    - New York is well known as a "judicial hellhole" by the American Tort Reform Association
    - It is time to pass the Gallivan/Morelle bills establishing a recalcitrant worker standard under LL 240/241
    - People who trespass have the ability to sue the property owner. We must pass legislation that makes it clear that trespassers cannot sue when they are at fault

It is no secret that for decades, New York has relied on grants and tax credits to attract businesses and investment in order to offset the cost of regulations listed previously. The state's extraordinarily high tax burden has, in effect, forced us to pay for businesses to locate here and in many instances to remain here. Our view is that it doesn't have to be this way. Unshackle Upstate firmly believes that the best way to convince job creators that New York is truly 'open for business' is to reduce the state's high tax burden. This is what we are proposing with our New ERA for Upstate plan.

As I have said many times over the course of the last year, I love yogurt, wine, beer and many of the other wonderful products that Upstate New York produces. But our communities need a bold and dramatic policy shift to allow for an Upstate economic resurgence.

While the wealth-creating activities of New York City's financial, business-services, media and entertainment industries appear to be able to bear the burden of high taxes, the less profitable manufacturing and agricultural industries that have long been the economic life-blood of Upstate New York cannot. And that is very clear.

According to the Empire Center for New York State Policy, private employment in Upstate peaked in 2000 and hasn't fully recovered from the last two recessions. The Binghamton, Elmira, and Utica-Rome metropolitan areas have suffered the biggest job losses Upstate during that time.

The state Department of Labor (DOL) noted that the Upstate region's rate of private sector job growth -- which was less than 1% -- fell well behind the New York City region, which saw 2% growth. According to DOL, four of the five counties in New York State with the highest unemployment rates in May 2013 are located Upstate:

- Lewis County (9.3%)
- Oswego County (9.2%)
- St. Lawrence County (9.2%)
- Jefferson County (9.0%)

But we are not just losing jobs, we are losing people too. According to U.S. Census data, thirty-five counties in upstate New York lost population between 2010 and 2012. Broome County has the largest population loss of any county, down 1.3 percent, to a total of 198,060 people in 2012.

Limited private sector job growth, high unemployment and population loss: If these numbers don't indicate a crisis, I don't know what does. Upstate New York is a perfect storm of economic decline. And we need real solutions or we risk losing many Upstate communities for generations to come.

We believe that we have a plan that will help our communities today. We call it *A New Economic Revitalization Agenda (ERA) for Upstate New York*. In developing our New ERA plan, we thoroughly

examined and analyzed various aspects of New York State tax policy before proposing the following broad-based tax relief solutions for economically struggling areas in Upstate New York.
By providing broad-based tax relief, we will enable the growth of private sector jobs and strengthen communities in need.

New ERA Item 1: Income Tax Relief
While the Governor and Legislature recently provided some income tax reductions for middle class families, we think that more relief is needed. We have always stood for policies that will allow for working families to keep more of their hard-earned money. When families have more money in their pockets, they use those funds on goods and services in their communities, bolstering the economy. **New York State should reduce by 25% state income taxes for Upstate residents making less than $50,000 annually.**

New ERA Item 2: Business Tax Relief
There are countless New York-based businesses that continue to call Upstate New York home despite the challenges they face in being here. New York should not only have programs and policies in place to lure private business to Upstate, but also provide tax relief to those that are already here so they can expand their operations and create jobs.

New York State should reduce the Corporate Franchise Tax (9-A) for Upstate New York businesses.
We propose that this tax be phased out in the following manner:

- 25% reduction in 2014-15
- 50% reduction in 2015-16
- 75% reduction in 2016-17
- Full Repeal in 2017-18

New ERA Item 3: Sales Tax Relief
As previously mentioned, many Upstate counties have suffered from population loss or high unemployment, and in some cases, both.

We propose to spur economic activity in these financially troubled areas by a state sales tax reduction in targeted counties. This would encourage families to purchase their goods and services in the counties that need the revenue the most.

New York State should reduce the state share of the sales tax by 50% (from 4% to 2%) for the Upstate counties that are economically hurting.

This tax reduction would apply only to the Upstate counties with the highest population loss as well as the counties with the highest average unemployment rate. It will not affect any local sales tax collections. A list of these counties is attached.

The continued loss of people, especially young people, from our Upstate counties is staggering. Eighteen counties, all located in Upstate, lost population between 2010 and 2012. Delaware County at -1.5%, Madison County at -1.4% and Broome County at -1.3% were the hardest hit.

To accompany the horrific outward migration statistics, there are numerous Upstate counties that continue to have unemployment rates far higher than both the state and national rates. Lewis, Oswego and St. Lawrence counties have continually had unemployment rates at 9% or higher. While places like

Franklin, Fulton and Steuben counties have unemployment rates between 8% and 9% - again, significantly higher than the state and national rates.

We need to do something to stop the brain drain and lower unemployment in these areas.

New ERA Item 4: Energy Tax Relief for Upstate Manufacturers
In 2009, Unshackle Upstate opposed the imposition of the energy tax commonly referred to as the 18a assessment, and we continue to urge its repeal. Unshackle Upstate feels strongly that this burden should be immediately eliminated for those high energy use industries that are hit the hardest by 18-a. **New York State should eliminate the 18a energy assessment for Upstate manufacturers.**

New ERA Item 5: Enable Development of the Marcellus Shale
The Marcellus Shale can be developed responsibly and New York State must begin to take full advantage of this tremendous economic opportunity. The state should finalize its comprehensive review of the potential environmental impacts of natural gas development and adopt regulations that strike an appropriate balance between economic development and environmental protection as soon as possible. Local governments, many of which are facing extreme fiscal challenges, will also benefit. The Southern Tier will see additional sales tax revenues and an increase in ad valorem property tax revenue.

New York State should approve safe natural gas exploration, which will greatly improve the economic stability of numerous Upstate communities.

I understand and recognize that the Upstate tax relief plan I just outlined is relatively dramatic and not without potential detractors. I also recognize that the problems we face are not unique to Upstate. But the long-term decline of the Upstate economy continues. The only way that we are going to help put Upstate back together is to first acknowledge that there are two very different economies in this state. That is indisputable.

Our proposal is a multi-faceted, comprehensive and bold tax relief plan. New ERA for Upstate includes nearly a billion dollars a year in targeted tax relief for the Upstate taxpayers and businesses that desperately need it. Additionally, we have calculated that state would receive approximately $78 million dollars annually in revenue from the development of natural gas in the Marcellus region.

We have identified a number of laws and regulations that impact the general business community and more specifically manufacturing. In addition, I have attached to this testimony more laws and regulations that you can repeal and/or reform. It is our hope that throughout next year's budget process, both Governor Cuomo and the Legislature give serious consideration to making New York more affordable and making our businesses more successful by fixing these issues.

As Senator Mary Landrieu once said, "Our solutions must be beyond anything we have ever considered ... We should not be afraid to try bold new approaches." Please know that we cannot rest on our successes. Let us continue to make bold decisions that will indeed change our future for the better."

I thank you for the opportunity to speak to you today and will now answer any questions.

Thank you.

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Taxes and Regulations that Impact Business

Enact A.3675 by Assm. Woman Lupardo

It changes the filing fee schedule for asbestos projects. It will be better for the state and localities, as well as the schools. It is net revenue neutral as far as fees for the state.

- This is a bill that now has a Senate sponsor as well. But we believe that this can be done through an administrative change and does not require legislation

There is a provision under DOL that all asbestos, regardless of whether it is friable (fibers in the air) or non-friable (things like floor tiles) it all has to be removed as friable.

That is far more expensive. There are established protocols to determine whether or not the asbestos is friable/non-friable. These are DOL standards. If it is determined to be non-friable, then it can be removed safely without the zero airflow process. Allow it to be by suspending the DOL regulation.

Restore state sales tax exemption for farm abstracts

NYS Department of Taxation and Finance reversed their longstanding policy on providing sales tax exemptions on abstracts of title to farm land last year via a Counsel's Opinion. The cost for abstract services and relevant tax is a sizeable expense for producers whose business is land dependent.

- The Counsel's opinion should be reversed and the exemption allowed.

The state would need to adopt federal Davis Bacon methodology

There are several reasons:

- It is better for workers. Instead of getting benefits in cash, the contractor would contribute to a fund/healthcare plan since they would be less concerned with DOL annualizing their payroll
- More merit shop contractors would bid the work (see above on DOL)
- More contractors means lower costs as more will bids will be submitted

Reform the SEQR Process (http://www.dec.ny.gov/permits/357.html)

As it currently exists, there is no way to calculate, with any certainty, the time and cost of going through the process. This uncertainty in the approval process has been a decisive factor when companies take their business opportunities outside New York State. There should be two amendments to SEQR:

- The first proposed amendment would simplify the draft environmental impact statement process, providing a clear path to obtain public comment, a key milestone in the approval process.
- The second proposed amendment would require that the final environmental impact statement be adopted within six months of the close of the public hearing if further study is warranted, or within two months if no further studies are needed

Neither of these amendments would diminish the broad authority under State Environmental Quality Review Act to evaluate any and all significant adverse environmental impacts. That authority would remain unchanged and adopting these amendments would only require a regulatory rule-making by the Department of Environmental Conservation.

Adopt AMA and ACOEM Guidelines
While the Workers Compensation Reforms of 2007 took steps to "modernize" the guidelines relative to the assessment and treatment of injured workers by creating its own standards, it has not worked. In addition, because there is very little being done to keep pace with advances in medical diagnosis and treatment, every day New York falls further behind. There are no real mechanisms for the state, specifically the Workers Compensation Board, to keep updating its standards.

We strongly recommend that the state adopt the American Medical Association and the American College of Occupational and Environmental Medicine (ACOEM) guidelines. Both organizations frequently review new advancements in medical care and treatment and make strong recommendations about the best way to treat injured workers.

It is imperative that New York adopt these guidelines so that we can ensure that our injured workers are receiving the best care possible allowing them to return to work as soon as possible. This will also help to ensure that workers compensation rates remain competitive with the rest of the country.

Authorizes the use of design build on the vertical projects (an expansion of the 12/11 design build language)

Limit the Role of the New York State Historic Preservation Office (SHPO)
According to its website, the SHPO works with governments, the public, and educational and not-for-profit organizations to raise historic preservation awareness, to instill in New Yorkers a sense of pride in the state's unique history and to encourage heritage tourism and community revitalization. Clearly, New York cannot and should not walk away from our rich history.

However, the role of SHPO in development needs to be investigated. There are countless stories across the state where SHPO has blocked/slowed the progress of a project that will create jobs for New York residents.

- Stipulate that SHPO be limited in its ability to request archeological surveys to projects that exceed 25 acres.

Building Code
When the state first enacted the Uniform Fire Prevention and Building Code in the early 1980s, it required local governments to enforce and administer the Uniform Code. An associated fee on commercial fire insurance policies written in New York was created and intended to offset local governments' costs of administering and enforcing the Uniform Code.

Regulatory Reform Hearing: Manufacturing
September 20, 2013
Syracuse, NY

Testimony Submitted by:

Karyn Burns

Vice President of Communications and Government Relations for the Manufacturers Association of Central New York

Establish Minimum Health Insurance Contributions Level for Employees and Retirees

- Employers will cover no more than 85% of a single healthcare premium or 75% of a healthcare premium for families or retirees. This will be phased in over a 3 yr period.
    - If state contract contribution rates decrease (i.e. employer pays less), then local contracts should follow the same reductions in the next negotiation cycle
    - If at any point in time the state repeals the Triborough Amendment this requirement will also be repealed.

No New mandates

- Pass S.4094 (O'Brien) / A.3106 (Morelle) Unfunded Mandate Reform Act
    - Authorizes the governor to submit an unfunded mandate reform plan to the legislature when it is in the public interest.
- Pass S.1176 (Martins)/A.5459 (Galef)
    - Restricts the imposition of additional unfunded mandates on local governments by the state until such time as those mandates are fully funded by the state; provides for certain exceptions; provides that a three-fifths majority in each house shall override this restriction.

MANUFACTURERS
ALLIANCE of New York

MACNY
100 YEARS

The Manufacturers Association

Testimony To:

New York State Senate Hearing

Regulatory Reform to Bolster Economic Development for Manufacturers

Presented By

Karyn Burns
Vice President, MACNY The Manufacturers Association of
Central New York

Executive Director, The Manufacturers Alliance of New York State

September 19, 2013

To start, I would like to thank you for the opportunity to speak today, and also for recognizing the immediate need to address the significant need to reduce costs and improve the economic climate for manufacturers and businesses statewide. My name is Karyn Burns, and I am here today representing the Manufacturers Alliance of New York State.

As you may know, The Manufacturers Alliance of New York State (The Alliance) is the State's premier and largest manufacturing association, representing small and large manufacturers in every industrial sector throughout New York State. Manufacturing employs The Alliance proudly serves as the leading advocate for a pro-business policy agenda that helps manufacturers compete in the global economy and allows policy makers to create a better business climate for New York State.

It is well known that a strong manufacturing base is absolutely critical to any successful economy. During New York State's difficult financial times, a solid manufacturing base is needed more than ever, to be able to do what our sector does best: retain and create family supporting and high paying jobs, maintain a significant amount of economic and tax revenues, and provide communities with the jobs and economic sustainability that is so necessary.

As you are well aware, the ongoing efforts to revitalize the New York State economy prove incredibly challenging. It is a well-known fact that in order to create economic growth, a vibrant and friendly business climate must be established and fostered, so that business can operate efficiently and successfully.

Such is not the case in New York State. The State's manufacturing sector experiences this firsthand. Regulatory burdens have become so exhaustive on the manufacturing sector, that it has significantly hindered its ability to do what it needs to: generate economic development and sustain and grow jobs in our communities.

While there are hundreds of various regulatory burdens that hinder the manufacturing sector, at your request we have outlined a few key areas that our members have specified are immediate needs by way of reform.

Economic regulation.

Economic regulation on businesses include areas such as prices or wages, allocation of public resources (i.e.: usage of tax dollars), etc. One significant area in need of reform here is through the Department of Labor, and their Unemployment Insurance regulations. Historically, manufacturers have taken a significant hit from the UI fiscal irresponsibility and lack of oversight. Most recently, resulting from over borrowing in 2011, New York owed the federal government $3.3 Billion for borrowed funds so it could afford to pay for unemployment benefits. In 2011 alone, $115M was owed by New York in interest costs. Over 500,000 New York State employers were blindsided by the aforementioned fees, with no reason other than the State could not afford to pay it back. These added fees, whether permanent or not, significantly impact a manufacturers' ability to operate a business here in New York. Simply put, the solution is not to put the cost burden of state borrowing into the hands of the hard working businesses and employers of New York State. The fund must be returned to solvency, and must be done without increasing costs on employers.

With a repetitive problem of borrowing and inability to pay back, the State and Federal government need to fix the structural problem and relieve the burden off businesses once and for all. I implore you and you Administration to take the lead on this effort.

Social regulation

Social regulation also comes at a cost for manufacturers, in areas such as environmental protection, consumer safety, employment discrimination and public health. A significant example of DEC regulatory reform comes with improving SEQRA and permitting programs to give business a more certain, workable timetable for the environmental review of major investment projects, including a more appropriate standard for adjudicating issues in DEC permit hearings; assuring that regulatory timetables for project reviews are adhered to;

creating an expedited process for applications that meet certain criteria (e.g., replacement projects, pollution reduction, etc.); and integrating coastal zone reviews with other state environmental review requirements. Additionally, amending DEC's new source review regulation to eliminate unnecessary restrictions on capital investments and operational changes that are intended to improve efficiency and competitiveness and/or reduce emissions and energy use would also provide beneficial to the state's manufacturing sector.

Compliance Regulation

Compliance regulation significantly hinders manufacturer's abilities to function effectively. Paperwork and document compliance are two such examples. The Wage Theft Protection Act that was passed in 2009 is a prime example of such burdensome regulatory compliance, and unnecessary for a large percentage of the business and manufacturing community.

A specific area specified by our members in need of reform is by way of regulating the Wage Theft Act. The NYS legislature recently passed amendments to section 193 of the labor law which governs deductions from wages, which you then signed into Law. Specifically employers were given the right in writing to deduct for the correct/repayment of an overpayment of wages. Also, they are now able to deduct for a loan repayment when they allow their employees to borrow against future wages. The issue is that these new rules require that "the employer shall comply with regulations by the commissioner for this purpose, which regulations shall include, but not be limited to, provisions governing: the size of overpayments that may be covered by this section; the timing, frequency, duration, and method of such recovery; limitations on the periodic amount of such recovery; a requirement that notice be provided to the employee prior to the commencement of such recovery; a requirement that the employer implement a procedure for disputing the amount of such overpayment or seeking to delay commencement of such recovery; the terms and content of such a procedure and a requirement that notice of the procedure for disputing the overpayment or seeking to delay commencement of such recovery be provided to the employee prior to the commencement of such recovery." To date, the commissioner has not issued any regulations for employers to follow an insure compliance. As a result, employers are going to be held to a standard retroactively once it is written.

It is our belief by addressing some of these regulatory burdens would enable manufacturers to operate more efficiently and effectively. By reviewing the current regulatory burdens in place, making recommendations on easing them, and most importantly, acting on these recommendations, a better business climate can be created, that which manufacturers can operate in and do what they do best: foster economic development and sustain and grown jobs.

Thank you for your time and consideration in these critical matters.

KEB
09.20.13

Regulatory Reform Hearing: Manufacturing
September 20, 2013
Syracuse, NY

Testimony Submitted by:

Deb Warner

Vice President of Public Policy and Government Relations for Center State CEO

CEO

CENTERSTATE
CORPORATION FOR ECONOMIC OPPORTUNITY

New York State Senate

Economic Development and Small Business Committee

Hearing on

Regulatory Reform for Manufacturing

Friday, September 20-, 2013

Syracuse, New York

Testimony of

Deborah S. Warner, Vice President

For Public Policy and Government Relations

Good Morning Senator Valesky.

Thank you for this morning's opportunity to bring some suggestions for regulatory reform that could enhance New York's environment for manufacturing.

I am Deborah Warner, Vice President for Public Policy and Government Relations, here today on behalf of CenterState CEO. We are the regional business and economic development organization representing 2,000 business members across twelve-counties in Central and Northern New York.

I. Taxation and Finance - *Compliance with NYS Sales Tax Manufacturing Exemption (NYSDTF)*

Issue—Section 1115 of the State Tax Law and related rules and regulations (20NYCRR, Section 528) are vague and open to broad interpretation. As part of our outreach to member-firms, a local company reported they have 2 or 3 staff members who spend approximately 20 hours per month interpreting these regulations to determine whether specific materials or articles being purchased fall under the Section 1115 manufacturing sales tax exemption. This issue most commonly relates to equipment that has both manufacturing production-related and safety purposes.

This employer cited the following specific examples:

1. A rebar lanyard (part of a work positioning system that holds and supports the user at a work location) used on the shop floor by the same employee could fall under the exemption or fall outside. If the lanyard is tied off so the employee may lean their weight against the lanyard in order to better weld equipment, the lanyard would fall under the exemption and be non-taxable. If the same lanyard, used by the same employee, was tied off for safety purposes, the lanyard would be taxable.

2. Also illustrative of the complexities in these regulations is the differentiation between "shop" and "office" in the manufacturing setting. If a company purchases 3 analyzers, it is difficult to determine whether that item will ultimately be used by research and development (exempt), on the shop floor (exempt), or by a service technician (non-exempt).

Recommendation: Have NYSDTF issue a policy that any items required by the Department of Labor for the safety of workers should be tax exempt.

II. Insurance - *Insurance "Lost Policies" Challenge (NYS Department of Insurance)*

Issue: In New York State, insurers are not required to provide coverage unless the insured can produce a copy of the policy in its entirety. Insurance companies have document retention policies that mandate that old policies are destroyed after only a few years. Therefore, if a company is involved in a lawsuit that reaches back in time, the insured alone is responsible for proof of coverage for the time in question. Manufacturers in particular are vulnerable to being sued for historical usage of products later found to be hazardous. It is burdensome and costly for manufacturers to conduct forensic document research and incur legal defense and other costs solely because neither the insurer nor insured have retained policy records of coverage.

Recommendation – Develop a new document retention policy, perhaps digital, that would cost-effectively address the issue of proof of coverage for longer periods of time.

III. *Agriculture/Agribusiness (NYSDEC and NYDAM) - Part 360 Regulations*

Issue: Current state regulations (Part 360 Permitting of Food Waste) discourage the use of dairy-related byproducts to the detriment of agriculture, food production opportunities and economic development.

Storage and use of food grade waste is regulated by the Part 360 permit process. The increase in dairy manufacturing activity, which has been encouraged by New York State, will result in an increase in highly desirable and valuable products, as well as by-products that will be categorized and regulated by Part 360. There are options and opportunities for use of these by-products that can be of benefit to the manufacturer, to dairy producers, and to other potential users consistent with New York State's environmental and economic development goals.

Recommendation: The Part 360 permit process should be reviewed and modified to allow for the safe and productive use of food manufacturing by-products. NYS should examine opportunities to incentivize such uses.

In addition to the agency-specific issues and recommendations outlined above, there were also suggestions made that have multi-departmental applicability and relevance, including the following:

IV. *Accessibility*

It is often difficult to reach the right person in state agencies and be able to reach the same person directly for follow up.

Example: An accountant works with Taxation and Finance on behalf of various clients' tax credits and other matters. Each time he calls, he spends time going through the lengthy auto attendant protocol to reach the appropriate department. Once he makes contact, he is not given the direct number of the staffer for follow up. It is difficult for him to reach the same person again and no other way to shorten the front end process of the call. Such repetition can take up to 30 minutes per call. Also, this accountant needed to arrange a conference call between himself, his client and the agency staffer. He was told the agency did not have the capacity to do a conference call.

Solution:

- Improved technology during the automated portion to more quickly reach the correct department after an initial contact, or allow staff to give out their direct number for follow up.
- Add conference call capability to the phone system or permit employees to use it if it already exists.

V. *Regulatory Reform Whistle Blowers Program*

Fear of retaliation keeps business owners and managers from openly voicing problems they experience with state agencies and their regulations. Businesses need a "whistle blower" tool and protections so they can report troublesome and burdensome regulations and agency overreach, as well as problematic agency practices.

Solution:

- Establish an 800 number or online feature to report problems and suggested solutions that assures confidentiality and protects businesses from retribution or retaliation.

We hope you find these suggestions helpful and urge that you adopt them for your 2014 agenda.

Regulatory Reform Hearing: Manufacturing
September 20, 2013
Syracuse, NY

Testimony Submitted by:

Laura Miller

General Manager of Darco Manufacturing

To: Members of the Senate Majority Coalition

9/20/13

My name is Laura Miller and I'm General Manager of Darco Manufacturing. We have been in business since 1978 and I've been with the company since 1988. We have 26 employees. Our employees have been with us, on average, 16 years. We, like dozens of small, privately held companies in CNY, do contract machining for durable goods OEM's. At this moment in time, we are busy with work from a wide array of industries. We are stating to book overtime and hire after a long, lean period.

I'd like to submit a few numbers for the record as part of the discussion here today. As a manager, I try to focus my time on the workplace issues that improve or impede our competitiveness.

The New York State Franchise tax costs us $1500.00 per year. Our sales are 3 million per year. If I've done my math correctly, that figure represents ½ of one 1%.

Our company produces product with electricity and our total electricity bill is 1.27% of revenue. I do not know what the 18A energy tax is, but I have brought our National Grid bill so we can do the math and write it in here. (   ).

I have brought a blank wage reporting form with me from the NYS Department of Labor. I'd like to submit it for the record. The mandate takes between 5 and 10 minutes per year per employee to administer. The form, as you can see, is simple and intuitive.

I'd like to put these numbers into perspective:

* We spend more on perishable tooling than we do on energy.

* We spend more on coffee for the troops than we spend on the franchise tax.

* We "lose" anywhere from 10 to 30 minutes per employee per day to the complexities of human beings working together to move good quality product out the door.

I do not consider any of the aforementioned items to be significant drags on our organization as we compete in the market place.

If you would like to come out and visit us in the production environment we'd be happy to could show you where we focus our attention,

Thank You,
Laura Miller

Regulatory Reform Hearing: Manufacturing
September 20, 2013
Syracuse, NY

Testimony Submitted by:

Kipp Hicks

Executive Director of the Madison County Industrial Development Agency

Madison County IDA
Industrial Development Agency

Madison County Center
for Economic Development

September 19, 2013

Senator David Valesky
805 State Office Building
333 East Washington Street
Syracuse, NY 13202

Senator Valesky,

I appreciate the opportunity to share with you and your colleagues a few issues related to economic development from the Madison County IDA perspective, with regard to issues that negatively affect business and job growth. The following items represent tax issues, IDA issues, and necessary regulatory reform that will allow us to facilitate business recruitment, retention, and expansion in New York State.

- **Section 18-A assessment** - This assessment is a regressive tax which increases customer energy bills, significantly adds to the cost of operating a business, and is bad for manufacturers.
  - Originally a 5-year assessment, which was increased from 0.3% to 2%, and allowed to be extended beyond its original timeframe in last year's legislative session.
- **IDA PILOT agreements lack of impact on Tax Levy Growth Factor calculations** – Taxing entities are not able to account for new growth or expansions to existing properties, and are penalized.
  - It is necessary to correct this inequity and allow local tax levies to rise in response to economic growth.
- **SEQRA as an open-ended contestability factor** – allowing individuals, activists, or even the DEC to hold-up projects indefinitely.
  - Limits must be set to allow companies to adhere to the intent of the SEQRA, to measure the impacts of their project, and allow for community input – but limit the open-ended period of contestation.
- **Instruct regulators to interpret IDA statute broadly** – State regulators including the State Comptroller and the Authority Budget Office are using a narrow interpretation of the IDA statute to hobble economic development efforts. Examples include:
  - Efforts at economic development consolidation are hampered by the narrow interpretation by the state comptroller in Jefferson County of the power of an IDA to provide economic development services to other governmental entities. (for example see: http://www.osc.state.ny.us/legal/2010/op2011-1.htm)

    - NYS asked Madison County to act as a conduit to pass a state grant onto a local company. When the IDA created a LDC to insulate the IDA from liability on the state grant, the ABO indicated that the IDA is not able to do such. (see attached correspondence)
    - The Madison County IDA is sometimes asked to provide financial assistance to other local development entities (such as the Partnership for Community Development in Hamilton, NY), but the ABO has issued a special report indicating that an IDA can only provide financial support to an actual project. (for example see: http://www.abo.ny.gov/reports/dataanalysis/ABOSpecialReportIDAGrants10.2011.pdf).
- **Change the name of Industrial Development Agencies to Economic Development Agencies** – to reflect evolving role that IDAs play in economic development.
    - IDA responsibilities have expanded beyond just industrial development; IDA's are known to raise awareness of costly regulations for businesses, to be a catalyst for industry / university collaboration and commercialization, helping with export opportunities, community development, and more.

These items are hindering our task of facilitating economic development in our county, the Central NY region, and NYS as a whole. With the Senate's backing, we believe that NYS has the ability to regain its title as the Empire State, and will allow us to realize our common goals of diversifying our economy, broadening our tax base, creating living wage jobs, and encouraging sustainable development for the benefit our community.

Thank you for your time and consideration. Please feel free to contact me if you would like to discuss any of these items further.

Kind Regards,

Kipp Hicks
Executive Director

Opinion 2011 - 1

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

INDUSTRIAL DEVELOPMENT AGENCIES -- Officers and Employees (serving as staff of not-for-profit corporations) -- Powers and Duties (hiring employees to serve as staff of not-for-profit corporations)

GENERAL MUNICIPAL LAW § 858 (7), (9), (17): An industrial development agency lacks authority to hire employees and assign them to serve as the staff of not-for-profit corporations.

This is in reply to your request for our opinion as to whether an industrial development agency ("IDA") may hire individuals as IDA employees and assign them to serve as the staff of several not-for-profit local development corporations and similar entities (individually, a "development corporation" or "corporation"). The issue arises in connection with questions concerning the individuals' status, by virtue of such employment, as being eligible for membership in the New York State and Local Employees' Retirement System. For the reasons set forth below, we conclude that an IDA may not assign its employees to serve as the staff of a development corporation.

Facts

Each of the development corporations was incorporated under the Not-For-Profit Corporation Law. In general, the corporations were established for purposes that include relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, and encouraging the development or retention of industry. The corporations' certificates of incorporation and by-laws do not appear to vest control in the IDA.

The IDA has entered into variously titled "services agreements" with each of the development corporations. Pursuant to these agreements, the IDA assigns a total of seven "fulltime employees" and two "part-time employee[s]" to perform certain functions for the corporations. Four of these individuals appear to be responsible for the day-to-day activities or operations of the corporations for which they serve; another two are responsible for maintaining financial records and performing other administrative duties; and the remaining three individuals are responsible for providing maintenance services in connection with a specific commercial development or property.

Each of the services agreements provides expressly that the individuals assigned to the development corporations "shall be and shall at all times remain employees of the [IDA], subject to its direction and control," but in exercising such direction and control, the IDA "shall give consideration to the recommendations of and seek assistan corporations' boards of directors. Similarly, each of the agreements provides for the IDA to be responsible for recruiting, hiring, assigning, evaluating, supervising, managing, promoting, disciplining and or discharging the individuals assigned to the development corporations, "with due consideration of the recommendations of and assistance from" the corporations' boards.

Under the services agreements, the development corporations are required to pay to the IDA a fixed annual fee as consideration for the services provided by the IDA to the corporations. In addition to the annual fee, the agreements obligate the corporations to reimburse the IDA on a bi-weekly basis for the IDA's gross payroll expense on account of the individuals assigned to the corporations including, but not limited to, the individuals' salary, workers' compensation premiums, social security taxes, health insurance expenses, and travel or other personnel expense reimbursements for the period.

Finally, although the services agreements provide that the individuals assigned to the development corporations are IDA employees and under the control of the IDA, the agreements require the corporations to indemnify the IDA from most claims made against the IDA in carrying out the agreements. The agreements also require the corporations to defend the IDA in actions brought in connection with the employment of the individuals 1.

IDAs - Generally

IDAs are formed for the benefit of municipalities by special act of the State Legislature (see General Municipal Law § 856 [1] [a]; see also NY Const, art X, § 5). With limited exceptions, these special acts establish IDAs for the purposes specified in Article 18-A of the General Municipal Law, and require their operations and activities to be governed in all respects as provided by that statute (see General Municipal Law, art 18-A, title 2 [§ 890 et seq.]). The special act establishing the IDA in question contains no express authority for the IDA to hire individuals to staff the development corporations.

Article 18-A of the General Municipal Law provides that IDAs are established to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing of certain types of facilities (General Municipal Law § 858). By fulfilling these purposes, IDAs are intended to advance the job opportunities, health, general prosperity and economic welfare of the people of the State of New York, and to improve their recreation opportunities, prosperity and standard of living (id.).

In furtherance of these purposes, Article 18-A provides IDAs with certain powers and duties. An IDA, however, is a "creature of statute" (AG-II Acquisition Corp. v Board of Assessors of County of Nassau, 21 Misc 3d 543, 545, 871 NYS2d 590, 592 [2008]). As such, an IDA "lacks powers not granted to it by express or necessarily implicated legislative delegation" (see e.g. Abiele Contracting Inc. v New York City School Construction Authority, 91 NY2d 1, 10, 666 NYS2d 970, 974 [1997], quoting from Matter of Flynn v State Ethics Commn., 87 NY2d 199, 202, 638 NYS2d 418 , 420 [1995] ; see also 1999 Ops St Comp No. 99-4, at 6; 1991 Ops St Comp No. 91-32, at 91).

Express Powers

Article 18-A provides for IDAs to fulfill their statutory purposes through the exercise of express authority to provide "financial assistance" for certain types of "projects" (see e.g. General Municipal Law §§ 854 [4], [14], 859 [1] [b], 864, 874), and "[t]o acquire, construct, reconstruct, lease, improve, maintain, equip or furnish one or more projects" (General Municipal Law § 858 [10]). Additionally, insofar far as here relevant, Article 18-A provides IDAs with express authority "[t]o ... use agents, employees and facilities of the municipality" (General Municipal Law § 858 [6]), "[t]o appoint officers, agents and employees" (General Municipal Law § 858 [7]), "[t]o make contracts" (General Municipal Law § 858 [9]), and "[t]o do all things necessary or convenient to carry out its purposes and exercise the powers expressly given in [title 1 of Article 18-A]" (General Municipal Law § 858 [17]).

Article 18-A, however, does not provide IDAs with express authority to assign IDA employees to serve as the staff of another entity. In fact, IDAs' express authority to use municipal employees (General Municipal Law § 858 [6]) lends support for reading article 18-A as not authorizing any other personnel sharing (see McKinney's Statutes § 240), such as the use of IDA employees by a development corporation.

Implied Authority - "Necessary or Convenient" Clause

The lack of express statutory authority for an IDA to assign its employees to serve as the staff of another entity is not necessarily dispositive of an IDA's authority to do so. In construing a "necessary or convenient" clause like the one applicable to IDAs (see General Municipal Law § 858 [17]), the courts have indicated that "the negative inference approach is a disfavored interpretative tool, especially in the face of a broad delegation of appropriate discretion and authority to effect ... stated legislative goals" (Citizens For An Orderly Energy Policy, Inc. v Cuomo, 78 NY2d 398, 412, 576 NYS2d 185, 191 [1991]; see also e.g. Gerdts v State, 210 AD2d 645, 620 NYS2d 512 [1994]; compare Wells v Town of Salina, 119 NY 280 [1890]). Nonetheless, "a narrow grant of power to make and execute contracts coupled with a general exhortation to do all that is necessary or convenient" is not an unlimited grant of authority (see Abiele Contracting Inc. v New York City School Construction Authority, 91 NY2d 1, 11, 666 NYS2d 970, 974). Instead, an IDA's power to contract and to do things "convenient" must be construed in relation to its purposes and its express powers (see General Municipal Law § 858 [17]; see also 1991 Ops St Comp No. 91-32, supra; 2007 Ops Atty Gen No. 2007-F4).

To the extent that the statutory purposes of an IDA and the corporate purposes of a development corporation are similar, it certainly can be argued that a contract pursuant to which the IDA staffs a development corporation is a "convenient" way to accomplish those shared purposes. Thus, it can also be argued that an IDA has implied authority to enter into such contracts based on its express powers to appoint officers, agents and employees, to contract, and to do all things necessary or convenient to carry out its purposes and exercise its express powers (see General Municipal Law § 858 [7], [9], [17]).

In our view, however, this argument ignores the limitation inherent in an IDA's express power to appoint officers, agents, and employees. That power is clearly intended to enable an IDA to carry out its own functions, not those of another entity. While an IDA and a development corporation may have common purposes, they are separate corporate entities (see General Municipal Law § 856 [2]; General Construction Law §§ 65 [a] [1], [2], [b] [3], [c] [4], 66[1], [4], [7]), the operations and activities of which are separate and distinct. Therefore, although an IDA may have authority to contract to provide certain services to a development corporation, and to use its employees to perform the services provided by the IDA under the contract, we do not believe that an IDA can simply contract to make its personnel available to a carry out a development corporation's separate and distinct operations and activities. This is particularly true when a development corporation's corporate purposes are broader than the IDA's statutory purposes. Any other conclusion would permit an IDA to serve as a staffing agency for any organization engaging in at least some activities that are consistent with the IDA's statutory purposes, a role which we believe that IDAs were never intended to play.

Indeed, an IDA's express powers make clear that the primary means by which IDAs fulfill their statutory purposes is by providing certain types of "financial assistance" to "projects," or itself acquiring, constructing, reconstructing, leasing, improving, maintaining, equipping or furnishing one or more "projects" (see e.g. General Municipal Law §§ 854 [4], [14], 858 [10], 859 [1] [b], 864, 874). For this purpose, the term "project" is defined essentially as certain land, buildings, improvements, and other real and personal property (see General Municipal Law § 854 [4]). Providing IDA personnel to staff a development corporation, however, is not a "project," and not even necessarily related to any particular "project." Therefore, we do not believe that providing IDA employees to staff a development corporation bears a sufficient relationship to an IDA's express powers to be considered "convenient" to the exercise of those powers.

Conclusion

Accordingly, in our opinion, an IDA lacks authority to hire individuals as IDA employees and assign them to serve as the staff of not-for-profit local development corporations or similar entities.

March 21, 2011

Kevin Murray
Executive Deputy Comptroller

[1] Independent of any inference that may be drawn from the conclusion reached in this opinion, we believe that there is a plausible basis for questioning the status of the individuals in question as employees of the IDA. The services agreements provide for the individuals to provide services in furtherance of the operations and activities of the development corporations, not those of the IDA. The direction and control over the individuals vested by the agreements in the IDA, if not illusory or violative of the fiduciary duty of the development corporations' directors, is at best qualified materially by the requirement [illegible] ve due consideration to the recommendations of and [illegible] from" the development corporations' boards of directors.

The agreements also impose on the development corporations the full cost of the employment relationship, including the costs incúrred in connection with claims asserted against the IDA by third parties, notwithstanding the purported status of the individuals in question as IDA employees and under the control of the IDA.

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August 9, 2013

Mr. Kipp Hicks
Executive Director
Madison County Industrial Development Agency
325 Seneca Turnpike
Canastota, New York 13032

Dear Mr. Hicks:

This is in response to your letter requesting that the Madison County Grant Facilitation Corporation (GFC), as a subsidiary of the Madison County IDA, be permitted to include its financial information in the PARIS reporting of the IDA.

We have taken your request under advisement. Since the GFC was recently formed, its first annual report must be filed in PARIS by March 31, 2014. Its 2014 budget report is expected to be filed in PARIS by November 1, 2013. The ABO will provide you with a definitive response in advance of those reporting deadlines.

In the case of the GFC, the ABO needs to consider if consolidated reporting of GFC activities by the IDA will result in a loss of transparency and accountability. Local development corporations are required to report information in PARIS on grant and loan recipients, the value of those grants and loans, and their intended purposes. Industrial development agencies do not report such information. Accordingly, this information would only be captured if the Madison County GFC filed its own annual reports with the ABO. It was certainly the intent of the Legislature that the ABO collect and make available to the public this information.

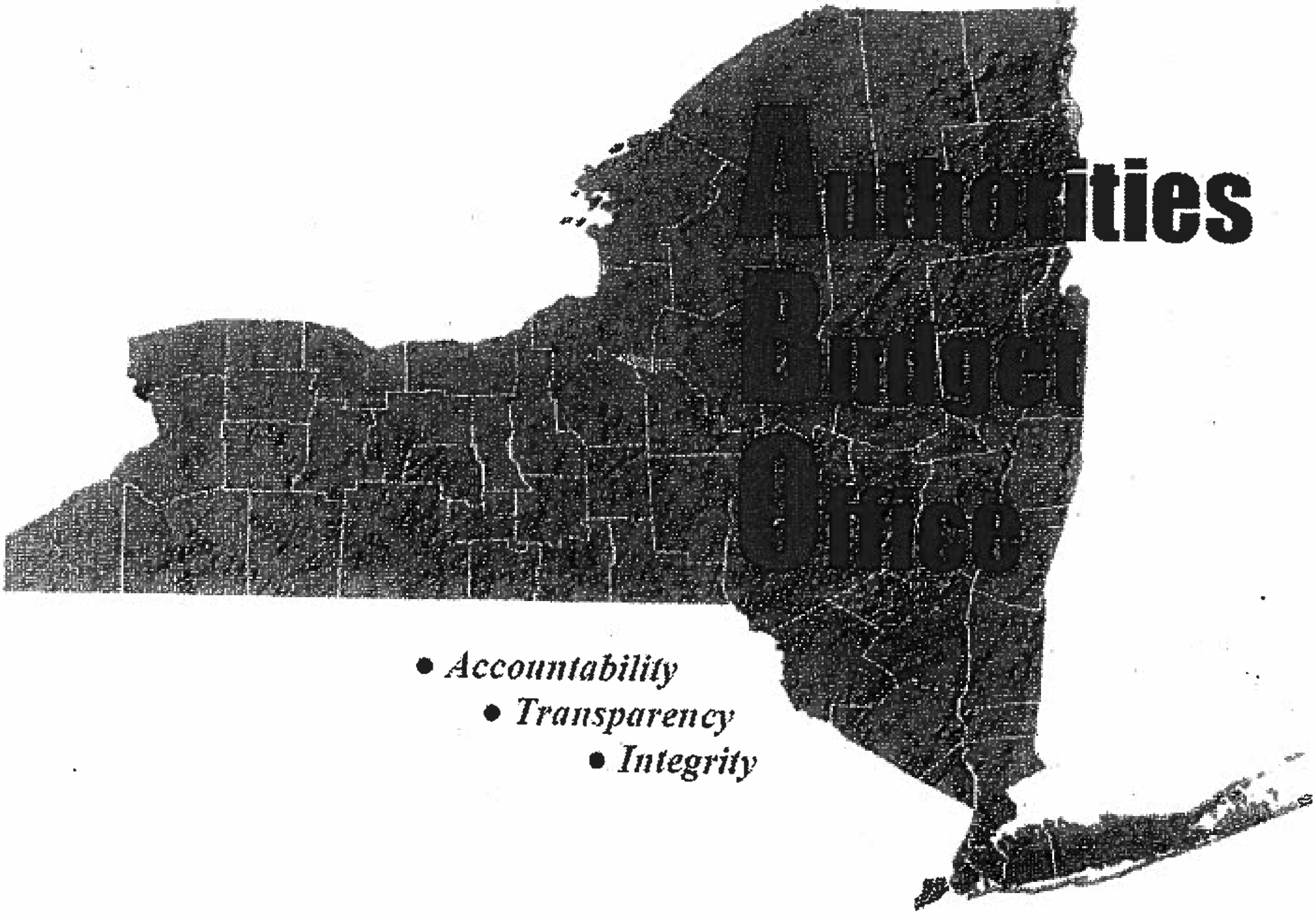
As we discussed, there is also the issue whether IDAs can form subsidiary corporations. Before addressing the request raised in your letter we hope to receive clarification on this broader issue from the Office of the Attorney General and the Office of the State Comptroller. It is our expectation that any decision we make would be applicable to other IDAs in similar circumstances. Accordingly, we would like to avoid providing you with any direction that later may be inconsistent with guidance rendered by either the Attorney General or the State Comptroller.

We thank you for your patience. We will officially respond to your request as quickly as possible.

Sincerely,

David Kidera

David Kidera
Director



Authorities
Budget
Office

- *Accountability*
- *Transparency*
- *Integrity*

Special Report
Industrial Development Agency
Grant Awards

October 17, 2011

Statutory Purpose of Industrial Development Agencies

Article 18-A of General Municipal Law (GML) authorizes the formation of industrial development agencies (IDAs) for the purpose of growing regional employment and encouraging the creation, expansion or re-location of viable commercial businesses in local communities. IDA financial assistance is to be used to promote and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing of industrial, manufacturing and commercial facilities, and certain other types of projects, for the purpose of minimizing unemployment and economic deterioration.

To achieve these objectives, IDAs are granted certain powers that are enumerated in section 858 of General Municipal Law (GML). These powers include the acquisition of real property, the ability to enter contracts and leases, acquire, construct, lease, improve, maintain, equip or furnish projects, accept gifts, grants, loans or contributions from the federal or state government or other entities, borrow money and issue bonds, and enter into PILOT agreements. Section 854 of GML defines the financial assistance that IDAs can provide as the proceeds from the sale of bonds, and exemptions from mortgage recording taxes, sales and use taxes, and real property taxes associated with the IDA taking title to a project as defined by section 854(4).

Limitations on Financial Assistance

Industrial development agencies are public benefit corporations, and the powers granted to such corporations are limited to those specifically enumerated in statute. Therefore, an IDA can only exercise those powers granted to it by General Municipal Law. This legal principle has guided the analysis reflected in this report.

Clearly, the enumerated powers of an IDA include the ability to provide limited forms of financial assistance and to accept grants, gifts and contributions from public and private sources that can be used to advance a legitimate IDA purpose. Federal or state funds received by the IDA may be granted or loaned for purposes consistent with spending restrictions imposed by that federal or state program. The statute does not specifically confer on IDAs the power to make outright grants, gifts or contributions from their own funds for such purposes, even if those funds are distributed by contract. Accordingly, the analysis of IDA financial practices performed by the ABO is premised on the fact that such the latter actions would be inappropriate and inconsistent with the powers granted to IDAs.

Industrial Development Agency Grants

The ABO reviewed the minutes and reports of 29 IDAs, that were chosen as geographically representative of IDAs across the state as well as representative of the different county level, town, city, and village IDAs. These minutes reflected agency board meetings held between 2007 and 2011. These public records indicate that IDAs are providing grants to various public and private entities, although the provision of grants is not a specific power authorized to IDAs in GML. The ABO review found that the amount of gifts, contributions, or sponsorship arrangements made by 19 of these IDAs to private entities could be as much as $10 million over the past four years.

The ABO attempted to ascertain whether the gifts, contributions, or sponsorship arrangements were direct payments, or contractual agreements between the IDAs and the recipients of the funds that were misrepresented in the meeting minutes. The ABO also reviewed certified reports submitted by the authorities in the Public Authorities Reporting Information System (PARIS) and found no indication that any of the examples were projects as defined by section 854(4) of GML.

The ABO recognizes that this is a sensitive issue and that IDAs cannot look to current law for clear guidance on what constitutes an appropriate use of IDA money. While IDAs have no specific legal authority to grant their own funds to either a public or a private organization, program money from federal or state sources can sometimes be granted or loaned, and IDAs may fail to distinguish these sources from their own funds. Often the sole determining criterion for an IDA board is whether the project recipient's use of the money can be broadly interpreted so as to advance the economic development mission of the IDA. The ABO does not believe that this evaluation criterion is adequate or determining, or that the examples cited in this report meet this test. A close reading of the minutes gives no indication that these grants were pass-through grants from the state or federal government to projects for otherwise eligible purposes.

Examples of IDA Grant Awards

The ABO takes no position on the merits of the projects that received as much as $10 million in grant funding. Many may be worthwhile and community-oriented. While some may argue that the language in General Municipal Law is open to interpretation and creates a gray area for boards of directors, the ABO believes that the law is clear on one point. The structure of any IDA funding should have as its primary purpose economic growth, the stabilization or expansion of employment, or the attraction of new businesses to the area. These public purposes cannot be secondary benefits. The primary purpose for the use of those funds cannot be for the benefit of the private entity. Nor should the funding be intended to subsidize the operations of the recipient. Moreover, an IDA funding decision should be made with the expectation that the IDA would receive an explicit benefit that advances its mission and purpose, and is not made for marketing or public relations purposes.

A review of board minutes, audit reports, press accounts, and other IDA documents for 2010 and 2011, found the following grants were made by IDAs in the sample group. Such awards would appear to be inconsistent with the ABO's reading of General Municipal Law:

- Orange County IDA:
    - $500,000 matching contribution for renovations and sports facilities at the nonprofit Newburgh Armory Unity Center;
    - $57,000 to the Orange County Firefighters Museum for its newly-renovated facility to buy furniture, computers, and training items;
    - $54,260 to Orange County Community College to expand its Business Solutions and Professional Development Program;
    - $22,500 to Hudson Valley Economic Development Corporation for operating expenses;

    - $9,000 to the National Purple Heart Hall of Honor for its project to purchase and distribute 2,500 honor coins;
    - $600 to purchase a table for 10 at the National Purple Heart Hall of Honor Tribute;
    - $250 to the Marlboro High School Band.

- Dutchess County IDA
    - $248,000 to the Dutchess County Economic Development Corporation (DCEDC), including:
        - $115,000 to match dollar-for-dollar private contributions to the DCEDC External Marketing Council by private businesses in Dutchess County;
        - $100,000 for the operating budget;
        - Up to $28,000 for DCEDC Trade Show Program;
        - $5,000 for the DCEDC student Business Plan Competition.
    - $1,500 to Hudson Valley Fresh to subsidize the cost of milk at the Dutchess County Fair.

- Onondaga County IDA:
    - Repurposed a $150,000 grant to Onondaga Community College so that it now funds the college's Presidential Scholars Program.

- St. Lawrence County IDA
    - $25,000 per year for three years for a total commitment of $75,000 to the FishCap project, intended to make St. Lawrence and Franklin counties the fishing capital of the world.

- Fairport IDA
    - $25,000 to the Village Tree Board for a project which involves recording the Village's tree inventory into a GPS system that allows the mapping of tree locations.

- Clarence IDA
    - $10,000 to the Clarence Chamber of Commerce to assist in relocating their offices.

- Brookhaven IDA
    - $7,500 to the Miller Business Resource Center at the Middle Country Public Library;
    - $15,000 to the Stony Brook Dare to Attempt/Risk Entrepreneurship.

- Greene County IDA
    - Donated money and iPads as prizes for a "Lemonade Day" competition which encouraged children to open their own lemonade stands for a day complete with business and marketing plans.

The AB0 has concluded that a number of factors have led boards of directors to believe that it is permissible to make such grant awards.

- The IDA is often the primary economic development organization in the community. IDAs are charged with promoting economic stability and enhancing the economic welfare of the residents through employment and recreational opportunities, tourism, and improving quality of life. Boards of directors view this mission very broadly and, therefore, justify any action or financial decision as supportive of these objectives. Board members, however, have a fiduciary duty to ensure that the agency not only operates consistent with its mission and public purpose, but also within the limitations imposed on the IDA by statute. The ABO does not believe that GML should be read as to allow the awarding of an IDA financed grant to an entity even if that grant is intended to be used for an accepted and beneficial public purpose.

- IDAs charge fees to process and evaluate project applications and to administer financial assistance. Since many IDAs operate much like financial institutions and arrange the financial backing for economic development projects, it is not uncommon for the IDA to be considered a potential funding source by public or private entities seeking financial support for a community project. As residents of the community, board members may want to accommodate such requests, especially as other sources of funds become scarcer. In addition, many boards of directors view these fees as the "private" funds of the IDA, not subject to the same restrictions imposed on public funds. It is the position of the ABO, and the clear intent of public authority reform legislation, that these funds are no different than the fees charged by state and local government agencies for services rendered and that they need to be treated and managed as public funds, and directed only for purposes for which they can be used by law.

- Prior to 2006, the regulatory climate allowed IDAs to operate without close public scrutiny. Even though financial reporting requirements were first enacted in 1993, prior to the Public Authorities Accountability Act of 2005 (PAAA) and 2009 Public Authorities Reform Act (PARA), IDAs were subject to limited oversight that amounted primarily to reporting project data and debt issuances. The ABO is aware that the lack of central oversight previous to PAAA and PARA contributed to mission creep and IDAs engaging in activities not exclusively (or only broadly interpreted) for industrial, manufacturing and commercial development.

Conclusions

The ABO sampled the spending activities of 29 IDAs dating back to 2007. This examination revealed that many IDAs, over the years, may have provided grants from their own revenue sources, which would appear to be beyond their authority to provide financial assistance only in the form of tax exempt bonds, exemptions from mortgage recording and sales taxes, and property tax abatements. In its examination of 29 of the 114 IDAs in New York State, the ABO found examples of questionable grant awards by at least 19 IDAs, an indication that such practices are likely widespread.

Moreover, it appears that much of this grant money was not intended to generate new economic growth in the community through increased payrolls, higher property values, or enhanced economic activity – the primary reasons for the existence of IDAs. Nor was it clear what direct benefit the IDA was to realize from the award in furtherance of its mission. Rather these grants appear to have been awarded, in part, for charitable purposes, to provide revenue to the recipient, or to promote the image of the IDA within the community.

The grants identified in this report indicate that IDA boards may not be fully aware of the limitations on the form of financial assistance that an IDA can provide. Even if a recipient is worthy of public support, or the purpose is ancillary to economic development, such routine approval of grants demonstrates that some IDA boards view the role of the IDA as a public funding stream to be used for whatever ends the board can justify.

As economic difficulties place strains on local government finances, municipalities, business owners, and community groups may view IDAs as an attractive source of funding. All too often, IDA boards may be pressured to direct public funds to projects that are unlikely to achieve the purpose for which the IDA was formed, or to award funds without following the normal project application evaluation process.

The ABO does not question the intentions or motives of boards of directors in making these funding decisions. The purpose of this report is to raise, as an issue, how IDAs direct their money to community projects and private entities. As a result of this report, the ABO suggests that IDA boards undertake a thorough review of their organizations' enabling legislation, missions, and financial assistance policies to make sure that all activities in which they are engaged are statutorily appropriate and mission-driven.

Appendix D

Construction

Mineola, NY **September 26, 2013**

Pages	
135 - 139	Mitch Pally *Chief Executive Officer of the Long Island Builders Institute*
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Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Mitch Pally

Chief Executive Officer of the Long Island Builders Institute

Testimony of the Long Island Builders Institute

Before the New York State Senate Construction Regulatory Reform Forum

9/25/2013
Long Island Builders Institute

Mitch Pally, Chief Executive Officer

LONG ISLAND
BUILDERS INSTITUTE

Advocating Responsible Building & Remodeling

TESTIMONY OF THE LONG ISLAND BUILDERS INSTITUTE BEFORE THE NEW YORK STATE SENATE CONSTRUCTION REGULATORY REFORM FORUM SEPTEMBER 25, 2013

MY NAME IS MITCHELL PALLY AND I AM THE CHIEF EXECUTIVE OFFICER OF THE LONG ISLAND BUILDERS INSTITUTE, THE LARGEST RESIDENTIAL BUILDING TRADE ASSOCIATION IN THE STATE. IT IS A PLEASURE TO BE WITH YOU TODAY TO DISCUSS REGULATORY ISSUES WHICH ARE HINDERING THE ABILITY OF THE RESIDENTIAL REAL ESTATE INDUSTRY TO CREATE ECONOMIC ACTIVITY WITHIN NEW YORK STATE.

FIRST AND FOREMOST IS OUR DEEP CONCERN OVER THE SCAFFOLD LAW, SECTIONS 240 AND 241 OF THE LABOR LAW, WHICH SIGNIFICANTLY INCREASES THE COST OF DOING BUSINESS. ON YOUR LIST OF SPEAKERS IS ARTIE CIPOLETTI, THE CURRENT VICE PRESIDENT OF LIBI AND THE PRESIDENT OF DAVINCI CONSTRUCTION WHO WILL TESTIFY REGARDING THE SPECIFIC COST ISSUES WHICH MUST BE TAKEN INTO ACCOUNT BY CONSTRUCTION COMPANIES. I WILL LEAVE THE DRAMATICS TO HIM.

SECOND, IN MANY CASES, DEVELOPMENT PROJECTS RECEIVE THE NECESSARY STATE AND LOCAL PERMITS FROM THE APPROPRIATE AGENCIES AND ARE READY TO START TO BUILD AND CREATE HUNDREDS OF JOBS, ONLY TO BE STOPPED BY LAWSUITS UNDER ARTICLE 78 OF THE CPLR. IN THESE CASES, WHICH OFTEN TAKE FROM ONE YEAR TO EIGHTEEN MONTHS, IT IS ALMOST IMPOSSIBLE TO GET FINANCING FOR THE PROJECT BECAUSE OF THE POSSIBLE UNCERTAINTY OF THE OUTCOME OF THE LAWSUIT. EVEN IF THE MUNICIPALITY WINS AND THE DEVELOPMENT PROJECT MOVES FORWARD, THERE ARE NO PENALTIES IMPOSED UPON THE LOSING SIDE, NOTWITHSTANDING THE FACT THAT THE DEVELOPER HAS BEEN DELAYED OVER EIGHTEEEN MONTHS AND MAY HAVE MISSED THE MARKET FOR HIS PRODUCT AND THE FACT THAT THE CONSTRUCTION INDUSTRY HAS LOST EIGHTEEN MONTHS OF JOBS AND TAX REVENUES. LEGISLATION SPONSORED BY STATE SENATOR JACK MARTINS WOULD REQUIRE A BOND TO BE POSTED BEFORE AN APPEAL CAN TAKE PLACE ON THESE ACTIVITIES, SUCH LEGISLATION PASSED THE STATE SENATE IN JUNE AND WE ARE HOPEFUL THAT THE ENTIRE STATE LEGISLATURE AND THE GOVERNOR WILL SEE THE NEED TO PROTECT PERMITTED DEVELOPMENT PROJECTS FROM UNNECESSARY DELAYS AND EXPENSES BY PASSING THIS LEGISLATION NEXT YEAR.

THIRD, THERE ARE TWO SPECIFIC REQUIREMENTS WITHIN THE STATE BUILDING CODE WHICH CREATE SIGNIFICANT ADDITIONAL COSTS TO BUILDERS WITHOUT PROVIDING SUBSTANTIAL ADDITIONAL PROTECTIONS. FIRST, THE REQUIREMENT THAT ALL BUILDIGNS IN THE STATE, REGARDLESS OF LOCATION, CONDUCT SEISMIC EVALUATIONS AND CONSTRUCTION LEVELS, EVEN HERE ON LONG ISLAND, CAN ADD UP TO 20-25% OF THE COST OF THE BUILDING. SECOND, THE REQUIREMENT THAT AIR MODIFICATIONS BE CONTINUALLY EVALUATED AND EXCHANGED, EVEN IN BUILDINGS IN WHICH FEW PEOPLE WORK, SUCH AS WAREHOUSING FACILITIES, ADDS SUBSTANTIALLY TO THE COST OF THE DEVELOPMENT OF SUCH BUILDINGS. WE WOULD URGE A REVIEW OF BOTH OF THESE REQUIREMENTS.

FOURTH, THE PROTECTION OF STORM WTER RUNOFF HAS BECOME A MAJOR ISSUE IN MANY PLACES, WITH SIGNIFICANT REQUIREMENTS BEING IMPOSED, EVEN IN PLACES WHERE SUCH RUNOFF DOES NOT TAKE PLACE. WHILE DEC HAS CLEARLY BECOME MORE FLEXIBLE IN THIS REGARD, AND IN FACT CHANGED TWO OF THEIR REGULATIONS AS A RESULT OF THE EFFORTS OF LIBI, WE CONTINUE TO TRY AND FASHION A SYSTEM WHICH WILL ALLOW FOR THE CONTROL OF SUCH RUN OFF IN WAYS WHICH DO NOT SIGNIFICANTLY INCREASE THE COST OF DEVELOPMENT.

FIFTH, WE REMAIN CONCERNED WITH THE SUBJECTIVE NATURE OF MANY OF THE NEW QUESTIONS BEING REQUIRED AS PART OF THE ENVIRONMENTAL QUALITY REVIEW ACT FORMS WHICH WILL TAKE EFFECT NEXT MONTH. WHILE WE FULLY SUPPORT THE NEED TO UPDATE THE FORMS, IT CONTINUES TO BE OUR BELIEF THAT MANY OF THE NEW QUESTIONS ARE MORE SUBJECTIVE RATHER THAN OBJECTIVE, REQUIRING ASSUMPTIONS AND ESTIMATES ON MANY ANSWERS, WHICH COULD LEAD TO MORE AGGRESSIVE LITIGATION ON THESE ISSUES BECAUSE OF THE NATURE OF THE ANSWERS BEING PROVIDED.

SIXTH, THERE ARE MANY INSTANCES WHERE A DEVELOPER MUST NEGOTIATE WITH DEC ON SPECIFIC USES OF PART S OF THEIR PROPERTY WHICH WILL HAVE A DRAMATIC IMPACT ON THE ABILITY OF THE PROPERTY TO FULFILL THE ECONOMIC DEVELOPMENT NEEDS OF THE STATE. IN THESE CASES, SUCH AS THE RE-USE OF PROPERTY AT CALVERTON, WE BELIEVE IT IS ESSENTIAL THAT THE EMPIRE STATE DEVELOPMENT CORPORATION BE INCLDUED WIHIN SUCH DISCUSSIONS AND THE DECISION MAKING PROCESS SO THAT A BALANCE CAN BE ACHIEVED BETWEEN BOTH THE ENVIRONMENTAL AND ECONOMIC DEVELOPMENT NEEDS OF OUR COMMUNITY.

SEVENTH, THE NEED FOR AFFORDABLE HOUSING FOR OUR YOUNG PEOPLE IS AN EVER INCREASING NEED FOR OUR ECONOMIC DEVELOPMENT GOALS AND UNFORTUNATELY MOST OF THE MUNICIPALIITES ON LONG ISLAND DO NOT WANT SUCH HOUSING IN THEIR COMMUNITIES. THE NEED FOR RENTAL HOUSING ON LONG ISLAND IS FAR AND AWAY ONE OF THE MOST IMPORTANT ASPECTS OF KEEPING OUR YOUNG PEOPLE HERE AND THE INABILITY TO BUILD SUCH HOUSING IN ALL PARTS OF LONG ISLAND CONTINUES TO DAMPEN THE OPPORTUNITIES TO GROW OUR COMPANIES. OVER FORTY YEARS AGO, IN A SIMILAR SITUATION WITH REGARD TO HOUSING FOR OUR CITIZENS WITH DISABILITIES, THE NEW YORK STATE LEGISLATURE ENACTED THE PADAVAN LAW WHICH ALLOWED THE STATE TO IMPOSE A SPECIFIC PROCESS WITH REGARD TO THE DEVELOPMENT OF HOUSING FOR OUR CITIZENS BECAUSE THE MUNICIPALITIES REFUSED TO ALLOW SUCH DEVELOPMENT IN THE AMOUNT NECESSARY FOR THE NEEDS OF NEW YORK STATE. WE WOULD URGE YOU TO ONCE AGAIN LOOK AT THIS PROCESS AND INCLUDE AFFORDABLE HOUSING WITHIN THE LAW TO ENSURE THAT SUCH RENTAL HOUSING, WHICH IS IN DIRE NEED HERE, CAN BE DEVELOPED.

THE LONG ISLAND BUILDERS INSTITUTE THANKS THIS COMMITTEE FOR REVIEWING THESE REGULATORY AND LEGISLATIVE ISSUES WHICH ARE OF GREAT IMPORTANCE TO THE ABILITY OF OUR BUILDERS TO CONTINUE TO PROVIDE THE AMERICAN DREAM FOR OUR CITIZENS. YESTERDAY, LIBI AND ITS CHARITABLE ARM, LONG ISLAND HOME BUILDERS CARE DEVELOPMENT CORP, ANNOUNCED THE NAMES OF THE SIX US SERVICE VETERANS WHO WILL THE OCCUPANTS OF THE FIRST SUBDIVISION IN

THIS COUNTRY BUILT ESPECIALLY FOR RETURNING VETERANS. THE SIX HOUSES ARE BEING SOLD TO THESE AMERICAN HEROES FOR LESS THAN 50% OF THE COST OF THE HOUSE THROUGH THE DONATIONS AND WORK OR LIBI MEMBERS. WE WOULD VERY MUCH LIKE TO BE ABLE TO DO SO FOR ALL OF OUR CITIZENS WHO NEED HOUSING IN OUR COMMUNITIES AND WE ARE HOPEFUL THAT YOUR WORK WILL ALLOW US TO EXPEDITE THE BUILDING OF SUCH HOUSING NOW. THANK YOU VERY MUCH.

Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Matthew Cohen

Vice President of Government Affairs for the Long Island Association

Long Island Association
LEADING LONG ISLAND

TESTIMONY FROM THE LONG ISLAND ASSOCIATION
BY MATTHEW COHEN, VICE PRESIDENT
TO THE NEW YORK STATE SENATE COMMITTEE ON

September 25, 2013

Senator Gallivan, Senator Valesky, Senator Marchione, Senator Carlucci and members of our Long Island delegation, Senator Flanagan, Senator Marcellino, Senator Martins and Senator Boyle, thank you for the opportunity to be with you today.

My name is Matthew Cohen. I am Vice President of Legislative Affairs for the Long Island Association ("LIA"), which is the leading business organization in the region. The LIA's membership is comprised of small and large businesses, technology and manufacturing companies, universities, financial service firms, banks, credit unions, hospitals, media companies, real estate companies and sole proprietors which together employ more than one half of Long Island's workforce. Our mission is to lead the region's economic development and bring together disparate factions within the community to forge regional solutions for Long Island.

We are pleased that the Senate Majority Coalition is holding a series of public forums on regulatory reform and that you have chosen Long Island to discuss the construction industry in particular; an industry that has always been important to us and now more than ever as we continue to rebuild from the devastation of Superstorm Sandy.

While Long Island and New York State are still struggling with a slow and bumpy economic recovery, Albany has properly repurposed its focus on creating jobs and supporting the business community. We have witnessed important efforts to provide meaningful relief to our municipalities and employers through some pension and Medicaid reforms and the implementation of some modest tax cuts and a two percent property tax cap.

But there is more work to do and difficult battles to wage to create more jobs, spur private investment, reduce the property tax burden and further improve the overall business climate. That is why the input you receive at your hearings and the work you do through your committees is important to our economic future.

In addition to more tax relief for small businesses, we need common-sense reforms to antiquated regulations like the Scaffold Law and thus we have supported Senator Gallivan's legislation, Senate Bill 111. The current law imposes a standard of absolute liability upon contractors and property owners for all "gravity related" injuries. The approach advocated by the legislation would replace the absolute liability standard with the fairer comparative negligence standard only in situations where a worker's injury is found to have been caused by that worker's failure to follow safety training or use available safety devices, intoxication, or commission of a crime. Meanwhile, negligent employers will still be held fully liable and the injured worker may still collect workers' compensation benefits.

New York is the only state which retains this antiquated law originally enacted in 1885. Thus, insurance costs for construction projects in New York are higher than anywhere else in the country and many small companies cannot afford policies. Reducing these costs would allow businesses to grow, spurring job creation and investment.

In addition to construction companies, high insurance costs also impact businesses and consumers that pay hundreds of thousands of dollars to millions more to build commercial and residential projects, and our local governments and taxpayers that are forced to pay more for public infrastructure projects such as roads, bridges and the recovery from Superstorm Sandy. Or, even worse, they do not build at all. Municipalities also bear the cost of judgments and settlements when they are sued under the "Scaffold Law."

A recent article in the Associated Press cited a few startling examples of the impact of the larger insurance costs. It noted that building groups estimate that the current law will add an extra $200-$400 million to the state's replacement of the Tappan Zee Bridge; that New York City's school system says the insurance cost it incurs from the law is enough to build two new schools every year; and that in western New York, the general liability insurance premium was $380,000 to cover rehabilitation on just 23 miles of the state Thruway.

As a result, the cost of business is higher than it needs to be, there is a disincentive to invest in infrastructure and fewer jobs are created. This is one area of regulatory reform that can be addressed while not impinging upon the workplace safeguards that have been established since the original passage of the "Scaffold Law."

The State Legislature should also consider reforming the Wicks Law, which requires state and local government construction projects to issue multiple contracts for plumbing, heating/ventilation/air conditioning and electrical work with the balance of the job going to a general contractor for all public works projects.

While perhaps well-intended to promote fair competition and protect workers' rights, it has also led to expensive inefficiencies and delays, higher construction costs for municipalities and school districts, and tax pressures on the business community. According to the Report of the New York State Commission on Local Government Efficiency & Competitiveness completed in April of 2008, several studies have estimated higher costs resulting from the Wicks Law provisions and New York City had estimated at that time that it would save $3.7 billion over its ten year capital plan with a full repeal of Wicks. Other studies have indicated the Wicks Law could add anywhere from 8%-30% to the project's price tag.

In 2008, the Wicks Law was amended to set an exemption threshold of $1.5 million for Nassau, Suffolk and Westchester Counties, $3 million in New York City and $500,000 upstate. While we enjoy a good working relationship with our brothers and sisters from labor and we are not suggesting anything to hurt labor, we need to strike the right balance. The Wicks Law should either be eliminated or, in the absence of that, see its thresholds dramatically increase in order to generate significant savings and thus improve the business climate.

A third area in which regulatory reform could promote economic development and assist the business community relates to the time frame of municipal decisions for land use.

Under current Article 78 law, any delay in moving a development project forward results in additional costs to the developer because it is not feasible to secure financing and start a project while such an appeal is moving forward. This has had a deleterious effect on important development projects throughout Long Island, including Avalon in Huntington Station, The Meadows at Yaphank and New Village in Patchogue.

In total, Article 78 has jeopardized projects that represent a total economic impact in excess of $1.5 billion and has either delayed or curtailed thousands of employment opportunities. That is why we have supported Senator Jack Martins' bill, Senate Bill 985, that would require a bond be submitted by the party appealing a decision so as to protect the developer from associated costs relating to delays caused by frivolous appeals of decisions made by municipalities in favor of development projects. The proposed legislation would lower business costs and generate critical economic activity.

Expedited and streamlining the State Environmental Quality Review Act process would also be helpful. There is an unfortunate practice of municipalities to keep SEQRA hearings open even though the totality of impacts have been vetted and mitigated. Municipalities sometimes do this only to delay votes and approvals.

While there are timelines and deadlines that are set forth within the regulations implementing SEQRA, these need to be made mandatory and enforceable. The imposition of default provisions for non-compliance with timelines and deadlines would provide leverage to the private sector to expedite the approval process. We could support longer timelines and deadlines with the condition that default approvals will be a consequence of non-compliance.

It is important that local government have the ability to positively encourage improved economic conditions by expediting projects consistent with the comprehensive plan of each municipality and municipal home rule. For example, an application in conformity with, and a principal permitted use under, local zoning should have the benefit of an accelerated approval process. Similar to the re-enacted Article X law, the state should establish a fast track process for applications that also meet certain environmental criteria (such as replacement projects or pollution reduction) that address critical economic development needs.

While some sensible reforms to SEQRA could foster economic development, we do not wish to do so at the expense of protecting the environment – something we must do. We are not in any way suggesting anything anti-environment, however, the reality is that many times the SEQRA process delays or prohibits good projects that do not have a negative impact on the environment.

California has also recently sought to amend its version of SEQRA - the Environmental Quality Act - because, while it too has helped keep the air and water clean, the law has also stalled projects that would spur economic growth.

Finally, we should explore self-certifications for certain construction projects like some other states permit. Here, an engineer or architect (licensed by New York State) would certify that all plans and drawings meet or exceed all building permit requirements and, once filed with the local municipality, construction can start. The municipality can always review and/or audit the submissions and if there were any evidence of misrepresentation, then the license of the engineer or architect could be revoked by the state. This would significantly accelerate construction of single family homes, additions and certain commercial projects.

The LIA applauds the New York State Senate for passing fourteen regulatory reform bills in the last session as part of an initiative that includes these statewide public hearings to identify and eliminate costly and unnecessary government regulations that inhibit job growth and drive up property taxes. Thank you for allowing me the opportunity to testify today and I respectfully urge you to consider our recommendations during your deliberations.

Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Charles Gardner

Director of Government Affairs for the National Electrical Contractors Association, Long Island Chapter

NECA

LONG ISLAND CHAPTER
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

INCORPORATED ★ 200 PARKWAY DRIVE SOUTH, SUITE 101
HAUPPAUGE, NEW YORK 11788 ★ TEL: 631-291-9732 ★ FAX: 631-291-9757

September 25, 2013

Statement in support of New York State law that would empower Suffolk County to assume all licensing duties for electricians given at the New York State Senate Majority Coalition Hearing in Mineola

The Long Island Chapter of the National Electrical Contractors Association (LINECA) strongly supports the passage of Bill S5132/A7298 which would have Suffolk County be the sole licensing authority for electricians working in Suffolk County. The requirements of the Village of Mastic Beach and the Town of Southampton forcing electricians already licensed by Suffolk County to be "registered" or "licensed" separately by those jurisdictions are perfect examples of unnecessary governmental duplication for the sole purpose of raising revenue. Instead of using the Suffolk County law as a complement to their Code and enforcement policies, at no cost to the Town or Village, they have chosen to add a redundant layer of compliance on the backs of all contractors.

We have no dispute with the Town or Village building codes or enforcement of those codes. Our concerns are the extra fees for the registration of contractors; the burden of extra administrative costs for a contractor; and the burden of having to appear in person to pick up registration stickers, for example. It is about the illusion of more protection for consumers and the illusion that, somehow, these jurisdictions are better able to keep untrustworthy, incompetent contractors from working within their boundaries. With or without the extra license, the enforcement policies of the Town or Village and the available sanctions against incompetent contractors are exactly the same. Licenses or registrations are only issued to contractors who already possess a County license! Why require these redundant licenses, especially when there is the implication that there will be more consumer protection or, somehow, "better" licensed contractors when, in fact, there will be neither?

We need to prevent the nightmare of regulations that currently exists in Nassau County where an electrician needs more than two dozen or so licenses to work within the bounds of that County. Thank you for your consideration.

Charles Gardner
Director of Government Affairs

NECA

LONG ISLAND CHAPTER
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

INCORPORATED ★ 200 PARKWAY DRIVE SOUTH, SUITE 101
HAUPPAUGE, NEW YORK 11788 ★ TEL: 631-291-9732 ★ FAX: 631-291-9757

September 25, 2013

Statement in support of the Wicks Law given at the New York State Senate Majority Coalition Hearing held in Mineola

The Long Island Chapter of the National Electrical Contractors Association strongly protests any proposal to repeal the Wicks Law for public works projects, allowing municipalities and school districts to bid projects using a single prime contractor instead of the current multiple prime system. There is a perception that contracts for large projects will always save taxpayer dollars if let to a single, prime bidder.

The fact is that using multiple prime contractors will always result in increasing competition and eliminating third party or middleman payments, both of which are strong factors in reducing costs associated with any project. In single prime contracts, the sub-contractors – those who will actually be doing the day-to-day work – are chosen by the General Contractor. In most cases, the criteria for being chosen by the GC are not known by the customer. One might assume that the subs are being picked based on quality of work, financial stability and credibility within the industry but too often the main factor for being chosen is a low ball price to the GC. "You get what you pay for" is a cliché that is understood by all of us when applied to purchasing any goods or services.

A repeal of the Wicks Law would not help tax payers; would benefit a relatively small number of General Contractors with the resources to bid on multi-million dollar projects; and would adversely affect hundreds of union and nonunion small- and medium-sized businesses and their thousands of employees and family members. We ask that you act to protect the interests of tax payers, working families and the small businesses of New York by insuring that the State's Wicks Law remains in effect. We thank you for your attention to this serious matter and stand ready to meet with you at any time to discuss its ramifications in detail.

Charles Gardner
Director of Government Affairs

Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Artie Cipoletti

President of DaVinci Construction

DaVinci Construction, Inc.

STATE	CLASS	PAYROLL	RATE	PREMIUM	% DIFF TO NY
NY	Carpentry NOC	$450,000	$95.89	$43,150.50	
CT	Carpentry NOC	$450,000	$82.696	$37,213.20	14% lower* ($5,937.30)
MA	Carpentry NOC	$450,000	$54.469	$24,511.00	43% lower ($18,639.50)

The chart represents General Liability only and excludes umbrella, however; insurance premium percentages are the same.

Scaffold Law has had a serious impact on NY contractors. The above rates represent "preferred rates" in a top tier insurance carrier. NY rates could be significantly higher if the Contractor has had prior losses.

Any fall from an elevation of as little as a 2 x 4 pc of wood on the floor qualifies as a fall from an elevation if the injured was standing on it. These cases are absolute and regardless of whether the employee was distracted for any reason, (cell phone, radio) ... it is deemed as the employers fault.

*Caveat, this has increased over the past ten years from 40% lower as a result of the proximity to NY. Insurance companies feel that a CT contractor is likely to work in NY

State Rate comparison pricing provided by BNC Insurance Agency / Main Street America Group. The $450,000 in payroll would equate to a building or buildings equaling approximately 80,000 square feet.

This is an on-going case example:

> *"W. Siguenza vs AvalonBay vs DaVinci Construction". It is an on-going case for close to nine years now. Plaintiff is claiming he fell from a height. After nine years of testimony/depositions it was disclosed that plaintiff stepped on wood that was lying horizontally on the ground. Wood was wet from morning dew causing plaintiff to fall. Plaintiff and his co-worker were responsible for placing this material at that location the day prior. Plaintiff's co-worker walked* ***around*** *the wood that was placed on the ground while Plaintiff elected to take a short-cut* ***over*** *the wood. At this stage in the case, they are working on the amount of the settlement. The Plaintiff suffered a broken leg and would have been able to return to his duties or similar duties within 12 weeks of the injury. An amount of $650,000.00 has been offered and to date it has not been accepted.*

Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Wilbur Breslin

President and CEO of Bresling Realty Corp.

CT

Policy Decisions
MSA Main Line BOP
Rating Worksheet
State Information Recap

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--------------------------------Businessowners State Level Coverages--------------------------------

State:                          CT
IRPM:                           1
Comm Contr:                     1

Rate Version Dt:                08/15/13

----------------------------------Businessowners CT RMF Development---------------------------------

RMF Formula         IRPM Fct * Other Mod Fct * Comm Contr Fct =                                     RMF Fct
                    1.000      1.000           1.000                                                1.000

----------------------------Businessowners Loc # 1/Bldg # 1 Information-----------------------------

Loc # 1                         Bldg # 1                    State: CT

420 E PUTNAM AVE
COS COB, CT 068072561
____________________________________________________________________________________________________

Prot Class                                                  BOPTerrCd                 003
BCEG/Year Graded                99/                         Indiv Grd                 N
EQ Zone                         04                          EQ Terr                   001
EQ Tier                         2
Construct Type
Construct Yr                                                Sprinkler

# Units                         0                           # Stories                 0
# Sq. Feet                      0
Occupancy Type                                              Occupancy Usage

Deductibles
Wind/Hail Exclusion                                         Wind/Hail Ded             0%
Property Ded                                                BPP Ded
Glass Ded                       None                        Coinsurance

Location Coverage Exclusions
Business Income                 N                           Money and Securities Theft  N
Theft - BLDG                                                Theft - BPP

Building Coverage
Limit                                                       BlanketId
Valuation
Roof Valuation
Inflation Guard
Class Code                                                  Program

Business Personal Property Coverage
Limit                                                       BlanketId
Valuation
Inflation Guard
Personal Property of Others
Class Code                                                  Program
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Rate = 82.696.

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Liability Coverages

Liability Coverages for Class Code 91342 : CARPENTRY (NOC)
Liability 1-91342   Base Premium * Exposure Amt * Incr Lmt Fct * Deductible Fct * Tier Fct = Adj Base Prem Amt =
                      67.095       450.000        1.450           1.000            .850       37212.56438
                    Sub Total =                                                                               Term Prem Amt
                    37213.00                                                                                   37213.00

Total Liability LIAB-91342 premium: $37,213

Total Liability Premium: $37,213
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MA

Policy Decisions
MSA Main Line BOP
Rating Worksheet
State Information Recap

--------------------------------Businessowners State Level Coverages--------------------------------

State:	MA
IRPM:	1
Comm Contr:	1
Rate Version Dt:	09/15/12

----------------------------------Businessowners MA RMF Development----------------------------------

RMF Formula	IRPM Fct * Other Mod Fct * Comm Contr Fct = 1.000 1.000 1.000		RMF Fct 1.000

-------------------------Businessowners Loc # 1/Bldg # 1 Information-------------------------

Loc # 1 Bldg # 1 State: MA

90 MARLBOROUGH ST
BOSTON, MA 021162022

Prot Class	02	BOPTerrCd	001
BCEG/Year Graded	05/2001	Indiv Grd	N
EQ Zone	04	EQ Terr	021
EQ Tier	1		
Construct Type			
Construct Yr		Sprinkler	
# Units	0	# Stories	0
# Sq. Feet	0		
Occupancy Type		Occupancy Usage	

Deductibles

Wind/Hail Exclusion		Wind/Hail Ded	0%
Property Ded		BPP Ded	
Glass Ded	None	Coinsurance	

Location Coverage Exclusions

Business Income	N	Money and Securities Theft	N
Theft - BLDG		Theft - BPP	

Building Coverage

Limit		BlanketId	
Valuation			
Roof Valuation			
Inflation Guard			
Class Code		Program	

Business Personal Property Coverage

Limit		BlanketId	
Valuation			
Inflation Guard			
Personal Property of Others			
Class Code		Program	

Liability Coverages

Rate = 54.469.

Liability Coverages for Class Code 91342 : CARPENTRY (NOC)

Liability 1-91342	Base Premium * 43.593	Exposure Amt * 450.000	Incr Lmt Fct * 1.470	Deductible Fct * 1.000	Tier Fct = .850	Adj Base Prem Amt = 24511.25408	
	Sub Total = 24511.00						Term Prem Amt 24511.00

Total Liability LIAB-91342 premium: $24,511

Total Liability Premium: $24,511

Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Walter Pacholczak

Vice President of Government Affairs for the Associated General Contractors of New York State

New York State Senate Majority Coalition
Regulatory Reform Public Forum - Construction
Wednesday, September 25, 2013
Theodore Roosevelt Executive and Legislative Building, Mineola, NY

Walter Pacholczak – Vice President of Government Affairs, Associated General Contractors of NYS

The Associated General Contractors of New York State, LLC (AGC NYS) is the largest statewide trade association representing the unionized and non-unionized construction industry, with over 650 contractor and related firms and over 80 years of experience working with public agencies and private developers to deliver quality projects that are the lifeblood of our economy. Our members perform the majority of the public and private transportation, education, environmental and building infrastructure work in New York State.

Today's topic about regulatory reform is a continuation of an ongoing and critical dialogue between AGC NYS, Legislators, the Executive Chamber and state agencies and authorities. On behalf of the members of AGC NYS, we appreciate the opportunity to participate at today's Senate public forum.

AGC NYS regularly hosts executive level partnering meetings with state agencies and authorities including the Department of Transportation, New York State Thruway Authority, Department of Environmental Conservation, State University of New York Construction Fund, New York City School Construction Authority and others. The purpose of these meetings is for the construction industry and government to discuss the multitude of laws, rules and regulations that impact business and work on solutions to help rebuild New York's deteriorating infrastructure.

It will take a strong partnership between the construction industry, Legislature, Executive and state government to truly enact the significant reforms supported by the construction industry.

Scaffold Law

First and foremost, is a 100 year old law that is crippling the construction industry costing taxpayers hundreds of millions of dollars annually and thousands of jobs. The single most important mandate relief for the construction industry is reforming the infamous scaffold law.

No other state in the nation has an absolute liability standard like the Scaffold Law which along with recent court decisions imposes a standard of absolute liability on contractors and owners for gravity related injuries. The Scaffold Law is the only area of civil liability in New York State in which comparative negligence does not apply.

Other than Illinois, no other state has such an absolute liability standard since at least the 1940s, when workers' compensation became the norm.

Attached you will find a copy of a research project conducted by AGC NYS which includes information about the repeal of the 1995 Illinois Structural Work Act, data from the insurance industry, Bureau of Labor Statistics construction data, and insurance costs for the New York City School Construction Authority and Port Authority of New York and New Jersey, and the projected outcomes of reforming New York's Scaffold Law.

AGC NYS recommends the passage of S.111 (Gallivan) / A.3104 (Morelle)

Wick's Law

The Wick's Law mandates multiple contracts for plumbing and gas fitting; HVAC; and electric wiring and illuminating fixtures on all public construction projects in New York State involving a building where the entire value of the building work is greater than the thresholds of $3 million in NYC; $1.5 million in Nassau, Suffolk and Westchester Counties; and $500,000 for the rest of the state.

The Wick's Law is mandated on all villages, towns, cities, counties, school districts and most state agencies. Some public authorities, but not all, are covered by reference or have a version of the Wick's Law within their enabling statute found in Public Authorities Law.

For example, when building dormitories the Dormitory Authority of the State of New York (DASNY) is not fettered by the Wicks Law. However, when DASNY builds a building for the City University of New York the Wick's Law applies. Therefore, when building anything other than SUNY residence halls DASNY is generally governed by some form of the Wicks Law.

Another example is the New York City School Construction Authority (SCA) which was created nearly 25 years ago. The SCA was given their own version of the Wicks Law directly within the enabling legislation. The SCA is generally exempt from the requirement for separate contracts, but must regularly ask that the exemption continue, perform studies about the value of the exemption, and require that the proposed plumbing, electrical and HVAC (MEP) subcontractors used along with their price.

In similar fashion, The State University Construction Fund (SUCF) is authorized to bid their projects with a single prime general contractor but requires the listing of their MEP subcontractors within 48 hours of the bid opening.

The Federal Government and nearly every other State in the Nation does not have a Wicks Law. If the Wicks Law was efficient, why are certain authorities carved out and why does it need to be mandated?

AGC NYS believes that the Wicks Law is very wasteful. Over the years, studies demonstrate that there are both cost and time savings for projects if the Wicks Law is eliminated. Savings, the studies suggest, could be as high as 10% or more.

AGC NYS recommends the repeal of the Wick's Law.

Diesel Emissions Retrofit Act

In August 2006, the Legislature enacted the Diesel Emissions Reduction Act (DERA) to address the public health threat posed by diesel fuel emissions. Under DERA, diesel powered heavy duty vehicles "owned by, operated by or on behalf of, or leased by" state agencies and certain public authorities are required to use ultra low sulfur diesel fuel and the best available retrofit technology (BART) in order to reduce the emission of air pollutants.

Generally, reducing carbon emissions is sound public policy when quantifiable goals are sought and achieved. For example, the biggest impact on reducing diesel emissions is the use of ultra-low sulfur diesel fuel (ULSD) on the heavy-duty trucks and buses. Beginning with the 2007 model year, the harmful pollution from heavy-duty highway vehicles was reduced by more than 90 percent. All off road construction vehicles use ULSD.

The second significant public policy is the Environmental Protection Agency's regulations lowering particulate matter of heavy-duty diesel trucks and busses. The implementation of this emissions regulation has lowered particulate matter on model year trucks 2007 and newer to .01 grams per brake horsepower hour. On average, heavy highway prime contractors replace vehicles every 6 to 8 years.

With the new federal ULSD standards and 2007 emissions regulations, DERA is a mandate that should be repealed. If fully implemented, DERA would keep older and less efficient trucks on the road and impose a costly mandate on the construction industry. Additionally, from a business perspective the diesel emissions retrofit industry is rapidly declining for the following reasons. Federal funding for the diesel emissions retrofit program has essentially evaporated and the state of California has delayed BART implementation due to the enormous fiscal impact on business.

Therefore, without federal funding and the California regulation the diesel emissions retrofit industry is no longer capable of providing the filters, installation and required maintenance services. Companies such as Clear Air Incorporated (Iowa), Donaldson Filtration Systems (Minnesota) and the ESW Group (Pennsylvania) are and have exited the diesel retrofit market.

The past several state budgets have extended the effective date of DERA, most recently until December 31, 2014. AGC NYS recommends the passage of S.2436 (Ranzenhofer). This legislation repeals this unfunded and costly mandate.

Timely Notice of Prevailing Wage Violations

Section 223 of the labor law makes prime contractors responsible for a subcontractor's failure to pay prevailing wages to its employees. However, that statute does not contain a requirement to notify the general contractor of such underpayment in a timely manner. Often, a prime contractor is notified about an underpayment years later - long after the offending subcontractor has been paid, left the job and is no longer in business. Simple fairness dictates that if the prime contractor is to be responsible for the subcontractor's failings, there should be reasonable notice of the underpayment. This would allow the prime contractor to take the necessary steps to obtain payment by the subcontractor.

Legislation introduced by Senator Ranzenhofer and Assemblyman Zebrowski would allow notification of the prevailing wage violation to the contractor and permit quicker payments to workers.

Amending Labor Law section 223 would bring consistency with Labor Law section 220-g which provides that if an unpaid worker is to file on the prime contractor's payment bond, they must do so within "one year of the last alleged underpayment." This legislation harmonizes section 223 with 220-g.

AGC NYS recommends the passage of S.2546 (Ranzenhofer) / A.1301 (Zebrowski). This bill mandates that a contractor be given timely notification of allegations of underpayment by a sub-contractor in order to hold that contractor liable.

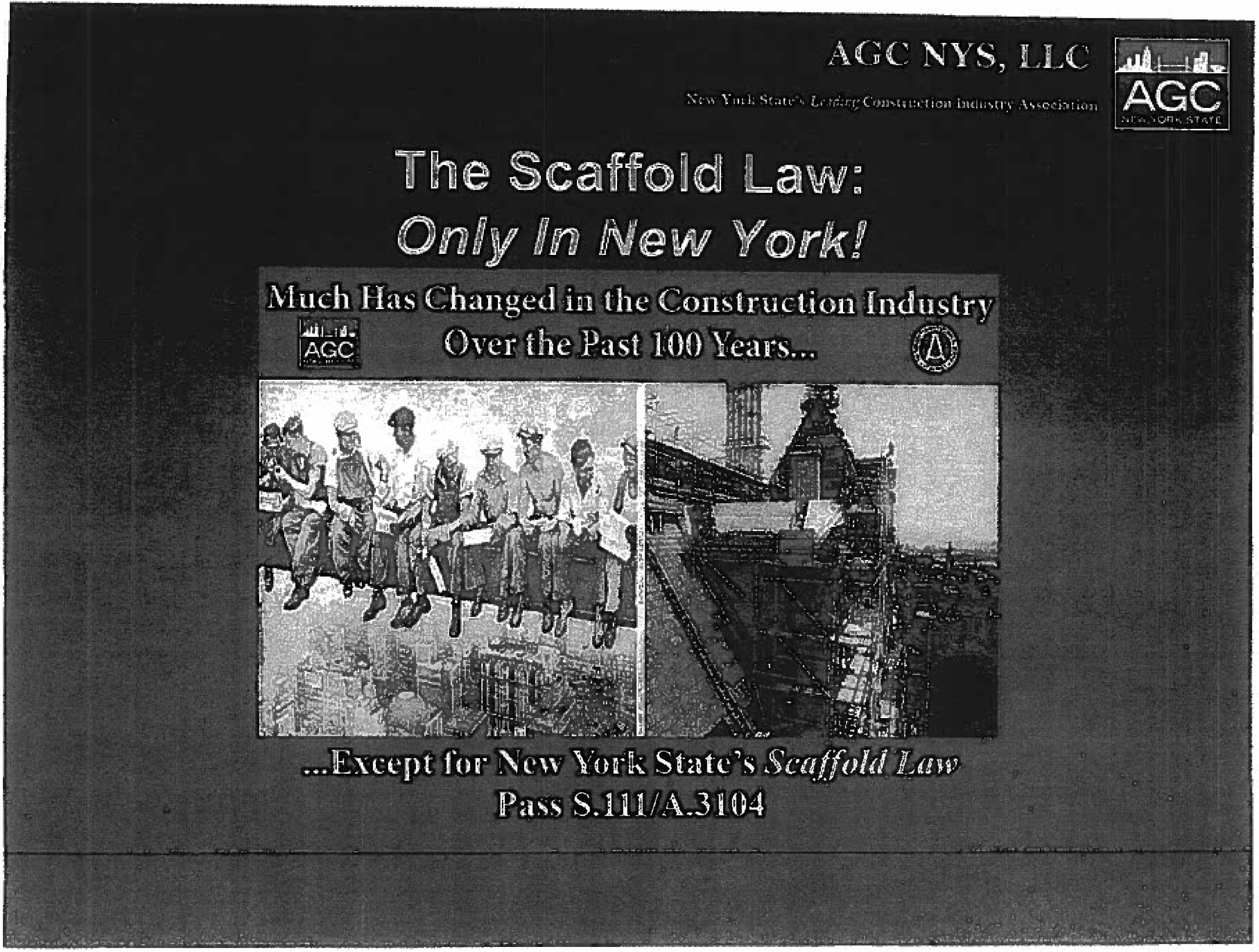
Budget Bulletin B1184 Revised

Budget Bulletin B1184 establishes revised guidelines for the implementation of agency contracts, capital, non-personal service, and local assistance spending controls for transactions valued at or above $500.

While we appreciate the need to better control government spending, this relatively new budget requirement prohibiting overtime work for state employees adds weeks and sometimes months to starting every project.

Due to the nature of the construction industry, AGC NYS recommends providing state agencies the flexibility to permit state employees to work overtime on construction contract.

In conclusion, thank you for the opportunity to discuss these costly mandates and provide the Committee with solutions to improve New York's business climate to create new jobs. The members and staff of AGC NYS look forward to continuing this dialogue and implementing the recommendations presented today.



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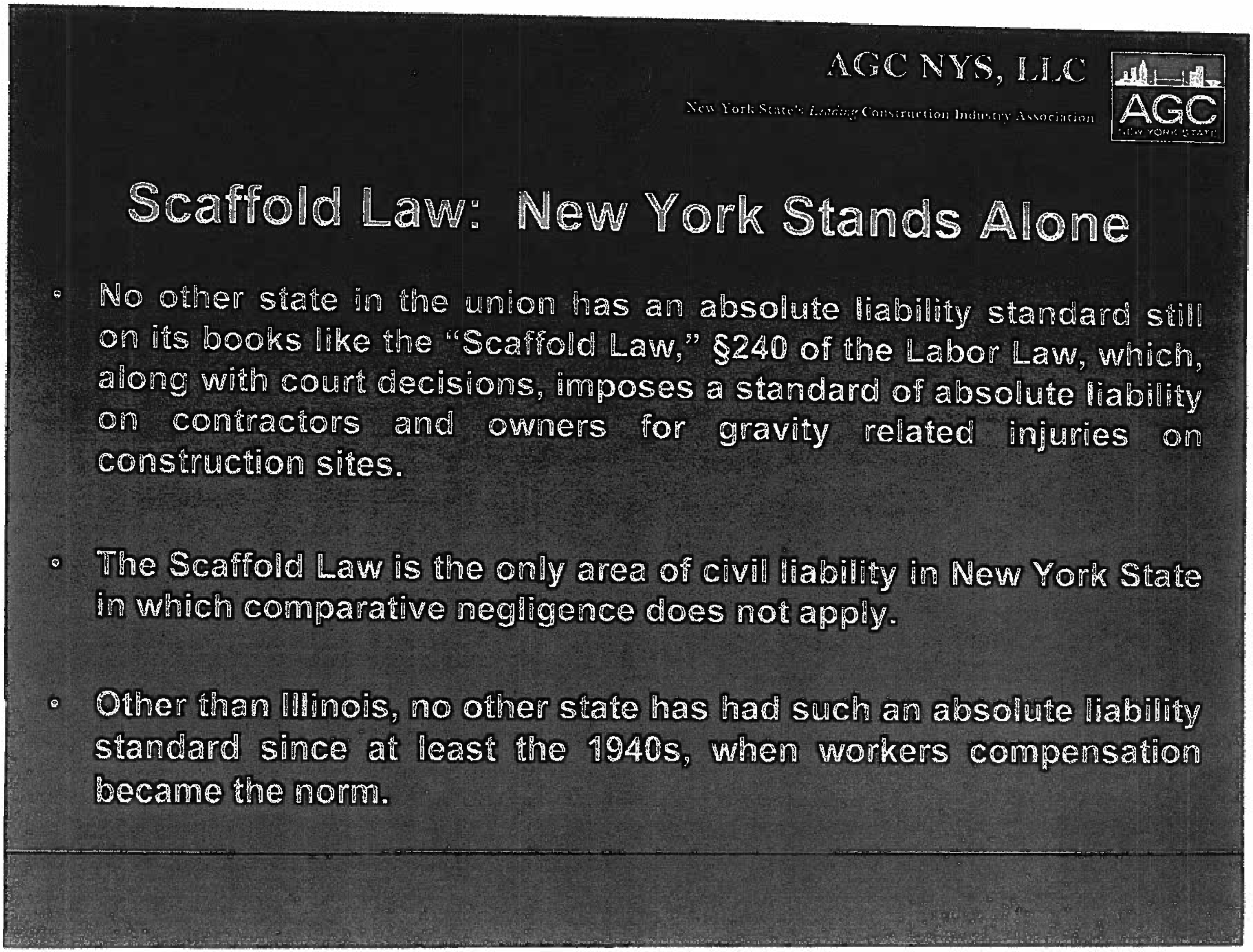
The Scaffold Law:
Only In New York!

Much Has Changed in the Construction Industry

Over the Past 100 Years...

...Except for New York State's *Scaffold Law*

Pass S.111/A.3104

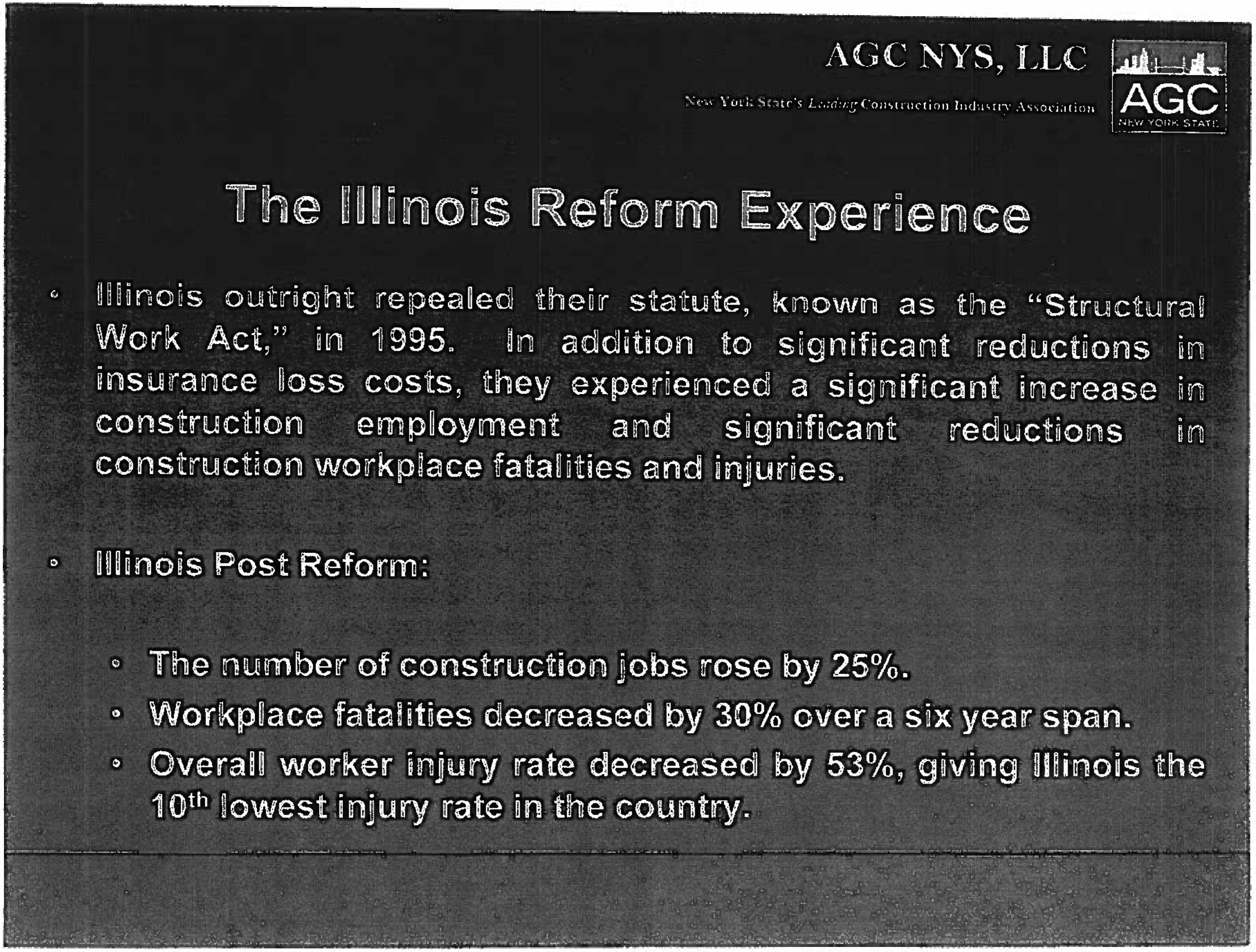


Scaffold Law: New York Stands Alone

- No other state in the union has an absolute liability standard still on its books like the "Scaffold Law," §240 of the Labor Law, which, along with court decisions, imposes a standard of absolute liability on contractors and owners for gravity related injuries on construction sites.

- The Scaffold Law is the only area of civil liability in New York State in which comparative negligence does not apply.

- Other than Illinois, no other state has had such an absolute liability standard since at least the 1940s, when workers compensation became the norm.



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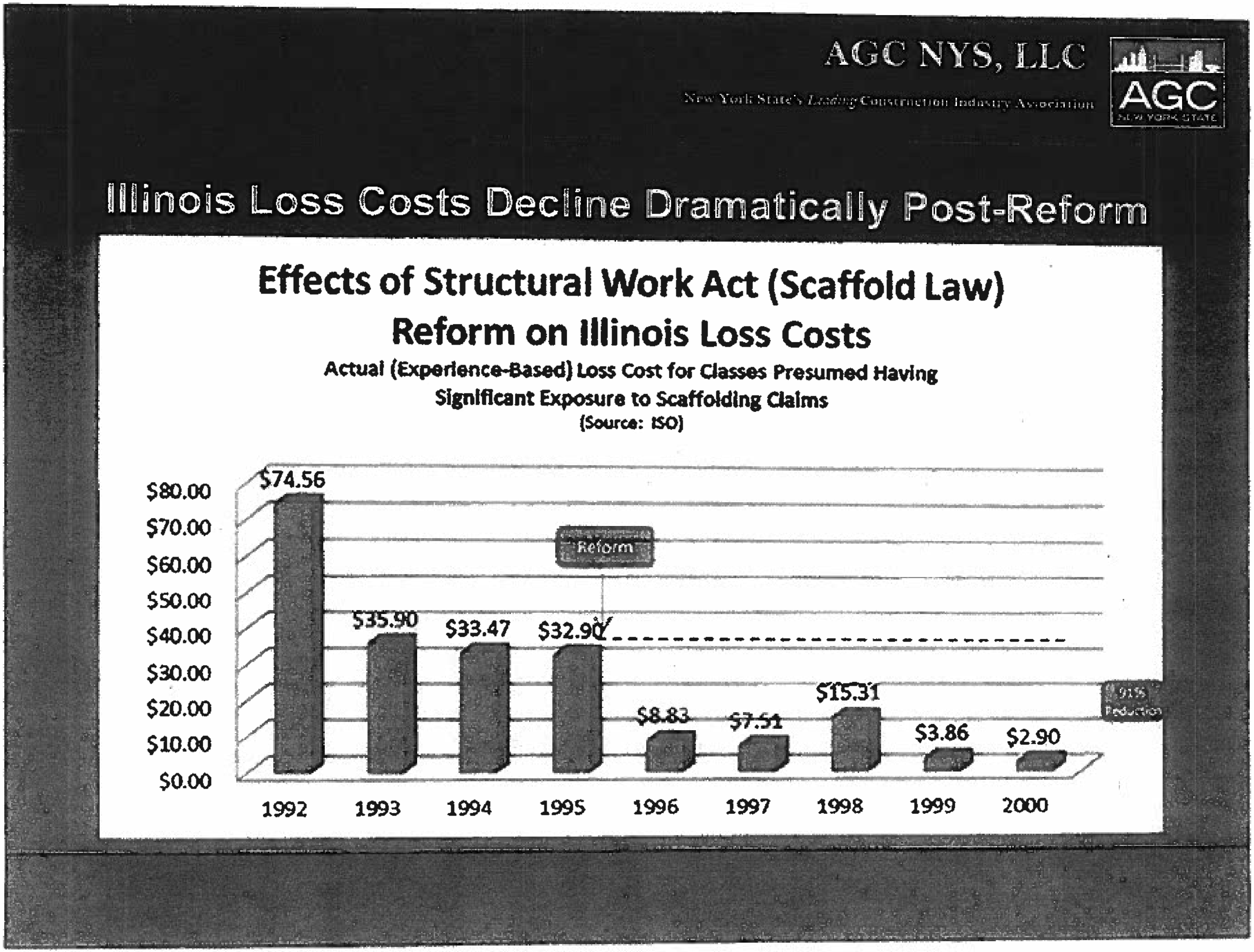
The Illinois Reform Experience

- Illinois outright repealed their statute, known as the "Structural Work Act," in 1995. In addition to significant reductions in insurance loss costs, they experienced a significant increase in construction employment and significant reductions in construction workplace fatalities and injuries.

- Illinois Post Reform:

  - The number of construction jobs rose by 25%.
  - Workplace fatalities decreased by 30% over a six year span.
  - Overall worker injury rate decreased by 53%, giving Illinois the 10th lowest injury rate in the country.



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Illinois Loss Costs Decline Dramatically Post-Reform

Effects of Structural Work Act (Scaffold Law) Reform on Illinois Loss Costs

Actual (Experience-Based) Loss Cost for Classes Presumed Having Significant Exposure to Scaffolding Claims

(Source: ISO)

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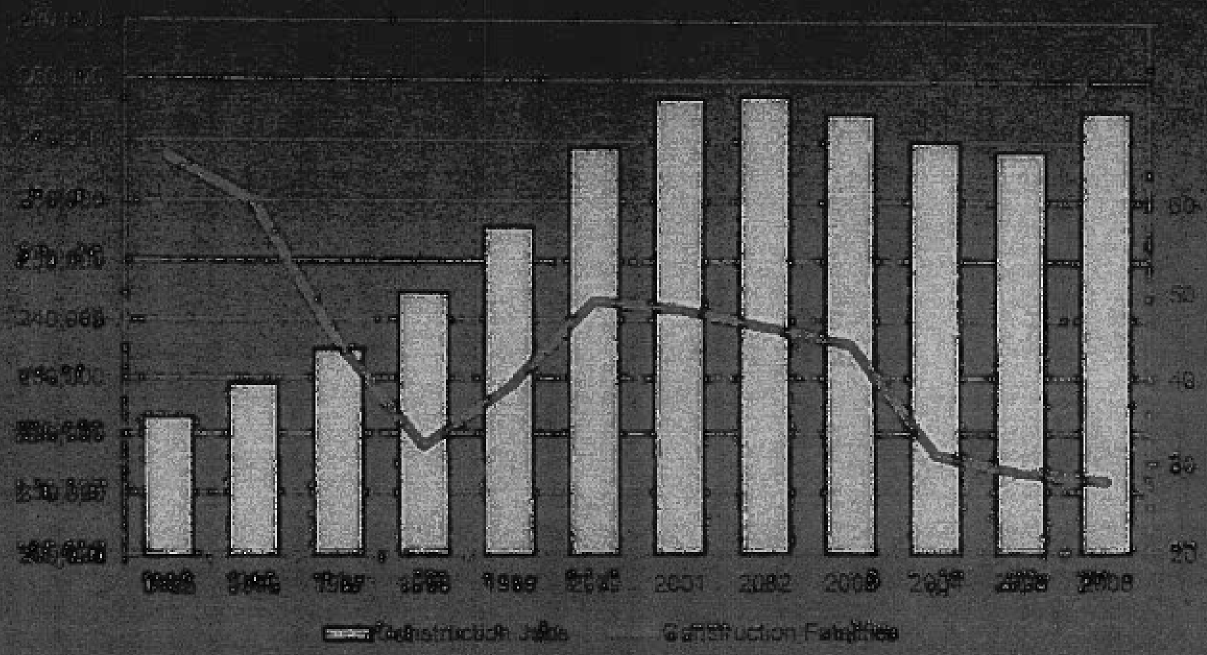
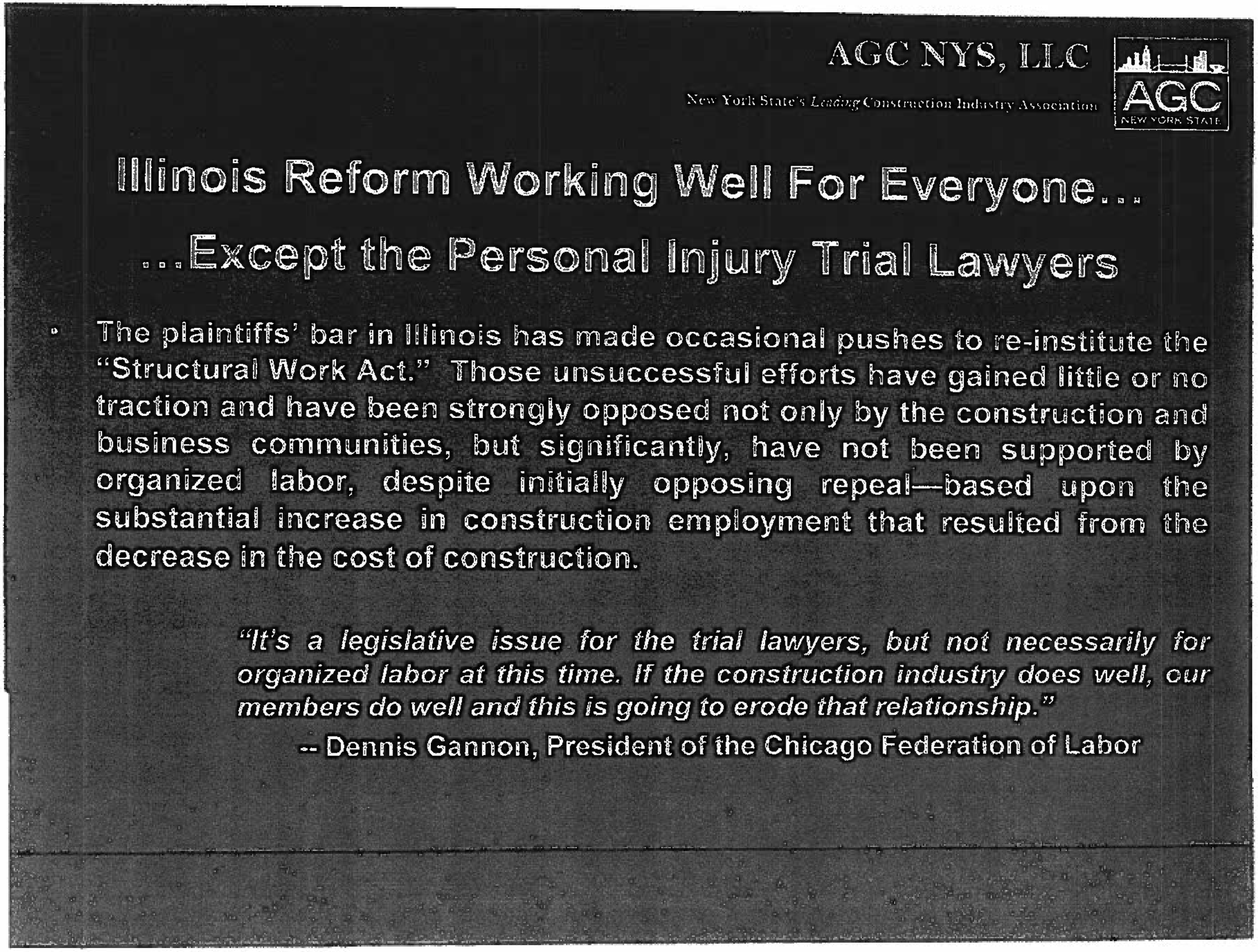
Illinois Increases Construction Employment While Reducing Fatalities Post Reform





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Illinois Reform Working Well For Everyone…

…Except the Personal Injury Trial Lawyers

- The plaintiffs' bar in Illinois has made occasional pushes to re-institute the "Structural Work Act." Those unsuccessful efforts have gained little or no traction and have been strongly opposed not only by the construction and business communities, but significantly, have not been supported by organized labor, despite initially opposing repeal—based upon the substantial increase in construction employment that resulted from the decrease in the cost of construction.

> *"It's a legislative issue for the trial lawyers, but not necessarily for organized labor at this time. If the construction industry does well, our members do well and this is going to erode that relationship."*
>
> -- Dennis Gannon, President of the Chicago Federation of Labor

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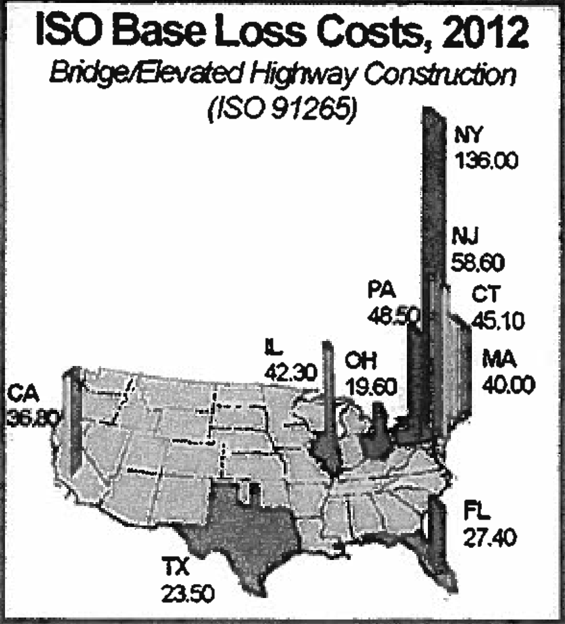
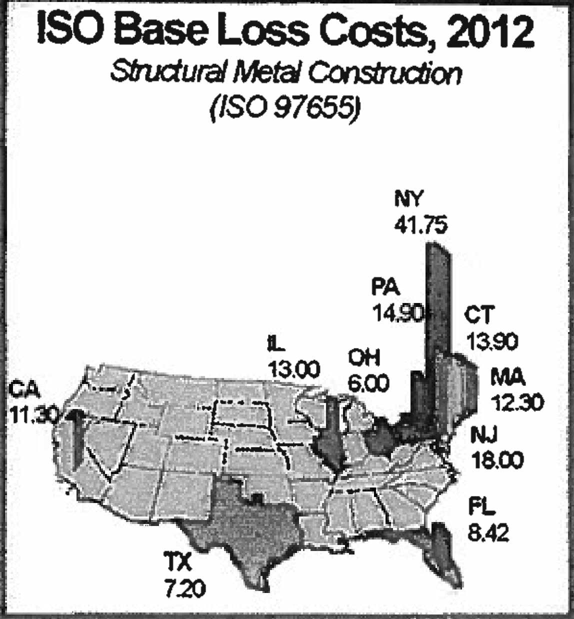
The Scaffold Law: Sending New York's Construction Base Loss Costs Into the Stratosphere



ISO Base Loss Costs, 2012

Bridge/Elevated Highway Construction
(ISO 91265)

NY
136.00
NJ
58.60
PA
48.50
CT
45.10
IL
42.30
OH
19.60
MA
40.00
CA
36.80
FL
27.40
TX
23.50



ISO Base Loss Costs, 2012

Structural Metal Construction
(ISO 97655)

NY
41.75
PA
14.90
CT
13.90
IL
13.00
OH
6.00
MA
12.30
CA
11.30
NJ
18.00
FL
8.42
TX
7.20

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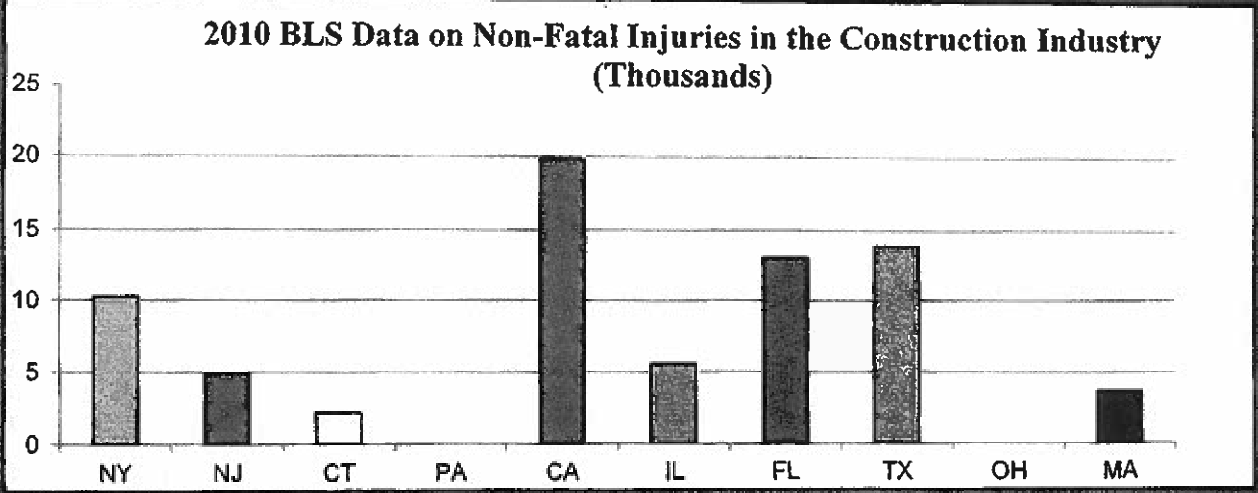
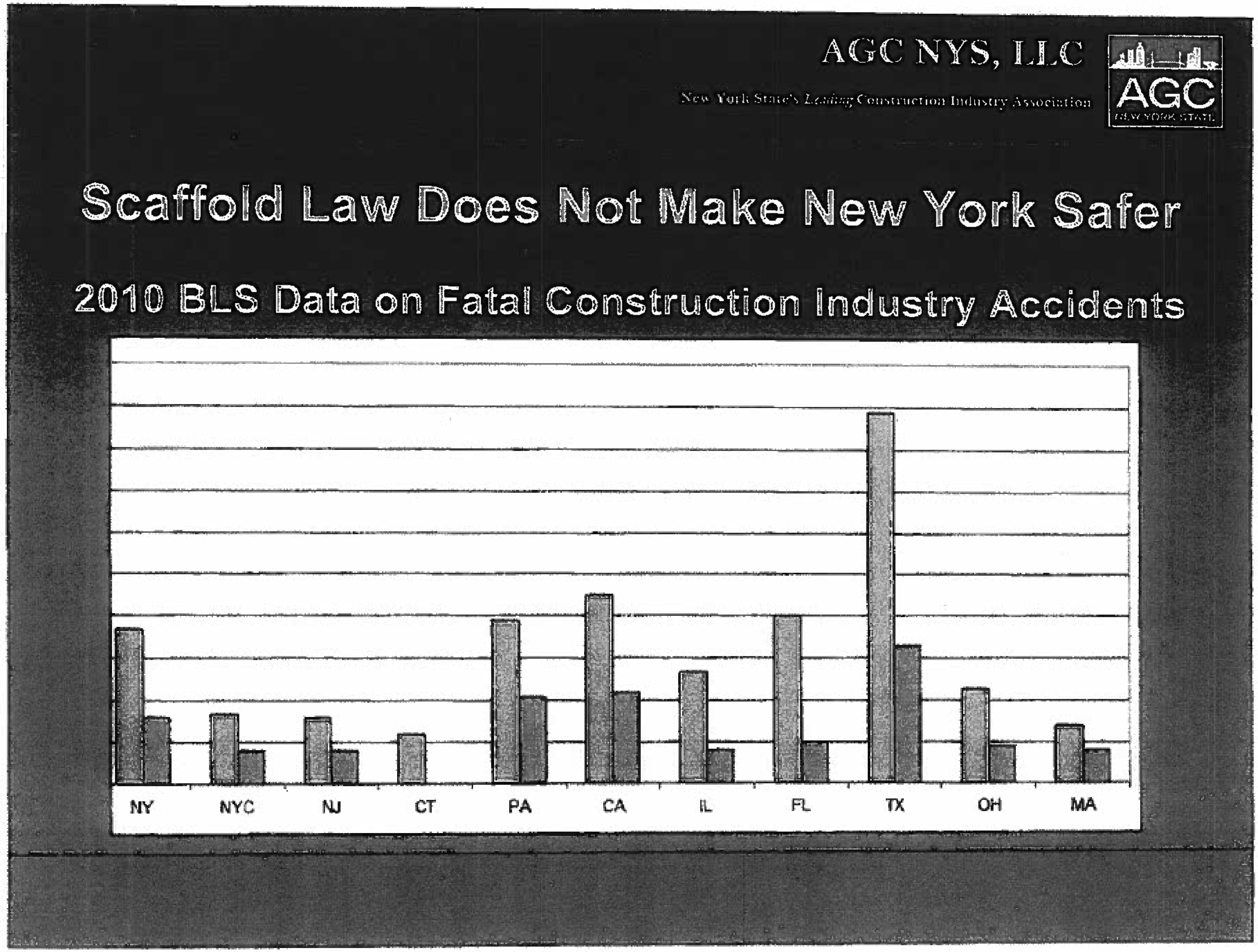
Costs Not Proportional to Injuries

- The previous charts show a significantly higher loss cost rate in New York than in other states in every construction class, except for carpentry, which again typically has the least elevation of the construction classes. Why is this? Is construction work at elevation more dangerous in New York than in the other states? Is gravity stronger here? The most recent data available from the Bureau of Labor Statistics clearly says "no."





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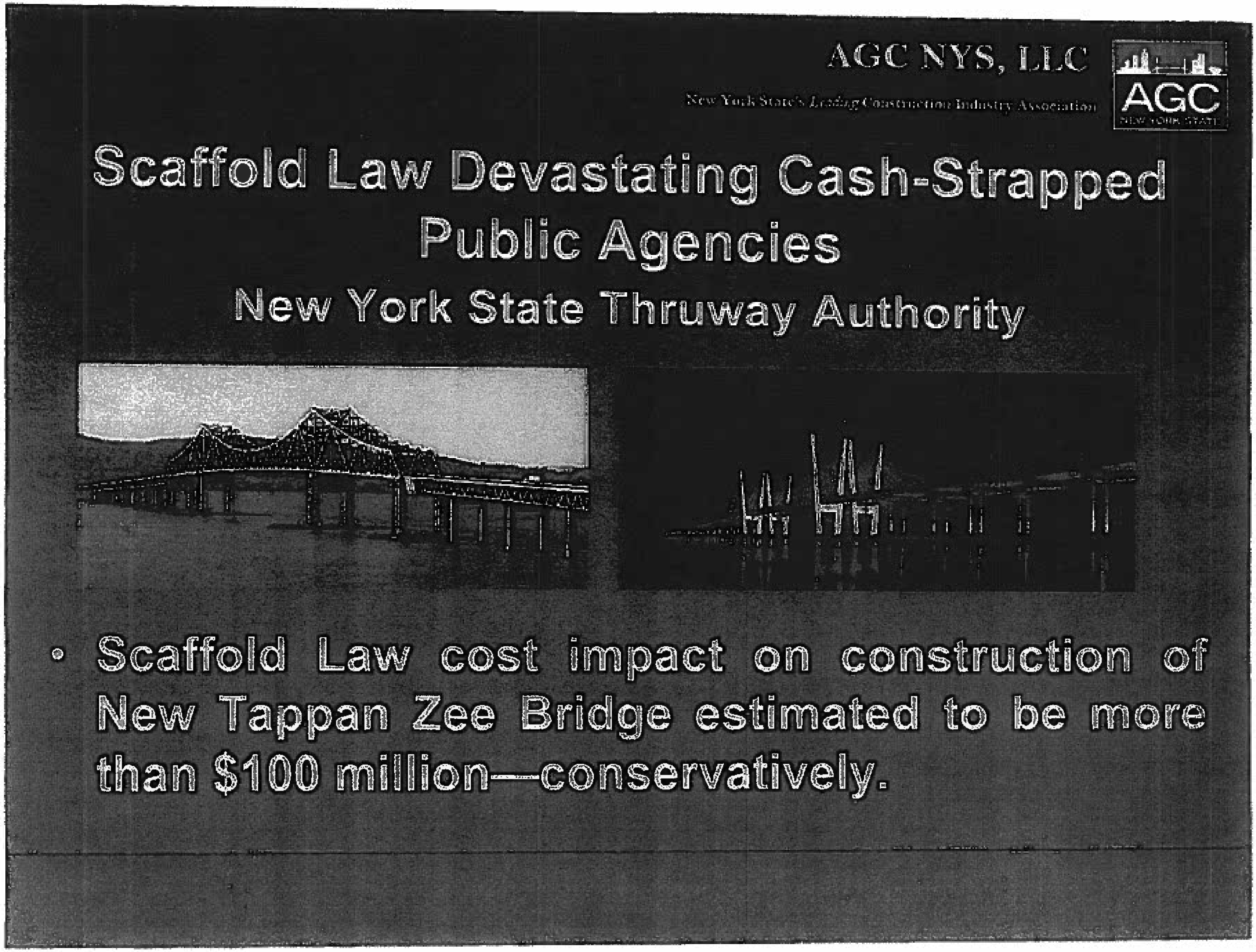
Scaffold Law Does Not Make New York Safer

2010 BLS Data on Fatal Construction Industry Accidents



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Scaffold Law Devastating Cash-Strapped Public Agencies

New York State Thruway Authority

- Scaffold Law cost impact on construction of New Tappan Zee Bridge estimated to be more than $100 million—conservatively.

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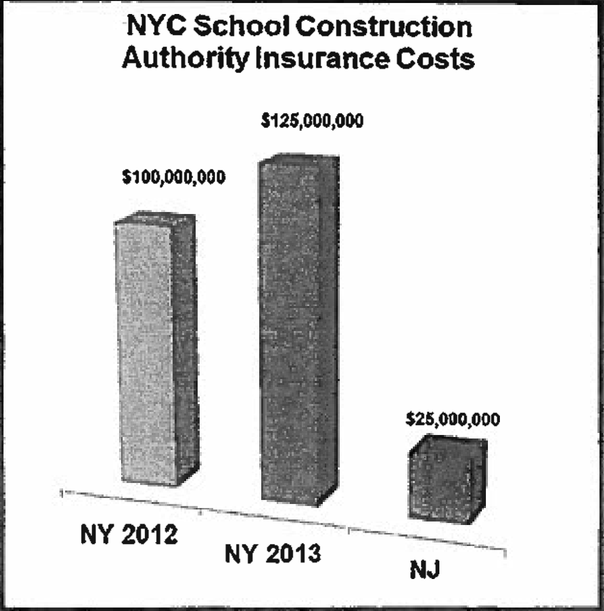
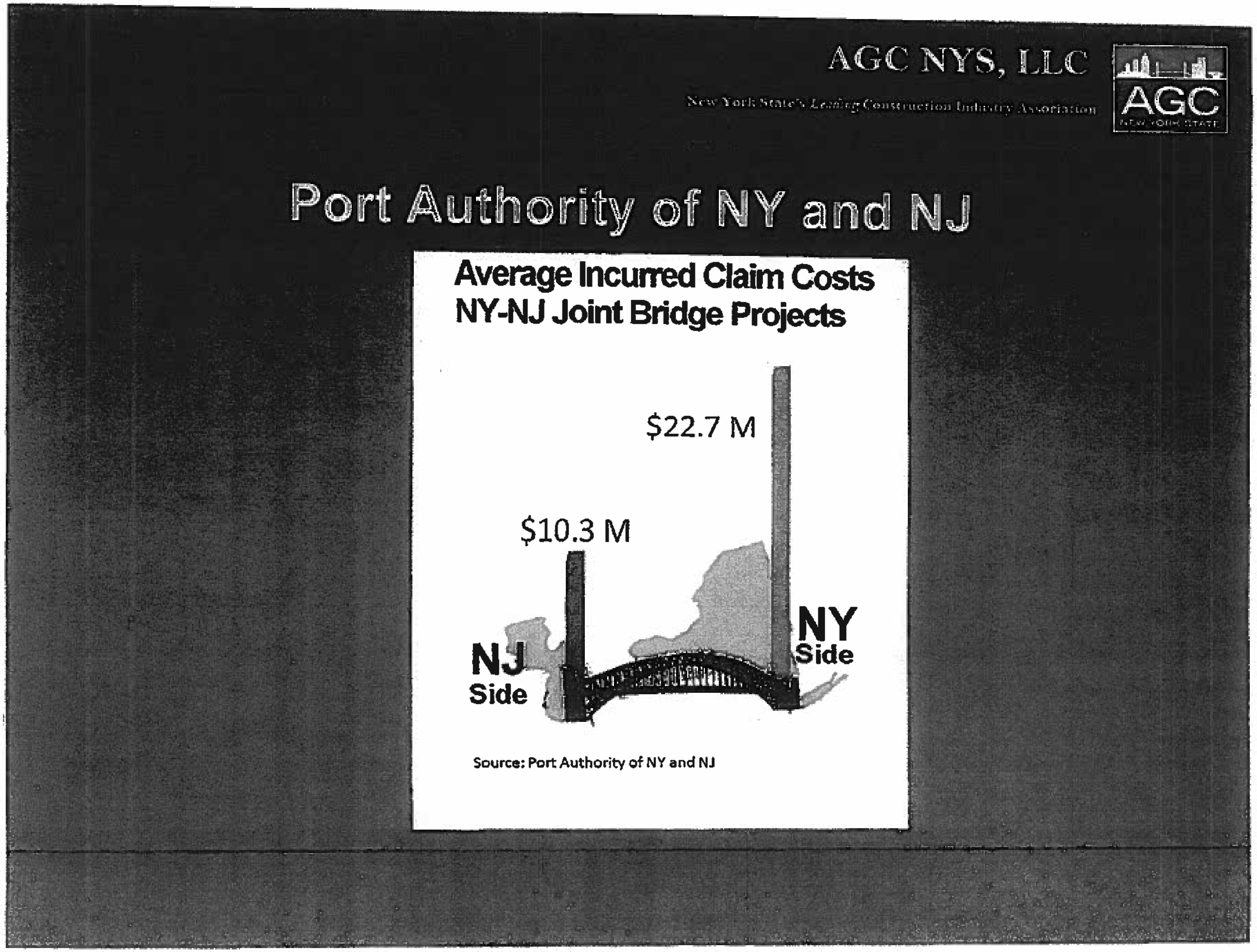
New York City School Construction Authority



"We could build another two or three schools a year for all the extra money we're spending on insurance."

-- *Ross Holden, Vice President and General Counsel, NYC School Construction Authority*



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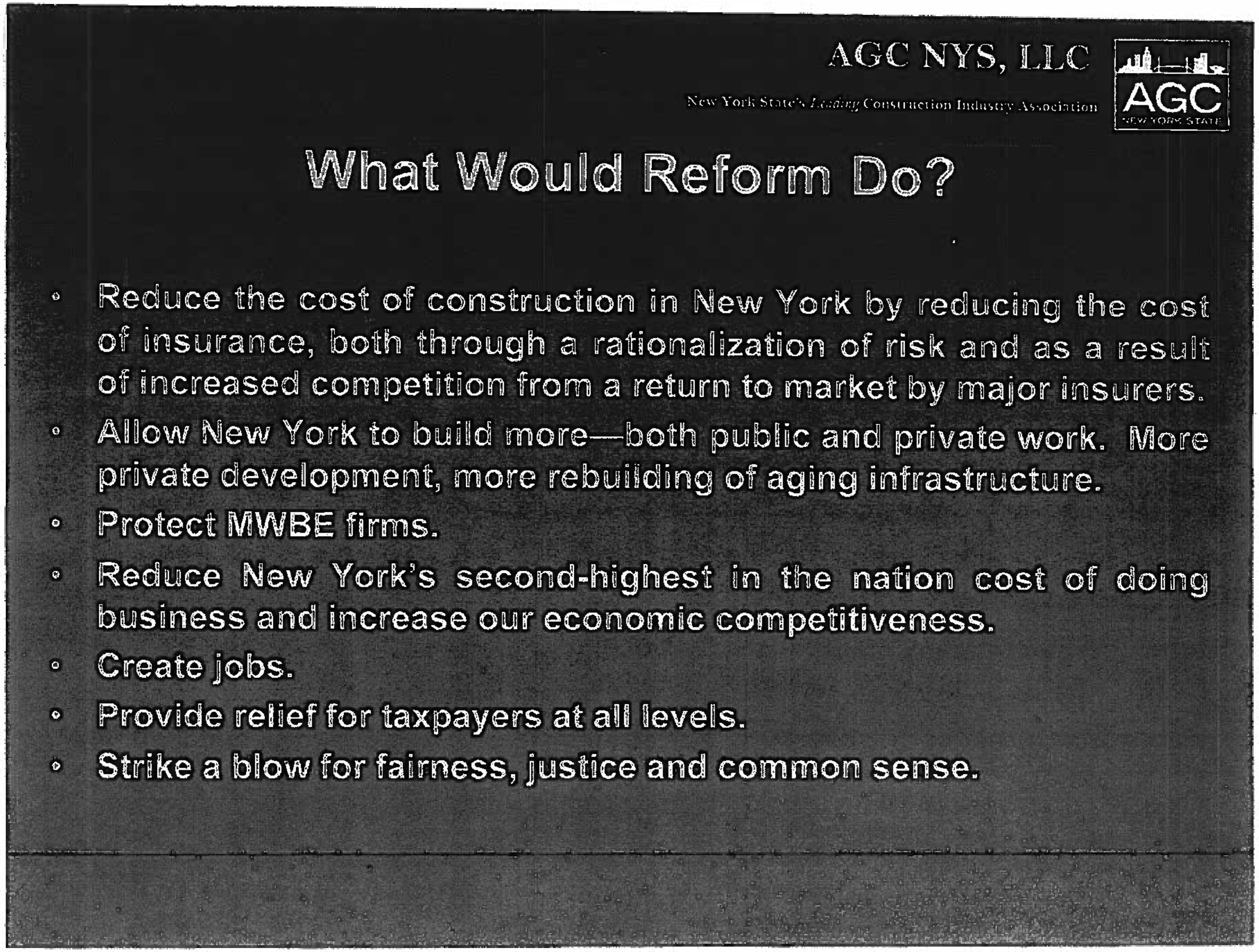
Port Authority of NY and NJ

Average Incurred Claim Costs NY-NJ Joint Bridge Projects

Source: Port Authority of NY and NJ



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What Would Reform Do?

- Reduce the cost of construction in New York by reducing the cost of insurance, both through a rationalization of risk and as a result of increased competition from a return to market by major insurers.
- Allow New York to build more—both public and private work. More private development, more rebuilding of aging infrastructure.
- Protect MWBE firms.
- Reduce New York's second-highest in the nation cost of doing business and increase our economic competitiveness.
- Create jobs.
- Provide relief for taxpayers at all levels.
- Strike a blow for fairness, justice and common sense.

Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Stephen LeFebvre

President of the Associated Builders and Contractors, Inc. ,Empire State Chapter

ABC
Associated Builders
and Contractors, Inc.

**Empire State
Chapter**

**Associated Builders and Contractors
Empire State Chapter**

Senate Regulatory Reform Public Forum – Construction Industry Hearing

September 25, 2013

Testimony given by Stephen Lefebvre – President, ABC Empire State

Thank you Senator Gallivan and members of the panel for the opportunity to present the Associated Builders and Contractors' testimony, as you seek input to identify specific regulations that can be repealed or modified to make New York more business friendly toward the construction industry.

The Empire State Chapter of the Associated Builders and Contractors is a trade association representing hundreds of New York state contractors and industry-related firms which employ thousands of New Yorkers. ABC is founded on the merit shop philosophy, which encourages the traditional American values of free-enterprise and open competition in the construction sector.

We believe that government regulation should be crafted to protect the system of open competition by ensuring a fair and level playing field that is competitive and promotes safety and quality in construction work. In a perfect world, government regulation would work to ensure construction is performed safely, ethically and competitively, regardless of labor affiliation for the benefit of taxpayers in the communities where contractors work and live. The general feeling from the membership of ABC is that there are a number of regulations in place and policies implemented by our state agencies that prohibit or at the least prove onerous for the construction industry to contend with.

Chief among our concerns is the continued existence of the draconian "scaffold law" which I know members of this panel are very familiar with. I want to applaud and thank Chairman Gallivan for being the leading Senator on the fight to reform Section 240/241 to introduce comparative negligence to the current law (S111 / A3104). As it exists today, scaffold law has created a situation where we are not only facing a crisis of cost, but now it has become a crisis of availability as more and more insurance companies are pulling out of the market or devising clever liability insurance plans that exclude 240/241 from their policies –a move which exacerbates the problem. This situation drives up the cost of construction to levels that are not attainable by many firms and those that can afford the coverage find that many owners will scale back the size and scope of construction based on higher bids. This situation negatively impacts work in private sector construction as well as the public sector with the building of schools, bridges and more as absolute liability applies to any project. The cost to taxpayers is daunting and as an example, I would like to point to claims by experts who have estimated scaffold law, absolute liability insurance, accounts for as much as $500 million of total cost of the new Tappan Zee Bridge. By reforming Section 240/241 of the state Labor Law, NY would stand to see significant economic benefits and still ensure workers are protected. I encourage you to continue the efforts to work with your Assembly counterparts to bring about this much needed reform.

In terms of specific regulations affecting the construction industry, I would like to call your attention to an impediment that many contractors face when complying with the state Department of Labor's annualization of benefits mandate. Contractors working on public projects must pay prevailing wage fringe supplements to a bona fide benefit program. Annualization forces the contractor to calculate the total hours worked, on both public and private jobs, and must divide the actual amount contributed by the total number of hours worked to determine the hourly cash equivalent of prevailing wage fringe paid to that employee. If this calculated hourly cash equivalent is less than the posted prevailing wage fringe supplement rate, the employer is deemed to have underpaid the required fringe supplements. This is often the case because private work hours are annualized into the fringe benefit calculation. The only way to avoid annualization is for the contractor to pay the fringe benefit as a cash supplement in the employee's paycheck. This growing practice eliminates the annualization on private work, but exposes the employee to higher income taxes and the employer to higher payroll taxes and other burdens such as worker comp insurance which is based on payroll.

ABC is strongly in support of annualization reform. We believe that creating greater consistency between State law and the Federal Davis-Bacon Act, including adoption of the federal annualization methodology, will go a long way toward removing an impediment to business growth and providing employees with the benefits our prevailing wage laws were designed to encourage. As you are aware, the state Senate passed S.3361 by Senator DeFrancisco, which is a legislative solution to address the problem and I would encourage you to push the Assembly (A.7800) for adoption of the bill; however, I also suggest that some persuasion from you might help to encourage the state DOL to make these changes administratively.

A final regulation that ABC supports would be the halt of the mandated use of project labor agreements and instead adopt a neutrality option as outlined in the "Public Construction Savings Pilot Act" (S.3484-A/A.6523), sponsored by Senator Michael Ranzenhofer and Assemblymember Robin Schimminger.

Less than 30% of the construction workforce in NYS is unionized. This pilot legislation would only affect construction projects initiated by state agencies and public authorities as they relate to project labor agreements. A project labor agreement ("PLA") is a pre-hire agreement, negotiated between a public owner and building trade unions, whereby the contractor is required to hire the vast majority of project workers (usually 85%) through union hiring halls. In exchange, unions agree not to strike and also agree to certain work rule changes in an effort to reduce costs.

PLAs are unfair to merit shop or non-union contractors because a PLA forces the contractor to use a majority of union labor thus idling the vast majority of the non-union contractor's employees. This fact alone results in many open shop contractors refusing to bid on public projects resulting in a lower number of bidders, less competition and an estimated cost increase of 12-20%. In addition, the purported savings from PLAs are illusory. Merit-shop employees do not strike and are not subject to conflicting and onerous work rules. Such issues are frequently used to justify PLAs even though such comparisons with non-union firms are irrelevant. PLAs are a gift to organized labor.

Mistakenly, PLAs are often tied to payment of prevailing wage. All contractors must pay prevailing wage on any public project regardless of a PLA on the project.

Even worse, there is strong evidence that PLAs do not save money for taxpayers and the "feasibility studies" which purport to identify such savings are often little more than subjective opinion masquerading as fact. There have been instances - notably in 2011 on the state Department of Transportation's ("DOT") Exit 122 project – where such studies have been manipulated to bring about a result desired by PLA proponents. The Exit 122 project in Orange County is a perfect case in point. The lowest bidder on that job – by $4.5 million – was denied that job by the DOT despite meeting all qualifications, because the low bid contractor refused to utilize a PLA. The matter is still the subject of litigation which has delayed this important infrastructure improvement.

The Public Construction Pilot Act seeks to avoid these disputes by simply allowing a contractor to enter a responsive bid regardless of whether he agrees to utilize a PLA. PLAs would be completely optional to the contractor and the lowest responsive bidder would be awarded the job. The bill also will sunset after five years to allow a thorough review of the effectiveness of this provision. Lastly, the legislation would only impact construction contracts for buildings and transportation projects that are entered into by state agencies and authorities. This common sense, simple approach will go far in helping put more New York construction employees back to work and will measure the real impact to the taxpayers in NY.

In conclusion today, the regulatory changes I have provided for your consideration seek to simply ensure a fair and competitive field that would promote safety, quality and competitiveness resulting in job growth. Your adoption of these proposals would do great justice to all NY workers in the construction industry regardless of labor affiliation. I thank you for your time and I would be happy to answer any questions you may have.

New York State Annualization Regulations

	NY		NYS PW	NYS PW				PW	Employer		"Cash"
Name	Public	Total	Fringe	Subject to	ER PAID	Average	Fringe In	Fringe In	Paid	Annualization	Annualization
(Last, First)	Hours	Hours	Earned	Annualization	Insurance	Fringe Rate/hr	Paycheck/hr	Benefits/hr	Benefits/hr	Underpmt/hr	Underpayment
						"A"	"B"	"C"	"D"	"=A-B-C-D"	"x Public Hours"
Mr. 20% NYS PW work	300.00	1,500.00	$ 6,000.00	$ 6,000.00	$ 5,760.00	$ 20.00	$ -	$ 4.00	$ 3.84	$ 12.16	$ 3,648.00
Mr. 50% NYS PW work	750.00	1,500.00	$ 15,000.00	$ 15,000.00	$ 3,600.00	$ 20.00	$ -	$ 10.00	$ 2.40	$ 7.60	$ 5,700.00
Mr. 80% NYS PW work	1,200.00	1,500.00	$ 24,000.00	$ 24,000.00	$ 1,440.00	$ 20.00	$ -	$ 16.00	$ 0.96	$ 3.04	$ 3,648.00

The bottom line is that NYS Annualization Regulations artifically force higher cash annualization underpayments, given an equal amount of hours, supplements and employer contributions.

Davis Bacon Annualization Regulations

	NY		NYS PW	NYS PW			Davis Bacon	PW	Employer		"Cash"
Name	Public	Total	Fringe	Subject to	ER PAID	Average	Cash Fringe	Fringe In	Paid	Annualization	Annualization
(Last, First)	Hours	Hours	Earned	Annualization	Insurance	Fringe Rate/hr	Credit/hr	Benefits/hr	Benefits/hr	Underpmt/hr	Underpayment
						"A"	"B"	"C"	"D"	"=A-B-C-D"	"x Public Hours"
Mr. 20% NYS PW work	300.00	1,500.00	$ 6,000.00	$ 1,440.00	$ 5,760.00	$ 20.00	$ 15.20	$ 0.96	$ 3.84	$ -	$ -
Mr. 50% NYS PW work	750.00	1,500.00	$ 15,000.00	$ 3,600.00	$ 3,600.00	$ 20.00	$ 15.20	$ 2.40	$ 2.40	$ -	$ -
Mr. 80% NYS PW work	1,200.00	1,500.00	$ 24,000.00	$ 5,760.00	$ 1,440.00	$ 20.00	$ 15.20	$ 3.84	$ 0.96	$ -	$ -

Assumptions:

1. The Prevailing Wage fringe supplement rate is $20 per hour on all NY Prevailing Wage hours.
2. Insurance costs $600 per month, $7,200 per year.
3. The emnployer contributes $4.80 per non-NY Prevailing Wage hour towards the insurance premium.
4. $4.80/hr of Prevailing Wage Fringe Supplements are allocated for insurance premiums. The remainder is sent to a fully vested profit sharing plan.

Notes:

A. Only prevailing wage fringe supplements used to purchase bona fide benefits are Annualized under both NYSDOL and USDOL (Davis-Bacon) regulations.

B. NYSDOL Annualization procedures are "less than clear" and contradictory, whereas USDOL (Davis-Bacon) are written, clear and consistent.

C. NYS Annualization calculation results in the prevailing wage fringe supplement rate ("A" scale) being paid on all private hours worked by a non-union contractor. In contrast, union contractors pay the "A" scale on public work, but often times utilize a "B" scale, "commercial" rates, "residential" rates, or "market recovery" rates on non- public work.

D. NYS Annualization calculation forces many non-union employers to place the stipulated NYS prevailing wage fringe supplements directly into the employee's paychecks. This has two effects. First, in order to be in complete and unquestionable compliance, some contractors will pay fringe supplements in cash and provide no benefits. This forces the contractor to pay "payroll" burden on these additional deposits making them less competitive in the bidding for these public jobs.

E. Giving "cash credit" to contractors for fringe supplements placed into a fully vested retirement plan, paid as a vacation benefit or paid as a supplemental unemployment benefit (all Davis-Bacon techniques/methodology) dramatically reduces the contractors hourly benefit requirement on the private hours worked. This would be more in line with the different rates and scales used by union contractors on private work.

Associated Builders and Contractors, Inc.

Empire State
Chapter

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East Syracuse, NY 13057
www.abcnys.org
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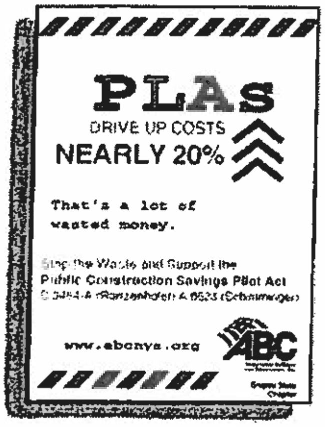
2014 Legislative Priorities

A Plan to Rebuild the Empire State

We are the Empire State Chapter of Associated Builders and Contractors, a national construction association devoted to merit contractors. ABC is a resource for over 25,000 merit contractors and other construction industry professionals committed to safety, training, employee benefits, and community involvement. ABC is also committed to protecting and enhancing free enterprise and the merit philosophy in the construction industry.

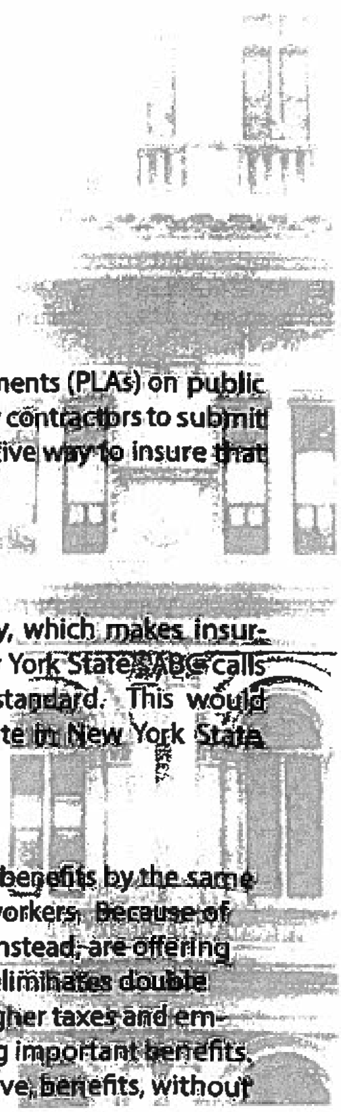

PLAs
DRIVE UP COSTS
NEARLY 20%
That's a lot of wasted money.
Stop the Waste and Support the Public Construction Savings Pilot Act
S.3484-A (Ranzenhofer) A.6523 (Schimminger)
www.abcnys.org
ABC
Empire State Chapter

Associated Builders and Contractor's legislative agenda for the 2014 Session calls for reforms that would help the construction industry put New Yorkers back to work, and provide for a stronger state economy. New York State faces many challenges that can be easily fixed and I encourage our state leaders to pass this agenda.

Sincerely,

SMLefebvre

Stephen Lefebvre
President
Empire State Chapter
Associated Builders & Contractors, Inc.



Public Construction Savings Pilot Act

S.3484A (Ranzenhofer) / A.6523 (Schimminger)

ABC has long opposed government mandates of anti-competitive project labor agreements (PLAs) on public work projects. State government should remain neutral on the subject and simply allow contractors to submit responsive bids whether they choose to use a PLA or not. It is the only fair and objective way to insure that taxpayer interests are protected in public contracting.

Sections 240/241 "Scaffold Law" Reform

S.111 (Gallivan) / A.3104 (Morelle)

This antiquated law exposes property owners and contractors to unfair strict liability, which makes insurance prohibitively expensive and ultimately drives up the cost of construction in New York State. ABC calls on our state leaders to establish a more sensible and balanced negligence-based standard. This would drive down the cost of insurance, create more jobs and improve the business climate in New York State.

Annualization Reform

S.3361 (DeFrancisco) / A.7800 (Brindisi)

Currently, the NYS Department of Labor calculations annualize both private and public benefits by the same method, resulting in excessive costs to contractors already providing benefits to their workers. Because of these calculations, many contractors are eliminating traditional benefit packages and, instead, are offering the benefits as a cash supplement in the employee's pay check. This growing practice eliminates double payment of previously offered benefits by contractors, but exposes the employee to higher taxes and employers pay more in payroll taxes and other burdens; all without the employee receiving important benefits. Annualization reform would again allow contractors to provide, and employees to receive, benefits, without penalty.

"Reforming or eliminating certain taxes will bring about job creation in the construction industry while at the same time provides benefit for all sectors of the state's very diverse economy."

Dedicated Infrastructure Fund

Chief among the concerns expressed by Reap was the current state budgeting practice of raiding the diesel and gasoline taxes to pay for general fund obligations. These taxes were intended to build and maintain New York's infrastructure system but are now used to pay for many other programs not related to roads and bridges. This raiding of infrastructure dollars has left state agencies with limited funds to properly execute a long term plan to ensure a safe transportation network for travelers.

A properly dedicated and protected highway fund ensures jobs for qualified New York construction workers while at the same time provides a guarantee of safe passage for motorists and the transportation of goods along New York's highway system. Corrective actions taken now to dedicate the funds as they should be will spare the state from higher costs in the future, greatly offsetting any budgetary issues realized in the short term.

Study and Eliminate Highway Use Tax

The Highway use tax is basically dedicated for vehicles above a certain weight and size with the thought process being that a vehicle of unusually higher weight has a greater impact on the road. For many years New York's contractors and trucking firms have been paying the highway use tax, with that revenue pledged to pay for past borrowing. New York is only one of four states that impose such a levy which carries with it burdensome recordkeeping that many contractors find to be costly. Given the burden of the tedious recordkeeping required to comply with this tax, and the fact that so few other states currently utilize such a practice, New York should study how to effectively eliminate this exorbitant cost of doing business.

Income Tax Reform

A vast majority of construction companies today are structured as LLCs or S corporations, which means company owners claim their entire share of the business' income on their personal income tax even if they did not take any money out of the business. Because individual rates are higher than corporate rates, most construction firms do not reap the benefit of often-discussed corporate franchise tax reductions; though ABC supports the lowering those rates, too.

The fact many construction firms file their taxes annually as individuals, they are hit unusually hard because often their liabilities will fall into the higher bracket. This sort of liability, coupled with a personal filing, a high net earner pays an exorbitant amount of taxes even though they are functioning as a corporation.

New York's construction companies would welcome such a reform because it would allow owners to invest more capital into their firms which will in turn produce more economic opportunity and job growth potential. New York construction companies would rather employ NY residents and perform work in NYS rather than being forced to seek other opportunities outside of NY where greater opportunity exists. I would ask that you simplify the system; perhaps by reforming the drastic disparity between the fifth and sixth tier of the personal income tax system.

Regulatory Reform Hearing: Construction
September 26, 2013
Mineola, NY

Testimony Submitted by:

Scott Hobson

Legislative Analyst for the Lawsuit Alliance of New York

LRANY Lawsuit Reform Alliance of New York

Justice Fairness Common Sense

19 Dove St. Suite 201 | Albany, NY 12210 | 518-512-5265 | www.lrany.org

Lawsuit Reform Alliance of New York

Testimony to the New York Senate Majority Coalition

Regarding Regulatory Reform in the Construction Industry

September 25th, 2013

Thomas B. Stebbins, Executive Director

Members of the Majority Coalition:

Thank you for the opportunity to provide testimony on regulations and laws which strangle job growth and drive up local taxes in New York.

The Lawsuit Reform Alliance of New York is a non-partisan, non-profit association of businesses, professionals, doctors, growers, membership organizations, and taxpayers dedicated to reform of the legal system in order to foster a better business climate, promote job growth and address the growing cost of lawsuit abuse. Our members represent a diverse cross-section of the state's economic base, and employ thousands of New Yorkers statewide.

Easily the most burdensome and detrimental regulation in New York is Labor Law sections 240 and 241, commonly referred to as the "Scaffold Law." This statute imposes upon contractors and property owners a standard of absolute liability for all elevation-related injuries.

We support the complete elimination of absolute liability in favor of a standard of comparative negligence, as is the case in every other state, and in virtually all other areas of New York's civil justice system. At the absolute minimum, this standard should be applied in cases of gross negligence, intoxication, or failure to use safety equipment, as proposed in SB.111 and AB.3104.

The Scaffold Law Imposes Substantial Costs on the Construction Industry

New York's construction industry currently employs over 300,000 workers and is an important engine for the creation of middle class jobs and economic growth. In its current form, the Scaffold Law imposes substantial costs, chilling the growth of the industry. In recent years, insurance premiums have increased dramatically, as much as 20% for practice policies.[1] Moreover, many insurance carriers are electing to leave the General Liability market entirely, or mandating exclusions for Scaffold Law claims.[2] Rising premiums and higher deductibles mean employers must spend resources on insurance rather than hiring employees and bidding on jobs. This puts New York companies at a disadvantage against competition from out of state.

The Scaffold Law is a Barrier to the Participation of M/WBE Firms

Minority and Women-Owned Business Enterprises (M/WBE) are an important part of New York's economic engine, and barriers to their growth should be eliminated. Governor Cuomo has set a goal of 20% of state contracts to be filled by M/WBE's, approximately double the current ratio.[3] However, given the insurance climate due to the Scaffold Law, this will be difficult to achieve among M/WBE construction contractors. A report by the Building Trades Employers Association identified the Scaffold Law as a major impediment to the growth of small

[1] Willis Group. *"Construction Practice Blueprint."* October, 2012. http://www.willis.com/documents/publications/Industries/construction/Blueprint_October_2012_FINAL.pdf

[2] Green, Meg. "*Mass Withdrawal of Construction Liability Writers in NY Traced Back to Scaffold Law.*" AM Best. 03 October, 2012.

[3] Press Release: "Governor Cuomo Issues Executive Oder Establishing Minority and Women Owned Business Enterprise Team." 17 February, 2011. http://www.governor.ny.gov/press/021711minority-women-ownedbusiness

contractors, most notably M/WBEs.[4] In just one year, rising costs and reduced competition has nearly doubled premiums for Owner-Controlled Insurance Programs (OCIPs),[5] which are a critical lifeline for many M/WBE firms, particularly in New York City. Due to rising costs, it is unlikely that the public authorities which currently offer OCIPs to MWBE contractors will be able to continue to do so. The loss of these programs will force hundreds of M/WBE firms to seek insurance coverage in the marketplace, which will prove prohibitively costly, if not impossible. This will jeopardize the viability of many M/WBE firms.

The Scaffold Law Increases the Cost of Taxpayer-Funded Capital Projects

Capital projects are a significant and essential function of the state and municipal governments. Many capital projects, such as maintenance and repair of existing structures cannot be delayed or eliminated without creating substantial future costs or compromising governments' ability to effectively fulfill essential functions. The absolute liability standard imposed by the Scaffold Law creates substantially higher costs for every taxpayer-funded construction project. Pure premium costs for construction projects in New York are the highest in the nation by over 300%.[6] According to the Insurance Services Office, bridge and elevated highway construction liability loss costs in New York City are equivalent to 74.7% of payroll costs, compared to 15.7% and 11.0% in Chicago and Los Angeles respectively.[7] The costs associated with the Scaffold Law are clearly illustrated by the New York City School Construction Authority's recent calculation that the law is currently costing the Authority $75 million annually – enough to build 2-3 additional schools.[8] Reforming the Scaffold Law would reduce the cost of capital projects, significantly benefitting taxpayers.

The Scaffold Law Imposes Direct Costs on Taxpayers When Public Defendants are Sued

Taxpayers bear the cost of the Scaffold Law directly when governments, agencies, and authorities are sued under this statute. The Scaffold Law's standard of absolute liability makes defending such a suit extremely difficult or impossible, even if the injured worker's own negligence significantly contributed to the accident. In an average year, New York's municipalities, excluding New York City, pay at least $1 billion for lawsuits and legal judgments, including increased liability under the Scaffold Law.[9] In 2012, 16 of the 30 highest legal settlements in New York were a result of the Scaffold Law, and of these, fully 25% were against public entities.[10] These costs, in addition to the associated liability insurance costs, have a significant effect on taxpayers.

[4] Building Trades Employers Association of New York City. A Blueprint for the Successful Growth of Minority and Women-Owned Construction Companies. 2005

[5] Willis Group. "Construction Practice Blueprint." October, 2012. http://www.willis.com/documents/publications/Industries/construction/Blueprint_October_2012_FINAL.pdf

[6] Insurance Services Office (ISO) Data. General Liability Loss Costs by State/Region. 2010 Data.

[7] ibid.

[8] Chaban, Matt. "Builders, Insurers Stepping up Effort to Dismantle Scaffold Law." Crain's New York Business. 17 March, 2013

[9] Creswell, S and Landon-Murray, M. *Assessing the Fiscal Impact of Lawsuits on New York State Municipalities.* Rockefeller College of Public Affairs and Policy, Program on Local and Intragovernmental Studies. October, 2011.

[10] "Top New York Settlements 2012." ALM VerdictSearch.

Reforming the Scaffold Law Would Create Jobs and Stimulate the Economy

> Reforming the Scaffold Law would lower the cost of insurance by reducing direct liability costs and making the insurance market more competitive by incentivizing carriers to re-enter the market. Lower insurance costs would allow businesses to grow, spur job creation and investment, and increase tax revenue. Historical evidence supports this assertion - following repeal of the Scaffold Law in Illinois in 1995, construction insurance loss costs fell by 91% over 5 years.[11] Employment increased by 54,000, or 25%, over the following 7 years, while construction fatalities declined by 26%.[12] Moreover, the reduced cost of construction would allow a higher level of investment in public capital projects, creating a substantial number of jobs. It is estimated that for each $1 billion in additional spending on nonresidential construction would support approximately 28,500 jobs.[13]

New York remains the only state in the nation with an absolute liability standard for elevation related construction injuries. New York's construction industry and taxpayers can no longer afford this burdensome, outdated, and ineffective law. We respectfully urge the Senate Majority Coalition to consider eliminating the Scaffold Law's standard of absolute liability in favor of the more equitable standard of comparative negligence.

Thank you,

Thomas B. Stebbins
Executive Director
Lawsuit Reform Alliance of New York
518-512-5265
tstebbins@lrany.org

[11] Data provided by Insurance Services Office, Experience-based loss costs for classes with significant elevation exposure.

[12] United States Bureau of Labor Statistics. Survey of Occupational Injuries and Illnesses (SOII). 1995-2010 Data.

[13] Fuller, Stephen S., PhD. Testimony presented to the U.S. House of Representatives Committee on Transportation and Infrastructure Regarding Ensuring an Effective Economic Recovery Package. 22 January, 2009. http://www.agc.org/galleries/advy/090122%20T%20and%20I%20hearing.pdf

APPENDIX

Figure 1.

Impact of Scaffold Law repeal in IL on construction employment and fatalities

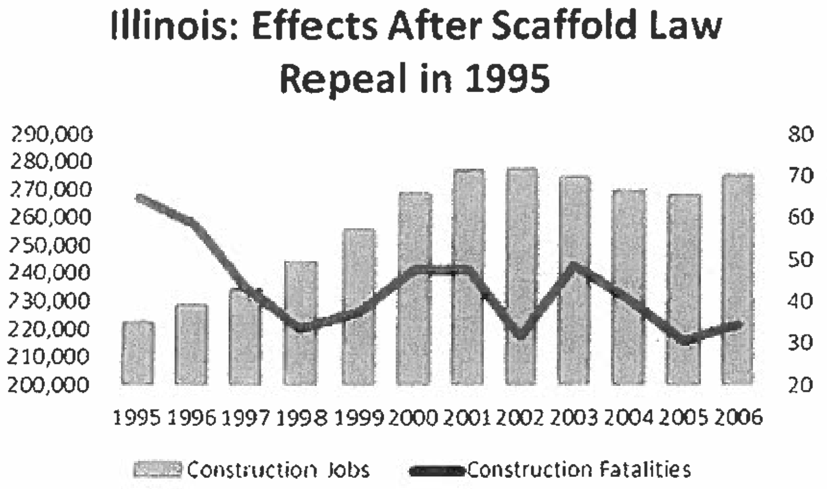
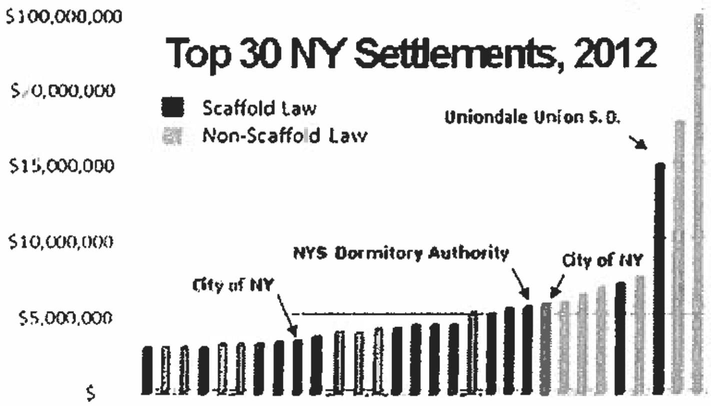


Figure 2.

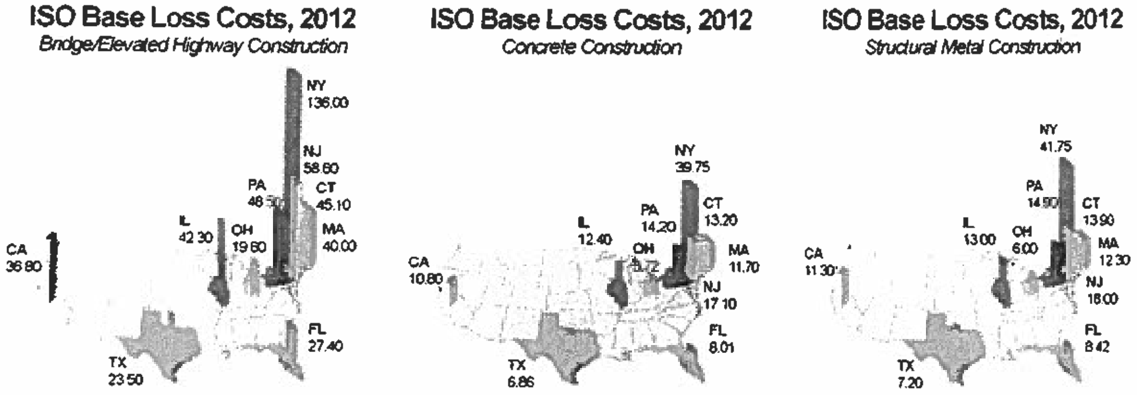
Scaffold Law settlements and public entity defendants



Source: ALM VerdictSearch

Figure 3.

ISO base loss costs for construction categories affected by the Scaffold Law


ISO Base Loss Costs, 2012
Bridge/Elevated Highway Construction
NY 136.00
NJ 58.60
PA 48.50
CT 45.10
IL 42.30
OH 19.60
MA 40.00
CA 36.80
FL 27.40
TX 23.50
ISO Base Loss Costs, 2012
Concrete Construction
NY 39.75
PA 14.20
CT 13.20
IL 12.40
OH 5.72
MA 11.70
CA 10.80
NJ 17.10
FL 8.01
TX 6.86
ISO Base Loss Costs, 2012
Structural Metal Construction
NY 41.75
PA 14.90
CT 13.90
IL 13.00
OH 6.00
MA 12.30
CA 11.30
NJ 18.00
FL 8.42
TX 7.20

Appendix E

Hospitality & Tourism
Saratoga, NY October 2, 2013

Pages	
197 - 200	Todd Garofano *President of the Saratoga Convention and Tourism Bureau*
201 - 202	Charles Wilson *Owner of the Willard Mountain Ski Area*
203 - 210	Christine Hoffer *Tourism Administrator for the Washington County Tourism Association*
211 – 214	Cynthia Hollowood *Chairman of the Board for the New York State Hospitality and Tourism Association*
215 – 216	Mike Hoffman *President of Turf Hotels*
217 - 219	Jan Chesterton *President of the New York State Hospitality Association*
220 - 224	Scott Wexler *Executive Director of the Empire State Restaurant and Tavern Association*

Regulatory Reform Hearing: Hospitality & Tourism
October 2, 2013
Saratoga, NY

Testimony Submitted by:

Todd Garofano

President of the Saratoga Convention and Tourism Bureau

TESTIMONY TO THE NYS SENATE REGULATORY REFORM FORUM WEDNESDAY, OCTOBER 2, 2013

PROVIDED ON BEHALF OF THE SARATOGA CONVENTION & TOURISM BUREAU

PROVIDED BY: Todd Garofano, President – Saratoga Convention & Tourism Bureau.

Opening:

Good morning, my name is Todd Garofano and I am the President of the Saratoga Convention & Tourism Bureau. I would first like to thank Senators Marchione & Little for co-hosting this event and the opportunity to share our thoughts & insights with you all.

I am here representing the 457 member businesses of the Saratoga Convention & Tourism Bureau. Our members are predominately made up of businesses in the hospitality & tourism sector in Saratoga County. They range from hotels, motels, B&B's & Inns to bars/restaurants, area attractions and service providers. Our membership has grown by over 15% in the last 3 years due in large part to Saratoga's success as a destination.

The mission of the Saratoga Convention & Tourism Bureau is to market Saratoga County as a year-round global destination for groups of all sizes and occasions, whether it be a large city-wide convention at the Saratoga Springs City Center and area hotels, a sports tournament at one of our excellent facilities, an executive retreat, destination wedding or motorcoach group; our organization is responsible for getting them to choose Saratoga County over other destinations and ensuring that they have an incredible experience once they are here and want to return in the future.

As you have heard, or will hear, from some of the other industry representatives here today, businesses face many obstacles from the state level that if corrected or adjusted, could certainly go a long way for future growth & success. So as to not be repetitive of my fellow presenters, I would like to touch on the following overall industry concerns.

I Love New York & the Division of Tourism:

While much has been made of the announced $60 million in tourism marketing spend from the Governor's office earlier this year, the industry still seeks a predictable, multi-year State tourism funding program. A consistent and predictable funding level, (remember $30m of the $60m this year came from Superstorm Sandy relief), each year would allow the I Love NY marketing team and their PR team to produce multi-year strategic plans that permit the individual regions to piggy-back with their own specific plans to optimize the overall dollar spend on tourism.

We are certainly supportive of and appreciate the$3.8 million in Matching Funds to the Tourism Regions around the State and the $2.5 million to directly market the I Love NY brand, and we want that to continue, but it needs to go beyond that.

Competitive Tourism Marketing Fund:

One of the new initiatives from the State this year was the creation of a $5million fund where regions would compete for additional tourism marketing dollars...similar to the structure of the Regional Economic Development Councils. The difference in our industry though is that our regions often collaborate to market several regions at a time or the entire state, depending on project and audience. I'll give you an example;

Meet in New York: This initiative was launched earlier this year through a public /private partnership with members of the NYS DMO (our statewide organization of convention & visitor bureaus) and ESDC. It launched with an event in Albany to market & promote the state's meetings assets to a targeted audience. The initiative has continued to evolve as we have worked together to develop a 3 year program to identify target markets, target regional & national trade shows, develop a meeting planner database, create collateral and marketing tools, develop sales initiatives and articulate what success will be measured by. Again, this is being done through a collaborative effort statewide with our fellow destination marketing organizations.

The competitive tourism marketing fund dollars would be better utilized in directly marketing the I Love NY brand and/or to further partner with the NYS DMO's in the Meet in New York program.

Tourism & the REDC's:

It's obvious the Regional Economic Development Councils are and will be the State's mechanism for economic development programs for the foreseeable future. It has taken a couple of years to take hold but Tourism and Hospitality are now part of the larger REDC process, which is great. In the Capital Region, a Tourism working group was formed to support this earlier this year. What we have found is that while tourism is big business for NYS it is generally comprised of mostly small businesses, or non-profit museums and other attractions – the REDC system does not lend itself well to projects championed by smaller businesses. All grants are reimbursable and until a grant is actually received – funding cycles are unknown to those who have successfully applied. At a recent CREDC meeting, a colleague suggested a revolving loan fund for smaller – but transformational projects in the Cap region. Other regions have done this (the Southern Tier and North Country have both done this– perhaps an across the board revolving loan fund to help close this gap.

Once again, I appreciate the opportunity to speak to you today. I look forward to working together, in partnership, to improve and grow New York's Hospitality & Tourism industry.

Regulatory Reform Hearing: Hospitality & Tourism
October 2, 2013
Saratoga, NY

Testimony Submitted by:

Charles Wilson

Owner of the Willard Mountain Ski Area

mandatory business

1. Mandatory Business Economic Survey

   A. What happens with this information

   B. I can't fill it out

2. Workers comp rules and postings

3. NYS Department of Labor rules, records and potsings.

   A. 14 & 15 We do not hire, too hard

   B. 16 & 17 As few as we can a lot of extra work to control hours. Maybe a 5 % leeway 20 hr week would give an employee 1 hour he or she could be off.

4. Sales tax filings

   A. No paper files

   B. 1 day with no tax due is a $1,000.00 fine

5. Tax increase on alcohol

6. The private ski area competing with the state owned areas is uneven.
   A. operate at a profit

In closing yes paperwork is required by state and federal goverment that could be easier to work with. However the state could be more lenient on time lines and penalties

Regulatory Reform Hearing: Hospitality & Tourism
October 2, 2013
Saratoga, NY

Testimony Submitted by:

Christine Hoffer

Tourism Administrator for the Washington County Tourism Association

Rice Mansion Inn

2004-Todav

Purchase

The Mansion, originally built as the home of Jerome and Laura Rice, is an early 20th Century construction built in 1903-05 with an adjacent Carriage House. The Mansion sits on Cambridge's Main Street with approximately ¾ of an acre. Both are in a neighborhood of businesses and residences of similar age. In 2004 the property was purchased bv the Hoffer's for $350,000.

A Brief History

1903-05 Built in 1903-05 as the home of Jerome and Laura Rice
1912 Jerome Rice passes away
1918 Laura Rice Passes awav
1928 Charles Forecy & Theodre Reynolds purchase
1930 3:15a intentionallv set fire took 1.5 hours to out out
1933 Lena Reynolds reclaimed for back taxes $732.72 – sat unused
1958 Joe and Judith Sourdiff owned and operated a restaurant turned propertv into apartments
1968 Rebecca Griffin - Apartments
1975 Charles & Dawn Pollock – Apartments and total neglect
1984 Don & Eileen Darling – turned Carriage House into B & B – removed apartment elements in Mansion
2004 Hoffers purchased and additional renovations begin

Renovation

The property sat for sale, vacant and basically abandoned from 2002-04. The intention when purchasing the property was to create an Inn offering guest rooms within the Mansion and adjoining Carriage House, host events and eventually open a restaurant. In sixteen months a substantial portion of the interior spaces on the property were renovated. The Mansion interior work took place first, to capture much needed guest room revenue including four guest rooms with bathrooms, center foyer and main staircase maintaining the original style and details of the building. The Carriage House was esthetically upgraded using Rice Seed memorabilia as inspiration. This included paint and fabrics.

The third floor of the Mansion renovation took place in 2006 as the private residence of the Hoffer Family.

Red Tape and Regulations

Municipal Water (May 2004) - Prior to opening we had to disconnect the Carriage House from a well and connect it to Village Water or be faced with a potential Phase 5 environmental review at a cost that could exceed $15,000 with no guarantee that the well could be used. We connected the Carriage House at a cost of $5,000 plus monthly service and water fees. *Please note the local water company has changed hands MANY times and the "service fees" are at a cost of $130 regardless if any water is actually used.* The residents and businesses on Village water are absorbing the costs or the repairs and maintenance of the water service in the Village.

Code Enforcement (July 2007) - As part of a Main Street revitalization project the property applied for and received $12,000 to renovate existing space within the Mansion to become the main entrance for guests providing them with direct access from the parking area to check-in, a retail component and addine an ADA compliant ramp making the Mansion accessible to all. The Village's new code enforcement officer denied our building application on the grounds that we were changing the use of the building from residential to assembly. We went through the process of applying to the state for a variance which was granted, however, the local authority would not override the local enforcement officer's decision. In turn we threatened suit and were assigned a different officer who advised that we did not have a certificate of occupancy for the Inn and therefore he could not approve the changes we were applying for. We produced the certificate of occupancy issued by the county when we purchased it in 2004. There was no explanation on why it was not in our file, nor why this was always the underlying issue. The new officer worked with us to reach an agreeable determination and we received our stamped building permit for the grant work. However, we were advised that the certificate of occupancy was for an Inn not a restaurant/assembly. In order to add a restaurant we would need a full sprinkler system in order to get a change of use for full assembly. At the time this would have been at a cost of $250-300,000 minimum. We were advised we could host events as long as they were contained on the first floor.

Septic System – All Cambridge properties are on individual septic systems. In 1990 the DEC and Health Department forced a variety of property owners including the Darlings (whom we purchased from) to install a septic system. At the time the waste from the Mansion flowed into the Owl Kill. When we began pursuing the ability to open a restaurant it was discovered that there are NO stamped drawings regarding the septic system on file with the health department, the county, the DEC or the firm that installed the system. The previous owners had only a copy of a photocopy. In short it became our responsibility to "prove" our system. In order to do this we would have to dig up our system to prove its parts and pieces at a cost of not less than $35,000. Regardless of the outcome, we would also have to install a new septic system to accommodate the restaurant waste only and potentially a third with a grease trap at an estimated cost of $85-100,000.

While a restaurant is an option within the building, the cost associated with compliance and the potential for damage to the fabric of the building far exceeds the return on the investment.

NYS Liquor Authority (July 2008) - In an effort to grow the business and at the suggestion for the liquor authority we applied for a beer and wine license. New York State changed their policy and applicants for a temporary license can only apply for four annually, so we were advised by the agency to apply for a Bed and Breakfast Beer and Wine license. After more than a year of work and intervention by our Senator and Assemblyman we were advised to pull our application because it would not be approved. If we did not pull the application and it was denied it would be a negative mark and potentially hinder future applications. Because we host events we could have incorporated beer and wine sales to our revenue stream. We have had a liquor bond as part of our insurance since 2004. Additionally, even when securing a temporary beer and wine license you must purchase through a distributor. Distributors have rules and regulations that they must adhere to and those do not work for those receiving a temporary license.

NYS Health Department (October 2009) - During our regular sanitation inspection we received four pages of violations specific to fire separation and were issued a cease and desist order by the health department. The fire separation section of the Health Departments handbook was written in 1979 and never updated. The Rice Mansion Inn was and is compliant with today's standards and holds all completed building permits and certificate of occupancy. After months of letters, providing descriptions of current building code and amendment K special sections for Historic Buildings and once again intervention by Senator Little and Assemblyman Jordan the department agreed we could continue to operate. It is important to note that the Health Department no longer inspects for fire separation which ended in December 2009.

Taxes

In the nine years we have tried to run the Rice Mansion Inn our taxes have gone from $10,356 to $17,997, while similar properties have gone unchanged. It appears that the decision to increase is based upon the assessors choice on who is increased and when. Please see the Rice Mansions tax table as well as a table of properties within the Town of White Creek at the bottom. Our purchase price was $350,000, the assessed and full market value was $237,000 with an equalization rate of 100%. The work done to the property has not added a room, bathroom, closet or additional square footage. It has removed fire damage from 1930, replaced decking that was unstable, reclaimed derelict and unused space within the building. Today, our assessed value is $435,500 and a full market value of $702,491 with an equalization rate of 64%.

As a business we have contributed to our community, town, village and state by adding to the sales and occupancy tax collection, increased discretionary spending associated with the guests' stays and added value and revenues to many youth, community and nonprofit groups by opening our doors for their benefit. In return we have had a substantial tax increase coupled with a reduction in school, town and village services.

In comparison a potential buyer could purchase a property similar to the Rice Mansion Inn in Saratoga paying more for the property, but pay [illegible] per month in combined mortgage and taxes. Additionally the purchaser would have the benefit of public water, sewer, trash and other services as well as a community with infrastructure such as restaurants, shopping and [illegible] appealing.

Taxes and School Aid = CWR

The current taxing process not only impacts us as home/business owners, it impacts the very livelihood of our school, the success of our students and community. The state aid received by Cambridge Central School (CCS) is based on the Combined Wealth Ratio (CWR) which is calculated on property values (AV) combined with the actual adjusted gross income (AGI) of its residents. Property values are established by the town assessors within each community. CCS has eight towns attending the school. The town assessors appear to have little or no training to properly assess properties and with regards to the Rice Mansion Inn have NEVER set foot on the property. The school uses the town's assessment of properties when establishing taxes for individual properties. My school tax bill for this year was $9.880.

- ❖ The importance of the school and tourism are significant and linked. People visit communities that are vibrant and exciting, they do not visit communities that are depressed and unsuccessful. The current tax burden on property owners in the CCS community are not balanced nor a reflection of the residents that live, work and participate in the community. From 2004-2007 a majority of the guests visiting the Rice Mansion Inn were looking at moving to the area. The current property taxes are driving potential visitors that could become residents and business owners to other areas.

- The AV in 2004 was $292,385,844 Av for 2010 is $577,762,137
  - An increase of 98%
- The AGI in 2004 was $99,223,430 AGI for 2010 is $112,554,976
  - An increase of 13%
- Combined in 2004 was $391,609,274 Combined in 2010 is $690,317,113
  - An increase of 76%
- Student population 2005 = 1092 Students on Free or Reduced lunches 2005 – 335
  - 31% of our students qualified under the guidelines for the Federal free lunch
- Student population 2012 = 894 Students on Free or Reduced lunches 2012 – 300
  - 34% of our students qualify under the guidelines for the Federal free lunch

The decrease in state aid coupled with unfunded mandates have forced our school administrators and board to cut what we can control – teachers, staff, support, extracurricular activities and sports.

Bill S07616 AN ACT in relation to the determination of actual valuation for the Cambridge Central School District is sponsored by Senator Little and Assemblyman Jordan initiated in June 2012. As a community, we have been advised to call and e-mail the committee of education to get the committee to pay attention to Senator Little's initiative. Senator Little and Assemblyman Jordan listened to us and reacted with this bill. As a tax payer it leaves little faith in the system that our representatives work on our behalf falls upon their counterparts deaf ears.

Rice Mansion Inn Tax review

Tax Year	Tax Type	Original Bill	Total Assessed Value	Full Market Value	Uniform %	
2013	School	$9,880.10	$435,500.00	$680,469.00	64	
2013	Village	$3,639.76	$333,000.00	$512,308.00	65	
2013	County	$4,477.65	$435,500.00	$702,419.00	62	
	TTL	$17,997.51				
2012	School	$9,213.62	$435,500.00	$702,419.00	62	
2012	Village	$4,737.14	$433,000.00	$698,387 00	62	
2012	County	$4,301.14	$435,500.00	$725,833.00	60	
	TTL	$18,251.90				
2011	School	$8,470.28	$435,500 00	$725,833.00	60	
2011	Village	$4,703.40	$433,000.00	$733,898.00	59	
2011	County	$4,300.53	$435,500.00	$777,679.00	56	
	TTL	$17,474.21				
2010	School	$8,327.27	$435,500.00	$777,679.00	56	
2010	Village	$4,575.74	$433,000.00	$773,214.00	56	
2010	County	$4,339.72	$435,500.00	$837,500.00	52	
	TTL	$17,242.73				
2009	School	$8,023.66	$435,500.00	$837,500.00	52	
2009	Village	$4,410.60	$433,000.00	$698,387.00	62	
2009	County	$4,189.89	$434,000.00	$761,404.00	57	
	TTL	$16,624.15				
2008	School	$7,670.10	$434,000.00	$761,404.00	57	
2008	Village	$4,772.37	$458,000.00	$610,667.00	75	
2008	County	$5,060.95	$432,500.00	$576,667.00	75	
	TTL	$17,503.42				
2007	School	$9,542.62	$432,500.00	$576,667 00	75	
2007	Village	$4,454.25	$448,450.00	$448,450.00	100	
2007	County	$3,755.81	$432,500.00	$616,976.00	70.1	
	TTL	$17,752.68				
2006	School	$7524				
2006	Village	$4043				
2006	County	$3756				
	TTL	$15,323				
2005	School	$6644				
2005	Village	$3940				
2005	County	$3418				
	TTL	$14,002				
2004	School	$4281				
2004	Village	$3540				
2004	County	$2535				
	TTL	$10,356				

Property Comparisons - Town of White

Address	Description	Assessed Value	Purch Price	Lot Size	Sq FT	Other	Total Taxes
16 West Main	Rice Mansion Inn	$435,500	$350,000	131x250	11,000	12 Guest Rooms	$17,998
58 North Park	Peace Be Still	$175,600	$250,000	12 acres	7,000	12 Guest Rooms/For Sale	$12,943
9 Broad Street	Residence-Hoffer Sale	$170,000	$318,000	103x160	5,000	Private Home	$7,129
30 West Main	Cambridge Antiques	$125,000	$115,000	108x122	12,000	Commercial Business	$7,854
12 South Park	Boeri	$116,100	$250,000	106x112		Commercial Business/Foreclosed	$10,107
11 South Union	Cambridge Guest Home	$190,000	$720,000	7.3 acres	15,976	Assisted Living	$10,380
46/48 E Main	Florist Shop	$225,200	$265,000	89x187	4,565	Commercial Business/Foreclosed	$8,164
2/4 East Main	Agway	$200,000	$200,000	1.12 acres	8,760	Commercial Business/Foreclosed	$8,852
52-56 W Main	Ed Levin	$250,000		102x117	6,839	Commercial Business	$8,713
51 South Park	Blue Willow	$265,600	$265,000	1.34 acres	6,986	12 Guest Rooms/For Sale	$23,120
4 West Main	Cambridge Hotel	$565,000	$565,000	236x163	25,554	17 Guest Rooms/Foreclosed	$24,248
5 Washington	Mixed Use	$299,000	xxx	41x86	3,600	Commercial Office Space	$8,578
13/15 E. Main	Mixed Use	$227,000	$86,000	43x80	5,560	Bookstore/Apartments	$9,885
38/40 E. Main	Hardware Store	$522,188	$460,661	1.1 acres	13,366	Sold in 2012	$16,110
35 W. Main	Grocery	$375,00	$302,055		6,000	Sold in 2010	$11,904
2 N. Park St	Rite Aid	$895-1.6M		187x174	8,520	New Const	$68,075

Commercial buildings outside of the Village of Cambridge, but within the Town of White Creek commercial node

Address	Description	Assessed Value	Purch Price	Lot Size	Sq FT	Other	Total Taxes
33 Gilbert	Commercial Rental	$421-435,000		1.34 acres	4,466	4 rental units	$13,284
35 Gilbert	Commercial	$1.3 M		4 acres	6,500	GF Medial & Urgent Care	$39,661

Language of S07616 and A10638

IN ASSEMBLY

June 12, 2012

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Jordan) -- read once and referred to the Committee on Education

AN ACT in relation to the determination of actual valuation for the Cambridge central school district

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Notwithstanding paragraph c of subdivision 1 of 3602 of the education law for the Cambridge school district "actual valuation" shall mean the valuation of taxable real property in a school district obtained by taking the assessed valuation of taxable real property within such district as it appears upon the assessment roll of the town, city, village, or county in which such property is located, for the calendar year one year prior to the calendar year in which the base year commenced, after revision as provided by law, and dividing it by the state equalization rate as determined by the state board of real property services, for the assessment roll of such town, city, village, or county completed during such preceding calendar year. The actual valuation of a central high school district shall be the sum of such valuations of its component districts. Such actual valuation shall include any actual valuation equivalent of payments in lieu of taxes determined pursuant to section 485 of the real property tax law. "Selected actual valuation" shall mean the lesser of actual valuation calculated for aid payable in the current year or the two-year average of the actual valuation calculated for aid payable in the current year and the actual valuation calculated for aid payable in the base year.

S 2. This act shall take effect immediately.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD16151-02-2

Regulatory Reform Hearing: Hospitality & Tourism
October 2, 2013
Saratoga, NY

Testimony Submitted by:

Cynthia Hollowood

Chairman of the Board for the New York State Hospitality and Tourism Association

Testimony Submitted by Cynthia Hollowood
New York State Hospitality & Tourism Association

At the Joint Legislative Budget Hearing on Economic Development

February 12, 2013

I am Cynthia Hollowood, Chairman of the Board of the New York State Hospitality & Tourism Association and also the General Manager of the Holiday Inn Saratoga Springs. I would like to start by thanking Chairmen Farrell and DeFrancisco and members of the committee for the opportunity to comment on the 2013-2014 Executive State Budget Proposal as it relates to tourism.

BACKGROUND

The New York State Hospitality & Tourism Association (NYSH&TA) is the oldest lodging Association in the country - founded in Saratoga Springs in 1887. We have nearly 1,300 member businesses and individuals in the lodging and attractions industry, and we currently represent 70% of the total lodging room inventory in the State.

The tourism industry in New York is an unparalleled industry that is a combination of creating and maintaining jobs, as well as providing the State with a return on its investment no other industry can offer. The tourism industry is a part of each region of the State, providing employment to all levels from management to entry level.

TOURISM NEEDS INVESTMENT

In his Executive Budget Governor Cuomo has proposed a total reduction of $500,000 from last year's enacted budget to the I Love NY and Matching Grant Programs. Given its proven track record as a revenue source for State and local governments, as well as a job generator, Tourism is not only a wise investment, but a critical one that yields unmatched and well sustained returns for New York's economy. **To that end, we encourage the Legislature as it did last year to restore the $500,000 to the "I Love NY" and Matching Grant Programs.**

NEW YORK STATE AND THE TOURISM INDUSTRY – PARTNERS

The industry has and continues to do its part in marketing and promotion. Together, through the Tourism Matching Grant program, which is an aid to locality legislative program that provides focused support that is matched locally (dollar for dollar by the industry) is used to market the regional tourism attractions in New York. This perfect example of a private/public partnership is the lifeline of our industry and it is critical that the program be funded and maintained as every dollar that the State makes available through this program will be matched by an industry participant to promote, market and provide jobs across New York. The numbers and success of the matching grant program are amazing statewide. In the Capital-Saratoga Region where my business is located, in 2011 tourism was a $1.6 billion industry generating $502 million in employee income. In fact, 12% of the employment in the region is sustained by visitors. In the Greater Niagara Region, tourism is a $2 billion industry, supporting 47,000 jobs and in the Central Region, travelers spent nearly 8% more in 2011 than they did in 2010.

The benefits collected in the form of state and local taxes alone are worth the investment, especially considering the limited resources with which New York can invest. **Tourism is an investment that produces revenues and jobs.** The revenue Tourism produces trickles down to impact every citizen in the State. Therefore, a strong tourism brand along with critical marketing programs are vital to help restore and continue to create much needed jobs, while returning New York to its pre-eminent position as the number one destination in the United States.

Further, the "I Love NY" program itself provides statewide marketing strategies establishing partnerships and implementing programs to encourage visitation. The businesses that make up the tourism industry have lived through these tough economic times of limited commercial bookings and fewer vacations. Marketing is what will bring the visitors back and it is incumbent upon New York to ensure that the tourism industry is a powerful one in order to generate critical revenues. That is why, we continue to raise awareness that neighboring states consistently out-invest us in tourism marketing dollars.

The industry has done its part to maximize the current funding level of the "I Love NY" Program and the summer campaign and advertising spots of the "I Love NY" brand were a success for the industry and must continue and expand in 2013. Most importantly, these two programs (I Love NY, Matching Grants) were an integral part in the tourism economy reaching a new **high in 2011, with $53.9 billion in traveler spending.**

REGIONAL ECONOMIC DEVELOPMENT COUNCILS (NY OPEN FOR BUSINESS)

We continue to support the Governor's Regional Economic Development model, and ask for a continued funding stream for it. I would be remiss if I did not mention how encouraged the industry was by the 2012 summer and fall advertising campaigns that used the iconic "I Love NY" logo to promote the state's unmatched vacation destinations. In 2012, thanks in part to a dedicated marketing program that featured every region of the State, hotel occupancy rates statewide reached 72%, which exceeded occupancy rates from 2007 and 2008, when the industry was experiencing record-breaking business.

Marketing is what will bring the visitors back and it is incumbent upon New York to ensure that the Tourism industry is a powerful one, as well as an industry and State that can compete with other states for the all important traveler. While, the Tourism Matching Grant and I Love NY programs funded through the annual State Budget is and will always be much needed, we believe they are part of the solution to continue to move forward and effectively market the attractions and destinations New York has to offer.

Through the first two rounds of each Regional Economic Development Council process, tourism initiatives were put forward, promoted and were recipients of awards, grants and tax credits that were made available. Every Region had plans submitted to the State for funding awards that recognized the importance of tourism and its potential to help grow and strengthen the State's economy. It is critical the Legislature continue to support the Administration's efforts to keep New York Open for Business and support a third round of Regional Economic Development Councils for 2013 to ensure that specific dollars are allocated for tourism in each region.

Likewise we are encouraged by the Governor's commitment to tourism by providing $5M in funding for a new "Market NY" program and an additional $2M for "Taste NY. These two new proposals encourage industry participation across the State and while we caution the competitive nature of these new funding streams would put tourism interests across the State in competition rather than partners working together or in conjunction with the State as under the current matching grants program, we will continue to work with the Administration and the Legislature on all critical funding streams and avenues for the tourism industry.

TOURISM CREATES & PROMOTES JOBS

All funding streams and programs for tourism yield unparallel results. According to independent studies, tourism jobs have increased by more than 22% over the last 20 years, compared to an increase of less than 6% for the rest of private sector employment. **In 2011, nearly 700,000** jobs were directly sustained by visitors to New York. In New York State, **1 out of every 13 jobs** in private employment is a Tourism job. To that end, **in 2011, tourism employment grew 3.8% generating 6.9% in personal income growth** derived from visitors to the State. Whether it is restaurants or retail stores, hotels or amusement parks, tourism sustains employment at every level; from entry to executive positions, providing personal income of **over $28 billion last year.**

This effect is prevalent in all regions of New York. Tourism is **responsible for 8.0% of the State's employment**, demonstrating its integral place in the economies across the entire State. Tourism sustains people's livelihood in each region and in some communities it is the sole industry. **Investing in tourism marketing promotions provides jobs** whereas other industries are laying off workers, putting a strain on families, and increasing dependence on public assistance. The State has many initiatives and opportunities that are aimed at creating jobs. Tourism does just that.

Thank You.

Regulatory Reform Hearing: Hospitality & Tourism
October 2, 2013
Saratoga, NY

Testimony Submitted by:

Michael Hoffman

President of Turf Hotels

Regulatory Reform Hearing: Hospitality & Tourism
October 2, 2013
Saratoga, NY

Testimony Submitted by:

Jan Chesterton

President of the New York State Hospitality Association

Testimony Submitted by Jan Chesterton, President
New York State Hospitality & Tourism Association

Senate Hearing on Regulatory Reform

Saratoga Springs, NY

October 2, 2013

I am Jan Marie Chesterton, President of the New York State Hospitality & Tourism Association and Administrator of the Tourism Industry Coalition of New York State. I would like to start by thanking Senators Valesky, Gallivan, Carlucci and Marchione for this opportunity to discuss rules, regulations and mandates affecting the tourism industry of New York State.

The New York State Hospitality & Tourism Association (NYSH&TA) is the oldest lodging Association in the country - founded in Saratoga Springs in 1887. NYSH&TA has nearly 1,400 members that are businesses and individuals in the lodging and attractions industry all over the State, including 70% of the lodging inventory in the State and all types of attractions, from ski areas to amusement parks.

As you will hear or have heard from some of our members, the industry faces numerous regulations and mandates that are obstacles to doing business in New York. Among them are:

- **Wage Theft Prevention Notification:** NYSH&TA applauds the Senate for its annual passage of lifting the notification requirement related to Wage Theft Protection Act. The notification requirement is both tedious, time consuming and a waste of business resources that provide nothing to a company's ability to run a successful business. We feel that it is redundant and unnecessary and in eliminating the requirement, you are doing nothing to jeopardize the employee protections and assurances provided for in the rest of the Act. We will continue to support the Senate on this initiative and urge the Assembly to act on its passage to make businesses become more efficient in the allocation of its resources.

- **State Agency Communications:** In representing an array of members within the hospitality and tourism industries, our businesses come in contact with a variety of State Agencies. The industry, like most in the state are responsible to report, request and apply for various things (i.e. permits, safety measures, inspections, licenses, tax information), many of which can be found and/or processed online. However, not all State Agencies are as technology friendly, updated or accessible as others, thus at times causing confusion and delays. For example, the NYS Department of Taxation & Finance reporting systems such as the quarterly sales tax forms/reports change with frequency and there are often elements that do not work correctly. It then becomes difficult to get assistance from the Department in finding a work around and being efficient. On multiple occasions the outcome for the business has been to take the time consuming task of sending paper schedules by regular mail to supplement the filing already done online. This duplication could be avoided and is unnecessary if a system for handling questions to the new information is made available to the businesses that have to report.

Another example that has been cumbersome for our businesses is that while we take great pride in promoting and marketing our State and its attractions, it is often difficult to advertise our businesses in areas of high regulation such as the Adirondacks and Long Island. Specifically, to obtain signage to advertise along our main highways in these areas is a major problem, ~~and~~ quite often impossible due to the strict regulations to obtain the necessary permissions.

- **Business Taxes & Costs:** As an industry we are appreciative of the recent efforts by the State to make NY Open for business, however, NY business tax levels still make it difficult to be profitable and competitive with other states. Workers Compensation and Unemployment Insurance costs are a major concern within our industries and pledge to work with the State to continue to reform these programs.

  Further, municipalities have continued to raise or implement new taxes on our businesses to fill their own budget shortfalls and in return we as businesses (especially small businesses) have received little, if any, increased services. As the economy continues to rebound, we will continue to push the State for tax relief in the areas of most concern, specifically in the areas of corporate, energy and sales taxes.

While this is not an exhaustive list of the regulatory burdens and mandates the tourism industry faces, it is a snapshot and pulse of our membership on areas that need immediate atten~~tion. As you~~ move forward in finding ways to lift these restrictions, I offer our assistance in providing additional examples and specific occurrences as to the issues facing this industry.

Once again, I thank you on behalf of the hospitality and tourism entities that make up NYSHTA's membership, who like you wish to make New York the place to do business in.

Regulatory Reform Hearing: Hospitality & Tourism
October 2, 2013
Saratoga, NY

Testimony Submitted by:

Scott Wexler

Executive Director of the Empire State Restaurant and Tavern Association

Empire State Restaurant & Tavern Association

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TESTIMONY OF

SCOTT WEXLER

EXECUTIVE DIRECTOR

EMPIRE STATE RESTAURANT & TAVERN ASSOCIATION

BEFORE A LEGISLATIVE FORUM

CONDUCTED BY THE

NEW YORK STATE SENATE MAJORITY COALITION

ON REGULATORY REFORM FOR THE HOSPITALITY & TOURISM INDUSTRY

OCTOBER 2, 2013

SARATOGA, NEW YORK

Good morning. I'm Scott Wexler and I'm here today on behalf of the Empire State Restaurant and Tavern Association, a statewide organization representing New York's 25,000 on-premise alcohol beverage licensees. The association's members operate restaurants, bars, taverns, clubs, hotels, resorts, bowling centers, golf courses, ski areas and other businesses where alcohol beverages are consumed on-site and our members' businesses are located throughout all regions of the state. Almost all of our members are single-store operators – we used to call them "mom & pop" businesses. They're local owners who live, work and re-invest in their community.

Thank you for the opportunity to provide you with our input into your unprecedented initiative to identify and eliminate costly regulations. There is no doubt that economic conditions continue to place stress on our members so your efforts are welcome. And there is no doubt that compliance with the rules governing the operation of our member establishments adds costs to their bottom line putting their profitability at risk.

And while I'm here today to talk about future efforts to reduce costs on our association members and remove barriers to their growth, I want to start by thanking you for working with your partners in state government to make our current conditions better than they had been. Holding the line on state taxes, enacting the property tax cap to slow the growth of local taxes and putting economic development and job creation at the top of your priority list has laid the ground work for the state's recovery. I'm glad you're not tired or resting on your laurels since there's more to be done.

Representing the state's on-premise alcohol beverage licensees, the issues related to the Alcoholic Beverage Control Law and the State Liquor Authority have the greatest impact on our members. I'm pleased to report that the SLA is well along the path to a complete transformation and that a great deal of progress has been made. It was not that long ago that it took six to nine months for a typical license to be issued. These delays are not only costly to business owners, but the delays slow down job creation and tax collection from these new businesses. Today the Authority has all but eliminated the delays upstate and cut them substantially downstate.

These improvements were achieved in part due to changes in the Alcoholic Beverage Control Law that were made to give the Liquor Authority the flexibility needed to expedite putting people into business. Unfortunately, we're all too aware of the restrictions throughout the ABC Law that are barriers to economic growth and job creation. The State's Law Revision Commission called attention to the many outdated provisions in their Final Report on the Alcoholic Beverage Control Law and Its Administration. They recommended a more reasoned, thoughtful and coherent policy of regulating alcoholic beverages.

This process began a few years ago. The law was changed to expand the Authority's ability to grant temporary permits and to give the SLA expanded rulemaking power. As noted above, these statutory changes have been used effectively by the Liquor Authority to reduce the time and expense it takes to open a new business. But there's a lot to be done to meet the objective laid out by the Commission and most of the work requires statutory change to provide the needed relief.

That's not to say that there aren't regulatory or administrative actions that impact our members that would benefit from modification or elimination. In spite of the many improvements, our list starts with the SLA:

- Compliance – the SLA's compliance program is more like a disciplinary program. The goal is not to seek compliance with the law but rather to discipline and punish the licensee. There is little flexibility – business owners have the choice to pay the fines the SLA determines due or subject themselves to the long, arduous administrative hearing process.

- Method of Operation Changes – any changes an owner seeks to make in the method of operating their business requires the prior approval of the SLA. This is a classic overreach – clearly there are some changes that should require prior approval, such as switching from a restaurant to a bar or expanding hours of service into the late night hours – but just because some changes deserve prior approval it shouldn't require all changes to be approved in advance.

- Catering Permits – in order to cater alcohol beverages to an off-site event, alcohol beverage licensees are required to seek permission from the Liquor Authority but current policy requires the permit applications to be filed 15 days in advance of the event. Operators can be forced to decline business due to this requirement.

There are a number of other regulatory and administrative issues of concern to our members, but since they impact a broader spectrum of industries rather than merely the hospitality industry we will be presenting our testimony on those issues at your forum on small business next week. They include concerns about sales tax compliance, the treatment of musicians as employees rather than independent contractors, and an overly broad definition of security guards.

Thank you for allowing us to provide input into your process. We look forward to continuing to work with you in the year ahead.

Appendix F

Small Business

Nanuet, NY **October 7, 2013**

Pages

227 - 231	Scott Wexler *Executive Director of the Empire State Restaurant & Tavern Association*
232 - 237	Lena Bodin *President/CEO of People Resource Strategies*
238 - 240	Robert Pitkofsky, Esq. *Small Business Attorney for Pitkofsky PLLC*
241 – 247	Jim Calvin *President of the New York Association of Convenience Stores*
248 - 249	David Golub *Senior Vice President of Administration for Price Chopper Supermarkets*
250 - 256	Joseph Fitzpatrick, Esq. & Karen White *Representatives from the New York State Motor Truck Association*

Regulatory Reform Hearing: Small Business
October 7, 2013
Nanuet, NY

Testimony Submitted by:

Scott Wexler

Executive Director of the Empire State Restaurant & Tavern Association

The Security Guard Act was not deigned to apply to bouncers unless their principal duties are to perform security functions – like Security Guards. There are obviously some bouncers that do fit the definition but the Department of State has broadened its application to meet the Department's view of what the Security Guard Act should regulate without regard for the legislative intent. As a result, almost any time a person stands at the door of a bar or tavern they are defined as a security guard requiring registration, training and the payment of hundreds of dollars in fees.

The Department of State was so focused on its view that in 2010 they proposed amending the Security Guard Act regulations to remove the requirement that employees of licensed premises function as security guards at least half the time in order to meet the definition of security guard. In other words it no longer would matter what percentage of your job was security related, if you worked in a bar, restaurant or similar establishment and you performed "security functions" at anytime you would be considered a security guard and be subject to those requirements. Apparently it didn't matter that the law provides that a person has to "principally perform" security functions to be covered.

This proposal would have had the effect of requiring almost all employees in licensed premises to become registered security guards. More reasonable heads prevailed and that proposal was slowed down and eventually withdrawn. But the underlying overly broad policy remains in effect, subjecting business owners to the costs of compliance and fines for non-compliance, almost always due to the business owners' ignorance. Fixing this gross overreach by the unelected bureaucrats at the Department of State would benefits thousands of business owners throughout the state.

Sales tax audits are another problem for ~~our members. No one wants to be~~ audited by the Tax Departm~~ent but~~ if you're in business it's likely to happen from time to time. And if you're in a "cash' business, in the view of the auditors, sales tax audits are fairly common. So our members are frequent subjects of sales tax audits and have increasingly been subject to aggressive, envelope-pushing tactics by the auditors. A few years ago the state hired hundreds of new auditors to enhance the Department's audit and compliance programs and generate state revenue. The Department launched several new initiatives with these new auditors that are costly to business as well as being unfair.

The first concern is the auditors' growing emphasis and inflexibility with their recordkeeping requirements. Our members are increasingly having their books and records deemed inadequate by the auditors, often for the most technical of reasons. If the Tax Department auditors deem a taxpayer's records to be inadequate, then the taxpayer cannot defend its sales tax payment to the auditor and leaves the assessment of the sales tax due to the auditor – exposing the taxpayer to being charged for sales tax due, plus interest and penalties as determined by the state.

Our second concern is the auditors use of external indices to assess the sales tax due once they've determined that the taxpayer's books and records are not adequate. The auditors estimate the correct sales of the business by comparing the invoices, utility bills, payroll or other data for the taxpayer with data for the industry at large. Often these indices are not based on local standards and include few, if any, comparable businesses in their analysis. One of the most common indices used by the Tax Department includes less than 100 restaurants in New York State.

Senator Young and Assemblyman Schimminger have introduced legislation to provide relief from these regulatory burdens. S2691 – A5937 establishes a recordkeeping compliance program which provides a safe harbor for business owners who take certain ~~steps, certifying~~ them as compliant with the recordkeeping requirements. S2710 – A5936 requires any external index used by the Tax Department to reflect local economic conditions. These bills restore fairness to the tax assessment process by preventing the Tax Department from arbitrarily ignoring a business' records and using unfair comparisons to estimate additional ~~sales tax due.~~

A third problem area for our members is the Labor Department's rules for determining whether musicians are considered employees or independent contractors of a business. This is somewhat different than the broader independent contractor issue because the musicians issue stems from an interpretation of amendments to the Labor and Workers Compensation Laws made in 1986. In an attempt to provide clarity to the question of whether a musician is an employee or independent contractor the law was amended to provide that the musician is the employee of the business unless by written contract such musician is stipulated to be an employee of another covered employer. But it's not that simple.

The Labor Department has the narrowest interpretation of the law possible. Unless the chapter and verse of the statute are specifically mentioned in the contract the musician is considered to be an employee of the business where they perform rather than an employee of the band or band leader. This doesn't appear to be motivated by logic this interpretation seems to be based upon having the broadest possible reach. Musicians who regularly perform for a specific business, like a house band, are employees and should be treated as such. But musicians who are part of a band or are self employed that regularly perform at different businesses are independent contractors and business owners should not be have to bear the costs that comes along with classifying them as employees.

~~These are the most prominent regulatory~~ and administrative burdens on our members' businesses but some rule, regulation, administrative directive or bureaucratic dictate gets in their way every day. While there are exceptions, very few of their interactions with government are positive. At your forum in Saratoga last week the owner of a local ski area expressed it best .he told you he has a passion for running his business, but that figuring out how to comply with confusing government rules and doing it right is demoralizing and costly. Thou~~sands of small business~~ owners know how he feels. But ~~your commitment is invigorating~~. Our members are appreciative of your accomplishments to date and are impressed with your willingness to continue the battle.

Thank you for allowing us to provide input into your process. We look forward to continuing to work with you in the year ahead.

Empire State Restaurant & Tavern Association

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TESTIMONY OF

SCOTT WEXLER

EXECUTIVE DIRECTOR

EMPIRE STATE RESTAURANT & TAVERN ASSOCIATION

BEFORE A LEGISLATIVE FORUM

CONDUCTED BY THE

NEW YORK STATE SENATE MAJORITY COALITION

ON REGULAIURY REFORM FOR SMALL BUSINESS

OCTOBER 7, 2013

NANUET, NEW YORK

Good morning. I'm Scott Wexler and I'm here today on behalf of the Empire State Restaurant and Tavern Association, a statewide organization representing New York's 25,000 on-premise alcohol beverage licensees. The association's members operate restaurants, bars, taverns, clubs, hotels, resorts, bowling centers, golf courses, ski areas and other businesses where alcohol beverages are consumed on-site and our members' businesses are located throughout all regions of the state. Almost all of our members are single-store operators – we called them "mom & pop" businesses 25 years ago when I started with the association. They're local owners who live, work and re-invest in their community.

Thank you for the opportunity to provide you with our input into your unprecedented initiative to identify and eliminate costly regulations for small business. I want to begin by thanking you for working with your partners in state government to hold the line on state taxes, enact the property tax cap to slow the growth of local taxes and for putting economic development and job creation at the top of your priority list. These accomplishments have laid the ground work for the state's recovery.

I had the privilege of appearing at your forum on regulatory reform for the hospitality and tourism industry in Saratoga last week and focused on issues related to the State Liquor Authority and the Alcoholic Beverage Control Law. I reported to you the tremendous progress the SLA has made, substantially reducing licensing delays and being more flexible in working with licensees. I shared with you our priorities for amending the Alcoholic Beverage Control Law's antiquated provisions. And I offered our suggestions for how the Liquor Authority could change their administrative and regulatory procedures to make the agency more business friendly.

Today I want to focus on several other regulatory and administrative issues of concern to our members. One of the most egregious examples of a regulatory burden being imposed on business is the administration of the General Business Law's Security Guaru Act. The law was passed in 1992 and mandated the training, approval and registration of security guards under the direction of the Department of State and the Division of Criminal Justice Services. It was amended in 1994 to correct the overly broad interpretation of the law. According to the sponsors' memo:

> "As currently written, the law will impose additional costs through unnecessary mandates upon employers who are not contract companies. There is a distinction between contract security agencies, for whom the law was originally designed, and organizations which hire their own staff to perform security/surveillance duties."

The Department of State, the agency responsible for licensing security guards and security guard companies, interprets the law to require bouncers to be licensed security guards. It's their determination that the duties of a bouncer to check patrons' proof of age and state of intoxication and denying admission to the premises to those who are underage, intoxicated or unruly meet the definition of a security guard. Not only does this require bouncers to be trained and licensed as security guards, but as employers of security guards our members are forced to register their businesses as security guard companies.

Regulatory Reform Hearing: Small Business
October 7, 2013
Nanuet, NY

Testimony Submitted by:

Lena Bodin

President and CEO of People Resource Strategies

STATEMENT OF LENA BODIN

CEO/PRINCIPAL

PEOPLE RESOURCE STRATEGIES

POMONA, NEW YORK

ON BEHALF OF THE:

THE SMALL BUSINESS COUNCIL &

THE HUMAN RESOURCES COUNCIL OF

THE ROCKLAND BUSINESS ASSOCIATION

&

NEW YORK STATE COUNCIL OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT (NYS SHRM)

SUBMITTED TO THE

SENATE MAJORITY COALITION

PUBLIC MEETING: SMALL BUSINESS REGULATORY REFORM FORUM

NANUET PUBLIC LIBRARY, 149 CHURCH STREET – 2ND FLOOR NANUET, NEW YORK

OCTOBER 7, 2013

Good afternoon Senators Gallivan, Valesky, Marchione and Carlucci. My name is - Lena Bodin and I am the CEO/Principal of People Resource Strategies, an Organizational Development/Human Resource Management consulting firm located in Pomona, NY.

In addition, I am a board member of The Rockland Business Association's (RBA) and chair its Small Business Council and the Human Resources Council. I am also a board member of the New York State Council of the Society for Human Resource Management (NYS SHRM), where I currently serve as the Legislative Co-Director of Government Affairs, as well as board member and Legislative Director for the Westchester Chapter of SHRM.

I am pleased to appear before you today on behalf of the RBA Small Business Council and HR Council and the Society for HR Management and its New York State Council Westchester Chapter and to voice concerns and burdens shared by the members of the groups I serve.

Therefore, thank you for the opportunity to present this statement in support of amending the Wage Theft Prevention Act of 2010, specifically repealing the annual notification requirement that employers provide their employees before February 1 of each year.

Before I get started, I wanted to say that we are grateful for your support and "yay" vote for the repeal of the annual notification requirement in the Senate this June.

The Act of 2010 requires communication, in the form of a notice, to all employees which is a written statement of their rate(s) of pay; overtime rate and other premiums or payments, if applicable; designated pay day; the employer's intent to claim allowances as part of the minimum wage; and other information set forth in the statute. A signed copy of this notice must be retained by the employer for each employee. The annual notification requires that the notice be re-issued to each employee at the beginning of each calendar year and again have signed copies collected from the employees to be maintained by the employer.

As an HR consultant, I have hands-on knowledge about how the Wage Theft Prevention Act has impacted my clients' businesses and the costs associated with complying with the annual notification requirement.

In my consulting capacity, I am regularly called upon to develop workplace policies balancing the interests of my client companies and their employees, while ensuring that those policies are in full compliance with New York employment laws. To that end, I know well the reporting requirements of the Wage Theft Prevention Act and the hardships employers are encountering in complying with the law – particularly due to the duplicative nature of the information requirement of the annual notice, the timing of when the annual notice must be provided to employees, and particularly the requirement that employers collect signed copies of the notice from each employee or risk penalties for non-compliance.

In my role as council chair for the various councils I serve on, I also hear from individual HR professionals and business owners talk about the time consuming task of complying with this duplicative requirement. The New York Business Council had conducted a study collecting data from their member organizations which is available on their website. Their information can easily be applied to the small businesses as well as the larger companies. The Business Council statistics showed the cost of compliance to be anywhere from $3.00 approximately to over $55.00 per employee, which can become cost prohibitive for the small business.

As you know, this is an issue that was before the Legislature for the past few years. Most recently, bills were introduced in both the Assembly and the Senate [A.8856 by Assemblyman Gabryszak and S.6063-A by Senator DeFrancisco] which would have repealed the annual reporting requirement of the Act. On June 21 of this year, in the final hours of this year's legislative session, the Senate passed its bill in a bipartisan vote of 43-20. The Assembly, on the other hand failed to act before adjournment, although its bill was cosponsored by a bipartisan mix of 62 members. Again, thank you for your votes to support the repeal of this burdensome requirement.

The groups I represent strongly support the intent of the Wage Theft Protection Act, particularly the requirements that employers provide wage information to their employees at the time of hire, as well as any time the rate of pay changes for an employee.

With regard to the annual notice requirement of the Act, we strongly feel that this requirement is duplicative, given that employees are provided wage information on each pay stub and annually on their W-2 wage statement for federal, state, and in some instances, city tax purposes.

Further, we are concerned with the timing of the annual statement (between January 1 and February 1 of each year), which happens to coincide with probably the busiest time of the year for small employers and particularly HR department staff given the numerous other employee notifications employers must or do provide their employees during this timeframe – such as W-2 wage statements, confirmation of applicable employee-provided health care, other benefit notices such as 401(k) statements and requests for employer-provided educational assistance under Section 127 of the Internal Revenue Code, etc., if applicable.

This requirement is particularly burdensome and costly for small businesses who don't have a dedicated HR department or who have contracted with an independent payroll/benefits administrator. In many instances, the person who performs HR activities for such businesses also has many other responsibilities, which may include health and safety responsibilities for the organization and/or a range of other administrative duties. Often times, for the small business, this person may be the owner of the company.

Most burdensome, time-consuming and expensive for New York employers to comply with is the requirement under the Act that employers must collect and store, for 6 years, signed copies of the pay notification for each employee. While this does not present a hardship at the time the employee is hired, since they generally have a number of employment forms to sign, or at the time they are notified of a change in their rate of pay (usually in the context of a performance review with their manager or supervisor), the annual notice requirement causes a significant hardship for employers and our members – who often are the very ones who have to hunt down these forms from their employees or risk the organization to significant monetary penalty. The cost statistics that I mentioned from the NYS Business Council is understandable, and could be more than $55 per employee if the person who is responsible for making sure employees are returning the signed copies happen to be the owner or principal of the business.

This annual notice requirement of the law is equally burdensome to the small employer (of 25 employees or less), as well as the large employer, particularly those who have a significant number of workers who work remotely or for companies headquartered outside of our state but who have employees located in New York.

Given the economic fragility of our state and the U.S. economy as a whole, the RBA and NYS SHRM members implore you and other members of the Legislature to take a close look early in 2014 at the hardships New York employers have encountered with the annual reporting requirement of the Wage Theft Protection Act. I think you will find that by amending the law to eliminate the annual reporting requirement (or at least the requirement that employers collect signed copies of the annual notices provided their workers), you will be eliminating a major burden for employers while maintaining the original intent of the statute – that employees in our state are well informed about their rate(s)of pay, and the other requirements set forth by the statute.

Thank you for providing me with the opportunity today to share our views about how the Legislature can amend the Wage Theft Protection Act to balance the interests of both New York workers and their employers. I am happy to answer any questions you might have about my statement or about my affiliations with the RBA and the NYS SHRM.

Regulatory Reform Hearing: Small Business
October 7, 2013
Nanuet, NY

Testimony Submitted by:

Robert Pitkofsky, Esz.

Small Business Attorney for Pitkofsky PLLC

Robert L. Pitkofsky, Esq.
Pitkofsky PLLC
151 North Main Street, Suite 300
New City, NY 10956

Thank you Senators for convening this important forum. I appreciate the opportunity to discuss the amendment and/or elimination of statutes, regulations, and rules which hinder the creation of new business entities in the State of New York. My name is Robert Pitkofsky, and I am a small business attorney with a solo legal practice here in New City in Rockland County. My practice consists of working with small and emerging start-up businesses to set them on the right foot. I am proud to serve the business community as co-chair of the small business council of the Rockland Business Association, an organization committed to advocating for business interests in the Hudson Valley and Albany. The Small Business Council works with entrepreneurs with fewer than 25 employees – the lion's share of businesses in RBA. SBC offers a relaxed and supportive forum to discuss their operational, marketing, and employment concerns with other business owners. We have been very excited about the support that our Council has received from the Rockland business community and look forward to expanding its offerings.

One of the most confounding requirements that are imposed upon New York business entities is the LLC publication requirement. New York's Limited Liability Company Law Section 206 requires all members of limited liability companies, one of the most user-friendly corporate forms, to publish a legal notice in two newspapers (one daily and one weekly) over a six-week time frame within 120 days of the organization of the entity. The Legislature has confirmed this requirement several times, most recently in 2006. To be quite honest, prior to the June 1, 2006 amendment, many entities decided to simply ignore this statutory requirement. Before 2006, LLCs that did not comply with this requirement were unable to access the court system to defend or prosecute an action in state court. Many business owners decided that the risk of this eventuality was outweighed by the burdensome costs of publication. However, in 2006, the Legislature again reaffirmed this requirement and attempted to strengthen the penalty for noncompliance. Under current law, section 206(a) of the Limited Liability Company Law states that an LLC's "authority to carry on, conduct or transact business in this state . . . " is suspended as a result of failing to comply with this publication requirement. However, this language is nebulous at best, and ~~does not seem to limit the LLC's ability to contract or conduct business~~ in the State. The Department of State does not appear to keep any records of these "non-compliant" LLCs and does not have any mechanism for suspending them.

My clients and I continue to struggle with the public policy rationale behind this requirement. After an entrepreneur makes the decision about what type of ~~entity to~~ choose, a client turns to the start-up legal and filing costs. After the initial filing fee and registered agent fees for a business entity, the publication costs alone can cost up to $2000 per entity and depending on what county the LLC is organized in! As my clients tell me often, no one reads the legal notices in the newspaper as information is available more readily on the Internet. I would submit that there are better and much less expensive ways to notify the public about the creation of a new LLC.

Most importantly from a public policy standpoint, I submit that this requirement has reduced the willingness of business owners to open or conduct business in New York State. Other "business friendly" jurisdictions, such as Delaware, have taken advantage of arcane requirements such as New York's LLC publication requirement and have relaxed the jurisdictional nexus that a business must have with a foreign state. I would further argue that this requirement, which does not seem to have a strong public policy underpinning, perpetuates the unfair perception that New York State is not business friendly – or somehow our State is not a great place to invest capital, hire employees, or manufacture products.

I recognize that the elimination of this requirement would reduce some revenue recognized by the Department of State in terms of filing fees. In addition, there would be a loss of revenue to the handful of newspapers which are approved to publish these LLC notices. However, I would argue that the elimination of this requirement would encourage new and emerging business owners to consider doing business in New York State which will result in a net increase in tax revenue to the State. Business owners who are considering which state to incorporate or do business in always look at the bottom line in terms of start-up costs. I would respectfully ask this group, and by extension, your colleagues in the Legislature, to examine this requirement in further detail and strongly consider abolishing it.

Thank you again for your consideration and I would be happy to answer any questions that you may have.

Regulatory Reform Hearing: Small Business
October 7, 2013
Nanuet, NY

Testimony Submitted by:

Jim Calvin

President of the New York Association of Convenience Stores

NYACS

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Testimony of James Calvin, President
New York Association of Convenience Stores
Senate Majority Coalition Small Business Regulatory Reform Forum
Monday, October 07, 2013, Nanuet NY

My name is Jim Calvin. I am President of the New York Association of Convenience Stores, a private, not-for-profit, membership organization representing the state's 8,000 mini-marts and convenience stores.

From a corner market in West Seneca to a bodega in a thriving Brooklyn neighborhood, from a country store in Saratoga County to a sprawling gas-and-go in suburban Syracuse or Spring Valley, convenience stores come in all sizes, shapes and formats.

Open extended hours, these small businesses – many of them independent, family-run enterprises – are proud to be part of an industry that millions of New Yorkers rely on as a gas station, quick-serve restaurant, bank, refreshment center, and source of community connection.

Our thanks to the Senate Majority Coalition and Senators Gallivan, Valesky, Marchione, and Carlucci for convening this forum. NYACS is honored to be invited to testify.

Convenience stores have a unique perspective on New York State's regulatory climate, because we are engulfed by it.

We sell motor fuel, tobacco, lottery, prepared food, beer, milk, snacks, and a wide range of other products. We collect billions of dollars in excise and sales taxes for the State of New York. Consequently, we are licensed, regulated, audited and/or inspected by the following state agencies:

- Consumer Protection Board
- Department of Agriculture and Markets
- Department of Environmental Conservation
- Department of Health
- Department of Labor
- Division of the Lottery
- Department of State
- Department of Taxation and Finance
- State Liquor Authority
- Office of Alcoholism and Substance Abuse Services

If it isn't the tax auditors, it's the alcohol-warning-sign police, or Ag and Markets inspectors monitoring food service sanitation, or health departments performing undercover tobacco stings, or badge-wielding bureaucrats showing up announced and opening every cigarette carton to see if every pack has a valid state tax stamp, or the Labor Department checking your wage-and-hour records, or the environmental officer writing you up for fading paint on your underground fuel tank caps, or the weights and measures guy doing an item-pricing inspection. It's endless.

I swear, some days more inspectors come through the door than customers. On more than one occasion, I have half-jokingly suggested that in the name of efficiency and common sense, why don't the state, local, and federal governments team up and assign one dedicated, full-time "Superinspector" to each convenience store to ensure 100 percent compliance with every single law, regulation and policy known to man?

All day, every day, Superinspector would occupy a lifeguard chair overlooking the front counter, where he or she would witness every movement and transaction, crying "foul" or "you didn't check ID," periodically scanning the walls for proper posting of signs warning of every imaginable risk to the general populace, and admonishing a clerk at the deli counter to put on a hairnet.

Most of our members got into the convenience store trade because they wanted to sell stuff, interact with customers, and grow a business. But wave after wave of additional regulation has turned them into compliance officers, draining their limited time, energy and resources away from running their business in order to ensure they meet the State's ever-expanding requirements. For the single-store, mom-and-pop operator, the challenge is almost insurmountable.

Mixed Message on Teen Smoking

There are maddening contradictions in laws governing the age-restricted products we sell. In the name of preventing youth smoking, the law imposes severe penalties – fines, license suspension, and potentially even jail time – on retailers caught selling cigarettes to minors. Yet on the other side of the transaction, there is no accountability whatsoever – it's perfectly legal for minors to possess and use tobacco in New York! They can be arrested for possessing fireworks, alcoholic beverages, or graffiti tools, but not cigarettes. The state's policy is "smoke 'em if you got 'em."

Bureaucratic Double Standards

One of our member stores recently had a county health department inspector, enforcing the various State laws governing tobacco sales, tell them they could not display e-cigarettes on the counter inside a locked container. He was wrong. You may display any tobacco product on the counter as long as it's inside a locked container, typically a Plexiglas case, which it was. When the retailer contacted the health department to question this guidance, they acknowledged the inspector was mistaken and said they would re-train him on that point. So, if the enforcement agency screws up, it's "Oh well, we'll do better next time." But if the store screws up and sells cigarettes to a minor or fails to display a sign, it gets nailed with hefty fines and even suspension of its licenses to sell tobacco and lottery. Just one example of the double standards that drive us nuts.

Do As I Say

In 2009, the Legislature authorized the Tax Department to require all sales tax vendors to "re-register" – and pay a special $50 fee – so they could upgrade their outdated computer system. The Department was directed in statute to complete this project by March 31, 2013. Yet in April 2013, retailers were still getting notices from the Department telling them to fill out the form and pay the $50. When they miss a deadline, nobody bats an eye, but if we miss a deadline for tax remittance, there's hell to pay. More double standards.

One-Upmanship at the Local Level

Because state law permits local governments to pass tobacco retailing regulations that are more restrictive than the State's, we now have members of county legislatures proposing local laws to prohibit pharmacies from selling tobacco – local laws that would define a pharmacy as any retail establishment that sells prescription or over-the-counter drugs, meaning any convenience store that carries Advil.

The Ends Justify the Means

Last year, the State Liquor Authority unilaterally authorized its enforcement officers, when carrying out undercover inspections to detect and punish sales of beer to minors, to allow the undercover minor to lie about his or her age in order to bait store clerks into selling them beer. This fundamentally altered the rules of engagement for compliance enforcement. Yet there was no legislation, no public hearing, and no public comment period – just a wave of the Chairman's hand.

When it comes to formally notifying store management of an alleged undercover alcohol sale violation, the SLA is content to let the offending clerk stay on the job for months on end. We can cite specific examples of retailers receiving notice *6 to 10 months* after the alleged sale. This denies the business owner the chance to immediately remove the offending cashier. By doing so, the SLA in the name of preventing underage sales – knowingly exposes the community to the risk of subsequent underage sales by that same cashier during the intervening period.

Mandatory ID for Age-Restricted Products

We wish to commend Senator Gallivan for introducing legislation this year (S.3493) that would require *all* individuals wishing to purchase alcohol or tobacco at off-premise establishments to present a valid photo ID – regardless of their age.

Existing state law says we must ID a tobacco customer who appears to be under 25 and a beer customer who appears to be under 21. But anyone who has worked in retail knows how hard it is to discern a customer's age. Too often, properly trained cashiers guess wrong, don't ask for ID, and mistakenly sell to a minor, jeopardizing public health and safety while subjecting themselves and their stores to harsh penalties.

This legislation will eliminate the guesswork, thereby reducing underage sales. Rather than training store clerks to only ID customers who look younger than a certain age, we'll be able to train them to require ID from *everyone*. Some stores have voluntarily adopted this as a store policy, but regrettably it has cost them business because older customers get annoyed and instead go across the street to a store without a mandatory ID policy. A statewide law is the solution.

Addressing the lack of prompt notification described above, S.3493 would also require health departments and the State Liquor Authority to notify store management within seven days of an alleged underage sale violation.

We look forward to working with Senator Gallivan and the Senate Majority Coalition to pass this legislation in 2014.

Minimum Wage Hike Notification

Over our objections, the Legislature passed a three-step increase in the state minimum wage. The first jump occurs January 1, 2014, to $8.00 an hour, up 75 cents. You would think that by now, the state Labor Department would be notifying employers of this change – and the corresponding increases in the uniform allowance, meal allowance, and minimum weekly salary that are statutorily triggered by a minimum-wage hike.

But today, as small businesses try to compile their operating budgets for 2014, there's not a peep about the impending wage rates on the Department's web site. Last time around, in 2009, the Department waited until the very day the minimum wage increase became effective to issue a notice to employers. I guarantee you that most small businesses have no idea that the uniform allowance, meal allowance, and minimum weekly salary are going up on January 1st. But they'll find out when an employee complains and the Department charges them with a wage-and-hour violation.

Wage Theft Annual Notice

The requirement that employers annually present their employees with a slip of paper confirming their job title, pay rate and other basic information that is already furnished on weekly or biweekly paystubs is silly, wasteful, and a symbol of senseless regulation. We agree with the Senate Majority Coalition that it should be repealed.

Double Jeopardy

The Public Health Law requires that if a retailer's tobacco license is suspended for an underage sale, his lottery license gets suspended as well – based not on an act of selling lottery tickets to a minor, but a presumption that the store *will do so in the future* based on the tobacco violation. That's like saying if you get a speeding ticket, you should have your hunting license suspended, because if you violated the Vehicle and Traffic Law, you will probably violate the Conservation Law too. Moreover, it unfairly subjects tobacco retailers who sell lottery to harsher punishment than tobacco retailers who do not sell lottery. Lottery license action should be decoupled from tobacco enforcement.

Avalanche of Signage

A few of the signs we are required by State law to display at our stores are:

- A red-lettered 8.5 x 11 tobacco warning sign whose wording has changed twice in 3 years as more products were added to definition of tobacco products. Some retailers displaying the older version have been fined $500 for not displaying newer version.
- One 11 x 17 poster saying no one under 21 can buy beer, and another 11 x 17 poster warning pregnant women they should not consume alcohol.
- A 182-word "Bottle Bill of Rights" advising consumers how, where and when they can redeem deposit containers, along with additional Bottle Bill signage.
- Our refund policy in the event of an overcharge, and our policy on bad checks.
- Black-and-white placards mounted atop the fuel pump disclosing the highest and lowest price of each grade of fuel. That's not enough for some legislators, who also want to dictate the content of the pole-mounted price sign out along the street.
- Our tobacco registration, lottery license, food service license, beer license, and sales tax certificate of authority.

There probably was a rationale for enacting each of these sign mandates, but requiring all of them doesn't make any sense. Therein lies the bigger problem. Legislators and regulators often view things issue by issue, tree by tree, rather than stepping back and seeing the forest – the vast amounts of space devoted to displaying mandatory signs of all sizes, shapes and colors to satisfy well-meaning desires to shield constituents from perceived risk.

Our Unregulated Competitors

New York's pervasive regulatory burden would be easier for us to bear if our Native American competitors were held to the same standards. They sell *billions* of dollars worth of cigarettes and motor fuel to non-Indian New Yorkers, yet are not required to obtain licenses, collect and remit state and local taxes, undergo audits or inspections, or abide by any of these regulations.

And in the case of the Oneida Indian Nation in Central New York, their reward is an agreement, signed by Governor Cuomo and ratified by the Legislature earlier this year, under which our State essentially promises to forever look the other way on all the above – permanently bestowing special privileges and competitive advantages on those who have made a fortune thumbing their noses at duly enacted standards for doing business with New Yorkers. Law-abiding convenience store operators who for decades have pleaded with the State to end this injustice instead got poked in the eye with a stick.

What Can the Legislature Do?

We appreciate the initiative you have taken, and success that you have achieved, to begin the arduous task of reforming and repealing costly and unnecessary regulations that impede small business growth.

But when legislators ask, "What can we do to make things better?" I paraphrase the Hippocratic Oath and tell them, "Refrain from making it any worse."

Thus, in 2014, when election-year proposals for more meddlesome and burdensome legislation are introduced, just say no.

- When they want to expand the Bottle Bill to juice, iced tea, sports drinks, flavored water – sticking us with the mess of redemption and storage of empty, unrinsed containers – say no.

- When they try to impose mandatory paid sick leave on private-sector employers who simply can't afford it, say no.

- When they try to place new restrictions on what products we can carry, or what form of payment we can accept, say no.

- When they try to prohibit retail businesses from checking into whether an applicant for a cashier job has any past criminal convictions until *after* conditionally offering them a job, say no.

- When they propose higher taxes on the core products we sell, say no, because those tax rates are already the highest, or among the highest, in the country.

- When they want convenience store operators to wear "Kick Me" signs on their backs by requiring gas pumps to display the phone number of the Attorney General's Office so consumers frustrated with gas prices can call and arbitrarily accuse the retailer of overcharging, say no.

Say no because these measures would drive up our costs, reduce our sales, and/or erode our ability to cope with the *existing* tax and regulatory burden.

Say no because such actions would only reinforce New York's reputation as having the worst business climate in the country.

Say no because you sincerely want small businesses to be able to succeed, and grow, and provide employment, and generate tax revenue, and contribute to the communities they serve.

On behalf of the New York Association of Convenience Stores, thank you all for time and attention, and for your bipartisan commitment to addressing overregulation of small businesses.

Regulatory Reform Hearing: Small Business
October 7, 2013
Nanuet, NY

Testimony Submitted by:

David Golub

Senior Vice President of Administration for Price Chopper Supermarkets

Price Chopper

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David Golub
Sr VP Administration

October 4, 2013

Testimony on Regulations Impeding Business Growth in NY

Good Afternoon, my name is David Golub, and I am the Senior Vice President of Administration for Price Chopper Supermarkets. We are a privately held, full service grocery store chain operating in 6 Northeastern states. We have a total of 132 stores, and we operate 81 of those stores in the state of New York. We are headquartered in Schenectady, New York, and we service our entire chain from five warehouses, located in Rotterdam and Guilderland, NY. We have 22,000 employees, with 14,000 working in the state of New York.

I appreciate the opportunity to speak with you today regarding current rules, regulations, and mandates that have a negative impact on business and job growth in our state. While there are a number of topics I could cover, I will focus on 3 areas that we feel are most in need of attention.

With the implementation of the Affordable Care Act, the mandate requiring all US citizens to have healthcare coverage and the introduction of transitional reinsurance fees, it should no longer be necessary to impose surcharges at the state level, on providers of healthcare, in order to fund indigent care. As an employer with self-insured medical plans, Price Chopper currently pays approximately $2M in HCRA surcharges annually. This is a tax on health care services which negatively impacts our company and our teammates, in that a part of this expense is passed on to them. Elimination of this large tax would help alleviate some of the burden on companies, like ours, and consequently have a favorable impact on job creation.

Another area of opportunity involves the significant cost of having a self-insured workers compensation program in the state. Price Chopper currently has a self-insured program, and we pay an extremely high amount for premiums and assessments in NY vs. the 5 other states we operate in. Premiums and assessments in NY is proportionally 10 times more than the other 5 states combined. We are aware that there is currently a significant amount of work being done to identify opportunities for improvement, through a WC process re-engineering project. As ideas are generated through this process, we would ask for your support in helping to bring down the stifling cost to businesses of having a self-insured WC program in NY.

The final area that I would like to cover involves the inefficiency of the licensing process for food retailers in the state. When trying to open a food retailing business in NY, there currently is no uniformity in the application process from the different state agencies. You currently have to provide the same basic information, over and over again, to each of the agencies to apply for the various licenses. Some of the agencies include: Tax & Finance, SLA, Ag & Mkts, Health Dept, Division of Lottery, and DEC. It would be much more efficient, and cost effective for business and for the agencies, to have a common form that could be used statewide, which could be submitted in one place. This could also be used to improve the flow of the application process. For instance, a store cannot get a WIC license until it has obtained an Ag & Mkts, and SLA approval. Implementation of a more efficient and streamlined process could be a win-win for all involved.

In closing, I would like to thank you for giving me the opportunity to share some of the opportunities that we see for regulatory changes in NY, which can help to make our great state even more business friendly, and in turn will help economic development and job growth.

Thank you for your consideration,

David Golub
SVP Administration, Price Chopper Supermarkets

Regulatory Reform Hearing: Small Business
October 7, 2013
Nanuet, NY

Testimony Submitted by:

Joseph Fitzpatrick, Esq. & Karen White

Representatives from the New York State Motor Truck Association

NYSMTA

The voice of trucking

Senate Majority Coalition Forum on Regulatory Reform

Testimony of the New York State Motor Truck Association
Given by Joe Fitzpatrick, Lightning Express Delivery Service, Inc.
October 7, 2013
Nanuet Public Library

Senate Majority Coalition members, thank you for the opportunity to speak to you today regarding the impact of burdensome regulations on small businesses.

My name is Joe Fitzpatrick, and I own Lightning Express, a small trucking company based in Gardiner, New York in Ulster County. I employ 27 people who ensure that my customer's goods are delivered in a safe and timely manner. I am also a member of the New York State Motor Truck Association Eastern Region Board.

Lightning Express serves an average of 100 small business and retail customers a year throughout New York State. So anything that impacts my small trucking business, trickles down to impact all the businesses I serve, and in turn, their customers.

Since I started my company 14 years ago, I have seen a great deal of growth. But as the years have passed, running a business has gotten much more difficult. Workers' Compensation insurance is now the equivalent to over 13% of my entire payroll, and the rate for my drivers is over 15%. I was informed by my auditor that truckers are now second, only to roofers, in workers' compensation premium rates.

My business, like all other businesses, now gets an extra bill each year for unemployment insurance, to pay back the interest New York took out on a federal loan it hasn't paid back. And liability insurance premiums on small businesses are also exorbitant, because of frivolous lawsuits and the Scaffold Law. Thanks to the Scaffold Law, I have to carry general liability insurance on my facility to cover even things that aren't my fault, or the fault of the contractor I hire to replace windows, for instance.

As you likely know, the Scaffold Law imposes "absolute liability" for elevation-related injuries. That means that the actions of an injured worker, such as failure to use provided safety equipment or gross negligence, is virtually irrelevant in court. As an owner of a business facility, if I hire a company to install new windows and one of their workers is injured because he does not use the safety equipment provided by his employer, his employer is automatically held liable and I can be sued for liability as well. An absolute liability standard makes no sense and drives my insurance premiums through the roof. Additionally, New York is the only state with such a standard, leaving me at a competitive disadvantage to small trucking companies in bordering states who do not have that financial burden.

As I mentioned, in addition to being a small business owner, I am also a member of the New York State Motor Truck Association. The number of rules and regulations stifling the trucking industry in New York is astonishing. For the sake of time, I will only touch on a few of the most onerous regulations.

First, it should be noted that the trucking industry in New York State employs over 270,000 people. It is responsible for delivering everything that is produced, used, consumed or sold by nearly every business in New York State. Trucking is the backbone of New York's businesses. What impacts the trucking industry, impacts all businesses it serves and the consumers served by those businesses. What's more, trucking not only supplies New York's businesses large and small, but the majority of the state's 28,000 trucking companies are small businesses.

One of the biggest financial burdens in the trucking industry is the Highway Use Tax, or Ton-Mile-Tax.

New York is the only state in the northeast and only one of four states in the nation, with a highway use tax. The tax puts New York at a competitive disadvantage and is a primary reason why New York ranks as the 2nd most expensive state in the nation in which to operate a truck.

Compliance with the tax is extremely burdensome, not only to carriers, but to the state as well. In addition to the cost of the tax itself, there is a significant administrative cost to maintain the detailed records required to comply with the tax. Many motor carriers have staff dedicated to compliance with the highway use tax.

Evasion of the tax is a serious issue that results in lost revenue to the state, and inadvertently results in an unfair competitive advantage to out-of-state carriers. While there is an audit program in place, it is much more likely for a company in New York to be selected for audit by the New York State Tax Department than a carrier based out-of-state. Additionally, if an out-of-state carrier is evading the highway use tax, they are evading compliance with the International Fuel Tax program and International Registration Plan as well, resulting in significant revenue loss to the state.

Currently, the tax generates approximately $145 million, which goes into the Dedicated Highway and Bridge Trust Fund. There are other alternatives for the state to collect this revenue that ensures all commercial users are paying the tax, not just those in New York.

An increase in registration fees and fuel tax can be evenly distributed through the International Fuel Tax Agreement and International Registration Plan programs. While not politically attractive, fuel tax remains the most efficient mechanism by which to generate highway funds. An increase in the fuel tax is supported by the trucking industry as a way to ensure parity.

A study conducted on five states that repealed their highway use tax found that annual highway user revenue after the repeal equaled or surpassed the annual revenue collections when highway use taxes were in place. In addition, in the year following the elimination of their highway use tax, reported taxable gallons of diesel fuels increased, on average 5 to 7 percent more than the national average. This increase in diesel fuel can be attributed to eliminating evasion, not because more diesel fuel was actually used. It is important to note that four of the five states studied eliminated the highway use tax without any increase in other taxes or fees in an attempt to replace the highway use tax revenue.

The highway use tax is an onerous, antiquated tax that puts all businesses in New York at an economic disadvantage. High taxes continue to harm New York and discourage business from establishing locations here. The elimination of this tax will help reduce transportation costs in New York and encourage new business, as well as help retain the business New York already has.

The second regulation I would like to discuss is the Wage Theft Prevention Act, which came into effect in 2011. Part of the act requires an annual wage notice to employees which involves a lot of time, effort and expense on the part of the employer.

This annual pay notice contains the same information now required by state labor law to be placed on each and every paystub by employers including rate of pay, overtime rate of pay, basis for pay- by hour, week, salary etc.- allowances, if there are any, pay day, employer name, DBA used by employer, physical address, mailing address, employer phone number and employee name. This is the exact same information we give our employees every time they get their pay check.

Further, the employer is required to obtain written acknowledgement of the receipt of this notice by every employee and maintain this documentation for six years. Realistically, the annual wage reporting requirement is a time-consuming, costly endeavor for both small and large employers. In the trucking industry, even small businesses often have drivers whose routes may keep them away from the terminal for weeks at a time. Getting them to sign and return a slip of paper isn't always easy. And there is nothing to be gained by doing so.

Though the Department of Labor has acknowledged that wage compliance is an issue for only a small percentage of New York State employers, the annual pay notice requirement universally applies to everyone- even those without compliance issues. This type of annual notification requirement is much better suited as an enforcement tool and should be the exception rather than the rule, reserved for instances where non-compliance by an employer has been an issue.

The trucking industry would like to see a repeal of the requirement that forces all private sector employers to provide a written pay notice to every employee in New York State annually, and obtain written acknowledgement of the receipt of this notice by every employee. This modification to the Wage Theft Prevention Act leaves in place the act's most significant reforms intended to assure payment of all wages earned by employees.

The final issue I'd like to bring to your attention is the issue of indemnification clauses in carrier contracts.

In the past decade, it has become common practice for shippers to include language in their contracts with for-hire carriers indemnifying the shipper against any liabilities or damage to the goods being shipped, regardless of fault.

These clauses serve to automatically assign liability to the carrier, rather than determine who is liable. I'd like to give you an example:

> A shipper hires a carrier to deliver a truckload of housewares, including dishes and glasses. A pallet of these goods is dropped by a forklift operator in the shipper's warehouse, damaging some of the breakables inside, prior to loading the truck. The boxes are loaded onto a carrier's truck and transported to a retailer. The retailer rejects the load due to damage. Under current law, the indemnification clause by the shipper would automatically make the carrier responsible for all damage, regardless of actual fault or negligence.

Due to the number of shippers utilizing this practice in New York, carriers do not have the luxury of simply rejecting these contracts. The increasing instance of shippers assigning liability to carriers for things out of the carriers' control must be stopped, and the New York State Motor Truck Association aims to do so with passage of "Fairness in Contracts" legislation. This legislation, S1087/A3673 was sponsored by Sen. Maziarz and Assemblywoman Lupardo in 2013.

"Fairness in Contracts" legislation will "level the playing field" by enabling the responsible party to be held accountable for damages and liabilities. This legislation would not limit anyone's ability to sue someone who is at fault. Instead of liability automatically being assigned to the carrier, it would allow fault to be determined.

Currently, 38 states have adopted legislation aimed at protecting carriers from overreaching indemnification provisions in shipper contracts. More than half of those laws were passed in the last four years. In practical terms, that translates to 76% of the states in the country having a competitive advantage over carriers in New York. Pennsylvania, Connecticut, and

Massachusetts have adopted such legislation and it is being considered in Vermont and New Hampshire, putting New York carriers at an even greater disadvantage in the region.

Senators, I would like to thank you for the opportunity to speak to you today. As I mentioned earlier, anything that impacts the trucking industry impacts all businesses. It's unavoidable. I encourage you to keep that in mind as you look to determine the top 1,000 impediments to business growth in New York.

Thank you.

Appendix G

Insurance/Banking/Financial Services
New York City, NY October 8, 2013

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Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Lou Coletti

President and CEO of the Building Trades Employers' Association

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Louis J. Coletti
President & CEO

TESTIMONY

PRESENTED TO THE

NEW YORK STATE SENATE MAJORITY COALITION

Presented by
Louis Coletti
Building Trade Employers Association
President & CEO

Good morning Chairman and Members of the Committee. My name is Louis Coletti and I am President of the Building Trade Employers Association, an organization representing 28 union contractor trade associations made up of 2,000 construction managers, general contractors and specialty trade contractors doing business in the City. BTEA members are employing 25,000 project managers and support staff as well as over 100,000 skilled members of the building trade unions in New York City. Simply put, the BTEA **contractors are** the construction community of New York City.

I'm proud to say many of our members have been and will continue to be an integral part of the effort to grow the minority and women owned business community of New York. There are a number of challenges threatening the successes we've experienced, however, none as great as the ability of M/WBEs to obtain their own general liability insurance coverage. This challenge is now threatening the M/WBE program at the *School Construction Authority (SCA).*

The SCA is overseeing one of the country's most successful M/WBE programs, with over 800 certified firms doing business with the SCA, that have been awarded 2.7 billion dollars of construction contracts over the last 10 years. A large number these firms do work solely for the SCA and it is therefore the lifeblood of their business, helping to keep thousands in the minority community employed.

The failure to amend of Scaffold Law 240/241 threatens the M/WBE program at the SCA and at all city agencies and will put a halt to the progress the M/WBE community has made.

Without amending this antiquated and unfair 240/241 Scaffold Law, the most successful M/WBE, program in the nation will be forced to cancel its owner controlled insurance program. Their current OCIP ends on December 31st and due to skyrocketing costs it will not be able to reissue it- thus requiring each firm competing for SCA work to obtain and pay for their own general liability insurance, for both existing and new contracts. A majority of M/WBE firms doing business with the SCA simply cannot afford to carry their own insurance and have enjoyed years of growth and success due to the SCA's OCIP coverage.

As of today, the SCA has been unable to find an affordable option for their 2014 OCIP program and their OCIP program will end December 31st. A letter has been sent to entire M/WBE community of more than 800 certified firms notifying them they will be forced to provide their own liability insurance on January 1st if they continue to do work on our City's schools.

The letter reads: Due to the difficulty of obtaining insurance coverage for construction programs in New York, in large part as a result of the impact of the absolute liability provisions of Section 240 of New York State Labor Law, we are reevaluating continuance of this insurance coverage. We are considering asking contractors to furnish insurance starting January 1, 2014.

Three years ago there were 7 insurance companies willing to write general liability policies for the construction community. Last year, that number dwindled to 2. When the SCA solicited bids this summer for their 2014 OCIP program, they at best received one.

Why has the SCA been forced into this position? Let me provide an example of the relative costs in a neighboring state. In 2013, the OCIP insurance premium for the SCA was $100 million for approximately $1.7-2.5 billion in construction costs. In NJ, for a similarly sized capital program, the insurance premium was $25-75 million less than the SCA's. With the difference we could build 2 more schools, add thousands of student seats and employ thousands of workers because every $1 dollar paid in premiums is $1 dollar taken from the budget for school construction.

Why are these premiums skyrocketing and forcing the SCA to very likely lose its coverage? Because New York City construction firms and owners incur defense and indemnity costs 300 times higher than their counterparts in neighboring states.

Ladies and gentleman, this is a crisis for the M/WBE community, for the construction industry, and for the taxpayers of New York City. This is a crisis for the SCA, our nation's most ardent and celebrated supporter of M/WBE firms. Hundreds of firms are mentored and given the chance to grow and succeed under the SCA's guidance. Because of the OCIP coverage, they are able to focus on building their business to compete in the broader market but this opportunity will cease to exist on January 1st.

I think you would agree that in the US, everyone has a right to defend themselves in the court of law. Except in New York, Owners and Contractors are unable to. This amendment does not impact workers' rights, but simply asks that owners and contractors be able to submit their own evidence to the jury. As evidenced by the crisis at the SCA, the time has come to make changes, otherwise costs will continue to rise and M/WBE opportunities will be halted. New York is alone in the nation in retaining this century old law, as all other states apportion liability in proportion to fault: and there is a reason for this.

We simply cannot afford to wait until it's too late. The time to act is now.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Denis M. Richardson

Managing Director for the General Contractors Association of New York, Inc.

Denise Richardson, Managing Director
The General Contractors Association of NY, Inc.

New York State Senate Forum on
Insurance Regulations

October 8, 2013

250 Broadway – 19th Floor
Senate Hearing Room

Thank you for convening this hearing on insurance regulations and for the opportunity to comment today on the crisis that has hit the construction industry. I am Denise Richardson, managing director of the General Contractors Association of New York.

The General Contractors Association represents the unionized heavy construction industry in New York City that constructs New York's building foundations and public works infrastructure. Our 225 members employ 20,000 hardworking professional and trades workers across New York State. In addition to New York City, our employees come from 702 New York State zip codes, as far east as North Haven, as far north as Champlain and as far west as Chautauqua.

Labor Law 240/241, more commonly known as the scaffold law, has created a crisis of cost and of availability of construction liability insurance in New York, the only state left in the union that still has such an antiquated and costly law on the books.

The scaffold law, which dates back to 1885, makes property owners and contractors 100% liable for most gravity related injuries to workers on construction sites. The law has remained in place long after other states replaced similar types of laws with workers compensation insurance which requires the worker to give up their right to sue for liability and provides payments for medical bills and lost wages as a quick way to settle claims without assessing blame.

The scaffold law allows workers to sue owners and contractors directly for liability which can include punitive damages or pain and suffering. Every other personal injury action in New York State uses a comparative negligence standard.

Through a combination of increased costs, inability to get insurance and skyrocketing awards, the Scaffold Law has negatively affected every town, county, school district, taxpayer and employee across New York State. Indeed the highest scaffold law settlement in 2012 was against a school district.

The Scaffold Law's negative impact has accelerated in the last few years. A survey of GCA members shows that general liability insurance costs have increased between 300 and 1000% in the past 2 years alone. At the same time, the minimum levels of insurance that were available to cover the working level of liability coverage have increased from $1million/$2million per occurrence to $2million/$4million or, in some cases, $3million/$5million further driving up costs.

This dramatic increase in insurance costs impacts all government agencies and all New Yorkers by driving up project costs while reducing the total number of projects that can be built. Insurance costs a few years ago ranged between 2 and 4% of the total cost of construction. In 2013, those costs have risen to 8-12% of a project's cost. What that means is that for every $1 billion in construction, the scaffold law unnecessarily adds $60 to $100m in insurance costs.

For example, in the case of the high profile Tappan Zee Bridge replacement project, the scaffold law adds between $100 and $400 million to the cost of the project in higher insurance costs – with no real benefit in terms of safety for employee or employer. This increase in insurance premiums is equal to the amount the Thruway Authority recently cut out of its four year capital program. Think of how many more roadways could be improved or how many transit vehicles could be replaced with that kind of money. Instead, it disappears into the ozone, with no real value to the driving or riding public.

Im addition to cost, the Scaffold Law has created a crisis of availability. Over the last few years, a number of large insurers have left the New York market as a result of the ballooning costs of the Scaffold Law. Our partner national organization, the American Road and Transportation Builders Association, started a captive insurance fund to help safe contractors lower their insurance costs. That program is not available to New York contractors because of the Scaffold Law.

The Scaffold Law is not just impacting contractors, but is affecting anyone who purchases construction liability insurance. The School Construction Authority uses an Owner Controlled Insurance Program, or OCIP, to provide liability insurance for all of its construction projects. Their policy expires at the end of this year and the SCA has been informed that their current insurance provider will not renew the insurance policy and is, in fact, leaving the New York market. To date, only one insurance company has expressed any interest in providing a portion of the existing OCIP program and at a dramatically inflated price.

For small companies, especially certified minority and women owned businesses who are by definition small companies, they either cannot get insurance, can no longer afford the level of insurance required to do business in New York, or are only able to obtain insurance with exclusions for labor law 240/241 essentially making their insurance worthless.

The infrastructure needs in this state are significant. With competing demands for every tax dollar, we should be spending our dollars wisely. No other state in the nation has a law as archaic as the scaffold law. It is time for New York to modify Labor Law 240/241 and move from a strict liability standard to a comparative negligence standard.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Marc Craw

Vice President of the New York Insurance Association

NYIA

New York Insurance Association, Inc

SENATE MAJORITY COALITION

PUBLIC HEARING TESTIMONY

CONCERNING REGULATORY REFORM IN THE INSURANCE SECTOR

ON

TUESDAY, OCTOBER 8, 2013

AT

SENATE HEARING ROOM, 19TH FLOOR

250 BROADWAY
NEW YORK, NEW YORK

TESTIMONY DELIVERED BY:

MARC CRAW
VICE PRESIDENT
NEW YORK INSURANCE ASSOCIATION, INC.

Good morning Senator Valesky, Senator Seward and members of the Senate. I am Marc Craw, Vice President of the New York Insurance Association, or "NYIA." NYIA is the state trade association that has represented the property and casualty insurance industry in New York for more than 130 years. NYIA's membership is broad and diverse, consisting of stock, mutual and cooperative insurance companies writing in every county of New York State. On behalf of NYIA, thank you for the opportunity to address you regarding the serious need for regulatory reform in the property and casualty insurance sector. Properly done, this reform could go a long way toward truly making New York "open for business" and lead to the thriving economy that benefits all New Yorkers.

The following proposal consists of existing regulations that NYIA and its members have identified as imposing unnecessary, burdensome and/or excessive costs on property/casualty insurance companies. Before listing the regulations identified as needlessly burdensome, NYIA appreciates the Senate Majority Coalition's efforts in this endeavor to establish a responsive and balanced regulatory system that will enhance and promote New York's economy.

The first insurance regulation we believe should be substantially revised, if not eliminated, is Regulation 30, 11 New York Code of Rules & Regulations (NYCRR) sections 105-109. This regulation governs the uniform classification of expenses for rate making purposes and should be updated, streamlined or repealed. Department financial examiners spend a lot of time verifying compliance with Regulation 30, a regulation promulgated in 1948 without revisions and accordingly out of date. NYIA submits that statistical organizations such as the Insurance Services Office ("ISO") should determine standards for the uniform classification of expenses which its members should be required to use.

NYIA's primary issue with Regulation 30 is its mandate that insurers perform elaborate and detailed time studies to verify the allocation percentages an insurer conducts to allocate expenses to various product lines and the three major categories of underwriting, claim adjustment and investment expense. All of these detailed requirements go back to the federal McCarran-Ferguson Law (a law passed in 1945, the last year of World War II!) and the rate monopolies of the insurance rating organizations of the mid-1940s. Today, there are numerous rate organizations and insurers can deviate quite substantially, either up or down, from bureau rates. Insurers have a vested interest in seeking to price their product appropriately and hence there is no need for elaborate time studies in most cases. When Department of Financial Services' (DFS) examiners are asked why they want these studies, they are unable to answer or provide a reason for the purpose of Regulation 30. For these reasons, it is a regulation that is no longer necessary.

Another regulation presenting practical difficulties for property/casualty insurers is 11 NYCRR section 79.6. This regulation authorizes those insurers who cede some of their risks to an unauthorized reinsurer to take credit for such reinsurance if it is collateralized by a letter of credit. NYIA recommends amending this regulation as follows to more accurately reflect the actual practice of issuing letters of credit:

§ 79.6 Reinsurance reporting requirements

(a) A letter of credit may not be used to reduce any liability for reinsurance ceded to an unauthorized reinsurer in financial statements required to be filed with this department unless:

(1) a letter of credit, issued in compliance with the provisions of this Part with the filing ceding insurer as beneficiary, ~~has been issued on or before~~ is effective no later than December 31 of the year for which filing is being made ~~the "as of" date of the financial statement of the ceding insurer~~; and

(2) the letter of credit, or a copy thereof, is in the possession of, or in trust for, the beneficiary on or before the filing date of its annual statement ~~within 30 days of its issue date~~.

The current 11 NYCRR section 79.6 stipulates that in order for ceding insurers to take credit for reinsurance that has been collateralized by a letter of credit ("LOC"), the LOC must be "issued on or before the 'as of' date of the financial statement of the ceding insurer". The problem arises because the date of the financial statement for a ceding insurer is December 31 but LOCs are typically issued after December 31 of a given year because of the time it takes for insurance companies to adjust their final year end numbers. LOCs are "issued" when the bank physically prepares and transmits the LOCs to the cedent or broker. Adjustments to final year end numbers is an even more time-consuming process when there is a major catastrophe or event that impacts the ceding insurer's financials in the last quarter. Upon ceding insurers' completion of their calculations, reinsurers must then undergo the task of reviewing and verifying the numbers and submit requests for LOCs to banks, which must then issue the actual documents. As is readily apparent from the foregoing recitation of steps that must occur prior to an LOC being ready for issuance, it is virtually impossible to finalize hundreds of LOCs and deliver them all to the insurers by

December 31, when the final balances are rarely known. Conceptually, the LOC process is akin to being required to complete and file income taxes with the IRS by December 31.

Presently, 11 NYCRR section 79.6 mandates that the LOC be issued on or before December 31. Due to the inherent problem with issuing an LOC by December 31, the New York Insurance Department has permitted the ceding insurer to take credit if the LOC's "effective" (i.e. "as of") date was on or before December 31, even if the LOC was "issued" *after* December 31. The problem that has recently arisen is that banks, for the purpose of transparency, now require that LOCs reflect an "issue" date as well as an "effective", or "as of", date. This requirement was not the case until the last few years. The practical result of the banks' recent requirement is that when the issue date is after December 31, as it will frequently be due to the needed steps in the process as outlined previously, the LOC is technically not in compliance with the NY regulation.

As a result, one proposed solution is to follow the National Association of Insurance Commissioners ("NAIC") Model rule for reinsurance credit in cases of LOCs. Unlike the current New York regulation, the NAIC model rule does not establish a specific "issue" date deadline but instead it provides deadlines for the effective date of the LOC and the date the LOC must be in the possession (which of course presupposes that the LOC has been issued) of the ceding insurer or held by the broker in trust for the ceding insurer. The NAIC model stipulates that security can be in the form of an LOC "issued or confirmed by a qualified United States institution...effective no later than December 31 of the year for which filing is being made, and in the possession of, or in trust for, the ceding company on or before the filing date of its annual statement" (which is March 1st).

Another area of regulatory conduct by the DFS that NYIA's members have increasingly identified as burdensome and unnecessary with a resulting imposition of excessive costs on the NY domestic property/casualty insurance companies are the financial examination process. The first point to be made with respect to the financial examinations is that they should be focused on financial matters only (such as financial solvency) and not on other matters that are more appropriate for a market conduct examination. Unnecessary requests substantially lengthen the process, costing insurers large sums of money as they must pay for these examinations. An over-arching broad principle for financial examinations should be to keep in mind that the intent behind these exams is to review the reliability of the assets and liabilities reported by the insurance company at the date of examination. For instance, financial examiners have requested and spent substantial time reviewing an insurer's Board minutes, insurance policies purchased by the company, expense classifications (Regulation 30 compliance), employee benefits, privacy compliance, disaster preparedness plans, fraud plan compliance and other non-financial items. These items, it is respectfully submitted, should not be the subjects of inquiry during a financial examination but rather should be looked at in a market conduct exam.

One regulatory issue that occasionally arises concerns the DFS' excessive use of emergency regulations. While emergency regulations do have their place in certain exigent circumstances, they should not become a means of circumventing the public comment period required for non-emergency regulations. One example of an emergency regulation encountered by the property and casualty industry that seemed to not be warranted by the facts at that time was the DFS adoption on February 27 of emergency regulation fifteenth amendment to regulation 64 instituting a mediation program for policyholders impacted by

Superstorm Sandy. In fact, the DFS had to provide a clarification on the emergency regulation by answering detailed questions provided by the industry a little over a month later. Additionally, the entity charged with administering the mediation program was not ready until the middle of April, beyond the 45 day comment period that would have been required if the DFS had gone through the ordinary regulation adoption process.

Another regulation that automobile insurers have found causes unnecessary complications is 15 NYCRR section 82.8 (c) (1). This regulation stipulates that a customer may not be charged for storage by a motor vehicle repair shop unless a written notice is given. This written notice may consist of a statement on the estimate or other document given to the customer, a letter or other written means that give the customer actual notice. Unfortunately, auto insurance carriers have found that notice is almost never given to the vehicle owner by the shop. While the regulation is specific, it does not appear to be enforced in practice and as a result carriers have no practical means to contest the charges when they are not legitimate charges. As a result, the shops will then hold the vehicle "hostage" and not release it until all charges are paid. Our suggestion is to amend the regulation by adding a new paragraph (3) to 82.8 (c) to expressly state that the penalties under New York Vehicle & Traffic Law section 398-e for motor vehicle repair shops who willfully fail to comply with the Department of Motor Vehicles' regulations apply to a violation of 82.8 (c) (1). We also recommend that for purposes of determining a willful violation of 82.8 (c) (1), a second failure to provide the notice after the shop has been informed of the need to comply with this regulation shall be deemed to be willful.

Here is language that could be used to amend this regulation to make it more useful for auto insurance companies:

Section 82.8. Charges

(c) (1) A customer may not be charged for storage unless notice in writing is given. Notice may be given by a statement on an estimate or other document given the customer, by letter or by other written means which gives the customer actual notice.

(3) A violation of paragraph (1) of this subdivision shall subject a motor vehicle repair shop to the penalties outlined in section 398-e of the Vehicle and Traffic Law. A willful failure to comply with paragraph (1) of this subdivision, for purposes of Vehicle and Traffic Law section 398-e (1) (i), shall be when a shop does not provide the requisite notice after it has been informed of its first violation of paragraph (1) of this subdivision.

Regulation 79 (11 NYCRR Part 67), which implements the New York photo inspection law requiring auto insurance consumers to obtain a photo inspection from their auto insurance carrier of a new vehicle they obtained, is another regulation that no longer serves a useful purpose and could be substantially modified to reflect modern realities. When the law was first enacted in 1977, there was rampant auto fraud that could only be curbed by physically inspecting vehicles to ensure "phantom" vehicles were not being used to make fraudulent claims. Since 1977 there has been the creation and implementation of sophisticated databases, uniform salvage disposal laws and insurance companies with large special investigation units (SIUs) that exclusively work on auto insurance fraud issues. This makes commission of a phantom vehicle fraud almost impossible today. For these reasons, we suggest amending 11 NYCRR section 67.3 (b) (3) to read as follows:

Section 67.3.* Waivers of mandatory inspection.

(b) An insurer may waive or dispense with a mandatory inspection under any of the following circumstances: (3) For an additional and/or replacement vehicle, where the named insured has been continuously insured for automobile insurance, with the same insurer, or affiliate, for [four] two or more policy years. An insurer may, in its filed plan of operation, elect to inspect specified vehicles included within this waiver. Such exceptions to this optional waiver must be based on underwriting criteria uniformly applied.

In addition, section 67.4 should be amended to read as follows:

Section 67.4.* Deferral of mandatory inspections: standards for deferrals.

(a) Upon an insured's request for coverage for automobile physical damage insurance on an additional or replacement vehicle the insurer shall provide coverage immediately and shall defer the mandatory inspection for the [five] ten calendar days following the effective date of coverage, if the insurer is required, pursuant to section 3425 of the Insurance Law, to provide automobile physical damage coverage on an additional or replacement automobile.

(b) An insurer may defer the mandatory inspection under any of the following circumstances:

(1) On new business for [five] ten calendar days following the effective date of coverage.

(2) On replacement vehicles, an insurer may provide the same type of level of physical damage coverage which covered the replaced automobile, without a request for coverage by the insured. Such automatic coverage prior to the insured's request for coverage shall be for a period of [three] six days, including the day on which the automobile is acquired. The [three]six-day period shall be extended by one day for each Saturday, Sunday or any New York State legal holiday falling within the period. The insurer's election shall apply only to automobiles replacing covered automobiles which were insured by the insurer for physical damage coverage for at least the 12-month period preceding the replacement date and must apply to all private passenger automobile insurance, including New York automobile insurance plan policies, written by such insurer. An insurer which makes an election pursuant to this clause shall file an appropriate policy endorsement with the superintendent and furnish a copy of such endorsement to all of its insureds who have physical damage coverage.

(c) (1) For inspections of new business for which the [five]ten-day deferral has been granted, and for additions and replacements, to an existing policy, unless the inspection and the inspection report form are completed immediately upon the request for coverage, an insurer shall either immediately confirm physical damage coverage and remind the insured of the inspection requirement on a prescribed confirmation letter or immediately obtain the prescribed acknowledgment signed by the insured (applicant). Insurers must use the prescribed CONFIRMATION OF PHYSICAL DAMAGE COVERAGE--NOTICE OF MANDATORY PHOTO INSPECTION REQUIREMENT letter (NYS APD form B), with a copy thereof to the producer of record, or the prescribed ACKNOWLEDGMENT OF REQUIREMENT FOR PHOTO INSPECTION (NYS APD form D), contained in section 67.11 of this Part. A copy of the notice (form B) addressed to the insured, and Certificate of Mailing thereof, or the completed acknowledgement (form D) shall be retained by the insurer in the insured's policy record. The insurer shall, at the time coverage is effected, furnish the insured with an inspection site where the inspection can be conducted during the five-calendar-day period. [The location of an inspection site or sites and the consequences of the insured's failure to obtain a timely inspection shall be furnished immediately to the insured either in person or by telephone. Documentation of such verbal notice, including the name of the person giving the notice and the identity of the site(s) provided must be contained in the insured's policy record.]

(2) When an insurer does not grant a deferral for new business as permitted by section 67.4(b)(1) of this Part, it shall arrange for the inspection to take place within [five] ten calendar days after the request for coverage. The insurer shall, at the time coverage is requested, furnish the insured with an inspection site where the inspection can be conducted during the [five]ten-calendar-day period. The location of an inspection site or sites and the

> consequences of the insured's failure to obtain a timely inspection shall be furnished immediately to the insured either in person or by telephone. Documentation of such verbal notice, including the name of the person giving the notice and the identity of the site(s) provided must be contained in the insured's policy record.

We propose taking out the current regulation's requirement in (c) (1) that the auto insurance consumer be notified of the inspection either in person or by telephone and merely leave in the requirement that the insurer furnish the consumer with an inspection site or sites. This change would allow the regulation to fit current practices, where many consumers do not engage in verbal contact with the insurer or agent but instead handle their insurance on-line. According to at least one auto insurer, the consumer can apply on-line, put their e-signature on the Acknowledgment form, and get a pop-up window notifying them on screen of the inspection requirement and inspection providers/sites. The consumer then hits the OK button and acknowledges it. Meanwhile, an electronic footprint is placed in the insurance file for documentation purposes. This proposed modification would allow all of the various means of communicating the inspection requirement to be used, namely verbal, written or through the computer.

Circular Letter 32 of 2001, issued by the then-Insurance Department on October 19, 2001, provides authorization that continues to the present for an annual insurance availability survey. This survey requires insurers to provide in a detailed format a list of all the insurance markets where they provide coverage. This annual insurance availability survey began in the midst of a liability insurance crisis that occurred in the mid-1980s, when it appeared that commercial liability insurance for certain types of risks were unavailable at any price. Circular Letter 3 of 1986 (since withdrawn) began this practice, noting that the Department was conducting a survey to determine whether an insurance market existed for these commercial liability risks. The Insurance Department took that data and advised consumers who could not find coverage of any available markets. Although the survey was intended to be temporary, it has remained in place and has in fact been expanded. NYIA respectfully submits that there is no need for this availability survey anymore as there are more than adequate markets for most insurance products today. The DFS retains the ability to act through Insurance Law section 308 data calls if they begin to see an availability problem, but there is no need to burden insurers with completion of these surveys on a yearly basis. We suggest Circular Letter 32 of 2001 be withdrawn.

There is a regulatory requirement imposed by DFS in the continuing education field for those licensed in New York that we believe is unnecessary and leads to needless complications. All continuing education applications must include a "wet", or original, signature. In this time of electronic signatures, this requirement is anachronistic and should be eliminated. It can lead to wasted resources for the continuing education sponsor. Providing and securing documents with an original signature is a needless expenditure of time and attention for all those involved in insurance continuing education in the state. NYIA suggests allowing continuing education applications to contain any of the following:

1) an original signature;
2) a copy of a signature; or
3) an electronic signature.

This would give continuing education providers the flexibility to determine how they can meet the signature requirement in a timely and cost-effective manner.

The Department of Transportation regulations contain one regulation, 17 NYCRR section 182.24 (Insignia and signs on vehicles), that we believe should be eliminated. This regulation prohibits nonrestricted vehicles that have any corporate logo or name on it from traveling on the parkway system. This is a problem for our property and casualty insurance company adjusters who need to respond to reported claims in a timely manner. Having to travel alternative routes, especially when a disaster such as Superstorm Sandy occurs, is not an efficient use of company resources and can delay response to policyholders who require the adjuster's services.

In conclusion, NYIA must emphasize that the most important thing to keep in mind regarding insurance regulations is the need to ensure solvency while allowing the market to have enough regulatory "leeway" to be innovative in serving its New York customers. This approach will protect consumers while permitting all property and casualty insurance companies doing business in New York to thrive and prosper. When that happens, the result is more business activity that leads to a growing New York economy and the creation of more New York jobs. For that reason, we believe adoption of NYIA's regulatory relief proposals is in the best interests of a truly thriving and prosperous New York.

Thank you. I can take any questions you may have at this time.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Dr. Sam Unterricht

President of the Medical Society of the State of New York

The Medical Society
of the State of New York

TESTIMONY OF DR. SAM UNTERRICHT, MD
THE MEDICAL SOCIETY OF THE STATE OF NEW YORK
AT A
NEW YORK STATE SENATE HEARING ON REGULATORY REFORM
OCTOBER 8, 2013
NEW YORK, NY

Good morning. My name is Dr. Sam Unterricht. I am an ophthalmologist in Brooklyn and President of the Medical Society of the State of New York. We appreciate the opportunity to testify on behalf of the physician community regarding the ever increasing administrative and financial burdens we face in seeking to assure our patients can get the care they need and deserve. We look forward to working with you to lessen these burdens.

As my colleague Dr. Tom Madejski did when he testified at the Buffalo hearing, I think it is important to begin with reminding the panel that New York is an exceedingly difficult state in which to deliver the care which our patients - and your constituents - expect to receive. This is due to confluence of a number of factors, led by the extraordinarily high medical liability insurance costs as compared to premium costs incurred by physicians in other states. At the same time physicians must endure insurers policies and practices which impose additional roadblocks to delivering patient care and continue to reduce, deny and delay payment for necessary care delivered. We also face the burdens facing many other businesses, such as a ridiculously high tax burden, and ever increasing other overhead costs. State government legislative and regulatory mandates significantly add to this burden and take time away from delivering patient care.

These problems must be considered and addressed as policymakers hope to assure an adequate health care safety net for the hundreds of thousands of New Yorkers who will be likely be obtaining health insurance coverage for the first time through the State's Health Insurance Exchange which opened for enrollment last week.

Recently MSSNY conducted a survey with over 800 physician respondents to gauge physician perspective of a variety of issues relating to New York State's health care delivery system. Notably, over one-third (34%) of the respondents indicated that they were "seriously considering" retiring from practice in the next two years, and over 37% indicated that they plan to reduce the services they deliver over the next two years. Also, 16 % indicated they are "strongly considering" leaving the state in the next 2 years.

The study also showed that only 35% of physicians would affirmatively recommend to their children or younger family members that they become physicians and **only 22%** of physicians would affirmatively recommend to medical students that they practice in New York State.

These statistics are a frightening indictment of our already fragile health care system. What will this mean for our health care delivery in the future?

Certainly, there are many issues that must be looked at, but as the theme for your hearing today is insurance, I will focus my remarks on insurance related issues.

A. WE NEED TO REFORM NEW YORK'S LIABILITY SYSTEM

Many New York physicians, particularly those right here in New York City as well as in Long Island and the lower Hudson Valley, must pay extraordinary medical liability insurance premiums to be able to continue to deliver care to their patients. While physicians in many other states have seen their premiums reduced in the last several years, New York physicians' liability premiums continue to rise, and face far greater liability insurance costs and exposure than their colleagues in other states.

And while some may argue that it's the fault of the insurance companies, New York's Department of Financial Services must actually approve the rates that are charged by the medical liability insurance companies, to prevent insurers from overcharging for this essential coverage. The situation is actually even worse, since some New York insurance companies may have inadequate reserves. By the criteria that other states use, those companies would not be allowed to write insurance, and if they were challenged would not be able to pay large claims, exposing both patients and physician personal assets.

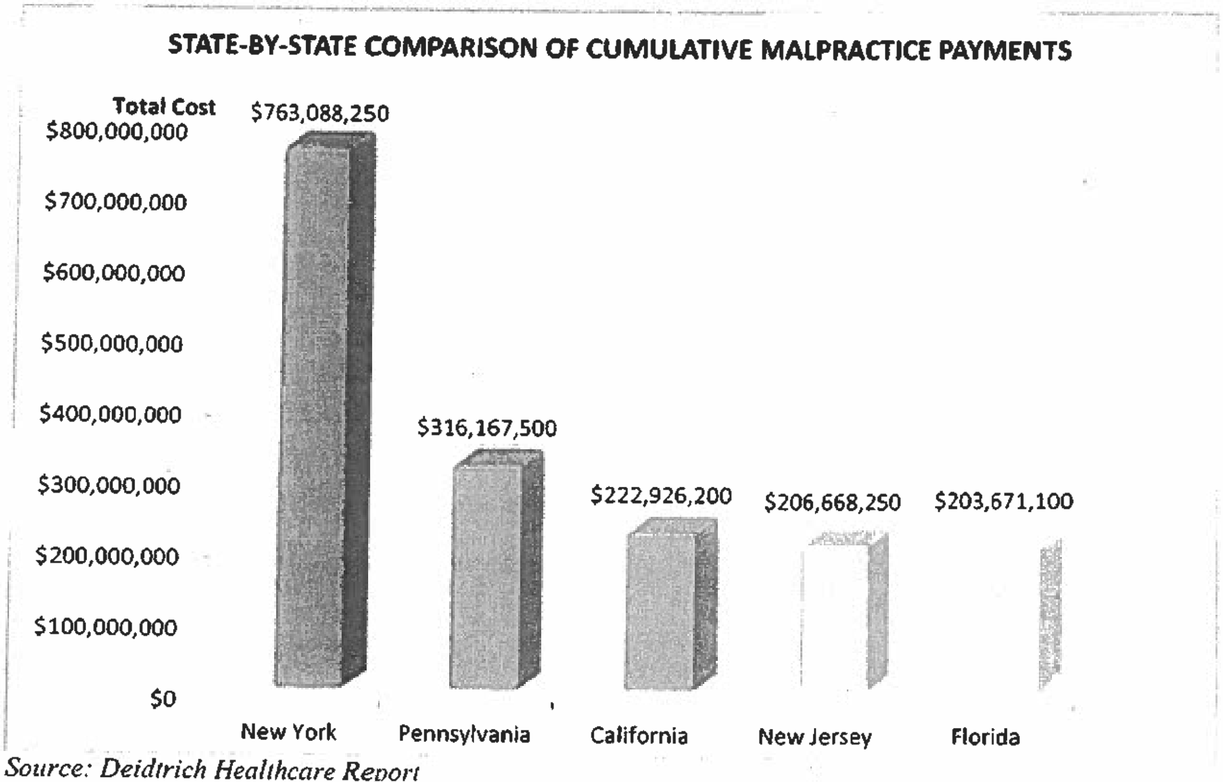
There are numerous hospitals which cannot afford to purchase malpractice coverage at all and self-insure; one large award would wipe out these hospital's assets. Despite these potential insufficiencies in coverage, our premiums keep trending higher and, for physicians in the NYC-metropolitan area, are among the very highest in the nation.

By way of example, a neurosurgeon practicing on Long Island must pay an astounding $331,295 for just one year of insurance coverage and an OB-GYN practicing in the Bronx or Staten Island must pay $192,412. Other high risk specialties include cardiac surgery, vascular surgery, bariatric surgery, orthopedic surgery and reconstructive surgery, pay well over $100,000 per year! Our physician survey showed that nearly 40% of the respondents indicated that medical liability insurance costs consumed at least 10% of their practice revenue, and nearly 16% indicated that it consumed at least 20% of their practice revenue. And nearly 40% said high liability costs are the biggest or second biggest impediment to delivering care in New York.

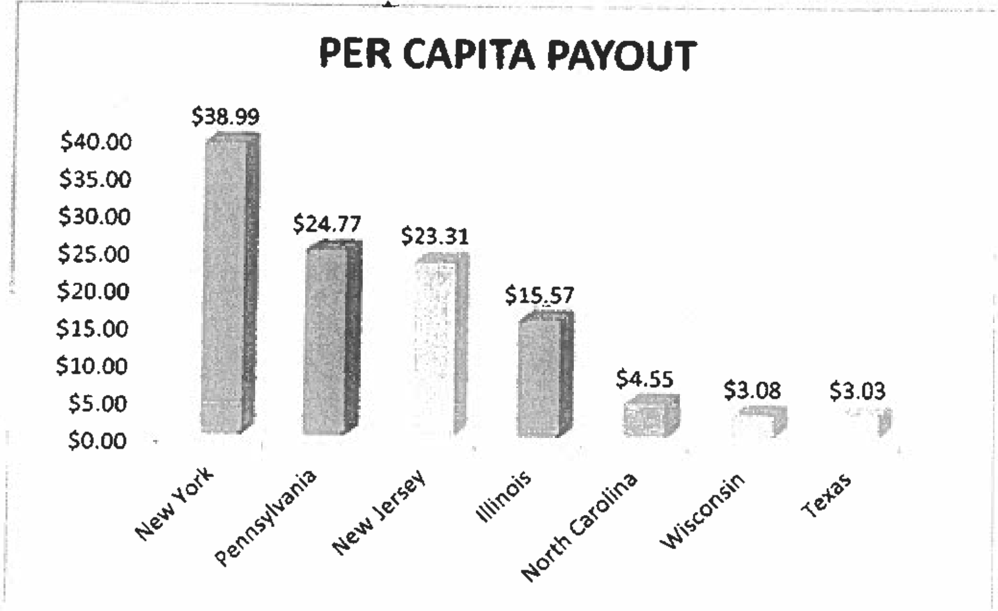
And while many other states passed liability reforms which have resulted in reduction in premium costs for their physicians, New York physicians' premiums continue to rise every year. Something has got to give.

According to one report, there were over $760 million in medical liability payments in New York State in 2011, nearly 250% higher than the state with the second highest total (Pennsylvania, $316 million) and nearly 350% higher than California ($222 million) and Florida ($203 million).

Remarkably, New York's per capita medical liability payment of $38.99 far exceeds the second highest state Pennsylvania (which is $24.77) and third highest state New Jersey (which is $23.31). And even highly urbanized Illinois is nearly three times less at $15.57.



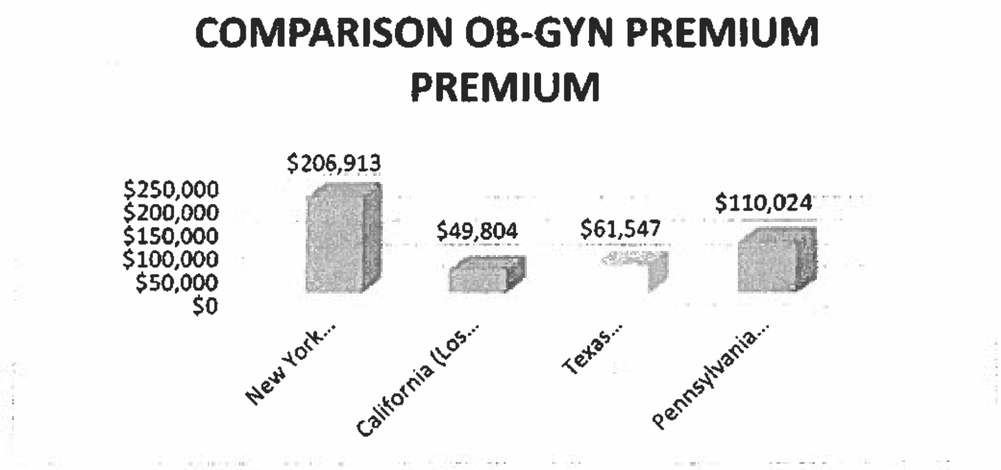
Source: Deidtrich Healthcare Report



Source: Deidtrich Healthcare Report

Faced with similar problems, many other states have passed comprehensive medical liability reform legislation. And it has demonstrated significant results in reducing liability insurance costs. According to the Texas Alliance for Patient Access, 90% of Texas physicians have seen a minimum 30% reduction in their premiums since the enactment of comprehensive reform there in 2003. And according an article in a 2012 edition of the *San Antonio Business Journal* by an expatriate New York female Ob-GYN who left to go to Texas because she couldn't deliver enough babies to meet her overhead costs, of the more than 27,000 physicians that have been licensed to practice in Texas since 2003, nearly 2,000 did their training or had an active practice in New York

It is also noteworthy that in Los Angeles, California, in a state where strong medical liability reforms were enacted in the mid-1970s, OB-GYNs pay less than 1/4 the premiums that OB-GYNs in Nassau and Suffolk County pay. Why must we be so disadvantaged when compared to other states?



Source: Medical Liability Monitor

In addition to the impact on physicians and patients, there is also a larger societal issue - the impact on cost of all health care, and its attendant impact on health insurance premiums paid by businesses and the State. Several studies have shown that billions of dollars are unnecessarily spent each year due to the practice of defensive medicine, such as unnecessary MRIs, CT scans and specialty referrals. The exact impact varies based upon which studies you read, but many show its cost to be significant. For example, a 2009 study by the Congressional Budget Office (CBO) showed that enactment of medical liability reforms would reduce the federal deficit by $54 billion over 10 years largely due to reducing defensive medicine. And I would note that the group Patients for Fair Compensation recently estimated that enactment of comprehensive medical liability reform could actually reduce defensive medicine costs by $650 billion.

Some modestly positive steps have occurred to begin to address this problem, including the passage of the Medical Indemnity Fund by the Legislature in 2011 and Office of Court Administration demonstration projects to facilitate early negotiation of medical liability allegations. While promising, these programs have yet to produce any tangible premium relief to physicians. As noted previously, while physician premiums in other states continue to go down, ours continue to go up.

We must do more.

New York must follow the lead of the many, many other states who have passed legislation to bring down the gargantuan cost of medical liability insurance. Some of these necessary reforms include:

- Creating Alternative Systems for Resolving Medical Liability Cases such as a Neurologically Impaired Infants No-Fault fund or legislation to implement medical courts;

- Assuring Adequate Funding for the state funded Excess Medical Liability Insurance program, and reducing the minimum coverage necessary for obtaining this coverage. We thank the Legislature for rejecting language proposed in the Governor's Executive Budget earlier this year that would have cut the funding, and limited the coverage to certain high-risk specialists and those physicians who participate in the notoriously low and slow-paying Medicaid program.

- Enact reforms to address some of the flaws in New York's litigation process that promote gamesmanship and lengthy litigation including:

    1. Identifying and Assuring Qualified Expert Witnesses many other states have enacted laws requiring experts to practice in the same specialty as the defendant physician and no other state has a law that shields the identity of a testifying expert.
    2. Identifying the physician who supplies a Certificate of Merit enabling a medical liability lawsuit to be initiated
    3. Reasonable limits on certain non-economic damages as has been enacted in over 30 other states
    4. Immunizing statements of apology or regret

5. Immunity for physicians providing pro bono care

B. WE NEED TO PREVENT UNTENABLE EXPANSIONS OF LIABILITY

At the same time that physicians and hospitals faced these extraordinary costs, remarkably there are some interest groups continuing to pursue legislation that would radically increase these costs. We urge you as strenuously as we can to oppose any measure to expand the damages recoverable in medical liability actions, including legislation that would:

- Create a "date of discovery" rule for New York's statute of limitations for medical liability actions, which is estimated to increase premiums by 15%.
- Expand "wrongful death" damages to permit "pain and suffering", which is estimated to increase premiums by 53%.
- Permit the awarding of pre-judgment interest in tort actions, which is estimated to increase premiums by 27%
- Eliminate the current statutory limitations on attorney contingency fees in medical liability cases, which is estimated to increase premiums by over 10%.
- Prohibit ex-parte interview by defense counsel of the plaintiff's treating physician.
- Require a non-settling defendant to choose *before* trial whether to reduce their liability by either 1) the amount paid by the settling defendant or 2) by the equitable share of the settling defendant as determined by the jury

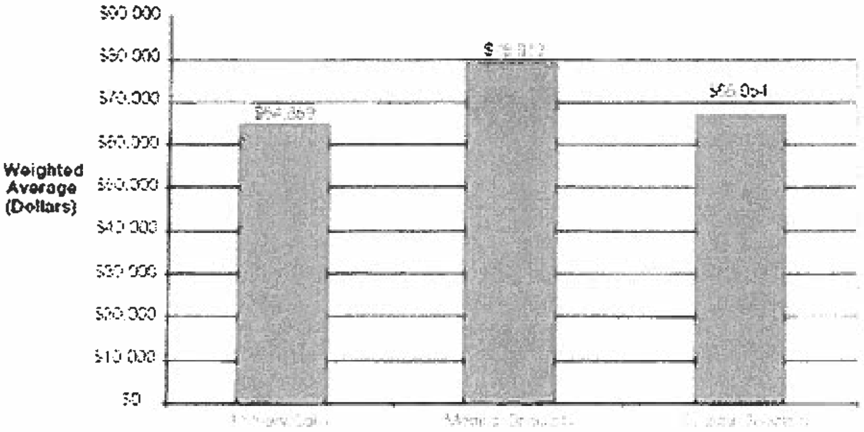
Enactment of any of these measures would have calamitous consequences on our health care system. Efforts to reform our medical liability adjudication system must be comprehensive!

C. WE NEED TO CREATE ADMINISTRATIVE SIMPLIFICATION IN INSURANCE COMPANY TRANSACTIONS

We strongly support legislation or other means to create greater administrative simplicity in the submission of claims to insurers and facilitating requests for needed patient care. Greater uniformity could produce greater savings in the health care system. One recent study showed that physicians spent the equivalent of three work weeks annually on administrative tasks required by health plans, with a cumulative cost of $31 billion, and a per physician cost of nearly $70,000. MSSNY supports a number of measures to reduce the administrative hassles experienced by physicians, and reduce the paperwork headache that gets in the way of delivering patient care, including

- **Assuring greater uniformity in claim submission forms** - Right now New York State Medicaid, Workers compensation and No-Fault all have their own unique claim submission forms mandated by the State Department of Health, the Workers Compensation Board and Department Of Financial Services, respectively. And all these forms are different than the forms physicians submit to commercial health insurers. In some cases, these forms can be incredibly burdensome to complete. For example, in 2010, the Workers Compensation Board decided to withdraw the required use of new injury report forms after a huge number of physicians dropped out of the workers compensation program, particularly in the Rochester area, in response to the complexity of the forms. We are pleased to hear that the Board is undertaking a complete re-evaluation of its claim adjudication process, and hope it will lead to a simplified process that reduces administrative hassles.
- **Assuring uniformity in request for needed patient care** In 2012, the NYS Legislature passed a law mandating the use of a uniform prior authorization form for prescription for our patients enrolled in Medicaid and Medicaid Managed Care. Other states have gone much further and required these uniform prior authorization forms for all medical claims and all forms of health insurance coverage. New York should do the same.
- **Assuring uniformity in health plan care review guidelines** - health plans should use appropriate specialty society-developed treatment care guidelines when reviewing medical necessity determinations; and assure medical necessity determinations are made by physicians practicing with similar clinical training as the physician recommending treatment;
- Assure Continuity in our patient's prescription Drug Coverage when formularies/prescription tiers change;
- Assure inclusion of patient cost-sharing information on Health Plan ID cards;
- Assure greater transparency when a physician contracts with a rental network entity (i.e. MagnaCare, MultiPlan)

Average Practice Cost of Interacting with Health Plans by Specialty



Source: Changes in Healthcare Financing & Organization, March 2010

D. WE NEED TO REJECT NEW MANDATES.

Furthermore, there are a number of other proposals under consideration that would impose additional potentially costly mandates on physicians that will interfere with the timely availability of quality patient care, and may very well drive up the cost of health care. We note our strong opposition to the following proposals that have been introduced or under consideration in certain state agencies:

- Opposition to proposals under discussion at the State Public Health and Health Planning Council (PHHPC) that would require physicians to undergo prohibitively expensive Certificate of Need approval if they wish to perform certain medical procedures that are routinely performed in non-hospital settings. We should be reducing Certificate of Need requirements to bring about more competition in health care, not enacting new requirements which may very well place a stranglehold on efforts by physicians to establish collaborative care ventures with other physicians as well as new models for delivering timely quality care.
- Opposition to proposals under discussion by the New York eHealth Collaborative (NYeC) that would mandate physicians adopt inter-operable Electronic Medical Records system and participate on the SHIN-NY.
- Opposition to legislation that would mandate course-specific continuing medical education coursework (such as pain management). MSSNY supports a general requirement for physicians to obtain 50 hours of CME on a biennial basis, but opposes legislative or regulatory mandates for specific courses that may have no connection to a physician's medical practice.

Again, we appreciate your efforts to identify ways to reduce the administrative burdens faced in the delivery of care so that patients are in a better position to obtain the timely quality care they deserve. I would be happy to answer any questions you may have.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Paul Macielak

President and CEO of the New York Health Plan Association

New York
HPA
Health Plan Association

Testimony of the New York Health Plan Association

to the

Senate Majority Coalition

on the subject of

Regulatory Reform of the Insurance Industry

October 8, 2013

INTRODUCTION

The New York Health Plan Association (HPA), comprised of 22 health plans that provide comprehensive health care services to nearly seven million New Yorkers, appreciates the opportunity to present its members' views on regulatory reform of the insurance industry. Our member health plans have long partnered with the state in achieving its health care goals including improved access to quality care in its government programs as well as providing access to care that exceeds national quality benchmarks for enrollees. Our plans include those that offer a full range of health insurance and managed care products (HMO, PPO, POS, etc.), public health plans (PHSPs) and managed long term care plans. The New Yorkers who rely on these plans are enrolled through employers, as individuals, or through government sponsored programs — Medicaid Managed Care, Child Health Plus, Family Health Plus and Healthy New York. Starting October 1st, additional New Yorkers began signing up for coverage from HPA members as new policies are offered through the NY State of Health, the state's new health plan marketplace implemented under the Affordable Care Act (ACA). Accordingly, we appreciate the opportunity to offer our view on regulation of the health insurance sector.

Unlike the life and property and casualty sectors, health insurance regulation has changed significantly with passage of the federal ACA. The need to align federal law with state statute and regulation has led to state regulatory changes involving issues that have been debated for years. The 2013-2014 New York State budget incorporated a number of statutory changes to align and update New York's health insurance regulation with the ACA. Two examples help illustrate the cleanup and changes:

1. New York HMO cost sharing has historically been tightly restricted by a state regulatory framework, making HMO licensed products uncompetitive in the small group marketplace compared to insurance licensed products, which had the flexibility to design copays and cost sharing to meet employer needs.

   Implementation of the New York State Marketplace forced the state to modify its HMO cost sharing structure to level the playing field for HMOs competing with insurance licensed PPOs.

2. The state's "Reg 146" Risk Adjustment program is a massive complicated regulation that, when first implemented, was intended to share risk among plans to prevent adverse selection ramifications. Over the years, administration of the program has grown increasingly cumbersome, costly and time consuming. Disputes concerning data submissions and reconciliation of data led to significant delays in payments. This system and the regulation are being phased out in order for New York to comply with a simplified federal ACA risk adjustment mechanism.

While the health insurance sector remains subject to formal regulations promulgated by the Department of Health (DOH) and Department of Financial Services (DFS), many programs are administered by agency issuance of "guidance" (i.e., DFS circular letter or desk drawer rule).

Current problems associated with state administration of the Early Intervention (EI) program through use of a fiscal intermediary (FI)—a new system implemented earlier this year— help illustrate the situation.

The new billing system, based on DOH guidance, directs providers to bill the FI who in turn bills the plan. However, the new approach requires plans to split the payment and the remittance, with payment going directly to providers and the remittance to the FI. Unfortunately, plan IT systems do not allow for a separate payment and separate remittance notice, nor does this new approach recognize current DFS rules for the handling of claims by non-participating (non-par) providers where payment is made to the member, not the billing provider. This entire process was developed without regulation and instead relied on "guidance." There was no publishing of a proposed regulation, public comment or plan input prior to implementation. Health plans had no knowledge of the split remittance proposal and no opportunity to advise the DOH of the IT system problem.

As discussed earlier, the ACA implementation provided an opportunity to update portions of New York's health insurance framework. It also highlights the need for further oversight and review of other regulatory anomalies that do not make sense in the current market environment. The following are some examples of regulations which should be amended or repealed.

1. Broker Commissions set forth in Title II Regulation 52.42(e) are capped at a maximum of 4% for HMO products but are uncapped for insurance products. Both licensed products should be treated the same and the two different standards modified to either cap or uncap commissions for both insurance and HMO products.
2. The Part 98 Regulation of Medicaid Managed Care plans should be amended to exclude provider utilization review (UR) functions from the need for state certification as a UR agent. There is currently a six month to one year backlog, hobbling the efforts of plans to add or modify UR service capacity. These delays are in large measure due to a lack of staff to perform the review functions. The state needs to adequately staff the efforts, or develop alternatives permitting retroactive reviews or audits with appropriate penalties.
3. The Part 98 Regulation of plan reserves needs to also be modernized to reconcile different reserve levels for different government insurance products such as Medicare, Medicaid, MAP and soon, FIDA. It should be noted that the inconsistency of reserve levels extends to differences with commercial reserves defined by statute, which are at odds with the NAIC recommended risk-based capital model.
4. DFS has an antifraud reporting and advertising program, implemented pursuant to statute. It requires plans to adopt antifraud advertising campaigns and report on those efforts. The plan expenditures are now aggregated with other plans to purchase print and radio advertising, but unlike the auto insurance sector, no perceived value exists and the resources could be better utilized.

CONCLUSION AND RECCOMMEDATIONS:

The ACA forced a modernization of many regulations and policies that were outdated, cumbersome and costly.

Many state programs administered by DOH and DFS avoid formal state regulation and are implemented by "guidance."

Additional oversight of agency regulatory activity should be pursued to reconcile unequal license differences and/or modernize practices to comport to the current market environment.

Once again, we thank you for the opportunity to share our views today. HPA and its member plans remain committed to working with you and your colleagues on to help reduce regulatory burdens that only serve to add to the overall cost of providing health care to all New Yorkers.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Thomas Workman

President and CEO of the Life Insurance Council of New York

TESTIMONY OF

Thomas E. Workman

President & CEO

Life Insurance Council of New York, Inc. (LICONY)

BEFORE THE

Senate Majority Coalition

Senate Committees on Commerce, Economic Development & Small Business and Insurance
Administrative Regulations Review Commission

Senators David Carlucci, Patrick M. Gallivan, Kathleen A. Marchione,
James L. Seward & David J. Valesky

ON

Insurance Regulatory Reform

October 8, 2013
10:00 a.m.
250 Broadway
New York, New York

Good morning, Senators. My name is Thomas Workman. I am President & CEO of the Life Insurance Council of New York, Inc. (LICONY). I appreciate this opportunity to appear before you today.

LICONY is the trade organization representing the life insurance industry doing business in New York State. Of the 69 member life insurers, 50 are domiciled in New York and 19 are domiciled outside New York. These companies write a very large proportion of the life, disability income, and long term care insurance, as well as annuities, issued in New York, and a large majority of such coverage issued throughout the United States.

I am here today because LICONY has been invited to provide you with its views regarding the regulatory environment for insurers doing business in New York, including its views on actions that can be taken to improve the business climate in this state so that LICONY members can grow their businesses and provide more insurance protection and financial security and independence to the citizens of New York. We appreciate your invitation to comment on these matters.

The life insurance industry makes major economic contributions to this State and to the United States. Based on information from the Department of Taxation and Finance, we estimate that life insurers paid approximately $140 million in taxes to New York State in 2011. In addition, we estimate that life insurers paid approximately $100 million in Section 206 assessments that year. According to the American Council of Life Insurers, that same year life insurers had $364 billion invested in New York State, and paid out $26 billion in benefits and other payments to New Yorkers. That is $500 million weekly, on average. Life insurers employ approximately 30,000 New Yorkers and are represented by 75,000 licensed life insurance agents who work throughout New York State.

While all of those statistics are important to know, the most important point is that New Yorkers need more life insurance, more annuities, more long-term care insurance, and more disability income insurance. Accordingly, our state government should be doing everything possible to make it easier for New Yorkers to secure this critically important protection.

It often seems that very few outside the life industry fully comprehend the extraordinary importance of life insurers and their products to individual Americans, to their families, to their businesses, to our government, and to our country as a whole. For the most part, those who comprehend this value tend to be limited to those who have experienced the benefits that we provide. Life insurers provide protection to individuals and businesses so they can go on with their lives—continue covering their mortgages and car loans, continue paying for education, continue making the business payroll, continue to operate the family farm, and provide a financial shock absorber against the emotional burden that comes when a loved one or key employee passes away. Life insurers provide benefits to individuals when they become disabled and require money to supplement their lost income. Life insurers provide income through annuity payments to older Americans so they can maintain their financial independence and continue to enjoy the same quality of life, once they retire, and life insurers provide long-term care insurance to seniors when they need assistance in covering the costs of long-term care services.

Not only is this coverage extraordinarily important to the people who have and benefit from it, it should also be valued as extraordinarily important to policymakers, since life insurers are assisting these individuals in taking care of themselves, their families and businesses during their time of need, rather than relying on the government to do it for them.

Yet, currently, according to LIMRA International, 30% of American households have no life insurance at all, and only 44% have individual life insurance. Fifty percent of households (58 million) say they need more life insurance. The amount of coverage adults have is declining. Part of the reason for this decrease in coverage is due to the current economic downturn, but we believe part of it is also due to state policymakers, including regulators, often not considering the adverse effects of new compliance burdens on the marketplace, and often not encouraging consumers to purchase the important protection life insurers provide.

These policymakers often overlook the fact that life, disability income, and long-term care insurance, and annuities, help people keep their homes, educate their children, keep a business going, and live without government assistance. They often fail to recognize that it benefits everyone as citizens and as taxpayers when a family purchases the products that life insurers sell. Instead of prioritizing legislation and regulation to enable more families and businesses to purchase this protection, policymakers sometimes make it more difficult. They fail to recognize that unnecessarily burdensome requirements are counterproductive and harmful to real people, real families, and real businesses.

We are, therefore, pleased that the Senate is asking for our thoughts on how the regulatory environment for life insurers in New York can be improved—in other words, to enable many, many more New Yorkers to secure the protection they need. This is a noble purpose—one that our state government and the life industry share.

Before proceeding to offer specific suggestions for legislative action in this regard, we want to state unequivocally that the Senate has been one of the most effective segments of New York State government by adopting legislation that fosters more of this critically important protection for New Yorkers.

I now wish to offer a few suggestions for changes in statutes and regulations that would make life insurance protection products more readily available, and in so doing, strengthen the contribution life insurers make to the economy and government of New York State.

LICONY annually seeks input from our membership, and develops, approves and executes Affirmative Legislative and Regulatory Programs. A common theme for initiatives in affirmative LICONY programs is the enactment or promulgation of National Association of Insurance Commissioners (NAIC) or National Conference of Insurance Legislators (NCOIL) Model Acts or Regulations in this state. Uniform insurance regulation among the states is of great importance to insurers, particularly life insurers, since they compete with other entities that do not have fifty state regulators. In short, many of our members endure regulations in the State of New York which are more restrictive, expensive, and inconsistent with the regulations in the other 49 states.

Three bills that have been a part of the LICONY Affirmative Legislative Program that fall into that category are: (i) a bill to remove from a statute the impediments to implementation of the NAIC Life Insurance & Annuities Replacements Model Regulation (S.3065); (ii) a bill to provide that New York becomes a member of the Interstate Insurance Product Regulation Commission (S.2895) and; (iii) a bill to enact the entire NAIC Redomestication Model Law (S.3543).

NAIC Life Insurance & Annuities Replacements Model Regulation

S.3065, which is sponsored by Senator Seward, provides that the regulation governing replacements of life insurance policies and annuities in this state should be consistent with the NAIC Life Insurance & Annuities Replacements Model Regulation and, therefore, should remove the requirement in the current law that there must be a detailed cost comparison of products before one life insurance policy or annuity can be replaced with another. Many years ago, the forerunner of the Department of Financial Services (DFS)—the Department of Insurance—used the current law as the basis for Regulation 60, a complicated regulation governing replacements of life insurance policies and annuity contracts. Since its promulgation in 1998, Regulation 60 has not worked well because it often requires the comparison of products that are not at all similar, and it results in a lengthy delay (sometimes up to a month) in completing the transaction the consumer wants to execute. This delay does not serve the customer well, since the customer may suffer a change of health or the investment performance of the product may change in an unfavorable way, while the customer is waiting to complete the transaction.

This Regulation is also a problem for agents and insurers since New York is the **only** state that requires this level of detailed comparison of one product to another. A large amount of related material must be provided to an applicant before completing the purchase of a life insurance policy. The completion of the Regulation 60 documents is very costly in time and money, and some agents say that the compensation they receive barely covers those costs. The requisite information provided is so voluminous that the applicant rarely looks at, much less comprehends, that information.

Most states have implemented the NAIC Life Insurance & Annuities Replacements Model Regulation, which requires insurers to provide simple disclosure of factors that should be considered when replacing one life insurance policy or annuity product with another. This simple disclosure model has proven to be sufficient to deter inappropriate replacements.

Life insurers and their agents in New York, as well as their customers, would benefit if this bill were enacted, since Regulation 60 could then be conformed to the NAIC Model Regulation.

NAIC Interstate Insurance Product Regulation Compact

S.2895 would enable New York State to become part of the NAIC Interstate Insurance Product Regulation Commission (IIPRC). To date, 43 jurisdictions have joined this interstate compact, representing a combined 72% of the nationwide premium volume for products written by life insurers. The Compact Commission operates a streamlined system of product form filing that allows insurers to have a single point of filing for approval of life insurance policy forms. Insurers that secure approval of the Compact Commission for a product form are provided access to the markets of the states that have joined the Compact.

Life insurers offer a wide range of products, including many that are primarily used for investment purposes. These long-term, investment-oriented insurance products compete directly with other retirement and estate planning instruments that are sold by banks and securities firms. While insurers must currently seek approval of their products on a state-by-state basis, banks and securities firms can make use of a more streamlined product approval process.

Being able to secure product approval from a single source for the sale of products in many states, including New York, would give life insurers a much more efficient regulatory option than the current antiquated system.

NAIC Redomestication Model Law

S.3543 specifies the requirements governing the transfer from this state of the corporate domicile of an insurance company. If this proposal were enacted, New York's law would be fully consistent with the NAIC Redomestication Model Law, since the current law in New York only contains the provisions of that Model that allow foreign companies to re-domesticate into New York (i.e., you can check in, but you can't check out). Although this measure might appear on its face to be authorizing the removal of jobs from New York, the truth is actually the opposite.

The lack of any rules to govern the departure of an insurance company from New York has kept some insurers from coming here. They believe that if they redomesticate to New York, it will be difficult, if not impossible, to leave in the event they conclude that they could operate more profitably or efficiently somewhere else. Concern about the regulatory environment in

New York is often an impediment to coming to New York under current law. This concern has also impeded New York insurers from entering into affiliations with out-of-state insurers.

It is also important to recognize that not having a redomestication statute does NOT keep jobs in New York State. Hundreds of insurance jobs have been moved to other states in recent years due to the costs of doing business in New York. Thus, the logic of refusing to enact a redomestication statute in order to maintain jobs in New York State is faulty.

Legal flexibility to accommodate new business opportunities in New York, as well as corporate restructuring, is key to providing a positive business environment. Enactment of this bill will provide that flexibility.

Enactment of the three, foregoing legislative proposals would benefit the most important stakeholders—current and future policyholders—and would contribute significantly to making New York a more attractive place to conduct the business of life insurance. More New Yorkers would have the life, long-term care, disability income insurance, and annuities they need—to protect themselves, their families, and their businesses.

Section 206 Assessments

The fourth proposal we wish to put forward is the need for correction of the use of Section 206 assessments on all insurers domiciled in New York to fund not only the Department of Financial Services, but a number of other programs unrelated to the operation of DFS. These programs are "funded" through the DFS budget, but are administered by other state agencies. In other words, insurers have become a funding source for programs unrelated to insurance regulation. Those programs should be financially supported by the General Revenue Fund or other sources related to the programs, or they should be eliminated. The Section 206 assessments were more than doubled a few years ago. They are back-door "taxes" that should be rolled back to the amount needed only to fund DFS.

Finally, with respect to your inquiry about the regulatory environment for life insurers in New York, I begin by stating unequivocally that the Department of Financial Services is filled with highly talented executives and operating officials. We appreciate their availability to meet with LICONY and its members on virtually any and all matters relating to the business of life insurers. That said, it would be helpful to receive prior notice of significant regulatory actions or policies affecting life insurers, as that would enable LICONY to provide meaningful, practical comment **before** formal action is taken. The adoption of regulations through emergency promulgation and the use Section 308 not just for information gathering, but also to establish new requirements, sometimes prevents DFS from receiving valuable input from the public and industry before action is taken. Accordingly, a change in regulatory practice here would be helpful in improving the reputation of New York State among insurers, and thereby making New York a more attractive place to offer the protection that many, many New Yorkers need badly.

In conclusion, we thank you again for inviting our comment on these important legislative and regulatory matters. I would be happy to respond to any questions you may have.

Respectfully submitted,

Thomas E. Workman
President & CEO
Life Insurance Council of New York, Inc.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Andrew J. Kaufman

Chair of the Board for Independent Insurance Agents and Brokers of New York

Independent Insurance Agent.

Trusted Choice

TESTIMONY

of the

Independent Insurance Agents & Brokers of New York

Before

The Senate Majority Coalition

Legislative Forum on Regulatory Reform

Tuesday, October 8, 2013
NYS Senate Office Building
250 Broadway
19th Floor Senate Hearing Room
New York, NY

Presented by

Andrew J. Kaufman
Chair of the Board
Independent Insurance Agents & Brokers of New York

Members of the Senate Majority Coalition, I want to thank you for the opportunity to speak on behalf of the Independent Insurance Agents and Brokers of New York, IIABNY. My name is Andy Kaufman and I am Chair of the Board for IIABNY. I am also President of Aurora, Inc. an insurance agency located in Albany providing insurance products to both businesses and individuals.

There are several requirements that we believe the coalition should look into that impose unnecessary costs and burdens on the insurance industry. The first one I'd like to talk about is Insurance Regulation 194 (11 NYCRR §30.1) which went into effect on January 1, 2011.

Regulation 194 requires insurance producers to provide to all applicants for insurance a **disclosure notice** that provides information on how they are compensated for an insurance sale. If the applicant wants additional information, he or she can request further details and insurance producers are required to provide the applicant with more detailed information about their compensation. This more detailed information includes descriptions of alternative quotes that were obtained including the different coverage levels, premiums and compensation the producer would have received for each of these alternative quotes. Producers must maintain documentation of compliance with these new rules for three years.

When Regulation 194 was originally proposed IIABNY told the Department of Financial Services that the rules were costly and burdensome to producers and more importantly, provided very little benefit to consumers. IIABNY has always believed that customers are more concerned with the price of their insurance policy and not how much their producer is receiving in commissions. After almost two years since the regulation has been in effect, this belief has proven to be true. Our members report that only one or two people out of hundreds of customers have asked for details about their compensation.

Regulation 194 has simply created a paperwork and record retention burden for producers. We recommend the regulation be repealed in its entirety.

Another costly and time consuming requirement imposed by the DFS deals with the rules governing **continuing education requirements** for agents and brokers. Like many professionals, insurance producers must complete continuing education every two years in order to renew their licenses.

When continuing education was first required, many courses were provided through in-person seminars. As the years progressed, CE providers found that many professionals simply could not take time out of the office to travel to a continuing education class. Now, CE providers offer a variety of ways for professionals to complete their CE requirements, including self study. The internet has allowed CE providers to offer live webinars, as well as pre-recorded online courses that a professional can take at their leisure.

New York's continuing education rules allow insurance producers to complete their CE requirement through in-person courses, as well as self study work, whether that be a textbook course, or a pre-recorded course delivered by CD, DVD tape, or by computer. Like some other professions, if a self-study course is taken, producers must take an exam at the completion of it. However, unlike other professions, insurance producers must take the examination in the presence of a monitor that has to be approved by the department. So, if a producer takes a pre-recorded, online course, they cannot also take the examination online. They must go to a physical location where a monitor, who often charges a fee up to as much as $75.00, will watch them take the test to make sure they are not cheating. No other profession that I am aware of has this type of requirement for a monitored exam. The requirement makes the usefulness of self-study courses limited and implies that producers are more untrustworthy than other types of professionals.

The rules which require both the exam and the monitor are not found in the NYCRR or in statute, but are instead the department's own internal procedures. IIABNY believes it is time that these internal rules requiring monitored tests be tossed out.

Another regulation that has imposed a time consuming and costly burden on the insurance industry is Regulation 79 (11 NYCRR 67.4). Regulation 79 implements Insurance Law §3411 which requires that insurance companies conduct an **inspection of a vehicle** to be insured before providing physical damage coverage on that vehicle. The statute also allows the inspections to be dispensed with under circumstances specified in regulations of the department. Regulation 79 does provide circumstances where an insurer may waive inspection of a vehicle, but if a circumstance is not listed, the insurer must conduct the inspection.

The photo inspection requirement was put in place over 35 years ago to combat the problem of "phantom" automobiles and of insureds looking for "retroactive" coverage for unrepaired damage to their automobiles. Most insurance companies today use national databases of VIN numbers and claims information, such as Carfax and the National Insurance Crime Bureau database, to determine whether an automobile to be insured actually exists and whether a vehicle has sustained previous damage. Because of these new techniques to combat fraud, inspections are now simply costly and redundant. We suggest that the regulations be amended to allow insurance companies to waive the inspection requirement any time, at their option.

Another regulation that needs updating affects all motorists in the state of New York. It is a Department of Motor Vehicle regulation (15 NYCRR 32.9) that requires motorists to carry a **paper automobile insurance identification card** as proof that they have automobile insurance.

Today, we live in a technologically advanced world where most transactions and documents are electronic. Twenty-eight states have moved their ID card rules into this new world and allow ID cards to be displayed electronically, or in paper form if that is the customer's choice. Many insurance companies even have their own cell phone apps for this purpose. Electronic display of ID cards will save insurance agencies and companies the cost of printing and mailing cards to policyholders. It will also save law enforcement and the court system money because they will not have to issue tickets to drivers who had insurance, but couldn't find the physical piece of paper to prove it.

We suggest that DMV regulation §32.9 be amended to allow for the option of an electronically displayed ID card.

I'd like to turn now to two laws that have had a devastating effect on insurance for the construction industry.

Sections 240 and 241 of the New York State Labor Law have significantly increased the cost of insurance for construction projects in our state. Section 240, also known as the Scaffolding Law, imposes an absolute liability standard on contractors and property owners for certain types of workplace accidents. Under an absolute liability standard there is no consideration of fault or negligence and the contractor or building owner is held completely responsible, regardless of fault. Section 241 is a vicarious negligence statute that holds owners and contractors liable for workplace violations by those employers on the worksite, regardless of whether the owner or contractor had any control or supervision of the worksite.

Because of these antiquated laws, insurance on construction projects for both owners and contractors has become increasingly expensive and the market for this coverage severely restricted. Lack of coverage is preventing construction projects from proceeding, costing New York State jobs. When coverage can be obtained, the cost of construction is needlessly driven up. In these difficult economic times, any law driving up business costs and preventing job growth needs to be carefully examined.

IIABNY believes these laws should be repealed, or at least amended to provide for a comparative negligence standard, similar to that proposed in Senate Bill 111 sponsored by Senator Gallivan.

Lastly, another antiquated insurance law that provides very little, if any benefit, is Insurance law 2122(b) which deals with **advertising requirements.**

This law requires insurance producers that refer to an insurance company in an advertisement, also display the insurer's full name and the name of the city, town or village of its principal office. "Referring to an insurer" includes any mention of price in an advertisement even if the insurer's name is not used. The term advertisement is quite broad and includes all advertisements regardless of the medium through which they are disseminated, including radio, internet or print.

This outdated law serves no public policy purpose in today's information age. What is does is to place an unnecessary burden upon producers who must clutter phone book advertisements and web pages with meaningless text. The law may have been helpful to consumers in the days before widespread advertising on television and the internet. Today, the vast majority of consumers can identify insurers from company logos and other common names or abbreviations. There is also no particular reason for advertisements to display the location of an insurer's principal office. Consumers are more concerned with the location of the company representative who will provide them with service, which is not usually the main office. If for some reason they want to know where the insurer's principal office is located, the agent can provide them with the information.

IIABNY supports Senate bill S.3064 sponsored by Senator Seward that would repeal the requirement that producer advertisements display an insurer's full name and principal office location.

Thank you again for considering IIABNY's comments.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Gary Henning

Regional Vice President of the American Insurance Association

American Insurance Association

Testimony of the

AMERICAN INSURANCE ASSOCIATION

Before the

NEW YORK STATE SENATE MAJORITY COALITION

Public Hearing

On

INSURANCE REGULATORY REFORM

October 8, 2013
10:00 AM
Senate Hearing Room
250 Broadway
New York, New York

Presented by:

Gary Henning
Vice President, Northeast Region
American Insurance Association

My name is Gary Henning. I am the Vice President, Northeast Region, for the American Insurance Association (AIA), a national property-casualty insurance trade association of more than 300 companies whose members write more than $8.2 billion in premiums in the state, which represents 22% of all premiums in the New York market. AIA's members provide coverage for millions of New York's homeowners, drivers, small business owners and large corporations. AIA thanks the Senate Majority Coalition for the opportunity to discuss insurance regulatory reform.

DMV Regulation 15 NYCRR 32.9 – Automobile Insurance Identification Cards

The first regulation I would like to discuss deals with ID cards for automobile insurance. Article 6, Section 311 of the Vehicle and Traffic Law defines "*insurance identification card*" as "*a card issued by or on behalf of an insurance company or bonding company duly authorized to transact business in this state, stating in such form as the commissioner may prescribe or approve that such company has issued an owner's policy of liability insurance or a financial security bond on the motor vehicle or vehicles therein.*" The Department of Motor Vehicles (DMV) regulation 15 NYCRR 32.9 establishes size and paperweight requirements for the ID cards. However, insurers have begun issuing these ID cards electronically, upon request, to their policyholders in other states and would like to do so in New York. A person could simply pull up the ID card on his or her smartphone when needed. This DMV regulation, however, prevents this, as it requires an actual piece of paper to be produced. Modifying this regulation to allow policyholders to receive their automobile insurance identification cards electronically would be more convenient for consumers as well as more cost-effective for insurers. Section 32.9 of the DMV regulations should be modernized by amending it to allow for the use of this electronically delivered cards.

Insurance Regulation 79 – 11 NYCRR 67 – Photo Inspection Requirements for

Auto Physical Damage Coverage

Section 3411 of the Insurance Law sets forth situations in which a policyholder must get his or her automobile inspected prior to the insurance company providing physical damage coverage for that car. This inspection requires an agent or other authorized third-party to physically inspect the car for any damage, while taking pictures of the car to document its condition. This person must then complete a report, a report which the insurer, or authorized third-party, must keep in its files for at least six years.

This statute was enacted to help prevent insurance fraud. By documenting an automobile's condition at the inception of coverage, the thinking went, it would be harder to later file a fraudulent claim for pre-existing damage to the car. The Insurance Department promulgated Regulation 79 in 1977 to implement the requirements of Insurance Law 3411.

Technology has since eliminated the need for this regulation. DMV abstracts and claims databases allow insurers to check on the accidents a vehicle has been in in the past, as well as verifying whether or not prior damage to an insured vehicle has been repaired. However, hard copy reports and photographs are still being required to be produced and stored.

This whole construct was better suited for times before instantaneously accessible databases and the internet. Most insurers simply have the pictures of the automobiles and the accompanying reports filed away as soon as they are completed, never to be looked at again. The companies must do this, not for any business purpose, but simply so they remain in compliance with an outdated regulation that provides little or no benefit, while wasting insurers' and consumers' time, as well as insurers' resources.

Section 3411(m)(2) gives the superintendent of financial services the authority to waive inspection requirements. The Department of Financial Services (DFS), to its credit, already has a list of ten circumstances where the inspection may be waived. However, DFS should go further. Insurers know best how to prevent insurance fraud, with the use of modern technology and their fraud investigation units. To *require* insurers to use paper inspection reports and hard copy photographs to battle fraud serves no good purpose. The use of automobile physical damage inspections should be made completely optional, at the discretion of the insurer issuing the physical damage coverage. This way, if an insurer does see value in someone actually inspecting the vehicle prior to putting coverage into effect, it could require an inspection. If not, time and resources would not have to be wasted on an inspection that would be completed simply to fulfill a regulatory requirement.

Insurance Regulation 68 – 11 NYCRR 65 – Automobile No-Fault Insurance

The whole automobile no-fault claims process is extremely complicated. There are many requirements which may have at one time made perfect sense, but have now become outdated. Given the extremely adversarial atmosphere that currently exists within the no-fault system, the requirements listed below present ample "gotcha" situations for insurers in the regulatory and civil justice systems. All these requirements could either be eliminated or amended, with no harm to the consumer:

a) 11 NYCRR 65-3.8(c)(1) requires that denials of economic loss claims be issued in duplicate. The regulation reads:

> *(1) If the insurer denies a claim in whole or in part involving elements of basic economic loss or extended economic loss, the insurer shall notify the applicant or the authorized representative on the prescribed denial of claim form,* ***in duplicate*** *(my emphasis), and shall furnish, if requested by the applicant, one copy of all prescribed claim forms submitted by or on behalf of the applicant thereto.*

It is unclear why a form would need to be sent to a claimant's lawyer in duplicate. However, this requirement can present serious problems. In the litigation before the courts, insurers face arguments from medical provider counsel that denials are defective in the absence of proof that they were mailed in duplicate.

b) 11 NYCRR 65-3.9(b) limits an insurer's ability to negotiate interest payments as part of a settlement. The regulation reads:

> *(b) The insurer shall not suggest or require, as a condition to settlement of a claim, that the interest due be waived.*

Although an outright waiver should not be required as a condition of settlement, negotiation of the amount of interest payable should be permitted. The no-fault statutory interest rate is extremely high – 24% annually. The prohibition of negotiation on the amount of interest payable, as is allowed in other insurance litigation scenarios, can hinder the settlement of these no-fault cases.

c) 11 NYCRR 65-3.19(f)(2) requires that that a specific form for benefits be *"printed on buff-colored paper."* These types of overly specific rules need to be eliminated. There is no reason the form cannot be printed on white paper.

d) Throughout Regulation 68, there are requirements that an insurer *"mail"* a specific form to a claimant or a claimant's representative. See 65-3.6(a) for example. The word *"mail"* should be replaced with the word *"send"* throughout regulation 68 to allow for delivery of documents and notices via fax, email or the mail. AIA understands there has to be allowances for claimants who do not use email, but to suggest document exchange between the counsels for the insurers and the counsels for the claimants has to be via snail mail is silly. In a time when so much information is exchanged electronically, requiring forms to be sent through the United States Postal Service wastes time and resources.

Insurance Regulations 107 & 110 – 11 NYCRR 71 & 11 NYCRR 72 – Duty to Defend in Liability Policies

This issue is much more esoteric, but very important nonetheless. It deals with liability insurance and the legal defense coverage provided by such insurance. Coverage of legal defense costs in the context of a third-party civil action is common to all liability insurance policies – homeowners' policies, auto policies, small business policies. For most policies, the insurance company is not only required to pay for legal defense costs, but also to manage the policyholder's legal defense, which includes retaining counsel and actively participating in the policyholder's legal defense strategy. This makes sense, as a typical homeowner, driver or small business owner probably does not have the time nor experience to mount an effective legal defense on his or her own behalf.

However, with sophisticated policyholders, the situation is a bit different. With directors and officers (D&O) insurance, for example, the reputational risk to a corporation's board which is being sued is so great that the board members will likely want to direct their own defenses; they will not want their insurance company directing their defense in civil litigation. Therefore, insurers sell liability policies where the "duty to defend" remains with the policyholder, rather than with the insurer. The insurer still pays for defense costs, but the policyholder would direct the legal defense. This worked well up until 2008, when the then-Insurance Department issued a legal opinion stating that insurers could not issue policies where policyholders retained the "duty to defend;" insurers had to direct the defense of any civil litigation that was being defended against.

This Insurance Department opinion caused serious disruption in the marketplace. There are policy forms in use currently that allow the duty to defend to remain with the policyholder, but new forms allowing policyholders to take on the duty to defend have not been approved since this opinion. This means innovation in this marketplace regarding liability coverage for sophisticated insureds in regard to legal defense costs has been hampered in New York since 2008.

It is also questionable if DFS has the statutory authority to require that insurers retain the "duty to defend " for all types of liability policies. Section 1113(a) of the Insurance Law does require insurance policies covering personal liability risks to include coverage for "loss, damage or expense" related to such claims. However, there is not a mandate in the statute that an insurer actually direct the defense in a litigation context. It would seem that an insurer paying for the costs of such a defense would satisfy the statutory requirements.

It is difficult to see what public policy objective is being served by this DFS interpretation of the statute. It prohibits sophisticated policyholders from making a choice that is in their best interest. Requiring insurers to actively defend small policyholders in civil litigation makes sense. Prohibiting directors and officers and other sophisticated insureds from directing their own legal defense when they want to do so does not.

Insurance Regulation 168 – 11 NYCRR 244 - Confidentiality for Domestic Violence Victims

In 2005, legislation was enacted protecting the confidentiality of domestic violence victims in regard to insurance transactions. These confidentiality provisions were added to Section 2612 of the Insurance Law; this section of law already prohibited insurance discrimination against domestic violence victims. The clear legislative intent of the 2005 amendments was to prohibit *health insurers* from disclosing a domestic violence victim's phone number and address to the person who had been abusing the victim. However, given ambiguities in the way the statute was written, after further amendments to the statute, DFS, when it promulgated regulations on December 31, 2013 implementing these confidentiality protocols, made the regulations applicable to ALL insurers, including property-casualty insurers.

While these protocols for domestic violence victims may make sense in a very limited number of property-casualty insurance scenarios – automobile no-fault medical claims, for example – AIA strongly believes this regulation does NOT have wider applicability to property-casualty insurance. Property-casualty insurers already must comply with federal requirements prohibiting the disclosure of a domestic violence victim's address and phone number. These DFS regulations simply overlay a set of state regulations on top of existing federal requirements regarding this issue.

Regulation 168 also requires all insurers to *"post conspicuously"* on their websites a notice alerting consumers about these confidentiality protocols. This notice must also list the phone number for the New York State Domestic and Sexual Violence Hotline. While posting of another notice on an insurer's website may not be the most onerous requirement, it is one more example of New York State mandating something that may sound good, but serves no real purpose. How many victims of domestic violence go to the website of their homeowner's insurance company or automobile insurer to get information about their rights as domestic violence victims? As state-regulated entities, insurance companies are very concerned about individual states mandating state-specific notices. While in and of itself the New York State domestic violence hotline notice may not be terribly problematic, the cumulative effect of all the different states each mandating something different is extremely problematic.

Even more odd is the fact that this regulation applies to property-casualty commercial lines coverage. An insurer that only sells commercial property coverage for large commercial properties, for example, would nonetheless still have to meet all the requirements of this regulation.

In the beginning of my remarks on this regulation, I stated that the legislative intent for this section of law was that it would apply to health insurers, not property-casualty insurers. Let me expand upon this a bit. The confidentiality requirements were first established by Chapter 246 of the Laws of 2005. The justification in the sponsor's memo for this law states,

> *"This bill will insure that medical records related to coverage under insurance policies, or Child Health Plus, Medicaid Managed Care, or Family Health Plus Program, are kept confidential if a person has a standing order of abuse (sic) against their spouse. It will ensure the abusers have one less record of tracking down their spouses."*

The confidentiality protocol provisions were added by Chapter 491 of the Laws of 2012, Part E of the legislation. The "Summary of Provisions" is the sponsor's memo states, in part,

> *"Except with the express consent of the person making a request, **a health insurer** (my emphasis) could not disclose to the policyholder the address, telephone number, or any other personally identifying information ..."*

It seems clear from real-world situations where these confidentiality protocols would be useful and from the public record that the legislative intent was to have this statute apply only to health insurers. AIA would be happy to discuss applicability of this regulation to the limited number of instances where property-casualty insurers pay medical claims, but as Regulation 168 is currently constituted, it is overreaching and without statutory basis in regard to property-casualty insurers.

New York State Insurance Department – 2008 Office of General Counsel Opinion –

Names of Insurers in Advertisements

This issue deals with a legal opinion that has been long held by the Insurance Department and now by the Department of Financial Services. The most recent time this opinion was reiterated publicly by the department was in 2008. There is no corresponding regulation relating to property-casualty insurers on this issue, but given the way DFS continues to interpret the Insurance Law, this 2008 opinion still has real-world implications.

In 2008 the Insurance Department issued an opinion stating that in any advertisements property-casualty insurers produce, the insurers *must* provide the names of the companies within their group that are actually providing insurance in New York; the trade name of the group would not suffice. For example, Travelers cannot simply put "Travelers" in an advertisement. All the different Travelers companies – Travelers Casualty and Surety Company, Travelers Home and Marine Insurance Company, Travelers Property Casualty Insurance Company, etc. – have to be listed in the advertisement, along with their specific addresses. Companies can have dozens of subsidiaries selling insurance in New York. According to this DFS opinion, all would have to be listed in an advertisement.

Another problem with this opinion is that a subsidiary may have a name that is not recognizably linked to the trade name and therefore unknown to the general public. The requirement to list the subsidiary's name defeats the purpose of a company trying to get recognition for its "brand," but could also confuse consumers, who know their insurers only by their trade names.

The 2008 opinion argues that simply listing the trade name in an advertisement violates Section 1102(a) of the Insurance Law. Section 1102(a) prohibits an entity from conducting insurance business in the state without a proper license. DFS therefore argues that an insurer's trade name (Travelers, The Hartford, Fireman's Fund, etc.) is not the exact name of any particular subsidiary that is licensed in the state, so the trade name entity is not a licensed insurer and therefore cannot advertise itself as an insurer.

The 2008 opinion also argues that using the trade name only in advertisements runs afoul of Insurance Law Section 2122(a). This section of law prohibits the use of any advertisement that *"calls attention to any unauthorized insurer or insurers."* DFS' argument is that use of a company's trade name calls attention to an entity that is not licensed by DFS, so this practice is prohibited under the Insurance Law. DFS also argues, using similar reasoning, that use of a company's trade name could constitute an unfair or deceptive trade practice trade practice in violation of Article 24 of the Insurance Law.

I guess a hypertechnical reading of the statutes could lead to the opinion DFS continues to hold. However, in the real world, this position makes no sense and could actually confuse consumers. If an insurer decides to advertise by its trade name, how are they deceiving the public? Is advertising using the trade name *"doing an insurance business?"* How is it helpful to consumers to list the dozens of a company's subsidiaries in an advertisement?

This issue can be resolved relatively easily. A company should be allowed to use its trade name in advertisements. The company could provide a notice within the advertisement informing consumers that further information on the particular subsidiaries selling insurance in New York State can be found at a specific web address of the company. This way, the pointless exercise of listing unknown subsidiaries in an advertisement is avoided, while giving those consumers who may want further information the ability to obtain such information.

Conclusion

AIA thanks the Senate Majority Coalition for the opportunity to bring to its attention regulations and rules that may have once served a purpose, but now are outdated, along with some regulations that never really made sense to begin with. I would be happy to answer any questions.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Alan Plafker

President of the Professional Insurance Agents

NYS Senate Administrative Regulations Review Commission (ARRC):

Insurance Regulatory Reform Forum

Tuesday, October 8th, 2013, 10:00 am - 12:00 pm
Senate Hearing Room, 250 Broadway 19th Floor, New York, NY 10007

Senators Gallivan, Valesky, Marchione, Carlucci, Seward, Skelos and Klein:

Thank you for the opportunity to present the testimony of the Professional Insurance Agents of New York at this insurance regulatory reform forum. My name is Alan Plafker and I am the president of PIANY.

PIANY is a voluntary, membership-based trade association representing professional, independent property/casualty insurance agents and brokers. We are your neighbors providing valuable property/casualty insurance coverage to protect the homes, businesses and automobiles of the citizens of New York State.

A statewide organization, PIANY serves member insurance agencies doing business in every New York community. In every city, every town and every village, PIANY members are small businesses that employ more than 20,000 insurance professionals, provide insurance for more than 2 million households and 750,000 businesses, governmental units and other organizations. PIANY's issues protect insurance consumers.

Today, I would like to briefly talk about four subject areas. In the interests of time I will be brief in my testimony, but I will be available to answer any questions you may have or follow up with any additional information you request.

My testimony today will center upon the topics of scaffold law reform, the standardization of homeowners' insurance hurricane deductible triggers, mandatory automobile photo inspections and allowing insurance agent and broker fiduciary accounts to be held in credit unions.

We applaud New York State Senator Gallivan for his sponsorship of legislation to reform New York's antiquated "Scaffold Law."

As a member of the Lawsuit Reform Alliance of New York, PIANY has long advocated for change to the Labor Law's "absolute liability" standard. PIANY urges the Legislature to enact this change and provide relief to the state's business and property owners. High-cost lawsuits threaten to drive construction companies and property owners out of business and people are losing jobs because of New York State's Labor Law Sections 240 and 241, also known as the "Scaffold Law."

These laws have caused skyrocketing litigation over accidents at construction work sites. The prevalence of television advertisements soliciting such cases is testimony to the way these laws work. They hold project owners and general contractors strictly liable for a worker's injury and preclude an effective defense, even in the event of negligence on the part of the employee.

New York is the only state that maintains an antiquated strict-liability standard for lawsuits against general contractors and site owners even if an employee recklessly causes injury to himself. The state's workers' compensation system already provides medical treatment and wage-loss benefits to injured workers, regardless of fault. Because of this law, businesses find themselves held absolutely liable for huge awards.

Senator Gallivan's proposal would allow property owners and general contractors to mitigate their liability and [illegible] contributes to his or her own injury by committing a criminal act, using drugs or alcohol, failing to use safety devices furnished at the job site, failing to comply with employer instructions regarding the use of safety devices at the jobsite, or failing to comply with safe work practices in accord with safety training programs provided by the employer.

PIANY urges lawmakers to remove this burden from New York state businesses by passing scaffold law reform.

Second, we must standardize coastal homeowners insurance hurricane deductible triggers.

When (not if) a severe hurricane hits New York's coastal areas, it will reveal inconsistencies that will cause a public outcry over lack of foresight by policymakers: hurricane deductible triggers vary widely by company.

This lack of standardization causes neighboring homeowners who suffer equal damage from a coastal storm to find that one homeowner has coverage for the damage and the other does not.

Standardizing the trigger point at which an insurer's windstorm deductible will apply will protect consumers against this type of scenario and needs to be done now.

The State Insurance Department proposed just such a regulation in 2010 to standardize these triggers. And recently, Benjamin Lawsky, superintendent of the state's Department of Financial Services, said that more uniformity would help people compare offerings from competing insurers. We must reform New York's Regulation (11 NYCRR Part 74).

Thirdly, we must repeal mandatory photo inspections that cause policyholders to lose automobile physical damage coverage.

Simply stated, New York's mandatory photo inspection regulations have outlived their usefulness and should be repealed. The current regulation (Insurance Regulation 79, 11 NYCRR 67.0) is complex and expensive for insurers to comply with, and drives up the overall cost for all auto insurance in New York State.

In addition, numerous people have lost coverage for damages to their vehicle because no auto inspection was performed, despite being reminded to have the photos taken.

Many times the inspection stations were closed or not available to take the pictures, and sometimes the insureds merely forgot.

In these situations, the insured has purchased coverage and paid the premium, but will not be covered if his or her auto sustains physical damage, simply because the auto inadvertently was not inspected. This regulation has outlived its usefulness and should be repealed.

And finally, we must ensure that the ability of insurance agents and brokers to retain fiduciary accounts in credit unions is preserved. The Insurance Department has specifically addressed and previously concluded that an insurance agent or broker may maintain a premium account in a federally-insured credit union, provided that the credit union is located and authorized to do business in New York state and permitted by its own regulator to hold premium accounts (Office of General Counsel Opinion, 07-06-21 Maintaining Premium Accounts in Credit Unions).
The restrictions on premium accounts are imposed to ensure that agents and brokers, as fiduciaries, protect their principals' funds to the utmost degree. The fact that the Department previously concluded that federally-insured credit unions fall within the term "bank or banks duly authorized to do business in this State" and satisfy the "federally- insured" requirement for premium accounts, provided that they are located and authorized to do business in New York state, and the regulator of the credit union permits the holding of such accounts (Office of General Counsel Opinion dated Oct. 23, 2000), led the Department to conclude that it had no objection to an insurance agent or broker maintaining a premium account in a credit union insured by the NCUA, subject to the aforementioned qualifications.

Respectfully, we see no compelling reason to reverse that determination now and request that this option be preserved in any update of Regulation 29.

I thank you for this opportunity and I would be happy to answer any questions you have.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

James Ownen

President and CEO of CARCO Group, Inc.

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October 8, 2013

Remarks of James C. Owens, President and CEO of CARCO Group, Inc.

Before the Senate Majority Coalition Task Force; Senate Commerce, Economic and Small Business Committee, Senate Insurance Committee, Administrative Regulations Review Commission (ARRC)

Senators Gallivan, Carlucci, Marchione, Seward and Valesky

napbs
National Association of Professional Background Screeners

Better Decisions Through Accurate Information
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SAFEHARBOR
U.S. DEPARTMENT OF COMMERCE

Good morning, I am Jim Owens, President and CEO of CARCO Group. On behalf of our company, I appreciate this opportunity to address the Senate Majority Coalition regarding a regulation that affects not only the insurance industry, but also, consumers and law enforcement.

CARCO Group, Inc., a Long Island based company, administers the highly successful pre-insurance photo inspection law. This very effective law, and its accompanying Regulation 79, protects consumers by deterring motor vehicle theft and fraud while also identifying vehicles that may not be safe to drive. It assists the insurance industry by identifying pre-existing damage, as well as, situations involving stolen vehicles. Law enforcement also benefits from the Regulation since it is often the last line of defense against criminal activity involving vehicles.

In New York State the Regulation applies to those vehicles that have been determined to be most prone to theft and fraud. This subset of vehicles means that only 8% of the vehicles in New York are required to be inspected, but due to just this 8% being inspected, the Regulation has had a material direct and deterrent effect on criminal activity. In fact, soon after it was enacted the theft rate in New York decreased by 7% while the theft rate in neighboring states, who had no similar law, rose. The New Jersey theft rate increased by more than 36%, in Connecticut it increased by more than 18% and in Pennsylvania by more than 16%.

The Regulation incorporates unique features that require both a physical inspection of the vehicle and a thorough analysis of its "EPA sticker" label. This label is particularly important since it contains vital information about the vehicle including its vehicle identification number (or "VIN"), where it was manufactured, its color and other information unique to that vehicle. It is important to note that the analysis of the EPA sticker is not performed by any other entity, not insurance agents, not insurance companies, not even the New York State DMV.

The analysis of the EPA sticker has resulted in the identification of "cloned" cars and, in turn, stolen car rings. We know that car rings often involve the theft of between 50 and 200 cars, at an estimated cost per car of $30,000. This means that each time a Regulation 79 inspection identifies a car ring, it saves between 1.5 million and 6 million dollars.

In addition to this critically important EPA sticker analysis, CARCO also captures pictures of the vehicle so as to identify any pre-existing damage. By identifying situations where a vehicle has been damaged, prior to the current insurance company writing the coverage, the program stops this fraud and helps contain the cost of insurance.

Unknown to most parties, CARCO is often an originating source of data on stolen cars since we are an entity that reports questionable VINS to the National Insurance Crime Bureau ("NICB") which then investigates such vehicles further. CARCO reports at least 100 annually to the NICB.

The key point is that Regulation 79 is the best way to protect New York consumers, and their insurers, from criminals that try to inject stolen, damaged, or even storm salvaged vehicles, such as those from Super Storm Sandy, into the New York marketplace.

The usefulness of the data is clear. CARCO has more than 20 million inspections including over 50 million photos available online to law enforcement and insurance company special investigation units. In fact, during 2012 law enforcement accessed our database to research potential criminal activity involving 148,709 vehicles. In addition, other individuals, such as those in the insurance companies' Special Investigation Units, checked more than 3 million vehicles.

The price of the program is minimal, since the ultimate cost to the insurance companies is an additional twenty-five cents for all insured vehicles for each 6 month policy renewal.

Law enforcement strongly supports Regulation 79, and opposes any attempt to repeal the law, or make it optional, which is tantamount to repeal. Unfortunately, some entities, who are not aware of the program's benefits, oppose it.

However, CARCO does believe the law should be modernized to better recognize the digital era and make compliance with the Regulation easier, without removing the anti-fraud deterrent benefits of the law.

Specifically, CARCO recommends the following changes to the Regulation:

1. Increase the time allowed to inspect a vehicle from the current 5 days.
2. Enable faster transmission of data by formally permitting the use of electronic devices, such as iPhones and Androids, to capture and transmit the inspection information to CARCO.

We greatly appreciate this opportunity to present the benefits of Regulation 79 to you today.

Respectfully submitted,

James C. Owens
President & CEO

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Dan Mahar

Executive Director of Excess Line Association of New York eLANY

EXCESS LINE ASSOCIATION
OF NEW YORK

One Exchange Plaza / 55 Broadway (29th Floor)
New York, New York 10006-3728

Daniel F. Maher
Executive Director

New York Senate Insurance Regulatory Reform Hearing

Tuesday October 8, 2013
Senate Hearing Room
250 Broadway, 19th Floor New York, NY

I am Daniel F. Maher, Executive Director of the Excess Line Association of New York (a/k/a ELANY) and I thank you on behalf of my members for providing me the opportunity to make the following brief remarks.

By way of background, ELANY is a statutorily-created entity which exists to facilitate and encourage compliance with the law regarding excess line transactions.

The excess line industry also known as the surplus lines industry exists to underwrite property and casualty insurance risks rejected by licensed insurance companies. Most excess line risks have significant volatility or greater exposure to loss. Excess line insurers cover distressed risks, risks with a bad loss history or new businesses with no loss history or new insurance products such as cyber-liability insurance.

By way of example, the excess line industry writes a significant amount of construction risks in New York. It also provides standalone flood insurance, either excess of the NFIP or for exposures ineligible for NFIP.

ELANY projects that it will process approximately 220,000 excess line transactions this year supported by approximately $3 billion of premium. This will generate direct taxes of about $100,000,000 to New York while supporting thousands of jobs directly and indirectly.

Excess line insurers are licensed in at least one jurisdiction but not by the state of New York. New York permits financially sound insurers to be eligible in New York to underwrite excess line risks. Excess line transactions are regulated by duties imposed on specially licensed brokers known as excess line brokers. These brokers have express legal duties to:

1) attempt to place risks first with New York licensed insurers before accessing any excess line markets, and

2) use due care in the selection of a financially sound, solvent, eligible insurer.

Excess line insurers consider risks rejected by licensed insurers because they have freedom of rate and form. They can charge rates commensurate with greater exposures and customize coverage terms and conditions.

ELANY has three distinct proposals to amend the regulation of excess line transactions:

1) Under Insurance Law §2118 (a)(1) an excess line broker must use "due care" in selecting the unauthorized insurer from whom policies are procured. New York Insurance Regulation 41 (11 NYCRR 27) does not define "Due Care" per se but does require the broker to 1) ascertain the insurers' financial stability and capacity to support the business it underwrites and 2) verify the insurer's claims practices are satisfactory and its management is trustworthy and competent.

   In support of all excess line brokers, ELANY has for 25 years analyzed and examined excess line insurers for financial solvency and other metrics to verify that these insurers should be eligible.

   ELANY publishes a list of those insurers and maintains financial data available to excess line brokers on each eligible insurer.

   ELANY recommends that Regulation 41 be amended to state that an excess line broker is presumed to have exercised due care when it places coverage with any insurer listed by ELANY subsequent to ELANY's financial review and examination. This will not prohibit other placements with insurers ELANY has not listed but excess line brokers will only get the benefit of the presumption for carriers listed by ELANY after financial review and examination.

2) In order to place a risk with an excess line insurer, an excess line broker must conduct a diligent search, which essentially means the broker must approach three licensed insurers whom they believe write the type of coverage or class of insurance. The excess line broker or producing broker (when two brokers are involved in the placement) must provide 21 data elements in an affidavit for each placement regarding the diligent search detailing which licensed insurers declined to write the account. This is a burdensome, time consuming and costly process. We believe the statistics attached to this testimony show a substantial percentage of accounts renew every year. This is because the risk profile of an account does not change overnight so an account that is in the excess line market often stays in the market for three years.

We propose that the diligent search made in year one of an account be deemed by Regulation 41 to be valid for 36 months. Many placements do not make a broker money in the first year because of all of the work involved initially. This change to the diligent search requirement will facilitate a reduction in administrative work and permit more service to be customer focused. Moreover, this will not prevent an account from moving back to the licensed market but simply make excess line renewals less burdensome.

3) The third proposal also relates to the diligent search. Medical Malpractice insurance is a major line of business in most states for excess/surplus lines but not so much in New York.

New York's medical malpractice market is very limited. Only three licensed insurers write a material volume of business. A residual market, the Medical Malpractice Insurance Pool (a/k/a MMIP) and various Risk Retention Groups which are exempt from most state insurance laws, write the balance of this business.

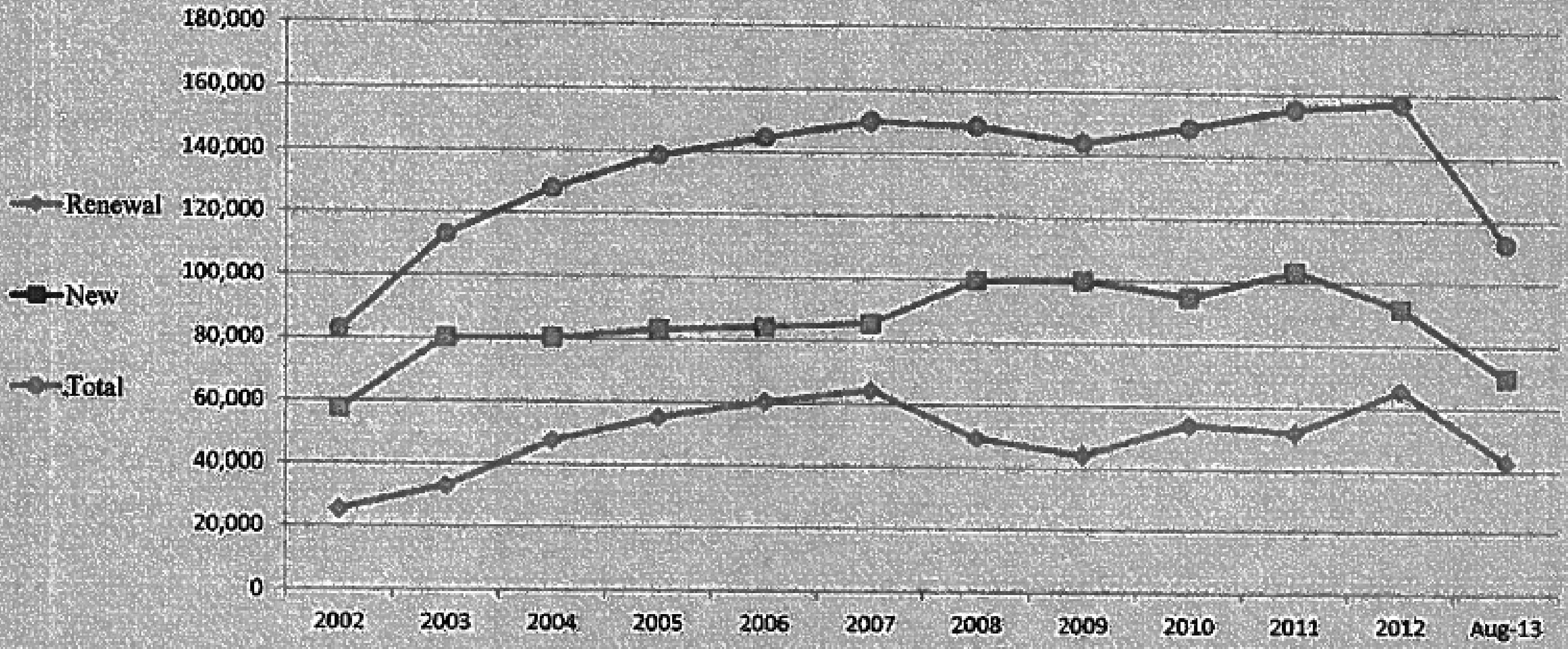
Under the Insurance Law an excess line broker cannot place primary medical malpractice insurance for a doctor, dentist or general hospital with an excess line insurer unless MMIP rejects the risk. MMIP has informed ELANY that it would reject risks where the insured would prefer excess line insurance but it is not empowered to do so. It appears the Superintendent has the authority to permit MMIP to reject risks by consenting to an amendment to MMIP's Plan of Operation. **ELANY proposes that MMIP's Plan of Operations be amended to permit MMIP to reject a risk at the request of the insured.** This will give the insured the broadest array of available markets which can address multistate underwriting exposures and other risk exposures MMIP was not designed to handle. The insured is in the best position to determine whether MMIP or an excess line insurer is offering the best terms and conditions.

Respectfully submitted,

Daniel F Maher

Daniel F. Maher

New York Excess Line Transaction Count *

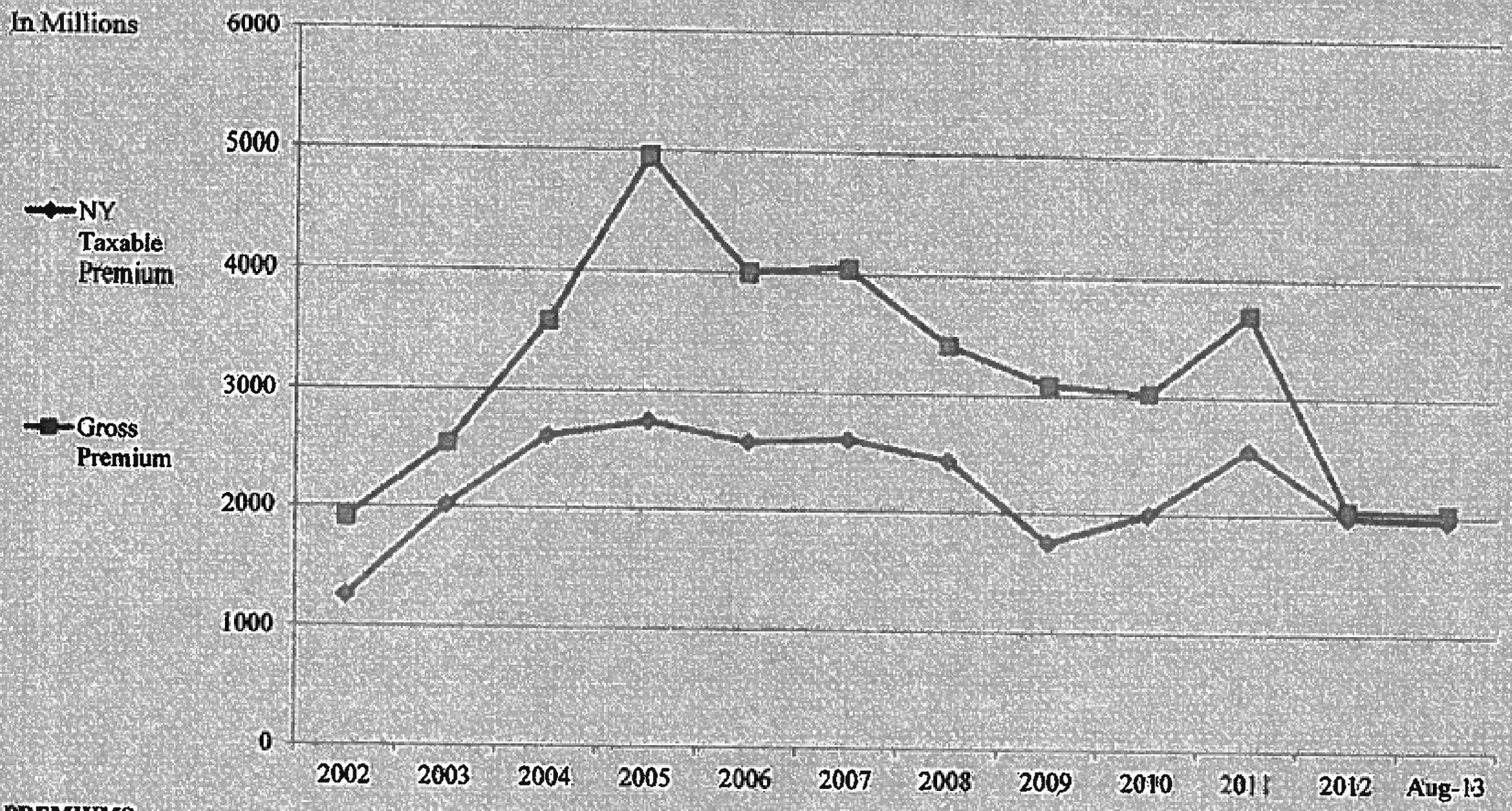


Years	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Aug-13
New	57,434	80,169	80,343	83,263	84,321	85,782	99,611	99,867	94,860	103,337	91,742	69,773
Renewal	25,186	32,870	47,433	55,237	60,247	64,318	49,188	44,013	54,145	51,917	65,460	42,738
Totals	82,620	113,039	127,776	138,500	144,568	150,100	148,799	143,880	149,005	155,254	157,202	112,511
Renewal % of Total	30.48%	29.08%	37.12%	39.88%	41.67%	42.85%	33.06%	30.59%	36.34%	33.44%	41.64%	37.99%

eLANY

* Endorsement Transactions Excluded

New York Excess Line Annual Premium



TOTAL PREMIUMS (IN MILLIONS)

Years	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	13-Aug
Gross	1907	2541	3596	4952	4003	4042	3416	3091	3025	3703	2048	2026
Taxable	1254	2016	2611	2743	2575	2605	2430	1750	1994	2545	1985	1964

eLANY

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Independent Bankers Association of New York

Independent BANKERS ASSOCIATION℠
of New York State, Inc

Community Bankers. Serving the Community.

This testimony is submitted on behalf of the Independent Bankers Association of New York State to the Senate Majority Coalition legislative forum on regulatory reform.

Banking regulations have significantly multiplied in recent years, most recently in response to the financial crisis. Community banks' compliance costs have skyrocketed in response to the increased regulatory burden. Compliance costs have reached more than 10% of the entire budget of some community banks. Regional and money center banks are better equipped to respond to regulatory requirements and the implementation costs because of their size and scale. The community bank business model is at risk of crumbling under the weight of increased compliance costs, which are difficult to absorb from a business perspective. Community banks do not have many of the revenue opportunities available as larger banks to account for additional compliance costs.

At the outset, it should be pointed out that the bulk of the regulatory burden emanates from federal mandates. Much to his credit, Superintendent Lawsky has actively engaged community bankers in discussions on ways to improve the regulatory environment in New York State.

There is a significant operational chasm between community banks and large regional and money center banks. Community banks are built on a straightforward business model of making loans in their respective communities. These banks do not have London whale transactions. Their transactions are with Main Street. Community banks are, however, subject to a similar regulatory regime because they are banks. Regulations need to be analyzed from the vantage point that one size does not fit all banks. Paperwork requirements have a much greater cost impact on community banks. It is particularly problematic when the regulation has little practical value to the customers of community banks. Clearly, where there is a value compliance should be achieved.

WHITEMAN
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MEMORANDUM

TO: Senator Patrick M. Gallivan (via fax: 716-656-8961)

CC: Todd J. Aldinger (via e-mail: aldinger@nysenate.gov)

FROM: William Y. Crowell, III

DATE: October 21, 2013

RE: Banking and Financial Services Industries Regulatory Reform Forum

In response to the legislative forum on regulatory reform held on October 8, 2013, enclosed please find written testimony submitted by our client, the Independent Bankers Association of New York State. Your consideration of this testimony is greatly appreciated.

If you have any questions, please don't hesitate to contact me. Thanks.

The Community Reinvestment Act examinations of state chartered banks are independently performed by the Federal Reserve Bank of New York and the New York State Department of Financial Services. Both examinations review the same documentation and generally arrive at the same conclusion. IBANYS member banks do not see the necessity for overlapping examinations. This is particularly true when the State examinations occur after the federal exam. In one particular case, a bank received its exam results 21 months after the targeted exam date and 10 months after the examiners left the bank. This delay was compounded by the fact that the exam covered years which made the data from the exam five years old. The current system is duplicative and taxes the resources of both community banks and the Department of Financial Services. A State exam should be triggered based on a failure of the federal CRA exam.

Another example of a regulatory burden on community banks is the volume of servicing report. This is a 28-page report which requires significant detail on mortgage loans, subprime loans, servicings, loss mitigation and foreclosure data. This report is filed on a quarterly basis. This data is gathered to provide data on loan foreclosure assistance. It is not, however, relevant to community banks in New York State. Community banks did not participate in the subprime market. Community bank foreclosures are minimal and generally a result of divorce or some other reversal of financial circumstances. Despite this situation, community bank compliance personnel are required to devote a significant amount of time to gathering data, implementing internal record-keeping and completing these forms. The value of this data is extremely limited, as it applies to mortgage foreclosures.

The failure to distinguish between community banks, particularly in upstate New York, was recently demonstrated by requiring them to complete a survey on taxi medallion lending.

Just as banks are required to apply "know your customer" standards, State and federal regulators should also be obligated to account for the major differences between community banks and large banks. Common sense regulation works best.

Thank you for reaching out on this issue of major significance to community banks.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Property Casualty Insurers Association of America (PCI)

Senate Majority Coalition Regulatory Reform Legislative Forum

Insurance Industry Issues

October 8, 2013

Written Testimony of the Property Casualty Insurers Association of America (PCI)

The Property Casualty Insurers Association of America (PCI) appreciates this opportunity to provide written testimony relative to regulatory reforms which should be considered pertaining to the insurance industry. PCI is a national trade association representing over 1,000 property casualty insurance companies. In New York, PCI member companies write 35% of the state's property casualty insurance.

Allowing Electronic Motor Vehicle Insurance Identification Cards

Current Department of Motor Vehicle (DMV) regulations (15 NYCRR 32.9) contain specific requirements relative to specifications for motor vehicle insurance identification cards which require a particular type of paper to be utilized and, therefore, do not allow drivers to show proof of financial security through electronic transmission to a smart phone or tablet. Currently, twenty eight states have enacted laws or regulations allowing drivers to show proof of insurance through a smart phone or tablet. These states have recognized that it makes good sense to enable consumers to embrace available technology to facilitate compliance with proof of insurance laws and New York should amend DMV regulations so as to join this growing list of states which have adopted sensible provisions to modernize their proof of insurance laws.

With each passing day people are using their smartphones to do more and more things electronically. They shop, bank and pay bills from their phone. They even use them to board airplanes. Yet today in New York motorists are still required to carry a physical insurance identification card with them. If a law enforcement officer asks for the card and a motorist can't find it, or simply forgot to switch out an expired card with a new one, that motorist will be ticketed and will have to go to court even though that person had insurance. Even if they can't find a current identification card, though, odds are that they do have their smartphone with them. If this bill is enacted, motorists will never again be without proof of insurance as long as they have their smartphone with them.

If this sensible regulatory change were made, all stakeholders would benefit. Insured motorists would be spared the hassle of having to go to court just to prove they had insurance, courts would have fewer tickets to hear and insurance companies would benefit because they wouldn't have to print and mail insurance cards to those motorists who prefer to display proof on their phone.

NY Rate and Form Filing Review Processes

The efficiency of a state's rate and form filing approval process is of major importance to the insurance industry because securing these approvals in an efficient and expeditious manner is crucial to being able to do business in a given state and offer new insurance products and innovations to consumers. When the Department of Financial Services (DFS) was created from the merger of the banking and insurance departments in October of 2011, Superintendent Lawsky made improving the rate and form filing review process a priority and PCI is pleased to note that this effort has generally resulted in improvement to the process. Prior to DFS undertaking this effort, the filing review process in New York tended to be a quagmire of multiple examiners and required sign-offs which often caused lengthy delays and confusion. While there is still room for improvement, a number of PCI member companies have noted significant improvements to the process and PCI commends the Superintendent for making this issue a priority.

PCI would urge that efforts in this regard continue as continued improvements in this process will make New York a more attractive place for insurers to do business. PCI would urge continued focus on reducing the number of sign offs required prior to the approval of filings and on consolidating all objections/inquiries relative to a filing so that such objections can be addressed more efficiently and comprehensively at an early stage in the review process. PCI would also urge that formal guidance be provided relative to various requirements relating to particular filings as opposed to relying on unpublished "desk drawer rules" or examiner interpretations. Such informal interpretations can make it difficult for insurers who may be new to the state or delving into a new policy type to learn about the Department's expectations or requirements relative to certain types of filings.

Motor Vehicle Photo Inspection

The motor vehicle photo inspection requirements set forth in Regulation 79 (11 NYCRR 67) are burdensome, unnecessary and costly. New York's photo inspection requirement dates back to 1977 and while, at that time, photo inspections represented a state of the art motor vehicle theft and fraud detection tool, this is not the case in modern times and insurers now have numerous more effective tools which they utilize to detect theft and fraud. Requiring the use of this outdated theft and fraud detection tool is not only expensive and burdensome for insurers, but it is a burden and significant potential hardship to the consumer if the consumer fails to secure a photo inspection of their vehicle within five days and physical damage coverage is dropped in accordance with the requirements of Regulation 79. Accordingly, PCI believes that Regulation 79 should be revised to make photo inspections optional.

If all inspections are not to be made optional, Regulation 79 should be revised to eliminate required inspections under circumstances where they will not likely detect fraud. For example, it is the experience of PCI member companies that if an insured is going to submit a fraudulent preexisting damage or phantom vehicle claim, this happens in the initial policy term, so PCI would submit that requiring inspections at renewal is unnecessary. Additionally, the vast majority of exposure on physical damage coverage comes from newer vehicles (three model years or less), so PCI would also submit that requiring inspections of older vehicles is not warranted.

In addition to requiring unnecessary inspections, Regulation 79 is overly detailed and complex, with numerous compliance requirements. PCI would submit that this regulation should be modernized so as to allow insurers flexibility in developing their own processes to ensure that policyholders get their inspections done in a timely fashion rather than setting forth strict requirements relative to every step in the process. Obviously, insurers do not want to have to strip physical damage coverage from their policyholders, so insurers should be allowed to develop more efficient and innovative ways to ensure that inspections are obtained.

Allowing Sophisticated Insureds to Retain Control over Defense of Claims

While it is the general rule that the insurer has the duty to defend claims, in the context of directors and officers liability policies, large businesses often prefer to retain control over the defense of such claims. Current regulations governing legal defense costs in liability policies (11 NYCRR 71 – Regulation 107) need to be amended to clarify that sophisticated insureds may have the option to purchase directors and officers liability policies which allow the insured to bear the duty to defend claims and thereby manage their own defense and pursue a litigation strategy that they feel is best suited to the circumstances of the case and the business. These policies are common in other jurisdictions and New York businesses should similarly have this option available to them as they look to meet their individual insurance needs.

PCI appreciates the Senate Majority Coalition's interest in improving the regulatory climate of New York State and appreciates the Coalition's consideration of PCI's comments in this regard. If there are any questions or if the Coalition wishes to discuss any of these issues, please contact Kristina Baldwin at (518) 443-2220 or kristina.baldwin@pciaa.net.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

James W. Clyne, Jr.

President and CEO of Leading Age New York

LeadingAge™
New York

Senate Majority Coalition
Legislative Forum on Regulatory Reform
Testimony Presented By:
James W. Clyne, Jr., President/CEO

October 8, 2013

Senate Hearing Room
250 Broadway
New York, New York

Introduction

My name is James W. Clyne, Jr., and I am the president and CEO of LeadingAge New York. Thank you for the opportunity to testify on recommended changes to the regulatory environment in New York. The following remarks will focus on a tremendous opportunity to address the over-regulation of Continuing Care Retirement Communities (CCRCs) in New York State.

Founded in 1961, LeadingAge New York is the only statewide organization representing the entire continuum of not-for-profit, mission-driven and public continuing care including home and community-based services, adult day health care, nursing homes, senior housing, continuing care retirement communities, adult care facilities, assisted living programs and Managed Long Term Care (MLTC) plans. LeadingAge New York's 600+ members serve an estimated 500,000 New Yorkers of all ages annually. LeadingAge New York also represents all of the CCRCs in the state.

By most anyone's standards, CCRCs are one of the most regulated communities and products in New York State. This is the result of CCRCs falling under the oversight of both the Department of Health (DOH) and the Department of Financial Services (DFS), leading to excessive regulation that is often duplicative. As a result, these communities can take years to build – if they get built at all – and regulations can significantly limit a CCRC's growth potential and even jeopardize its financial viability. Since the 1989 authorizing legislation was enacted 24 years ago, only 12 CCRCs have been built in the state to date.

This trend is unfortunate given the popularity of the model with seniors as well as the financial benefits to the state and local communities. CCRCs allow seniors to use their home equity and other assets to purchase an affordable residential and health care arrangement that provides access to housing, supportive services, social activities and long term health care services in a campus setting. The CCRC approach incentivizes keeping seniors at the lowest level of care and in their communities. At the same time, the consumer is guaranteed that their needs are met, regardless of how frail they may become. CCRCs encourage seniors to invest their assets in long term care services within a retirement community that largely prevents asset divestiture to qualify for Medicaid funded services, and encourages seniors with financial means to receive their services in New York rather than relocating to another state.

This is certainly a very popular option among seniors, with CCRCs proliferating along the east coast, particularly in many neighboring states. Unfortunately, with only 12 CCRCs scattered throughout New York State, many seniors are out-migrating to neighboring states to access services. Nationwide, there are approximately 1,900 CCRCs, according to the Ziegler National CCRC Listing and Profile, 80 percent of which are Not-for-Profit (NFP). Pennsylvania has 271 CCRCs, Florida has 70 CCRCs and New York's 12 CCRCs represent less than one percent of all CCRCs nationally. Our CCRC peers in Pennsylvania often joke that they don't want New York to change a thing, because they want to continue to care for our seniors.

Regulation Times Two

CCRCs are highly regulated in New York by both DOH and DFS, and they require approval by DFS and DOH before, during and after construction. These regulations make it extremely difficult for sponsors to construct communities, manage communities and gain access to financing. Here is just a sampling of the regulatory hurdles that CCRCs face:

- Construction cannot begin until at least 50 percent of the units have been pre-sold.
- Occupancy of CCRC housing also cannot begin until at least 50 percent of the residential units have been pre-sold.
- Contractual agreements, resident occupancy and all finances must be approved by both DOH and DFS.
- Once the CCRC has been built and is in operation, both agencies continue to meet with the CCRC on a regular basis to review and monitor finances.

In addition, CCRCs are regulated as several separate licensed entities rather than as one integrated service provider. As a result, CCRCs must adhere to duplicative and sometimes conflicting sets of regulations that hinder the seamless continuum of care they strive to offer residents. For example, a CCRC would be expected to follow individual licensing requirements and regulations through DOH, such as:

- a CCRC operating certificate under Article 46 of the Public Health Law;
- an adult care facility license;
- a residential health care facility (i.e., nursing home) license;
- a home care agency license; and
- a diagnostic and treatment center license (if it seeks to provide clinic services).

Regulation 140 Reform

In spite of the impact of these duplicative and burdensome regulations, the most detrimental regulation impacting CCRCs are the reserve and investment requirements, imposed by Regulation 140, which significantly limits investment potential. LeadingAge New York convened a Regulation 140 Workgroup to develop recommendations for DFS to amend Part 350 (Reg. 140) of Title 11 NYCRR on reserve requirements and allowable investment purchases by CCRCs, which are conservative and conventional among most long term care communities. The proposed amendments will enhance investment returns, which will ultimately accrue to the benefit of CCRC residents. The recommendations, which LeadingAge New York has advocated for with DFS, are summarized below.

- **Minimum Liquid Reserve (MLR) Investments and non-MLR Investments**

LeadingAge New York has proposed that all investments be included in the required investment policy, and that both MLR investments and non-MLR investments should be considered together in developing investment policy. MLR investments can currently be invested in various fixed income securities including United States government bonds, agency bonds and other fixed income securities rated in the top four rating categories.

Yet another result of current Regulation 140 investment policy is that current CCRC residents' annual monthly fees are increased due to the loss of income caused by the required conservative investments. These higher fees can have a negative impact to some CCRC residents who are on a fixed income and who might have lost funds in their personal investment portfolio in recent years.

- **Mutual Funds Investment**

The current regulations are very specific as to the types of securities in which a CCRC may invest. For example, CCRCs may invest in equity securities. Yet, because there is not a specific provision for mutual funds or exchange traded funds, these investments are not permitted. Investment in mutual funds consisting of individual equity investments is widely acknowledged to be safer than investing in a single equity security. LeadingAge New York proposes that the language in Regulation 140 be changed to permit investments in mutual funds and exchange traded funds. LeadingAge New York could assist DFS in developing mutual fund guidelines taking into account fund size, style and other variables should this provision be adopted.

- **Asset Diversification**

To further reduce portfolio risk, the workgroup proposes that additional asset classes be included in permitted investments. LeadingAge New York proposes that these "diversifying" asset classes be limited to a certain percentage of total assets. The asset classes proposed to permit are Indexed Commodity Investment or Other Real Asset Portfolio; High Yield Bonds; and International Bonds.

LeadingAge New York's proposals offer practical easy-to-implement risk guidelines that accommodate the financial needs of a wide range of CCRCs. On one end of the spectrum, some CCRCs will not have significant assets above and beyond the MLR; therefore, asset allocation will not change in any significant manner. On the other end of the spectrum of financial strength, CCRCs will be able to invest prudently so that residents are protected and long term growth in assets can keep pace with ever-changing needs.

Reserve Requirements and Actuarial Soundness

LeadingAge New York believes that by lowering reserve requirements for life care and modified CCRCs to be more in line with the reserve requirements in other states, while still protecting consumers' interests and investments, CCRC development in New York will prosper. Pennsylvania, which boasts the most CCRCs of any state in the country, has low reserve requirements. As a matter of fact, Pennsylvania law requires life care communities to maintain 15 percent of their projected annual operating expenses, exclusive of depreciation, in liquid reserves.

Regulation 140 calls for the most stringent reserve requirements allowed under current law. This has inhibited CCRC growth; unlike in Pennsylvania, in which there is a smaller senior population compared to

New York, as well as collective wealth. "Life care" and "modified" CCRCs in New York (two different CCRC models that guarantee differing amounts of nursing home care for a CCRC resident), unfortunately, are required under Regulation 140 to reserve the equivalent of 12 months of principal and interest payments upon obtaining financing of the CCRC, while six months of projected operating costs, six months of projected refunds, 12 months of taxes and insurance, repairs and replacement reserves must be funded with resident entrance fees. These unrealistic reserve requirements have made it difficult to develop CCRCs and resulted in higher entrance fees and monthly fees for life care and modified CCRC residents than are necessary.

Life care communities, which guarantee unlimited nursing home care to their residents, typically achieve an actuarial surplus within 8-10 years after opening. The start-up losses naturally incurred by new communities are typically recovered within that 8-10 year period. New York regulations require communities to have an actuarial surplus in the third year of operations, essentially requiring all start-up losses to be recovered from the initial residents, thereby placing an unfair burden on the shoulders of those residents. By requiring an actuarial surplus by the third year, entrance fees and monthly fees inhibit marketing of new communities and prohibit all but the wealthiest of New York's seniors from enjoying all the benefits of the CCRC. LeadingAge New York has recommended changing this requirement to allow the certified actuarial study submitted initially and every third year thereafter by each CCRC to DFS, to act as the basis for determining the actuarial validity and financial stability of the CCRC. The CCRC study would be required to confirm to practices adopted by the Actuarial Standards Board of the American Academy of Actuaries (AAAs); the national standard for actuarial validity of CCRCs. Doing so would provide for a more streamlined, flexible and updated method for assuring actuarial soundness.

Modern Portfolio Theory maintains that to minimize risk for a given level of return, a careful selection of the proportions of various assets be held. Currently, portfolios held by CCRCs typically have fixed income positions in excess of 90 percent. LeadingAge New York believes that the current policy in favor of fixed income will fail to keep up with inflation over certain periods of time. LeadingAge New York remains convinced that CCRC business models are being negatively impacted by the limitations presented by permissible investments under Regulation 140 and respectfully request consideration of increased equity positions coupled with investments in mutual funds and Exchange Traded Funds (ETFs). LeadingAge New York believes that access to mutual funds and ETFs warrants immediate consideration as this investment allows for low cost access to managed funds.

Conclusion

To encourage the development of CCRCs in New York, LeadingAge New York and its membership are seeking regulatory reform from DOH and DFS, which will make regulations more flexible like those LeadingAge New York see in states like Pennsylvania and Florida. In a fiscal climate that calls for encouraging economic development and reduced public spending, increased CCRC development would meet both of these important goals. Residents of CCRCs invest their assets into the CCRC for residential and health-related services, which in turn, obviates the need to rely on Medicaid to cover such costs. In addition, the residents of the CCRC spend their income in the community, contributing to the economic growth of local communities. The market for CCRCs is expected to expand as baby boomers age and begin planning for their retirement, resulting in job creation and a brighter economic future for the state.

In order to make New York a contender among its neighbors, LeadingAge New York encourages lawmakers and regulators to recognize the market for CCRC development so New York's aging citizens can remain in their communities and most importantly in the state. The LeadingAge New York proposal offers practical easy-to-implement risk guidelines that accommodate the financial needs of a wide range of CCRCs, allowing CCRCs to invest prudently so that residents are protected and long term growth in assets can keep pace with ever-changing needs.

The experience of other states, indeed the tremendous growth of CCRCs across the country, demonstrates beyond any doubt that this is a product that seniors desire and need. As a result of our onerous, regulatory environment, New York seniors are being denied access to a service that has become the standard of senior care across the nation. In addition, for those seniors that are able to access the service, they face higher fees and reduced freedom of choice as to how to invest their resources towards their own care. Likewise, the construction of CCRC campuses, including the jobs included in construction and development of CCRCs is curtailed by the exceedingly stringent business requirements imposed by Regulation 140.

Perhaps worst of all, the lack of access to affordable CCRC services helps to perpetuate the perverse incentives for individuals to impoverish themselves by divesting assets to qualify for Medicaid. The CCRC model, as proven in other states, provides a dignified alternative to the humiliating process of self-imposed poverty that many seniors now endure.

If ever one needed to look at an example of how regulatory overreach negatively impacted the availability of health care services and job development, one need only compare the New York CCRC experience with our neighbors. Along with our LeadingAge national affiliate, LeadingAge New York is prepared to provide additional information and statistics to demonstrate how New York has really missed the boat on this.

As always our staff is available to provide additional information and support for the cause of much needed reform of our regulatory environment.

Regulatory Reform Hearing: Insurance/Banking/Financial
October 8, 2013
New York City, NY

Testimony Submitted by:

Michael P. Smith

President and CEO of the New York Bankers Association

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Michael P. Smith
President and CEO

Statement of Michael P. Smith
President & CEO
New York Bankers Association

The New York State Senate
October 8, 2013

My name is Michael P. Smith. I am President and CEO of the New York Bankers Association. Thank you for this important opportunity to discuss the regulations, rules, and mandates that affect the health and profitability of the banking industry in New York State.

The New York Bankers Association is comprised of approximately 150 commercial, money-center, regional, and community banks and thrifts of all sizes, lines of business, and geographic location throughout the State of New York. The industry employs about 200,000 New Yorkers.

We applaud the New York State Senate's efforts to study the impact of regulation on businesses and job creation, and are particularly heartened to be asked to provide the banking industry's perspective.

At the outset, I would like to make clear that we believe the State's banking system functions best with a careful balance between regulatory oversight and the ability to innovate. New York is a global financial capital, and we hope that it remains so in the future. For our community banks, which can be the financial lifeblood of our smaller towns and villages, the heavy cost burden of increased regulatory compliance has been hurtful to their bottom line. This increased cost burden has affected many aspects of the banking business, not the least of which is a necessary decline in the charitable contributions made by financial institutions in their communities.

We have some specific suggestions, that if adopted, could: 1) help relieve the detrimental backlog of foreclosures in the State; 2) help the State retain the highly valuable trust and estates business that is leaving New York for more trust-friendly states; and 3) free up capital to increase mortgages and small business loans.

1. **Expedited Foreclosure of Abandoned Residential Properties**
   For the past several years, NYBA has been urging the State Legislature to adopt an expedited foreclosure process in cases where the action is uncontested and the property has been proven to be vacant. Allowing the courts to forego the lengthy, and in these cases, completely unnecessary settlement conference procedure, for example, would speed the process significantly, thereby allowing deteriorating properties to be sold and/or rehabilitated. It would also free up the courts to address the other backlogged foreclosure actions. Moving properties through New York's inordinately long standard foreclosure process has been difficult and has resulted in a significant backlog of cases in the State's court system, in many parts of the State, up to four years. Communities will benefit from having properties returned to their proper condition and returned to the tax rolls. New Jersey has recently enacted similar legislation.

2. **Non-Judicial Commercial Mortgage Foreclosure**
   New York historically permitted commercial mortgage foreclosures to be resolved without the involvement of the courts. Most of these foreclosures are uncontested, with lenders eager to redeploy the properties for purchase by other businesses. Three years ago, the provision of law allowing non-judicial foreclosure of commercial mortgages expired. Since then, commercial mortgage foreclosures have unnecessarily

contributed to the backlog of foreclosures in the State's court system and have also unnecessarily delayed the economic recovery as commercial properties sit idle through a long foreclosure process. NYBA urges that the law allowing non-judicial commercial mortgage foreclosures by renewed as soon as possible.

3. **Tax Reform**

   NYBA urges the State of New York to reduce its corporate tax rate in order to attract and retain businesses in the State, which currently has one of the highest corporate tax rates in the nation. Also, NYBA supports a key element contained in the 2011 Corporate Tax Reform Summary Document, generated by the State Department of Taxation and Finance, which would allow community banks and thrifts the opportunity to reduce their income subject to tax to the extent their activities support residential and small business lending in New York.

   We recommend that the State consider adding targeted tax incentives for lending activities in upstate New York and other underserved and/or economically challenged communities. Incentives should be linked to demonstrable measures of success.

   NYBA urges that New York City and State tax laws and rules be consistent. Two divergent sets of tax requirements create compliance and administrative challenges, including possible conflicts and uncertainties in the audit process.

   We also suggest that to the extent an item has been examined in one audit cycle, that the same item should be treated consistently unless relevant facts have significantly changed.

   The banking industry strongly recommends that the Gramm Leach Bliley Act (GLBA) transitional tax provisions be made permanent. The tax provisions were originally added to the New York Tax Law and New York City's Administrative Code in 2000 to reflect GLBA's removal of the prohibitions on affiliations of banks, securities firms and insurance companies. It is also difficult to plan with certainty when laws and provisions are repeatedly "sunseted" and then re-instated. A reduction in the reliance upon recurring sunset provisions, in lieu of adopting finalized tax law, would be enormously helpful. In a letter to the New York State Tax Reform and Fairness Commission this summer, NYBA more fully expressed our recommendations for Tax Reform. A copy of that letter is attached.

4. **Reviving the State's Trust Industry**

   NYBA urges the State of New York to address the continuing demise of New York's Trust industry by eliminating the fiduciary income tax and by modernizing many other aspects of New York's trust law. Under current New York law, for example, income retained in a trust and capital gains realized on trusts established by New York resident grantors and administered by New York resident trustees are taxed by the State (and by New York City for City grantors) at the same rates at which individual income and capital gains are taxed. For most trusts, this means taxation at the top marginal rate of 8.82% for the State and 3.876% for the City, with a combined top tax rate of 12.696%. This provides great financial incentives for trusts to be administered out of New York. Many other New York trust laws, for example, those related to directed trusts and proprietary funds, have also caused many trust jobs to move out of state. Modernization of these laws would enhance New York's competitiveness and begin the return of a once vibrant industry to the State.

5. **Credit Unions and Public Deposits**
   NYBA recognizes that the tax-exempt status of credit unions is for the most part outside the purview of the Commission and rests with the Federal government. However, we note that there is one focus of credit unions that is particularly relevant to New York law – that is, their desire to take public deposits, which are, in fact, taxpayer dollars which currently can only be deposited into tax-paying banks. In this regard, we think it is worth commenting, that while in New York State, commercial banks and thrift institutions paid approximately $1 billion last year alone in State income taxes and hundreds of millions in other State and local income and sales taxes and the MTA Payroll tax) credit unions paid virtually none. Yet, each year New York's non-tax paying credit unions become more like banks, offering virtually the same products and services almost without geographic limitations or other restraints, yet doing so at a huge competitive advantage.

   We believe an expansion of authority which allows credit unions to take public deposits, would not only be unfair to tax-paying financial institutions, but would also be detrimental to New York's economy. This is so for several reasons. For example, for every dollar removed from a bank and placed in a credit union, a dollar in earning assets must be extinguished. The earnings on bank assets are taxed by the State and City of New York, while no earnings on credit union assets could be taxed. Moreover, deposits withdrawn from local community banks reduce the tax revenues on which New York's local governments deposits depend.

Be assured that the banking industry recognizes the importance of sound regulation and oversight. In fact, the industry welcomes smart, efficient regulation which can provide banks and thrifts with a competitive advantage over those firms that operate below the government's radar.

Our goal as an industry is to continue to provide credit to New Yorkers responsibly so that they can purchase homes, build or expand their businesses, and ultimately create jobs. At the same time, we would like to maintain New York's status as a global financial hub and that can happen only if innovation within the industry is allowed to flourish.

Please do not hesitate to call upon us, or your local banker, for additional information on these topics as you move forward with this effort.

Regulatory Reform Hearing: Insurance/Banking/Financial Services
October 8, 2013
New York City, NY

Written Testimony of:

Michael P. Smith
New York Bankers Association

NYBA

Michael P. Smith
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August 15, 2013

Honorable H. Carl McCall
Honorable Peter J. Solomon
Co-Chairs
New York State Tax Reform and Fairness Commission
[address]

RE: **New York State Tax Reform Recommendations**

Dear Co-Chairs McCall and Solomon:

Thank you for the opportunity to provide to the New York State Tax Reform and Fairness Commission (the "Commission") the perspective of the New York Bankers Association ("NYBA") regarding possible opportunities for meaningful tax reform in our State. We share the Commission's goals of creating a simpler and fairer tax code which will facilitate economic growth and reduce the resources expended on tax compliance and administration. In this spirit, we make the following recommendations, focusing our comments generally on ways in which tax reform can further enhance New York's reputation as the financial capital of the world.

The October 2011 Corporate Tax Reform Summary Document

NYBA supports the October 2011 Corporate Tax Reform summary document generated by the State Department of Taxation and Finance (the "Department"). It is an excellent blueprint for meaningful tax reform. However, we recognize that some out-of-State institutions will find the nexus provisions burdensome and costly. We also note importantly that the basic design of the Department's reform bill expands the tax base but contemplates a rate reduction to achieve revenue neutrality. In this regard, we continue to urge that the corporate tax rate be reduced in order to attract and retain business in the State, which currently has one of the highest corporate tax rates in the nation.

A key element of the October 2011 draft, which we believe is critical to ensure that community banks do not suffer a substantial tax increase, are the provisions allowing community banks and thrifts the opportunity to reduce their income subject to tax to the extent their activities support residential and small business lending in New York. These provisions ensure that local community lenders who concentrate their lending to New York borrowers, and keep their loans in portfolio, will not be disadvantaged in competition with lenders who mark to market their loans, sell them into the secondary market and do not maintain as strong a community presence. It is essential to the economic vitality of communities to have in their midst financially strong local banks who will ride out economic cycles and remain committed to their local communities.

Suggested Enhancements
We recommend that the Commission consider adding targeted tax incentives for lending activities in Upstate New York and other underserved and/or economically challenged communities throughout the State. Unlike most other tax credits, however, we would suggest these tax incentives be linked to demonstrable measures of success.

We would welcome an opportunity to discuss thoughts for useful targeted tax incentives as well as ways in which to modernize and keep relevant the definition of community banks.

Clarity of Legislative Language
To the extent practicable, we also urge specificity and clarity in the development of statutory language. For example, we believe there is an opportunity to clearly address the many tax issues that arise from the application of tax rules to a combined group of companies – including limitation on the deduction of charitable contributions and net capital losses, computation of NOL, deferral of inter-corporate gains and losses, determination of the tax basis in the investment in subsidiaries, applying the principle of limiting negative receipts to zero and the computation of REMIC limitations. Additionally, guidance and examples are requested to assist in determining when a corporation is less than 20% or 50% owned, "directly and indirectly" and clear rules for determining unitary relationships so that there is limited controversy as to the appropriate affiliates to be included in the combined return group. It would be helpful to address the application of many tax provisions to a New York taxpayer that has merged or acquired another New York or non-New York taxpayer.

New York City Conformity
We would urge that New York City and State tax laws and rules be consistent. Two divergent sets of tax requirements create compliance and administrative challenges, including possible conflicts and uncertainties in the audit process. In this regard, we urge that the State and New York City coordinate and issue schedules of proposed adjustments at the same time, avoiding multiple response due dates.

Audits
We would suggest that to the extent an item has been examined in one audit cycle, that same item should be treated consistently unless relevant facts have significantly changed. (Alternative: We would suggest that to the extent an item has been examined in one audit cycle, that same item should be treated consistently for at least the subsequent audit cycle, unless relevant facts have significantly changed.) Lastly, we

believe New York State and City should adopt a version of the Compliance Assurance Process (CAP) initiated by the IRS to enable taxpayers and government to achieve certainty of tax liability upon the submission of tax returns.

Permanent Codification of Key Tax provisions
NYBA strongly recommends that the Gramm-Leach-Bliley Act (GLBA) transitional tax provisions which were originally added to the New York Tax Law and New York City's Administrative Code in 2000 to reflect GLBA's removal of the prohibitions against the affiliation of banks, securities firms and insurance companies, be made permanent. The transitional provisions have been in place for more than a dozen years, through a series of legislative tax extenders, and the current extender is due to expire on December 31, 2014. Until the GLBA tax provisions are made permanent, however, there continues to remain uncertainty surrounding financial institutions' taxable status, as they exercise the powers granted to them by the GLBA. We note that the original intent of these GLBA tax provisions was to address situations in which many banks found their subsidiaries in substantial competition with broker/dealers or other financials who were subject to tax under a different regime (Article 9A). This situation remains relevant today and the GLBA provisions should remain in effect until the effective date of a new tax law which integrates the taxation under Articles 9A and 32 into one set of rules. Similarly, we would ask that the current investment tax credit (ITC) for equipment of buildings used in broker/dealer activity, also be made permanent. This important ITC, which encourages investment in New York, is now available to qualified banks, general business corporations, and insurance companies who are brokers or dealers in securities is currently due to expire on October 1, 2015.

We would also encourage, where practicable, a reduction in the reliance upon recurring sunset provisions, in lieu of adopting finalized tax law. This would provide much needed certainty to financial institutions, both in their tax planning and to accurately meet ongoing regulatory requirements. For example, tax law certainty for future periods is an important component in measuring GAAP deferred tax assets and liabilities (and, thereby, the institution's regulatory capital.) Also, regulators devise hypothetical economic scenarios to test the capital strength of banks in future periods. These forward-looking "stress test" computations should not be subject to the challenges of determining whether an existing tax law will sunset or likely be renewed.

Modernization of Trust Industry
NYBA would also urge that the Commission seek to address the continuing demise of New York's Trust industry by eliminating the fiduciary tax and urging much needed modernization of many other aspects of New York's trust law. Under current New York law, income retained in a trust and capital gains realized on trusts established by New York resident grantors and administered by New York resident trustees are taxed by the State (and by New York City for city grantors) at the same rates at which individual income and capital gains are taxed. For most trusts, this means taxation at the top marginal rate of 8.82% for the State and 3.876% for the City, with a combined top tax rate of 12.696%.

Non-New York residents who create trusts administered by New York institutions are not required to pay this tax. Ironically, however, New York residents can only escape the tax if they set up their trust in another state with a lower (or no) fiduciary income tax. Thus, affluent New Yorkers – and their advisors – very often take their trust business to states such as Delaware, Florida and Alaska who do not tax trust income at all.

In a 2004 report by Appleseed (attached), a New York City-based economic development consulting firm, commissioned by the Lower Manhattan Development Corporation – which still has great relevance today – it is noted that the difference in fiduciary tax liability between New York and other states, can be extremely substantial. In fact, bankers and attorneys who were interviewed for the report were unanimous in stating that they are obliged to advise their New York clients of the tax advantages to be gained in establishing their trusts out of New York, as trustees have a fiduciary obligation to protect the financial interests of trust beneficiaries. As a result of this tax law, and other arcane, inflexible provisions of New York's trust law, businesses, thousands of jobs and tax revenues continue to leave our State annually.

Credit Unions

NYBA recognizes that the tax-exempt status of credit unions is for the most part outside the purview of the Commission and rests with the Federal government. However, we note that there is one focus of credit unions that is particularly relevant to New York law – that is, their desire to take public deposits, which are, in fact, taxpayer dollars which currently can only be deposited in tax-paying banks. In this regard, we think it is worth commenting, that while in New York State, commercial banks and thrift institutions paid approximately $1 billion last year alone in State income taxes (and hundreds of millions more in other State and local income and sales taxes and the MTA Payroll tax) credit unions paid virtually none. Yet, each year New York's non-tax paying credit unions become more like banks, offering virtually the same products and services, yet doing so at a huge competitive advantage.[1]

We believe an expansion of authority which allows credit unions to take public deposits, would not only be unfair to tax-paying financial institutions, but would also be detrimental to New York's economy. This is so for several reasons. For example, for every dollar removed from a bank and placed in a credit union, a dollar in earning assets must be extinguished. The earnings on bank assets are taxed by the State and City of New York, while no earnings on credit union assets could be taxed. Moreover,

[1] Historically, credit unions were created to be specific membership organizations. They were founded by individuals with a common bond to provide financial services to those with low and moderate income. The federal income tax exemption was intended to assist in that mission. In recent years, however, requirements that members of a credit union "live, work or worship" within the geographic around the credit union are no longer regarded, essentially morphing credit unions into traditional banks. **Indeed, a recent study by the National Community Reinvestment Coalition** (http://www.ncrc.org/media-a-resources-mainmenu-118/press-releases-mainmenu-75/514-are-credit-unions-serving-their-mission) found that banks were now providing more financial services to lower and moderate income individuals than credit unions which were established for that purpose.

deposits withdrawn from local community banks reduce the tax revenues on which New York's local governments depend.

We therefore urge, as part of the Commission's final report, that a recommendation be made that municipal deposit taking for credit unions should not be supported. We would urge, alternatively, that the Commission support the idea that tax-paying thrift institutions – who also now have no authority to accept public deposits – be granted that authority, so that they, like commercial banks, can generate additional tax revenue while providing localities with additional choices and services.

In conclusion we thank you for the opportunity to provide comments to the Tax Commission and would be delighted to discuss these matters further.

Sincerely,

Michael P. Smith

Appendix H

Manufacturing

Corning, NY **October 9, 2013**

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369 - 370	G. Thomas Tranter *President of Corning Enterprises*
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Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Testimony Submitted by:

G. Thomas Tranter

President of Corning Enterprises

G. Thomas Tranter – Corning Enterprises.

Topics:
Environment

- As is the case with the re-enacted **Article X** of the Public Service Law, the state should establish a "fast-track" process for applications that meet certain environmental criteria (e.g., replacement projects, pollution reduction, etc.) that address critical state economic development needs.
- Restore the standing threshold for challenges to actions under the **State Environmental Quality Review Act** to that which was established by the Court of Appeals in Society of Plastics Industry v. County of Suffolk, which required the plaintiff to demonstrate that they would suffer a personal injury-in-fact different from that of the public at large.

LABOR

- Reverse the trend of expanding the definition of "public work" for purpose of prevailing wage mandates, whether thru legislation or administrative/enforcement actions.
- Assure that "prevailing wage" determinations accurately reflect regional private sector wage levels.
- Repeal the annual notice requirement of the Wage Theft Protection Act of 2010, which employers would have to implement in January 2012.

RPT ADMINISTRATION

- A national business taxpayer organization recently ranked NY as 50th among the states for its administration of the real property tax. The state should adopt: statewide assessment standards and practices; consistent reassessments cycles; more reasonable timetable and procedures for appeals. Based on input to date, reforms could include: a move to county level assessments; fixed reassessment cycles; uniform, full market value assessments; appropriate statewide assessment standards; and specialized trial courts for challenges (at the county or state tax tribunal level).

TELECOMMUNICATIONS

- Avoid imposing new state level regulation of internet usage the rates, terms and conditions on services delivered over Internet technologies such as VoIP (Voice over Internet Protocol), in order to promote continued technical advances and expanded services in the state.

UNEMPLOYMENT INSURANCE

WORKERS COMPENSATION

18A

Repeal of Scaffold Law

Consolidation of Services

- Layers of Government
- Multijurisdictional tax bills

Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Testimony Submitted by:

William Wolfram

Board Chair for the New York State Chemical Alliance
Director of Global and Regulatory Affairs for SI Group

SI Group® | THE SUBSTANCE INSIDE

NEW YORK STATE CHEMICAL ALLIANCE

October 9, 2013

Overview

William Wolfram is Director of Product Stewardship and Advocacy for SI Group, Incorporated. He holds a Ph.D. degree in organic chemistry and has 32 years of industrial experience 23 of these with SI Group. I also serve as Board Chairman of the New York State Chemical Alliance, the only industry association dedicated to represent New York State chemical manufacturers.

SI Group, Inc. is a family owed, privately held, global chemical company with 19 manufacturing locations in 10 countries, headquartered in Schenectady, New York. We employ approximately 350 people on New York State, 600 nationally and over 2,000 worldwide. Our company was founded in 1906 and has been in the business of chemistry in New York State for over 106 years. SI Group's operations contribute $45 Million in annual payroll and benefits to the NY State economy. Additionally we contribute more than 110 Million annual economic impact through purchase of goods and services in NYS.

SI Group's Rotterdam Junction NY plant employs 200 people and in 2012 produced 44,000 metric tons (97 million pounds) of high value chemical intermediates for the rubber, coatings and adhesives industries. Approximately 1/4 of these products are exported to other regions of the world.

SI Group is an ACC member and Responsible Care® company with comprehensive environment, health, safety and security management system verified by external 3rd party audit. SI Group is committed to product stewardship efforts to assure that our products are used safely for their intended purpose and that human health and the environment are protected.

State by State Chemical Control

As a regulated entity, the regulatory environment in New York State is extremely important to SI Group. Our existing statutory obligations cost us hundreds of thousands of dollars annually

Regulatory certainty and a level playing field is crucial for the sustainability of chemical industry in New York State and more broadly in the United States. SI Group does business in 32 states of the Union and we could imagine nothing worse than a patch work of disparate chemical regulations which would certainly cause market disruption. In recent years the states have concluded that in the absence of TSCA reform, that the States must take action. Unfortunately these efforts have resulted in a chemical by chemical approach to specific end uses that are not tied to any specific positive environmental or human health outcome.

With all due respect to the Senators, we concur with ACC's conclusion that a chemical control scheme closely based on the Lautenberg-Vitter Chemical Safety Improvement Act (US Senate bill S 1009) would provide the best opportunity for regulatory certainty and assessment of chemical risk based on sound science and a balanced weight of evidence approach to assess chemical risk.

Lautenberg-Vitter TSCA REFORM Main Points

(14) SAFETY ASSESSMENT. —

The term 'safety assessment' means a risk-based assessment of the safety of a chemical substance that

(A) integrates hazard; use; and exposure information about a chemical substance; and

(B) includes

(i) an assessment of exposure under the intended conditions of use; and

(ii) reference parameters that may be appropriate with regard to a specific chemical substance (such as a margin of exposure).

(15) SAFETY DETERMINATION.—

The term 'safety determination' means a determination by the Administrator as to whether a chemical substance meets the safety standard under the intended conditions of use.

(16) SAFETY STANDARD.—

The term 'safety standard' means a standard that ensures that no unreasonable risk of harm to human health or the environment will result from exposure to a chemical substance.

(E) IDENTIFICATION OF HIGH-PRIORITY

SUBSTANCES.—The Administrator—

(i) shall identify as a **high-priority substance** a chemical substance that, relative to other substances, has the potential for high hazard and high exposure;

(F) IDENTIFICATION OF LOW-PRIORITY

SUBSTANCES.—

The Administrator shall identify as a **low-priority** substance a chemical substance that the Administrator on the basis of the available information determines is likely to meet the safety standard under the intended conditions of use.

ACC RESPONSIBLE CARE CODE 2014-2016 implementation

1) Product Safety Standard

2) Process Safety Standard

3) PRODUCT Safety Standard

   a. Phased in implementation of 11 management practices by 2016

   b. Voluntary program subject to 3rd party verification and audit

   c. Enhances existing RC-14001 Management Standard

4) Focus on

   a. Product Safety Assessment

   b. Product Safety Management

   c. Transparency of Information on Chemicals

   d. Supply chain communication

   e. Public outreach

Energy Utilization by Chemical Industry

The NYS chemical industry relies critically on stable economical sources of energy. SI Group's Rotterdam Junction Plant in recent years consumes between 3.5 and 5 Million dollars' worth of natural gas so its continuing supply is essential for our growth.

The advent of Shale Gas being available in the market has had a significant effect not only on the market price of natural gas but also market stability where speculation on natural gas availability had causes spikes in doubled the cost. In the 3rd Quarter of 2012 SI Group saw the lowest natural gas price in a decade

2010 $9.35 /dekatherm
2011 $9.15 /dekatherm
2012 $8.61 /dekatherm
2013 $6.68 /dekatherm

The development of natural gas resources has had other well publicized positive effect on the US economy and the chemical industry in particular spurring new investments in US-based, world scale chemical feedstock facilities that were unheard of just a few years ago. Higher natural gas prices in Europe and Asia give US Chemical companies a significant market advantage under current conditions

The safe development of Shale Gas in New York will be essential to keep this trend going in a positive direction. SI Group feels that moves to provide infrastructure to allow the mass exports of liquefied natural gas to foreign countries will strongly influence domestic natural gas prices which may in some respect have a negative outcome for the chemical uses of natural gas in the US.

New York State Chemical Alliance and SI Group strongly support the safe development of natural gas resources in NY State.

New York State Regulation

In discussing the impact of regulatory environment in NY State both within my own company and within the NYS Chemical Alliance the issue of the slow pace of permit approval came up repeatedly.

The issue is not restricted to one particular media (such as air, water or solid waste) and seems to be general

I have an example from a chemical company in upstate NY whose Title V air permit was originally granted in 2001.

- The company filed for a renewal of their air permit ahead of the 5-year renewal deadline in 2006
- Original Permit Advisor retired in 2010
- Submitted 2006 renewal application held by DEC for 5 years without significant action
- New Permit Advisor threw out the 2006 renewal application in 2011 forcing the company to resubmit a new application in April 2012

- DEC has still not acted on the 2012 permit renewal after 1 ½ years. Draft version not accepted and not offered for public comment

After 12 years the company's 2001 Title V air permit remains the legally binding document until a new permit is issued. The permit application is still open and could potentially be modified, causing considerable uncertainty for the facility

Environmental Self Audit Policy

DEC announced a newly revised Environmental Self Audit Policy over 1-year ago. We understand and applaud that DEC intends to post its finalized policy and post it for public comment in the near future. The fact remains however that several key provisions of the policy will limits its usefulness to chemical industry in NY

General Comments on the DEC Environmental Self Audit Policy December 2012 Draft.
Overall comment – good policy, and not an inherent concern that it seeks to go well beyond the objectives of the EPA Audit Policy. However, some incentives may be out of reach of smaller facilities that would simply like to self-disclose and work to assure compliance on a small scale, and which do not have resources (staff and $) to implement and administer a pollution prevention or EMS program. For example, under the EPA Audit Policy, a company that meets the criteria and discloses a single violation can have all penalties waived, and EPA often gives a complete penalty waiver. Here, the policy gives maximum benefit only to entities engaged in more ambitious programs.

It seems overly cumbersome for the small facility, and it could be clarified by telling facilities what to do and what they will get if they self-disclose an eligible violation, and nothing more. Then, the rest of it tells facilities that want more incentives – identification on the website, ESD incentives, etc. – what they need to do. It is in contrast to the EPA Audit Policy which simply says, if you meet 9 conditions, gravity penalties are waived, and if you meet 8 of 9, 75% of gravity is waived. Here, there are no percentages tied to penalty reductions, so the intent is not clear.

Another issue – what is the relationship between DEC and EPA with respect to a violation of a delegated federal program? Is there a reciprocal agreement with Region 2 that states the agencies will each defer to each other's resolution of disclosed violations? (See Question 8 of EPA's 4/30/07 Audit Policy Q&A guidance).

V. Eligibility Criteria and Procedure:
A. Regulated Entities;
1.The entity received a warning letter, notice of violation, or field citation; or was subject to a penalty demand for alleged violation of the same or similar requirement for which the penalty waiver is being sought

There is no requirement stated here that the warning letter, NOV etc. was valid. It could have been contested or withdrawn or simply without basis, but as drafted, mere receipt renders the entity ineligible.

B. Eligible Violations
1,b. a violation (i) discovered through Department inspection activities, including information requests and review of records related to inspection activities; (ii) resulting in issuance of an Environmental Conservation Appearance Ticket or other field citation; (iii) reported to a Federal, State or local agency by a member of the public or a "whistleblower" employee; or (iv) required to be self-reported pursuant to Federal or State statute, regulation, permit or order

This term is used a couple of times, and not clear what it means. It is similar to the exclusion under the EPA Audit Policy for "monitoring, sampling or auditing" procedures, but it appears to have broader applicability here because it is not conditioned on those criteria. Does a requirement to self-report encompass, for example, a requirement to submit a DMR under a SPDES permit or an emission limit exceedance under a Title V permit condition? If so, a large number of violations that facilities would want to report and correct would be excluded. Sometimes a facility hires a new consultant or EHS manager and the fresh pair of eyes detects, in good faith, that a reporting requirement was missed. These sorts of activities should be encouraged.

1,d. a violation categorized as Significant Non-Compliance (SNC) by the Federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) program or the Resource Conservation and Recovery Act (RCRA) hazardous waste compliance monitoring and enforcement program; or a violation categorized as a High Priority Violation (HPV) under the Clean Air

This could be too restrictive and NYSDEC should retain discretion to consider eligibility in certain situations. The fact that certain violations have been characterized in a particular manner does not affect the way in which a potential violation is discovered. Indeed, such violations could have a greater benefit if they are discovered and voluntarily disclosed.

E. Correcting the Violation(s) – A regulated entity must correct all violations expeditiously, consistent with any time frame prescribed by law and as may be directed by the Department in writing. Correction of the violation(s) must occur within 60 days after disclosure to the Department, unless an alternate time frame is established as part of a facility audit agreement

So, this forces an audit agreement if more than 60 days is needed to implement corrective action? Some violations will simply need more time, such as those involving capital expenditures or construction

F. Penalty Waiver - Monetary penalties levied against regulated entities for violations of state environmental laws regularly include an amount representing the gravity of the violation and an amount equal to the economic benefit of delayed compliance. Pursuant to this Policy, the Department will waive the gravity component of the penalty against regulated entities that are eligible for penalty mitigation and self-disclose. For entities engaged in environmental audits and environmental management systems during the ordinary course of business.

This is unclear. Some facilities, particularly those with sophisticated EHS departments, regularly engage in environmental audits or EMS activities. Even then, the frequency may be every 2 or 3 years. However, many facilities (perhaps even most) conduct audits infrequently, and as drafted, it appears that such facilities would be ineligible for the additional penalty mitigation. Also, it is not clear whether waiver of a de minimis EB component is only for facilities that conduct audits/EMS activities in the ordinary course of business. Waiver of de minimis EB amounts would seem to provide an additional compliance incentive in all cases.

G. Manner of Disclosure A self-audit agreement is not required for disclosure and may not be warranted in certain circumstances. For instance, a self-audit agreement may not be warranted where the scope of disclosure is limited or where a regulated entity does not require a determination of eligibility prior to disclosure

Understand who may not need an agreement, but a facility seeking an audit agreement would probably not conduct the audit until having the agreement in place. Since it cannot be known what violations may be discovered until the audit is conducted, it will not be known whether the violations would be eligible for penalty mitigation. So, why would a facility be seeking a determination of eligibility before conducting the audit? Intent is unclear.

H. Ensuring Future Compliance – Regulated entities that receive penalty mitigation under this Policy must identify measures to ensure future compliance with the violated regulatory provision(s) and guarantee

Regulated entities seek in good faith to ensure compliance, but it is impractical and unreasonable to require a "guarantee" of compliance. Practically, such a high standard is not feasible and it does not allow any leeway for unexpected noncompliance, despite best efforts. The EPA Audit Policy requires agreement to take steps to prevent recurrence, but does not contain a guarantee. A more reasonable threshold would be appropriate. Other issues relating to the "guarantee" – 1. How long would the "guarantee" be in effect? 2. For an entity that does not enter into an audit agreement (i.e., contract), what is the enforceability of a "guara ntee"? This is only a policy document.

J. **New Owners** – Regulated entities
acquired by a new owner must satisfy the eligibility criteria specified herein, except that disclosure of violations discovered prior to acquisition must be disclosed within 60 calendar days after acquisition; and disclosure of violations discovered after the acquisition must be disclosed within 30 calendar days after the business knew or should have known of the violation or within 60 calendar days after acquisition, whichever is later. If, during due diligence activities prior to acquisition of the regulated entity, a new owner

This appears to mean a prospective owner.

J. New Owners – A new owner must certify that 1) prior to acquisition, the new owner was not responsible for environmental compliance at the facility which is the subject of the disclosure, did not cause the violations being disclosed and could not have prevented their occurrence; 2) the violation which is the subject of the disclosure originated with the prior owner

What is the impact of this? If a new owner self-discloses, corrects and receives penalty mitigation, will the matter be considered closed as to the prior owner as well, or will NYSDEC take enforcement against the prior owner? The answer to the question could affect negotiations between the parties. These certification requirements seem unnecessary to the objective of self-disclosure and returning a facility to compliance.

6NY CRR 212 Proposed Modifications;

SI Group is still studying DEC's modifications and is an active participant in stakeholder meetings

Cost implications for reduction in control requirement from 1 pound per hour to 0.1 pound per hour for "A" Rated Toxic Contaminants still under study.

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Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Testimony Submitted by:

Margaret Gorman

Manager of State Affairs Northeast Region, American Chemistry Council

American®
Chemistry
Council

October 9, 2013

Overview

The American Chemistry Council (ACC), a national trade association representing chemicals and plastics manufacturers in the United States, including member companies in the state of New York. We have over 80 plant sites in New York A large concentration of our facilities are in Western New York, Hudson Valley, Capitol Region and Long Island. In addition, over 500 customer sites are throughout New York State.

Over 96% of all manufactured goods are directly touched by the business of chemistry, making this industry an essential part of every facet of our nation's economy. Chemistry provides significant economic benefits in every state including New York. Thanks to chemistry, our lives are healthier, safer more sustainable and productive than before.

For every job created by the Chemistry industry in New York, on average an additional 2 jobs are created in chemistry dependent Industries including Mining and Utilities, Construction, Nondurable and Durable Manufacturing and Health Care.

The chemical industry directly employs over 40,275 people in New York State and indirectly supports another 88,165 jobs. The average wage of a chemistry industry employee in New York is approximately $74,000 and the industry directly generates $355.5 million in state and local taxes and another $726.8 million in federal taxes supporting then needs of New York and its residents.

Chemistry creates fertilizers that enable an abundant food supply and plastic packaging that helps to preserve healthy food shipped from New York farms and factories to homes across the country. Chemistry creates solutions that help local food producers purify water and sanitize meat and poultry to reduce foodborne illness. Many lithium-ion and lithium polymer batteries, many made in New York, employ chemistry to create rechargeable batteries for consumer and military applications, including laptops, cameras, mobile phones, communication devices and global positioning systems.

Chemistry is essential to our everyday lives and the economy. The business of chemistry transforms the natural raw materials of the earth, sea and air into products that we use every day. The business of chemistry drives innovation and creates jobs and economic growth by creating products that bring major societal benefits to quality of life, health, productivity, convenience and safety.

The chemical industry represents 9% of total NY manufacturing employment in New York and 24% of overall manufacturing shipments. Innovative and dynamic industries are creating jobs and helping with our economic growth in New York.

Today, New York is now ranked as the 7th largest chemistry producer in the United States. It is now outranked by North Carolina that has surpassed New York and is now ranked the 3rd largest chemistry producer in the U.S. Comparing 2006 to 2011 (latest available), shipments in New York declined 27% from $41.5 billion to $30.3 billion. In North Carolina, shipments rose 43% from $39.5 billion to $56.4 billion.

Preventing a State-level Chemical Regulatory Program in New York State

S.4614 (Boyle)/A.6328 (Sweeney) would essentially create a State-level chemicals regulatory program with the ultimate intent of allowing the State, through a "chemical prioritization" process, to target specific chemicals for bans in consumer products. ACC opposes this legislation for the primary reason that it is predicated on the assumption that there is inadequate protection for consumers and children in today's marketplace. The justification used by environmental groups pushing for chemicals regulation at the state level is that the current federal regulatory system for chemicals is "broken" and therefore States have to step in. We strongly disagree.

This Legislation is Already Being Addressed by the U.S. Environmental Protection Agency and does not need to be addressed by the Department of Environmental Conservation.

S.4614 (Boyle)/A.6328 does not acknowledge the broad "safety net" of existing federal consumer protection and chemical regulation laws. Over 14 different federal statutes play a role in regulating chemical use in consumer products. The issues in this legislation are being addressed by EPA today: reporting information about chemicals; prioritization of chemicals; assessment of chemicals; and, regulation of chemicals. In fact, the enacted EPA FY 2012 budget for Safety of Chemicals and Preventing Pollution (Goal 4) was $659 million.

The Chemical Data Reporting Rule: In February of this year, EPA released information it had collected from chemical manufacturers last year about their USES of chemicals – industrial uses, commercial uses, consumer product uses. This was an update of a regular reporting requirement EPA has imposed on industry for many years. In the 2012 report, EPA required more information about more chemicals than ever before. And, EPA split out "commercial uses" from "consumer uses" of chemicals for a more refined look at uses of chemicals. EPA even required manufacturers to report what they knew about uses of chemicals in children's products. EPA provides a list of chemicals that chemical manufacturers reported as used in children's products at www.epa.gov/opt/cdr/index.html.

Prioritization: In February 2012, EPA identified 83 "Work Plan" chemicals for review and assessment and regulation where warranted. To identify these priority chemicals for further review, EPA didn't just look at the cross-section of a variety of chemical lists. Instead, EPA developed a broad list of about 400 chemicals based on hazard, use and exposure screening level criteria (e.g. criteria like PBTs, probable/known carcinogens, used in children's products, repro/developmental children's health concerns, detected in bio monitoring, etc.) and then applied hazard and exposure based SCORES to these, based on very specific criteria

New York does not have the financial resources or technical expertise to undertake a wide-ranging authoritative chemical review and regulatory process.

The piecemeal review of a few chemicals a year will do nothing to enhance safety of New York residents, nor will it provide any certainty to New York many chemistry businesses that will never be certain when their products will come under State regulatory scrutiny. Additionally, there is no baseline for what scientific information would be found acceptable on which to make decisions. This required review by state agencies will require technical expertise and significant staff time that will put a crushing burden on the State's fiscal resources.

The State should allow Congress to continue its reform of the Toxic Substances Control Act (TSCA) and allow the United States Environmental Protection Agency to complete its designated chemical action plans. These federal reforms would provide a sound national statutory and regulatory system that all businesses and manufacturers, including those in New York, can follow.

Natural Gas and Chemistry: Fueling a Manufacturing Renaissance and Driving our Economy

Access to vast new supplies of American natural gas from shale deposits is one of the most exciting domestic energy developments in decades, particularly for the business of chemistry—energy policies must enable access to this immense supply of natural gas while protecting the environment.

A recent report says plentiful, affordable supplies of natural gas will provide America's chemical industry with a "profound and sustained" competitive advantage—part of a manufacturing expansion that generates new jobs.

American chemistry relies on abundant, affordable natural gas as a source of energy and as a raw material, or "feedstock," for countless chemical products. The relatively low price of natural gas gives U.S. manufacturers an advantage over competitors in other parts of the world that rely on a more expensive oil-based feedstock.

Growth in domestic natural gas production reduces prices and creates a more stable supply. It is estimated that U.S. shale deposits contain 100 years of natural gas supply. This shale gas is a "game changer" that is rejuvenating America's chemistry industry – and can strengthen U.S. manufacturing, boost exports, create hundreds of thousands of new jobs, and improve our nation's energy security.

Proper government oversight and product stewardship is needed to protect the surrounding environment.

The business of chemistry is at the heart of manufacturing—access to shale gas is dramatically boosting America's competitiveness and can help meet our nation's goals for increased exports and new jobs. A comprehensive energy strategy must increase the production of domestic energy supplies while implementing balanced regulatory policies that protect our environment.

To maximize the national benefits of shale gas, energy policy must avoid undue restrictions on natural gas supplies from shale deposits.

State oversight of hydraulic fracturing is appropriate since state governments have the knowledge to oversee the process in their jurisdictions.

Thank you for the opportunity to discuss these issues of concern with you.

Margaret Gorman
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Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Testimony Submitted by:

Mark Johnson

Vice President of the pepsi Cola and Canada Dry Bottling Companies of New York (PCBCNY) Member of the New York State Bottlers Association

Testimony of Mark Johnson
Vice President of Finance for the
Pepsi-Cola and Canada Dry Bottling Companies of NY

October 9, 2013

New York State Senate Hearing on Manufacturing

Good Afternoon Senators Gallivan, Valesky, Marchione and Carlucci. My name is Mark Johnson and I am the Vice President of Finance for both Pepsi Cola and Canada Dry Bottling Companies of New York. We manufacture and distribute mostly PepsiCo and Dr Pepper Snapple Group products, including soft drink brands such as Pepsi, Canada Dry and Schweppes. We also distribute non-carbonated beverages like Gatorade sports drink, Evian and Aquafina water, to the five boroughs in New York City, Westchester, Suffolk and Nassau Counties. PCBCNY operates two bottling plants and half a dozen distribution warehouses in the NY market. We are part of a group bottlers owned by the Honickman family, one of the largest privately held bottlers in the US. Since we cover densely populated areas with many individual retailers, we sell our beverages primarily via independent distributors who have long-term relationships with their customers. We also utilize company employees to distribute our Canada Dry portfolio of brands.

Our workforce consists of over 1,500 people. As a company, we have a historic track record of investing in our manufacturing and distribution business, the New York economy and the communities in which we operate. Manufacturing businesses like ours need your assistance in addressing out of control regulatory challenges in this state so that we may continue to survive and thrive in New York.

While you will hear from and have heard from many of our corporate colleagues today regarding a vast array of hurdles New York companies face, I'm here today to provide testimony on the single largest regulatory impediment to our businesses, which is New York State's Workers' Compensation System Regulations. In particular, Scheduled Loss of Use (SLU) awards, but I'll get back to that after I provide you with some important background information.

As you are well aware, the Workers' Compensation program was developed to provide financial support to employees who are injured while working or who are prevented from working because of work-related illnesses or diseases, while relinquishing the employer of any tort of negligence. The Workers' Compensation system was designed to provide some replacement income and cover an employee's medical expenses, but was certainly never intended to give employees rich windfalls.

Let me be very clear. Our companies take very seriously injuries that are a result of employment with us and we acknowledge and embrace our responsibility to recompense every injured employee, even though it is often virtually impossible to differentiate non-work related injuries from work related injuries. This is an inherent system design weakness and essentially "tilts the scale" in favor of the employee. For example, an employee could have injured their knee, arm, hand, back or foot participating in a personal sporting activity completely unrelated to their job. Nevertheless, we pay the bill.

We had hoped that the reforms of 2007 were going to bring us some relief from the huge burden of Comp costs which plague New York manufacturers. Instead, we were met with very unwelcome results. Our Comp costs skyrocketed. As a reference point, here is our company's scorecard before and after the Workers' Compensation 2007 Reform Act.

In 2003, we had 379 reported claims versus 201 in 2012, a reduction of 47%. We essentially cut the number of incidents in half. Our costs in 2003 were $5.4 million, or an average of $14,000 per claim. In 2012, our costs are $10.8 million, or $54,000 per claim.

To sum, accidents cut in half, costs doubled.

How does a company compete with those kinds of costs that other employers in other states simply don't have. This phenomenon alone is enough to deter any business from locating to New York State.

The economic model of New York States' Workers' Compensation system can be broken down into three categories: 1) indemnification of lost wages, 2) reimbursement of medical and other related expenses and 3) loss of use awards.

Let's discuss indemnification of wages. Currently, workers are entitled to 2/3 of their weekly wage capped at the NY State average weekly wage. Today, the weekly rate is $803 not taxable, or the equivalent of a $1,071 taxable wage. That's an annual rate of over $55,000 per year. Our average annual wage for our hourly employees is around $55,000.

Therein lies a very significant systemic problem.

Assuming an injured employee earns $1,000 per week and while not working under the Comp system is entitled to $667 per week, two-thirds of their average weekly wage, that $667, adjusted for taxes is really equivalent to $889, or 89% of their regular earnings. That's a compelling incentive to stay out of work.

Prior to the Workers Compensation 2007 Reform Act, the maximum cap was $400 per week. That all changed with the 2007 reform act. The regulations were changed to be indexed to two thirds of New York State average weekly wage, which today is $803. So today on the same employee, instead of paying $400, we are now paying $667, **a 67% increase.**

Our recommendation regarding the weekly rates would be to either roll them back to 2007 pre-Reform Act rate of $400, or extract "Wall Street" wages from the average weekly rate calculation, but something must be done to address the excessive rates. It puts NY companies at a severe disadvantage to other states as well creating an unintended incentive to stay out of work.

Let's transition to medical costs. I'm sure you are all aware of the compounded increases in medical costs over the last several years. We recognize our collective inability to impact medical industry cost curves, however, you do have the authority to make legislation that would require the most current and most evidence based medical treatment guidelines as opposed to relying on either "New York specific" or outdated practices. We need to address and eliminate the wide discrepancies of findings between doctors.

Lastly, but certainly the most important of all three categories, the exponential growth of loss of use awards (SLU's). Here's how SLU's work; assume our employee I mentioned earlier had injured her arm and was out of work for 12 weeks and had surgery that costs $25,000. At this point, the company has incurred a cost for lost wages $8,000 (12 weeks x $667) and $25,000 medical costs for a total of $33,000.

Post surgery and rehabilitation, the employee visits her doctor and the doctor makes a determination that the employee has a loss of use of 80%. The company's independent medical doctor examines the employee and makes a determination that there is zero loss of use. Lawyers for both sides negotiate and settle on 40%. Here's where the proverbial "wheels come off."

At this point, you simply look at the SLU chart, which has % across the top in columns and type of injury on the left hand side in rows and it shows 124 weeks for a 40% arm, so the math is 124 weeks times 2/3 of the employee's weekly wage ($667) assuming the wage is below the cap. The SLU determination totals $82,700. The company must now pay an additional SLU award of $74,700.

We offer two different recommendations. Eliminate the SLU concept for any no-lost time or little-lost time injuries, leaving exceptions in the severe instances of a lost limb or injuries that were the original reason for such awards, or again, roll back the weekly indemnification rates to pre-2007 reform levels. Regardless of the chosen path of SLU reform it must be acknowledged that award payouts and frequencies have severely grown since the doubling of the weekly benefit. For effective economic development to occur, these windfall award amounts must be brought back down.

Finally, as you may be aware, Workers' Compensation fraud is a serious problem in New York. New York ranks second in the nation for questionable workers' compensation insurance claims according to the National Insurance Crime Bureau (NICB). The analysis noted that questionable claims in New York more than doubled between 2011 and 2012 with 344 reported in 2012 and 161 in 2011. Going after fraud is the correct approach and we recognize the difficulty in proving fraud. Believe me; we have many cameras and private investigators but virtually no convictions. Fraud enforcement requires significant resources and realistically, we don't expect New York State to have the necessary manpower to fully eliminate fraud, but this does not excuse the Workers' Compensation Board, the Attorney General or local District Attorneys from doing their job to root out and prosecute this fraud which dramatically hampers the economic vitality of this state. We would hope to see more "teeth" in fraud abuse cases.

In summary, we have shared our company's internal information with the Workers' Compensation Board to demonstrate the devastating impact attributable to the rate increases from the 2007 Reform Act. The Workers' Compensation system in New York has been transformed into an entitled bonus award system leaving companies defenseless even in the face of non-work related injuries. The reduction of SLU awards and/or rates are the only alternatives to the current system that would promise significant cost impact. Hopefully I have provided you with some insight to a critical cost that is driven by both regulation and legislation that places New York businesses at a severe competitive disadvantage.

I would welcome the opportunity to answer any questions you may have regarding these important issues.

Thank You,

Respectfully Submitted,

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Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Testimony Submitted by:

Randy Wolken

President of the Manufacturing Association of Central New York (MACNY)

MANUFACTURERS ALLIANCE of New York

MACNY 100 YEARS

The Manufacturers Association

Testimony To:

New York State Senate Hearing

Regulatory Reform to Bolster Economic Development for Manufacturers

Presented By:

Randy Wolken

President, MACNY The Manufacturers Association of Central New York

President, The Manufacturers Alliance of New York State

October 9, 2013

To start, I would like to thank you for the opportunity to speak today, and also for recognizing the immediate need to address regulatory costs and improve the economic climate for manufacturers and businesses statewide. My name is Randy Wolken, and I am here today representing The Manufacturers Alliance of New York State.

As you may know, The Manufacturers Alliance of New York State (The Alliance) is the State's premier and largest manufacturing group, representing small and large manufacturers in every industrial sector throughout New York State. The Alliance proudly serves as the leading advocate for a pro-business policy agenda that helps manufacturers compete in the global economy and allows policy makers to create a better business climate for New York State.

It is well known that a strong manufacturing base is critical to any successful economy. During New York State's difficult financial times, a solid manufacturing base is needed more than ever, to be able to do what our sector does best: retain and create family supporting and high paying jobs, maintain a significant amount of economic and tax revenues, and provide communities with the jobs and economic sustainability that is so necessary.

As you are well aware, the ongoing efforts to revitalize the New York State economy prove incredibly challenging. It is a well-known fact that in order to create economic growth, a vibrant and friendly business climate must be established and fostered, so that business can operate efficiently and successfully. Such is not the case in New York State. The State's manufacturing sector experiences this firsthand. Regulatory burdens have become so exhaustive on the manufacturing sector, and businesses in general, that it has significantly hindered the sector's ability to do what it needs to: generate economic development and sustain and grow jobs in our communities.

As part of this testimony, I am pleased to announce that based on the requests from Albany for regulatory burdens and feedback, we conducted a study with the Manufacturers Alliance members which represent over 2,500 companies and organizations throughout New York State. In this survey, we asked what specific regulatory burdens are they experiencing, and what departments they have the most difficulty in working with. This survey is currently being compiled into a report, and will be released in the near future. I can assure you copies of this survey will be sent to each of you for your consideration, and I hope you find the responses directly from the statewide manufacturing community helpful. For your reference, a copy of the questionnaire used in the study is included with my testimony.

While there are hundreds of various regulatory burdens that hinder the manufacturing sector, at your request we have outlined a few key areas that our members have specified are of immediate needs for reform.

Economic Regulation

Economic regulation on businesses included areas such as prices or wages, allocation of public resources (i.e.: usage of tax dollars), etc. One significant area in need of reform here is through the Department of Labor, and their Unemployment Insurance regulations. Historically, manufacturers have taken a significant hit from the UI fiscal irresponsibility and lack of oversight. Most recently, resulting from over borrowing in 2011, New York owed the federal government $3.3 Billion for borrowed funds so it could afford to pay for unemployment benefits. In 2011 alone, $115 Million was owed by New York in interest costs. Over 500,000 New York State employers were blindsided by the aforementioned fees, with no reason other than the State could not afford to pay it back. These added fees, whether permanent or not, significantly impact a manufacturers' ability to operate a business here in New York. Simply put, the solution is not to put the cost burden of UI state borrowing on the backs of the manufacturers and employers of New York State. The fund must be returned to solvency, and must be done without increasing costs on employers. The State and Federal governments need to fix the structural problem and relieve the burden that is placed on businesses once and for all. I implore you and The Administration to take the lead on this effort.

Social Regulation

Social regulation also comes at a cost for manufacturers, in areas such as environmental protection, consumer safety, employment discrimination and public health. A significant example of DEC regulatory reform comes with improving SEQRA and permitting programs to give business a more certain, workable timetable for the environmental review of major investment projects, including a more appropriate standard for adjudicating issues in DEC permit hearings; assuring that regulatory timetables for project reviews are adhered to; creating an expedited process for applications that meet certain criteria (e.g., replacement projects, pollution reduction, etc); and integrating coastal zone reviews with other state environmental review requirements. Additionally, amending DEC's new source review regulation to eliminate unnecessary restrictions on capital investments and operational changes that are intended to improve efficiency and competitiveness and/or reduce emissions and energy use would also prove beneficial to the state's manufacturing sector.

Compliance Regulation

Compliance regulation significantly hinders manufacturer's abilities to function effectively. Paperwork and document compliance are two such examples.

The Wage Theft Protection Act that was passed in 2009 is a prime example of such burdensome regulatory compliance, and unnecessary for a large percentage of the business and manufacturing community. One area where our members routinely identify as a target for reform has been the Wage Theft Act. The NYS Legislature recently passed an amendment to section 193 of the labor law which governs deductions from wages, which were then signed into Law. Specifically, employers were given the right in writing to deduct for the correct/repayment of an overpayment of wages. Also, they are now able to deduct for a loan repayment when they allow their employees to borrow against future wages. The issue is that these new rules require that "the employer shall comply with regulations by the commissioner for this purpose, which regulations shall include, but not be limited to, provisions governing: the size of overpayments that may be covered by this section; the timing, frequency, duration and method of such recovery; limitations on the periodic amount of such recovery; a requirement that notice be provided to the employee prior to the commencement of such recovery; a requirement that the employer implement a procedure for disputing the amount of such overpayment or seeking to delay commencement of such recovery; the terms and content of such a procedure and a requirement that notice of the procedure for disputing the overpayment or seeking to delay commencement of such recovery be provided to the employee prior to the commencement of such recovery." However, to date, the commissioner has not issued any regulations for employers to follow to insure compliance. As a result, employers are going to be held to a standard retroactively once it is written.

What is most interesting with my comments on the Wage Theft regulations and lack thereof is that one may be led to believe that I am ASKING for regulation to take place. That is not my message here. What I am pointing out, is a clear case of the Government making a regulation and then not taking the necessary action to implement it. What does this say about the regulation and its necessity in the first place? I think this provides a clear and concise example of a regulatory burden that is not even necessary. I ask you to consider this in the upcoming session when regulations are introduced.

As you know, MACNY and the Manufacturers Alliance has a long history of working with our partner business organizations and your conference in finding ways to help

Sincerely, Karyn Burns

(kburns@macny.org, 315.474.42101 X13)

SURVEY

As a business owner, do you believe current regulations are hurting your operating environment?

Yes
No

As a business owner, would you say New York State regulations are preventing you from future job or capital investment in New York State?

Yes
No

Please list your top three departments you have regulatory concern with

Department of Agriculture and Markets
Department of State
Department of Environmental Conservation
Department of Health
Department of Labor
Department of Taxation and Finance
Insurance Department
Banking Department
Department of Transportation
Office of General Services
Other

Please list three regulations you would like to see reform on.

Anything else you wish to add?

Sincerely, Karyn Burns

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Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Testimony Submitted by:

George Miner

President of Southern Tier Economic Growth

STEG | SOUTHERN TIER ECONOMIC GROWTH

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Testimony to the
Senate Majority Coalition
Concerning the Taxation, Regulations and Mandates
That Stifle Manufacturing And Job Growth in New York

By
George E. Miner, President
Southern Tier Economic Growth, Inc.
October 9, 2013

My name is George Miner. I serve as the President of Southern Tier Economic Growth, whose mission is to promote prosperity and job creation in the Elmira/Chemung County Region. Elmira has a rich manufacturing tradition. For over 100 years, our labor force manufactured fire trucks, helicopters, planes, trains, machine tools, water valves, fire hydrants, , glass bottles, food products, televisions, automobile parts, cardboard containers, and numerous parts of products assembled in other parts of the country and world. Over 95% of all products manufactured in the Elmira area, are purchased outside of New York, generating wealth that has sustained generations of New Yorkers.

I have lived in New York State all 56 years of my life, and the last 38 in Upstate New York. For the past 30 years working in the economic development profession, I have witnessed New York State earn its reputation as the most expensive place to do business in the United States. I suppose Hawaii and California pass us sometimes on some list...maybe Connecticut occasionally, but we always rank in the top few of the worst categories and bottom few of the best categories that measure which states are most business friendly. I have watched hundreds of businesses, workers, and their families make an exodus from Upstate New York.

In 2013, New York ranked 50th in Tax Climate

1st in combined State and local tax burden

And, as the 49th worst state for business Climate according to Chief Executive Magazine.

Over the past five years, I have watched thousands of workers from outside of New York come to New York to work in the natural gas industry only to be treated with the utmost discourtesy and scorn that I have ever witnessed. At the same time, I have watched as thousands of New Yorkers move from Upstate New York and in particular the Southern Tier to Pennsylvania, Ohio and West Virginia to secure high paying jobs supported by the natural gas industry. The Southern Tier of New York has missed out on thousands of much needed jobs. Our municipalities have been prevented from earning millions in revenues. These opportunity costs are tremendous and will never be realized.

Today, 100% of all property taxes collected by Chemung County go to pay for New York State mandated social service programs, such as welfare, Medicaid, probation, childhood intervention, etc. These funds are not available to pay for much needed infrastructure. Our roads are crumbling, our pipes are bursting.

Besides taxes, energy rates are among the highest in the nation. Yet the cost of utilities for users to purchase electric and natural gas is the same as in other states, whether the utility is in Pennsylvania, Virginia, New York or Ohio. The difference is the layers of taxes which utilities have become good at displaying on our utility bills. New York's commercial rates are 60% higher than the national average. We need to remove the Systems Benefit charge, the 18A Surcharge, and the regional Greenhouse Gas initiative charge.

New York businesses pay the state over $4 billion in taxes to have the state regulate the insurance industry, healthcare providers, and employers. Health insurance costs drive manufacturers out of New York State but mostly discourage new businesses from coming here. Site location consultants point to taxes such as the Covered Lives Assessment, HCRA Surcharge, Section 332 Assessment and the Premium Tax as taxes that place New York manufacturers at a competitive disadvantage.

Thirteen percent of Chemung County workers manufacture a product. Many of these workers manufacture compressors, valves and relayed equipment and tools used in the energy industry. Manufacturers are denied the ability to manufacture products that convert natural gas into Liquid Natural Gas, an environmentally friendly and low energy source. This is because New York State is the only state that is prohibiting the transportation of Liquid Natural Gas intrastate. You cannot manufacture machinery and equipment if you cannot test it. Why manufacturer a product in the only state that outlaws its use? Manufacturers, businesses, and residents are prevented from benefiting from this low cost fuel source.

New York's labor laws are often repressive to employers. The State's Wage Theft Prevention Act needs to be repealed. Mandated Paid Family leave bills drive up the cost of doing business in a state that is already the most expensive to do business in. These laws are particularly burdensome for small businesses.

In 1885, States enacted a "Scaffold Law" to protect construction workers. For the past 128 years, construction companies have paid high insurance costs that have driven up the costs of building commercial and residential facilities. Today, New York is the only state which retains this antiquated law, which drives up the cost of roads, bridges or simply the facilities and infrastructure don't' get built. This is one area of regulatory reform that can be addressed while not infringing on worker safety, and will result in lowering the cost of doing business, encourage investment in infrastructure and create jobs.

The Wicks Law, that requires layers of public bidding and multiple contracts in each skill trade for public works projects leads to increased expensive inefficiency, and higher construction costs. It works just the opposite of practices industry uses to drive down costs such as Lien Manufacturing.

As I stated at the beginning, the negative anti-business environment in New York is not new, it was inherited by legislature and this administration.. The loss of manufacturing jobs is not just a New York problem, it is a national problem, but one where economists, policy analysts and unfortunately business location consultants all point to New York as the best example of the worst place to do business.

We are not just losing jobs, we are losing people. The majority of Upstate counties lost population according to the 2010 census. Neighboring Broome County had the largest population loss of any county in the state.

The Governor acknowledges that the upstate economy is in a crisis. We need real solutions, or we risk losing many Upstate communities and citizens for generations to come.

I want to thank you for allowing me to speak on the record today and close by saying that while I don't hold much optimism for much productive change in New York's business climate based on my years of firsthand experience, I do commend all of you for acknowledging that there is a severe problem and for seeking ways to reverse New York's decline.

Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Testimony Submitted by:

John Giavenco

Traffic Manager for Nucor Vulcraft

NUCOR

TESTIMONY OF JOHN GIOVENCO
Before the Senate Majority Coalition
Manufacturing Regulatory Reform Forum
October 9, 2013
Corning Community College, Corning, NY

Distinguished Members of the Senate Majority Coalition, good morning, my name is John Giovenco and I am the Traffic Manager for Nucor's Vulcraft steel fabrication facility located in Chemung, NY. On behalf of Vulcraft Chemung and its parent company Nucor Steel, thank you for this opportunity to speak with you today.

We are proud to say the Nucor/Vulcraft family is part of the fabric of New York State. Nucor owns and operates a raw steel manufacturing facility in Auburn, NY, casting over 500,000 tons of rebar and other steel products used in all kinds of infrastructure and industrial applications.

In 2001, Nucor built its Vulcraft Chemung facility, where we build steel joist and deck. Nearly half of all the raw steel we use in Chemung is manufactured in Auburn. Also, in 2008 Nucor purchased and now operates its Harris Steel rebar fabrication and installation facility in Albany.

All told, Nucor is a huge economic driver Upstate, employing nearly 600 teammates whose average annual earnings are $70, 000, not including management. In addition, 85% of the one billion pounds of scrap we purchase annually to make our steel comes from dozens of New York-based scrap businesses.

We are also proud to say Nucor is serving as the largest supplier of steel beams for the Freedom Tower and 9-11 Memorial projects in New York City and we supplied the vast majority of steel used in the CitiField and Yankee Stadium projects.

We appreciate the opportunity to participate in this hearing. You have asked we make specific recommendations on how to enhance New York's regulatory structure to make the Empire State a better place for manufacturers to do business. We urge the Majority Coalition to strongly consider the following:

Consider "Buy American" Protections to Create and Protect American Jobs: Nucor was extremely disappointed to learn about the Metropolitan Transit Authority and Port Authority's recent decisions to award multimillion dollar infrastructure contracts to the Chinese to supply steel for the Verrazano Bridge and Bayonne Bridge redecking contracts. Sending major infrastructure projects overseas flies in the face of local job creation and restoring New York's economy. We urge the Coalition to explore ways to protect jobs and keep New York taxpayer investment at home by incorporating "Buy American" provisions into New York State law.

Repeal the Wage Theft Protection Act's Notification Requirement: Add Nucor, Vulcraft and Harris Steel to the list of dozens of businesses large and small calling for the repeal of this onerous, redundant and unnecessary requirement by passing Senator DeFrancisco's and Assemblyman Gabryszak's bipartisan legislation to do so.

Support Governor Cuomo's Bipartisan Efforts to Cut Taxes: We applaud the Governor's recent effort to find ways to cut individual, property and business taxes to create jobs and spur New York's economy. We urge the Majority Coalition to work with the Governor and your colleagues in the Legislature to reform New York's burdensome and costly taxation system, and hold the line on State spending.

Embrace Policies to Facilitate a Robust Commercial Transportation Industry:
A lynchpin to the continued growth and success of New York's steel industry is a robust and affordable commercial trucking industry able to compete on a level playing field with neighboring states. We recommend the following policy changes to do so:

- ***Repeal Intrastate Prohibition on LNG Hauling:*** We urge the Majority Coalition's support of legislation sponsored by Senator Maziarz and Assemblyman Camara to repeal the byzantine and counterintuitive policy of prohibiting *intra*state LNG hauling while allowing *inter*state LNG hauling. Currently, it is legal for a tanker to haul LNG from a facility in Connecticut to a receiver in New York, but it is illegal for a tanker to haul LNG from a facility in New York to a receiver in New York. As it stands, the current system literally trucks investment and jobs out of New York State.
- ***Repeal the Highway Use Tax (HUT):*** Nucor strongly supports funding bridge and infrastructure projects, but the HUT tax that funds the Dedicated Highway and Bridge Trust Fund is dramatically unfair to in-state carriers. Evasion of the tax has historically been a serious issue that results in an unfair competitive advantage to out-of-state carriers. We urge your support of Senator DeFranciso's and Assemblyman Magnarelli's legislation to repeal this unfair tax and to explore ways to fairly assess the tax on all carriers.

- ***Enact Fairness in Contracting Legislation:*** In the past four years, 38 states including Pennsylvania, Connecticut, and Massachusetts have adopted laws aimed at protecting common carriers from unfair indemnification provisions in shipper contracts. Legislation sponsored by Senator Maziarz and Assemblywoman Lupardo would reduce undue costs borne by New York carriers by establishing a system of fairness: the responsible party is accountable for damages and liabilities. This legislation would not limit anyone's ability to sue someone who is at fault, but simply prohibit undue liability automatically being assigned to the carrier.

Hold the Line on Repeal of the 18-A Utility Tax: We applaud the Members of the Majority Coalition, the Legislature and Governor in approving a phase out of the onerous 18-A utility tax last year. However, the impact of phase out does not begin until the upcoming budget cycle. We urge the Coalition's support to ensure your colleagues continue to embrace the phase out. New York State has the highest utility rates in the continental U.S. This is due in large part to taxes and surcharges that flow through to ratepayers. Manufacturers are disproportionally impacted by these regressive taxes because they are typically energy intensive. As such we urge the Coalition to continue the phase out of the 18-A utility tax in the upcoming budget cycle.

Adopt Policies to Increase Domestic Energy Supply: Again, New York manufacturers pay the highest energy rates in the continental U.S. We support any policy that reduces our dependence on foreign sources. We must develop all of our energy resources including oil, natural gas, nuclear, wind, solar, biomass and other renewables. Building the infrastructure and producing this energy will create millions of jobs, enhance our energy security, drive innovation and R&D in clean energy sources of all kinds, and help balance our trade deficit by reducing foreign oil imports. Drilling for natural gas in shale areas has greatly increased domestic natural gas supplies and made natural gas a key component of low carbon energy. Drilling moratoriums in shale areas by state and local governments or unnecessary regulations on hydraulic fracturing will greatly reduce the production of domestic natural gas. We urge the Majority Coalition to adopt this sensible approach.

We are hopeful our recommendations are useful as the Majority Coalition continues its important work in making New York a better place for manufactures to thrive and grow. Of course, if you have any questions or need further information do not hesitate to contact me right away.

Respectfully submitted,

John Giovenco
Vulcraft Chemung

John Giovenco

From: Christopher Duryea [cduryea@marshduryea.com]
Sent: Wednesday, October 09, 2013 10:04 AM
To: John Giovenco
Subject: Schumer, Brown urge MTA to Avoid Using Steel From State-Owned Chinese Enterprises on Future Projects;

Schumer, Brown urge MTA to Avoid Using Steel From State-Owned Chinese Enterprises on Future Projects; Chinese Gov't Deeply Subsidizes Industry, Giving Them Unfair Advantage Over American Firms in Any Bidding Process

Schumer, Brown Urge MTA To Change Its Bidding Procedures To Give American Firms Level Playing Field On Major Projects And Avoid Purchasing From Subsidized, State-Owned Enterprises

Thursday, July 11, 2013

China Heavily Subsidizes It's Steel Industry, So Firms Like Angang Steel Can Undercut Their American Competitors – Senators Call For Advance Notice On Major Contracts So American Firms Are Prepared To Compete

Purchasing State-Subsidized Chinese Steel For Massive Domestic Infrastructure Projects Promotes A Race To The Bottom That Could Ultimately Drive U.S. Steel Producers Out Of Business, Reduce Competition, And Cause Prices To Skyrocket

WASHINGTON, D.C. – U.S. Senators Charles E. Schumer (D-NY) and Sherrod Brown (D-OH) today urged the Metropolitan Transportation Authority (MTA) to alter its bidding processes to level the playing field for American steel manufacturers by accounting for the inherently unfair advantages state-sponsored firms, especially those from countries like China, now enjoy. These advantages take the form of subsidies from the government - including reduced energy costs, reduced environmental regulations, and infrastructure support - and make Chinese steel artificially cheap, allowing Chinese companies to undercut their American competitors by up to 25 percent. This issue was recently underscored by the MTA's announcement that it would be using steel from Angang Steel (Ansteel) Group, a state-owned enterprise in China, to make repairs along the Verrazano-Narrows Bridge.

The senators, citing these anticompetitive and unfair advantages enjoyed by state-subsidized foreign firms, said reforms should be made to MTA's bidding process so that domestic companies have an equal chance of securing a contract. They said that while purchasing steel from these state-sponsored companies may save money in the very short run, it would ultimately lead to higher steel prices and harm the United States economically. Continuing to purchase Chinese steel priced artificially low due to Chinese subsidies would lead to a race to the bottom, undermining the competitiveness of American manufacturers and potentially putting them out of business. If state-subsidized firms drive their competition out of business, they are free to dramatically raise prices.

Schumer said that MTA generally does a very good job supporting workers and businesses in New York and America, but that extra care needs to be taken not to reward China's anticompetitive practices.

"State-owned enterprises like Ansteel have an unfair, artificial, competitive advantage against American firms, and in the future the MTA should change its processes to account for this unfair advantage, and do everything in its power to avoid purchasing from these companies," said Schumer. "If we continue to source to Chinese companies based entirely on bid pricing, they will always win – with the level of government support and overproduction it's impossible to beat their prices. This is causing a global race to the bottom on steel prices, a budding environmental catastrophe and the threatening of steel production not just in the U.S. but worldwide. If American government entities like the MTA don't support a level playing field for American steel made by American steelworkers, no one will."

Brown has led the fight to ensure that federally-funded infrastructure projects utilize American-made steel, successfully amending the highway bill and water infrastructure bill to strengthen "Buy America" provisions and close loopholes.

"American infrastructure projects should utilize American-made steel," Brown said. "In Ohio and across the country, there is no shortage of supply for the strongest and safest steel in the world to repair and build roads and bridges. The U.S. steel manufacturers are the world's most efficient and our bridge industry can meet our nation's infrastructure needs, and I encourage the MTA and any government entity to give American companies a fair shot to compete for this and future work."

The MTA awarded a $235.7 million contract to Tutor Perini Corporation for repairs along the Verrazano-Narrows Bridge. The contractor subcontracted the steel decks to China Railway Shanhaiguan Bridge Group and will be using 15,000 tons of steel plate fabricated by Ansteel. The steel is being used to replace the bridge's concrete upper roadway.

The Buy America Act requires the U.S. government to use American-made products. The Act allows for preferential treatment to domestically produced materials used for mass-transit-related projects which are funded through the federal government.

The MTA normally falls under the Buy America Act but because bridge and tunnel repairs are funded by bonds backed by toll collections, the repairs along the Verrazano-Narrows Bridge are exempt from domestic sourcing requirements.

Schumer and Brown today pointed to two issues with using steel from Ansteel that are in direct conflict with the best interest of the U.S. economy. First, state-sponsorship can dramatically drive down costs on steel production. The Chinese government has a long history of subsidizing production and dumping products into the United States at a reduced cost in order to threaten the solvency of the domestic market. They do this by providing energy, environmental and infrastructure subsidies and other benefits to the companies, making it far easier and cheaper for them to produce steel. Second, China keeps its currency artificially low, giving imports from China a significant competitive advantage against competitors worldwide.

Last month, Brown introduced the *Currency Exchange Rate Oversight Reform Act of 2013*, bipartisan legislation that would reform and enhance oversight of currency exchange rates. Specifically, the bill would use U.S. trade law to counter the economic harm to U.S. manufacturers caused by currency manipulation, and provide consequences for countries that fail to adopt appropriate policies to eliminate currency misalignment. Brown's introduction came in advance of talks between President Obama and Chinese President Xi later that week in California.

In May, the U.S. Senate passed a Brown amendment, introduced with Sen. Jeff Merkley (D-OR), in the Water Resources Development Act (WRDA) that would ensure that American-made iron, steel, and manufactured goods are used in federally-funded water infrastructure projects whenever they are available and competitively priced. The amendment passed by a vote of 60 in favor, 36 against. The entire bill, with Brown's amendment, passed by a vote of 83-14 and now heads to the House of Representatives for consideration.

In June 2012, the U.S. Senate passed a Brown amendment in the bipartisan highway bill to strengthen "Buy America" provisions and support Ohio-made steel. The legislation benefits several Ohio steel companies, including ArcelorMittal and Cliffs Natural Resources in Cleveland; Nucor, located in Marion; and AK Steel in Middletown.

In their letter to Chairman Prendergast, Schumer and Brown today urged the MTA to consider using domestic companies when making sourcing decisions in the future.

Thomas F. Prendergast
CEO & Chairman
Metropolitan Transportation Authority
347 Madison Avenue
New York, NY 10017

July 11, 2013

Dear Chairman Prendergast,

We write today with concern over the recent decision of the Metropolitan Transportation Authority to use steel from Angang Steel (Ansteel) Group in China, a state-owned enterprise, to repair the Verrazano-Narrows Bridge. While we are appreciative of the tight budget constraints that MTA is subject to on public works projects, we believe that supporting state-owned enterprises such as Ansteel is in direct conflict with the best interest of the U.S. economy and in the future MTA should exercise all power within their authority to avoid this outcome.

Ansteel is the second largest steel manufacturer in mainland China and a state-owned enterprise, which means they are wholly owned by the Chinese government and as a result receive significant preferential treatment. Through this preferential treatment by the Chinese government companies such as Ansteel can dramatically drive down costs on steel production, even in a fragmented market. The Chinese government, through its state-owned steel market, has a long history of subsidizing production and dumping products into the United States at a reduced cost in order to threaten the solvency of our domestic market. This is why the Commerce Department has issued dozens of anti-dumping and countervailing duty orders on Chinese steel and iron imports over the last three decades. In addition to unfair trade practices specific to state-owned enterprises and steel on the part of the Chinese government, flagrant currency devaluation continues to give all imports from China a significant competitive advantage against competitors worldwide.

Together these two factors create a circumstance in which Chinese state-owned steel companies will continue to have a significant competitive advantage against American and other foreign steel manufacturers. If government entities such as the MTA cannot make the conscious choice to source from domestic producers, or at minimum foreign manufacturers who play by the same global trade rules as our American companies for the *sake of the domestic market and free and fair trade, we worry the global steel market will be forced into a race to the bottom due to the unfair mercantilist practices of the Chinese government.*

In the future we hope that the Metropolitan Transit Authority considers the broad implications for the domestic market when making sourcing decisions. It is our hope that in the future MTA will consider the profound impact that their purchasing power has on supporting domestic manufacturing against unscrupulous foreign and state-owned companies.

Sincerely,

U.S. Senators Charles E. Schumer & Sherrod Brown

Christopher J. Duryea
Marsh, Duryea & Associates
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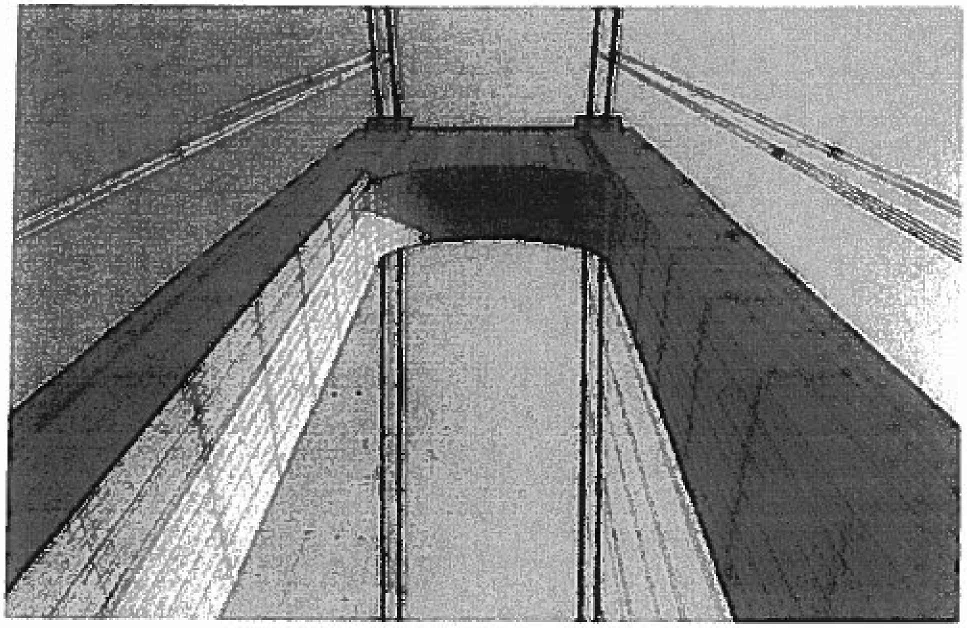
NEW YORK Updated June 20, 2013, 6:23 p.m. ET

U.S. Icons Now Made of Chinese Steel

Imports Surge While U.S. Mills Idle; Lacking Bridge Expertise at Home

By JOHN W. MILLER and CHUIN-WEI YAP



The Verrazano-Narrows Bridge was a feat of American engineering when it was built across New York's harbor in the 1960s. Now, it's being repaired with steel made in China.

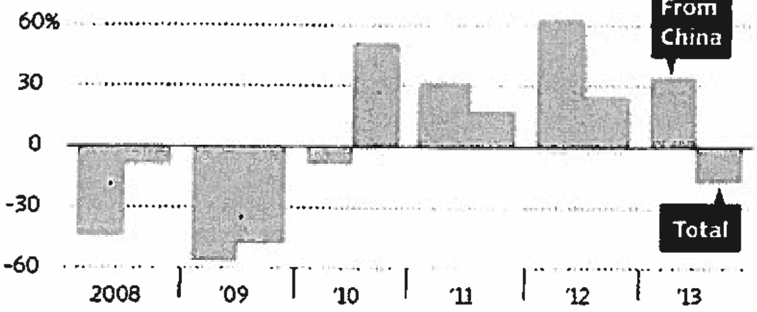
Chinese steel imports have surged so far this year, even as U.S. producers are awash with excess domestic capacity. Chinese steel was also recently used in the San Francisco-Oakland Bay Bridge.

The reason is partly because Chinese-made steel is cheaper. In fact, U.S. steel companies argue its price is unfairly subsidized, and want the U.S. government to restrict imports as much as possible. China claims it is simply a more efficient producer.

China's Steel Edge

As weak American demand has hurt steel imports overall, Chinese companies have increased their exports to the U.S., thanks in part to specialization in steel-heavy construction projects.

Year-over-year change in U.S. steel imports (Jan-April)



Source: Global Trade Information Services

The Wall Street Journal

Also at play, however, is the relative scarcity of American contractors with expertise in specialized projects like bridges.

Together, these two factors show why the U.S. is unlikely to completely swear off Chinese steel.

Last year, New York's Metropolitan Transportation Authority awarded a $235.7 million contract to a California contractor to repair the Verrazano-Narrows, a towering suspension bridge that is still the longest in the U.S.

The contractor, Tutor Perini Corp., TPC -3.97%subcontracted the fabrication of steel decks for the bridge to China Railway Shanhaiguan Bridge Group, which the MTA says is using 15,000 tons of steel plate made by China's Anshan Iron & Steel Group. The decks will replace the two-level bridge's concrete upper roadway.

The MTA said it tried to find a contractor whose bid for the project included American steel, but there was only one such bidder, Structal-Bridges, and its bid was twice as high as Tutor Perini's, said MTA spokeswoman Judie Glave.

MTA officials said price wasn't their only consideration, noting that Chinese companies have become specialists in making parts for bridges across the U.S.

The bridge work is one of the reasons Chinese steel shipments to the U.S. have been surging. In the first four months of 2013 they jumped 33% from a year earlier to 480,095 tons. The increase is particularly striking because total U.S. steel imports for the period fell 17% to 10.6 million tons.

The China Iron and Steel Association said the growth is based on supply and demand, and suggested Chinese steel exports have been rising because they are more competitive. "Why is it that we can export more? It's because of competitiveness on price and service," said Li Xinchuang, the trade group's deputy secretary-general.

U.S. steel mills, meanwhile, have been increasingly inactive. As of June 15, their production had fallen to 76.7% of their capacity from 78.8% a year earlier. The U.S. produced 88.6 million tons in 2012, 5.7% of the world's total.

Most of the steel from China now goes into building projects like bridges and buildings, sweet spots for Nucor Corp., NUE -1.90%the No. 3 U.S. steelmaker, which makes half of its steel for the construction industry.

"Construction is essential to our business," said Dan DiMicco, Nucor's chairman and former chief executive. Though construction steel commands less of a premium than automotive steel, it is one of the biggest steel markets in volume terms.

It is also one that domestic steelmakers are looking to for growth in the wake of several high-profile bridge collapses and calls to boost infrastructure spending, and in anticipation of a rebound in construction of large, nonresidential buildings such as—office complexes, malls and hospitals, which consume 70% of the steel used in construction. The surge in Chinese imports is threatening those hopes.

"There's usually a year-or-more lag," said Daniel Meckstroth, chief economist of the Manufacturers Alliance for Productivity and Innovation, a manufacturing industry-funded research group based in Arlington, Va. Consumption of non-residential construction steel -- for projects like ranging from bridges and highways to schools and hospitals -- is expected to increase 1% this year and 6% in 2014, according to MAPI. New housing developments also need "more roads, highways and bridges," he said, although that can take "several years."

Bill McEleney of the National Steel Bridge Alliance, whose members make bridges and bridge parts, said many U.S. companies can build bridges, but not many are experienced with the flat-deck design being used these days to build or renovate heavily trafficked bridges.

In rapidly urbanizing China, such construction is booming. "The Chinese are building many more of these kinds of bridges, so they have more fabricators," Mr. McEleney said.

Structal, a Chicago-based division of Canada's Canam Group Inc., said it is the only U.S. company that makes decks for those type of bridges. Sales manager Tony Matutis said the company uses only American steel and can't compete on price with China's government-backed steelmakers.

Leo Gerard, president of the United Steelworkers union, said Chinese steel's "supposed cost savings do not take into account the environmental price of shipping steel from hundreds of thousands of miles versus 100 miles, nor the cost to our fragile economic recovery and the loss of American jobs."

The MTA said its bridge and tunnel repairs are funded by bonds backed by toll collections, and receive no state or federal funding. Therefore, they don't fall under the Buy American Act, which requires government projects to use American-made products when possible.

Still, Ms. Glave said the "MTA wants to continue working with the domestic steel industry to develop American-made solutions for bridge renovations."

Anshan Iron & Steel confirmed it and the China Railway Shanhaiguan Bridge Group were cooperating on the Verazzano-Narrows Bridge project. The companies also worked together on Alaska's Tanana River Bridge, which the steelmaker described as China Railway Shanhaiguan's first bridge project in the U.S.

Anshan described the New York project as a test of whether its steel bridges "can go out into the world." Shanhaiguan couldn't be reached for comment.

"Where there is construction activity occurring in the United States, domestic steel is often not being used," said Alan Price, a trade attorney for Nucor. "Many construction projects are sourcing steel from overseas, including from state-owned enterprises in China."

Wilson Huang, a manager with Shanghai-based steel-trading firm Falcon Resources isn't surprised American companies are using Chinese steel. "U.S. production costs are high, and Chinese steel costs a lot less, so it's natural that the U.S. is buying more," he said.

Consultant John Packard, publisher of the Steel Market Update newsletter, recently surveyed American buyers of steel used in construction and found that prices for Chinese-made steel were 25% lower.

The U.S. government currently collects duties on Chinese steel products, including steel bars, plate and pipes, all used in construction. Last week, the U.S. renewed tariffs on bars for five more years.

Earlier this month, the American Iron and Steel Institute, which represents U.S. steelmakers, called on President Barack Obama to extend the tariffs on other steel products.

Beijing has warned in the past that any U.S. effort to roll back Chinese steel exports would hurt broader bilateral economic ties with Washington.

Write to John W. Miller at john.miller@wsj.com and Chuin-Wei Yap at chuin-wei.yap@dowjones.com

A version of this article appeared June 20, 2013, on page B1 in the U.S. edition of The Wall Street Journal, with the headline: U.S. Icons Now Made Of Chinese Steel.

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The New York State Motor Truck Association

2012

Wage Theft Prevention Act

SUPPORT: S6063 (DeFrancisco)/A8856 (Gabryszak)

The Wage Theft Prevention Act was enacted in 2010 and effective in April 2011. Part of the act requires an annual wage notice to employees which involves a lot of time, effort and expense on the part of the employer.

This annual pay notice contains the same information now required by state labor law to be placed on each and every paycheck stub by employers: rate(s) of pay, overtime rate(s) of pay, basis (by hour, week, salary etc.), allowances (if any), pay day, employer name, DBA used by employer, physical address, mailing address (if different), employer phone number and employee name.

This legislation would repeal the requirement that forces all private sector employers to provide a written pay notice to every employee in New York State annually, and obtain written acknowledgement of the receipt of this notice by every employee. Further, the employer is required to maintain this documentation for six years. This modification to the Wage Theft Prevention Act leaves in place the act's most significant reforms intended to assure payment of all wages earned by employees.

Realistically, the annual wage reporting requirement is a time-consuming, costly endeavor for both small and large employers costing as much as tens of thousands of dollars a year to a large employer. There is nothing to be gained by requiring employers to provide an annual statement to employees, which contains the same information required to be shown on their pay stub.

Though the Department of Labor has acknowledged that wage compliance is an issue for only a small percentage of New York State employers, the annual pay notice requirement universally applies to everyone- even those without compliance issues.

This component of the Wage Theft Prevention Act is overkill. It forces all law-abiding employers to incur additional expenses, instead of simply targeting the few employers with a history of non-compliance. As an across-the-board measure, this adds costs to employers and provides little, if any, additional benefit.

The annual reporting requirement is grossly ineffective and very costly. It is much better suited as an enforcement tool reserved for those with a history of non-compliance. This type of annual notification requirement should be the exception rather than the rule and be reserved for instances where non-compliance by an employer has been an issue.

The New York State Motor Truck Association supports the passage of this legislation.

Regulatory Reform Hearing: Manufacturing
October 9, 2013
Corning, NY

Written Testimony of:

New York State Motor Truck Association

NYSMTA

The voice of trucking.

The New York State Motor Truck Association

2013

Wide Based Single Tires

- Designed for use in place of dual tires.
- Designed to be interchangeable with dual tires without any change to the vehicle.
- Benefit: Weigh approximately 800 lbs. less than a traditional five axle combination
- Benefit: EPA shows reduction in fuel consumption of 3-4%
- Benefit: EPA noted reduction of emissions of carbon dioxide and nitrogen oxide
- Benefit: Reduces tire wear in some applications
- Benefit: Increases payload capacity due to lower weight
- Benefit: Improves vehicle ride and handling
- Benefit: Improves vehicle stability
- Tests show rapid tire air loss does not pose a handling concern
- Close to neutral as far as road damage
- Not currently allowed in divisible load operations
- Canada, Mexico and other states allow wide based single tires in divisible load operations

Proposed Amendments:

- Vehicles manufactured after 2006 must meet all infrastructure friendly vehicles (IFV) requirements in order to obtain a divisible load permit
- Vehicles manufactured prior to 2006 grandfathered until December 31, 2014
- $8,000- $10,000 retrofit after December 2014
- Vehicles must meet axle group weighting distribution (80% rule) by December 31, 2019
- Grandfather requirement should be delayed to December 31, 2019 to avoid expensive retrofit good for only 5 years.
- **NYSDOT Div. load permit cap** currently has to be approved by Assembly and Senate
- Last time, it took 4 years, lottery system put in place, non-compliance increased
- 2004: Issued 25,000 permit cap. Now at almost 23,000.
- Enforcement has discouraged non-compliance.
- Should be placed under NYSDOT for better control of entire system.

NYSMTA

The voice of trucking.

The New York State Motor Truck Association

2013

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NYSDOT for better control of entire system.

The voice of trucking.

The New York State Motor Truck Association

2013

Fairness in Contracts: Talking Points

SUPPORT: S1087 (Maziarz)/A3673 (Lupardo)

- Two types of motor carriers: common and private. Private transport their own goods and common are "for hire."
- "Fairness in Contracts" legislation would help protect common carriers from being taken advantage of by shippers.
- Right now, it is legal for a shipper to include language in their contracts with carriers which absolves them of all liability for damage to the goods being shipped.
- If something (inside a box) is damaged in a warehouse but makes it onto the truck, the carrier is held responsible for the damage.
- **This legislation would not limit anyone's ability to sue someone who is at-fault. It would just stop the practice of "assigning" blame without taking facts into consideration.**
- 38 states currently have laws prohibiting anti-indemnification language in contracts (including Pennsylvania, Massachusetts and Connecticut). 26 of those have been passed in the last 4 years.
- High taxes on carriers (2nd highest in the nation) already put New York at a competitive disadvantage. Not having a "Fairness in Contracts" law makes it much worse.
- The increasing instance of shippers assigning liability to carriers for things out of the carriers' control must be stopped.
- States with anti-indemnification legislation:

Alabama
Alaska
Arizona
California
Connecticut
Florida
Georgia
Hawaii
Idaho
Illinois

Indiana
Iowa
Kansas
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Missouri

Montana
Nebraska
New Mexico
North Carolina
North Dakota
Oklahoma
Oregon
Pennsylvania
South Carolina

South Dakota
Tennessee
Texas
Utah
Virginia
Washington
West Virginia
Wisconsin

NYSMTA

The voice of trucking.

The New York State Motor Truck Association

2013

Fairness in Contracts

SUPPORT: S1087 (Maziarz)/A3673 (Lupardo)

Motor carriers can be broken into two classifications: private carriers and common carriers. Private carriers are generally companies who own a fleet of trucks to ship and transport their own goods. Common carriers are for-hire and transport goods from shippers who contract with them to use their services. "Fairness in Contracts" legislation will help protect common carriers from being taken advantage of by shippers.

In the past decade, it has become common practice for shippers to include language in their contracts with carriers indemnifying the shipper against any liabilities or damage to the goods being shipped, regardless of fault.

The issue with this practice can be simply illustrated with the following two examples:

1. A shipper hires a carrier to deliver a truckload of housewares, including dishes and glasses. A pallet of these goods is dropped by a forklift operator in the shipper's warehouse, damaging some of the breakables inside, prior to loading the truck. The boxes are loaded onto a carrier's truck and transported to a retailer. The retailer rejects the load due to damage. Under current law, the indemnification clause by the shipper would automatically make the carrier responsible for all damage, regardless of fault or negligence by the shipper.

2. There is a refrigeration malfunction in a cold-storage facility owned and operated by a shipper. The shelf life of the produce stored there is greatly reduced as a result. The carrier hired to transport the food does so, keeping the refrigeration unit in the trailer functioning within the parameters set forth in the contract with the shipper. The produce spoils regardless and is rejected by the retailer. The carrier is then held responsible for the loss, not the shipper with the faulty cold-storage facility.

"Fairness in Contracts" legislation will "level the playing field" by enabling the responsible party to be held accountable for damages and liabilities. This legislation would not limit anyone's ability to sue someone who is at fault. Instead of liability automatically being assigned to the carrier, it would allow fault to be determined.

In the past four years, nearly half the states in the country have adopted legislation aimed at protecting carriers from overreaching indemnification provisions in shipper contracts, bringing the total number of states with such legislation to 38. That translates to 76% of the states in the country having a competitive advantage over carriers in New York. Pennsylvania, Connecticut, and Massachusetts have adopted such legislation and it is being considered in Vermont and New Hampshire.

Due to the number of shippers utilizing this practice in New York, carriers do not have the luxury of simply rejecting these contracts. The increasing instance of shippers assigning liability to carriers for things out of the carriers' control must be stopped, and the New York State Motor Truck Association aims to do so with passage of the above referenced legislation.

The New York State Motor Truck Association

The voice of trucking.

2013

Highway Use Tax Repeal

- New York is the only state in the northeast and only one of 4 in nation to have a highway use tax
- New York is already the 2nd most expensive state in the nation in which to operate a truck
- Compliance is burdensome to carriers and the state- significant administrative costs
- Tax evasion results in lost revenue to the state
- Those that don't file HUT, are likely also evading the International Fuel Tax (IFTA) program and International Registration Plan (IRP)- additional revenue lost to New York
- Inadvertently "punishes" New York carriers because they end up paying more of the tax
- There are other alternatives for the state to collect this revenue that ensures all commercial users are paying the tax, not just those in New York
- Fuel tax remains the most efficient mechanism by which to generate highway funds
- An increase in the fuel tax is supported by the trucking industry
- Study of 5 states that repealed their use tax: collected more highway user revenue than when HUT was in place
- Year after the repeal: taxable gallons of diesel fuels increased 5 to 7 percent more than the national average
- 4 of those 5 states didn't increase any other fees
- HUT is burdensome and puts New York at a competitive disadvantage
- The elimination of the tax will help reduce transportation costs in New York and encourage new business, and keep old business here

NYSMTA

The voice of trucking.

The New York State Motor Truck Association

2013

Highway Use Tax Repeal

SUPPORT: S2310 (DeFrancisco)/A474 (Magnarelli)

New York is the only state in the northeast and only one of four states in the nation, with a highway use tax (HUT). The tax puts New York at a competitive disadvantage and is a primary reason why New York ranks as the 2nd most expensive state in the nation in which to operate a truck.

Compliance with the tax is extremely burdensome, not only to carriers, but to the state as well. In addition to the cost of the tax itself, there is a significant administrative cost to maintain the detailed records required to comply with the tax. Many motor carriers have staff dedicated to compliance with HUT.

Evasion of the tax is a serious issue that results in lost revenue to the state, and inadvertently results in an unfair competitive advantage to out-of-state carriers. While there is an audit program in place, it is much more likely for a company in New York to be selected for audit by the NYS Tax Department than a carrier based out-of-state. Additionally, if an out-of-state carrier is evading the HUT, they are evading compliance with the International Fuel Tax (IFTA) program and International Registration Plan (IRP) as well, resulting in significant revenue loss to the state.

Currently the tax generates approximately $145 million, which is dedicated to the Dedicated Highway and Bridge Trust Fund. There are other alternatives for the state to collect this revenue that ensures all commercial users are paying the tax, not just those in New York.

An increase in registration fees and fuel tax can be evenly distributed through the IFTA and IRP programs. While not politically attractive, fuel tax remains the most efficient mechanism by which to generate highway funds. An increase in the fuel tax is supported by the trucking industry.

A study conducted on five states that repealed their ton-mile tax found that annual highway user revenue after the repeal equaled or surpassed the annual revenue collections when highway use taxes were in place. In addition, in the year following the elimination of their HUT, reported taxable gallons of diesel fuels increased, on average 5 to 7 percent more than the national average. This increase in diesel fuel can be attributed to eliminating evasion, not because more diesel fuel was actually used. It is important to note that four of the five states studied eliminated the HUT without any increase in other taxes or fees in an attempt to replace the HUT revenue.

The HUT is an onerous, antiquated tax that puts New York and its trucking industry at an economic disadvantage. High taxes continue to harm New York and discourage business from establishing locations here. The elimination of the tax will help reduce transportation costs in New York and encourage new business, as well as help retain the business New York already has. It is economically attractive and will be a boost to New York businesses and consumers. It is time to repeal this burdensome tax.

NYSMTA

The voice of trucking.

The New York State Motor Truck Association

2013

Liquefied Natural Gas (LNG)

- Fuel increasingly being used in heavy duty trucking as a cleaner, less expensive alternative to diesel
- LNG is transported and stored safely in New York every day
- New York is the only state which has a moratorium on the transportation of LNG in intrastate commerce.
- It is legal for a tanker to haul LNG from a facility in Connecticut to a receiver in New York, but it is illegal for a tanker to haul LNG from a facility in New York to a receiver in New York.
- LNG is safer than both propane and butane, which are routinely transported within New York.
- It's lighter than air so it vaporizes into air if spilled. Very difficult to ignite.
- A 1978 moratorium on the use of LNG in New York was lifted for upstate in 1999
- Lift didn't address the transport of LNG- still prohibited under the 1978 moratorium
- Current ENCON law allows LNG transport in New York in limited quantities along routes established by the state Department of Transportation.
- DOT doesn't certify routes.
- Intrastate transport of LNG is not possible.
- LNG is cleaner and cheaper than diesel ($1-3 less per equivalent diesel gallon), but New Yorkers aren't seeing the benefit.
- LNG in all quantities is already being transported safely throughout New York every day, governed by state and federal hazardous material safety requirements
- While S1119 and A4202 would help by providing an exemption for the transportation and storage of up to 40,000 gallons of LNG, section 23-1713 of the environmental conservation law should be repealed in its entirety
- The origin or destination of the transporter is inconsequential and keeps New York at a significant competitive disadvantage

The voice of trucking.

The New York State Motor Truck Association

2013

Liquefied Natural Gas

SUPPORT: S1119(Maziarz)
A4202(Camara)

Liquefied Natural Gas (LNG) is a domestic fuel increasingly being used in heavy duty trucking as a cleaner, less expensive alternative to diesel. Every day, in every state in the nation, including New York, LNG is transported, used and stored safely in storage facilities.

However, New York is the only state which has a moratorium on the transportation of LNG in intrastate commerce. LNG can be used in New York and stored in New York, but it can only be transported in New York if it is part of interstate commerce. LNG can't be transported in New York if it starts and ends within the state. Therefore, it is legal for a tanker to haul LNG from a facility in Connecticut to a receiver in New York, but it is illegal for a tanker to haul LNG from a facility in New York to a receiver in New York.

LNG is safer than both propane and butane, which are routinely transported within New York. If spilled, the LNG vapor will warm, become lighter than air and disperse with the prevailing wind. This vapor can only burn if it is mixed with the correct proportion of air (5 to 15 percent). Mixed with too little air, it cannot sustain a flame. Mixed with too much air, the gas is too diluted to ignite.

A 1978 moratorium on the use of LNG in New York was lifted for upstate in 1999. However, the lift didn't address the transport of LNG, which is still prohibited under the 1978 moratorium. Section 23-1713 of the environmental conservation law, which enacted the 1978 moratorium, provides for the intrastate transportation of LNG in limited quantities along routes established by the state Department of Transportation. However, DOT is not in the business of certifying routes, nor do they have the resources to do so. Therefore, intrastate transport of LNG is not possible.

LNG has significant environmental and economic benefits which are not being realized in New York due to the current moratorium. The need for LNG as a transportation fuel has been documented by the New York State Energy Research and Development Authority which studied the safety and economic benefits of LNG. Additionally, major fleet operators are making the shift to natural gas, and realizing savings of $1 to $3 per diesel equivalent gallon depending on source and supply.

While S1119 and A4202 would help by providing an exemption for the transportation and storage of up to 40,000 gallons of LNG, section 23-1713 of the environmental conservation law should be repealed in its entirety. LNG in all quantities is already being transported safely throughout New York every day, governed by state and federal hazardous material safety requirements. The origin or destination of the transporter is inconsequential and keeps New York at a significant competitive disadvantage.

NYSMTA

The voice of trucking.

New York: Too Taxing for Trucks

New York State is ranked second in the nation when it comes to taxes on commercial motor vehicles. With total annual state highway user fees of $13,946.00, each commercial truck in New York pays $22,905.00 annually in state and federal taxes. That not only places New York second only to Oregon, it places the state at 29 percent above the national average of $16,347.34.

The competitive disadvantage New Yorker's face attempting to attract and retain business is further exacerbated by considering the significantly lower taxes charged by border states. More than half of New York's border states have a tax burden of less than the national average, with New Jersey's tax burden a staggering $9,000 a year less (40% lower) than New York's taxes, per truck.

State	Total Annual State Hwy User Fees ($)	Federal Fuel, Heavy Vehicle Use, and Excise Taxes	Total State and Federal Hwy User Fees	State Ranking by $ Total	Percent of National Average
New York	$ 13,946.00	$ 8,959.00	$ 22,905.00	2	140%
Connecticut	$ 10,644.00	$ 8,959.00	$ 19,603.00	6	120%
Pennsylvania	$ 9,666.00	$ 8,959.00	$ 18,625.00	9	114%
Vermont	$ 7,348.00	$ 8,959.00	$ 16,307.00	21	99%
Massachusetts	$ 5,833.00	$ 8,959.00	$ 14,792.00	36	90%
New Jersey	$ 4,910.00	$ 8,959.00	$ 13,869.00	42	85%
National Average	**$ 7,388.34**	**$ 8,959.00**	**$ 16,347.34**		

No industry in New York can survive without trucks. Even the most self-sufficient seeming entity will, at some point, depend on trucks for something: office supplies, attire, shelter or running water. Continuing to tax business out of New York will only further damage the state's already faltering economy.

Celebrating 80 Years 1932-2012 NYSMTA

The New York State Motor Truck Association

2012

Wage Theft Prevention Act

SUPPORT: S6063 (DeFrancisco)/A8856 (Gabryszak)

- The Wage Theft Prevention Act was enacted in 2010 and effective in April 2011.

- Part of the act requires an annual wage notice to employees which involves a lot of time, effort and expense on the part of the employer.

- This annual pay notice contains the same information now required by state labor law to be placed on each and every paycheck stub by employers.

- This legislation would repeal the requirement that each year a written pay notice be provided by all private sector employers to each and every employee in New York State, and that a written acknowledgement of the receipt of such notice be obtained each year from each and every employee by their employer, and be maintained by the employer for six years.

- There is nothing to be gained by requiring employers to provide an annual statement to employees containing the same information required on their pay stub.

- The Department of Labor has acknowledged that wage compliance is an issue for only a small percentage of New York State employers.

- The annual pay notice requirement universally applies to everyone- even those without compliance issues.

- This effectively kills a fly by wiping out a city block.

- This measure is much more suited as an enforcement tool reserved for those with a history of non-compliance.

- This type of annual notification requirement should be the exception rather than the rule and be reserved for instances where non-compliance by an employer has been an issue.

- As an across the board measure this adds costs to employers and provides little if any additional benefit.

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assure payment of all wages earned by employees.

Appendix I

Biotechnology

Monroe, NY **October 15, 2013**

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Regulatory Reform Hearing: Biotechnology
October 15, 2013
Rochester, NY

Testimony Submitted by:

Joel Seligman

President of the University of Rochester

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UNIVERSITY *of* ROCHESTER

NEW YORK STATE SENATE MAJORITY COALITION

BIOTECHNOLOGY IN UPSTATE NEW YORK – ITS IMPACT ON BUSINESS, JOB GROWTH AND TAXES

OCTOBER 15, 2013

MONROE COUNTY OFFICE BUILDING
LEGISLATIVE CHAMBERS, ROOM 406
ROCHESTER, NY

STATEMENT FOR THE RECORD

JOEL SELIGMAN

PRESIDENT
UNIVERSITY OF ROCHESTER

Senators Robach, Gallivan, Valesky and the other Members of the Senate Administrative Regulations Review Commission:

Thank you for the opportunity to testify and for calling this hearing on this important topic.

As both President of the University of Rochester and the Co-Chair for the Finger Lakes Regional Economic Development Council, I want to thank the Senate Majority Coalition for their leadership and efforts to reduce unnecessary regulations that limit economic growth. I also appreciate the Senate Majority's support for incentives and initiatives that strengthen the biotechnology industry and research institutions, like the University of Rochester.

The biotechnology industry is a leading sector in New York State's economy and in the Finger Lakes region. It is estimated that New York's biotechnology industry currently supports 250,000 jobs — both direct and indirect — generating $309 million in personal state income tax and over $5.63 billion in wages.

The industry is driven by leading technology companies, world-class research universities, and a highly educated workforce. Collectively, New York State's research institutions are among the national leaders in the amount of funding received from the National Institutes of Health (NIH) and the National Science Foundation. New York's public and private medical schools alone are responsible for $416.5 million in research funding upstate, and $1.8 billion downstate, including $253 million in National Science Foundation awards and $2 billion in from the National Institutes of Health. The schools had an $85.6 billion economic impact in 2010, according to a Tripp Umbach study. In addition, New York hosts an incredible seven NIH Clinical and Translational Science Institutes centers, including one at the University of Rochester Medical Center – only California has more. The innovations and technologies that emulate from New York's institutions attract the biotechnology industry and help stir investment in the region that lead to additional jobs in the private sector.

In the Rochester region, the biotechnology industry ranges from large, established firms - such as CooperVision, CarestreamHealth, and Ortho Clinical Diagnostics - to small companies such as Vaccinex, SimPore, Oyagen, VirtualScopics, and iCardiac Technologies. The creation of some of these start-up companies are driven, in part, by the University of Rochester, which has grown to be the region's largest employer with 22,019 full-time equivalent jobs and the seventh largest private employer in New York State. In total, the University is the source of 47,000 direct and indirect jobs and $2.4 billion in direct and indirect wages.

Over the last 5 years, the University has received more than $2 billion in external research funding. When normalized for faculty size in 2011, the most recent year for which we have data, we rank 15th in federal research funding among the 176 top funded research universities, with more than $400 million in total sponsored research during each of the prior two years and $348 million in 2012. Annually, we receive more NIH funding than institutions of Buffalo, Syracuse, and Albany combined. Our scientists are on the cusp of extraordinary breakthroughs every day and public support from both the federal government and New York State has a tremendous impact on the ability of our institution to advance scientific discoveries that will improve patient care, affect the overall health of our community as the area's largest health care provider, and be at the forefront of efforts to develop new technologies and innovations that create new jobs and companies.

We are proud to be a national leader in translating our research and discoveries into new technologies and practical applications. We have brought education, research, and commercialization together to become a major hub of innovation and economic growth. Since 1996, 53 companies have been created using University-licensed technologies, of which 38 are still active and 29 located in New York State. For the past several years, the University has been among the top institutions in terms of the amount of royalty revenue received from its licensed technologies, according to the Association of University Technology Managers. The University's place among the nation's leading universities reflects our strong commitment to transferring viable research discoveries to the marketplace. Groundbreaking advances such as the world's first cancer vaccine, the Haemophilus influenza type b (Hib) vaccine that has virtually wiped out a leading cause of meningitis in preschoolers, the use of lung surfactant in premature infants that has saved the lives of tens of thousands of babies worldwide, and our advancements in LASIK surgery that have improved the vision of tens of thousands of people, are only a few examples of the transformational clinical and translational research that has been done at the University.

Our innovation ecosystem, which includes many state programs supported by the New York State Senate such as NYSTAR's Centers for Advanced Technology, which supports the University's Center for Emerging and Innovative Sciences, and the Regional Technology Development Center, which supports the region's only state and federally designated business incubator - High Tech Rochester, has been cited as a model.

In addition, last year the University launched the Center for Medical Technology and Innovation, a collaboration between the School of Medicine and Dentistry and the Hajim School of Engineering and Applied Sciences to help generate ideas for potential medical devices or procedures.

Despite recent challenges with the acquisition of Bausch + Lomb by Canadian-based Valeant Pharmaceuticals and the sale of UCB's Rochester-based manufacturing plant to Unither, our region's focus remains on growing research and development, technology transfer, and expanding biotechnology manufacturing, and incubation and acceleration facilities. Strategic investments by New York State have fueled our significant growth, strengthened our ability to attract research funding from federal and private sources, and expanded the commercialization of our research.

The Health Sciences Center for Computational Innovation (HSCCI) is partnership between IBM and the University to create the nation's most advanced high performance computing health science research center. With support from the State through the Regional Economic Development Council, the University is now home to a Blue Gene/Q, IBM's fastest and most advanced computer. To date, more than 100 faculty and 650 scientists have used high performance computing and it has attracted more than $200 million in external research funding.

The Upstate Stem Cell cGMP Facility at the University's Medical Center is upstate's only university-based stem cell manufacturing facility that meets the strict regulatory requirements necessary to conduct clinical studies. The facility, which opened in 2012 thanks to $3.5 million in support from NYSTEM, is a collaboration among the University's Medical Center, SUNY Upstate, Albany Medical Center, University at Buffalo, and Roswell Park. It addresses a critical gap in the region's biomedical R&D infrastructure and supports more than 260 scientists at the University with over $100 million of regenerative medicine research.

I would be remiss when addressing this group, if I didn't personally recognize Senator Robach for his support for the Robert B. Goergen Hall for Biomedical Engineering and Optics. This 100,000 sq. ft. facility allows us to build on two of our greatest strengths at the University – biomedical engineering and optics – and present us with the unprecedented opportunity to be number one in the world in the emerging field of biomedical optics.

The New York State Senate's Generating Employment through New York State Science (Gen*NY*sis) initiative also had a significant impact on our institution's growth. Thanks to the $20 million in support through Gen*NY*sis back in 2002, the University expanded to add more than 400,000 square feet of new state-of-the-art research facilities and hired more than 500 new faculty and support staff to develop new technologies and approaches to patient care. The University, supported by funding from the Gen*NY*sis program, also converted a former Wyeth facility to become the Rochester BioVenture Center, the first biotechnology incubator in the region with wet lab facilities that serves as an important link in the chain of resources necessary to promote and foster the growth of early stage life science companies on a regional scale.

Despite the tremendous potential for future growth, New York State continues to lag in terms of harnessing research and development for economic growth. While budget sequestration and cuts at the federal level continue to undermine our progress and threaten our scientific leadership, one of the other fundamental challenges facing the State is to ensure that the discoveries that have and will emerge from our research intuitions are accelerated and stay in New York State to help propel economic growth.

Governor Cuomo and the Senate clearly recognize that the government has and must continue to play a role in creating the environment for innovation and academic/private partnerships to thrive. The work of this panel to identify and eliminate unnecessary regulations is essential part of that effort. Excessive or onerous regulations increase administrative costs and impede research productivity. State policy makers and regulators should review the costs and benefits of state regulations, eliminating those that are redundant, ineffective, inappropriately applied to higher education and biotechnology sectors, or that impose costs that outweigh their benefits to the state and society. Any additions to the reporting or regulatory requirements of universities should be implemented with a cost-benefit analysis and additional funding to support administrative costs.

Regulations and reporting requirements should also be more consistent across agencies so that the university can simplify compliance efforts and reduce costs, particularly with dealing with the stringent rules associated with grants and contract management. While we appreciate the intention to significantly reduce costs and streamline reporting through for New York State and grantees through the newly established Master Contract for Grants and the Grants Gateway, there needs to be greater flexibility to negotiate clauses that do not apply to educational institutions, make it more user friendly, and help reduce redundancy with the information already required on the New York State Vender Responsibility Questionnaire. In addition, New York State should differentiate the type of contract based on the scope of the project to distinguish between a research, construction, clinical or fee-for-service contract. We can reduce administrative costs for the conduct, management and oversight of grants and contracts without compromising the effectiveness of the regulations and the accountability of our institution and New York State.

We also urge the repeal of the annual notification provision of the Wage Theft Prevention Act. This provision creates a significant administrative burden, particularly for large employers, and we've calculated that the cost of compliance with this legislation is well over $25,000 annually. Employees have regular access to the information provided in the annual notification. Further, the information is especially duplicative and inefficient for individuals on contract, including both faculty and employees covered by multi-year collective bargaining agreements.

As you look for other ways to fuel growth in the State's biotechnology commercial sectors, I would also encourage you to continue your support for existing programs that are having a consequential difference in our ability to attract and retain top scientists and impact economic growth. These include programs I previously mentioned, such as NYSTAR's Centers for Advance Technology, Regional Technology Development Centers, NYSTEM, and the Governor's Regional Economic Development Councils, as well as the Spinal Cord Injury Research Program, which serves as a national model and its funding is critical to maintaining New York State's leadership position in this field, creating and retaining jobs, and developing improved treatments, technologies and therapies for patients with spinal cord injury.

I would also encourage you to strengthen the state's ability to harness the new technologies that are emerging from our region's universities and research centers and transform them into commercial opportunities. While significant progress has been made in this space, Upstate New York continues to faces major obstacles to growth in technological fields, namely insufficient financial capital to launch these new technology companies. Many venture capital funds, including those that were initially designed to be angel investors, are now focused on later stages of investment and have become more ROI focused. Consequently, there remains an acute demand for seed and venture capital funding. While state-supported efforts like Innovate NY administered through entities like Excell Partners have helped universities grow their research and strengthen partnerships with the business community and push early-state innovations to commercialization, we should expand upon these successes to mature nascent technologies that help advance science, develop novel technologies, and allow us to provide further economic benefits to the region and New York State.

As you study these issues further and develop recommendations to strengthen New York State's biotechnology sector, I would like to continue to offer the University's assistance. Again, thank you for allowing me this opportunity to submit my testimony for the record and thank you for your continued support of the University of Rochester and your commitment to strengthen New York's biotechnology sector.

Regulatory Reform Hearing: Biotechnology
October 15, 2013
Rochester, NY

Testimony Submitted by:

Harold C. Smith, PhD.

Professor of Biochemistry & Biophysics at the University of Rochester Medical Center Founder of OyaGen, Inc.

OyaGen inc

10/15/2013

To enable biotech to grow as an economic engine and jobs creator we need to the state to adopt a biotech specific role in husbandry for the industry that will involve: (1) to form a State-wide commission specific to biotechnology for oversight and allocation of the resources, environment mentoring and financing directly to biotech companies so that they can pursue successful business models and (2) adopt a flexible policy towards entrepreneurism within universities that will recognize the value in tangible contributions to society in the form of products and services stemming from biological/biomedical discovery and that will encourage faculty to adopt broader metrics for incentive, motivation and attitudes toward entrepreneurism while actively mentoring the upcoming generation with a flexible value system with regard to all career opportunities that require critical thinking is an essential path to success.

I ask that you to help support biotechnology economic growth in NY by the creation of a new program, the **Biotechnology Industry Revitalization and Development Initiative (BIRDIe)**. This will entail your helping build a consensus among NY State legislators for:

(1) a proclamation of the above priorities through BIRDIe;

(2) the creation of a commission for Biotech economic development;

(3) to enable NY Senate hearings with Biotech CEOs from across the State to assess the current needs and to gather information.

(4) to appropriate a $200M fund uniquely targeted to Biotech prepared to establish companies under BRIDIe to which matching Federal funds will be provided. The full range of company initiatives from startup companies to companies seeking increments in capital equipment or staff to meet well-defined product development milestones should be included in the investment priorities. Funding could be in the form of grants based on jobs creation milestones or as low interest loans.

I have been building consensus for a commission specifically to address Biotech as an economic and jobs growth engine by meeting with Senators and Assemblymen across the State and will continut to do so.

I look forward to the opportunity to speak with you in person, invite you to have a tour of the OyaGen Lab and work toward this important goal for our State.

Respectfully,

Harold C. Smith

Harold C. Smith Ph.D.
Founder, CEO and CSO
OyaGen, Inc
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(585) 697 4351

Preserving and Protecting Domestic Small Biotechnology Innovation

Expressing the sense of the House of Representatives that preserving the nation's small biotechnology sector is to the domestic and global interests of the United States, its people and its economy because this sector creates new medicines, services, and jobs and meets unmet health and wellness needs of the Citizens of the United States and millions of people across the world, especially those populations and patients with infectious and chronic diseases, including those of medically underserved populations.

113th CONGRESS

IN THE HOUSE OF REPRESENTATIVES

RESOLUTION

Expressing the sense of the House of Representatives that preserving the nation's small biotechnology sector is to the domestic and global interests of the United States, its people and its economy because this sector creates new medicines, services, and jobs and meets unmet health and wellness needs of the Citizens of the United States and millions of people across the world, especially those populations and patients with infectious and chronic diseases, including those of medically underserved populations.

Whereas small biotechnology firms have developed intellectual property that is of value to the health and well-being of the people in the United States and the world;

Whereas small biotechnology firms deserve a comprehensive, prompt, direct, and effective review of their products and processes by all Federal agencies of jurisdiction;

Whereas the Federal Government is the leading funding sources for biomedical research and applications in the world;

Whereas HIV/AIDS, the most virulent strains of tuberculosis, Hepatitis C, pandemic diseases, and other life threatening conditions, including cardiovascular conditions, stroke, cancer, sickle cell, neurological conditions, gastrointestinal, infectious, autoimmune, and mental illness diseases, are an increasing threat to the life, safety, and the fiscal balance of State and local health public health organizations, especially in areas with high proportions of underserved and under-resourced populations;

Whereas over 1,100,000 persons in the United States are living with HIV/AIDS, including a large number of racial and ethnic minorities;

Whereas there is a need to encourage therapies and new drug development to treat the unmet medical needs of patients with debilitating conditions and life-threatening diseases, including those in medically underserved communities;

Whereas small biotechnology firms discover 56 percent of all new drugs and undertake 70 percent of new therapeutic research and development;

and support of new companies as they move their R&D along sound business pathways. My team and I would like to work with the State in this endeavor. Indeed, we would like to propose language that will enhance the State's ability to work with innovative firms across the state. This solution can include a direct collaboration between biotechnology entrepreneurs, the State and others to incentivize investment in biotech and facilitate the growth and development of the companies in the biotechnology sector through a business grants program.

I believe working together toward entrepreneurism in our State while actively mentoring the upcoming generation with a flexible value system with regard to career opportunities is the essential pathway to success.

In this regard, my team and I would like to work with you to create the necessary legislative vehicles for the creation of this collaborative approach, create hearings with innovative biotechnology companies from across the state to hear about their needs and their ideas, and create a pathway beyond the initial funding to ensure the future development of innovation in the biotechnology sector in New York State.

I have been building consensus for a commission specifically to address Biotech as an economic and jobs growth engine by meeting with Senators and Assemblymen across the State and will continue to do so.

I look forward to the opportunity to speak with you in person, invite you to have a tour of the OyaGen Lab and work toward this important goal for our State.

Respectfully,

Harold C. Smith

Harold C. Smith Ph.D.
Founder, CEO and CSO
OyaGen, Inc

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Whereas private sector investment in the small biotechnology sector, especially early and mid-stage funding for new drugs and therapies and for the firms that produce them, has been in a steep decline especially for those firms concentrating in the HIV/AIDS sector;

Whereas the high cost of clinical trials has hit small biotechnology sector especially hard with the cost of reaching commercializing nearing over $800 million per new drug;

Whereas new antibiotic and biologic medicines for these infections and diseases will not only save lives, but provide cost savings vitally important to the improvement of the Nation's health and the reduction of health care costs; and

Whereas small biotechnology firms need Federal assistance to commercialize products related to promising technologies, including therapeutics for drug resistant pathogens, defensin mimetics addressing vancomycin- and methicillian-resistant bacteria, adenosine-based synthetic blood substitutes, peptide-based and nanoparticle-based therapeutic HIV vaccines, DNA lentiviral therapeutic vaccines HIV vaccine adjuvants, immune-based therapies including cytokines, broadly reactive neutralizing antibodies, recombinant interleukins addressing lymphopenia, HIV antiviral therapies including nucleoside reverse transcriptase inhibitors active against thymidine-associated mutations, emerging integrase inhibitor programs, stealth nucleoside analogues provoking a lethal cascade of viral mutagenesis, viral capsid assembly inhibitors, Vpu inhibitors, therapeutics targeting HIV infected macrophages, lentiviral-based and zinc finder nuclease gene therapy, antiviral hyperactivation limiting therapeutics, Vif dimerization antagonists and APOBEC3G agonists, autologous dendritic cell therapy, Pyrimidinedione-based NNRTIs, CCR5/CCR2 antagonists, cannabinoid-mediated viral suppression of HIV, KSHV and inflammation targeting cellular factors new therapeutics for viral-driven inflammation, point-of-care rapid diagnostics, therapeutic nutrition addressing HIV-associated enteropathy and microbial translocation, malabsorption unremitting diarrhea and HIV related osteonecrosis, RNA-based therapeutics for infectious disease, non-tuberculosis mycobacterias,,: Now, therefore, be it

Resolved, That the House of Representatives—

1. Recognizes the need to stimulate private sector investment in the interest of public safety and security to sustain the development, commercialization and availability of a new generation of drugs, medicines and therapies to ensure the lives and well being of millions of American citizens.
2. Recognizes the need to simplify the rules, regulations and procedures that encumber and slow innovation in the biotechnology sector and hurt innovative therapies and medical devices from reaching the commercial marketplace;
3. Recognizes that the public deserves the safest, most effective, and efficient processes in regards to saving the lives of people living in the United States with infectious and chronic diseases;

4. Recognizes the need to continue the development of innovative therapies, medical devices and therapeutic platforms;
5. Supports and seeks to encourage the advancement of United States-based commercialization of point of care therapeutics and diagnostics by emerging and small business biotechnology firms for domestic and global use;
6. Recognizes the need to coordinate existing public investment to help small business biotechnology firms whose products may be lost due to domestic economic conditions, and fund critical paths for small biotechnology drug development and for regulatory review and commercial approval;
7. Encourages the development of a formalized, national strategic framework to facilitate technological advancements in improving the commercialization processes for small business biotechnology firms;
8. Wishes to promote and encourage the creation of incentives for small business biotechnology companies that perform basic and applied research through the development and commercialization of biotechnology products and processes and their diffusion into national and local economies to improve the quality of life of people in the United States;
9. Encourages the development of a comprehensive approach to describing disease populations and the production of comprehensive research programs that are current with evolving biotechnology and the unmet needs of diverse patient populations; and
10. Encourages the Secretary of the Department of Health and Human Services and the Secretary of Commerce to develop a coordinated approach to spur private investment with the inclusion of representative of small business biotechnology companies, research facilities, and Federal agencies with a strategic initiative to facilitate development and preserve these small business biotechnology firms and coordinate resources and funding mechanisms for this purpose.
11. Encourages the setting aside of all or a portion of fines and penalties collected by the U.S. Justice Department and other Federal agencies in the settlements related to the pharmaceutical industry for the creation of a Biotechnology Development Fund in the U.S. Department of Commerce for the purpose of promoting and commercializing a new generation of biomedical products and processes produced by small, innovative biotechnology companies biotechnology and their diffusion into national, state and local economies to improve the quality of life of people in the United States;

Regulatory Reform Hearing: Biotechnology
October 15, 2013
Rochester, NY

Testimony Submitted by:

Joanne Thompson

Lead Specialist in Government Affairs at Welch Allyn

Testimony before the New York State Senate Majority Coalition
Public Hearing on Biotechnology in Upstate New York: Impact on business, job growth, and taxes
Presented by Joanne Thompson, Lead Specialist, Government Affairs, Welch Allyn
October 15, 2013

Good afternoon. Our sincere thanks to Senators Gallivan, Valesky, and Robach for the opportunity to participate in today's hearing. I am pleased to represent Welch Allyn, and welcome the opportunity to discuss a few of the challenges that we have found with the current regulatory environment in New York State.

Welch Allyn is a leading global healthcare company that offers a complete range of digital and connected diagnostic solutions that help reduce risk and enhance workflow in a variety of clinical settings. Our company specializes in helping doctors, nurses and other frontline practitioners across the globe enhance care by developing innovative products, breakthrough technologies and cutting-edge solutions that improve patient outcomes, safety and satisfaction

Founded in 1915, Welch Allyn is a family-owned business that employs nearly 2,500 employees in 26 different countries. Our corporate headquarters, located in Skaneateles Falls, NY, houses approximately 1,150 total employees, and is the company's largest manufacturing site, producing a wide variety of products, including physical assessment devices, stethoscopes, cardiopulmonary devices, patient monitors, blood pressure cuffs, endoscopic devices, and women's health products.

For nearly 100 years, Welch Allyn has done business in New York State, and is committed to remaining in this state. That said, the current regulatory environment within the state can be complex and challenging to businesses like ours. To that end, we'd like to discuss the areas of tax reform as well as the Medicaid Redesign Health Technology Assessment process.

The New York State Corporate Income Tax system is complex and burdensome, and is one of the primary reasons why the State is consistently ranked as one of the most challenging state for companies to do business in, based on the Tax Foundation annual Business Tax Climate rankings. We urge the State to consider eliminating the corporate income tax for manufacturers. We also ask that the State consider revising Article 9A of the Corporate Income Tax code to remove the multiple ways to calculate tax, as this requirement is complex and burdensome. The sales and use tax is also onerous and overly complicated. We believe that the State would have a competitive advantage over other states, were New York to consider making the sales and use tax less so.

We'd also like to draw your attention to the Health Technology Assessments that are a part of the Medicaid Redesign. Health technology assessments are the process whereby the Department reviews certain medical technologies and procedures in order to determine if those technologies and procedures should be covered under the Medicaid program. To date, such reviews in New York have included, among others, certain treatments for low back pain, implantable infusion pumps for non-cancer pain, and percutaneous coronary intervention in certain circumstances.

Medical technologies like these are extensively reviewed at the federal level, by the FDA, the Agency for Healthcare Research and Quality, and the Center for Medicare and Medicaid Services. We feel that similar reviews at the state level are unnecessarily burdensome and duplicative.

We appreciate the Department of Health's desire systematically review such technologies and procedures in order to ensure that covered medical benefits are both cost effective and medically effective, but in each of the above decisions, the Department did not provide an opportunity for public comment or participation in the assessment process. We feel that a transparent and well informed decision making process is essential to making fair and equitable decisions regarding health care coverage.

To that end, we ask that the State create a health technology assessment committee.

The legislation creating a Health Technology Assessment Committee has been introduced by Senator Kemp Hannon and Assemblyman Joseph Morelle. We applaud the efforts of these lawmakers, and urge their fellow lawmakers to pass S4509 and A7528.

The health technology assessment committee would provide advice and make recommendations regarding coverage of health technology for purposes of the state Medicaid program. The committee would be comprised of individuals appointed by the Commissioner and would be a cross section of those who are licensed to practice medicine, nurses, the medical device/health technology industry, individuals with expertise in health technology assessment, consumers, and a chairperson who is a member of the Health Department.

The group would meet regularly. Notice of meetings and potential coverage decisions would be made to the public, and interested parties would be allowed to provide public comment as to health technology decisions that are up for review.

Decisions made by the Health Technology Assessment committee would be based on patient safety and clinical effectiveness, and the Commissioner would provide public notice of the final determinations.

Again, we would like to thank Senator Hannon and Assemblyman Morelle for their responsiveness and advocacy, and urge their fellow lawmakers to join them in passing S 4509 and A7528, creating a health technology assessment committee for the Medicaid program.

Thank you, again, for your time and consideration.

Regulatory Reform Hearing: Biotechnology
October 15, 2013
Rochester, NY

Testimony Submitted by:

Mel Kurtz

President of Quasar Energy Group

quasar
energy group

October 15, 2013

Good afternoon and thank you for allowing me to present testimony to the New York State Senate Majority Coalition. Communicating with decision makers is critical because ***innovation always precedes legislation and regulation***. Without this type of open dialogue how would our leaders know what innovation has come to fruition and where it can improve our quality of life? I am honored to be part of the state's concerted effort to identify and eliminate costly regulations that strangle business and job growth in the biotechnology industry. My comments will specifically address regulatory and legislative changes that will accelerate the development of the anaerobic digestion industry.

quasar energy group is a Cleveland, Ohio based anaerobic digestion and renewable energy company. Anaerobic digestion is a natural process in which microorganisms break down organic waste in the absence of oxygen. The process includes receiving organic residuals and reducing their volume through conversion to renewable energy and nutrient rich fertilizer. quasar recently completed the construction of two new digesters in the Buffalo/Niagara Region and we have fourteen other facilities operating across Ohio and our first facility in Massachusetts. We are also in the pre-development stage of four additional projects in New York.

Anaerobic digestion is the starting point for sustainable solutions with economic benefits that will affect every New Yorker. The technology presents an immediate waste management solution for the Greek yogurt industry and all processors of dairy products. From 2007 to 2013, New York's Greek yogurt industry has tripled in size[1] and for every ounce of yogurt produced, almost three ounces of acid whey and other byproducts must be managed[2]. It is estimated that approximately 150 million gallons of acid whey are being produced each year in the Northeast, led by New York[3]. Anaerobic digestion is a solution for managing this waste while generating clean renewable energy that can be sold to adjacent businesses in the form of combined heat and power, added to the local utility grid or sold as a less expensive, lower emission motor vehicle fuel. Since 2006, quasar has demonstrated that anaerobic digestion is an economic development and job creation reality. Most notable is that the process, in every case, is less expensive than traditional waste management and renewable energy options.

Recommended Changes - Anaerobic Digestion is Not Just for Farms
It is a mistake to legislatively pigeonhole anaerobic digestion as a farm based technology. Excessive interconnection fees and restrictive virtual net metering policies stifle the anaerobic digestion industry by constraining development to farm based applications. New York State Consolidated Laws, Public Service Law, Article 4[4] caps the interconnection fees for customer-generators who own or operate farm waste electric generating equipment at five thousand dollars ($5,000). Under this rule, electricity generated from biogas is capped at one megawatt and must be derived via anaerobic digestion of

[1] May 22, 2013 Modern Farmer: Whey Too Much: Greek Yogurt's Dark Side
[2] November 21, 2012 NPR: Why Greek Yogurt Makers Want Whey to Go Away
[3] May 22, 2013 Modern Farmer: Whey Too Much: Greek Yogurt's Dark Side
[4] New York Consolidated Laws, Public Service Law, Article 4

[redacted]

agricultural waste that is at least fifty percent animal manure. Interconnection fees for digester projects that do not fall under this rule are not capped, resulting in a disparity of rates between utilities. For instance, to interconnect a one megawatt digester in West Seneca, New York NYSEG charged more than eighty thousand dollars ($80,000), but, to interconnect a similar one megawatt facility in Wheatfield, New York National Grid charged more than three hundred thousand dollars ($300,000).

Whether located on a farm processing manure and milk byproducts or at a merchant site processing similar waste streams and sewage sludge, all same size generators should be charged similar predictable fees to interconnect to the electric utility grid. All digester projects should also be afforded the opportunity to benefit from New York's virtual net metering policy. The policy is currently restricted to customer-generators operating farm waste based electric generation equipment using biogas produced by at least fifty percent manure[5].

It is important to understand that a digester cannot operate on a diet of 100% acid whey – a consistent base-load of material, such as manure or sewage sludge, is required to stabilize the biology. Sewage sludge also improves the economics of anaerobic digester projects because of tipping fees while sustainably diverting waste from landfills, chemical processes and incinerators.

The New York State Department of Economic Development's Environmental Investment Program (EIP) offers grants up to five hundred thousand dollars ($500,000) toward projects that lead to measurable recycling, pollution prevention and sustainable economic development results[6]. A program like this has the potential to encourage the construction of anaerobic digesters across the state – except that it specifically excludes waste-to-energy projects and projects that include sewage sludge. To promote an industry that offers lower cost waste management solutions while contributing to regional economic development initiatives and environmental improvement needs, the program should be revised to include 1) recycling projects that convert waste to energy, and 2) sewage sludge as an approved organic material.

Conclusion:
New York's legislators and regulatory agencies can encourage continued job growth and economic development in the biotech industry AND the Greek yogurt industry simultaneously by extending the interconnection cap and virtual net metering to all digester projects and by expanding the Environmental Investment Program to include waste-to-energy projects with sewage sludge. If this public hearing encourages legislators and regulators to consider the BIGGER opportunity for anaerobic digestion on or off farm they could set in motion a transformation that will be truly meaningful for New York, its residents and its business owners.

Thank you for allowing me to offer this testimony. I would be pleased to address any questions at this time.

Mel Kurtz

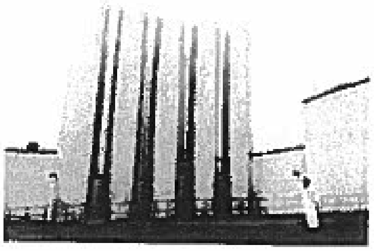
Mel Kurtz
President

[5] New York Consolidated Laws, Public Service Law, Article 4
[6] 2013/2014 Empire State Development: Environmental Investment Program Guide

[redacted] [redacted]

Back NPR Home

Why Greek Yogurt Makers Want Whey To Go Away



NPR

Most of the gleaming steel tanks outside Fage's yogurt factory hold milk. One, however, holds the yogurt byproduct whey.

Published: November 21, 2012
by Dan Charles

A few months ago, I let you in on a little secret about Greek yogurt. Not all of this extra-thick, protein-rich yogurt is made the old-style way, by straining liquid out of it it. Some companies are creating that rich taste by adding thickeners, such as powdered protein and starch.

Judging by comments that I heard, a lot of people feel rather passionately that the original, strained version is morally superior. But here's another little secret: That traditional process for making Greek yogurt is also quite wasteful.

At the Fage factory in Johnstown, N.Y., for instance, **it takes 4 pounds of milk to make 1 pound of authentic Greek yogurt. What happens to the other 3 pounds? It's strained out of the yogurt as a thin liquid called whey**, and getting rid of that whey is actually a headache. Greek yogurt factories have to pay people to take it off their hands.

This may sound confusing if you heard my story about cheese-making the other week. That story described whey as a valuable source of lactose and concentrated protein that ends up in other food products (including the thickened version of Greek yogurt, in fact).

Unfortunately for Greek yogurt makers, their whey isn't nearly as valuable as what you get from cheese-making. The whey from the Fage or Chobani factories contains fewer solids and is more acidic. So far, nobody's figured out a way to make money from it.

What's more, you can't just dump it into some nearby river; that would be an environmental crime.

George Bevington, an engineer who deals with wastewater treatment in Johnstown, says the whey would set off a boom of sugar-eating bacteria, "and that means there'd be no oxygen left in the river, and that means there'd be no fishies left in the river!"

I met Bevington at Johnstown's wastewater treatment plant, which he used to manage. (He still works there as a consultant.) In the distance, less than a mile away, we can see the steel storage tanks of the Fage factory. Fage built its factory there, in fact, so it could pump its whey straight across the fields to this plant.

Not all plants could handle such waste, but this one can. It has something called an anaerobic digester, which is basically a huge tank where bacteria feast on this kind of waste.

"Anaerobic digesters love sugar; they love milk; they love beer," Bevington says. "Anything you can put in a digester that's 'high-strength' waste, bacteria love to eat it."

These helpful bacterial make the whey less harmful — and even convert it into something very useful: biogas, which is mostly methane. That biogas is burned in two powerful electrical generators, and they, in turn, supply most of the power that it takes to run Johnstown's wastewater treatment plant.

When the giant storm Sandy came through New York a few weeks ago and the state's electrical grid started to wobble, engineers simply cut the wastewater plant off from the grid and the plant relied entirely on these generators.

This is the best solution so far to the whey problem, but it's not perfect. It costs Johnstown taxpayers more to run these generators than it would cost to buy the same amount of power from the local utility. To cover that extra cost, Fage still has to pay the city to take the whey off its hands.

In addition, Fage now puts out more whey than the city's digester can actually digest. So the company has to find other takers for about 20 percent of its whey.

So does the Chobani yogurt factory, an hour or so east of here in the small town of East Berlin.

The Chobani factory, which is even bigger than Fage's, isn't fortunate enough to have an anaerobic digester nearby so it hauls most of its whey to farmers like Ken Dibbell, who lives outside the city of Norwich, about 10 miles from the Chobani factory.

The whey goes into the manure storage pit on Dibbell's farm, and eventually it gets spread on hay fields as fertilizer. Some other farmers mix it into their cattle feed.

Dibbell gets paid $300 every time he takes a 6,000-gallon truckload of Chobani's whey. "It's a cash cow," he says. "And anything you can do on the farm to generate cash, safely, you do it."

But there's a limit on how much each farmer can take; too much, and the whey would end up running off fields and polluting nearby streams.

The fast-growing yogurt factories in upstate New York have to dispose of millions of pounds of whey every day. So Chobani has to haul its whey long distances — hours, in some cases — to farmers who can take it.

That gets expensive. The state of New York, which is anxious to keep this yogurt boom going, has asked researchers at Cornell University to look for a better alternative. That alternative might be building more digesters to turn whey into biogas. It might involve new methods for capturing valuable sugars and proteins from the whey. Dave Barbano, a food scientist at Cornell, wrote in an email that "there are many technical possibilities, but making them economically attractive will be the trick." [Copyright 2013 NPR]

TRANSCRIPT:

LINDA WERTHEIMER, HOST:

It's MORNING EDITION from NPR News. I'm Linda Wertheimer.

RENEE MONTAGNE, HOST:

And I'm Renee Montagne. Good morning.

One of the biggest changes recently in America's supermarkets is in the dairy aisle, where Greek yogurt keeps shoving aside its rivals. This thick, protein-rich version of yogurt has become very cool. But the traditional straining process that makes it so thick and rich is also very messy. It leaves behind a thin liquid called acid whey. And getting rid of that whey isn't as easy as you might think, as NPR's Dan Charles reports.

DAN CHARLES, BYLINE: Fage Greek yogurt comes from a ultra-modern, robot-equipped factory in Johnstown, New York. It was built in 2008, and it's already doubled in size.

RUSSELL EVANS: We're supplying yogurt for the whole United States from here...

CHARLES: Russell Evans is director of marketing for Fage U.S.A.

EVANS: ...right from this one plant, from the beaches of California all the way to the islands of Maine, everywhere.

CHARLES: Trucks bring more than a million pounds of milk into this factory every day. Evans explains that because Fage uses the traditional straining process to make their yogurt extra thick, it takes four pounds of milk to make one pound of yogurt. But when I ask him if I could see exactly where the rest of the milk goes, the other three pounds, Evans is stumped at first. Waste management is not exactly his department.

It turns out that the watery stuff that's drained out of the yogurt, the whey, gets pumped into one of the tall storage tanks outside the factory.

EVANS: So I believe that that third, steel silo is where the whey is. It's being collected there.

CHARLES: Getting rid of that whey, though, is complicated. Whey comes in different forms. Cheese factories produce lots of whey, too, but that whey is thicker. It has more sugar and protein in it. So big cheese makers filter out that lactose and concentrated protein and sell it to other food companies. It's a good business.

Greek yogurt factories, though, aren't so lucky. Their whey is thinner and more acidic and nobody's figured out a way to make money from it. But if you just poured it into a river, it would be an environmental crime.

George Bevington, an engineer who deals with waste water treatment, says the whey would set off a boom of bacteria in the river, feeding on the sugar.

GEORGE BEVINGTON: And that means there'd be no oxygen left in the river and that means there'd be no fishies left in the river.

CHARLES: Bevington and I are standing outside Johnstown's waste water treatment plant. And in the distance, less than a mile away, we can see the steel storage tanks of the Fage factory. It's so close the company can pipe most of its whey straight over here for treatment. Not every waste water plant can handle whey, but this one can, because it has what's called an anaerobic digester: a huge tank full of special bacteria that feasts on this kind of waste.

BEVINGTON: Anaerobic digesters love sugar, they love milk, they love beer. Anything you can put in a digester that's high-strength waste, bacteria love to eat it.

CHARLES: And these very helpful bacteria convert it into something useful: Biogas, mostly methane.

BEVINGTON: What we do is, we take this biogas, around 240 cubic feet per minute, we split that to two engines, and we're generating power 24/7.

CHARLES: The generators deliver enough power to run this plant. When Superstorm Sandy came through and the electrical grid in New York started to wobble, engineers here simply cut themselves off from the grid and relied entirely on gas from their own digesters.

It's the best solution, so far, to the whey problem, but it's not perfect. It costs Johnstown's taxpayers more to run these generators than it would cost to buy the same amount of power from the local utility. To cover that extra cost, Fage still has to pay to city to take the whey off its hands.

Also, Fage now puts out more whey than the city's digester can actually digest. So Fage has to do the same thing that even bigger Greek yogurt factory not far away, the Chobani factory, does with its waste. The yogurt makers haul that whey back to farmers.

Farmers like Ken Dibbell, who lives outside the town of Norwich, about ten miles from the Chobani factory. Dibbell mixes the whey together with manure from his cows and spreads it on his hay fields as fertilizer. Some other farmers mix it into their cattle feed. Dibbell gets paid $300 every time he takes a 6,000 gallon truckload of the factory's whey.

KEN DIBBELL: It's a cash cow. And anything you can do on the farm to generate cash, safely, you do it.

CHARLES: But there's a limit on how much each farmer can use: any more than that, and the whey would end up polluting nearby streams. And there's so much whey coming out of these fast-growing yogurt factories in upstate New York, Chobani is hauling that waste a couple of hours, in some cases, just to find farmers who can take it - that gets expensive.

So the State of New York, which is anxious to keep this yogurt boom going, has set up a task force with researchers from Cornell University to look for a better alternative. Maybe it's turning more whey into biogas; maybe it's filtering out those valuable sugars and proteins. There are lots of technologies, one of the researchers said, but the economics are tricky.

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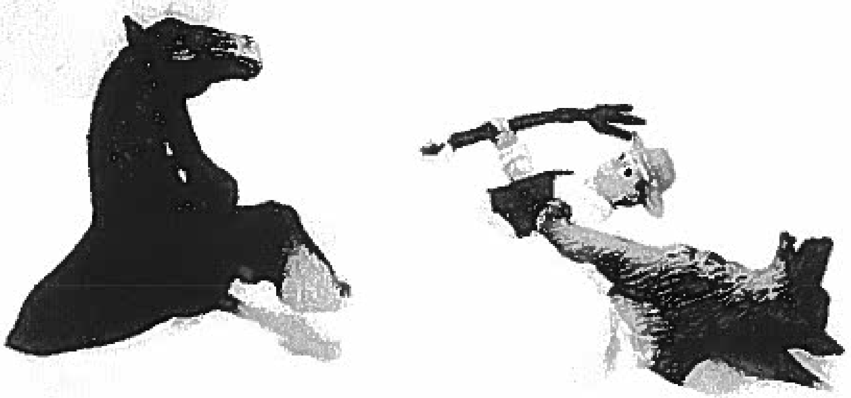


Whey Too Much: Greek Yogurt's Dark Side

Greek yogurt is a booming $2 billion a year industry — and it's producing millions of pounds of waste that industry insiders are scrambling to figure out what to do with.

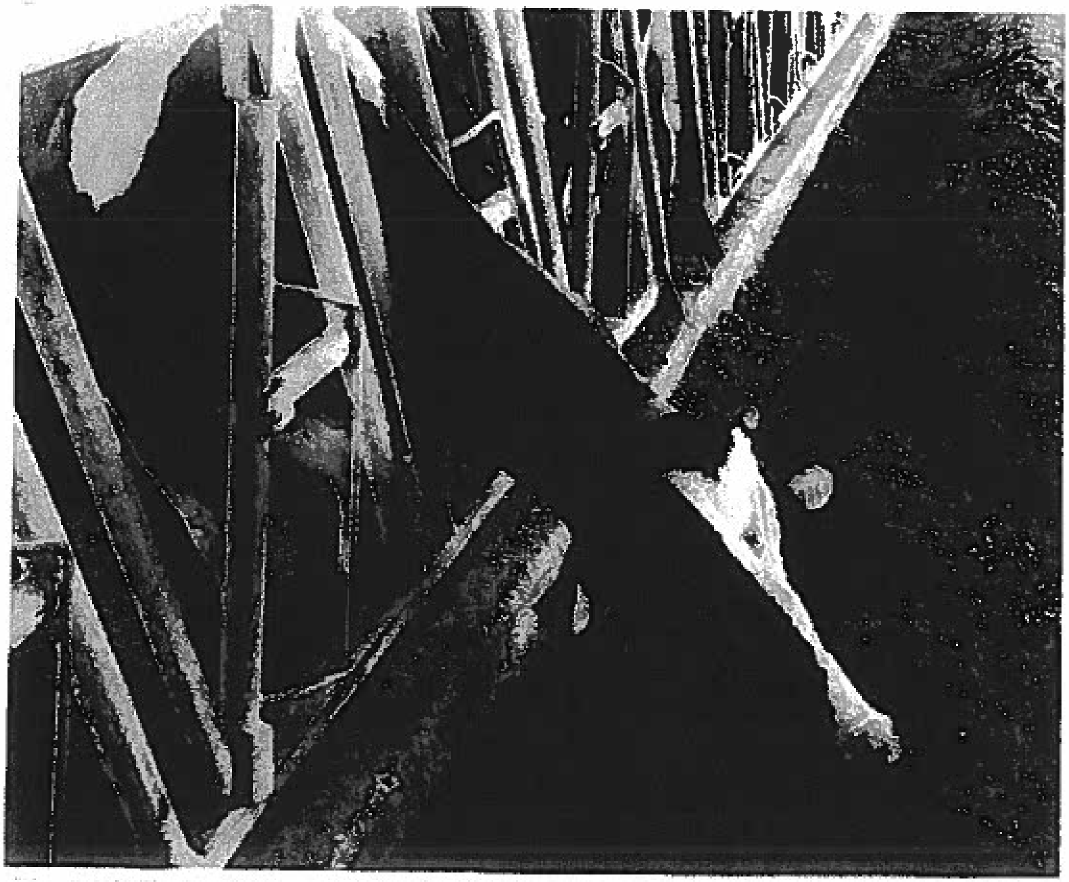
By [illegible] on May 22, [illegible]

Twice a day, seven days a week, a tractor trailer carrying 8,000 gallons of watery, cloudy slop rolls past the bucolic countryside, finally arriving at Neil Rejman's dairy farm in upstate New York. The trucks are coming from [illegible] plant two hours east of Rejman's Sunnyside Farms, and they're hauling a distinctive byproduct of the Greek yogurt making process acid whey.

For every three or four ounces of milk, Chobani and other companies can produce only one ounce of creamy Greek yogurt. The rest becomes acid whey. It's a thin, runny waste product that can't simply be dumped. Not only would that be illegal, but whey decomposition is toxic to the natural environment, robbing oxygen from streams and rivers. That could turn a waterway into what one expert calls a "dead sea," destroying aquatic life over potentially large areas. Spills of cheese whey, a cousin of Greek yogurt whey, have killed tens of [illegible] around the country in recent years.

The scale of the problem or opportunity, depending on who you ask is daunting. The [illegible] has become one of the biggest success stories in food over the past few years and total yogurt production in New York nearly tripled between [illegible] and [illegible]. New plants continue to open all over the country. The Northeast alone, led by New York, produced more than 150 million gallons of acid whey last year, according to one estimate.

And as the nation's hunger grows for strained yogurt, which produces more byproduct than traditional varieties, the issue of its acid runoff becomes more pressing. Greek yogurt companies, food scientists, and state government officials are scrambling not just to figure out uses for whey, but how to make a profit off of it.



[illegible]

Chobani is so desperate to get rid of the whey, they pay farmers to take it off their hands.

Rejman, a blonde-haired 37-year-old, and third-generation dairy farmer with a Cornell animal science degree, started accepting the stuff a few years ago after a Chobani representative called him out of the blue.

Rejman's workers take the shipments and try to find uses for the whey: mix it with silage to feed to the farm's 3,300 cows; combine it with manure in a giant pit for fertilizer; and even convert some into biogas to make electricity

'How do you handle all the whey without screwing up the environment?'

But it's not so easy to integrate acid whey into the workings of the farm. The silage Rejman feeds his cows, for example, can only soak up so much before becoming unmanageable slop – "like dropping water on your pizza," he says. It's also sort of like feeding your cows candy bars – they like it, but shouldn't eat too much or it upsets their digestive system. It's a problem that Rejman admits defies easy solutions. "How do you handle all the whey without screwing up the environment?"

The root of the whey problem is the very process that gives Greek yogurt its high protein content and lush mouthfeel.

Unlike traditional yogurt, Greek yogurt is strained after cultures have been added to milk. In home kitchens, this can be done . Greek yogurt companies still throw around the term "strained," but in reality industrial operations typically remove the whey with mechanical separators that use centrifugal force

The resulting whey is roughly as acidic as orange juice. It's almost entirely made up of water, but scientists studying the whey say it contains five to eight percent other materials: mostly lactose, or milk sugar; some minerals; and a very small amount of proteins.

Greek yogurt companies trying to keep up with exploding consumer demand in the last few years didn't have a good plan to deal with the ocean of whey they were producing. Now they're racing to find solutions, all the while keeping mum about the results, if there are any: the yogurt industry is highly secretive and competitive.

There are no industry-wide statistics on where all the whey is going, but a typical option is paying to have it hauled to farms near the yogurt factories. There, it is often mixed into feed or fertilizer. Chobani, for example, says more than 70 percent of its whey ends up as a supplement for livestock feed.

***

But there is another possible consumer – babies.

"Because the Greek yogurt production grew so rapidly, no one really had the time to step back and look at the other viable options," says Dave Barbano, a dairy scientist at Cornell.

State and industry officials reached out to Barbano last year following the first-ever , convened by New York Gov. Andrew Cuomo.

Barbano, who specializes in filtration methods for separation and recovery of protein, has his sights set on the tiny amount of protein in acid whey. He believes it might be usable as an infant formula ingredient. But first Barbano has to figure out how to extract the protein in a cost-effective way, and his research is just getting underway.

The concept is roughly modeled on the success that cheese-makers have had selling products derived from their own byproduct – Sweet whey is more valuable and easier to handle than acid whey, as it has a lot more protein, and is easier to dry because it isn't as acidic as Greek yogurt whey. Cheese-makers have developed a lucrative business selling whey protein for use in body-building supplements and as a food ingredient. And Greek yogurt makers are eager to follow suit.

"There are a lot of people coming in and out of New York state looking at whether this is a good opportunity for investment," Barbano says.

***

While Barbano focuses on proteins, researchers in Wisconsin are studying how to extract whey's dominant ingredient: sugar.

Scientists at the [illegible], have been experimenting for nearly a year on how to get edible-grade lactose out of acid whey. Such lactose is valuable as an ingredient in things like icing and as a browning agent in bread. "It's kind of like oil refining: from crude oil you get gas and diesel and other products," says Dean Sommer, a food technologist at the center. "This is the same concept. You figure out what's in there and how to grab it and get value out of it."

Sommer wouldn't describe the filtration process to extract lactose because the industry-financed research is proprietary. But he believes some third-party companies are now considering building plants to convert acid whey into lactose.

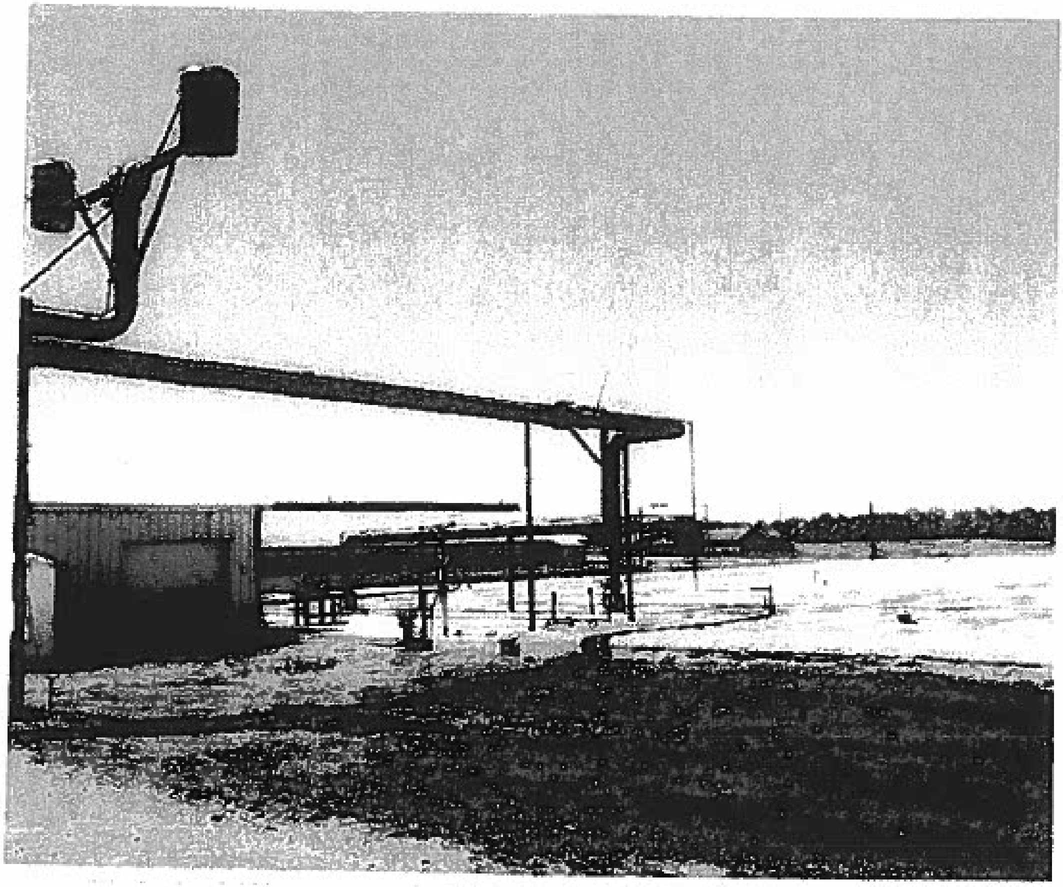
[illegible]

Meanwhile, back at Rejman's farm in Scipio Center, N.Y , they're converting the lactose into methane that can generate electricity.

When the whey arrives from Chobani, some of it is mixed with the vast quantity of manure the farm produces daily. From the manure pit, the light brown soup (basically a river of shit) flows into a 16-foot-deep underground concrete tank known as an anaerobic digester. An innocent looking expanse of cement in a big, green field dotted with dandelions, there's a lot going on inside, where a fetid mix of manure and whey percolate.

The material is heated up and kept in the tank for about 20 days, during which time bacteria break up the organic material — the lactose, in the case of whey — and release gases, including methane. The gas is fed into generators that produce electricity to power the farm and to sell to the local utility for use elsewhere.

But the setup, which Rejman and his brother had installed five years ago, required a big capital investment that would be out of reach for small farms. It cost $4.5 million, $1 million of which the Rejmans got back through a state subsidy.



They primarily built the digester for what Rejman calls "odor control" for their neighbors, as digested manure smells much less than the raw stuff ("You ever take a shit in the toilet and leave it in there?" Rejman asks, by way of explanation.) The whey is an afterthought. In any case, just 20 of New York's the state's 5,200 dairy farms have an operating digester, according to Curt Gooch, a waste management engineer at Cornell.

And if any of the big yogurt companies have come up with a better whey solution, they're being cagey about it. "We are currently exploring other options for our whey, but nothing we are ready to discuss at this time," says Chobani spokeswoman Lindsay Kos. Dannon spokesman Michael Neuwirth says the company is looking at the nutritional possibilities of whey, but "we don't have any plans to announce at this point."

Home Greek yogurt makers have experimented with using whey in and . But no one expects a bread or pickle factory to be able to absorb tens of millions of gallons of it.

Meanwhile, the tidal wave of acid whey is not slowing down As one producer said at New York's Yogurt Summit: "If we can figure out how to handle acid whey, we'll become a hero."

Photos by Justin Elliott. *Photo illustration by Andy Wright.*

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You Might Like

Regulatory Reform Hearing: Biotechnology
October 15, 2013
Rochester, NY

Testimony Submitted by:

Tom Fitzgerald

President of OyaGen, Inc.

Statement of Thomas Fitzgerald
Biotechnology in Upstate New York

October 15, 2013

Good morning Senator Robach.

My name is Tom Fitzgerald and I would like to thank you for this opportunity to share some thoughts regarding the opportunities and challenges faced by Biotech in Upstate NY.

I have been involved in the development, regulation and marketing of pharmaceuticals for the past 25+ years. I have worked for a number of large and small US and European biopharma companies including SmithKlineBeecham, Fisons here in Rochester and Aventis.

During that time I have worked with, led or advised a range of businesses in the development, regulation and commercialization of therapeutics, drug delivery systems and medical devices.

Over the past few years, I have had the opportunity to work with a number of early stage life science companies, including several located in our region. I have also advised various economic development authorities in the US and Europe on their efforts to generate and attract early stage businesses in the life sciences. My perspective reflects those experiences.

I am currently the President and COO of OyaGen Inc., a University of Rochester spin-out, founded by Dr. Harold Smith who is also here today. OyaGen is engaged in the discovery and development of a range of promising drug candidates for the treatment and functional cure for HIV-AIDS. I am also involved with several other early stage life science businesses.

Based on my personal experience, New York has the potential to and should be a leader in biosciences, not only in an academic sense, but as key driver in making available the drug products, devices and diagnostics that improve our health and quality of life.

In my opinion Upstate New York has the real potential to emerge as a Biotech Hub. It has much of what is essential to attract and foster the development of biotechnology:

- We have world class research institutions, colleges and hospitals driven by faculty and researchers with the skills and creativity to generate innovative approaches to the diagnosis and treatment of important diseases.

- The region's history speaks to an entrepreneurial spirit in our people and evidences skill in innovation and the generation of intellectual property - the life blood of biotech.

- Our people are remarkably well-educated in the life sciences and the ancillary disciplines and skills necessary to develop and grow biotech businesses. This notably includes the graduates from our many Universities and colleges who have and will commit to staying in the region if meaningful career opportunities such as those offered by the life science companies were available to them.

- Beyond our local human resources, the region offers a quality and style of life that enables young scientists and executives access to affordable housing and a cultural environment that easily outweighs our, at times, challenging winters. Upstate is financially manageable and livable, and this is not adequately exploited by the State.

However, biotechnology in New York, particularly in Upstate New York is not thriving and the small victories of individual localities are too often the result of the individual skills and luck of the local entrepreneur rather than the result of a comprehensive plan to develop biotech as an engine of economic growth.

Biotech has particular needs to flourish that require understanding and nuance that is known in the biotech industry but is often difficult to grasp by those not engaged in it on a day to day basis. The time to market, required capital investment, the importance of intellectual property, the rigors of the regulatory path to market and the international competitive environment require a sophisticated understanding that cannot be fully appreciated from the periphery.

Too often we see public monies intended to support and advance biotech yield little or no result because it is spread too thin across competing local companies loosely grouped as "High Tech". Often money is committed to public and private institutions with interests and focus that are not primarily biotech.

Seed stage investment and early stage financing are too often only available outside NY State which puts immediate pressure on the founders to locate closer to funding or go through the time and expense of fundraising away from home.

The responsibility for many of the current efforts to encourage local biotechs are entrusted to entities that have investment portfolios too broad based in scope and geographically diffuse to significantly alter the current situation. As a result most of our biotechs are running in place or becoming dormant for lack of meaningful funding, inadequate equipment and services and the exodus of experienced biotech professionals from the state.

Early stage biotechs face a number of challenges to success. Some of these challenges are true to all early stage life science businesses not just those in New York. We all are familiar with companies that experience clinical failures or unanticipated adverse events in the development process.

These fledgling biotech businesses thrive best when they have access to experienced management and scientific talent, increasingly sophisticated equipment and specialty expertise and systems. They need access to these things without unnecessarily stripping away the limited and difficult to get cash resources that drive product development.

There are a several challenges and opportunities to our biotechs which New York State government is in a position to address:

New York's lack of a concentrated, integrated biotech infrastructure which limits New York's ability to efficiently and effectively tie into the global bioscience community in the way Boston and San Francisco do. Upstate is financially manageable and livable, and this is not exploited by the State. New York State government could play pivotal role in creating a Biotech hub or several hubs which build on the existing but scattered local efforts and infrastructure that now exist.

In establishing these Biotech Hubs, New York should implement a coordinated support system for Biotechs enabling shared access to biotech appropriate facilities, state of the art equipment, subject experts and service providers to encourage and incentivize biotechs to locate their operations in proximity to these centers and other biotechs. By encouraging collaboration including cost sharing for some of their employees, management, technical experts and support services in their early development stages, the drain on their vital capital will be reduced. This capital could enable biotechs to experience a gradual and manageable growth process unburdened by institutional overhead and the whims of venture capital. In doing this the State will begin to grow the infrastructure and develop the critical mass necessary to sustain long term growth of the sector.

New York lacks a coordinated, effective public advocacy for the distinct needs of Biotech. Perhaps a commission or a working group of industry experts and executives would be useful to give focus to this initiative. States that have been successful in establishing biotech hubs did not do so by accident. Each recognized the potential value of biotech and committed the resources that enabled them to become a dynamic economic driver for their state's economy.

In recent years, Europe has also begun to aggressively recruit existing US Biotechs and their personnel with an attractive range of incentives to relocate or establish research and development activities offshore. All offer examples of programs and approaches which New York could select from as models.

I believe there is an opportunity for New York to emerge as a significant force in biotech but it requires commitment and follow through. The increasing number of biotechs emerging across the state indicates that something is going on here and needs the encouragement and support of the State government.

I thank you for the opportunity to share my thoughts on Biotech with you.

Regulatory Reform Hearing: Biotechnology
October 15, 2013
Rochester, NY

Testimony Submitted by:

Dr. Larry Buckley

Department Head of the School of Life Sciences at the Rochester Institute of Technology

Introduction

Good afternoon Senators Gallivan, Valesky, Marchione, Carlucci, and Robach and distinguished members of the panel. Thank you very much for allowing me the opportunity to speak with you this afternoon concerning the state of biotechnology in Upstate New York. Your initiative in calling for hearings related to the health of biotechnology in our region is timely and strategic. I'm happy to provide you with an update on the role RIT has played as a partner with New York State in preparing the biotechnology workforce and identifying impediments to that ongoing endeavor.

The New York State-RIT shared history in Biotechnology and Bioscience

The Rochester Institute of Technology and New York State have a long and productive relationship working together to promote Biotechnology and Bioscience in Upstate NY. Through NYS Senate support, a 1999 workforce study at RIT found that levels of workforce training up to that point in New York were insufficient to meet the demands of a growing biotech and bioscience industry. The study also identified that the upstate region lacked sufficient advanced biotech training for the professional development needs of the existing biotech workforce in the area.

In 2003 the New York State Senate and Assembly partnered again with RIT to fund the RIT Center for Biotechnology Education and Training (CBET), a 38,000 square foot state-of-the-art facility dedicated to providing the education and training for the type of workforce needed to support the projected growth in the biotechnology and bioscience industries. This facility continues to provide industry and K-12 partners with essential training and consulting services for the promotion of Biotechnology and Bioscience workforce enhancement.

The RIT Biotechnology Program is enjoying its 30th anniversary this year, and was the first BS Undergraduate degree in Biotechnology in the country. During its history the program has grown steadily by providing extensive hands-on laboratory study using work-place level equipment and protocols, ample opportunity for independent research and student teaching experiences. The majority of research-active faculty co-publish peer-reviewed research with their students. Over the history of the program more than 1500+ graduates have emerged to fill position in industry, government and academia.

Enrollment and support of Biotechnology and Bioscience at RIT

The historically successful Biotechnology, Bioinformatics, and Biology programs at RIT currently enroll 350+ students in the RIT College of Science. New Bioscience programs at RIT include the 2007 Biomedical Sciences Program with 250+ students in the College of Health Science and Technology and the 2010 Biomedical Engineering Program with another 250+ enrolled in the Kate Gleason College of Engineering. These programs in total amount to over 850 students in Biotechnology and Bioscience related disciplines at RIT providing 200+ graduates to the workforce each year.

The RIT CBET provides resources in the form of professional development opportunities for local K-12 administrators and instructors who wish to augment their skills in STEM disciplines. This training is highly customizable and unique to each school district and industrial partner that participates. The services can also include collaboration and consulting services with principal investigators in the STEM fields at RIT.

CBET also regularly engages local K-12 school districts to provide bioscience exploration programs for middle and high school students. These programs are intended to strengthen the STEM discipline training of these students and prepare them for college programs requiring strong backgrounds in science and technology fields such as biotech and bioscience.

Workforce skillset needs and how BS and MS programs can meet them.

RIT's current strengths in 4-year BS programs continues to support the traditional skillsets needed for successful careers in biotechnology and bioscience (microbiology, molecular biology, and tissue culture) that have continued to flourish as technologies such as whole genome sequencing make the cost of research lower each year. RIT undergraduate programs in Biotechnology and Bioinformatics provide RIT students with access to undergraduates research advances necessary to support innovation in applications. RIT's Biomedical Engineering program builds on those foundational STEM principles and prepares students with undergraduate research that leads to innovative applications in areas such as tissue engineering.

Biotechnology and Bioscience research and development growth since the inception of CBET increasingly include the necessity for more and more analytical skills in the maturing fields of proteomics, genomics, and bioinformatics. Employers are telling us that the most high value graduates are those with independent wet and dry lab skills, bench and analytical skills. Our MS Bioinformatics graduates, and Biotechnology undergraduates who participate in Undergraduate Research Experiences at RIT and other institutions are those in the most demand.

This evidence has led us to begin to form an external advisor board for the Biotechnology and Bioscience Programs at RIT to be charged with discerning what type of post-secondary degree is optimally suited to gaining the skill sets needed by a modern biotechnology and bioscience graduate. We know that undergraduate research experience leads to successful lab employment and it may in fact be the case that an MS degree with its built-in research component is the kind of training that brings graduates the enhanced level of skill necessary to compete for today's biotech and bioscience positions. Those of us involved at RIT with Biotechnology and Bioscience undergraduate program are discussing the benefits and risks of producing an MS program in Biotechnology or Bioscience to both the employability of our graduates and Upstate Biotech workforce balanced against the increased costs of graduate programs in general compared to undergraduate programs.

How New York State and RIT can continue to promote Biotechnology and Bioscience.

RIT and New York State government can enhance the Biotechnology and Bioscience workforce in several key areas.

1. **Assess workforce needs and program effectiveness**
    a. A update to the 1999 biotechnology workforce study would really help us to know how well we've done and plan for future work by identifying:
        i. Workforce progress made since 1999.
        ii. Areas that remain in need of improvement (Next-Generation sequencing training).
        iii. New areas of Biotech and Bioscience that need to be addressed through workforce training (big-data, tissue engineering).
    b. A study compiled from graduates to assess their success in Biotechnology and Bioscience careers.
    c. An assessment and examination of Biotech and Bioscience programs using an external advisory board to examine the effectiveness of programs at placing graduates in careers.
2. **Control costs to students for Biotech and Bioscience education.**
    a. RIT has one of the lowest tuition increases and lowest overall tuition of private schools in NYS. ($32,700/yr. = tuition)
    b. Keep student loan rates low.
3. **Control costs to educators and industry**
    a. Leverage group buying power of University, State and Federal labs to purchase equipment and consumables necessary for lab research.
    b. Streamline the process of setup and maintenance of animal care facilities that now are far too costly to maintain at most smaller facilities.
4. **Keep principal investigators and students at work in their labs.**
    a. Increase funding levels for State and Federal research agencies
    b. Sponsor summer undergraduate research initiative targeted specifically at biotechnology and bioscience training.
    c. Increased funding for graduate student stipends and scholarships so MS programs can produce more highly trained Biotech and Bioscience graduates.
5. **Enhance the profile of STEM disciplines in K-12 education.**
    a. Summer camps (CBET RIT)
    b. Support teacher-led school initiatives with STEM components
    c. Charter Schools focused on STEM education

Appendix J

Additional Submissions

Pages

475 - 489 Thomas M. Pitegoff
Chair, Legislation Subcommittee of the Franchise, Distribution and Licensing Committee

491 - 500 William Y. Crowell, II
Whiteman, Osterman & Hanna on behalf of the Rent Stabilization Association

501 - 514 Joseph M. Condon
Community Housing Improvement Program, Inc.

Additional Submission
Of

Thomas M. Pitegoff

Report of the Legislation Subcommittee

of the
Franchise, Distribution and Licensing Committee

of the

New York State Bar Association's Business Law Section

November 10, 2009

Subcommittee Members:

Thomas M. Pitegoff – Chair
Andre R. Jaglom
David J. Kaufmann
Harold L. Kestenbaum
David W. Oppenheim
Richard L. Rosen

Background

In a meeting on April 28, 2009, of the Franchise, Distribution and Licensing Committee (the "Committee") of the New York State Bar Association's Business Law Section, the Committee appointed a legislative subcommittee (the "Subcommittee") to develop and recommend changes to the New York Franchise Act (GBL Article 33, §680 et seq.) and regulations. This is the Subcommittee's report.

In January 2007, after years of study, the Federal Trade Commission issued a thoroughly revised trade regulation rule on franchising (16 CFR Part 436) (the "Amended FTC Rule" or the "Rule"), replacing the Commission's 1978 franchise rule. The Amended FTC Rule, which became mandatory in July 2008, preempts inconsistent state laws except to the extent that the state laws afford prospective franchisees protection equal to or greater than the Amended FTC Rule.

The North American Securities Administrators Association ("NASAA"), comprised of representatives of the state authorities that administer state franchise laws, adopted the disclosure requirements of the Amended FTC Rule with minimal additional requirements when NASAA issued new NASAA Franchise Registration and Disclosure Guidelines effective in July 2008 (the "Amended NASAA Guidelines" or the "Guidelines"). The Amended NASAA Guidelines replaced the Uniform Franchise Offering Circular Guidelines that NASAA had adopted in 1993. The 1993 guidelines had replaced the original guidelines adopted in 1975 by the Midwest Securities Commissioners Association, NASAA's predecessor.

Because the Amended FTC Rule substantially preempts the New York Franchise Act, the New York State Department of Law now accepts franchise disclosure documents for registration that follow the Amended FTC Rule and the Amended NASAA Guidelines, even though neither the Rule nor the Guidelines are reflected in the state law or regulations.

The Subcommittee drafted revisions to the New York Franchise Act to remove and revise the preempted requirements to be consistent with the requirements of the Amended FTC Rule. The Subcommittee made a number of other revisions intended to improve the law and to improve the legal environment for franchising in the state.

The Subcommittee also proposes that the Department of Law issue new regulations modeled after the Amended NASAA Guidelines. These new regulations would replace NYCRR, Title 13, Chapter VII, Part 200, dealing with franchise offerings. The Subcommittee recommends that the Department of Law issue these new regulations to become effective when the changes in the New York Franchise Act become effective.

Attached to this report is the text of the Subcommittee's proposed revised New York Franchise Act and regulations. The text of the revised Act is marked to show the changes from current law. The text of the regulations completely replaces Part 200 of the current regulations. Large portions of this text are essentially the same as the Amended NASAA Guidelines, with minimum revisions to fit in the context of the New York statutory and regulatory structure.

Summary of the Proposed Changes

Broadly speaking, the proposed changes accomplish several basic goals. First, the changes eliminate provisions of New York franchise law that are preempted by the Amended FTC Rule and replace them with provisions that restate the federal requirements. Second, the proposed changes align the scope of coverage of New York franchise law more closely with the franchise laws of other states, eliminating traps for the unwary and making New York a friendlier place to do business.

Specifically, the proposed Act and regulations together would accomplish the following significant improvements, among others:

- conform the required contents of a franchise disclosure document to the requirements of the Amended FTC Rule and the Amended NASAA Guidelines;

- conform the registration and disclosure procedures more closely to the Amended NASAA Guidelines and comparable requirements of the Amended FTC Rule;

- conform the definition of a franchise more closely to federal law and to the franchise laws of other states;

- remove the broker registration requirement;

- remove the requirements to file sales literature and to include a special NY disclaimer;

- remove the requirement of a franchisee to disclose on resale of the franchise; and

- add exemptions to conform to those of the Amended FTC Rule and the laws of other states, including offers and sales:
  - of franchises outside the U.S.;
  - of single master franchises within the state;
  - of franchises that require an initial investment of at least one million dollars;
  - of franchises to franchisees that have a net worth of at least five million dollars; and
  - of franchises to former franchisor insiders.

Section by Section Analysis – Proposed Changes to GBL Article 33, §680 et seq.

Section 680 – Declaration of Policy

Subsection (1) of the current law is an anachronism and is removed. Subsection (2) sufficiently and accurately reflects the Act's intent and purpose.

Section 681 – Definitions

Advertisement. The definition of "advertisement" is updated to incorporate technologies that did not exist when the law was written.

Fractional Franchise. This definition is moved out of the regulations and made a part of the statute. The definition is the same as the definition of a "fractional franchise" under the Amended FTC Rule.

Franchise. The definition of "franchise" is substantially revised to conform closely to the definition of a "franchise" used in the Amended FTC Rule and the franchise laws of other states.

The current New York definition of a "franchise" is uniquely broad. Under current New York law, a business arrangement is a franchise if either (1) a party is granted the right to offer, sell or distribute goods or services under a marketing plan or system prescribed by a franchisor and the franchisee is required to pay a franchise fee or (2) a party is granted the right to offer, sell or distribute goods or services substantially associated with the franchisor`s advertising, trademark or certain other intellectual property rights designating the franchisor and the franchisee is required to pay a franchise fee. This bifurcated definition covers, for example, many licensing arrangements that were never intended to be covered by franchise law. New York now requires companies that would not be viewed as franchises in any other state to prepare extensive pre-sale disclosure documents and register their offerings with the state. This discourages some companies from doing business in New York. For others, the unexpectedly broad scope of the law acts as a trap for the unwary. It creates uncertainty, making compliance difficult.

Franchisor. This definition makes it clear that a franchise broker or area representative is not a franchisor because the franchisor actually signs the franchise agreement.

Area Franchise. This definition was deleted. It is unnecessary and describes a subfranchise or master franchise arrangement rather than an arrangement that is commonly understood today to be an "area franchise".

Franchise Fee. This definition was deleted because its use resulted in a circular definition of a "franchise". The specific list of payments that the current law lists as "not the payment of a franchise fee" were moved to a new Section 681.4(b) to accomplish the same purpose by stating that these payments do not constitute a "required payment" for purposes of the revised subsection 681.4(a), which defines a "franchise". These transactions are taken from the current subsection 681.7.

Franchise Sales Agent. This definition was deleted. Franchise sales agents are more commonly referred to in the business as franchise brokers. Their obligations are included within the scope of the new definition of "franchise seller" below, which is similar to the same term in the Amended FTC Rule, and the new definition of a "franchise broker".

Franchise Seller. This definition is new. It is the same definition used in the Amended FTC Rule. It replaces the prior term, "franchise sales agent".

Fraud. In this definition and throughout the revised law, the term "disclosure document" is used in place of the word "prospectus" for the sake of conformity with the FTC Rule.

Person. This definition is expanded to include limited liability companies.

Prospective Franchisee. This definition is new. It is the same definition used in the Amended FTC Rule. This term is used throughout the Act, and this definition clarifies its meaning.

Publish. This definition is expanded to include electronic communications.

Sale. This definition now excludes the sale of a franchise by a franchisee for its own account when the franchisor plays no significant role in arranging for the sale. This is consistent with the laws of other states. The buyer can examine the operating history of the business and does not need to rely on the disclosure document unless the franchisor actively recruits to buyer or requires that the buyer sign a materially different form of franchise agreement.

Subfranchisor. This definition was revised for the sake of clarity.

Section 682 – Scope

This section replaces the same section of the current law in its entirety. This section of the current law adds nothing substantive to the law and no other state has an analogous provision.

Section 683 – Registration and Disclosure Requirements

Subsection 683.1 simply states that no person may offer or sell a franchise in New York unless the offer has been registered or is exempt.

The items required to be disclosed are contained in the revised regulations and no longer in subsection 683.2 of the statute.

The current subsections 683.5, 683.6 and 683.7 are renumbered (as 683.2, 683.3 and 683.4) and revised for consistency with the revised statutory structure and language.

New subsection 683.5 derives from California's "risk-based review" protocol. It is intended to optimize the review process by requiring franchise examiners to place greater focus on those applications that pose the greatest risk, such as new franchise offerings. With limited time available to a limited staff, this approach is designed to free up the time of regulatory personnel so that it can be devoted, for example, to investigating and prosecuting violations of the·Act.

The new subsection 683.6 replaces the current subsection 683.8 and brings the disclosure timing requirements in line with the Amended FTC Rule. This new subsection (a) eliminates the "first personal meeting" disclosure trigger, (b) replaces the "ten business days" disclosure trigger with the "14 calendar days" trigger of the Amended FTC Rule, and (c) eliminates the requirement to furnish prospective franchisees with execution copies of the documents at least five business days before execution. This new provision also allows for electronic delivery of the disclosure document.

The current subsections 683.9 and 683.10 are renumbered (as 683.7 and 683.8) and revised for consistency with the revised statutory structure and language.

The requirements of the current subsections 683.11 and 12 to include specific language in franchise advertisements are removed. No other state has such requirements. New subsection 683.9 simply states that all advertising must be consistent with the information contained in the franchise disclosure document.

Current subsection 683.13 was deleted. This section is the broker registration requirement. This requirement is no longer necessary because the new definition of a "franchise seller", the proposed regulations would require franchisors to file franchise seller disclosure forms with respect to franchise brokers.

The current subsections 683.14 and 683.15 are renumbered (as 683.10 and 683.11).

Section 684 – Exemptions

Subsections 684.2 and 684.3(a) retain the exemption (or the right to seek an exemption) for franchisors with a high net worth, but they clarify that the exemption applies to the disclosure requirements as well as the registration requirements.

Subsection 684.3(c) retains the exemption for isolated sales, but removes the exclusion of offers to franchisees who will have the right to offer franchises to others. This change allows for the grant of a single master franchise to a New York company. Under current law, a foreign company that wants to enter the U.S. by granting national franchise rights to a single master franchisee in New York would be required either (a) to prepare a disclosure document and seek franchise registration, or (b) seek a letter ruling from the Department of Law exempting the transaction from these requirements. This revised subsection 684.3(c) removes an impediment that foreign companies face in appointing master franchisees in New York. There is no policy reason that justifies the cost the foreign master franchisor must bear to prepare a disclosure document for a single, unique, highly negotiated transaction with a sophisticated business partner.

New paragraphs (e) through (l) of subsection 684.3 do the following:

> (e) This paragraph places the fractional franchise exemption in the law and removes it from the regulations. See also Section 681.3.
>
> (f) The leased department exemption conforms to the same exemption in the Amended FTC Rule and removes the need for former subsection 681.7(d).
>
> (g) The exemption for franchises governed by the Petroleum Marketing Practices Act appears in the Amended FTC Rule. The reference to Article 11-b is taken from the last sentence of Section 681.3 of the current law.
>
> (h) This exemption mirrors the new exemption in the Amended FTC Rule for investments of more than one million dollars.
>
> (i) This exemption mirrors the new exemption in the Amended FTC Rule for a franchisee with a high net worth.
>
> (j) This exemption is the same as the exemption in the Amended FTC Rule for franchisor insiders.
>
> (k) This paragraph introduces the $500 threshold contained in the Amended FTC Rule. This allows for the removal of current subsection 681.7(e).
>
> (l) This paragraph exempts the sale of foreign franchise rights. This brings the geographic scope of the Act into line with the scope of the Amended FTC Rule. It also reduces the unnecessarily high cost of compliance for sales of franchise rights abroad, which are typically highly negotiated transactions involving sophisticated purchasers unique to the destination country.

Subsection 684.4 is deleted. This provision allows the Department of Law to deny or revoke an exemption in its discretion. The department's authority to impose requirements in its discretion that are contrary to the express language of an exemption undermines predictability and the public's ability to comply with the law. We know of no instance in which the Department of Law has ever invoked this provision.

Former subsection 684.5, now subsection 684.4, was revised for consistency with the Amended NASAA Guidelines. This revised subsection also eliminates the requirement that a franchise owner who sells the franchise is required to furnish a disclosure document to the buyer. This requirement was difficult, if not impossible, for franchisees to meet, and was ignored in practice.

Former subsection 684.6 is now subsection 684.5.

Section 685 – Escrows and Impoundments

This section is unchanged, except that references to the "department of law" now use the term "department" which is defined in Section 681.2. This change was made throughout the revised statute.

Section 686 – Designation of Department of Law as Agent for Service of Process; Service of Process

This section is essentially unchanged except for the use of the defined term "franchise seller" and the term "franchise disclosure document" in place of "offering prospectus".

Section 687 – Fraudulent and Unlawful Practices

This section contains new prohibitions that are the same as some of the specific prohibitions in the Amended FTC Rule and in other states.

Section 688 – Investigations

This section is unchanged except that it now uses the defined term "department".

Section 689 – Action by the Department of Law

This section is unchanged except that it subsection 1 now uses the defined term "franchise seller" and refers to a 'principal executive officer or director" (as also used in Section 691.3) instead of a "principal".

Section 690 – Violations and Penalties

This section is unchanged.

Section 691 – Civil Remedies

Subsection 691.1 corrects an apparent mistake in the current law. An immaterial and non-willful violation of the Act should give rise to the remedy of rescission; but, if the conduct is willful, the remedy should be damages. The current law states the remedies the other way around. The revised law also states that the interest rate is contained in the regulations.

Subsection 691.2 is unchanged except that the interest rate is now contained in the regulations.

Section 692 – Enforcement by Attorney General

This section is unchanged.

Section 693 – Immunity

This section is unchanged.

Section 694 – Administration

This section no longer states specific fees payable to the Department of Law. These will be in the revised regulations, which are far easier to amend.

Section 695 – Separability Clause; Construction

This section is unchanged.

The New Regulations

The proposed regulations attached to this report are largely the same as the Amended NASAA Guidelines. Sections 200.2 through 200.7 of the proposed regulations are essentially the Amended NASAA Guidelines, renumbered to replace portions of Part 200 of the current regulations. Part 201 of the current regulations, which are procedural regulations governing hearings held under the New York Franchise Act, would not be changed.

The Current Regulations

The new regulations would replace Part 200 of the current franchise regulations. The following comments refer to the numbered sections in the current regulations:

200.1 Definitions

This section defines a "franchise fee", a "marketing plan", a "predecessor" and a "principal".

The definition of a "franchise fee" was deleted from Section 680 of the Act because its use resulted in a circular definition of a "franchise". The Revised FTC Rule and the Revised NASAA Guidelines do not use the term "franchise fee".

The definition of a "marketing plan" is also no longer necessary in light of the years of interpretation of that term under the franchise laws of several states. The term "marketing plan" is used in Section 681 of Act and is not used at all in the proposed regulations.

The term "predecessor" is defined in the Section 200.7 of the proposed regulations in the same manner as in the current Section 200.1.

The proposed Act and regulations do not use the term "principal" except in the context of the "principal executive officer".

200.2 Contents of Franchise Offering Prospectus

The subject of the contents of the disclosure document is largely preempted by the Revised FTC Rule. The content requirements in the Revised NASAA Guidelines are the same as those under the Revised FTC Rule with the addition of a state cover page and other permitted state additions. These appear in Sections 200.3, 200.5 and 200.7 of the proposed regulations.

200.3 Franchise Prospectus Registration Application

The instructions for preparing the disclosure document appear in Section 200.4 of the proposed regulations. The forms are contained in Section 200.5.

Under the proposed regulations, it is no longer necessary to sign the application before a notary public. Most states do not require notarization of the application.

The language dealing with department action now appears in Section 200.2.E in a revised form.

The language dealing with sales pending amendment now appears in Section 200.2.F in a revised form.

200.4 Rules Concerning Denial, Suspensions or Revocation of Franchise Sales Agent Registrations

A shortened version of this section appears in the proposed regulations as Section 200.11(c).

200.5 Amendments to Franchise Offering Prospectus

The language dealing with amendments now appears in Section 200.4.B.

200.6 Impoundment of Funds

This Section is moved to Section 200.10.

200.7 Rules Concerning Exemptions

This section appears in a revised form as Section 200.12 of the proposed regulations.

200.8 Annual Report Requirements

This section appears in a revised form as Section 200.2.D of the proposed regulations.

200.9 Filing of Sales Literature

This section was deleted from the proposed regulations. New York is one of only a few states that requires the filing of franchise sales literature. We know of no case in which the department of law has ever objected to franchise sales literature. This requirement appears to be a regulatory burden with no benefit to the public. The Department of Law retains the authority to issue regulations in the future to require the filing of sales literature under Section 683.12 of the proposed Act (Section 683.15 of the current Act).

200.10 Exemptions from Registration

(1) The reference to a form for a sale to an existing franchisee was deleted because such a sale can be included in the annual report under revised subsection 684.3(d) of the proposed Act and requires no special form.

(2) The fractional franchise is exempted under revised subsection 684.3(e) of the proposed Act.

(3) The fee for the filing of an exemption application is set forth in section 200.8(c) of the revised regulations.

200.11 Registration of Franchise Sales Agents

This section was deleted. It is no longer necessary in light of the deletion of current Section 683.13 of the Act.

200.12 Exemption from Filing Requirements of Franchise Advertising on the Internet

This section was deleted. It is no longer necessary in light of the deletion of current Section 200.9 of the regulations.

200.13 Franchise Regulations

This section remains unchanged in substance, but contains minor revisions and it is renumbered as Section 200.12.

The Proposed Regulations

This section describes the differences between the proposed regulations and the Revised NASAA Guidelines, as well as the changes in the current law and regulations reflected in the proposed regulations.

200.2 Franchise Registration Application

This section refers to initial franchise applications and applications for amendment. Consistent with past practice in New York, the registration is "amended" within 120 days after the end of each fiscal year with the new audited financials. This is the "annual report".

200.2.D – This section describes the form of annual report in a manner specific to New York.

200.2.E – Department Action – This is a revised version of the current Section 200.3(h)(1).

200.2.F – Sales Pending Amendment – This is a revised version of the current Sections 200.3 (h)(2) and (3).

200.3 The Franchise Disclosure Document

This section presents the form of the cover page required by the Revised NASAA Guidelines.

200.4 Instructions for Preparation of the Franchise Disclosure Document

200.4.A.9 – The three-year period of time to hold the documents is consistent with the statute of limitations and is a new provision. The Revised NASAA Guidelines refer generically to the applicable state law.

200.4.B – This section describes the requirements both for amendments and annual reports, replacing the current Section 200.5.

200.5 Forms

These forms are already in use in New York as in the rest of the U.S., contrary to the language of the current law and regulations.

Form A does not require that the application be signed before a notary public. This changes the current requirement in New York. Most states do not require notarized applications.

Form E is a guarantee of performance to be used if the franchisor's parent or affiliate will be guaranteeing the franchisor's performance under the franchise agreement. The guarantee states that it continues in effect until all of the franchisor's obligations under the franchise agreement are satisfied or the franchisor's liability to its franchisees under the franchise agreement has been completely discharged. The attached regulations add this language:

> "or until the Franchisor has been acquired, sold to, merged with or assigned to an entirely unaffiliated person or entity which expressly agrees to assume and discharge the functions of the Franchisor under the Franchise Agreement and is financially capable of doing so ...."

Public companies that own franchise companies commonly use the audited financial statements of the parent company in their franchise registrations, thereby agreeing to guaranty the obligations of their franchise subsidiaries. The added language allows the company to sell off a franchise subsidiary without incurring the inequitable result of guarantying previously issued franchise agreements for a period of years or even decades following the sale of the business.

200.6 Electronic Delivery of Franchise Disclosure Documents

This section is NASAA's prescribed language explicitly permitting electronic disclosure. Current New York law does not address this issue.

200.7 Disclosure Requirements

This section lays out the NASAA and FTC requirements with respect to the content of a franchise disclosure document.

The following definitions from the Revised NASAA Guidelines were not included in the proposed regulations because they appear in the proposed Act: Franchisee, Franchisor, Parent and Person.

Item 21 allows a start-up franchise system to phase in the use of audited financial statements. This is consistent with the Revised FTC Rule and contrary to the current New York requirement of audited financials from the outset. A startup in New York must have at least an audited opening balance sheet. While it would be possible under the Amended FTC Rule for New York to continue this requirement, it is doubtful that this requirement adds materially greater protection to franchisees or prospective franchisees.

Unlike current New York law, the new regulations do not require the inclusion of a separate page that states: "This disclosure document does not knowingly omit any material fact or contain any untrue statement of a material fact." While it would be possible under the Amended FTC Rule for New York to continue this requirement, no other state includes such a requirement in its franchise law and it is highly unlikely that it benefits franchisees or prospective franchisees in any way.

200.8 Filing Fees

Section 694 of the current law states the fee for filing an application for franchise registration and the fee for filing an amendment. Section 200.8 of the proposed regulations moves the required fee amounts to the regulations and out of the Act. The fee for an exemption filing appears in Section 200.10(3) of the current regulations.

200.9 Interest Rate

Sections 691.1 and 691.2 of the current law state the interest rate payable upon rescission. Section 200.9 of the proposed regulations moves the interest rate to the regulations and out of the Act.

200.10 Impoundment of Funds

This Section is the same as Section 200.6 of the current regulations.

200.11 Applications for Exemption

This section allows the department of law to exercise its best judgment in determining what information should be required so that it may make a determination.

200.12 Exemption for Franchise Advertising on the Internet

This section is a slightly revised version of Section 200.13 of the current regulations.

Additional Submission
Of

William Y. Crowell, III

RENT STABILIZATION ASSOCIATION • 123 William Street • New York, NY 10038

Legislative Forum on Regulatory Reform

The Impact of Rent Regulations and Other Regulations

Upon Housing in the City of New York

This testimony is submitted on behalf of the members of RSA who own or manage 25,000 residential buildings throughout the City of New York containing approximately one million regulated and unregulated apartments.

Apartment building owners and managers in New York City have long been among the most heavily regulated by the State of New York and the City of New York. The list of regulatory agencies with which a building owner or manager must interact is a lengthy one. The primary agency affecting property owners, particularly those with rent regulated apartments, is the State Division of Housing and Community Renewal. The agency is responsible for the administration and enforcement of the rent control and rent stabilization laws. There are approximately one million rent stabilized apartments and approximately 30,000 rent controlled units in the City. Regulated units, including rent stabilized, rent controlled, New York City Housing Authority, Mitchell-Lama and other forms of regulated housing, make up 52%, a majority of the rental units in the City. That is why the City does not have a normally functioning rental housing market.

These rent regulatory systems, in one form or another, go back decades and the web of statutes and regulations, not to mention operational bulletins, policy statements and other directives, only become more dense and more complicated with each passing day. Many owners are required to deal with both rent control and rent stabilization regulations – two distinct regulatory regimes – in the same building. Once described as an "impenetrable thicket" by a State appellate court, these laws and regulations are overly burdensome and difficult and costly to navigate. Experience has shown that these regulations, which every economist has concluded discourage rather than encourage the development of housing, are reducing the housing stock in the City.

The reality of the New York City real estate market is that:

- Over two-thirds of property owners in the City own less than twenty apartments.
- As opposed to the Manhattan-driven perception of high-end rents, the median monthly rent charged for rent stabilized apartments in the City's five boroughs is $1,050.
- In most areas of the City outside of core Manhattan, rent regulations have outlasted any relevance. For example, the rents charged in over 20% of the rent stabilized apartments are less than the amount allowed by law.

In addition to the extraordinary reach of DHCR into virtually every aspect of property management in a rent regulated building, the mechanism by which owners obtain rent increases for lease renewals is subject to the jurisdiction of a City entity known as the Rent Guidelines Board. The nine members of the Board, including five public members and two members each for property owners and tenants, meet annually to determine the amount by which rents for upcoming renewal leases can be increased. Each and every year, regardless of the determination by the RGB, that amount is always less than what an objective assessment of the economic data would yield. Regulatory burden is a significant cost driver. This burden has a particularly negative impact on small owners who do not have the size and scale to absorb the administrative costs that flow from the regulatory burden. Unnecessary regulations result in costs that not only hurt owners but also tenants. It is important to remember that the majority of apartment buildings in the City of New York pre-date World War II.

DHCR'S PROPOSED RENT CODE AMENDMENTS

The most recent example of hyper-regulation by State government and its agencies is the proposed compilation of regulatory amendments by DHCR to the Rent Stabilization Code which were published for comment on April 24, 2013. These proposed amendments were the subject of a public hearing and are awaiting promulgation by DHCR.

By way of background, on October 5, 2012, DHCR solicited comments from advocates for both property owners and tenants to obtain their views regarding what each constituency sought from future regulatory amendments. That outreach resulted in the publication of the proposed Code amendments by DHCR on April 24, 2013.

Unfortunately, the proposed Code amendments largely embody only the comments submitted by tenant advocates. All pretenses of objectivity and fair administration of the rent regulatory laws were blatantly tossed aside to placate the tenant community.

While many of proposed amendments are based upon the comments previously submitted by the tenant community, it is notable that not a single change – **not one** - suggested by property owners found its way into the proposed regulations.

The changes proposed by DHCR expand the regulatory morass to negatively impact the economy of the City of New York, and typically lack the statutory authority to make such changes. The regulations would, for example:

- formally establish the Tenant Protection Unit, headed by its own Deputy Commissioner, to supplement and effectively supersede the enforcement efforts long-performed by DHCR's Office of Rent Administration. The additional annual cost to taxpayers is $5.7 million for the TPU, in addition to $40 million for the ORA;
- enable tenants to impede the ability of owners to improve vacant units and to increase rents based upon such individual apartment improvements allowed by law based upon the mere request by the tenant (as opposed to a request by the agency) for the documentation for the improvement. This regulatory change discourages owners from improving and investing in their buildings;
- empower tenants to obstruct owners from obtaining a rent increase for a building-wide major capital improvement because of a single housing code violation, even if located in a tenant's apartment and the tenant refuses access for correction. This discourages necessary repair and investment in

aging buildings which has impacts on the economy and the condition of the housing stock;

- require owners to apply to amend a rent registration, on notice to a tenant, any time that an amendment is required, regardless of how trivial the amendment. Currently, these amendments are made as a matter of course as a clerical function and the proposal would result in more administrative proceedings and increased backlogs in an already backlogged agency. This regulation is designed to entrap owners by establishing a requirement that provides a "gotcha" opportunity which further burdens owners;
- prohibit owners from collecting statutory vacancy rent increases and major capital improvement rent increases due to an agency-issued service reduction order although the underlying statute allows owners to collect these increases without qualifications or pre-conditions. This creates yet another impediment and disincentive for owners;
- effectively eviscerate the four-year statute of limitations on record-keeping and overcharge liability mandated by the Rent Regulation Reform Act of 1997, anu will require owners to maintain records and expose owners to dated rent claims by tenants in perpetuity, and
- equate mistakes by owners on rent registration or other documents to harassment, which carries significant criminal and/or civil penalties.

DHCR'S TENANT PROTECTION UNIT

Since its inception, the rent regulatory system has been premised upon its impartial administration by DHCR's Office of Rent Administration. ORA is responsible for ensuring that rent stabilized rents are registered each year by owners, for processing applications by owners for rent increases for major capital improvements, processing overcharge and service reduction complaints from tenants, and for administering all the myriad aspects of remarkably complicated laws and regulations. It is not uncommon for MCI applications to take more than one year or more to be processed while during which time owners are re-paying the costs for such work without the additional rental income. It is also not uncommon for such MCI applications to be subject to further administrative and judicial challenges from tenants lasting years.

That regulatory landscape was significantly altered by the Governor's creation of DHCR's Tenant Protection Unit, not long after the Governor was criticized by the tenant movement which was disappointed that the Rent Act of 2011 did not contain more tenant-oriented provisions. Separate and apart from the 300 staff and $40 million already dedicated to rent law enforcement and administration for ORA, the TPU was provided with an additional $5 million and 30 staff to undertake pro-active initiatives to determine, for example, whether an owner appropriately registered the correct number of apartments or to conduct audits to determine whether an owner has appropriately increased rents due to an individual apartment improvement. Although neither the rent laws nor the rent regulations contain guidelines or standards relating to the performance of such work, the TPU issues audit "determinations" adjudicating the validity of the rent increase. Unlike the determinations made by ORA, TPU determinations are not "final orders" and are not, according to the TPU, appealable. Instead, the TPU threatens that unless the owner complies with an audit determination, the TPU will inform the tenant or ORA to commence overcharge proceedings. All notions of fundamental fairness and due process have been discarded.

ALL OTHER AGENCIES

Separate and apart from the rent regulations administered and enforced by DHCR, the list of agencies with which owners must interact and the innumerable requirements with which owners must comply is exhaustive:

- the City's Department of Finance administers the property tax system, as well as the mechanisms for rent subsidy programs for approximately 50,000 senior or disabled tenants;
- the City's Department of Housing Preservation and Development administers the City's Housing Maintenance Code, involving building inspections and a complex, multi-layered violation enforcement system premised upon Housing Court litigation. The violations include serious matters, such as heat, hot water and lead paint conditions. They also include violations caused by tenants who remove batteries from smoke detectors and carbon monoxide alarms or who install double-cylinder locks and illegal

window gates. The law also requires owners to send annual notices to every tenant to determine whether children under six years of age reside there. HPD also administers approximately 25,000 Section 8 vouchers and the majority of tenants using those vouchers are rent-stabilized, adding complexity to already-complex federal requirements;

- the Human Resources Administration is responsible for rental payments for many thousands of low-income New York City tenants. Recently, after the State and City withdrew their funding to owners who had agreed to participate in the Advantage program to provide housing to homeless families, property owners were compelled to commence non-payment eviction proceedings in Housing Court against these families;
- the City's Department of Environmental Protection administers the system whereby owners are charged ever-increasing amounts for the consumption of water by their tenants. DEP has also recently promulgated regulations, affecting over 10,000 apartment buildings, which prohibits the use of No. 6 oil in the City and requires the costly conversion to natural gas or to more expensive (but cleaner) oil;
- the City's Department of Buildings administers the City's Building Code and the related inspection and enforcement functions, as well as building permits, and issues violations for numerous types of conditions;
- the City's Department of Health and Mental Hygiene administers the City's lead paint law which is targeted primarily at children under six years of age living in apartment buildings built before 1960, which is the vast bulk of all apartment buildings in the City, and issues violations for lead paint conditions. DOHMH, along with HPD, enforces the window guard law, which requires that guards be installed in every apartment with a child 10 years of age or under and that owners send an annual notice to every tenant to determine where children reside. DOHMH also issues violations against owners for tenants who have bedbugs;
- the City's Fire Department inspects apartment buildings for compliance with sprinkler and other safety requirements, including the annual fire safety plan which must be mailed to tenants each year and posted in each building;
- the New York City Housing Authority is responsible for the administration of approximately 90,000 Section 8 vouchers used by tenants in privately-

owned housing, the majority of which are used by rent-stabilized tenants. As the result of the City's so-called "source of income law," owners are prohibited from refusing to rent to Section 8 tenants and are forced to participate in a complex and bureaucratic program even though the program was intended to be voluntary when it was initially established approximately 40 years ago, and

- the City's Sanitation Department is responsible for ensuring compliance with garbage collection and recycling requirements.

To demonstrate the seemingly unending laws and regulations even more graphically, a publication entitled, "New York City Apartment Management Checklist," which provides in summary form the list of many of the requirements with which owners must comply contains 45 chapters and over 600 pages of materials. And the Checklist does NOT even contain any information on the requirements of rent regulation!

The residential real estate industry is an essential component of the City's economic engine. One study demonstrated that during the 14-year period from 1994-2007, $4.1 billion in construction and improvement investments and thousands of new jobs were attributable to the industry. Besides improving the quality of housing for tenants, stimulating investment in affordable housing, fueling the local economy and creating new jobs, these investments have resulted in $2.1 billion in new property tax revenue. (That economic impact study was limited to only one aspect of building-related expenditures. An upcoming study will reveal the full impact of residential housing on the City's economy.)

While property owners are investing in their properties to preserve and maintain them for the future, DHCR's efforts are discouraging those vitally important efforts. In its 2012 Annual Review, DHCR touts the fact that for the years 2009-2011, their efforts "resulted in the reduction or denial of the majority of applications filed for rent increases due to Major Capital Improvements." In 2011, the agency rejected over $56 million out of the $200 million- more than 25%- in MCI renovations and modernizations undertaken by property owners. DHCR's proposed regulations regarding individual apartment improvements, major capital improvements, the four-year statute of limitations and other subjects, together with many of their existing practices and policies, send precisely the wrong message to building owners who house the City's residents.

Rather than seeking to strangle the residential housing industry, the State should be encouraging further investments in the existing housing stock. In a City where most of the housing stock pre-dates World War II, these investments are essential and are too often taken for granted.

We thank you for the opportunity to submit these comments.

Additional Submission
Of

Joseph M. Condon

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Testimony of the Community Housing Improvement Program re: The DHCR's Proposed Amendments to the RSC and Companion Regulations

Supplemental to the Testimony Provided by CHIP on June 10, 2013

This written submission is provided as a more complete commentary regarding our objections to certain of the proposed amendments to the Rent Stabilization Code (RSC). CHIP provided testimony at the June 10, 2013 public hearing, and due to the 5 minute limitation on speaking time, this additional written submission is necessary to ensure that the DHCR is aware of our concerns.

The below items are numbered to correspond to the proposed amendments as numbered in the Division of Housing and Community Renewal's (DHCR) "RSC Regs Package."

1. 9 NYCRR 2520.5

This amendment designates the Tenant Protection Unit (TPU) as an office of the DHCR. We are curious as to why this designation was necessary, as there are many units within the DHCR that are not designated in the code, such as the Rent Information Unit, the Rent Overcharge Unit, the MCI Unit. Further, 2520.5 is intended to define the term because it is used somewhere else in the RSC. We are not aware of use of the term TPU anywhere else in the RSC. We are aware that many tenant advocates requested the "codification" of the TPU, but we see no functional reason for doing so.

4-6. 9 NYCRR 2521.2(b) and (c)

This amendment alters the DHCR's treatment of preferential rents. Under the current code, both the legal rent and the preferential rent needed to be set forth in the lease for the preferential rent to be valid. Once properly set forth in a lease, the preferential did not need to be set forth again in a lease to be valid, except that the rental history could not be examined for that apartment beyond the four-year period prior to the filing of a complaint challenging the legal rent and requesting overcharges. Thus, if an owner properly put both the legal and preferential rent in a one-year vacancy lease beginning Sept. 1 2009, but did not put that same information in a subsequent one-year renewal lease beginning Sept. 1, 2010, but then put the information in a second renewal lease beginning Sept. 2011, and in every lease after that, a tenant would be able to challenge the legal rent in that apartment any time from Sept. 1, 2014 through August 31, 2015 and succeed in an overcharge proceeding because the base date for that complaint would be Sept. 1, 2010 - August 1, 2011, and the lease in effect during that time would not have both the legal rent and the preferential rent stated, therefore leading a rent administrator to find that the rent actually paid by the tenant under that lease becomes the base date legal rent, even though it was a valid preferential rent at the time that lease began, and the rent computation going forward from the base date would be based on the preferential rent that was charge in that lease, not the actual legal rent at the time, and the legal rent would be adjusted and an overcharge (if any) would be awarded to the tenant, most likely with treble damages (despite the lack of willfulness). This hypothetical illustrates the problem with the current regulation: it left owners vulnerable to a knowledgeable tenant despite having complied with the law. The bigger problem is that the current regulation can be said to invite this type of conduct from an owner, leading them to believe they are compliant, but actually putting them at risk of being found to have overcharged a tenant.

That being said, the proposed amendments on this topic are not an improvement. Rather than making the simple fix by requiring owners to set forth the legal rent and preferential rent in every lease or renewal lease pursuant to which a preferential rent is charged (CHIP agrees with this practice), and leaving it at that, the proposed amendment unnecessarily tinkers with the rest of the language. The tinkering is not only unnecessary, but it is also, in our belief, unsupported by either the Rent Stabilization Law (RSL) or case law. The RSL (and the CPLR, for that matter) clearly state that no rental record beyond the four year period prior to the filing of a complaint challenging the legal rent and alleging an overcharge can be reviewed. There are no exceptions to this rule stated in the RSL. True, the courts have found exceptions to this four-year rule, but the proposed amendments take an overly broad, and one might even say aggressive, view of the principles the courts have set forth in the rare cases in which they have found exceptions to the four-year rule. Further, no case has found an exception to the four-year rule for the purpose of establishing a preferential rent. By requiring owners to keep an entire lease history for a tenancy in which a preferential rent is charged, the DHCR creates a brand new exception to the four-year rule. This is beyond the DHCR's authority in two respects. First, the proposed regulation would contradict the four-year rule stated in the RSL, therefore the proposed regulation is invalid. Second, the proposed regulation goes beyond the authority found in case law on the subject, and is therefore invalid.

In the Explanatory Statement that accompanies the proposed amendments, the DHCR states that the four-year rule gives way in areas where there is a continuing obligation to conform one's conduct to the standards of the RSL, and that preferential rent is one of those areas. Presumably, the DHCR bases this statement on the principles set forth in Matter of Cintron v. Calogero, where the court ruled that an order from the DHCR reducing the rent and requiring the restoration of services must be taken into consideration when determining the base-date and legal rent for a stabilized apartment, even where that rent reduction order was issued more than four years prior to the filing of a complaint. In Cintron, the DHCR's treatment of rent reduction orders issued outside the four-year review period but still in effect during that time (i.e, freezing the rent at the rent charged on the base date) was invalidated, and instead the rent was to be frozen at the amount as stated in the rent reduction order. In Cintron, the court reasoned that "[r]ent reduction *orders* [emphasis added] thus place a 'continuing obligation' upon an owner to reduce rent until the required services are restored or repairs are made" (citations omitted). The authorization to issue a rent reduction order comes from RSL 26-514, which states that where services are found to be reduced, the DHCR shall reduce the rent and the owner shall be barred from collecting any further increase until the restoration of such services. However, the circumstances and reasoning in Cintron are clearly distinct from the circumstances surround the use of preferential rents, as there is no DHCR order involved which could be said to create a continuing obligation on the owner. Because the offer and acceptance of a preferential rent is voluntary, and there is no DHCR order involved, it appears that reliance on Cintron as support for this provision of the amendment is misplaced.

Alternatively, if Cintron is interpreted to mean that RSL 26-514 places the continuing obligation on the owner, the proposed amendment is still without support as there is no requirement in the RSL that a preferential rent be listed in every lease, and thus no continuing obligation to set forth both the preferential rent and the legal rent in every lease. Even if there were such an obligation found in the RSL, the conflict between the four-year rule and the preferential rent obligation would be a matter of statutory construction, which is within the purview of the judiciary, not the executive branch of government.

The DHCR's Explanatory Statement also states that courts have ruled that the present regulations are incorrect. We are not aware of any such decisions, and the DHCR does not reference any cases to support its claim. We would like the DHCR to provide citations to the cases it believes lend support to the circumvention of the four-year rule simply because of a preferential rent.

Additionally, the DHCR suggests in its Explanatory Statement that "[t]he present rule of time limiting the findings of preferential rent … places tenants in an untenable situation that discourages the exercise of their right to obtain a proper rent history." This conclusory statement is left without any explanation. Further, it lacks any logical explanation - the four-year rule applies to the review period when complaints are filed, the four-year rule does not prevent tenants from requesting an obtaining their apartment's entire registration history from the DHCR.

8. 9 NYCRR 2522.4(a)(13)

In the "RSC Amendment Summary," the DHCR states that "if there is an immediately hazardous violation in a building, the [MCI] application will be rejected with leave to renew once the violation is remedied."

There is no description of what "remedied" entails. Does it mean that the violating condition was corrected? Does it mean that the violation has been cleared from the city agency's database? The lack of an articulated standard that the DHCR will apply to determine whether services have been restored or immediately hazardous conditions have been corrected allows the DHCR to make inconsistent, arbitrary, and capricious decisions under the guise of the agency's discretionary authority. The "Consolidated – Regulatory Impact Statement Summary" states that the amendment will allow the DHCR to "assure uniform and consistent enforcement of this standard." But there is no statement or description from the DHCR setting forth what "this standard" is. If the standard is all MCI applications will be dismissed if even a single immediately hazardous violation is on record, then why does the RSC provision allow for the conditional granting of an MCI? And what is the DHCR's standard for determining when the conditional granting of an MCI is appropriate? And what is the DHCR's standard for determining when a violating condition has been corrected? Is an affidavit from the licensed contractor sufficient? Removal from the agency's database? The proposed amendment and accompanying summaries and statements from the DHCR do not clarify the standards, and the conflict which exists between the RSC text and the summary statements only adds to the confusion. Without a stated standard, the process can only be said to be arbitrary.

Further, the DHCR's amendment summary language suggests that the language in the RSC provision itself is meaningless. The RSC provision states that the MCI application "may either be granted upon condition that such services will be restored within a reasonable time, or dismissed with leave to refile ...." Although the RSC provision suggests that some circumstances will warrant the DHCR to conditionally grant the MCI and other circumstances will cause the DHCR to dismiss the application, the DHCR states in the amendment summary language that all MCI applications will be dismissed. This raises numerous concerns, including but not limited to the lack of equity in dismissing a building-wide MCI application due to the existence of a violation in a single apartment that is unrelated to the MCI work itself. The proposed amendment also states that if an MCI application is dismissed, the owner will have "leave to refile within sixty days which time period shall stay the two year filing requirements...." The first issue with this proposed language is that correction of a violating condition can take more than 60 days – owners must coordinate with tenants for access to apartments, while coordinating with the contractor who will perform the work. Further, even if the contractor corrects the violating conditions, it can take weeks, or months, for a city agency to remove a violation from their database – this can be due simply to processing delays, or the need for reinspection by the agency to confirm the correction (which can be delayed due to the volume of inspections being conducted by the agency and the difficulty in gaining access to apartments). The 60-day time frame is even more difficult to meet if the violations are due to a presumption of lead paint.

Additionally, the "stay" of the two-year filing deadline (MCI applications must be filed within two years after the work has been completed) during the 60-day period during which the owner has leave to re-file needs to be further explained. If an MCI application is filed 20 months after work has been completed, and the DHCR dismisses the application 5 months later, the two-year deadline will already have passed, meaning leave to re-file and a stay of the two-year requirement for the 60-days after the dismissal would be useless – a stay of a filing deadline is only helpful if the stay becomes effective before the deadline expires. Instead, the two-year filing requirement should be stayed from the date the application is filed, therefore providing the owner with the time remaining in the two-year filing period as measured from the time the application was filed, plus an additional 60 days, to refile. In this example, a stay from the date the application was submitted would allow the owner four months, plus the 60 days, to resubmit. If the intent of the amendment is to give an owner 60 days to refile regardless of whether the two-year filing deadline has passed at the time the application is dismissed, it should be more clearly stated in the proposed amendment. But ultimately the 60-day period to correct violating conditions and re-file should be extended for the reasons stated above.

A final issue is the proposed language that would allow a "tenant representative" to submit information in an MCI proceeding. This term is not defined, and would seem to allow parties with no standing or nexus to the proceeding to intervene, which is a significant violation of procedural requirements and the due process rights of owners.

10. 9 NYCRR §2522.5(c)(1)

The proposed amendments to this provision of the RSC require a detailed description of how the rent was adjusted from the prior legal rent to be included as part of the rent-stabilized lease rider given to tenants signing vacancy or renewal leases. At first glance, this is not a drastic change, as tenants who sign vacancy leases are already provided with this information as part of the rent stabilization lease rider that accompanies the lease itself. However, we do have concerns about the DHCR's definition of what a "detailed description" would entail. Lease riders already include the last legal rent, the amount of statutory vacancy increase (including any statutory increase based on longevity), the amount of any additional vacancy allowance as permitted by the Rent Guidelines Board, the amount of any supplementary adjustment as permitted by the RGB, the amount of any increase attributable to individual apartment improvements, as well as the amounts for any surcharges related to government programs (e.g., 421-a), ancillary services, etc. Thus, the tenant is already provided with a detailed description of the rent.

The first concern is regarding the proposed language mentioning "the prior lease." It is unclear if the proposed amendment would require the owner to provide a copy of the prior lease to an incoming tenant after a vacancy, or simply provide an explanation of how the rent in the vacancy lease was computed above the amount of rent stated in the prior lease. If the proposed language is intended to require owners to provide a copy of the prior lease to an incoming tenant, there are significant privacy issues with such a requirement. A lease is for a residential apartment is not a matter of public record. Tenants are able to request a rent history from the DHCR, which will provide the information necessary for the tenant to determine if they are being overcharged.

A second concern is the proposed language permitting tenants to request "supporting documentation" from the owner regarding the adjustments to the rent stated in the lease rider. The DHCR interprets this rather vague language, as evidenced by the RSC Amendment Summary and the "Consolidated – Regulatory Impact Statement Summary," to mean that a tenant can request the supporting documentation for IAI increases. The justification is that, according to DHCR, a tenant may only secure meaningful information or review of these increases through the cumbersome and costly process of filing an overcharge complaint with the DHCR. The overcharge complaint form is quite simple, and allows tenants to simply check off items that the complaint relates to, one of those being an IAI increase – where is the cumbersome process there? Further, there is a reason that the administrative process exists, and for the DHCR to circumvent that process is a clear violation of its authority. The due process rights of owners and tenants in administrative proceedings were not created by the DHCR, and therefore cannot be taken away or added to by the DHCR. Of interesting note, the DHCR is not concerned with the cumbersome and costly process that owners face in applying for MCI increases, or for hardship increases, or for MBR increases, or for high-income luxury deregulation, etc.

This is another example of a common theme throughout these proposed amendments, which is to provide more protections for tenants while reducing protections for owners. This example, and the theme as a whole, indicates the biased approach which the agency has taken towards the code revision process, in violation of its duty to administer the provisions of the RSL in a fair and just manner. Further, it purports to transfer the DHCR's authority to request documents and investigate potential violations of the RSL onto tenants.

11. 9 NYCRR §2522.5(c)(3)

This proposed amendment removes the cure period for the situation where the owner does not provide a copy of the lease rider (and now, potentially, other documentation that the tenant can demand) to the tenant before penalizing the owner by prohibiting the collection of guideline adjustments. This raises a significant due process issue, and echoes a theme that can be seen throughout the proposed regulations - eliminating due process protections for owners and providing more due process protections for tenants. The proposed amendment raises serious constitutional questions regarding potential violations of both equal protection and due process rights.

12. 9 NYCRR §2522.6(b)

This proposed amendment is described by the DHCR as a codification of the default formula. Under the amendment, the default formula would be used to determine the base-date rent in situations where (1) the rent charged on the base date cannot be determined, (2) a full rent history from the base date cannot be provided, (3) the base date rent is the product of a fraudulent scheme to deregulate, or (4) the owner has engaged in attempts to evade the RSL (e.g., having a tenant agree that the apartment is not used for their primary residence, or that the apartment will be used for professional or commercial purposes, or engaging in illusory or collusive rental practices). However, the DHCR's codification is overbroad, and is in conflict with respect to both the RSL and case law.

The default formula is a product of the DHCR's inner workings, it is not embodied in the RSL, nor is it currently embodied in the RSC. With respect to items 1 and 2 in the paragraph above, there is nothing in the RSL which requires or authorizes the use of a default formula when a base date lease cannot be established or a full rent history from the base date cannot be provided. In fact, courts have found that use of the default formula in such situations is irrational (see Matter of Washington 921 LP v. DHCR, 912 NYS2d 846 [2010]), particularly where unchallenged and properly filed rent registrations exist. Through this amendment to the RSC, the DHCR is adding an extremely punitive method for setting rents in certain circumstances, despite the fact that courts have struck down the agency's use of the default formula in the exact same situations. Thus, those parts of the proposed amendment go beyond the statutory language of the RSL and also goes beyond what has been approved by the courts in their interpretation of the RSL and RSC.

Not only does this amendment add a punitive rent setting method to the RSC, but it also eliminates the language from this section of the RSC which states that the rental amount set forth in a registration statement filed four years prior to the date the most recent registration statement was required to have been filed which has not been challenged for four years of its filing shall not be subject to challenge any time thereafter. Not only is this in violation of the four-year rule as stated in RSL §26-516, which is essentially repeated verbatim by the language in the RSC that the DHCR is proposing to delete, but from a public policy standpoint, it will have a chilling effect on the purchase and sale of rent-regulated buildings. The chilling effect will impact the buildings, and the tenants in those buildings, who might benefit from a change in ownership the most.

However, one might argue that using the last annual rent registration filed and unchallenged for four years violated the four-year rule as well (because such rent registration would necessarily be beyond the base date and outside the four-year period prior to the filing of the complaint). That may be true, but the courts have already resolved this perceived statutory conflict, finding that an owner must be confident that any rent registered longer than the previous four years is established and may not be reduced in a subsequent year absent a finding of decreased services. Thus, the application of a default formula to instances where the rent charged on the base date cannot be determined, or where a complete lease history from the base date cannot be provided, is irrational since doing so would result in the negation of an unassailable registered rent. Not only would it be irrational, but it would be in conflict with the legislative intent behind the RSL's four-year limitation on challenges to registrations.

Items 3 and 4 of the proposed amendment, stating that the default formula would be applicable when a fraudulent scheme to deregulate or other prohibited rental practices were engaged in, are supported in case law, but we do not see a need for their codification. The determination of whether the default formula is appropriate in a case is dependent upon the facts and circumstances of that case. And although situations 3 and 4 may warrant the use of the formula, there may be situations where the default formula is inappropriate. Further, item 3 and 4 seem to be redundant, as many of the cases in which the default formula has been applied contained evidence of false non-primary residence declarations, false declarations of professional use, or other fraudulent practices which made any available rent records unreliable.

13. 9 NYCRR §2523.4(a), (c), and (d)

This proposed amendment does several things. First, it states that statutory vacancy increases cannot be taken where a DHCR order is in effect which has found a decrease in services, ordered the restoration of services, and reduced the rent. The proposed amendment is clearly in conflict with RSL 26-514, which permits a vacancy increase in these situations, and is therefore invalid. The DHCR has no authority to curtail the rights of owners as stated in the RSL.

The proposed amendment also would prevent the further collection of an approved MCI increase where the full amount of the increase has not yet been implemented and where the temporary retroactive amounts have not yet been fully collected due to the 6% cap on an MCI increase. Again, this is in violation of the RSL and therefore invalid. The RSL permits owners to continue collecting MCI increase arrears and increments when a rent reduction order is subsequently issues, and any provision in the RSC which curtails this right is invalid.

The proposed amendment also changes the current requirement for tenants to notify owners prior to filing a service reduction complaint. Under the proposed amendment, a tenant need not notify the owner of the decrease in services prior to filing a complaint. As such, the amendment takes away due process protections that are afforded to the owner, allowing them to be subject to administrative proceedings for a reduction of services or other conditions of which they have no knowledge. Particularly if the complained of condition is located within a tenant's apartment (e.g., non-working intercom, clogged plumbing, etc.). In a further erosion of owners' due process rights, and another example of the bias and irrationality of these proposed regulations, the proposed amendment would decrease an owners time to respond to a complaint from 45 days to 20 days if the tenant does notify the owner prior to filing a complaint. Where is the justification for this in the law? Where is the justification for this in public policy considerations? This and other amendments which curtail the due process rights of owners are unconstitutional. Further, they encourage and promote a lack of communication between owners and tenants. Rather than using the agency as a last resort, the proposed amendments encourage tenants to forego communication with their building ownership/management and immediately begin the adversarial process of an administrative proceeding. The proposed amendment does not help tenants, and hurts owners. Further, it is inconsistent with recommendations and policies of city agencies, such as the Division of Housing Preservation and Development, who encourage tenants to first communicate with building ownership to address service issues and obtain repairs before getting the agency or the courts involved.

14. 9 NYCRR §2523.5(c)

This proposed amendment removes the ability of owners to deem leases as renewed. This will undoubtedly result in an increase of the cost to operate rent-stabilized buildings, as an owner will have no other option than to bring a holdover proceeding when a rent-stabilized tenant fails to renew a lease. Despite its name, a summary holdover proceeding is not a quick process. Further, an owner will not be able to accept rent from the tenant once the lease expires, lest they want to create a month-to-month tenancy. The consequences of this amendment will result in an increase in court filings (which will put more strain on an already overburdened court system), a reduction in cash-flow for buildings (owners will not accept rent from occupants whose leases have expired in order to avoid creating a month-to-month tenancy), and create unnecessary and additional burdens on both owners and tenants.

Further, the DHCR claims that this amendment was necessary in light of Samson Mgmt. v. Hubert, 92 AD3d 932, 939 NYS2d 138 (App. Div. 2nd Dept., 2012) because the case pointed out that owners could use the "deemed lease" provision as a sword by deeming a lease renewed solely based on the tenant's holding over in the apartment and then holding that tenant liable for all rent under the "deemed' lease term if the tenant were to move out after the deeming occurred. In other words, the tenant would hold over, planning to stay an additional month before moving out, and an owner would have the right to deem a lease renewed and hold that tenant responsible for the rent for the remainder of the deemed lease term. Nevermind that monetary damages for breaking a lease are dependent upon additional factors, not just that the tenant broke the lease. And one of those factors is the length of time for which the apartment is vacant. And if there is such a housing emergency, the apartment will not be vacant for long and the tenant will not be responsible for the rent remaining in the deemed lease term.

The true reasoning behind the court's decision was based on Real Property Law 232-c which states that a lease cannot be deemed to be renewed based solely on the fact that the tenant held over. Rather than eliminating the deemed lease altogether, the DHCR could have added language that would have based a deemed renewal lease on other factors, such as a renewal offer (or multiple renewal offers) by the owner that was unanswered, lack of notice from the tenant that they would be vacating the apartment, payment by the tenant of the increased amount of rent, notice from the owner that payment of the increased amount would be considered the tenant's act of accepting the renewal offer, etc.

Additionally, the RSL does not provide for month-to-month tenancies, requiring rent stabilized apartments to be leased for one- or two-year periods. A tenant who fails to renew a rent-stabilized lease could be argued to no longer be subject to the protections of the RSL, particularly the limitation on evictions.

15. 9 NYCRR §2524.3

The amendments to this section provide tenants with more time to cure any activity which is considered a violation of a substantial obligation of the lease. This amendment is another example of the consistent theme throughout the proposed amendments, providing tenants with more due process protections and lessening those protections afforded to owners. The theme is illustrative of the lack of balance between owner rights and tenant rights created by the amendments, creating a punitive and adversarial environment which is biased against owners of rent-regulated housing.

16. 9 NYCRR §2525.5

This proposed amendment adds the filing of false documents or making false statements to the DHCR as examples of conduct that may cause a tenant to not exercise their rights under the RSL. Significant penalties already exist for the filing of false documents or making false statements to the DHCR, or any other government agency. The DHCR expands upon these penalties without authority.

17-18. 9 NYCRR §2526.1(a)(2)

These amendments attempt to codify what the DHCR believes to be judicially sanctioned exceptions to the prohibition on examining an apartment's lease and rental history beyond the four-year period prior to the filing of a complaint, also known as the four-year rule.

The first exception to the four year rule stated in the amendment is "for the limited purpose of determining whether a fraudulent scheme to destabilize the housing accommodation or a rental practice proscribed under 2525.3(b), (c), or (d) rendered unreliable the rent on the base date." This particular language of the proposed amendment is troublesome because it expands the very narrow principle set forth in Grimm v. DHCR, 15 NY3d 358, 912 NYS2d 491 (1st Dept. 2010). In Grimm, the court stated that a "mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization." Once the tenant has met that evidentiary threshold, "the rental history [beyond the four year period preceding the filing of the complaint] may be examined [by DHCR] for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date." Thus, the proposed amendment is problematic because it does not reference the prerequisite that the tenant must first meet a threshold burden of proof regarding a fraudulent scheme or the proscribed activity before the DHCR has the authority to examine the rental history beyond the base date. The proposed amendment mischaracterizes and greatly expands the reach of Grimm and other decisions which permitted examination of an apartment's rental history beyond the base date. The proposed amendment, as evidenced in the DHCR's statements of justification, removes the burden of producing evidence of a fraudulent scheme or other rental practices that invalidate the base-date rent from the tenant, and instead allow the DHCR to go beyond the base date based upon "a mere allegation of fraud, with nothing mor" By doing so, not only is the tenant's burden of producing evidence removed (contrary to the Grimm decision), but an additional burden is added on the owner to produce evidence of the propriety of the rental history beyond the base date, which is contrary to the intent of the four-year rule of the RSL to lessen the record keeping burden of good owners.

The proposed amendment also provides an exception to the four-year rule where a rent-reduction order remains in effect but was issued prior to the base date applicable to the complaint. The authority of the DHCR to do so is taken from the Court of Appeals decision Cintron v. Calogero and the codification of the principle in the RSC is consistent with that decision.

The proposed amendment also provides an exception to the four-year rule to determine the willfulness of an owner in overcharging a tenant for the purposes of deciding whether treble damages should apply. This is contradictory to the language of the RSL, and there is no authoritative case law on the issue that would support this part of the proposed amendment. To date, the only exception to the four year rule is where the base date rent is invalid due to a fraudulent scheme to deregulate, where an owner has engaged in a rental practice proscribed by the RSC, or where a rent reduction order is in effect.

Regarding the part of the amendment that allows the DHCR to go beyond the four-year look-back period to determine the propriety of a rent increase based on the longevity of a prior tenancy, the provision is invalid because it violates the provisions of the RSL which state that a properly filed and served rent registration which has not been challenged within four years of its filing is no longer subject to challenge. Granted, if the tenant's produce evidence which indicate that fraudulent rental practices occurred, an exception may be granted under the reasoning of Grimm, but this provision goes beyond that scenario. Under this provision, owners would have to maintain lease histories in perpetuity if at any point in the apartment's history there was a tenancy that lasted longer than 8 years. And without a statement of prospective application only, the proposed amendment would provide a weapon to tenants because owners would be required to produce a rental history which in all likelihood is no longer contained in their files.

Regarding the part of the amendment that allows DHCR to go beyond the four-year look-back period with respect to preferential rents, the objections to **9 NYCRR 2521.2(b) and (c)** stated above are reiterated here.

Regarding the part of the amendment allowing the DHCR to go beyond the four-year look-back period for the purpose of establishing the legal rent for an apartment that was vacant or temporarily exempt on the base-date, our objections to this part of the amendment are stated in the below section.

19. 9 NYCRR §2526.1(a)(3)(iii)

The proposed amendment changes the method of establishing the base-date legal rent for an apartment that was vacant or temporarily exempt on the base date. The current method is for the legal rent in such circumstances to be the rent agreed to by the owner and the first rent-stabilized tenant taking occupancy after the vacancy or temporary exemption. The proposed method would require a determination of the legal rent prior to such temporary exemption or vacancy, adding a vacancy increase, and then increasing the rent according to the two-year renewal guideline increases from the RGB, and finally adding any other increases, (e.g., MCI or IAI) allowable under the RSC.

This is beyond anything authorized by the RSL. Further, it is beyond any case law interpreting the issue. The DHCR states that under the current provisions, they were "precluded from determining whether the tenant's rent was legal." This is a complete mischaracterization - under the current regulations, the legal rent is determined by the rent negotiated between the owner and the next incoming tenant. Thus, the DHCR is not precluded from determining the legal rent, but has determined that the legal rent is the first negotiated rent.

Further, the DHCR suggests that they are showing leniency and compassion to owners by not using the default formula, as the agency inexplicably equates an apartment that was vacant or temporarily exempt on the base date to a situation where the owner has engaged in fraud or other proscribed practices.

Finally, the DHCR cites support for this amendment in Gordon v. 305 Riverside Corp., 93 AD3d 596, 941 NYS2d 93 (1st Dept., 2012), claiming that in this case the court reviewed information before the base date in a situation where the apartment was vacant or temporarily exempt on the base date. In fact, that court did not review rental information beyond the base date. The court simply said that according to the wording of the RSC, where an apartment is vacant or temporarily exempt for more than four years, the first rent negotiated between owner and tenant cannot lead to the deregulation of the apartment, even if that first rent is above the deregulation threshold. The court's decision was based on the current language of this provision stating that "the legal regulated rent shall be the rent agreed to by the owner and the first *rent stabilized* [emphasis added] tenant taking occupancy after such vacancy or temporary exemption…." Thus the court did not look beyond the base date, but held that a "first rent" in such circumstances cannot lead to the deregulation of a stabilized apartment.

The DHCR has proposed this amendment based on a misinterpretation of case law and a misstatement of the current practice. Further, even after the Gordon case was decided, the DHCR has not altered the information it provides to owners, as its web page still states that a "first-rent" after a long-term vacancy or temporary exemption which is above the deregulation threshold causes the apartment to become deregulated (see the FAQ page at http://www.nyshcr.org/Rent/faqs.htm#hrvd2). To conform the current RSC provision to the long-standing practice regarding legal rents after long term vacancies or temporary exemptions, the DHCR simply needed to remove the term "the first *rent stabilized* tenant taking occupancy" and replace it with "the first tenant taking occupancy," as the inclusion of "rent stabilized" was clearly the reason why the court found that the apartment was not deregulated. The Gordon court did not state that the practice of setting a first rent under the current RSC provision was illegal or improper, nor was that the issue. The issue was whether the apartment was properly deregulated, and although the apartment's rent was properly set at an amount above the deregulation threshold, it could not be deregulated because the building was receiving J-51 benefits at the time the lease was entered into. However, the court did not determine the base date rent, nor did it state that the negotiated first-rent could not be the base date rent. The court simply said that the "first-rent" was required to be with a rent-stabilized tenant, therefore preventing the deregulation of an apartment through a "first-rent" scenario.

The cases that have involved "first-rents" only go beyond the four-year look-back period to determine the regulatory status of the apartment (i.e., whether the apartment was properly removed from the RSL), not to set the base-date legal rent. The DHCR is confusing issues, and citing cases that have went beyond the four-year rule to determine regulatory status as support for going beyond the four-year rule to set the base-date legal rent.

Ultimately, the opportunity to charge a first-rent after a long-term vacancy or temporary exemption is a method of bringing an apartment that has been off the market for valid reasons back into the market at an amount determined by the market itself, and then subjecting that rent and that apartment to the RSL. The method is not predatory or irrational in nature, as many other counties and municipalities in other states that have some form of rent regulation often allow a re-renting of an apartment at market rate upon vacancy, but then subjecting increases in that vacancy rent amount to regulation.

20. 9 NYCRR §2526.1 (g) and (h)

For the reasons previously stated regarding the codification of the default formula, we object to this amendment.

23. 9 NYCRR §2528.3(c)

This amendment requires owners to file an application with the DHCR to amend a previously filed rent registration, upon which an administrative proceeding will be opened, docketed, and in which an owner will be required to establish the propriety of the amendment, and pursuant to which the DHCR will have authority to determine the legal rent and direct the refund of any rent collected in excess of the determined amount.

From a public policy perspective, the amendment is unnecessary, redundant, and a misuse of resources. Amendments to apartment registrations are already filed with the DHCR and served on the tenant. And the DHCR already has the authority to institute a proceeding on its own initiative (2527.2). The DHCR can question an amendment to a registration whenever it feels necessary. Further, the processing times at the DHCR are lengthy due to an already limited and overburdened staff - to add more processing to the existing workload will only increase delays.

The proposed amendment also appears to be invalid under the RSL. The authorization of the DHCR to determine legal rents is based upon the filing of a complaint. RSC 2526.1(2) states that "a complaint pursuant to this section must be filed within four years of the first overcharge alleged…." The proposed amendment would convert the filing of an amended registration by an owner into an overcharge complaint against the owner herself - in what way does this promote the registration of accurate rental history? Further, under what authority can the DHCR turn the registration requirements into overcharge proceedings? There is nothing in the RSL which relates the two - one is a registration procedure, the other is an adversarial proceeding. From a procedural standpoint, the DHCR should have to initiate a proceeding against an owner to challenge a rent registration. The proposed amendment imposes obligations on the filing of registration amendments that are not contained within the RSL.

chip

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Legislative Office Building, Room 947
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October 18, 2013

RE: Forum on Regulatory Reform

Dear Senator Gallivan,

We are encouraged by the objective of the Senate Majority Coalition to identify and eliminate costly regulations that strangle job and business growth. With a focus on New York City, we ask that you not only look into the regulations governing the banking and financial service industries, but also into the regulations that govern the multifamily housing industry. The Community Housing Improvement Program (CHIP) is a trade association with about 2,500 members who, amongst them, own and/or operate about 250,000 units of rent-regulated housing throughout the city. Accordingly, CHIP and its members have a unique understanding of the rent regulatory system and its impact from a business perspective.

The Court of Appeals has described the rent regulatory system as an "impenetrable thicket, confusing not only to laymen, but to lawyers" (Roberts v. Tischman, 13 N.Y.3d 270, 295, 918 N.E.2d 900, 913, 890 N.Y.S.2d 388, 392 (2009) (quoting 89 Christopher St. Inc. v. Joy, 35 N.Y.2d 213, 215, 318 N.E.2d 776, 780, 360 N.Y.S.2d 612, 640 (1974)). This description was first penned in the 1970's, and was again reiterated in 2009. We would welcome the opportunity to present a list identifying the numerous regulations embodied in the Rent Stabilization Code (and its companion regulatory bodies) which are burdensome and unnecessary. In addition to the regulations, there are policies and practices employed by the state Division of Housing and Community Renewal (DHCR), the arm of NYS Homes and Community Renewal responsible for administering and enforcing the rent regulatory system, which drive up the costs of owning and maintaining multifamily housing within the city.

Although there are many provisions within the RSC that we believe can be repealed or modified, we also call the Coalition's attention to the recent regulatory amendments proposed earlier this year by the DHCR (and which we believe are to be promulgated in the very near future). Many of these proposed amendments add to the administrative burden of owners by imposing additional and unrealistic record keeping requirements, reducing time frames and notice requirements given to owners (and simultaneously obliging owners to provide more information to tenants), codifying draconian penalties for minor violations which were never before in existence, and eroding the certainty provided by the four-year statute of limitations. A major result of the proposed regulations, if passed, would be to increase administrative costs and potential liabilities while reducing confidence and certainty in the rent-regulated multifamily industry.

Another significant factor that has increased costs of owning and operating regulated housing is the recent creation of the Tenant Protection Unit (TPU). Our members have reported spending significant back office hours and other resources in generating responses to the TPU's inquiries, only to be told that they are in compliance with the regulations; collectively our members have reported receiving hundreds of audit determinations from the TPU without one finding of overcharge. Owners estimate spending approximately 20 hours of office time per inquiry response.

Ultimately, the misguided regulatory scheme and poorly targeted enforcement agenda of the DHCR drains time and money from compliant owners that could otherwise be reinvested in their buildings or their business. Think about it in terms of jobs: the inability to reinvest results in fewer opportunities for the contractors, engineers, architects, carpenters, masonry workers, plumbers, electricians, doormen, porters, roofers, etc., who the owner employs to perform the work. It also reduces the ability of the owners and managers to grow their businesses, which would mean hiring more staff.

Enclosed you will find CHIP's testimony regarding the DHCR's proposed amendments, which highlight the additional administrative burdens that owners will face if the regulations are adopted. Further, we believe the DHCR does not have the authority to enact many of the cost increasing regulations, although it appears they will do so over our objections. In fact, it appears that several of the proposed regulations go beyond administrative powers and usurp the authority of the legislature.

We would welcome the opportunity to meet with yourself, and other representatives of the coalition, to discuss the different ways in which the rent regulatory system prevents job growth as well as deterring responsible owners from growing their businesses.

Sincerely,

Joseph M. Condon
Counsel
Community Housing Improvement Program

Enc.: 2

C: Sen. Jeffrey D. Klein
Sen. Kathleen A. Marchione
Sen. David J. Valesky