

# RULE MAKING ACTIVITIES

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

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

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

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## Office of Children and Family Services

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### NOTICE OF ADOPTION

#### Qualifications for Personnel in Juvenile Detention Facilities

**I.D. No.** CFS-45-11-00006-A

**Filing No.** 22

**Filing Date:** 2012-01-13

**Effective Date:** 2012-02-01

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

**Action taken:** Amendment of section 180.8 of Title 9 NYCRR.

**Statutory authority:** Executive Law, section 501(3)

**Subject:** Qualifications for personnel in juvenile detention facilities.

**Purpose:** To streamline the juvenile detention personnel requirements and align them with the requirements for authorized agencies.

**Text or summary was published** in the November 9, 2011 issue of the Register, I.D. No. CFS-45-11-00006-P.

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

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

#### Assessment of Public Comment

The agency received no public comment.

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## Department of Corrections and Community Supervision

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

#### Officials of the Department of Corrections and Community Supervision

**I.D. No.** CCS-05-12-00001-P

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

**Proposed Action:** This is a consensus rule making to amend section 50.1(c), (j), (u), (v) and (ai); repeal of section 50.1(af) and (ah); addition of section 50.1(q), (aj), (ak), (al), (am), (an) and (ao); and amendment of Part 50 of Title 7 NYCRR.

**Statutory authority:** Criminal Procedure Law, sections 1.20(33) and 2.10(25)

**Subject:** Officials of the Department of Corrections and Community Supervision.

**Purpose:** To make revisions due to the merger of Correctional Services with the Division of Parole and other discretionary revisions.

**Text of proposed rule:** The New York State Department of Corrections and Community Supervision is making the following changes to 7NYCRR. Amending the title of Part 50, and amending section 50.1. Amending subdivisions 50.1(c), (j), (u), (v), and (ai), repealing and reserving subdivisions 50.1(af) and (ah), and adding subdivisions 50.1(q), and 50.1(aj) through (ao) as indicated below.

#### PART 50

#### OFFICIALS OF THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION [STATE CORRECTIONAL FACILITIES]

##### Section 50.1. Definition.

*In accordance with* [For the purposes of ] Criminal Procedure Law, section 1.20, subdivision 33, and section 2.10, subdivision 25, the following are hereby designated as officials of the *Department of Corrections and Community Supervision* [State correctional facilities]:

- (a) the commissioner;
- (b) executive deputy commissioner;
- (c) deputy commissioner *and deputy commissioner & counsel*;
- (d) associate commissioner;
- (e) Reserved;
- (f) assistant commissioner;
- (g) superintendents;
- (h) deputy superintendents;
- (i) chief of investigations;
- (j) [correctional services] investigators;
- (k) correction captains;
- (l) correction lieutenants;
- (m) correction sergeants;
- (n) assistant chief of investigations;
- (o) assistant deputy superintendents;

- (p) community correction center assistants;
- (q) *correctional services training academy director*;
- (r) facility operations specialists;
- (s) Reserved;
- (t) coordinator, correctional services employee investigations;
- (u) *correctional services* employee investigators;
- (v) senior *correctional services* employee investigators;
- (w) Reserved;
- (x) correction officers assigned to a training academy in the department or the central office of the department;
- (y) the director of the Correction Emergency Response Team (C.E.R.T.);
- (z) first deputy superintendent;
- (aa) director and assistant director of special housing and inmate disciplinary procedures;
- (ab) institution safety officers;
- (ac) Reserved;
- (ad) correctional security technical services specialist;
- (ae) director of human resources management;
- (af) [correctional services internal auditor V;] *Reserved*;
- (ag) director and assistant director of the crisis intervention unit;
- (ah) [executive assistant to the commissioner; and] *Reserved*;
- (ai) *correctional services* fire & safety coordinator;
- (aj) *senior warrant & transfer officer*;
- (ak) *senior parole officer and senior parole officer special services*;
- (al) *supervising parole officer and supervising parole officer special services*;
- (am) *regional director parole operations*;
- (an) *supervising regional director*;
- (ao) *assistant deputy director parole operations*;

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, The Harri-man State Campus - Building 2 - 1220 Washington Ave, Albany, NY 12226-2050, (518) 457-4951, email: RULES@Doccs.ny.gov

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

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

#### **Consensus Rule Making Determination**

The Department of Corrections and Community Supervision has determined that no person is likely to object to the proposed action. The amendments to this section revise, remove, and add employee job titles to the listing of officials of State Correctional Facilities. Revisions to the title of Part 50 and section 50.1 were also determined to be necessary to accurately reflect the updated agency name due to the merger with the former Division of Parole. Since the law grants the Commissioner the discretion to determine this listing of officials and changes are necessary due to the mandated agency merger, the Department has determined that this rule making is technical or otherwise non-controversial in nature. See SAPA section 102(11)(c).

The Department's authority resides in the Criminal Procedure Law, which authorizes the Commissioner of the Department of Corrections and Community Supervision pursuant to the rules of the Department, to designate officials of State correctional facilities and penal correctional facilities. See Criminal Procedure Law § 2.10(25). Additionally, the Correction Law authorizes the Commissioner to make such rules for the governance of officers and other employees, not in conflict with the statutes of the State, and in regard to the duties performed by them, for correctional facilities and community supervision. See Correction Law §§ 112(1) and 112(2).

#### **Job Impact Statement**

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal reflects the changes to Department titles that the Commissioner has determined should be included in the listing of Officials of State Correctional Facilities.

## Education Department

### NOTICE OF ADOPTION

#### **Teaching Certificate in Earth Science, Biology, Chemistry, Physics, Mathematics or a Closely Related Field**

**I.D. No.** EDU-09-11-00005-A

**Filing No.** 36

**Filing Date:** 2012-01-17

**Effective Date:** 2012-02-01

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

**Action taken:** Renumbering of section 80-1.1(b)(45)-(47) to section 80-1.1(b)(46)-(48); addition of new section 80-1.1(b)(45) and section 80-5.22; and amendment of sections 80-3.3(b)(2)(i) and 80-3.7 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207, 305(1) and (2), 3001(2), 3004(1) and (6) and 3006(1)

**Subject:** Teaching certificate in Earth Science, Biology, Chemistry, Physics, Mathematics or a Closely Related Field.

**Purpose:** To allow individuals with advanced degrees in the STEM areas and related teaching experience to teach certain subjects in 7-12.

**Text or summary was published** in the March 2, 2011 issue of the Register, I.D. No. EDU-09-11-00005-EP.

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

**Revised rule making(s) were previously published in the State Register** on June 1, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-8857, email: legal@mail.nysed.gov

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

The agency received no public comment.

### NOTICE OF ADOPTION

#### **Skills and Achievement Commencement Credential for Students with Disabilities**

**I.D. No.** EDU-40-11-00006-A

**Filing No.** 37

**Filing Date:** 2012-01-17

**Effective Date:** 2012-02-01

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

**Action taken:** Amendment of sections 100.5, 100.6, 100.9 and 200.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided), 305(1) and (2), 4402(1-7) and 4403(3)

**Subject:** Skills and Achievement Commencement Credential for Students with Disabilities.

**Purpose:** To replace Individualized Education Program (IEP) diploma with a Skills and Achievement Commencement Credential.

**Text of final rule:** 1. Subparagraph (iii) of paragraph (7) of subdivision (b) of section 100.5 of the Regulations of the Commissioner of Education is amended, effective February 1, 2012, as follows:

(iii) Earning a Regents or local high school diploma shall be deemed to be equivalent to receipt of a high school diploma pursuant to Education Law, section 3202(1) and shall terminate a student's entitlement to a free public education pursuant to such statute. Earning a high school equivalency diploma [or], an Individualized Education Program diploma or a *skills and achievement commencement credential as set forth in section 100.6 of this Part* shall not be deemed to be equivalent to receipt of a high school diploma pursuant to Education Law, section 3202(1) and shall not terminate a student's entitlement to a free public education pursuant to such statute.

2. Section 100.6 of the Regulations of the Commissioner of Education is repealed, effective February 1, 2012.

3. A new section 100.6 of the Regulations of the Commissioner of Education is added, effective February 1, 2012, as follows:

*§ 100.6. Skills and achievement commencement credential.*

*Beginning with the 2013-14 school year and thereafter, the board of education or trustees of a school district shall, and the principal of a nonpublic school may, issue a skills and achievement commencement credential to a student who has taken the State assessment for students with severe disabilities, as defined in section 100.1(t)(2)(iv) of this Part, in accordance with the following provisions:*

*(a) Prior to awarding the skills and achievement commencement credential, the governing body of the school district or nonpublic school shall ensure that:*

*(1) the student has been recommended by the committee on special education to take the alternate assessment in lieu of a required State assessment;*

*(2) such student meets the definition of a student with a severe disability as defined in section 100.1(t)(2)(iv); and*

*(3) the student has been afforded appropriate opportunities to participate in community experiences and development of employment and other instructional activities to prepare the student for post-secondary living, learning and employment.*

*(b) The credential may be issued at any time after such student has attended school for at least 12 years, excluding kindergarten, or has received a substantially equivalent education elsewhere, or at the end of the school year in which a student attains the age of 21.*

*(c) The credential shall be similar in form to the diploma issued by the school district or nonpublic school, except that there shall appear on such credential a clear annotation to indicate that the credential is based on achievement of alternate academic achievement standards.*

*(d) The credential shall be issued together with a summary of the student's academic achievement and functional performance, as required pursuant to section 200.4(c)(4) of this Title, that includes documentation of:*

*(1) the student's level of achievement and independence for each of the career development and occupational studies learning standards set forth in section 100.1(t)(1)(vii)(a), (b) and (c) of this Part including, but not limited to: career development; integrated learning; universal foundation skills that include basic skills in reading, writing, listening, speaking, math and functional math; thinking skills; personal qualities; interpersonal skills; use of technology; managing information and resources; systems skills;*

*(2) the student's academic skills, as measured by the State assessment for students with severe disabilities; and*

*(3) the student's strengths and interests and, as appropriate, other student achievements and accomplishments.*

*School districts may use the State model form developed by the commissioner for the summary of academic and functional performance or a locally-developed form that meets the requirements of this subdivision.*

*(e) If the student receiving a credential is less than 21 years of age, such credential shall be accompanied by a written statement of assurance that the student named as its recipient shall continue to be eligible to attend the public schools of the school district in which the student resides without the payment of tuition until the student has earned a regular high school diploma or until the end of the school year in which such student turns age 21, whichever shall occur first.*

4. A new subdivision (g) is added to section 100.9 of the Regulations of the Commissioner of Education, effective February 1, 2012, as follows:

*(g) The provisions of this subdivision shall be deemed repealed on June 30, 2013 and no IEP diploma shall be awarded pursuant to this section on or after July 1, 2013.*

5. Subparagraph (iii) of paragraph (5) of subdivision (a) of section 200.5 of the Regulations of the Commissioner of Education is amended, effective February 1, 2012, as follows:

(iii) Prior to the student's graduation with an individualized

education program (IEP) diploma *or, beginning with the 2013-14 school year, prior to a student's exit with a skills and achievement commencement credential as set forth in section 100.6 of this Title*, such prior written notice must indicate that the student continues to be eligible for a free appropriate public education until the end of the school year in which the student turns age 21 or until the receipt of a regular high school diploma.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 100.5(d)(1).

**Text of rule and any required statements and analyses may be obtained from:** Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-8857, email: legal@mail.nysed.gov

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

Since publication of a Notice of Proposed Rule Making in the State Register on October 5, 2011, nonsubstantial changes were made to the proposed rule as follows: in section 100.5(d)(1), grammatical corrections were made to replace a period with a colon and to replace several commas with semicolons.

These changes do not require any changes to the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis and Rural Area Flexibility Analysis.

**Revised Job Impact Statement**

Since publication of a Notice of Proposed Rule Making in the State Register on October 5, 2011, nonsubstantial changes were made to the proposed rule as described in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as revised, would repeal the individualized education program (IEP) diploma for students with disabilities upon expiration of the 2012-13 school year and, beginning with the 2013-14 school year, replace it with an alternate credential (i.e., Skills and Achievement Commencement Credential) only for students with disabilities with the most significant cognitive disabilities who have taken the New York State Alternate Assessment (NYSAA) and who are not eligible for a regular diploma.

The proposed rule, as revised, will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

**Assessment of Public Comment**

Since publication of a Notice of Proposed Rule Making in the State Register on October 5, 2011, the State Education Department (SED) received the following comments on the proposed amendment.

**§ 100.6 - Skills and Achievement Commencement Credential**

**COMMENT**

Proposed rule presents a meaningful credential for students participating in the New York State Alternate Assessment (NYSAA); allows demonstration of career readiness skills and skills and knowledge for living, learning and employment; recognizes more than student attendance; establishes option for students unable to earn a regular diploma relating to trades/careers. Unlike individualized education program (IEP) diploma, it is aligned with learning standards and alternate performance indicators.

**DEPARTMENT RESPONSE**

Comments are supportive in nature.

**COMMENT**

Regulations should be effective prior to 2013-14 school year. Districts need time to build capacity to provide students access to educational programs and experiences. Provide appropriate time, staff development, and resources. Provide information and outreach to businesses and higher education communities.

**DEPARTMENT RESPONSE**

Proposed 2013-14 timeline is necessary to provide SED with time to develop and deliver guidance to parents, employers and districts; and to provide districts time to adjust instructional programs and make

changes to policies/procedures to implement the credential. No new mandates are imposed on districts and delayed implementation date provides districts with sufficient lead time.

#### COMMENTS

Support removing “diploma” given confusion term causes. “Skills credential” is less deceiving as “diploma” indicates academic achievement. Adopt credential, but include language validating and endorsing it with privileges associated with regular diplomas and recognition of students as graduates. Credential is not a regular diploma and will not provide students with same post-secondary and employment opportunities; districts will be penalized in graduation and drop out rate measures. Students may be less motivated to work for credential and to graduate; credential takes away individualization of students’ education; concerned about credential’s potential value to employers; does not serve same breadth of students as IEP and local diplomas; need more information on credential documentation. Term “credential” diminishes students’ accomplishments and employers may not give this same credence as diploma. As majority of jobs require diploma, rename to have diploma in title and provide format similar to typical diploma. Replace “IEP diploma” with “credential diploma” or other label emphasizing “CDOS Standards.”

#### DEPARTMENT RESPONSE

Term “credential” distinguishes it from a regular diploma and avoids confusion associated with term “diploma.” Because the credential is based on achievement of alternate achievement standards, it cannot be recognized as a regular diploma and students cannot be counted as graduates for federal accountability purposes. The credential is designed to promote individualized planning and document a student’s level of achievement in areas essential for post-secondary life. Specific credential documentation requirements are established in the proposed rule. SED will issue guidance for implementation, including a sample credential form and exit summary.

#### COMMENT

Credential name implies merit and achievement. Revise name to state true function as assessment of skills.

#### DEPARTMENT RESPONSE

Credential name was selected in consideration of the nature of skills to be documented and recognized.

#### COMMENT

Credential documentation should be required beginning at age 14, replace current “Level 1” career assessment and inform transition planning.

#### DEPARTMENT RESPONSE

The required documentation to accompany the proposed credential will promote curriculum to support student attainment of the CDOS standards and skills, and better inform transition planning and services. The recommendation to replace the Level 1 assessment with the credential documentation will be considered for future rulemaking.

#### COMMENT

Define “severe cognitive disability”; clarify if this includes students with intelligent quotients (IQs) in the 60s.

#### DEPARTMENT RESPONSE

“Students with severe disabilities” is defined in § 100.1(t)(2)(iv) to mean students who have limited cognitive abilities combined with behavioral and/or physical limitations and who require highly specialized education, social, psychological and medical services in order to maximize their full potential for useful and meaningful participation in society and for self-fulfillment. Schools must determine on an individual basis whether a student meets this definition and the criteria for participation in NYSAA.

#### COMMENT

Proposal does not address students whose participation in authentic community opportunities to develop employment skills is limited by their disabilities. May not have intended impact on employability of most severely disabled students who typically require post-secondary placements/supports and do not work competitively.

#### DEPARTMENT RESPONSE

The credential is designed to recognize a range of student achieve-

ment for the CDOS standards, including skills achieved through community-based learning and/or in-school experiences and provide all NYSAA students meaningful documentation of skills and achievement.

#### COMMENT

Credential creates unfunded mandate.

#### DEPARTMENT RESPONSE

The credential replaces the current IEP diploma and does not add additional responsibilities to school districts beyond those required by federal and State law.

#### COMMENT

Credential may result in over reliance on NYSAA; safeguards should be added to ensure students are appropriately recommended for NYSAA.

#### DEPARTMENT RESPONSE

Current regulations define students with severe cognitive disabilities eligible for NYSAA that CSEs must comply with.

#### COMMENT

Attaching exit summary to credential will segregate students from other graduates; this information is already provided to adult service providers.

#### DEPARTMENT RESPONSE:

Federal law requires an exit summary be provided to each student with a disability. It is at each student’s discretion as to whether he/she provides this information to employers, adult agencies, or others.

#### COMMENT

Require ongoing parent education and written and verbal information on credential and its limitations and other diploma options be provided to parents prior to meetings where these will be discussed.

#### DEPARTMENT RESPONSE

SED will advise districts of necessary actions to ensure parents and students are provided information to understand the differences between a regular diploma and the credential.

#### COMMENT

Require standard review process for updating document with new skills or if students return to school; clarify how credential is produced and who should be involved in its development; describe process for resolving disputes about credential content and/or development process. Provide guidance and resources for districts to create implementation plans tailored to needs of students currently enrolled and who will exit with IEP diplomas and those entering high school. Clarify how to provide highly mobile students with meaningful credential.

#### DEPARTMENT RESPONSE

Comments will be considered for SED guidance to be provided to the field.

#### COMMENT

Revise credential to represent mastery level with respect to soft skills and include in depth and measurable job, work related interpersonal, basic life and independence skills.

#### DEPARTMENT RESPONSE

Documentation issued with the credential must include the student’s level of achievement and independence for each of the CDOS Learning Standards.

#### COMMENT

Credential language must emphasize students’ strengths/skills and not highlight deficits (e.g., checklist of skills).

#### DEPARTMENT RESPONSE

Proposed amendment requires the related documentation include information describing the student’s skills and strengths, interests and, as appropriate, other student achievements and accomplishments.

#### COMMENT

Combine credential with information from NYSAA as work is redundant. Credential based on NYSAA may not permit identification of certain relevant skills. Work back from desired skills sets to ensure

there are ample opportunities for all students to develop credential skill sets. Credential should have benchmarks including links to existing CTE and vocational programs.

#### DEPARTMENT RESPONSE

While NYSAA measures a student's performance toward certain academic standards, the proposed credential additionally recognizes a student's level of achievement and independence toward CDOS standards.

#### § 100.5 - Repeal of IEP diploma

#### COMMENT

IEP diploma does not provide necessary credentials for students to graduate; is often confused with a regular diploma; is considered substandard; limits students' post-secondary education options; is not recognized by employers as regular diploma and does not enable students to gain employment; is not based on consistent standards; does not adequately indicate career or college readiness or recognize students' vocational skills and training; is not consistent with NY's planned use of student learning objectives and growth goals; is inequitable and may be viewed as discriminatory. Proposed credential would be more accurate and valid credential representative of students' skills and knowledge. Students who do not have severe disabilities should be given chance to pursue a Regents diploma; decision that a student will earn an IEP diploma is often made too early.

#### DEPARTMENT RESPONSE

Comments are supportive in nature.

#### COMMENTS

IEP diploma was developed to recognize students with severe disabilities achieving milestone and to be on par with the graduation document other students receive; proposal denies students access to a diploma and is discriminatory; IEP diploma is right students have earned for public acknowledgement of their accomplishments; is an incentive to "graduate"; students who work hard deserve a diploma; is an appropriate credential for severely disabled students that require lifelong services/supports and allows focus on basic skill development. Working for a credential versus diploma may negatively impact students' self esteem and increase dropout rate. Benefits of IEP diploma are limited, but it allows some students access to post-secondary opportunities. Only apparent difference between credential and IEP diploma is that the credential is available only to NYSAA students. Instead of eliminating IEP diploma, include more vocational components and skills needed in post-secondary life.

#### DEPARTMENT RESPONSE

The proposed policy addresses public concerns that such students be awarded a credential that meaningfully documents the student's level of achievement and skills for future employment and/or post-secondary training and to address broad public concern that the term diploma was misleading to parents and students. Like the IEP diploma, the proposed credential must be similar in form to the diploma issued by districts, but must include a clear annotation to indicate that it is based on achievement of alternate academic achievement standards.

#### COMMENTS

Some support deferring development of an alternate credential for other students until new policy on graduation requirements is set and multiple pathways to graduation are established. Others support deferring adoption of the proposed rule until a credential option is developed for all students with disabilities. Proposed rule, in combination with the elimination of RCT safety net, will narrow graduation options for students with disabilities, exclude many students with disabilities from accessing an appropriate diploma/credential and limit post-secondary opportunities. Proposal provides no motivation for students not eligible for a credential or regular diploma to remain in school, and could result in more school related behavior issues and increases in suspension, drop out, and incarceration rates. Proposal sets "gray area" students up for failure and will force them into Regents courses, thereby limiting their ability to work on skills to prepare them for post-school life. Proposal will have an impact on curriculum and expectations for Regents bound students and may result in "watered down" courses to ensure "gray area" students pass. Need to focus, not defer, attention on developing a viable and meaningful diploma

for this group of students. Both phases should be implemented simultaneously so that no students are left without a graduation credential. Defer implementation of credential and elimination of IEP diploma until decisions are made regarding graduation requirements and other options are in place for students "gray area" students. Ensure transitional planning period spanning two phases is not harmful to students.

#### DEPARTMENT RESPONSE

In addition to the proposed credential for NYSAA eligible students, prior to the 2013-14 school year, SED will propose an exiting credential that documents attainment of CDOS standards and acknowledges students' successful completion of academic and CTE programs and coursework.

#### COMMENT

Get broad stakeholder input on intended and potential unanticipated consequences of proposals. Monitor practical benefits of credential, including post-secondary career and educational outcomes, and audit NYSAA participation rates.

#### DEPARTMENT RESPONSE

SED sought extensive stakeholder input on the elimination of the IEP diploma and development of an alternate credential. SED continues to engage key stakeholders in development of guidance and sample forms that will be issued to the field. SED will be collecting and reporting on the percentage of students earning this credential as it currently does for IEP diplomas.

#### COMMENT

Revise graduation requirements, develop a continuum of diploma options; create multiple pathways to earn regular diploma; repeal requirement for high stakes tests; develop diplomas that have value to employers and meaningful links to post-secondary opportunities; allow students to specialize; begin early and connect with middle school/lower grade curricula; address differentiated needs of students; provide for family choice.

#### DEPARTMENT RESPONSE

Comments are beyond scope of proposed regulations.

## PROPOSED RULE MAKING HEARING(S) SCHEDULED

### Special Education Impartial Hearings

**I.D. No.** EDU-05-12-00007-P

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

**Proposed Action:** Amendment of sections 200.1 and 200.5 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101(not subdivided), 207(not subdivided), 305(1), 4403(3) and 4404(1)

**Subject:** Special Education Impartial Hearings.

**Purpose:** To align State's timeline requirements for issuing impartial hearing decisions to Federal requirements; address factors leading to delays in the completion of impartial hearings; and address issues relating to the manner in which hearings are conducted.

**Public hearing(s) will be held at:** 2:00 p.m.-5:00 p.m., February 15, 2012 at Manhattan ACCESS District Office, 116 W. 32nd St., 5th Fl. Conference Rm., New York, NY; 2:00 p.m.-5:00 p.m., February 21, 2012 at Capital Region BOCES, Central Administration, 900 Watervliet-Shaker Rd., Albany, NY; and 2:00 p.m.-5:00 p.m., February 23, 2012 at Monroe-1 BOCES, 15 Linden Park, Rochester, NY.

**Interpreter Service:** Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

**Accessibility:** All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

**Substance of proposed rule (Full text is posted at the following State website):** <http://www.p12.nysed.gov/specialed/timely.htm> The State Education Department proposes to amend sections 200.1 and 200.5 of the Commissioner's Regulations. The following is a summary of the substantive provisions of the proposed rule.

Certification and appointment of IHOs [new sections 200.1(x)(vi) and 200.5(j)(3)(c)]:

The proposed rule would require an individual certified by the Commissioner as a hearing officer to be willing and available to accept appointment to conduct impartial hearings, and would provide for the rescinding of an impartial hearing officer (IHO)'s certification if he or she is unavailable or unwilling to accept an appointment within a two-year period of time, unless good cause is shown.

The proposed rule would also prohibit an IHO from accepting appointment as an IHO if he or she is an attorney involved in a pending due process complaint involving the same school district, or has, within a two-year period of time, served in the same district as either an attorney in a due process complaint or as a provider of special education advocacy to parents of students with disabilities.

Consolidation of multiple due process requests for the same student [new section 200.5(j)(3)(ii)(a)]:

In the interests of judicial economy and in furtherance of the student's educational interests, the proposed rule would establish procedures for the consolidation of multiple due process hearing requests filed for the same student, including the factors that must be considered in determining whether to consolidate separate requests for due process.

Prehearing conferences [200.5(j)(3)(xi)]:

The proposed rule would require that IHOs conduct prehearing conferences for all due process requests received on or after July 1, 2012 and that the IHO issue a prehearing order to address certain procedural matters and to identify the factual issues to be adjudicated at the hearing. These requirements will provide IHOs with the tools to move the hearing forward in a smooth, orderly fashion, and to render decisions in an efficient and expeditious manner.

Withdrawals of requests for due process hearings [new section 200.5(j)(6)]:

The proposed rule would address existing concerns regarding the withdrawal and subsequent resubmission of the same or substantially similar due process complaints by establishing procedures for the withdrawal of a due process complaint and requiring a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing. In particular, the amendment would establish procedures for the withdrawal of a due process complaint, which would require a withdrawal to be made on notice to the IHO if it is made after the commencement of the hearing; would expressly authorize the IHO to dismiss a due process complaint with prejudice if the other party to the claim would be prejudiced by the withdrawal; and would provide for the same IHO to be appointed if the party who withdrew subsequently files another due process complaint within one year from the withdrawal that is based on or includes the same or substantially similar claims as made in a prior complaint.

Extensions to the due date for rendering the impartial hearing decision [section 200.5(j)(5)]:

The proposed amendment further reinforces the importance of granting extensions for only limited purposes, while addressing the practical concerns IHOs may face in conducting a hearing when the parties attempt to engage in settlement negotiations. The amendment would expressly prohibit an IHO from soliciting extensions for purposes of his or her own scheduling conflicts; prescribe additional considerations an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; and require the IHO to set forth the facts relied upon for each extension granted. The proposed amendment authorizes an IHO to grant up to one 30-day extension for the purpose of settlement discussions between the parties.

Timeline to render a decision [section 200.5(j)(5)]:

To further align the State's timeline requirements for issuing decisions with the federal requirements, the proposed amendment would clarify that:

- when a district files a due process complaint, the decision is due not later than 45 days from the day after the public agency's due process complaint is received by the other party and the State Education Department; and

- when a parent files a due process complaint notice, the decision must be rendered 45 days after the date on which one of the following conditions occurs first: (1) the IHO receives the parties written waiver of the resolution meeting, (2) the IHO receives the parties written confirmation that a mediation or resolution meeting was held but no agreement could be reached, or (3) the expiration of the 30-day resolution period (unless the parties agree in writing to continue mediation at the end of the 30-day resolution period).

Overall, the proposed amendment will streamline the process for conducting hearings, which will in turn, facilitate a more efficient and expeditious hearing. This improved process will promote timely due process decisions and is likely to result in costs savings to districts.

**Text of proposed rule and any required statements and analyses may be obtained from:** Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-8857, email: legal@mail.nysed.gov

**Data, views or arguments may be submitted to:** Kenneth Slentz, Deputy Comm. P-12 Education, State Education Department, Office of P-12 Education, State Education Building, 89 Washington Ave., Albany, NY 12234, (518) 474-3862, email: NYSEDP12@mail.nysed.gov

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

#### **Regulatory Impact Statement**

##### STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the State Education Department, with the Board of Regents at its head and the Commissioner of Education as the chief administrative officer, and charges the Department with the general management and supervision of public schools and educational work of the State.

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

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Regents.

Education Law section 4403 outlines the Department's and a school district's responsibilities regarding special education programs/ and services to students with disabilities. Section 4403(3) authorizes the Department to adopt regulations as Commissioner deems in their best interests.

Education Law section 4404 establishes appeal procedures for students with disabilities. Subdivision (1) requires the Commissioner to promulgate regulations relating to the qualifications, procedures and timelines for impartial hearings, as well as relating to the suspension and revocation of impartial hearing officer certifications.

##### LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statutes. The proposed rule amends the procedures for conducting a special education due process hearing so that the hearings will be conducted in an efficient and expeditious manner and expressly provides impartial hearing officers (IHOs) with the tools necessary to properly manage and conduct these hearings in such manner, in order to further promote compliance with the federal timeline requirements. More specifically, the proposed rule primarily addresses six procedural issues relating to impartial hearings, including (1) the certification and appointment of impartial hearing officers, (2) the consolidation of multiple due process requests for the same student, (3) the needs and purposes of prehearing conferences; (4) the withdrawal of requests for due process hearings, and potential prejudice on parties resulting from such withdrawal, and (5) the need to limit extensions to the timeline requirements for issuing an impartial hearing decision, and (6) the 45-day timeline requirement to render a decision, to align with the State's timeline requirements with the federal requirements.

In amending the procedures for conducting impartial hearings, the proposed amendment addresses various causes of delays which have been identified by the State Education Department over the past few years and addresses these issues in conformity with State Review Of-

ficer decisions, best practices, and findings made by the Department in investigating untimely decisions by hearing officers pursuant to its authority granted under section 200.21 of the Commissioner's regulations.

Among other things, the proposed amendment would establish procedures for the consolidation of multiple due process hearing requests filed for the same student; require and establish procedures for prehearing conferences; prohibit an IHO from soliciting extension requests or issuing extensions to an impartial hearing due to his or her own scheduling conflicts; prescribe additional considerations an IHO must consider in granting an extension; prohibit an IHO from granting an extension after the record close date; and require the IHO to set forth the facts relied upon for each extension granted; allow an IHO to grant not more than one 30-day extension for the purpose of settlement discussions between the parties; prohibit an IHO from reopening a decision that constitutes his or her final determination of the claims and from retaining jurisdiction over future disputes among the parties; and establish procedures for the withdrawal of a due process complaint, which would expressly authorize the IHO to dismiss a due process complaint with prejudice if the other party to the claim would be prejudiced by the withdrawal and would provide for the same IHO to be appointed if the party who withdrew subsequently files another due process complaint within one year from the withdrawal that is based on or includes the same or substantially similar claims as made in a prior complaint.

#### NEEDS AND BENEFITS:

Federal law and regulations require all impartial hearings to be adjudicated within the 45-day timeline, or a timeline that is properly extended by the IHO at the request of either party, or in the case of an expedited hearing, within the required timelines. In 2010, only 84.25 percent of impartial hearings were adjudicated within the timeline requirements. The proposed rule provides IHOs with more prescriptive authority to properly manage impartial hearing timelines. In addition, the proposed rule further ensures the impartiality of IHOs.

#### COSTS:

- a. Costs to State government: None.
- b. Costs to local governments: The proposed amendment does not impose any additional costs beyond those already imposed by federal and State statutes and regulations. It is anticipated that school districts will experience cost savings as a result of these hearings being conducted in a more efficient and expeditious manner.
- c. Costs to regulated parties: None.
- d. Costs to the State Education Department of implementation and continuing compliance: The proposed amendment does not impose any additional costs on the State Education Department beyond those already imposed in accordance with law and regulations. It is anticipated that this proposed rule will promote compliance with the timeline requirements, which will assist the Department in enforcing compliance with these requirements.

#### LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments beyond those already imposed by federal and State statutes and regulations. Among other things, the proposed rule amends the procedures that must be followed by an IHO in accepting an appointment, conducting a hearing, and rendering a decision and providing the decision to the State Education Department. The proposed rule amends the procedures for conducting hearings to ensure they are held in an efficient and expeditious manner in compliance with the federal timeline requirements, and provides IHOs with the tools to properly manage and conduct these hearings in such a manner. The rule also aligns the State's timeline requirements for issuing an impartial hearing decision with the federal requirements.

#### PAPERWORK:

The proposed rule does not impose any additional paperwork requirements on local governments.

#### DUPLICATION:

The proposed amendment does not duplicate, overlap, or conflict with any other State or federal statute or regulation. The rule aligns

the State's timeline requirements for issuing an impartial hearing decision with the federal requirements.

#### ALTERNATIVES:

There are no significant alternatives and none were considered. The proposed amendment responds to substantial delays in the issuance of impartial hearing decisions over the past few years. The rule addresses various causes for these delays identified by the State Education Department, investigations conducted by the State Education Department relating to untimely hearing decisions, review of State Review Officer decisions, comments by IHOs, and in consideration of best practices. The proposed amendment is consistent with these standards and State and federal laws and regulations.

#### FEDERAL STANDARDS:

34 C.F.R. sections 300.511 - 515 establish the federal requirements for the impartial due process hearing, hearing rights, hearing decisions, finality of the decision, appeal and impartial review and the timelines and convenience of impartial hearings. The proposed amendment is consistent with federal standards and aligns New York State's timeline to render the decision with the federal timeline. The proposed amendment also addresses actions required by the U.S. Department of Education to ensure the timely adjudication of impartial hearing decisions.

#### COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with the proposed amendment by its effective date.

#### Regulatory Flexibility Analysis

##### Small Businesses:

The proposed rule amends the procedures for conducting a special education due process hearing so that the hearings will be conducted in an efficient and expeditious manner and expressly provides impartial hearing officers (IHOs) with the tools necessary to properly manage and conduct these hearings in such a manner, in order to further promote compliance with the federal timeline requirements.

The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

The proposed amendment primarily applies to independent impartial hearing officers certified by the State Education Department and does not impose any additional compliance requirements or costs on such governments.

#### 1. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on local governments beyond those already required pursuant to federal and State statutes and regulations. The proposed amendment relates to the procedures that must be followed by an IHO in accepting an appointment, conducting a hearing, rendering a decision, and providing the decision to the State Education Department. It is anticipated that school districts will experience cost-savings as a result of these impartial hearings being conducted in a more efficient and expeditious manner, in compliance with federal and State regulations.

#### 2. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional service requirements on local governments.

#### 3. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on local governments. It is anticipated that school districts will experience cost-savings as a result of these impartial hearings being conducted in a more efficient and expeditious manner, in compliance with federal and State regulations.

#### 4. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any new technological requirements or costs on local governments.

## 5. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to enforce compliance with the timeline requirements prescribed in federal regulations governing the conduct of special education due process hearings. Sections 300.511 - 300.515 of the Code of Federal Regulations establish the federal requirements for the impartial due process hearing, hearing rights, hearing decisions, finality of the decision, appeal and impartial review, and the timelines and convenience of impartial hearings. The proposed amendment is consistent with federal standards and aligns New York State's timeline requirements to issue a decision with federal requirements.

The proposed amendment is necessary to address significant delays in the issuance of impartial hearing decisions in order to ensure compliance with federal law. The proposed amendment was developed in review of State Review Officer decisions, investigations of untimely hearing decisions made by the State Education Department pursuant to its authority granted under section 200.21 of the Commissioner's regulations, and best practices. The amendment is consistent with these standards.

## 6. LOCAL GOVERNMENT PARTICIPATION:

Three public hearings will be conducted to obtain comment on the proposed rule. In addition, copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment.

*Rural Area Flexibility Analysis*

## 1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed amendment applies to impartial hearing officers (IHOs) who conduct special education impartial hearings where all public schools located in New York State where the district or a parent initiates a due process complaint, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with population density of 150 per square miles or less.

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

The proposed amendment does not impose any additional compliance requirements or professional services requirements on entities in rural areas.

The proposed rule would ensure that individuals certified by the Commissioner as IHOs are willing and available to accept appointment to conduct impartial hearings; establish procedures for consolidation and multiple due process hearing requests filed for the same student; require and establish procedures for prehearing conferences; prohibit an IHO from issuing a decision to enforce the terms of a settlement agreement or an order by an administrative officer; align the State's timeline for an IHO to render a decision consistent with the federal timelines; prohibit an IHO from soliciting extension requests or issuing extensions to an impartial hearing due to his or her own scheduling conflicts; amend the considerations that an IHO must make in granting a request for an extension; specify information that must be included in the hearing record; prohibit an IHO from reopening a decision that constitutes his or her final determination of the claims and from retaining jurisdiction over future disputes among the parties; establish the timeline by which two copies of the impartial hearing decision must be provided to the State Education Department; and establish procedures for the withdrawal of a due process complaint.

## 3. COSTS:

The proposed amendment does not impose any additional costs on entities in rural areas.

## 4. MINIMIZING ADVERSE IMPACT:

The proposed regulations were developed in review of other states impartial hearing regulations, State Review Officer decisions and complaints filed pursuant to section 200.21 of the Regulation of the Commissioner of Education. The amendments proposed are consistent with these standards. 34 C.F.R. sections 300.511 - 515 establish the federal requirements for the impartial due process hearing, hearing rights, hearing decisions, finality of the decision, appeal and impartial review and the timelines and convenience of impartial hearings. The proposed amendment is consistent with federal standards and aligns

NYS timeline to render the decision, which is currently inconsistent with the federal timeline. The proposed amendment addresses actions required by the U.S. Department of Education to ensure the timely adjudication of impartial hearing decisions.

## 5. RURAL AREA PARTICIPATION:

Three public hearings will be conducted to obtain comment on the proposed rule. In addition, the proposed amendment was submitted for comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

*Job Impact Statement*

The proposed rule amends the procedures for conducting a special education due process hearing so that the hearings will be conducted in an efficient and expeditious manner and expressly provides impartial hearing officers (IHOs) with the tools necessary to properly manage and conduct these hearings in such manner, in order to further promote compliance with the federal timeline requirements. The proposed amendment will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

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## Department of Financial Services

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### EMERGENCY RULE MAKING

**Business Conduct of Mortgage Loan Servicers**

I.D. No. DFS-05-12-00002-E

Filing No. 23

Filing Date: 2012-01-13

Effective Date: 2012-01-17

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

**Action taken:** Addition of Part 419 to Title 3 NYCRR.

**Statutory authority:** Banking Law, art. 12-D

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

**Specific reasons underlying the finding of necessity:** The legislature required the registration of mortgage loan servicers as part of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") to help address the existing foreclosure crisis in the state. By registering servicers and requiring that servicers engage in the business of mortgage loan servicing in compliance with rules and regulations adopted by the Superintendent, the legislature intended to help ensure that servicers conduct their business in a manner acceptable to the Department. However, since the passage of the Mortgage Lending Reform Law, foreclosures continue to pose a significant threat to New York homeowners. The Department continues to receive complaints from homeowners and housing advocates that mortgage loan servicers' response to delinquencies and their efforts at loss mitigation are inadequate. These rules are intended to provide clear guidance to mortgage loan servicers as to the procedures and standards they should follow with respect to loan delinquencies. The rules impose a duty of fair dealing on loan servicers in their communications, transactions and other dealings with borrowers. In addition, the rule sets standards with respect to the handling of loan delinquencies and loss mitigation. The rule further requires specific reporting on the status of delinquent loans with the Department so that it has the information necessary to assess loan servicers' performance.

In addition to addressing the pressing issue of mortgage loan delinquencies and loss mitigation, the rule addresses other areas of significant concern to homeowners, including the handling of borrower complaints and inquiries, the payment of taxes and insurance, crediting of payments and handling of late payments, payoff balances and servicer fees. The rule also sets forth prohibited practices such as engaging in deceptive practices or placing homeowners' insurance on property when the servicers has reason to know that the homeowner has an effective policy for such insurance.

**Subject:** Business conduct of mortgage loan servicers.

**Purpose:** To implement the purpose and provisions of the Mortgage Lending Reform Law of 2008 with respect to mortgage loan servicers.

**Substance of emergency rule:** Section 419.1 contains definitions of terms that are used in Part 419 and not otherwise defined in Part 418, including “Servicer”, “Qualified Written Request” and “Loan Modification”.

Section 419.2 establishes a duty of fair dealing for Servicers in connection with their transactions with borrowers, which includes a duty to pursue loss mitigation with the borrower as set forth in Section 419.11.

Section 419.3 requires compliance with other State and Federal laws relating to mortgage loan servicing, including Banking Law Article 12-D, RESPA, and the Truth-in-Lending Act.

Section 419.4 describes the requirements and procedures for handling to consumer complaints and inquiries.

Section 419.5 describes the requirements for a servicer making payments of taxes or insurance premiums for borrowers.

Section 419.6 describes requirements for crediting payments from borrowers and handling late payments.

Section 419.7 describes the requirements of an annual account statement which must be provided to borrowers in plain language showing the unpaid principal balance at the end of the preceding 12-month period, the interest paid during that period and the amounts deposited into and disbursed from escrow. The section also describes the Servicer’s obligations with respect to providing a payment history when requested by the borrower or borrower’s representative.

Section 419.8 requires a late payment notice be sent to a borrower no later than 17 days after the payment remains unpaid.

Section 419.9 describes the required provision of a payoff statement that contains a clear, understandable and accurate statement of the total amount that is required to pay off the mortgage loan as of a specified date.

Section 419.10 sets forth the requirements relating to fees permitted to be collected by Servicers and also requires Servicers to maintain and update at least semi-annually a schedule of standard or common fees on their website.

Section 419.11 sets forth the Servicer’s obligations with respect to handling of loan delinquencies and loss mitigation, including an obligation to make reasonable and good faith efforts to pursue appropriate loss mitigation options, including loan modifications. This Section includes requirements relating to procedures and protocols for handling loss mitigation, providing borrowers with information regarding the Servicer’s loss mitigation process, decision-making and available counseling programs and resources.

Section 419.12 describes the quarterly reports that the Superintendent may require Servicers to submit to the Superintendent, including information relating to the aggregate number of mortgages serviced by the Servicer, the number of mortgages in default, information relating to loss mitigation activities, and information relating to mortgage modifications.

Section 419.13 describes the books and records that Servicers are required to maintain as well as other reports the Superintendent may require Servicers to file in order to determine whether the Servicer is complying with applicable laws and regulations. These include books and records regarding loan payments received, communications with borrowers, financial reports and audited financial statements.

Section 419.14 sets forth the activities prohibited by the regulation, including engaging in misrepresentations or material omissions and placing insurance on a mortgage property without written notice when the Servicer has reason to know the homeowner has an effective policy in place.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 11, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Sam L. Abram, NYS Department of Financial Services, 1 State Street, New York, NY 10004, (212) 709-1658, email: sam.abram@dfs.ny.gov

#### **Regulatory Impact Statement**

##### 1. Statutory authority.

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

Subsection (1) of Section 590 of the Banking Law was amended by the Mortgage Lending Reform Law to add the definitions of “mortgage loan servicer” and “servicing mortgage loans”. (Section 590(1)(h) and Section 590(1)(i).)

A new paragraph (b-1) was added to Subdivision (2) of Section 590 of the Banking Law. This new paragraph prohibits a person or entity from

engaging in the business of servicing mortgage loans without first being registered with the Superintendent. The registration requirements do not apply to an “exempt organization,” licensed mortgage banker or registered mortgage broker.

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

Subsection (3) of Section 590 was amended by the Subprime Law to clarify the power of the banking board to promulgate rules and regulations and to extend the rulemaking authority regarding regulations for the protection of consumers and regulations to define improper or fraudulent business practices to cover mortgage loan servicers, as well as mortgage bankers, mortgage brokers and exempt organizations. The functions and powers of the banking board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89.

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

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

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

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

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

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

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

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

##### 2. Legislative objectives.

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

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

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

Part 418 of the Superintendent’s Regulations, initially adopted on an emergency basis on July 1 2009, addresses the first component of the mortgage servicing statute by setting standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for ap-

proving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as setting financial responsibility standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. This part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor servicers' conduct and prohibits certain practices such as engaging in deceptive business practices.

Collectively, the provisions of Part 418 and 419 implement the intent of the Legislature to register and supervise mortgage loan servicers.

### 3. Needs and benefits.

Governor Paterson reported in early 2008 that there were more than 52,000 foreclosure filings in 2007, or approximately 1,000 per week. That number increased in 2008, averaging approximately 1,100 per week in the first quarter. While there was some drop in foreclosure filings in 2009 to just over 50,000, the crisis continues and the problems that have affected so many have been found to implicate not only the origination of residential mortgage loans, but also their servicing and foreclosure. The Mortgage Lending Reform Law adopted a multifaceted approach to the problem. It addressed a variety of areas in the residential mortgage loan industry, including: i. loan originations; ii. loan foreclosures; and iii. the conduct of business by residential mortgage loan servicers.

Until July 1, 2009, when the mortgage loan servicer registration provisions first became effective, the Department regulated the brokering and making of mortgage loans, but not the servicing of these mortgage loans. Servicing is vital part of the residential mortgage loan industry; it involves the collection of mortgage payments from borrowers and remittance of the same to owners of mortgage loans; to governmental agencies for taxes; and to insurance companies for insurance premiums. Mortgage servicers also act as agents for owners of mortgages in negotiations relating to loss mitigation when a mortgage becomes delinquent. As "middlemen," moreover, servicers also play an important role when a property is foreclosed upon. For example, the servicer may typically act on behalf of the owner of the loan in the foreclosure proceeding.

Further, unlike in the case of a mortgage broker or a mortgage lender, borrowers cannot "shop around" for loan servicers, and generally have no input in deciding what company services their loans. The absence of the ability to select a servicer obviously raises concerns over the character and viability of these entities given the central part of they play in the mortgage industry. There also is evidence that some servicers may have provided poor customer service. Specific examples of these activities include: pyramiding late fees; misapplying escrow payments; imposing illegal prepayment penalties; not providing timely and clear information to borrowers; erroneously force-placing insurance when borrowers already have insurance; and failing to engage in prompt and appropriate loss mitigation efforts.

More than 2,000,000 loans on residential one-to-four family properties are being serviced in New York. Of these over 8% were seriously delinquent as of the fourth quarter of 2009. Despite various initiatives adopted at the state level and the creation federal programs such as Making Home Affordable to encourage loan modifications and help at risk homeowners, the number of loans modified have not kept pace with the number of foreclosures. Foreclosures impose costs not only on borrowers and lenders but also on neighboring homeowners, cities and towns. They drive down home prices, diminish tax revenues and have adverse social consequences and costs.

As noted above, Part 418, initially adopted on an emergency basis on July 1 2009, relates to the first component of the mortgage servicing statute - the registration of mortgage loan servicers. It was intended to ensure that only those persons and entities with adequate financial support and sound character and general fitness will be permitted to register as mortgage loan servicers. It also provided for the suspension, revocation and termination of licenses involved in wrongdoing and establishes minimum financial standards for mortgage loan servicers.

Part 419 addresses the business practices of mortgage loan servicers and establishes certain consumer protections for homeowners whose residential mortgage loans are being serviced. These regulations provide standards and procedures for servicers to follow in their course of dealings with borrowers, including the handling of borrower complaints and inquiries, payment of taxes and insurance premiums, crediting of borrower payments, provision of annual statements of the borrower's account, authorized fees, late charges and handling of loan delinquencies and loss mitigation. Part 419 also identifies practices that are prohibited and imposes certain reporting and record-keeping requirements to enable the Superintendent to determine the servicer's compliance with applicable laws, its financial condition and the status of its servicing portfolio.

Since the adoption of Part 418, 45 entities have pending applications or been approved for registration and nearly 180 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements.

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

These regulations will improve accountability and the quality of service in the mortgage loan industry and will help promote alternatives to foreclosure in the state.

### 4. Costs.

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC and OTS publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. The State Foreclosure Working Group, consisting of thirteen state Attorneys General and three state Banking regulators, including New York, collects and reports on similar data from the largest subprime mortgage servicers. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and record keeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

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

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

### 5. Local government mandates.

None.

### 6. Paperwork.

Part 419 requires mortgage loan servicers to keep books and records related to its servicing for a period of three years and to produce quarterly reports and financial statements as well as annual and other reports requested by the Superintendent. It is anticipated that the quarterly reporting relating to mortgage loan servicing will be done electronically and would therefore be virtually paperless. The other recordkeeping and reporting requirements are consistent with standards generally required of mortgage bankers and brokers and other regulated financial services entities.

### 7. Duplication.

The regulation does not duplicate, overlap or conflict with any other regulations. The various federal laws that touch upon aspects of mortgage loan servicing are noted in Section 9 "Federal Standards" below.

### 8. Alternatives.

The Mortgage Lending Reform Law required the registration of mortgage loan servicers and empowered the Superintendent to prescribe rules and regulations to guide the business of mortgage servicing. The purpose of the regulation is to carry out this statutory mandate to register

mortgage loan servicers and regulate the manner in which they conduct business. The Department circulated a proposed draft of Part 419 and received comments from and met with industry and consumer groups. The current Part 419 reflects the input received. The alternative to these regulations is to do nothing or to wait for the newly created federal bureau of consumer protection to promulgate national rules, which could take years, may not happen at all or may not address all the practices covered by the rule. Thus, neither of those alternatives would effectuate the intent of the legislature to address the current foreclosure crisis, help at-risk homeowners vis-à-vis their loan servicers and ensure that mortgage loan servicers engage in fair and appropriate servicing practices.

#### 9. Federal standards.

Currently, mortgage loan servicers are not required to be registered by any federal agencies, and there are no comprehensive federal rules governing mortgage loan servicing. Federal laws such as the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. and regulations adopted thereunder, 24 C.F.R. Part 3500, and the Truth-in-Lending Act, 15 U.S.C. section 1600 et seq. and Regulation Z adopted thereunder, 12 C.F.R. section 226 et seq., govern some aspects of mortgage loan servicing, and there have been some recent amendments to those laws and regulations regarding mortgage loan servicing. For example, Regulation Z, 12 C.F.R. section 226.36(c), was recently amended to address the crediting of payments, imposition of late charges and the provision of payoff statements. In addition, the recently enacted Dodd-Frank Wall Street Reform and Protection Act of 2010 (Dodd-Frank Act) establishes requirements for the handling of escrow accounts, obtaining force-placed insurance, responding to borrower requests and providing information related to the owner of the loan. While the newly created Bureau of Consumer Financial Protection established by the Dodd-Frank Act may propose additional regulations for mortgage loan servicers, there is no certainty that it will do so or to what extent.

#### 10. Compliance schedule.

Similar emergency regulations first became effective on October 1, 2010.

### **Regulatory Flexibility Analysis**

#### 1. Effect of the Rule:

The rule will not have any impact on local governments. The Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law") requires all mortgage loan servicers, whether registered or exempt from registration under the law, to service mortgage loans in accordance with the rules and regulations promulgated by the Banking Board or Superintendent. The functions and powers of the banking board have since been transferred to the Superintendent of Financial Services, pursuant to Part A of Chapter 62 of the Laws of 2011, Section 89. Of the 45 entities which have pending applications or have been approved for registration to date and the nearly 180 entities which have indicated that they are exempt from the registration requirements, it is estimated that very few are small businesses.

#### 2. Compliance Requirements:

The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components: it requires the registration by the Department of servicers who are not a bank, mortgage banker, mortgage broker or other exempt organizations (the "MLS Registration Regulations"), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the "Mortgage Loan Servicer Business Conduct Regulations").

The provisions of the Mortgage Lending Reform Law requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent's Regulations, initially adopted on an emergency basis on July 1 2009, sets for the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting of borrower payments, late payments, account statements, delinquencies and loss mitigation, fees and recordkeeping.

#### 3. Professional Services:

None.

#### 4. Compliance Costs:

The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. Although mortgage loan servicers may incur

some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Moreover, any additional costs are likely to be mitigated by the fact that many of the requirements of Part 419, including those relating to the handling of residential mortgage delinquencies and loss mitigation (419.11) and quarterly reporting (419.12), are consistent with or substantially similar to standards found in other federal or state laws, federal mortgage modification programs or servicers own protocols.

For example, Fannie Mae and Freddie Mac, which own or insure approximately 90% of the nation's securitized mortgage loans, have similar guidelines governing various aspects of mortgage servicing, including handling of loan delinquencies. In addition, over 100 mortgage loan servicers participate in the federal Making Home Affordable (MHA) program which requires adherence to standards for handling of loan delinquencies and loss mitigation similar to those contained in these regulations. Those servicers not participating in MHA have, for the most part, adopted programs which parallel many components of MHA.

Reporting on loan delinquencies and loss mitigation has likewise become increasingly common. The OCC and OTS publish quarterly reports on credit performance, loss mitigation efforts and foreclosures based on data provided by national banks and thrifts. The State Foreclosure Working Group, consisting of thirteen state Attorneys General and three state Banking regulators, including New York, collects and reports on similar data from the largest subprime mortgage servicers. And, states such as Maryland and North Carolina have adopted similar reporting requirements to those contained in section 419.12.

Many of the other requirements of Part 419 such as those related to handling of taxes, insurance and escrow payments, collection of late fees and charges, crediting of payments derive from federal or state laws and reflect best industry practices. The periodic reporting and bookkeeping and record keeping requirements are also standard among financial services businesses, including mortgage bankers and brokers (see, for example section 410 of the Superintendent's Regulations).

Compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

#### 5. Economic and Technological Feasibility:

For the reasons noted in Section 4 above, the rule should impose no adverse economic or technological burden on mortgage loan servicers that are small businesses.

#### 6. Minimizing Adverse Impacts:

As noted in Section 1 above, most servicers are not small businesses. Many of the requirements contained in the rule derive from federal or state laws, existing servicer guidelines utilized by Fannie Mae and Freddie Mac and best industry practices.

Moreover, the ability by the Department to regulate mortgage loan servicers is expected to reduce costs associated with responding to consumers' complaints, decrease unnecessary expenses borne by mortgagors, help borrowers at risk of foreclosure and decrease the number of foreclosures in this state.

#### 7. Small Business and Local Government Participation:

The Department distributed a draft of proposed Part 419 to industry representatives, received industry comments on the proposed rule and met with industry representatives in person. The Department likewise distributed a draft of proposed Part 419 to consumer groups, received their comments on the proposed rule and met with consumer representatives to discuss the proposed rule in person. The rule as finally proposed reflects the input received from both industry and consumer groups.

### **Rural Area Flexibility Analysis**

**Types and Estimated Numbers:** Since the adoption of the Mortgage Lending Reform Law of 2008 (Ch. 472, Laws of 2008, hereinafter, the "Mortgage Lending Reform Law"), which required mortgage loan servicers to be registered with the Department unless exempted under the law, 45 entities have pending applications or have been approved for registration and nearly 180 entities have indicated that they are a mortgage banker, broker, bank or other organization exempt from the registration requirements. Only one of the non-exempt entities applying for registration is located in New York and operating in a rural area. Of the exempt organizations, all of which are required to comply with the conduct of business contained in Part 419, approximately 100 are located in New York, including several in rural areas. However, the overwhelming majority of exempt organizations, regardless of where located, are banks or credit unions that are already regulated and are thus familiar with complying with the types of requirements contained in this regulation.

**Compliance Requirements:** The provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers has two main components:

it requires the registration by the Department of servicers that are not a bank, mortgage banker, mortgage broker or other exempt organization (the “MLS Registration Regulations”), and it authorizes the Department to promulgate rules and regulations that are necessary and appropriate for the protection of consumers, to define improper or fraudulent business practices, or otherwise appropriate for the effective administration of the provisions of the Mortgage Lending Reform Law relating to mortgage loan servicers (the “MLS Business Conduct Regulations”).

The provisions of the Mortgage Lending Reform Law of 2008 requiring registration of mortgage loan servicers which are not mortgage bankers, mortgage brokers or exempt organizations became effective on July 1, 2009. Part 418 of the Superintendent’s Regulations, initially adopted on an emergency basis on July 1, 2010, sets forth the standards and procedures for applications for registration as a mortgage loan servicer, for approving and denying applications to be registered as a mortgage loan servicer, for approving changes of control, for suspending, terminating or revoking the registration of a mortgage loan servicer as well as the financial responsibility standards for mortgage loan servicers.

Part 419 implements the provisions of the Mortgage Lending Reform Law of 2008 by setting the standards by which mortgage loan servicers conduct the business of mortgage loan servicing. The rule sets the standards for handling complaints, payments of taxes and insurance, crediting borrower payments, late payments, account statements, delinquencies and loss mitigation and fees. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor servicers’ conduct and prohibits certain practices such as engaging in deceptive business practices.

**Costs:** The requirements of Part 419 do not impose any direct costs on mortgage loan servicers. The periodic reporting requirements of Part 419 are consistent with those imposed on other regulated entities. In addition, many of the other requirements of Part 419, such as those related to the handling of loan delinquencies, taxes, insurance and escrow payments, collection of late fees and charges and crediting of payments, derive from federal or state laws, current federal loan modification programs, servicing guidelines utilized by Fannie Mae and Freddie Mac or servicers’ own protocols. Although mortgage loan servicers may incur some additional costs as a result of complying with Part 419, the overwhelming majority of mortgage loan servicers are banks, credit unions, operating subsidiaries or affiliates of banks, large independent servicers or other financial services entities that service millions, and even billions, of dollars in loans and have the experience, resources and systems to comply with these requirements. Of the 45 entities that have pending applications or have been approved for registration, only one is located in a rural area of New York State. Of the few exempt organizations located in rural areas of New York, virtually all are banks or credit unions. Moreover, compliance with the rule should improve the servicing of residential mortgage loans in New York, including the handling of mortgage delinquencies, help prevent unnecessary foreclosures and reduce consumer complaints regarding the servicing of residential mortgage loans.

**Minimizing Adverse Impacts:** As noted in the “Costs” section above, while mortgage loan servicers may incur some higher costs as a result of complying with the rules, the Department does not believe that the rule will impose any meaningful adverse economic impact upon private or public entities in rural areas. In addition, it should be noted that Part 418, which establishes the application and financial requirements for mortgage loan servicers, authorizes the Superintendent to reduce or waive the otherwise applicable financial responsibility requirements in the case of mortgage loans servicers that service not more than 12 mortgage loans or more than \$5,000,000 in aggregate mortgage loans in New York and which do not collect tax or insurance payments. The Superintendent is also authorized to reduce or waive the financial responsibility requirements in other cases for good cause. The Department believes that this will ameliorate any burden on mortgage loan servicers operating in rural areas.

**Rural Area Participation:** The Department issued a draft of Part 419 in December 2009 and held meetings with and received comments from industry and consumer groups following the release of the draft rule. The Department also maintains continuous contact with large segments of the servicing industry through its regulation of mortgage bankers and brokers and its work in the area of foreclosure prevention. The Department likewise maintains close contact with a variety of consumer groups through its community outreach programs and foreclosure mitigation programs. The Department has utilized this knowledge base in drafting the regulation.

#### **Job Impact Statement**

Article 12-D of the Banking Law, as amended by the Mortgage Lending Reform Law (Ch. 472, Laws of 2008), requires persons and entities which engage in the business of servicing mortgage loans after July 1, 2009 to be registered with the Superintendent. Part 418 of the Superintendent’s Regulations, initially adopted on an emergency basis on July 1, 2009, sets forth the application, exemption and approval procedures for

registration as a mortgage loan servicer, as well as financial responsibility requirements for applicants, registrants and exempted persons.

Part 419 addresses the business practices of mortgage loan servicers in connection with their servicing of residential mortgage loans. Thus, this part addresses the obligations of mortgage loan servicers in their communications, transactions and general dealings with borrowers, including the handling of consumer complaints and inquiries, handling of escrow payments, crediting of payments, charging of fees, loss mitigation procedures and provision of payment histories and payoff statements. This part also imposes certain recordkeeping and reporting requirements in order to enable the Superintendent to monitor servicers’ conduct and prohibits certain practices such as engaging in deceptive business practices.

Compliance with Part 419 is not expected to have a significant adverse effect on jobs or employment activities within the mortgage loan servicing industry. The vast majority of mortgage loan servicers are sophisticated financial entities that service millions, if not billions, of dollars in loans and have the experience, resources and systems to comply with the requirements of the rule. Moreover, many of the requirements of the rule reflect derive from federal or state laws and reflect existing best industry practices.

## **EMERGENCY RULE MAKING**

### **Excess Line Placements Governing Standards**

**I.D. No.** DFS-05-12-00006-E

**Filing No.** 35

**Filing Date:** 2012-01-17

**Effective Date:** 2012-01-17

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

**Action taken:** Amendment of Part 27 (Regulation 41) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, arts. 21 and 59, sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 3103, 5907, 5909, 5911 and 9102; and Financial Services Law, sections 202 and 302; L. 1997, ch. 225; L. 2002, ch. 587; and L. 2011, ch. 61

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

**Specific reasons underlying the finding of necessity:** This regulation governs the placement of excess line insurance. Article 21 of the Insurance Law and Regulation 41 enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from unauthorized insurers (known as “excess line insurers”) if the unauthorized insurers are “eligible,” and an excess line broker places the insurance.

On July 21, 2010, President Obama signed into law the Nonadmitted and Reinsurance Reform Act of 2010 (“NRRRA”), which prohibits any state, other than the insured’s home state, from requiring a premium tax payment for nonadmitted insurance. The NRRRA also subjects the placement of nonadmitted insurance solely to the statutory and regulatory requirements of the insured’s home state, and provides that only an insured’s home state may require an excess line broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to such insured. On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amended the New York Insurance Law to implement the provisions of the NRRRA.

The sections of Part I of Chapter 61 that amend the Insurance Law to bring New York into conformance with the NRRRA take effect on July 21, 2011, which is when the NRRRA takes effect. The regulation was previously promulgated on an emergency basis on July 22, 2011, and October 19, 2011.

For the reasons stated above, emergency action is necessary for the general welfare.

**Subject:** Excess Line Placements Governing Standards.

**Purpose:** To implement chapter 61 of the Laws of 2011, conforming to the federal Nonadmitted and Reinsurance Reform Act of 2010.

**Substance of emergency rule:** On July 21, 2010, President Obama signed into law the federal Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which contains the Nonadmitted and Reinsurance Reform Act of 2010 (“NRRRA”). The NRRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for excess (or “surplus”) line insurance. The NRRRA also subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured’s home state, and declares that only an insured’s home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured.

In addition, the NRRRA provides that an excess line broker seeking to

procure or place excess line insurance in a state for an exempt commercial purchaser (“ECP”) need not satisfy any state requirement to make a due diligence search to determine whether the full amount or type of insurance sought by the ECP may be obtained from admitted insurers if: (1) the broker procuring or placing the excess line insurance has disclosed to the ECP that the insurance may be available from the admitted market, which may provide greater protection with more regulatory oversight; and (2) the ECP has subsequently requested in writing that the broker procure the insurance from or place the insurance with an excess line insurer.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the New York Insurance Law to conform to the NRRRA.

Regulation 41 (11 NYCRR Part 27) consists of 24 sections and one appendix addressing the regulation of excess line insurance placements.

The Department of Financial Services (hereinafter “the Department”) amended Section 27.0 to discuss the NRRRA and Chapter 61 of the Laws of 2011.

The Department amended Section 27.1 to delete language in the definition of “eligible” and to add three new defined terms: “exempt commercial purchaser,” “insured’s home state,” and “United States.”

Section 27.2 is not amended.

The Department amended Section 27.3 to provide an exception for an ECP consistent with Insurance Law Section 2118(b)(3)(F) and to clarify that the requirements set forth in this section apply when the insured’s home state is New York.

The Department amended Section 27.4 to clarify that the requirements set forth in this section when the insured’s home state is New York.

The Department amended Section 27.5 to: (1) clarify that the requirements set forth in this section apply when the insured’s home state is New York; (2) with regard to an ECP, require an excess line broker or the producing broker to affirm in part A or part C of the affidavit that the ECP was specifically advised in writing, prior to placement, that the insurance may or may not be available from the authorized market that may provide greater protection with more regulatory oversight; (3) require an excess line broker to identify the insured’s home state in part A of the affidavit; and (4) clarify that the premium tax is to be allocated in accordance with Section 27.9 of Regulation 41 for insurance contracts that have an effective date prior to July 21, 2011.

The Department amended Section 27.6 to clarify that the requirements set forth in this section apply when the insured’s home state is New York.

Section 27.7 is not amended.

The Department amended Section 27.8 to: (1) require a licensed excess line broker to electronically file an annual premium tax statement, unless the Superintendent of Financial Services (the “Superintendent”) grants the broker an exemption pursuant to Section 27.23 of Regulation 41; (2) acknowledge that payment of the premium tax may be made electronically; and (3) change a reference to “Superintendent of Insurance” to “Superintendent of Financial Services.”

The Department amended Section 27.9 to clarify how an excess line broker must calculate the taxable portion of the premium for: (1) insurance contracts that have an effective date prior to July 21, 2011; and (2) insurance contracts that have an effective date on or after July 21, 2011 and that cover property or risks located both inside and outside the United States.

The Department amended Sections 27.10, 27.11, and 27.12 to clarify that the requirements set forth in this section apply when the insured’s home state is New York.

The Department amended Section 27.13 to clarify that the requirements set forth in this section apply when the insured’s home state is New York and to require an excess line broker to obtain, review, and retain certain trust fund information if the excess line insurer seeks an exemption from Insurance Law Section 1213. The Department also amended Section 27.13 to require an excess line insurer to file electronically with the Superintendent a current listing that sets forth certain individual policy details.

The Department amended Section 27.14 to state that in order to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Regulation 41, an excess line insurer must establish and maintain a trust fund, and to permit an actuary who is a fellow of the Casualty Actuarial Society (FCAS) or a fellow in the Society of Actuaries (FSA) to make certain audits and certifications (in addition to a certified public accountant), with regard to the trust fund.

Section 27.15 is not amended.

The Department amended Section 27.16 to state that an excess line insurer will be subject to Insurance Law Section 1213 unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105 and Regulation 41 and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Regulation 41, in addition to other current requirements.

The Department amended Sections 27.17, 27.18, 27.19, 27.20, and 27.21 to clarify that the requirements set forth in this section apply when the insured’s home state is New York.

Section 27.22 is not amended.

The Department repealed current Section 27.23 and added a new Section 27.23 titled, “Exemptions from electronic filing and submission requirements.”

Section 27.24 is not amended.

The Department amended the excess line premium tax allocation schedule set forth in appendix four to apply to insurance contracts that have an effective date prior to July 21, 2011.

The Department added a new appendix five, which sets forth an excess line premium tax allocation schedule to apply to insurance contracts that have an effective date on or after July 21, 2011 and that cover property and risks located both inside and outside the United States.

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire April 15, 2012.

**Text of rule and any required statements and analyses may be obtained from:** David Neustadt, New York State Department of Financial Services, 25 Beaver Street, New York, NY 10004, (212) 480-5265, email: david.neustadt@dfs.ny.gov

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent’s authority for the promulgation of the Fourteenth Amendment to Regulation 41 (11 NYCRR Part 27) derives from Sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 9102, and Article 21 of the Insurance Law, Sections 202 and 302 of the Financial Services Law, Chapter 225 of the Laws of 1997, Chapter 587 of the Laws of 2002, and Chapter 61 of the Laws of 2011.

The federal Nonadmitted and Reinsurance Reform Act of 2010 (the “NRRRA”) significantly changes the paradigm for excess line insurance placements in the United States. Chapter 61 of the Laws of 2011 amends the New York Insurance Law and the New York Tax Law to conform to the NRRRA. The NRRRA and Chapter 61 will impact excess line placements effective on and after July 21, 2011.

Section 301 of the Insurance Law and Sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the “Superintendent”) to prescribe regulations interpreting the provisions of the Insurance Law, and effectuate any power granted to the Superintendent under the Insurance Law. Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Section 1213 provides the manner by which substituted service on an unauthorized insurer may be made in any proceeding against it on an insurance contract issued in New York. Substituted service may be made on the Superintendent in the manner prescribed in Section 1213.

Article 21 sets forth the duties and obligations of insurance brokers and excess line brokers. Section 2101 sets forth relevant definitions. Section 2104 governs the licensing of insurance brokers. Section 2105 sets forth licensing requirements for excess line brokers. Section 2110 provides grounds for the Superintendent to discipline licensees by revocation or suspension of licenses, or, pursuant to Section 2127, imposition of a monetary penalty in lieu of revocation or suspension. Section 2116 permits payment of commissions to brokers and prohibits compensation to unlicensed persons. Section 2117 prohibits the aiding of an unauthorized insurer, with exceptions. Section 2118 sets forth the duties of excess line brokers, with regard to the placement of insurance with eligible foreign and alien excess line insurers, including the responsibility to ascertain and verify the financial condition of an unauthorized insurer before placing business with that insurer. Section 2121 provides that brokers have an agency relationship with insurers for the collection of premiums. Section 2122 imposes limitations on advertising by producers. Section 2130 establishes the Excess Line Association of New York (“ELANY”).

Section 9102 establishes rules regarding the allocation of direct premiums taxable in New York, where insurance covers risks located both in and out of New York.

2. Legislative objectives: Generally, unauthorized insurers may not do an insurance business in New York. In permitting a limited exception for licensed excess line brokers to procure insurance policies in New York from excess line insurers, the Legislature established statutory requirements to protect persons seeking insurance in New York. The NRRRA significantly changes the paradigm for excess (or “surplus”) line insurance placements in the United States. The NRRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment

for excess line insurance. Further, the NRRRA subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured's home state, and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured. In addition the NRRRA establishes uniform eligibility standards for excess line insurers. A state may not impose additional eligibility conditions.

Under the new NRRRA paradigm, an excess line broker now must ascertain an insured's home state before placing any property/casualty excess line business. Thus, if the insured's home state is not New York, even though the insured goes to the broker's office in New York, the excess line broker must be licensed in the insured's home state in order for the broker to procure the excess line coverage for that insured. Conversely, a person who is approached by an insured outside of New York must be licensed as an excess line broker in New York in order to procure excess line coverage for a New York home-stated insured.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the New York Insurance Law to conform to the NRRRA. The NRRRA and Chapter 61 take effect on July 21, 2011 and will impact excess line placements effective on and after July 21, 2011.

3. Needs and benefits: Regulation 41 governs the placement of excess line insurance. The purpose of the excess line law is to enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from eligible excess line insurers. This regulation implements the provisions and purposes of Chapter 61 of the Laws of 2011, which amended the New York Insurance Law to conform to the NRRRA. The NRRRA and Chapter 61 take effect on July 21, 2011 and impacts excess line placements effective on and after July 21, 2011.

Section 27.14 of Regulation 41 currently prohibits an excess line broker from placing coverage with an excess line insurer unless the insurer has established and maintained a trust fund. However, the new NRRRA eligibility requirements do not include a trust fund with respect to foreign insurers (alien insurers, however, do have to maintain a trust fund that satisfies the International Insurers Department ("IID") of the National Association of Insurance Commissioners ("NAIC")). As such, New York is no longer requiring a trust fund of foreign insurers for eligibility.

Currently Insurance Law Section 1213(e) exempts excess line insurers writing excess line insurance in New York from the requirements of Section 1213, such as the requirement that the insurer deposit with the clerk of the court cash or securities or a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payments of any final judgment that may be rendered by the court; with the clerk of the court before filing any pleading in any proceeding against it, so long as the excess line insurance contract designates the Superintendent for service of process and, in material part, the policy is effectuated in accordance with Section 2105, which is the section that applies to excess line brokers. In the Superintendent of Insurance's memorandum to the governor, dated March 30, 1949, recommending favorable executive action on the bill, he wrote that it was "our understanding that this subsection was inserted as the result of representations made by the representatives of Lloyds of London because the contracts of insurance customarily issued by the underwriters and placed through licensees of this Department, contain a provision whereby the underwriters consent to be sued in the courts of this state and they maintain a trust fund in New York of a very sizable amount, which is available for the payment of any judgment which may be secured in an action involving one of their contracts of insurance."

When the Superintendent of Insurance first promulgated Regulation 41, effective October 1, 1962, pursuant to his broad power to make regulations, he codified in the regulation the longstanding practice regarding the trust fund, and established minimum provisions and requirements, thus providing a reasonable alternative for unauthorized insurers that regularly engage in the sale of insurance through the excess line market. While the specific provisions have been amended a number of times over the years, every iteration of Regulation 41 has called for a trust fund as a means of providing alternative security that the insurer would have resources to pay judgments against the insurer.

Although the NRRRA may preclude New York from requiring foreign insurers to maintain a trust fund to be eligible in New York, or a trust fund for alien insurers that deviate from the IID requirements, New York policyholders need to be protected when claims arise. As a result, the Department is amending Section 27.16 of Regulation 41 to provide that an excess line insurer will be subject to Insurance Law Section 1213's requirements unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105, the Superintendent is designated as agent for service of process, and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Regulation 41 (in addition to other requirements currently set forth in Section 27.16). Further, the Department is amending Section 27.14 of Regulation 41 to state that in or-

der to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Regulation 41, an excess line insurer must establish and maintain a trust fund. Insurance Law Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

The Department amended Section 27.8(a) of Regulation 41 to require excess line brokers to file annual premium tax statements electronically, and amended Section 27.13 to require excess line brokers to file electronically a listing that sets forth certain individual policy details. In addition, the Department added a new Section 27.13 to Regulation 41 to allow excess line brokers to apply for a "hardship" exception to the electronic filing or submission requirement.

4. Costs: The rule is not expected to impose costs on excess line brokers, and it merely conforms the requirements regarding placement of coverage with excess line insurers to the requirements in Chapter 61 of the Laws of 2011, which amended the New York Insurance Law to conform to the NRRRA. Although the amended regulation will require excess line brokers to file annual premium tax statements and a listing that sets forth certain individual policy details electronically, most brokers already do business electronically. In fact ELANY already requires documents to be filed electronically. Moreover, the regulation also provides a method whereby excess line brokers may apply for an exemption from the electronic filing or submission requirement.

With regard to the trust fund amendment, on the one hand, excess line insurers may incur costs if they choose to establish and maintain a trust fund in order to be exempt from Insurance Law Section 1213. On the other hand, it should be significantly less expensive to establish and maintain a trust fund rather than comply with Insurance Law Section 1213. This is a business decision that each insurer will need to make. The trust fund, if established and maintained, will be for the purpose of protecting all United States policyholders.

Costs to the Insurance Department also should be minimal, as existing personnel are available to review any modified filings necessitated by the regulations. In fact, filing forms electronically may produce a cost savings for the Insurance Department. These rules impose no compliance costs on state or local governments.

5. Local government mandates: These rules do not impose any program, service, duty or responsibility upon a city, town, village, school district or fire district.

6. Paperwork: The regulation imposes no new reporting requirements on regulated parties.

7. Duplication: The regulation will not duplicate any existing state or federal rule, but rather implement and conform to the federal requirements.

8. Alternatives: The Department discussed the changes related to trust funds and Insurance Law Section 1213 with counsel at the NAIC and with ELANY.

9. Federal standards: This regulation will implement the provisions and purposes of Chapter 61 of the Laws of 2011, which amends the New York Insurance Law to conform to the NRRRA.

10. Compliance schedule: Pursuant to Chapter 61 of the Laws of 2011, this regulation will impact excess line insurance placements effective on and after July 21, 2011.

#### **Regulatory Flexibility Analysis**

This rule is directed at excess line brokers and excess line insurers.

Excess line brokers are considered to be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule is not expected to have an adverse impact on these small businesses because it merely conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the New York Insurance Law to conform to the NRRRA.

The rule will require excess line brokers to file annual premium tax statements electronically, and to file electronically a listing that sets forth certain individual policy details. However, the excess line broker may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Further, the Department of Financial Services has monitored Annual Statements of excess line insurers subject to this rule, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have fewer than one hundred employees.

The Department of Financial Services finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

The rule does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

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

The Department of Financial Services finds that this rule does not impose any additional burden on persons located in rural areas, and the Department finds that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

#### **Job Impact Statement**

The Department of Financial Services finds that this rule should have no impact on jobs and employment opportunities.

The rule conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the New York Insurance Law to conform to the NRRRA. The rule also makes an excess line insurer subject to Insurance Law Section 1213, unless it chooses to establish and maintain a trust fund in New York for the benefit of New York policyholders.

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

#### **Valuation of Annuity, Single Premium Life Insurance, Guaranteed Interest Contract and Other Deposit Reserves**

I.D. No. DFS-05-12-00010-P

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

**Proposed Action:** Amendment of Part 99 (Regulation 151) of Title 11 NYCRR.

**Statutory authority:** Financial Services Law, sections 202, 301, and 302; and Insurance Law, sections 301, 1304, 4217 and 4517

**Subject:** Valuation of Annuity, Single Premium Life Insurance, Guaranteed Interest Contract and Other Deposit Reserves.

**Purpose:** Use of substandard annuity mortality tables in valuing impaired lives under individual single premium immediate annuities.

**Text of proposed rule:** A new subdivision (j) is added to section 99.6 to read as follows:

(j) *Use of substandard annuity mortality tables in valuing impaired lives under individual single premium immediate annuities.*

(1) *This subdivision applies to any individual single premium immediate annuity contract issued on or after January 1, 2012 not covered by subdivision (i) of this section, but for which medical records indicate the expectation of life has been reduced and for which the premium charged reflects that reduction.*

(2) *An insurer may use a substandard annuity mortality table where there is a medical assessment of the annuitant, or measuring life, based on relevant hospital records, treating physicians' reports, or independent medical evaluations that support at least a 25% reduction in the expectation of life, based on either the current valuation table or the insurer's pricing table, consistently applied, compared to a normally healthy individual of the same age and gender. The insurer shall retain the information used in the medical assessment in its underwriting file as proof of the individual's impaired health and shortened longevity for as long as the contract remains in force.*

(3) *Minimum Reserves*

(i) *The minimum reserves for a contract subject to this paragraph shall be the reserves obtained by making a constant addition to the mortality rate of the otherwise applicable valuation mortality table, as specified in section 99.10 of this Part. The constant addition shall be determined as follows:*

(a) *Calculate the present value of future benefits at issue for each contract using a rated up age, the applicable valuation mortality table, and the single premium immediate annuity valuation interest rate. The rated up age must produce an expectation of life under this valuation mortality table whose percent reduction from the actual age expectation of life under this table is not greater than the percent reduction in the expectation of life supported by the medical assessment described in paragraph (2) of this subdivision; and*

(b) *Solve for the constant addition to the true age mortality rates such that the present value of future benefits at issue is equal to or greater than the present value obtained in clause (a) of this subparagraph. The base mortality table and the valuation interest rate shall be the same as those specified in clause (a) of this subparagraph.*

(ii) *The constant addition to the mortality table shall be made as of the issue date and, once determined, held constant for the period of time that the contract remains in force.*

(iii) *For every contract subject to this subdivision, the insurer shall maintain records of actual to expected mortality to monitor the appropriateness of the substandard mortality. The appointed actuary must comment on the appropriateness of the substandard mortality and report any material deviations in the actuarial memorandum that supports the actuarial opinion required by Part 95 of this Title (Insurance Regulation 126). The fact that an insurer has held minimum reserves as described in this paragraph shall not relieve the appointed actuary from considering whether the reserves are adequate.*

**Text of proposed rule and any required statements and analyses may be obtained from:** David Neustadt, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1690, email: david.neustadt@dfs.ny.gov

**Data, views or arguments may be submitted to:** Frederick Andersen, Department of Financial Services, One Commerce Plaza, Albany, NY 12257, (518) 474-7929, email: Frederick.Andersen@dfs.ny.gov

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

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

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for the adoption of 11 NYCRR 99 (Insurance Regulation 151) derives from sections 202, 301, and 302 of the Financial Services Law ("FSL") and sections 301, 1304, 4217, and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies.

Section 202 of the Financial Services Law establishes the office of the Superintendent and designates the Superintendent to be the head of the Department of Financial Services.

FSL section 301 establishes the powers of the Superintendent generally. FSL section 302 and Insurance Law section 301, in material part, authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, the Banking Law, the Financial Services Law, or any other law of this State and to prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law requires insurers to maintain reserves for life insurance policies and certificates and annuity contracts in force according to prescribed tables of mortality and rates of interest.

Section 4217(c)(6)(D) of the Insurance Law authorizes the Superintendent to issue guidelines for the application of the reserve valuation provisions of section 4217 to the policies and contracts that the Superintendent deems appropriate.

Section 4517(c)(2) of the Insurance Law requires fraternal benefit societies to comply with the minimum valuation standards of section 4217 of the Insurance Law for life insurance and annuities issued on or after January 1, 1980.

Sections 4217(a)(3) and 4517(c)(3) of the Insurance Law give the Superintendent the discretion, in appropriate circumstances, to vary the standards of mortality applicable to policies of insurance on substandard lives.

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principal focus of the Insurance Law. One fundamental way the Insurance Law seeks to ensure solvency is by requiring all insurers and fraternal benefit societies authorized to do business in New York State to hold reserve funds necessary in relation to the obligations made to policy or contract holders. The Insurance Law prescribes the mortality tables and interest rates to be used for calculating such reserves.

3. Needs and benefits: This amendment allows the use of substandard annuity mortality tables in valuing impaired lives under individual single premium immediate annuities. Use of a substandard annuity mortality table or the use of a constant addition to the standard mortality rate allows the insurer to recognize the impaired health of the annuitant. A substandard rating may only be applied if there is documented medical proof that there is at least a 25% reduction in the life expectancy of the annuitant when compared to a normal healthy individual of the same age and gender.

The use of a substandard mortality table is not mandatory for valuing the reserves associated with individual single premium immediate annuities on impaired lives. The amendment will appropriately decrease reserves on in-force business for New York authorized life insurers that meet the conditions of the regulation and choose to value these contracts using substandard mortality. The amendment may benefit consumers with impaired health by enabling insurers to keep costs at a lower level because they will not need to hold standard reserves. Because insurers may hold lower reserves, they will be more likely to sell the product because the product will be less capital intensive and insurers may offer these annuities at a more competitive price to the annuitant. This standard was adopted by the National Association of Insurance Commissioners in its Actuarial Guideline IX-C in 2001. Most states are already using this standard since

Actuarial Guidelines are generally adopted automatically by most states when they adopt the Accounting Practices and Procedures Manual.

4. Costs: This amendment allows for the use of a constant addition to the mortality rate used to calculate reserves for impaired lives under individual single premium immediate annuities. The constant addition is a specified number of extra deaths per 1000 lives that is added to the mortality rate. The constant addition to the mortality rate will lower reserves held on these contracts due to the shortened life expectancy of the annuitant. However, an insurer need not modify its current computer systems if it continues to maintain higher reserves, which it always has the option to do.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Although the insurer may have additional administrative costs, they are likely to be offset by being permitted to establish lower reserves. Since many states have already adopted the lower reserve requirements, insurers that already comply with this standard in other states will likely need to make only minor modifications to their computer systems for use in New York. Further, this is voluntary on the insurer's part, and it may continue to maintain the higher reserves if it does not choose to do the additional things required by this Part to maintain the lower reserves.

Costs to the Department of Financial Services for this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for contracts affected by the amendment to Insurance Regulation 151. There are no costs to other government agencies or local governments.

5. Local government mandates: The amendment to the regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork: The regulation requires that insurers maintain records of actual to expected mortality to monitor the appropriateness of the substandard mortality. The regulation requires no additional paperwork for the Department.

7. Duplication: The amendment to the regulation does not duplicate any existing law or regulation.

8. Alternatives: As part of the drafting process, the regulation was sent out to the following groups: The Life Insurance Council of New York (LICONY), New York Public Interest Research Group, Consumer Federation of America, Division of Consumer Protection at the Department of State ("DCP"), The Insurance Forum, and the American Association of Retired Persons. The Department met with the DCP on November 28, 2011 to discuss questions they had on the draft regulation. The DCP recommended no additional changes being made to the text of the amendment. Additionally, the Department received some minor comments from LICONY on December 8, 2011. After discussion, LICONY recommended no changes to the text of the amendment. The Department received no comments from any of the other consumer groups.

The only alternative considered was to not allow the use of substandard mortality for individuals with impaired health and documented lower life expectancy. However, this would require New York authorized life insurers and fraternal benefit societies to maintain higher reserve requirements on these contracts than insurers in states that have adopted the 2001 NAIC model. This might raise the cost to consumers because insurers would be subject to a higher reserve requirement. It was determined that this alternative would not be appropriate.

9. Federal standards: There are no federal standards in the subject area.

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2012. This amendment allows the use of substandard annuity mortality tables in valuing impaired lives under individual single premium immediate annuities. Voluntary election of such table is conditional and dependent upon the insurer meeting the requirements set forth in the current rule with respect to the medical assessment of the annuitant or measuring life. Since this standard has been adopted on a national basis for many years, insurers that would be impacted by this amendment have already been complying with these requirements in other states.

#### Regulatory Flexibility Analysis

1. Small businesses:

The Department of Financial Services finds that this amendment will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at all insurers and fraternal benefit societies authorized to do business in New York State, none of which falls within the definition of "small business" as found in section 102(8) of the State Administrative Procedure Act. The Department has reviewed filed Reports on Examination and Annual Statements of authorized insurers and fraternal benefit societies, and believes that none of them fall within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

2. Local governments:

The amendment does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

#### Rural Area Flexibility Analysis

The Department of Financial Services finds that this rule does not impose any additional burden on persons located in rural areas and that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

#### Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. It prescribes minimum reserve standards for valuing impaired lives under individual single premium immediate annuities using substandard annuity mortality tables. The rule is likely to have no measurable impact on jobs and employment opportunities because existing personnel should be able to monitor the insurer's compliance with the reserve requirements. In addition, there should be no region in New York that would experience an adverse impact on jobs and employment opportunities. Finally, this rule would not have a measurable impact on self-employment opportunities.

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## Department of Health

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### NOTICE OF ADOPTION

#### Potentially Preventable Negative Outcomes

I.D. No. HLT-44-11-00023-A

Filing No. 38

Filing Date: 2012-01-17

Effective Date: 2012-02-01

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

**Action taken:** Addition of section 86-1.42 to Title 10 NYCRR.

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

**Subject:** Potentially Preventable Negative Outcomes.

**Purpose:** Denies additional reimbursement for hospital acquired conditions.

**Text of final rule:** Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35) of the Public Health Law, Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended, by adding a new section 86-1.42, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

*86-1.42 Potentially preventable negative outcomes.*

(a) *Effective for discharges occurring on or after July 1, 2011, payments pursuant to this Subpart shall be denied with regard to the following potentially preventable negative outcomes if they are acquired during a patient's inpatient stay at the hospital seeking such payments:*

- (1) *A foreign object retained within a patient's body after surgery.*
- (2) *The development of an air embolism within a patient's body.*
- (3) *A patient blood transfusion with incompatible blood.*
- (4) *A patient's development of stage III or stage IV pressure ulcers.*
- (5) *Patient injuries resulting from accidental falls and other trauma,*

*including, but not limited to:*

- i. *Fractures*
- ii. *Dislocations*
- iii. *Intracranial injuries*
- iv. *Crushing injuries*
- v. *Burns*
- vi. *Electric shock*
- (6) *A patient's manifestations of poor glycemic control, including,*

*but not limited to:*

- i. *Diabetic ketoacidosis*
- ii. *Nonketotic hyperosmolar coma*
- iii. *Hypoglycemic coma*
- iv. *Secondary diabetes with ketoacidosis*
- v. *Secondary diabetes with hyperosmolarity*
- (7) *A patient's development of a catheter-associated urinary tract infection.*

(8) A patient's development of a vascular catheter-associated infection.

(9) A patient's development of a surgical site infection following:

- i. a coronary artery bypass graft – mediastinitis;
- ii. bariatric surgery, including, but not limited to, laparoscopic gastric bypass, gastroenterostomy, and laparoscopic gastric restrictive surgery; or
- iii. orthopedic procedures, including, but not limited to, such procedures performed on the spine, neck, shoulder and elbow.

(10) A patient's development of deep vein thrombosis or a pulmonary embolism in connection with a total knee replacement or a hip replacement, excluding pediatric patients, defined as patients under eighteen years of age, and also excluding obstetric patients, defined as patients with at least one primary or secondary diagnosis code that includes an indication of pregnancy.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 86-1.42(a)(5)(vi).

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

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

Changes made to the last published rule do not necessitate revision to the previously published RIS, RFA, RAFA and JIS.

**Assessment of Public Comment**

The agency received no public comment.

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

**Episodic Pricing for Certified Home Health Agencies (CHHA)**

**I.D. No.** HLT-05-12-00011-P

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

**Proposed Action:** Addition of section 86-1.44 to Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 3614(13)

**Subject:** Episodic Pricing for Certified Home Health Agencies (CHHA).

**Purpose:** To control over-utilization of CHHA services and more appropriately align payment with services.

**Text of proposed rule:** Subpart 86-1 of title 10 of NYCRR is amended and a new section 86-1.44 is added, to read as follows:

86-1.44. *Episodic Payments for Certified Home Health Agency Services*

(a) Effective for services provided on and after April 1, 2012, Medicaid payments for certified home health care agencies ("CHHA"), except for such services provided to children under eighteen years of age, shall be based on payment amounts calculated for 60-day episodes of care.

(b) An initial statewide episodic base price, to be effective April 1, 2012, will be calculated based on paid Medicaid claims, as determined by the Department, for services provided by all certified home health agencies in New York State during the base period of January 1, 2009 through December 31, 2009.

(1) Such base price shall be calculated by grouping all Medicaid paid CHHA claims for dates of services in 2009 into 60 day episodes of care. All such 2009 episodes which include dates of service beginning in November or December of 2008 or ending in January or February of 2010 shall be included in such base price calculation. Low utilization episodes of care, as defined in subdivision (d) of this section, shall be excluded from such calculation. With regard to high utilization episodes of care, costs in excess of outlier thresholds, as determined in accordance with subdivision (e) of this section, shall be excluded from such calculation. The resulting base price shall be subject to such further adjustment as is required to comply with the aggregate savings mandated by paragraph (b) of subdivision 13 of section 3614 of the Public Health Law ("PHL").

(2) The episodic base price for periods beginning on or after April 1, 2013, may be based on paid Medicaid claims for services provided by all certified home health agencies during a base year period subsequent to 2009, as determined by the Department.

(3) The applicable base year for determining the base price shall be updated not less frequently than every three years.

(c) The base price paid for 60-day episodes of care shall be adjusted by an individual patient case mix index as determined pursuant to subdivision (g) of this section; and also by a regional wage index factor as determined pursuant to subdivision (h) of this section.

(d) Notwithstanding any inconsistent provision of this section, payments for low utilization cases shall be based on the statewide weighted average of fee-for-service rates for such services, as determined by the Department and as adjusted by the applicable regional wage index factor as described in subdivision (h) of this section. For purposes of this section, low utilization cases will be defined as 60 day episodes of care with a total cost of \$500 or less, based on statewide weighted average fee-for-service rates paid on a per-visit, per-hour, or other appropriate historical basis.

(e)(1) Payments for 60-day episodes of care shall be adjusted for high-utilization cases in which total costs, based on statewide weighted average fee-for-service rates as determined by the Department and as paid on a per-visit, per-hour, or other appropriate historical basis, exceed outlier cost thresholds determined by the Department for each case mix group. In such cases the provider will receive the adjusted episodic base payment pursuant to subdivisions (b) and (c) of this section, plus a percentage, to be determined by the Department, of the cost which exceeds the outlier threshold, as adjusted by the regional wage index factor, provided, however, that such adjustment percentage is subject to such further adjustment as may be necessary to comply with the aggregate savings mandated by PHL section 3614(13)(b).

(2) The outlier threshold for each resource group, as described in subdivision (g) of this section, shall be equal to a specified percentile of all episodic claims totals for the resource group during the base period, excluding low utilization episodes. Such percentiles shall range from the seventieth percentile for groups with the lowest case mix index to the ninetieth percentile for groups with the highest case mix index.

(f) The case mix index to be applied to each episodic claim, excluding low utilization claims, shall be based on patient information contained in the federal Outcome Assessment Information Set (OASIS) for the episode. The patient shall be assigned to a resource group based on data that includes, but is not limited to, clinical and functional information, age group, and the reason for the assessment. A case mix index shall be calculated for each resource group based on the relative cost of paid claims during the base period.

(g) Reimbursement for maternity patients, defined as patients who are currently or were recently pregnant and are receiving treatment as a direct result of such pregnancy, may be made pursuant to this section without the submission of an OASIS form, provided that providers billing for such patients must bill in accordance with such special billing instructions as may be established by the commissioner and such patients shall be grouped in a case mix designation based on the lowest acuity resource group.

(h) The regional wage index factor (WIF) shall be computed in accordance with the following and applied to the portion of the episodic base price attributable to labor costs:

(1) Average wages shall be determined for agency health care service occupations for each of the 10 labor market regions in New York, as defined by the New York State Department of Labor.

(2) The average wages in each region shall be assigned relative weights in proportion to the Medicaid utilization for each of the agency service categories as reported in the most recently available agency cost report submissions.

(3) Based on the average wages as determined pursuant to paragraph (1) of this subdivision, as weighted pursuant to paragraph (2) of this subdivision, an index shall be determined for each region, based on a comparison of the weighted average regional wages to the statewide average wages.

(4) The Department may adjust the regional WIFs proportionately, if necessary, to assure that the application of the WIFs is revenue-neutral on a statewide basis.

(i) Payments for episodes of care shall be proportionally reduced to reflect episodes of care totaling less than 60 days, provided, however, that CHHAs providing episodes of care totaling less than 60 days as a result of the following circumstances shall be reimbursed for a full 60 day episode:

- (1) discharges from the CHHA resulting from a determination that the patient no longer requires CHHA care and may remain at home;
- (2) transfer to a general hospital to receive acute care services;
- (3) transfer to a hospice for end-of-life care; or
- (4) the patient's death.

The commissioner shall monitor cases for which full payments are made for episodes of care of less than 60 days pursuant to the provisions of this subdivision and may require the CHHA to provide such information and documentation as the commissioner deems necessary to ensure quality of care.

(j) The Department may require agencies to collect and submit any data deemed by the Department to be required to implement the provisions of this section.

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

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

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

#### **Regulatory Impact Statement**

##### **Statutory Authority:**

The authority for implementation of an episodic payment system for Certified Home Health Agency services pursuant to regulations is set forth in section 3614(13) of the Public Health Law.

##### **Legislative Objectives:**

The Legislature chose to address the issue of over-utilization of Certified Home Health Agency services as a result of the recommendations submitted by the Medicaid Redesign Team and accepted by the Governor. Pursuant to statute, an episodic payment system based on 60-day episodes of care, with payments tied to patient acuity, was chosen as one of the vehicles to address this issue.

##### **Needs and Benefits:**

The proposed amendment appropriately implements the provisions of Public Health Law Section 3614(13), which establishes an episodic payment system effective April 1, 2012. According to data provided by the New York State Department of Health Datamart (Office of Health Insurance Programs), total paid Medicaid claims for Certified Home Health Agencies in New York State increased from \$760 million in 2003 to \$1.349 billion in 2009. At the same time, total CHHA recipients decreased from 92,553 to 86,641. The result was an 89.5% increase in spending per recipient from \$8,215 in 2003 to \$15,570 in 2009. The present fee-for-service reimbursement approach does not consider patient acuity or limit over-utilization.

This amendment will discourage over-utilization of CHHA services by establishing base payments for 60-day episodes, adjusted for patient acuity and regional wage differences. The episodic system is similar to Medicare's Prospective Payment System and will take effect following a one-year transition period in which CHHAs are subject to aggregate average per-patient spending limits (PHL 3614(12)).

##### **Costs:**

The regulated parties (providers) may incur some additional cost to modify their billing systems to accommodate the episodic system. This cost is not expected to be substantial.

There are no additional costs to the Department of Health, state government, or local governments for the implementation of and continuing compliance with this amendment.

##### **Local Government Mandates:**

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

##### **Paperwork:**

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

##### **Duplication:**

These regulations do not duplicate existing state or federal regulations.

##### **Alternatives:**

No significant alternatives are available. The Department is required by the Public Health Law section 3614(13) to promulgate implementing regulations.

##### **Federal Standards:**

This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

##### **Compliance Schedule:**

Providers were notified in April, 2011, that the episodic payment system will take effect April 1, 2012. The Department of Health is providing CHHAs with detailed information about the system as it becomes available. Required modifications to the Department's Medicaid billing system were completed and provider testing is underway. The Department anticipates that providers will have sufficient time to prepare for compliance with the statute.

#### **Regulatory Flexibility Analysis**

##### **Effect of Rule:**

The proposed rule will apply to 139 Certified Home Health Agencies. Of this total, 69 have fewer than 100 full-time equivalent employees. Public CHHAs (operated by county health departments) account for 42 of the 69 small providers.

##### **Compliance Requirements:**

There are no additional reporting, recordkeeping or other affirmative acts that small businesses or local governments will need to undertake to comply with the proposed rule. A "small business regulation guide" is not required.

##### **Professional Services:**

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

##### **Compliance Costs:**

Certified Home Health Agencies may incur minor additional costs to modify their billing systems for the new payment methodology.

##### **Economic and Technological Feasibility:**

As the proposed rule affects only the method of reimbursing providers for existing services, compliance by small businesses and local governments is not expected to have economic or technological implications beyond the possible software modifications noted above.

##### **Minimizing Adverse Impact:**

The proposed amendment reflects statutory intent and requirements.

##### **Small Business and Local Government Participation:**

The proposed rule resulted from the recommendations of the Governor's Medicaid Redesign Team. The recommendation process allowed for input from Medicaid industry stakeholders, including larger and smaller providers, and the general public, through statewide hearings and website outreach.

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

##### **Types and Estimated Numbers of Rural Areas:**

The proposed rule will apply to 139 Certified Home Health Agencies, of which 51 are located in counties with populations of less than 200,000. CHHAs are located in 40 of the 44 rural counties in the state. There are no agencies in townships which have population densities of 150 persons or fewer per square mile and are within counties with population above 200,000.

**Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services:**

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal. No additional professional services will be required for compliance.

##### **Costs:**

Certified Home Health Agencies may incur minor additional costs to modify their billing systems for the new payment methodology.

##### **Minimizing Adverse Impact:**

The proposed amendment reflects statutory intent and requirements.

##### **Rural Area Participation:**

The proposed rule resulted from the recommendations of the Governor's Medicaid Redesign Team. The recommendation process allowed for input from Medicaid stakeholders from all areas of the state, including rural areas, through regional hearings and website outreach.

#### **Job Impact Statement**

##### **Nature of Impact:**

The proposed rule is required to implement the recommendations of the Governor's Medicaid Redesign Team for controlling increases in Certified Home Health Agency (CHHA) utilization. Such increases contributed to the average annual Medicaid claims per recipient increasing from \$8,215 to \$15,570 (89.5%) between 2003 and 2009.

Changing reimbursement from a traditional fee-for-service model to payments for episodes of care will incentivize CHHAs to increase operational efficiency and control excess utilization. To the extent that total hours of service are reduced, the limits could result in some staffing reductions. However, providers also have the opportunity to reduce non-labor costs in order to minimize any impact on staffing levels. Because reimbursement will be tied to patient acuity, agencies will receive higher payments for patients who require more hours of service, thus more appropriately aligning payment with service provided.

In addition, a related Medicaid Redesign Team project will require the movement of significant numbers of CHHA patients into the Managed Long Term Care (MLTC) program. Consequently, potential staffing reductions by CHHAs will be counterbalanced by the increase in staffing required to serve the MLTC patient population.

##### **Categories and Numbers Affected:**

There are five categories of direct care workers at CHHAs: home health aides, nurses, physical therapists, occupational therapists and speech pathologists. Statewide, 84% of CHHA claims dollars are for home health aide services. In New York City, where this proposal's greatest impact is expected (see below), home health aides account for 89% of all CHHA claims dollars.

##### **Regions of Adverse Impact:**

New York City is the only region of the state which is expected to experience a net total decrease in reimbursement when the episodic system is implemented. There are several existing Managed Long Term Care programs in New York City which will accept CHHA patients requiring more than 120 days of care.

##### **Minimizing Adverse Impact:**

As noted above, any staffing reductions which might occur at Certified Home Health Agencies will be offset by increases in Managed Long Term Care or other types of providers. In addition, CHHAs will continue to receive funding through the Worker Recruitment & Retention program and the Recruitment, Training & Retention program, which allocated a combined total of approximately \$72 million to CHHAs in calendar year 2010.

Self-Employment Opportunities:  
Not applicable.

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## Public Service Commission

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

#### Petition for the Submetering of Electricity

I.D. No. PSC-05-12-00008-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Banner Avenue, LLC to submeter electricity at 1125 Banner Avenue and 2450 E. 12th Street, Brooklyn, New York.

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

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider Banner Ave., LLC request to submeter electricity at 1125 Banner Ave. and 2450 E. 12th St., Brooklyn, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Banner Avenue, LLC to submeter electricity at 1125 Banner Avenue and 2450 East 12th Street, Brooklyn, New York, located in the territory of Consolidated Edison Company of New York, Inc.

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

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

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

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

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

(12-E-0009SP1)

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

#### Petition for the Submetering of Electricity

I.D. No. PSC-05-12-00009-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by College Suites at Washington Square, LLC to submeter electricity at 107 Washington Avenue, Schenectady, New York.

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

**Subject:** Petition for the submetering of electricity.

**Purpose:** To consider College Suites at Washington Square, LLC request to submeter electricity at 107 Washington Ave., Schenectady, NY.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by College Suites at Washington Square, LLC to submeter electricity at 107 Washington Avenue, Schenectady, New York, located in the territory of Niagara Mohawk Power Corporation d/b/a National Grid.

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

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

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

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

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

(11-E-0709SP1)

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## Urban Development Corporation

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### EMERGENCY RULE MAKING

#### Innovate NY Fund

I.D. No. UDC-05-12-00003-E

Filing No. 24

Filing Date: 2012-01-13

Effective Date: 2012-01-13

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

**Action taken:** Addition of Part 4251 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, section 5(4); L. 2011, ch. 103, section 16-K; and L. 1968, ch. 174

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

**Specific reasons underlying the finding of necessity:** The current economic crisis, including high unemployment and the immediate lack of financing from traditional financial institutions for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Capital Access Program in order to promptly provide assistance to the State's small businesses in order to sustain and increase employment generated by these businesses.

**Subject:** Innovate NY Fund.

**Purpose:** Provide the basis for administration of the Innovate NY Fund.

**Text of emergency rule:** CAPITAL ACCESS PROGRAM

Section 4251.1 Purpose.

The purpose of this rule is to facilitate the administration of the Capital Access Program (the "Program") authorized by section sixteen-k of the New York State Urban Development Corporation Act (the "Act"). Pursuant to the Act, the Corporation (hereinafter defined) may, within available appropriations, assist small businesses, that otherwise find it difficult to obtain regular or sufficient bank financing, through the funding of loan loss reserves for loans made to such small businesses by participating financial institutions.

Section 4251.2 Definitions.

a) "Act" shall have the meaning given in Section I of this rule.

b) "Capital Access Program" ("Program" or "CAP") shall mean the loan portfolio insurance program established pursuant to section sixteen-k of the Act and subject to applicable laws, rules and regulations, and any guidelines that the Corporation may from time to time adopt with respect to the Program.

c) "Community Based Lending Organization" shall include community development financial institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, community development credit unions, and community banks.

d) "Corporation" shall mean shall mean the New York State Urban Development Corporation, d/b/a Empire State Development, a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation created by chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

e) "Eligible Small Business" shall mean a Small Business that otherwise finds it difficult to obtain regular or sufficient bank financing.

f) "Financial Institution" shall mean any bank, trust company, savings bank, savings and loan association or cooperative bank chartered by the State or any national banking association, federal savings and loan association or federal savings bank or any Community Based Lending Organization, provided, however, that such entity has its principal office located in the State.

g) "Highly Distressed Area" shall mean an area of pervasive poverty, high unemployment and general economic distress, that has (i) a poverty rate of at least twenty percent for the most recent year for which the data is available; or (ii) an unemployment rate of at least 1.25 times the statewide unemployment rate for the most recent year for which the data is available; or (iii) a median household income that is eighty percent or less of the statewide median household income for the most recent year for which the data is available.

h) "Loan Loss Reserve Fund" shall mean an account subject to the Program maintained as a loan loss reserve for losses incurred by a Participating Financial Institution on its portfolio of Program Loans.

i) "Minority-Owned Business Enterprise" this term shall have the definition set forth in section three hundred ten of the Executive Law and as used in such definition the term "minority group member" shall have the meaning set forth in such section.

j) "Participating Financial Institution" shall mean a Financial Institution approved to participate in the Program by the Corporation.

k) "Program Loan" shall mean a loan, that conforms with section sixteen-k of the Act and this rule, which is made to an Eligible Small Business by a Participating Financial Institution and covered by a Loan Loss Reserve Fund under the Program.

l) "Regulated Depository Financial Institution" shall mean a financial institution regulated and chartered by the State or federal government that is legally allowed to accept monetary deposits from consumers, provided that such depository institutions are insured by the Federal Deposit Insurance Corporation (FDIC).

m) "Small Business" shall have the meaning as set forth in section 131 of the Economic Development Law.

n) "State" shall mean the State of New York.

o) "Third Party Agent" or "Agent" shall mean either New York Business Development Corporation or another third party contracted through a competitive process by the Corporation to administer the Capital Access Program.

p) "Women-owned Business Enterprise" shall have the meaning set forth in section three hundred ten of the Executive Law.

Section 4251.3 Participating Financial Institutions.

To the extent feasible, the Corporation shall assure adequate geographic distribution of Participating Financial Institutions throughout the State. A Financial Institution that becomes a Participating Financial Institution shall execute an agreement in such form as the Corporation or the Agent may prescribe, which agreement shall contain, among other things, the terms and provisions set forth in Section IV of this rule and such other terms and provisions as the Corporation or the Agent may deem necessary or appropriate.

Section 4251.4 Program Operations.

A. A Participating Financial Institution shall:

1) provide to the Corporation or the Agent, as the case may be, a plan for the marketing of the Program to Eligible Small Businesses, including Small Businesses in Highly Distressed Areas and Minority-Owned Business Enterprises and Women-Owned Businesses Enterprises, with appropriate lending objectives identified by the Participating Financial Institution for such areas and businesses;

2) make Program Loans to Eligible Small Businesses only for the purposes of expansion, facility or technology upgrading, start-up or working capital purposes;

3) not make any Program Loan in a principal amount greater than five hundred thousand dollars;

4) with respect to each Program Loan, deliver for deposit in the Loan Loss Reserve Fund an amount, specified or agreed to in writing by the Corporation or its Third Party Agent, from both the Participating Financial Institution and the Eligible Small Business borrower, aggregating neither less than three percent nor more than seven percent of the principal amount of the Program Loan, whereby the amount contributed by the Eligible Small Business is not greater than fifty percent of such aggregate.; and

5) with respect to each Program Loan, certify to the Corporation or the Third Party Agent in such a fashion and with such supporting information as the Corporation or the Third Party Agent shall prescribe, that the Participating Financial Institution has made such loan and delivered the aggregate Loan Loss Reserve Fund contribution with respect to such loan.

B. With respect to each Program Loan, the Corporation or its Third Party Agent, after satisfactory certification pursuant to subpart 5 of part A of this Section IV, shall transfer to the Loan Loss Reserve Fund account an amount, as determined by the Corporation or the Third Party Agent,

that is (i) not less than the aggregate contribution of the Participating Financial Institution and the Small Business with respect to such loan, and (ii) not greater than one hundred fifty percent of such aggregate contributions as determined by the Corporation or its Third Party Agent.

C. In the event the Participating Financial Institution suffers a loss on its portfolio of Program Loans, the Participating Financial Institution may in its discretion draw upon the funds in such Loan Loss Reserve Fund to cover such loss in whole or in part.

D. With respect to a Participating Financial Institution, if there are insufficient funds in the Loan Loss Reserve Fund account to cover losses on such institution's Program Loans, the Corporation or its Agent may authorize the Participating Financial Institution to withdraw an amount equal to the current balance in the Loan Loss Reserve Fund account, which payment shall be deemed to satisfy fully the claim(s) on the Loan Loss Reserve Fund with respect to such losses, and the Participating Financial Institution shall have no right to receive any further amount from the Loan Loss Reserve Fund account with respect to such claim(s).

Section 4251.5 Program Administration.

A. The Corporation may administer the Program through the Third Party Agent, which may be the New York Business Development Corporation, established under section 210 of the Banking Law, provided, however, that if the Third Party Agent is to be a Financial Institution other than the New York Business Development Corporation, then such Third Party agent will be selected pursuant to a competitive process.

B. Any contract entered into pursuant to this Section V, shall have a term of two years and shall be renewed for an additional two year period subject to requirements of paragraph C of Section V of these rules and regulations and provide for compensation for expenses incurred by the Third Party Agent in connection with its services as Agent and for such other services as the Corporation may deem appropriate including, but not limited to the use of the premises, personnel and personal property of the Third Party Agent.

C. The Corporation shall conduct an annual review and assessment of the performance of the Third Party Agent in its capacity as agent for the Corporation to determine whether the contract with the Third Party Agent should be renewed for an additional two year period. The review shall be based on whether the Third Party Agent has satisfactorily met the terms and conditions of the contract, and such other factors as the Corporation shall deem appropriate.

D. Where an initial determination finds that the Third Party Agent's performance is unsatisfactory, the Corporation will allow the Third Party Agent a limited opportunity to take corrective action, generally, during a period of not longer than 60 days.

E. Where a final review of the Third Party Agent's performance concludes that the Third Party Agent's performance continues to be unsatisfactory, the Corporation shall submit to the speaker of the Assembly and the temporary President of the Senate the Corporation's recommendation to terminate the contract with the Third Party Agent, and thereafter, may terminate the contract and take over administration of the Program pursuant to section sixteen-k of the Act or procure another Third Party Agent.

Section 4251.6 Loan Loss Reserve Account.

All amounts in a Loan Loss Reserve Fund shall be deposited: (i) if the Participating Financial Institution is a Regulated Depository Financial Institution, in a depository account at said Participating Financial Institution; or (ii) if the Participating Financial Institution is not a Regulated Depository Financial Institution, in a depository account at a Regulated Depository Financial Institution satisfactory to the Corporation. Earnings of interest from the principal of said Loan Loss Reserve Fund account shall be (1) maintained in the said account and held as additional loan loss reserves for Program Loans and (2) available to the Corporation or the Agent at any time and from time to time, to be used to defray the costs of administering the Program incurred by the Corporation or its Agent or to replenish the loan loss reserve account of the Corporation or its Agent.

Section 4251.7 Application and Approval Process.

The Corporation shall identify, review, and approve eligible Participating Financial Institutions through an open recruitment and enrollment process throughout the life of the Program. Participating Financial Institutions participating in the Program will possess sufficient commercial lending experience, financial and managerial capabilities, and operational skills to meet the Program objectives. The Corporation may require from applicants such information or documentation as it deems necessary and appropriate, including one or more of the following documents.

For banks (including CDFI banks):

1) Uniform Banking Performance Report (UBPR) showing that commercial loans and leases comprise a significant part of the institution's assets.

2) A UBPR peer group analysis showing that the institution's percentage of non-current loans and leases does not exceed its peer group average.

For community credit unions:

1) Financial Performance Reports (FPRs) from the National Credit Union Administration.

For Community Development Financial Institutions (excluding banks and community credit unions):

1) A review of the CDFI's CARS ratings (CDFI Assessment and Ratings System).

Section 4251.8 Claims and Recoveries.

The Corporation or its Agent will process claims made against a Loan Loss Reserve fund by a Participating Financial Institution as set forth in the agreement between the Participating Financial Institution and the Corporation. The process for collections and the process for treating recoveries will be detailed in the agreement between the Participating Financial Institution and the Corporation.

Section 4251.9 Auditing, Compliance and Reporting.

A. The Corporation or its Agent shall require quarterly and annual reporting from Participating Financial Institutions. Each report shall be in such form and provide such information as the Corporation or the Agent may, from time to time, prescribe, and may include, without limiting the foregoing, the following information:

- 1) use and balance of Loan Loss Reserve Fund;
- 2) information regarding all Program Loans covered by the Loan Loss Reserve Fund;
- 3) the outstanding amount of each Program Loan covered by the Loan Loss Reserve Fund;
- 4) the amount of interest income generated on the Loan Loss Reserve Account Fund;
- 5) the dollar amount, number of claims and recoveries with respect to the Loan Loss Reserve Fund;
- 6) types and uses of each credit product enrolled in the Loan Loss Reserve Fund;
- 7) pricing of each loan enrolled in the Loan Loss Reserve Fund;
- 8) a unique Program Loan identifier number, the census tract and zip code of each Program Loan borrower's principal location in the state;
- 9) for each Program Loan, the total amount of principal loaned and authorized as a line of credit, and of that amount, the portion that is from non-private sources;
- 10) date of the initial Program Loan disbursement;
- 11) the insurance premiums paid by each Program Loan borrower and the Participating Lender;
- 12) each Program Loan borrower's annual revenues in the last fiscal year;
- 13) each Program Loan borrower's Full Time Equivalent (FTE) employees at the beginning and end of the period covered by the report;
- 14) the 6-digit North American Industry Classification System (NAICS) code for each Program Loan borrower's industry;
- 15) the year each Program Loan borrower's business was incorporated;
- 16) the number of jobs created or retained as a result of each Program Loan;
- 17) with respect to each Program Loan, the amount of additional private financing occurring after closing of such loan, if applicable; and
- 18) any other information that the Corporation may require.

B. The Corporation may conduct audits of Participating Financial Institutions in order to ensure compliance with the provisions of applicable laws and regulations, and with respect to and agreements between the Participating Financial Institution and the Corporation and the Agent, all aspects of the use of Program funds and Program Loan transactions, and any other area that the Corporation determines to be relevant to the Program. In the event that the Corporation finds substantive noncompliance, the Corporation may terminate the Participating Financial Institution's participation in the Program. Upon termination, no additional funds will be disbursed to the Loan Loss Reserve account for the Participating Financial Institution. Notwithstanding such termination, the Participating Financial Institution shall remain liable to the Corporation for any amount recovered on claims associated with the use of the Loan Loss Reserve account.

Section 4251.10 Confidentiality.

A. To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Program administered through Participating Financial Institutions, shall be confidential and exempt from public disclosures.

B. To the extent permitted by law, no full time employee of the State of New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.

Section 4251.11 Non-Discrimination and Affirmative Action.

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law,

including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254(11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 11, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

#### Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-k of the Act provides for the creation of the Capital Access Program (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation"), within available appropriations, to provide low interest loans to Community Based Lending Organizations and Participating Financial Institutions, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit.

2. Legislative Objectives: Section 16-k of the Act (Uncon. Laws section 6266-k, added by Chapter 103 of the Laws of 2011) sets forth the legislative objective of authorizing the Corporation, within available appropriations, to provide low interest loans to financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. The adoption of 21 NYCRR Part 4251 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated \$18,994,204 of federal funds to provide low interest loans to financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. Small businesses have been determined to be a major source of employment throughout the State. Small businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing loans to small businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program allows the Corporation to use either the New York Business Development Corporation or another third party contracted through a competitive process by the Corporation to administer the Capital Access Program. The rule further facilitates the administration of the Program by providing for defining eligible and ineligible small businesses and eligible uses of the proceeds of loans to small businesses and other criteria to be applied by the institutions in making loans to small businesses.

4. Costs: The Program is funded by a State appropriation of federal funds in the amount of \$18,994,204 dollars. Pursuant to the rule, principal amount of Program Loans will not be greater than \$500,000. The costs to a participating financial institutions or community based lending organizations would depend on the extent to which they participate in the Program and their effectiveness and efficiency in making small business loans.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule for Program participants except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and loan documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. Local Government Mandates: The Program imposes no mandates – program, service, duty, or responsibility – upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: While larger financial institutions can potentially provide small business financing and the community based lending organizations already provide small business financing, access to financing remains limited. The State has established the Program in order to enhance the access of small businesses to such financing, and the proposed rule provides the regulatory basis for providing low interest loans to community based lending organizations for lending to small businesses in accordance with the statutory requirements of the Program.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

#### **Regulatory Flexibility Analysis**

1. Effects of Rule: In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Community Based Lending Organization" is defined as including community development financial institutions, small business lending consortia, certified development companies, providers of United States department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, community development credit unions, and community banks; and "Financial Institution" is defined as any bank, trust company, savings bank, savings and loan association or cooperative bank chartered by the State or any national banking association, federal savings and loan association or federal savings bank or any Community Based Lending Organization, provided, however, that such entity has its principal office located in the State. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") assist small businesses, that otherwise find it difficult to obtain regular or sufficient bank financing, through the funding of loan loss reserves for loans made to such small businesses by participating financial institutions.

2. Compliance Requirements: There are no compliance requirements for small businesses and local governments in these regulations.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: There are no compliance costs for small businesses and local governments in these regulations.

5. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasible for compliance with the rule by small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide access to capital through the funding of loan loss reserves for loans made to small businesses by participating financial institutions.

7. Small Business and Local Government Participation: A number of community based lending organizations that engage in lending to small businesses responded to a survey circulated by the Corporation regarding implementation of the program as reflected in the rule.

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

1. Types and Estimated Numbers of Rural Areas: Community development financial institutions serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Capital Access Program (the "Program") assistance pursuant to a State-wide request for proposals.

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any financial institution receiving a similar loan regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no affirmative acts will be needed to comply other than the said reporting requirements and the making of loans to small businesses in the normal course of the business for any financial institution that receives Program assistance; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: The costs to financial institutions that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their Program loans to small businesses and the administrative costs in connection with such small business loans and the fees, if any, charged to small businesses in connection with loans to such businesses that include Program funds.

4. Minimizing Adverse Impact: The purpose of the Program is to provide loans to financial institutions in order to enhance the ability of these entities to make loans to small businesses, especially those small businesses that may otherwise not be able to borrow funds at acceptable rates. This rule provides a basis for cooperation between the State and financial institutions, including lending institutions that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such financial institutions and the small businesses, including small businesses located in rural areas of the State, that such financial institutions serve.

5. Rural Area Participation: This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of financial institutions that engage in lending to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

#### **Job Impact Statement**

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for main street everyday small businesses. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.

## **EMERGENCY RULE MAKING**

### **Economic Development Fund Program ("EDF")**

**I.D. No.** UDC-05-12-00004-E

**Filing No.** 25

**Filing Date:** 2012-01-13

**Effective Date:** 2012-01-13

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

**Action taken:** Addition of Part 4243 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, sections 9-c and 16-i; and L. 1968, ch. 174

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

**Specific reasons underlying the finding of necessity:** The modification to the rule facilitates the provision of Economic Development Fund emergency assistance to (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

**Subject:** Economic Development Fund Program ("EDF").

**Purpose:** Provide the basis for administration of the Champlain Bridge and August-September 2011 Storm and Flood Recovery Fund within EDF.

**Text of emergency rule:** CHAMPLAIN BRIDGE AND AUGUST - SEPTEMBER 2011 STORM AND FLOOD, RECOVERY FUND

#### *Section 4243.36 Generally*

*Champlain Bridge and August - September Storm and Flood Recovery Fund (the "Fund") provides General Development Financing assistance on an emergency basis (i) for retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, the Village of Port Henry, New York and agricultural and manufacturing businesses, located in Essex County, New York, ("Agricultural and Manufacturing Businesses") and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.*

*Section 4243.37 Champlain Bridge and August - September 2011 Storm and Flood Recovery Fund Assistance*

*(a) In order to provide General Development Financing assistance to Retail and Service Businesses and Agricultural and Manufacturing Busi-*

nesses in Eligible Areas (as defined below), the following provisions of the rule are modified as follows solely for Fund assistance.

(i) "Eligible Area" shall mean: (a) for assistance with respect to the closure of the Bridge Closure, as defined below, (1) with respect to assistance for Retail and Service Businesses the Towns of Crown Point, Moriah, and Ticonderoga, New York, the Village of Port Henry, New York and (2) with respect to assistance for Agricultural and Manufacturing Businesses, Essex County, New York; and (b) for assistance with respect to damages and losses caused by or related to storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011, in Essex County, New York.

(ii) "Bridge Closure" shall mean the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge.

(iii) The term "Distressed Area" in subpart 4233.2(a)(7) shall also include the Eligible Areas.

(iv) The term "Eligible Applicant" in subpart 4233.2(a)(11) shall also include all Retail and Service Businesses and Agricultural and Manufacturing Businesses.

(v) The term "Eligible Business" in subpart 4233.2(a)(12) shall also include all Retail and Service Businesses and Agricultural and Manufacturing Businesses.

(vi) The term "Eligible Recipient" in subpart 4233.2(a)(13)(iii) shall also include all Retail and Service Businesses and Agricultural and Manufacturing Businesses.

(vii) The term "Ineligible Cost" in subpart 4233.2(a)(22) subpart (v) does not apply.

(viii) The term "Ineligible Recipient" in subpart 4233.2(a)(23) subparts (i), (ii), (iii) and (iv) does not apply.

(ix) Subpart 4243.7 regarding fees does not apply, there are no fees for Fund assistance.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 11, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

**Regulatory Impact Statement**

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968, as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act. Section 16-i of the Act established the Economic Development Fund and authorizes the New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation"), within available appropriations, to provide grants for the purpose of creating or retaining jobs or preventing, reducing or eliminating unemployment or underemployment. The proposed regulations modify Chapter L, Part 4243 of Title 21 NYCRR.

2. Legislative Objectives: Section 16-i of the Act sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide grants and loans in order to promote the economic health of New York state by facilitating the creation or retention of jobs or would increase business activity within a municipality or region of the state. The adoption of 21 NYCRR Part 4243.36 and 4243.37 will further these goals by modifying 21 NYCRR Part 4243 in order to provides General Development Financing assistance on an emergency basis (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011, in order to facilitate the retention of jobs and increase business activity within those municipalities and the affected region.

3. Needs and Benefits: The Governor declared a state of emergency in Essex County and surrounding areas due to the emergency closure of the unsafe Lake Champlain Bridge (which was subsequently demolished). For nearly eighty years, the bridge had been a major transportation rout between the Ticonderoga, Crown Point and Port Henry areas of the State and the Vergennes, Middlebury and Burlington areas of Vermont. The loss of the bridge resulted in a 100 mile detour until a new bridge could be designed and constructed. Even with an emergency ferry service to handle limited traffic, local businesses lost customers and incurred increase costs

that would cause business closures, and require layoffs and firing. The Governor also declared a state of emergency in Essex County and surrounding areas due to the storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011 The modifications to the rule would allow affected businesses to receive economic assistance in order to retain jobs and mitigate layoffs and firings and increase business activity.

4. Costs: The Program is funded by a State appropriation for the Economic Development Fund and there are no other costs.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule on businesses participating in the Program. Standard applications and loan and grant documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. Local Government Mandates: The Program imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. Duplication: The regulations do not duplicate any existing state or federal rule.

8. Alternatives: There are no alternatives to this regulation for providing emergency assistance for business affected by the storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011 and the closing of the Lake Champlain Bridge in order to retain jobs in the affected area.

9. Federal Standards: There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. Compliance Schedule: The regulation shall take effect immediately upon adoption.

**Regulatory Flexibility Analysis**

1. Effects of Rule: The modification of the Rule pursuant to Parts 4243.36 and 4243.37 provide Economic Development Fund assistance (also referred to as Champlain Bridge and August - September 2011 Recovery Fund) in order to provide emergency Economic Development Fund General Development Financing assistance to (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011 in order to preserve business activity and the jobs by these businesses that would otherwise be reduced or lost due to the loss of customers and increased costs arising from the unexpected permanent closing (and subsequent demolition) of the unsafe Lake Champlain Bridge and the August - September 2011 storms and floods.

2. Compliance Requirements: There are no compliance requirements for small businesses and local governments in these regulations.

3. Professional Services: Applicants do not need to obtain professional services to comply with these regulations.

4. Compliance Costs: There are no compliance costs for small businesses and local governments in these regulations.

5. Economic and Technological Feasibility: There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasible for compliance with the rule by small businesses and local governments.

6. Minimizing Adverse Impact: This rule has no adverse impacts on small businesses or local governments because it is designed to provide low interest loans to community based lending organizations in order to enhance the ability of such organizations to fund loans to small businesses.

7. Small Business and Local Government Participation: The modification to the rule facilitates providing emergency assistance to all agricultural, manufacturing, retail, and service small businesses located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and Essex County, New York affected by the emergency closing and demolition of the Lake Champlain Bridge and the storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

**Rural Area Flexibility Analysis**

1. Types and Estimated Numbers of Rural Areas: (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Busi-

nesses'') and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011 are eligible to apply for Economic Development Fund General Development Financing pursuant to the Champlain Bridge Recovery Fund (the "Program").

2. Reporting, Recordkeeping and Other Compliance Requirements and Professional Services: The modification of the rule will not impose any new or additional reporting or recordkeeping requirements; no affirmative acts will be needed to comply; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. Costs: There should be no costs to small businesses receiving assistance other than the minimal costs of preparing a simple application for program assistance.

4. Minimizing Adverse Impact: The purpose of the rule modification is to provide General Development Financing assistance from the Economic Development Fund on an emergency basis for (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

5. Rural Area Participation: This rule provides emergency assistance to agricultural, manufacturing, retail and service business in rural Essex County, New York and the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York.

#### **Job Impact Statement**

This modification to Part 4243 of Title 21 NYCRR will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York, particularly by providing emergency Economic Development Fund assistance from the Economic Development Fund for (i) retail and service businesses ("Retail and Service Businesses") located in the Towns of Crown Point, Moriah, and Ticonderoga, New York, and the Village of Port Henry, New York and agricultural and manufacturing businesses located in Essex County New York ("Agricultural Manufacturing Businesses") and adversely affected by the October 16, 2010 emergency permanent closing of the unsafe Lake Champlain Bridge and (ii) Retail and Service Businesses and Agricultural and Manufacturing Businesses located in Essex County, New York and adversely affected by storms and flooding occurring from and including August 27, 2011 and continuing through and including September 8, 2011.

There will be no adverse impact on job opportunities in the state.

## **EMERGENCY RULE MAKING**

### **Small Business Revolving Fund**

**I.D. No.** UDC-05-12-00005-E

**Filing No.** 16

**Filing Date:** 2012-01-13

**Effective Date:** 2012-01-13

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

**Action taken:** Addition of Part 4250 to Title 21 NYCRR.

**Statutory authority:** Urban Development Corporation Act, section 5(4); L. 1968, ch. 174; L. 2010, ch. 59, section 16-t

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

**Specific reasons underlying the finding of necessity:** The delay in the approval of the State budget and the current economic crisis, including high unemployment and the immediate lack of financing from traditional financial institutions for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Small Business Revolving Loan Fund in order to promptly provide assistance to the State's small businesses in order to sustain and increase employment generated by these businesses.

**Subject:** Small Business Revolving Fund.

**Purpose:** Provide the basis for administration of Small Business Revolving Loan Fund including evaluation criteria and application process.

### **Text of emergency rule: SMALL BUSINESS REVOLVING LOAN FUND**

#### **Section 4250.1 Purpose.**

The purpose of these regulations is to set forth and codify administration by the New York State Urban Development Corporation (the "Corporation") of the Small Business Revolving Loan Fund (the "Program") authorized by Section 16-t of the New York State Urban Development Corporation Act (the "Act"). The Corporation is authorized, within available appropriations, to provide low interest loans to community development financial institutions, in order to provide funding for those lending organizations' loans to small businesses, located within New York State, that generate economic growth and job creation within New York State but that are unable to obtain adequate credit or adequate terms for such credit. If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

#### **Section 4250.2 Definitions.**

a) "Administrative Costs" shall mean expenses incurred by a Community Based Lending Organization in its administration of a Program Loan from the Corporation.

b) "Administrative Income" shall mean income from (i) fees charged by a Community Based Lending Organization, including application fees, commitment fees and loan guarantee fees related to the Business Loans made to borrowers by the Community Based Lending Organization and (ii) interest income earned on the portion of the Program funds held by the Community Based Lending Organization (whether such funds are undisbursed Program funds or are repayment proceeds of Business Loans made by the Community Based Lending Organization).

c) "Business Loan" shall mean a loan made by a Community Based Lending Organization to an Eligible Business for an Eligible Project that is either a Micro-Loan or a Regular Loan.

d) "Community Based Lending Organizations" shall mean community development financial institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

e) "Community Development Financial Institution" or "CDFI" shall mean a community based organization that provides financial services and products to communities, businesses and people underserved by traditional financial institutions.

f) "Corporation" shall mean the New York State Urban Development Corporation d/b/a Empire State Development Corporation, a corporate governmental agency constituting a body corporate and politic and a public benefit corporation of the State of New York created by Chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

g) "Eligible Businesses" shall have the meaning given in Section 4250.3 below.

h) "Eligible Project" shall have the meaning given in Section 4250.3 below.

i) "Eligible Uses" shall have the meaning given in Section 4250.4 below.

j) "Ineligible Businesses" shall mean newspapers, broadcasting, or other news media; medical facilities, libraries, community or civic centers. It also means any business relocating from one municipality with the State to another, except when the business is relocating within a municipality with a population of at least one million and the governing body of the municipality approves or each municipality from which such business operation will be relocated agrees to such relocation.

k) "Ineligible Projects" shall mean any project that is not an Eligible Project, including, without limiting the foregoing, public infrastructure improvements and funding for providing payment or distribution as a loan to owners, members and partners or shareholders of the applicant business or their family members.

l) "Loan Fund" shall mean the Small Business Revolving Loan Fund created by the Small Business Revolving Loan Fund Legislation.

m) "Loan Fund Account" shall mean each and every account established by the Community Based Lending Organization for the purpose of depositing Program funds.

n) "Loan Fund Legislation" shall mean Section 16-t of the Act.

o) "Loan Fund Proceeds" shall mean any and all monies made available to the Corporation for deposit to the Loan Fund, including monies appropriated by the State and any income earned by, or incremental to, the amount due to the investment of the same, or any repayment of monies advanced from the Loan Fund.

p) "Micro-Loan" shall mean a Small Business loan that has a principal amount that is less than or equal to twenty-five thousand dollars.

q) "Minority Business Enterprise" shall mean a business enterprise which is at least fifty-one percent owned, or in the case of a publicly-owned business at least fifty-one percent of the common stock or other voting interests of which is owned, by one or more minority persons and such ownership must have and exercise the authority to independently control the day to day business decisions of the entity. Minority persons shall mean persons who are:

1. Black;
2. Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent or either Indian or Hispanic origin, regardless of race;
3. Asian and Pacific Islander persons having origins in the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or
4. American Indian or Alaskan Native persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identification.

r) "Program Loan Fund Agreement" shall mean the agreement between the Corporation and the Community Based Lending Organization pursuant to which the Program funds will be disbursed to and used by the Community Based Lending Organization.

s) "Program Loan" shall mean a loan made by the Corporation to a Community Based Lending Organization.

t) "Regular Loan" shall mean a Small Business loan that has a principal amount greater than twenty-five thousand dollars.

u) "Service Delivery Area" shall mean one or more contiguous counties or municipalities to be served by the Community Based Lending Organization and described in the Program Loan Fund Agreement between the Corporation, as lender, and the Community Based Lending Organization, as borrower.

v) "Small Business" shall mean a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis.

w) "State" shall mean the State of New York.

x) "Women Business Enterprise" shall mean a business enterprise that is at least fifty one percent owned, or in the case of a publicly-owned business at least fifty one percent of the common stock or other voting interests of which is owned, by United States citizens or permanent resident aliens, one or more who are women, regardless of race or ethnicity, and such ownership interest is real, substantial and continuing and such woman or women have and exercise the authority to independently control the day to day business decisions of the enterprise.

y) "Working Capital Loans" shall mean short and medium term loans for working capital, revolving lines of credit and seasonal inventory loans made by Community Based Lending Organizations to Eligible Businesses for Eligible Projects.

Section 4250.3 Eligible Business, Eligible Projects and Ineligible Projects.

Business Loans shall be offered by Community Based Lending Organizations on the terms and conditions that are in accordance with and subject to the Act and the provisions of this Part. Business Loans shall be provided by the Community Based Lending Organization only to Eligible Businesses for Eligible Projects and shall not be used for Ineligible Projects. The terms "Eligible Business", "Eligible Projects" and "Ineligible Projects" are defined as follows.

An "Eligible Business" is a:

1. business enterprise that is resident in and authorized to do business in New York State,
2. independently owned and operated,
3. not dominant in its field, and
4. employs one hundred or fewer persons.

An "Eligible Project" is a Business Loan from a Community Based Lending Organization to an Eligible Business in the Service Delivery Area for an Eligible Use, whereby the Community Based Lending Organization has reviewed every Business Loan application to determine the feasibility of the proposed Eligible Use(s) of the financing requested by the small business applicant, the likelihood of repayment, and the potential that the loan will generate economic development and jobs within the State. An "Eligible Project" cannot be an "Ineligible Project" as defined below.

An "Ineligible Project" shall mean: (i) a project or use that would result in the relocation of any business operation from one municipality within the state to another, except under one of the following conditions, (A) When a business is relocating within a municipality with a population of at least one million where the governing body of such municipality approves such relocation, or (B) each municipality from which such business operation will be relocated has consented to such relocation; (ii) projects with respect to newspapers, broadcasting or other

news media, medical facilities, libraries, community or civic centers, and public infrastructure improvements; (iii) providing funds, directly or indirectly, for payments, distribution or as a loan (except in the case of a loan to a sole proprietor for business use), to owners, members, partners or shareholders of the applicant business, except as ordinary income for services rendered; (iv) any project that results in a Business Loan to a person who is a member of the board or other governing body, officer, employee, or member of a loan committee, or a family member of the Community Based Lending Organization or who shall participate in any decision on the use of Program funds if such person is a party to or has a financial or personal interest in such loan.

Section 4250.4 Eligible Uses.

Eligible Uses of Program funds by a Small Business borrower of the Community Based Lending Organization are:

1. working capital;
2. acquisition and/ or improvement of real property;
3. acquisition of machinery and equipment; and
4. refinancing of debt obligations provided that:
  - a. it does not refinance a loan already in the portfolio of the Community Based Lending Organization;
  - b. the refinanced loan will provide a tangible benefit to the business borrower as determined by the Corporation in writing; and
  - c. the aggregate of the principal of all borrower refinancing loan amounts in the Community Based Lending Organization's Program loan portfolio is not greater than twenty-five percent (25%) of the principal amount of the Corporation's Program loan to the Community Based Lending Organization.

Section 4250.5 Fees.

A Community Based Lending Organization may charge application, commitment and loan guarantee fees pursuant to a schedule of fees adopted by the institution and approved in writing by the Corporation.

Section 4250.6 Niagara, St. Lawrence, Erie, and Jefferson Counties.

Notwithstanding anything to the contrary in this rule, the Corporation shall provide at least five hundred thousand dollars in Program funds to Community Based Lending Organizations for the purpose of making loans to small businesses located in each of the following counties: Niagara, St. Lawrence, Erie and Jefferson.

Section 4250.7 Business Loan Types and Limits.

a) There shall be two categories of Business Loans to Eligible Businesses:

1. a microloan that shall have a principal amount that is less than twenty-five thousand dollars; and
2. a regular loan that shall have a principal amount not less than twenty-five thousand dollars.

b) The Program funds amount used by the Community Based Lending Organization to fund a Business Loan shall not be more than fifty percent of the principal amount of such loan and shall not be greater than one hundred and twenty-five thousand dollars.

c) No less than ten percent (10%) of the aggregate Program funds shall be allocated by the Corporation for Microloans.

Section 4250.8 General Evaluation Criteria.

a) In addition to such criteria as may be set forth by the Corporation from time to time in solicitations for applications from Community Based Lending Organizations, the Corporation shall evaluate the Program assistance application of a Community Based Lending Organization in conformance with the Act and in accordance with the criteria set forth in this Part, including as applicable:

1. The ability of the Community Based Lending Organization to analyze small business applications for Business Loans, to evaluate the credit worthiness of small businesses, and to monitor and service Business Loans.

2. The ability of the Community Based Lending Organization to review every Business Loan application in order to determine, among other things, the feasibility of the proposed Eligible Use(s) of the financing requested by the small business applicant, the likelihood of repayment, and the potential that the loan will generate economic development and jobs within the State.

3. The ability of the Community Based Lending Organization to target and market to Minority and Women-Owned Enterprises and other small businesses that are having difficulty accessing traditional credit markets.

b) The Corporation is authorized, within available appropriations, to provide low interest loans to community development financial institutions, in order to provide funding for those lending organizations' loans to small businesses, located within New York State, that generate economic growth and job creation within New York State but that are unable to obtain adequate credit or adequate terms for such credit. If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is autho-

ized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

**Section 4250.9 General Requirements.**

a) Program funds shall be disbursed to a Community Based Lending Organization by the Corporation in the form of a Program Loan.

1. The term of the Program Loan shall commence upon closing of the Program Loan Fund Agreement between the Corporation and the Community Based Lending Organization.

2. The Program Loan shall carry a low interest rate determined by the Corporation based on then prevailing interest rates and the circumstances of the Community Based Lending Organization.

b) Notwithstanding the performance of the Business Loans made by the Community Based Lending Organization using Program funds, the Community Based Lending Organization shall remain liable to the Corporation with respect to any unpaid amounts due from the Community Based Lending Organization pursuant to the terms of the Corporation's Program Loan to the Community Based Lending Organization.

c) At the discretion of the Corporation, a portion of Program loan funds may be disbursed to the Community Based Lending Organization in the form of a grant or forgivable loan provided that those funds are used by the Community Based Lending Organization for administrative expenses associated with Business Loans to Eligible Borrowers for Eligible Projects, loan-loss reserves, or other eligible expenses as may be approved in writing by the Corporation.

d) Notwithstanding any provision of law to the contrary, the Corporation may establish a Program fund for Program use and pay into such fund any funds available to the Corporation from any source that are eligible for Program use, including moneys appropriated by the State.

e) Interest received by the Corporation from Program Loans to Community Based Lending Organizations may be used at the discretion of the Corporation for Program Loans and the management, marketing, and administration of the Program.

f) If the use of a community development financial institution is not practicable based upon an assessment of geographic and administrative capacity and other factors as determined by the Corporation, then the Corporation is authorized, within available appropriations, to provide low interest loans to the following other local community based lending organizations: small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks.

**Section 4250.10 Loan Fund Accounts.**

Each Community Based Lending Organization shall deposit Program funds awarded by the Corporation, repayments, and interest earned into a bank account in a State or Federal chartered banking institution.

**Section 4250.11 Application and Approval Process.**

The Corporation shall identify eligible Community Based Lending Organizations through one or more competitive statewide or local solicitations.

**Section 4250.12 Auditing, Compliance and Reporting.**

a) The Community Based Lending Organization shall submit to the Corporation annual reports and additional reports as requested at the discretion of the Corporation stating:

1. The number of Business Loans made;
2. The amount of each Business Loan;
3. The amount of Program Loan proceeds used to fund each Business Loan;
4. The use of Business Loan proceeds by the borrower;
5. The number of jobs created or retained;
6. A description of the economic development generated;
7. The status of each outstanding Business Loan; and
8. Such other information as the Corporation may require.

b) The Corporation may conduct audits of the Community Based Lending Organization in order to ensure compliance with the provisions of this section, any regulations promulgated with respect thereto and agreements between the Community Based Lending Organization and the Corporation of all aspects of the use of Program funds and Business Loan transactions.

c) In the event that the Corporation finds substantive noncompliance, the Corporation may terminate the Community Based Lending Organization's participation in the Program.

d) Upon termination of a Community Based Lending Organization's participation in the Program, the Community Based Lending Organization shall return to the Corporation, promptly after its demand thereof, all Program fund proceeds held by the Community Based Lending Organization; and provide to the Corporation, promptly after its demand thereof,

an accounting of all Program funds received by the Community Based Lending Organization, including all currently outstanding Business Loans that were made using Program funds. Notwithstanding such termination, the Community Based Lending Organization shall remain liable to the Corporation with respect to any unpaid amounts due from the Community Based Lending Organization pursuant to the terms of the Corporation's loans to the Community Based Lending Organization.

e) In the event that a Community Based Lending Organization's participation in the Program is terminated, the Corporation, in its discretion, can reassign all or part of the award made to such Community Based Lending Organization to one or more Community Based Lending Organizations that are already administering the Program and that serve the same Service Area or portions thereof without an additional solicitation.

**Section 4250.13 Confidentiality.**

a) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Loan Fund administered through the selected Community Based Lending Organizations by the Corporation, shall be confidential and exempt from public disclosures.

b) To the extent permitted by law, no full time employee of the State of New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.

**Section 4250.14 Non-Discrimination and Affirmative Action.**

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15-A of the Executive Law and Section 6254(11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the affirmative action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

**This notice is intended** to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires April 11, 2012.

**Text of rule and any required statements and analyses may be obtained from:** Antovk Pidedjian, Sr. Counsel, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

**Regulatory Impact Statement**

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968, as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-t of the Act provides for the creation of the Small Business Revolving Loan Fund (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation"), within available appropriations, to provide low interest loans to Community Development Financial Institutions and other Community Based Lending Organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit.

2. Legislative Objectives: Section 16-t of the Act sets forth the Legislative objective of authorizing the Corporation, within available appropriations, to provide low interest loans to community development financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. The adoption of 21 NYCRR Part 4250 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. Needs and Benefits: The State has allocated \$25 million to provide low interest loans to community development financial institutions and other community based lending organizations, in order to provide funding for those organizations' loans to New York's small businesses that are unable to obtain adequate credit or adequate terms for such credit. Small businesses have been determined to be a major source of employment throughout the State. Small businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing loans to small businesses should sustain and

potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The Program (i) allows the Corporation to evaluate the effectiveness of community based lending organizations with respect to their ability to make loans to credit worthy small businesses, (ii) decentralizes to community based lending organizations the evaluation of the credit and operations of small businesses within the respective communities served by such organizations, and (iii) enhances the ability of community based lending organizations to make loans to small businesses in the communities served by such organizations. The rule facilitates these aspects of the Program by providing for a competitive process to select community based financial institutions for Program Loans and defining eligible and ineligible small businesses and eligible uses of the proceeds of loans to small businesses and other criteria to be applied by the community development financial institutions in making loans to small businesses.

4. **Costs:** The Program is funded by a State appropriation in the amount of twenty-five million dollars. Pursuant to the rule, community based lending organizations must provide not less than fifty percent of the principal amount of each small business loan funded with Program funds. The costs to a community based lending organization involved in the Program would depend on the extent to which they participate in the Program and their effectiveness and efficiency in making small business loans. The rule also provides for approval by the Corporation of fees charged by a community based lending institutions in connection with loans to small businesses that use Program funds.

5. **Paperwork / Reporting:** There are no additional reporting or paperwork requirements as a result of this rule on community based lending organizations participating in the Program except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and loan documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. **Local Government Mandates:** The Program imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. **Duplication:** The regulations do not duplicate any existing state or federal rule.

8. **Alternatives:** While larger financial institutions can potentially provide small business financing and the community based lending organizations already provide small business financing, the State has established the Program in order to enhance the access of small businesses to such financing, and the proposed rule provides the regulatory basis for providing low interest loans to community based lending organizations for lending to small businesses in accordance with the statutory requirements of the Program.

9. **Federal Standards:** There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. **Compliance Schedule:** The regulation shall take effect immediately upon adoption.

#### **Regulatory Flexibility Analysis**

1. **Effects of Rule:** In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Community Development Financial Institution" is defined as community based organization that provides financial services and products to communities, businesses and people underserved by traditional financial institutions; and "Community Based Lending Organizations" is defined as Community Development Financial Institutions, small business lending consortia, certified development companies, providers of United States Department of Agriculture business and industrial guaranteed loans, United States Small Business Administration loan providers, credit unions and community banks. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development Corporation (the "Corporation") make low interest loans to community based lending organizations in order to provide funding for those lending organizations' loans (including microloans in principal amounts equal to or less than twenty-five thousand dollars) to small businesses, located within the State, that are unable to obtain adequate credit or credit terms for such credit.

2. **Compliance Requirements:** There are no compliance requirements for small businesses and local governments in these regulations.

3. **Professional Services:** Applicants do not need to obtain professional services to comply with these regulations.

4. **Compliance Costs:** There are no compliance costs for small businesses and local governments in these regulations.

5. **Economic and Technological Feasibility:** There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasible for compliance with the rule by small businesses and local governments.

6. **Minimizing Adverse Impact:** This rule has no adverse impacts on small businesses or local governments because it is designed to provide low interest loans to community based lending organizations in order to enhance the ability of such organizations to fund loans to small businesses.

7. **Small Business and Local Government Participation:** A number of community based lending organizations that engage in lending to small businesses responded to a survey circulated by the Corporation regarding implementation of the program as reflected in the rule.

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

1. **Types and Estimated Numbers of Rural Areas:** Community development financial institutions and other community based lending organizations serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Small Business Revolving Loan Fund (the "Program") assistance pursuant to a State-wide request for proposals.

2. **Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:** The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any community based lending organization receiving a similar loan regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no affirmative acts will be needed to comply other than the said reporting requirements and the making of loans to small businesses in the normal course of the business for any community based lending organization that receives Program assistance; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. **Costs:** The costs to community based lending organizations that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their Program loans to small businesses and the administrative costs in connection with such small business loans and the fees, if any, charged to small businesses in connection with loans to such businesses that include Program funds.

4. **Minimizing Adverse Impact:** The purpose of the Program is to provide loans to community based lending organizations in order to enhance the ability of these entities to make loans to small businesses, especially those small businesses that may not be able to borrow funds at acceptable rates from larger financial institutions. This rule provides a basis for cooperation between the State and CBLOs, including CBLO that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such CBLO and the small businesses, including small businesses located in rural areas of the State, that such CBLOs serve.

5. **Rural Area Participation:** This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of CBLOs that engage in lending to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

#### **Job Impact Statement**

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve the economy of New York by providing greater access to capital for main street everyday small businesses. The Program is targeted to minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.