

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.

Education Department

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Schools Under Registration Review (SURR) and Persistently Lowest-Achieving (PLA) Schools

I.D. No. EDU-15-10-00014-P

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

Proposed Action: Amendment of section 100.2(p)(9)-(11) of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 210 (not subdivided), 215 (not subdivided), 305(1), (2) and (20), 309 (not subdivided) and 3713(1) and (2)

Subject: Schools Under Registration Review (SURR) and Persistently Lowest-Achieving (PLA) Schools.

Purpose: To merge the processes for determining SURR and PLA schools.

Substance of proposed rule (Full text is posted at the following State website:<http://www.emsc.nysed.gov/deputy/regs/>): The State Education Department proposes to amend paragraphs (9), (10) and (11) of subdivision (p) of section 100.2 of the Regulations of the Commissioner of Education, effective July 14, 2010, to conform Commissioner's Regulations regarding the identification of schools for registration review (SURR) with United States Department of Education (USED) requirements to identify schools as persistently lowest-achieving (PLA) in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants (SIG) and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USED in January 2010. The purpose of the proposed rule is to strengthen the SURR process

by merging it with the process to identify PLA schools in order to increase the percentage of schools that successfully implement an intervention strategy that results in the school being removed from PLA status or that results in the school being replaced by a new school in Good Standing.

The substantive amendments to the regulations are as follows:

Section 100.2p(9) is amended to indicate that, beginning with the 2010-2011 school year, a school that is identified as PLA shall be placed under preliminary registration review; and to set forth the academic indicators used to identify a school as PLA. More specifically, the amended regulations:

(1) Modify the definition of a SURR school so that potential SURR schools will be those that are PLA, rather than those that are farthest from State standards.

(2) Conform the SURR definition of PLA with the Federal definition of the term.

(3) Consider as potential SURR schools, non-Title I elementary schools and Non-Title I eligible secondary schools that perform at levels that would make them PLA.

(4) Ensure that existing schools that implement a turnaround or transformation model remain SURR until academic performance improves or the schools are closed and restarted or replaced.

(5) Provide the Commissioner with flexibility to identify alternative high schools, special act schools, schools in Community School District 75, non-Title I elementary schools or non Title-I eligible secondary schools for registration review. If such schools are Title I schools or Title I eligible secondary schools, they would also be considered PLA for Federal program purposes.

Section 100.2p(10) is amended to set forth the actions that are to be taken when a school has been placed under registration review. More specifically, the amended regulations:

(1) Integrate support for SURR schools with support provided to schools that are PLA and eliminate any duplication in planning requirements and technical assistance and monitoring.

(2) Set forth requirements for districts to implement an intervention, as approved by the Commissioner, including the following: turnaround model, restart model, school closure model, transformation model; and to develop a new restructuring plan or update an existing restructuring plan to describe the implementation of the intervention, in accordance with a timeline prescribed by the Commissioner.

(3) Remove the requirement for a resource, planning and program audit of the district and the school; and replace it with a joint intervention team, appointed by the Commissioner, to assist a district in the selection of an intervention.

(4) Provide a SURR with three rather than two academic years to show progress prior to the Commissioner recommending that its registration be revoked.

Section 100.2p(11) is amended to set forth actions a SURR must take to be removed from registration review. More specifically, the amended regulations:

(1) Base removal decisions on the academic indicators used to identify a school as PLA.

(2) Permit current SURR schools that do not meet the PLA definition to continue implementation of its existing restructuring plan; and require current SURR schools that meet the PLA definition to implement intervention requirements.

(3) Require that a SURR school that will phase out or close shall meet the requirements of an intervention prescribed by the Commissioner.

Text of proposed rule and any required statements and analyses may be obtained from: Chris Moore, Office of Counsel, State Education Department, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: John B. King, Jr., Senior Deputy Commissioner P-12, Office of Elementary, Middle, Secondary and Continuing Education, State Education Building, Room 125, 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.

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Regents to appoint the Commissioner of Education as the Department's Chief Administrative Officer, which is charged with the general management and supervision of all public schools and the educational work of the State.

Education Law section 207 empowers the Regents and the Commissioner to adopt rules and regulations to carry out State education laws and the functions and duties conferred on the Department.

Education Law section 210 authorizes the Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and the professions in the State.

Education Law section 215 authorizes the Commissioner to require schools and school districts to submit reports containing such information as the Commissioner shall prescribe.

Education Law section 305(1) and (2) provide the Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents. Section 305(2) provides the Commissioner shall have such further powers and duties as charged by the Regents.

Education Law section 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Education Law section 3713(1) and (2) authorize the State and school districts to accept federal law making appropriations for educational purposes and authorize the Commissioner to cooperate with federal agencies to implement such law.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority and is necessary to conform Commissioner's Regulations regarding the identification of schools for registration review (SURR) with United States Department of Education (USDE) requirements to identify schools as Persistently Lowest-Achieving (PLA) in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

3. NEEDS AND BENEFITS:

Section 100.2(p) is amended to comply with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

The purpose of the proposed rule is to strengthen the SURR process by merging it with the process to identify PLA schools in order to

increase the percentage of schools that successfully implement an intervention strategy that results in the school being removed from PLA status or that results in the school being replaced by a new school in Good Standing. The proposed amendment will:

(1) modify the definition of a SURR school so that potential SURR schools will be those that are PLA rather than those that are farthest from State standards;

(2) conform the SURR definition of PLA with the Federal definition of the term;

(3) state the academic indicators used to identify a school as PLA;

(4) consider Non-Title I elementary schools and Non-Title I eligible secondary schools that perform at levels that would make them PLA as potential SURR schools;

(5) provide new schools that are created as a result of implementation of the Turnaround or Restart model an accountability status of Good Standing and not identify these as SURR at the time of registration;

(6) ensure that existing schools that implement a turnaround or transformation model remain SURR until academic performance improves or the schools are closed and restarted or replaced;

(7) provide the Commissioner with flexibility to identify alternative high schools, special act schools, schools in Community School District 75, non-Title I elementary schools or non Title-I eligible secondary schools for registration review. If such schools are Title I schools or Title I eligible secondary schools, they would also be considered PLA for Federal program purposes;

(8) integrate support for SURR schools with support provided to schools that are PLA and eliminate any duplication in planning requirements and technical assistance and monitoring;

(9) set forth requirement for districts to implement an intervention, as approved by the Commissioner, including the following: turnaround model, restart model, school closure model, transformation model; and to develop a new restructuring plan or update an existing restructuring plan to describe the implementation of the intervention, in accordance with a timeline prescribed by the Commissioner;

(10) remove the requirement for a resource, planning and program audit of the district and the school; and, replace it with the joint intervention team assisting a district in the selection of an intervention;

(11) provide a SURR with three rather than two academic years to show progress prior to the Commissioner recommending that its registration be revoked;

(12) base removal decisions on the academic indicators used to identify a school as PLA; and

(13) permit current SURR schools that do not meet the PLA definition to continue implementation of its existing restructuring plan; and, to require current SURR schools that meet the PLA definition to implement intervention requirements pursuant to revised regulations.

4. COSTS:

Cost to the State: None.

Costs to Local Government: The rule is necessary to conform Commissioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010. As a condition for their receipt of federal funding under Title I of the Elementary and Secondary Education Act (ESEA), as amended, the State and LEAs, including school districts, are required to comply with both the requirements of section 1003(g) of the ESEA and the flexibilities for the SIG program provided through the Consolidated Appropriations Act of 2010.

The rule may impose costs on LEAs with schools that are placed under registration review. These costs would consist of the reasonable and necessary costs associated with the actions required under section 100.2(p)(10)(ii) and (iv). Because of the number of schools involved, and the fact that the services and activities required to be provided

will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. It is anticipated that the range of costs will be between \$50,000 to \$2 million per school, based on the intervention selected. However, the State Education Department anticipates the majority of this funding will be provided by ESEA section 1003(g).

Cost to Private Regulated Parties: None.

Cost to Regulating Agency for Implementation and Continued Administration of this Rule: None. The proposed rule will Integrate support for SURR schools with support provided to schools that are PLA and eliminate any duplication in planning requirements and technical assistance and monitoring, thereby reducing costs to the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed rule is necessary to conform Commissioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

The rule will not impose any additional program, service, duty or responsibility beyond those imposed by State and federal statutes.

6. PAPERWORK:

A public school subject to the provisions of 100.2(p)(9)-(11) that has been placed under registration review beginning with the 2010-2011 school year, or a school identified as PLA in the 2009-2010 school year that was not a SURR during the 2009-2010 school year, shall develop a new restructuring plan, or update an existing restructuring plan, that shall, in addition to the requirements pursuant to 100.2(p)(6)(iv)(c)(2), describe the implementation of the intervention as set forth in section 100.2(p)(10)(iv). The school shall implement the intervention in accordance with a timeline prescribed by the commissioner, and no later than the beginning of the next school year following the school's identification for registration review. The plan shall be updated annually for implementation no later than the first day of the regular student attendance of each school year that the designation continues.

A public school placed under registration review in the 2009-2010 school year or before pursuant to 100.2(p)(9)(i) shall continue implementation of the existing restructuring plan.

A public school identified as PLA pursuant to 100.2(p)(9)(ii) that is placed under registration review beginning with the 2010-2011 school year or thereafter, or a school identified as PLA in the 2009-2010 school year that was not a SURR during the 2009-2010 school year, shall implement one of the interventions set forth in section 100.2(p)(10)(ii) and (iv): Turnaround model, Restart model, School Closure model or Transformation model.

A public school described in 100.2(p)(9)(iii) that is placed under registration review beginning with the 2010-2011 school year or thereafter, shall implement a plan, in a format and timeline as approved by the commissioner, that shall, at a minimum meet the requirements of a restructuring plan pursuant to 100.2(p)(6)(iv)(c)(2) and include at least one of the actions of a Transformation model or Turnaround model.

A board of education that seeks to phase out or close a SURR shall submit for the Commissioner's approval a plan identifying the intervention pursuant to 100.2(p)(10)(iv) that will be implemented and will result in phase out or closure.

7. DUPLICATION:

The rule does not duplicate, overlap or conflict with State and federal requirements, and is necessary to conform the Commissioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

8. ALTERNATIVES:

There were no significant alternatives and none were considered. The proposed rule will integrate support for SURR schools with support provided to schools that are PLA and thereby eliminate any duplication in planning requirements and technical assistance and monitoring.

9. FEDERAL STANDARDS:

The rule does not exceed any minimum standards of the federal government for the same or similar subject areas, and is necessary to conform Commissioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

10. COMPLIANCE SCHEDULE:

The rule is necessary to conform Commissioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

It is anticipated that regulated parties may achieve compliance with the rule by its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The rule is necessary to conform Commissioner's Regulations regarding the identification of schools for registration review (SURR) with United States Department of Education USDE requirements to identify schools as Persistently Lowest-Achieving (PLA) in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants (SIG) and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010. As a condition for their receipt of federal funding under Title I of the Elementary and Secondary Education Act (ESEA), as amended, the State and Local Educational Agencies (LEAs), including school districts, are required to comply with both the requirements of section 1003(g) of the ESEA and the flexibilities for the SIG program provided through the Consolidated Appropriations Act of 2010. The proposed amendment applies to public schools that have been registered pursuant to Section 100.2(p) of Commissioner's Regulations. The purpose of the proposed amendment is to strengthen the SURR process by merging it with the process to identify PLA schools in order to increase the percentage of schools that successfully implement an intervention strategy that results in the school being removed from PLA status or that results in the school being replaced by a new school in Good Standing.

The proposed rule does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule that it does not affect small businesses, no further measures were 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 Government:

1. EFFECT OF RULE:

The proposed rule generally applies to public schools that have been registered pursuant to section 100.2(p) of Commissioner's Regulations.

2. COMPLIANCE REQUIREMENTS:

The proposed rule is necessary to conform Commissioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

A public school subject to the provisions of 100.2(p)(9)-(11) that has been placed under registration review beginning with the 2010-2011 school year, or a school identified as PLA in the 2009-2010 school year that was not a SURR during the 2009-2010 school year, shall develop a new restructuring plan, or update an existing restructuring plan, that shall, in addition to the requirements pursuant to 100.2(p)(6)(iv)(c)(2), describe the implementation of the intervention, as set forth in section 100.2(p)(10)(iv). The school shall implement the intervention in accordance with a timeline prescribed by the commissioner, and no later than the beginning of the next school year following the school's identification for registration review. The plan shall be updated annually for implementation no later than the first day of the regular student attendance of each school year that the designation continues.

A public school placed under registration review in the 2009-2010 school year or before pursuant to 100.2(p)(9)(i) shall continue implementation of the existing restructuring plan.

A public school identified as PLA pursuant to 100.2(p)(9)(ii) that is placed under registration review beginning with the 2010-2011 school year or thereafter, or a school identified as PLA in the 2009-2010 school year that was not a SURR during the 2009-2010 school year, shall implement one of the interventions set forth in section 100.2(p)(10)(ii) and (iv): turnaround model, restart model, school closure model or transformation model.

A public school described in 100.2(p)(9)(iii) that is placed under registration review beginning with the 2010-2011 school year or thereafter, shall implement a plan, in a format and timeline as approved by the commissioner, that shall, at a minimum meet the requirements of a restructuring plan pursuant to 100.2(p)(6)(iv)(c)(2) and include at least one of the actions of a transformation model or turnaround model.

A board of education that seeks to phase out or close a SURR shall submit for the Commissioner's approval a plan identifying the intervention pursuant to 100.2(p)(10)(iv) that will be implemented and will result in phase out or closure.

3. PROFESSIONAL SERVICES:

The proposed rule does not impose any additional professional services requirements on school districts.

4. COMPLIANCE COSTS:

The proposed rule is necessary to conform Commissioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon SIG guidelines issued by USDE in January 2010. As a condition for their receipt of federal funding under Title I of the ESEA, as amended, the State and LEAs, including school districts, are required to comply with both the requirements of section 1003(g) of the ESEA and the flexibilities for the SIG program provided through the Consolidated Appropriations Act of 2010.

The rule may impose costs on LEAs with schools that are placed under registration review. These costs would consist of the reasonable and necessary costs associated with the actions required under section 100.2(p)(10)(ii) and (iv). Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. It is anticipated that the range of costs will be between \$50,000 to \$2 million per school, based on the intervention selected. However, the State Education Department anticipates the majority of this funding will be provided by ESEA 1003(g).

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule does not impose any new technological requirements on school districts. Economic feasibility is addressed under the Compliance Costs section above.

6. MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidance provided by the U.S. Department of Education and is necessary to conform Commis-

sioner's Regulations regarding the identification of SURR with USDE requirements to identify schools as PLA in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants (SIG) and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010. As a condition for their receipt of federal funding under Title I of the ESEA, as amended, the State and LEAs, including school districts, are required to comply with both the requirements of section 1003(g) of the ESEA and the flexibilities for the SIG program provided through the Consolidated Appropriations Act of 2010. The proposed rule has been carefully drafted to meet specific federal and State requirements.

The purpose of the proposed amendment is to strengthen the SURR process by merging it with the process to identify PLA schools in order to increase the percentage of schools that successfully implement an intervention strategy that results in the school being removed from PLA status or that results in the school being replaced by a new school in Good Standing. By merging the process for determining SURR schools with the process for determining PLA schools, the proposed rule will integrate support services for SURR schools with support provided to PLA schools, and eliminate any duplication in planning requirements and technical assistance and monitoring.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:

The proposed rule applies to public schools that have been registered pursuant to section 100.2(p) of the Commissioner's Regulations.

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

The proposed rule is necessary to conform Commissioner's Regulations regarding the identification of schools for registration review (SURR) with United States Department of Education (USDE) requirements to identify schools as Persistently Lowest-Achieving in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

A public school subject to the provisions of 100.2(p)(9)-(11) that has been placed under registration review shall develop a new restructuring plan, or update an existing restructuring plan, that shall, in addition to the requirements pursuant to 100.2(p)(6)(iv)(c)(2), describe the implementation of the intervention, as set forth in section 100.2(p)(10)(iv). The school shall implement the intervention in accordance with a timeline prescribed by the commissioner, and no later than the beginning of the next school year following the school's identification for registration review. The plan shall be updated annually for implementation no later than the first day of the regular student attendance of each year that the designation continues.

A public school placed under registration review in the 2009-2010 school year or before pursuant to 100.2(p)(9)(i) shall continue implementation of the existing restructuring plan.

A public school identified as PLA pursuant to 100.2(p)(9)(ii) that is

placed under registration review beginning with the 2010-2011 school year or thereafter, or a school identified as persistently lowest-achieving in the 2009-2010 school year that was not a school under registration review during the 2009-2010 school year, shall implement one of the interventions set forth in section 100.2(p)(10)(ii) and (iv): Turnaround model, Restart model, School Closure model or Transformation model.

A public school described in 100.2(p)(9)(iii) that is placed under registration review beginning with the 2010-2011 school year or thereafter, shall implement a plan, in a format and timeline as approved by the commissioner, that shall, at a minimum meet the requirements of a restructuring plan pursuant to 100.2(p)(6)(iv)(c)(2) and include at least one of the actions of a Transformation model or Turnaround model.

A board of education that seeks to phase out or close a school under registration review shall submit for the Commissioner's approval a plan identifying the intervention pursuant to 100.2(p)(10)(iv) that will be implemented and will result in phase out or closure.

The proposed rule does not impose any additional professional services requirements on public schools.

3. COSTS:

The proposed rule is necessary to conform Commissioner's Regulations regarding the identification of schools for registration review (SURR) with (USDE) requirements to identify schools as Persistently Lowest-Achieving in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants (SIG) and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon SIG guidelines issued by USED in January 2010, relating to school accountability. As a condition for their receipt of federal funding under Title I of the ESEA, as amended, the State and LEAs, including school districts, are required to comply with both the requirements of section 1003(g) of the ESEA and the flexibilities for the SIG program provided through the Consolidated Appropriations Act, 2010.

The rule may impose costs on LEAs with schools that are placed under registration review. These costs would consist of the reasonable and necessary costs associated with the actions required under section 100.2(p)(10)(ii) and (iv). Because of the number of schools involved, and the fact that the services and activities required to be provided will vary greatly from school to school, depending on the academic circumstances and needs presented in each school, a complete cost statement cannot be provided. It is anticipated that the range of costs will be between \$50,000 to \$2 million per school, based on the intervention selected. However, the State Education Department anticipates the majority of this funding will be provided by ESEA section 1003(g).

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is in response to recent guidelines provided by the U.S. Department of Education and is necessary to conform Commissioner's Regulations regarding the identification of Schools Under Registration Review (SURR) with USDE requirements to identify schools as Persistently Lowest-Achieving (PLA) in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USDE in January 2010.

The proposed rule has been carefully drafted to meet specific federal and State requirements. Because these requirements are uniformly applicable state-wide to all public schools that have been registered pursuant to section 100.2(p) of the Commissioner's Regulations, it was not possible to prescribe lesser requirements for rural areas or to exempt them from such requirements.

The purpose of the proposed amendment is to strengthen the Schools Under Registration Review (SURR) process by merging it with the process to identify Persistently Lowest-Achieving (PLA) schools in order to increase the percentage of schools that successfully implement an intervention strategy that results in the school being removed from PLA status or that results in the school being replaced by a new school in Good Standing. By merging the process for

determining SURR schools with the process for determining PLA schools, the proposed rule will integrate support services for SURR schools with support provided to PLA schools, and eliminate any duplication in planning requirements and technical assistance and monitoring.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the Department's Rural Advisory Committee, whose membership includes schools located in rural areas. Copies of the proposed rule were also provided to the State Committee of Practitioners (COP), which consists of teachers, parents, district and building-level administrators, members of local school boards, and pupil personnel services staff, who are representative of all constituencies from various geographical locations across the State. The COP includes teachers and paraprofessionals from around the State representing a variety of grade levels and subject areas, directors of teacher-preparation institutions, officials and educators representing the New York City Board of Education, several other urban and rural school systems, nonpublic schools, parent advocacy groups, teacher union representatives and community-based organizations.

Job Impact Statement

The proposed rule is necessary to conform Commissioner's Regulations regarding the identification of schools for registration review (SURR) with United States Department of Education (USED) requirements to identify schools as Persistently Lowest-Achieving (PLA) in order for states to access State Fiscal Stabilization Funds (Phase II), School Improvement Grants and other Federal funding opportunities and to require schools identified as SURRs to implement intervention strategies based upon School Improvement Grant guidelines issued by USED in January 2010. As a condition for their receipt of federal funding under Title I of the Elementary and Secondary Education Act (ESEA), as amended, the State and Local Educational Agencies (LEAs), including school districts, are required to comply with both the requirements of section 1003(g) of the ESEA and the flexibilities for the SIG program provided through the Consolidated Appropriations Act of 2010. The proposed amendment applies to public schools that have been registered pursuant to Section 100.2(p) of Commissioner's Regulations. The purpose of the proposed amendment is to strengthen the SURR process by merging it with the process to identify PLA schools in order to increase the percentage of schools that successfully implement an intervention strategy that results in the school being removed from PLA status or that results in the school being replaced by a new school in Good Standing.

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

Department of Environmental Conservation

NOTICE OF ADOPTION

Sportfishing Regulations

I.D. No. ENV-37-09-00003-A

Filing No. 376

Filing Date: 2010-03-30

Effective Date: 2010-10-01

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

Action taken: Amendment of Part 10 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, 11-0317, 11-1301, 11-1303, 11-1316 and 11-1319

Subject: Sportfishing regulations.

Purpose: To revise regulations governing sportfishing and associated activities including use of bait fish.

Text or summary was published in: the September 16, 2009 issue of the Register, I.D. No. ENV-37-09-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Shaun Keeler, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8928, email: sxkeeler@gw.dec.state.ny.us

Additional matter required by statute: A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

Assessment of Public Comment

Comment: The regulation allowing for the taking of 5 brook trout, in addition to the statewide creel limit of 5 trout, should not be eliminated as it is not hurting the populations. When the economy is tight and license fees are increased, creel limits should not be reduced if biology is not negatively impacted. The regions where this regulation is in place have an extreme amount of small brooks and streams compared to the rest of the state that carry a great number of small trout.

Response: The department has found that many of its constituents are confused by this regulation. Established many years ago, this special regulation appears to have served little purpose, and there is no evidence that it has done much to increase angling opportunity. To benefit from this really involves angling on smaller tributaries, many of which are not heavily utilized for this purpose. Feedback from anglers, including information obtained from the 2007 Statewide Angler Survey has indicated that there are too many special regulations, and there is a need to address the resulting related complexities (e.g. interpretation). In addition, adding a bonus of five brook trout to the statewide creel limit for trout is inconsistent with current initiatives for supporting brook trout populations in times of diminishing habitat and competition with non-native fish species. This resource has come under additional stress and the department wishes to provide brook trout with a better layer of protection.

Comment: On the regulation allowing for the taking of 5 brook trout (in addition to the statewide creel limit of 5 trout) these small trout have a high mortality rate when caught and released, so letting them die is a waste of the resource.

Response: Five brook trout can still be creeled, without this special regulation, and once they have, an angler should stop fishing for trout, as is the case with other streams with the statewide reg, and there would be no additional mortality.

Comment: Young anglers have the skill to catch these small fish (versus larger fish) and often wish to keep and eat them.

Response: Even with dropping the bonus fish, young anglers will be able to creel up to five trout each.

Comment: Stopping fishing along the banks of the Oswegatchie River prior to May is wrong as people look forward to fishing for panfish, and its not fair to place further restrictions on anglers, "including the hook and sinker man" because of the reduced numbers of game fish.

Response: There has been an increase in the illegal harvest of walleye in this section of the Oswegatchie River during the closed (spawning) season, and this regulation will help prevent the illegal harvest of spawning walleyes. Results of the 2007 Statewide Angler Survey indicate that walleye are the third most sought after fish species by anglers, warranting efforts to protect valuable spawners. The closure affects only a small section of the river and will be in effect from March 16 to the first Saturday in May. Fishing above the dam will still be open year round. This regulation is widely used across New York State to protect spawning walleye.

Comment: The section of Chittenango Creek proposed for catch and release only should not be changed to catch and release only as it is a favorite area for adults to take children and to catch fish to take home for supper. For an aging group of sportsmen with mobility limiting illnesses, this area is very convenient to access, rather than a long painful trek.

Response: The two adjacent stocked sections of Chittenango Creek total 19.3 miles in length. There are four State-owned or easement angler parking areas within the 19.3 miles of stocked water. These parking areas are located on Olmstead Road, Emhoff Road, NYS Route 13 just south of Emhoff Road and on Nine Road. Three of these parking areas are outside the proposed 1.8 mile catch and release section. Fishing access to the entire 19.3 miles of stocked water is very good. There are numerous pull offs along Route 13 which are used extensively by anglers. Upstream from Route 13, good access exists in the Village of Cazenovia, Rippleton Road, Thompson Road, East Road and Nine Road.

The department currently owns 2.9 equivalent miles of Public Fishing Rights on Chittenango Creek and a total of approximately 20 miles of the creek are currently assessable to trout fishermen. Madison County also has a number of other trout streams where harvest is allowed.

Comment: On establishing the proposed section of Chittenango Creek as a catch and release section only, it doesn't seem right to take a prime section of this stream and to hand it over to some elitists so they can pursue "trophy fishing" at the expense of the regular people.

Response: Even with the establishment of a limited catch and release section there is an abundance of additional stream fishing that allows for harvest and the use of natural baits. This is a 1.8 mile section and approximately 20 miles of the creek are currently available and accessible to anglers. There is much angler support for establishing this catch and release section. The department strives to obtain a balance between being responsive to requests, such as for catch and release sections, and still ensuring adequate opportunities for all anglers.

Comment: A section better suited as a catch and release section on Chittenango Creek would be the section from south of and through the Village of Chittenango, including that it would put pressure on anglers to comply, and it would make for better public relations with parts of the public who are non supportive of the sport of angling.

Response: There are no public fishing rights in the Village of Chittenango. A catch and release section in the Village of Chittenango is less conducive for establishing a special regulated section of stream with unique fishing opportunity as it has less aesthetically appealing, being that most of that section lies within a urban business district.

Comment: The proposal to allow the use of alewives as bait in Lake Champlain and several counties including Franklin County should not be allowed as this is not an indigenous species. If blueback herring is not an indigenous species, I also urge you not to allow it to be used as bait.

Response: The regulation does not propose this. It simply removes a separate prohibition against the use of alewives and blueback herring as bait in Lake Champlain and several counties because it is now redundant and not needed as a result of the baitfish regulations that were put into place in 2008.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Chronic Wasting Disease

I.D. No. ENV-15-10-00007-P

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

Proposed Action: Amendment of Part 189 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301 and 11-0325

Subject: Chronic wasting disease.

Purpose: To update chronic wasting disease regulations.

Text of proposed rule: Title 6 of NYCRR, Part 189, entitled "Chronic Wasting Disease," is amended as follows:

Amend existing section 189.1 to read as follows:

189.1 Findings and purpose.

The Department of Environmental Conservation hereby finds that chronic wasting disease, a fatal transmissible neurodegenerative disease which endangers the health and welfare of wildlife populations and captive cervids, has been confirmed to exist in New York State. The nature of chronic wasting disease requires prompt and extraordinary actions to address the threat posed by this disease. The purpose of this rule is to prevent further introduction of this disease into New York, to contain the spread of this disease within New York, to prevent exportation of this disease outside of New York, and to protect the health of wild white-tailed deer [*odocoileus virginianus*] ("*Odocoileus virginianus*") and wild moose ("*Alces alces*") in New York.

Amend existing subdivision 189.3(b) to read as follows:

(b) "Feeding wild white-tailed deer or wild moose in New York." No person shall feed wild white-tailed deer or wild moose at any time in New York State except:

Amend existing subparagraph 189.3(e)(1)(i) to read as follows:

(i) United States: Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Vermont[, and Virginia].

Repeat existing subdivision 189.3(h) and renumber existing subdivision 189.3(i) as subdivision 189.3(h).

Amend existing section 189.4 to read as follows:

All carcasses and parts of any wild animal of the Genus *Cervus* or the Genus *Odocoileus* or the Genus *Alces* imported into New York, or packages or containers containing such carcasses or parts, shall be affixed with a legible label bearing the following information: the species of animal, the State, [or] province, or country where the animal was taken, and the name and address of the person who took the animal.

Repeal existing section 189.7 and adopt new section 189.7 to read as follows:

189.7 CWD containment areas.

(a) "CWD containment areas." *The department may establish CWD containment areas in the event that CWD is discovered to exist in captive or wild deer or wild moose in New York. CWD containment areas shall be established by the Department through publication of a notice in the Environmental Notice Bulletin. Such notice shall identify the boundaries of the containment area(s). Upon publication of notice of a CWD containment area, the provisions of this section shall apply to the identified area. The department shall also publicize the establishment of a CWD containment area through press release and by posting notice on the department's website.*

(b) "Exportation of certain animal parts from a CWD Containment Area." *No person shall remove from the CWD containment area the brain, eyes, spinal cord, tonsils, intestinal tract, spleen, or retropharyngeal lymph nodes, or any portion of such parts, of wild, captive, or captive-bred animals of the Genus Cervus or the Genus Odocoileus or the Genus Alces obtained from or taken within the CWD containment area, or any carcass containing such parts, except under permit issued by the department or as authorized by subdivision (g) of this section.*

(c) "Mandatory check of deer taken within a CWD containment area." *All statutes, rules and regulations governing the taking of wild white-tailed deer apply within the CWD containment area. In addition, the following restrictions apply:*

(1) *All wild white-tailed deer taken within a CWD containment area during the open hunting seasons for deer shall be registered at a designated DEC check station located within the CWD containment area. The department shall post on the DEC website (www.dec.state.ny.us) and publish in the Environmental Notice Bulletin information regarding deer check station locations within the containment area and times of operation.*

(2) *Any person required to register a deer at a DEC check station pursuant to this section shall bring to the check station:*

(i) *The field dressed deer carcass, or*

(ii) *The deer head, which shall be unfrozen, with antlers still attached (if any), with approximately three inches of neck still attached, and marked with a tag bearing the printed name, signature, and address of the person who took the deer, and the carcass tag documentation (doc) number, season of kill, date of kill and location of kill. The deer head tag shall be provided by the person registering the deer.*

(3) *Any person required to register a deer at a DEC check station pursuant to this section shall allow DEC staff to collect and retain tissue samples from the deer to test for the presence of CWD.*

(d) "Possession of deer or moose killed by collision." *Notwithstanding the provisions of Environmental Conservation Law section 11-0915, the owner of a motor vehicle which has been damaged by collision with a deer or moose within a CWD containment area is prohibited from possessing such deer or moose, and no permit for possession of the deer or moose carcass shall be issued to the vehicle owner or to any other party.*

(e) "Deer, moose, and elk urine." *No person shall collect, possess, transport or sell the urine of any deer, moose or elk located or taken within the CWD containment area.*

(f) "Rehabilitation of wild white-tailed deer or wild moose."

(1) *No person, including any licensed wildlife rehabilitator, shall take, capture, possess, or transport wild white-tailed deer or wild moose for the purpose of rehabilitation within a CWD containment area.*

(2) *No person shall import into a CWD containment area, from outside such CWD containment area, any live wild white-tailed deer or wild moose for any purpose.*

(g) "Disposal of carcasses and parts." *No person shall dispose of carcasses and parts of animals of the Genus Cervus or the Genus Odocoileus or the Genus Alces in a CWD containment area, except those parts removed in the field during normal field dressing, unless such parts shall be disposed of in a landfill authorized pursuant to Part 360 of this Title. Transfer or treatment of the waste prior to disposal, at a facility authorized pursuant to Part 360 of this Title, is acceptable.*

Amend existing subdivision 189.8(b) to read as follows:

(b) In addition to the requirements of Environmental Conservation Law section 11-1733, any person who engages in the art or operation of preparing, stuffing, and mounting the skins or other parts of animals of the Genus Cervus or the Genus Odocoileus or the Genus Alces shall maintain and keep in their taxidermy shop or place of business a taxidermy log, on forms provided by the Department, that includes the following information for each specimen of the Genus Cervus or the Genus Odocoileus or the Genus Alces:

Amend existing paragraph 189.8(b)(7) to read as follows:

(7) Date on which the animal was taken.

[Taxidermy log forms may be obtained from the department's website (www.dec.state.ny.us) or by calling the nearest department regional office.]

Repeal existing subdivision 189.8(d).

Repeal existing paragraph 189.8(e) and adopt new paragraph 189.8(d) to read as follows:

(d) *Original taxidermy logs for the current year and for previous two years shall be maintained at the taxidermy shop or place of business.*

Renumber existing paragraph 189.8(f) as paragraph 189.8(e).

Text of proposed rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: wildliferegs@gw.dec.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.

Additional matter required by statute: A negative declaration has been prepared pursuant to Article 8 of the Environmental Conservation Law and is on file with the Department of Environmental Conservation.

Regulatory Impact Statement

Statutory authority:

The Commissioner of the Department of Environmental Conservation (department), pursuant to Environmental Conservation Law (ECL) section 3-0301, has authority to protect the wildlife resources of New York State. Environmental Conservation Law section 11-0325 provides the department with authority to take action necessary to protect fish and wildlife from dangerous diseases.

Legislative objectives:

The legislative objective of ECL section 3-0301 is to grant the Commissioner the powers necessary for the department to protect New York's natural resources, including wildlife, in accordance with the environmental policy of the State. The legislative objective of ECL section 11-0325 is to provide the department with broad authority to respond to the presence or threat of a disease that endangers the health or welfare of fish or wildlife populations.

Needs and benefits:

The department proposes four changes to the Chronic wasting disease (CWD) regulation:

1. Decommission the current chronic wasting disease containment area. (The containment area is primarily within a portion of Oneida County in Region 6, but also includes a small part of Madison County in Region 7.) This would mean that hunters would no longer be required to have their deer checked at the department's Rome deer check station or cooperating meat cutters within this area. It would also allow hunters to transport their harvest outside of this area.

2. Rescind the provisions related to "sale of feed" in 6 NYCRR 189.3 (h). This provision of the CWD regulations is very difficult to enforce and is an unnecessary regulation.

3. Amend 6 NYCRR 189.8 (Taxidermy) to require that taxidermy logs be kept on hand for a two year period, instead of requiring that these records be sent to the department.

4. Add moose as a species that would be regulated if CWD was ever discovered in this native cervid (e.g., possession of road killed moose in a containment area).

Chronic wasting disease was detected in New York in the spring of 2005. A "containment area" was established at that time to allow for intensive monitoring of deer for signs of CWD and to lower the chance for movement of the disease out of this location. Test results on over 7,000 deer from this area have shown no further evidence of CWD. Maintaining current restrictions with its associated costs and regulatory burden to the public is not expected to result in better management of CWD. This proposal would effectively revert CWD surveillance activities within the containment area to pre-2005 levels. The department would retain the authority to establish a new containment area in the event of the confirmation of new cases anywhere in the State. Deer samples will continue to be collected on a voluntary basis within the boundaries of the current containment area.

The "sale of deer feed" provision was added to the regulation in 2005 as an effort to increase the effectiveness of the existing prohibition against feeding wild deer. It requires retailers to post signs regarding sale of feed for wild deer if they sell domestic livestock feed or wildlife feed. It also prohibits sale of feed labeled for wild deer. While a well intentioned effort to alert customers of legal considerations, there is little evidence that those who wish to illegally feed deer have heeded the warning. Because this provision applies to all retailers offering feed for domestic livestock or wildlife, it effectively applies even to a store which sells small quantities of bird seed or even suet. Enforcement of this provision has been difficult as a result, as the retailer does not typically know what the intent of the purchaser may be, and cannot be expected to question every purchase of livestock or wildlife feed. Amendment of this provision is cost neutral to the department and retailers, but does lift a regulatory burden from retailers. Existing restrictions on the act of feeding deer would remain.

Since CWD exists in other states and some countries, it is important that we continue to be proactive with taxidermists by requiring them to maintain a log of any cervids that they handle. At the same time, to relieve the burden on taxidermists, this proposal will drop the requirement to submit logs directly to the department. Maintaining these records at their place of business for at least two years is a more logical approach that allows the department access to this information to enable any disease forensic studies.

Chronic wasting disease remains a serious concern to deer managers throughout North America. In states and Canadian provinces where CWD has been detected in wild deer or elk, subsequent cases have been confirmed through intensive monitoring. New York State is the lone exception. The proposed revision to this regulation will reduce the regulatory burden and expense associated with monitoring CWD, while maintaining adequate capacity for detection of a new outbreak. It will retain the department's ability to sample and detect CWD in New York through the use of a non-regulatory wild deer sampling and monitoring program. A non-regulatory approach has been used across New York since 2002, and continues outside the containment area through the present. Provisions of the CWD regulation which are designed to prevent introduction of the disease in New York are not affected by this proposal.

Moose should be added to appropriate sections of the existing regulation to make sure that if CWD is ever newly detected, regulations are in place to control the spread of this disease through applicable restrictions (e.g., restricting the possession of road-killed moose in a containment area), since moose are also susceptible to CWD.

Costs:

There are no new costs associated with this proposal, but substantial savings in costs associated with the operation of the department's check station at Rome, Oneida County in Region 6. (The department will save about \$30,000 per year.)

Local government mandates:

The proposed rule making does not impose any new mandates on local government.

Paperwork:

The proposed rule does not impose any additional recordkeeping.

Duplication:

The proposed amendment does not duplicate any State or Federal requirement.

Alternatives:

The department considered a partial "de-commissioning" of the containment area. The department's check station costs would be reduced through a more limited schedule, and the public regulatory burden lessened through the repeal of mandatory hunter submission requirements. Instead, DEC would operate a voluntary check station. However, DEC rejected this alternative because it would still require the staffing of the check station and this would be expensive. Instead DEC recommends decommissioning the check station and the use of staff field checks at meat cutters as the primary means to continue sampling CWD within containment area, in the same manner as used in other parts of New York.

Federal standards:

The United States Department of Agriculture-Animal and Plant Health Inspection Service (USDA-APHIS) developed an Environmental Assessment (EA) in 2002. The EA outlined the role of the Federal government in CWD management. This role included providing coordination and assistance with research, surveillance, disease management, diagnostic testing, technology, communications, information dissemination, education and funding for State CWD Programs. At this time, there are no Federal standards governing management of deer, moose or elk.

Compliance schedule:

Hunters and other regulated persons will be able to comply as soon as the regulation is adopted.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend the regulations pertaining to chronic wasting disease in response to intensive monitoring over a five year period. Small businesses or local governments will not be directly affected by the proposed rule. Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rule making will have no adverse impact on small businesses or local governments. This rule will not impose any new reporting, recordkeeping or other compliance requirements on small businesses or local governments. For the above reasons, the department has concluded that this rule making does not require a formal Regulatory Flexibility Analysis.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend the regulations pertaining to chronic wasting disease (CWD) in response to intensive monitoring over a five year period. Rural areas will not be directly affected by the proposed

rule. Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rule making will have no adverse impact on rural areas. In fact, the rule making will likely have a positive impact on rural areas by continuing to preclude the importation of CWD infectious materials and the introduction of CWD to new areas of the State. The department has further determined that this rule will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities in rural areas. For the above reasons, the department has concluded that this rule making does not require a formal Rural Area Flexibility Analysis.

Job Impact Statement

The purpose of this rule making is to amend the regulations pertaining to chronic wasting disease in response to intensive monitoring over a five year period. Based on the department's past experience in promulgating regulations of this nature, and based on the professional judgment of department staff, the department has determined that this rule making will not have an adverse impact on jobs. The department has determined that this rule making will not have a substantial adverse impact on jobs and employment opportunities, and that by its nature and purpose (protecting wild deer and moose), the proposed rule will likely help to protect jobs and employment opportunities associated with wild deer and moose. Therefore, the department has determined that a job impact statement is not required.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Management of Striped Bass, Haddock, Atlantic Cod, American Lobster, Coastal Sharks and Weakfish

I.D. No. ENV-15-10-00008-P

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

Proposed Action: Amendment of Parts 40 and 44 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 13-0347, 11-1303, 13-0105, 13-0339-a, 13-0340-a and 13-0338

Subject: The management of striped bass, haddock, Atlantic cod, American lobster, coastal sharks and weakfish.

Purpose: Make State regulations consistent with State and Federal laws and maintain compliance with Interstate Fishery Management Plans.

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov): The Department of Environmental Conservation (DEC) proposes to amend 6 NYCRR 40.1(f) Table A – Recreational fishing as follows:

1. The minimum length for haddock decreases from 19 inches to 18 inches.
2. The possession limit for Atlantic cod taken by recreational anglers shall be reduced from no limit to what is specified in Federal regulations for Georges Bank (GB) cod: 50 CFR 648.89.
3. The possession limit for weakfish is reduced from 6 fish to one (1) fish.
4. The portions of Table A that apply to Large and small coastal sharks, Pelagic sharks and Prohibited sharks are repealed. All the footnotes of Table A that apply to Large and small coastal sharks, Pelagic sharks and Prohibited sharks are removed.

DEC proposes to amend 6 NYCRR 40.1(i) Table B – Commercial fishing as follows:

1. The trip limit for weakfish is reduced from no limit to 100 pounds. The bycatch possession limit is reduced from 150 pounds to 100 pounds: no more than 100 pounds in the round, per vessel, and provided that at least an equal amount of other food fish species is caught during the same trip is on board the vessel.
2. The portions of Table B that apply to Large and small coastal sharks, Pelagic sharks and Prohibited sharks are repealed. All the footnotes of Table B that apply to Large and small coastal sharks, Pelagic sharks and Prohibited sharks are removed.

DEC proposes to amend subparagraphs 40.1(j)(8)(ii) through 40.1(j)(8)(v) of 6 NYCRR to read as follows:

1. Permits to take a full quota share of striped bass will be issued at no cost to persons who currently possess a valid New York State commercial food fish license and who previously held a New York State license to sell striped bass during 1984, 1985, 1990, 1991, 1992, 1993, 1994, or 1995 and who can demonstrate through Federal or New York State income tax records that at least fifteen thousand dollars of earned income resulted

from their direct participation in the harvest of marine fish, shellfish, crustaceans or other marine biota in any one year during the period 1994 through 2009. Previously, 50 percent or more of their earned income had to result from direct participation in the harvest of marine biota during those years. Persons who otherwise qualify for a striped bass commercial permit, but fail to meet the fifteen thousand dollar earned income criteria will receive a partial quota share striped bass permit.

2. Any holder of a partial share permit may apply for a full share permit by demonstrating through Federal or State tax records that fifteen thousand dollars or more of his or her earned income has been derived from the direct participation in the harvest of marine biota during the preceding year. Previously, a partial share permit holder had to demonstrate 50 percent of his or her income was derived from the harvest of marine biota.

3. Beginning in 2010, and continuing at five year intervals, each striped bass commercial harvesters permit holder in the full share category must file with the department a complete copy of his or her Federal or State income tax records from one of the preceding three years. These tax records must be filed before the June 1 deadline for receipt of applications. Such tax records must demonstrate that the permit holder has maintained the fifteen thousand dollar income level in order to remain a participant in the full share category. Failure to file a timely and complete copy of Federal or State income tax records which demonstrate that the permit holder has maintained the fifteen thousand dollar income level will result in the permit holder being placed into the partial share category. The rules pertaining to partial share permit holders then apply.

DEC proposes to adopt a new section 40.7 of 6 NYCRR entitled Coastal Sharks. The purpose of adopting this new section is to promote the prudent management of coastal sharks that are landed in the State of New York. This section shall define which sharks may be taken for commercial and recreational purposes and which sharks are prohibited from harvest, size limits, possession limits, manner of taking and landing, gear restrictions and open and closed seasons will also be specified in this section. The provisions in this section are designed to promote healthy self-sustaining populations of coastal sharks and provide for the sustainable use of the shark resource for the benefit of the residents of the State of New York.

For recreational anglers, it is unlawful to take or possess any shark other those listed below: Atlantic sharpnose ("Rhizoprionodon terraenovae"); blacknose ("Carcharhinus acronotus"); blacktip ("Carcharhinus limbatus"); blue ("Prionace glauca"); bonnethead ("Sphyrna tiburo"); bull ("Carcharhinus leucas"); common thresher ("Alopias vulpinus"); finetooth ("Carcharhinus isodon"); great hammerhead ("Sphyrna mokarran"); scalloped hammerhead ("Sphyrna lewini"); smooth hammerhead ("Sphyrna zygaena"); lemon ("Negaprion brevirostris"); nurse ("Ginglymostoma cirratum"); oceanic whitetip ("Carcharhinus longimanus"); porbeagle ("Lamna nasus"); shortfin mako ("Isurus oxyrinchus"); smooth dogfish ("Mustelus canis"); spiny dogfish ("Squalus acanthias"); spinner ("Carcharhinus brevipinna"); and tiger ("Galeocerdo cuvier").

1. The minimum size limit for the shark species listed above is 54 inches fork length. There is no minimum size limit for Atlantic sharpnose, finetooth, blacknose, bonnethead, smooth dogfish and spiny dogfish.

2. Recreational anglers may not take sharks using any means other than handlines that are retrieved by hand, not mechanical means, or by rod and reel.

3. Recreational anglers may not sell, trade or barter sharks or shark pieces.

4. Shore anglers may take or possess no more than one shark, regardless of species, except that one additional Atlantic sharpnose may be taken and possessed, one additional bonnethead may be taken and possessed; and there shall be no limit to the number of spiny dogfish and smooth dogfish that can be taken or possessed.

5. Recreational anglers fishing from a vessel may take or possess no more than one shark, regardless of species, except that one additional Atlantic sharpnose may be taken and possessed per angler, one additional bonnethead may be taken and possessed per angler and there shall be no limit to the number of spiny dogfish and smooth dogfish that can be taken or possessed per angler.

For commercial fishing in New York and for the purposes of these regulations and for consistency with Federal rules and the fishery management plan for coastal sharks developed by the Atlantic States Marine Fisheries Commission, coastal sharks shall be classified as follows:

1. Prohibited species: Atlantic angel ("Squatina dumeril"); basking shark ("Cetorhinus maximus"); bigeye sand tiger shark ("Odontaspis noronhai"); bigeye thresher shark ("Alopias superciliosus"); bignose shark ("Carcharhinus altimus"); Caribbean sharpnose shark ("Rhizoprionodon porosus"); dusky shark ("Carcharhinus obscurus"); Galapagos shark ("Carcharhinus galapagensis"); longfin mako shark ("Isurus paucus"); narrowtooth shark ("Carcharhinus brachyurus"); night shark ("Carcharhinus signatus"); reef shark ("Carcharhinus perezi"); sand tiger shark ("Carcharias taurus"); sharpnose sevengill shark ("Heprachias

perlo") bigeye sixgill shark ("Hexanchus nakamurai"); bluntnose sixgill shark ("Hexanchus griseus"); smalltail shark ("Carcharhinus porosus"); whale shark ("Rhincodon typus"); white shark ("Carcharodon carcharias");

2. Research species: sandbar ("Carcharhinus plumbeus");

3. Smooth dogfish: smooth dogfish ("Mustelus canis");

4. Small coastal species: Atlantic sharpnose shark ("Rhizoprionodon terraenovae"); blacknose shark ("Carcharhinus acronotus"); bonnethead shark ("Sphyrna tiburo"); finetooth shark ("Carcharhinus isodon");

5. Pelagic species: blue shark ("Prionace glauca"); common thresher shark ("Alopias vulpinus"); oceanic whitetip shark ("Carcharhinus longimanus"); porbeagle shark ("Lamna nasus"); shortfin mako shark ("Isurus oxyrinchus"); and

6. Non-sandbar large coastal species: great hammerhead shark ("Sphyrna mokarran"); scalloped hammerhead shark ("Sphyrna lewini"); smooth hammerhead shark ("Sphyrna zygaena"); lemon shark ("Negaprion brevirostris"); nurse shark ("Ginglymostoma cirratum"); silky shark ("Carcharhinus falciformis"); spinner shark ("Carcharhinus brevipinna"); tiger shark ("Galeocerdo cuvier").

7. There is no closed season for the shark commercial fishery.

8. No person shall take, possess or land any shark species listed as Prohibited or Research Species without first obtaining and possessing a valid special license in accordance with Part 175.

9. There is no possession limit for sharks listed as Smooth dogfish, Small coastal species, Pelagic species, and Non-sandbar large coastal species.

10. No person shall take possess or land more than thirty-three sharks, regardless of species in any 24-hour period.

11. Sharks harvested for commercial purposes shall be taken by the following methods and gears only: rod and reel; handline, which shall be retrieved by hand, not mechanical means, and shall be attached to or in contact with a vessel; small mesh gillnet; large mesh gillnet; trawl; shortline; pound net; and weir. A maximum of two shortlines per vessel may be used. The use of any other gear to take sharks for commercial purposes is prohibited.

12. The following bycatch reduction measures must be practiced by any person taking, possessing or landing sharks using shortlines or large mesh gillnets:

(a) All hooks attached to shortline gear must be corrodible circle hooks;

(b) All persons participating in the commercial shark fishery shall practice the protocols and possess the Federally-required release equipment for pelagic and bottom longlines for the safe handling, release and disentanglement of sea turtles and other non-target species;

(c) All captains and vessel owners must be certified in using handling and release equipment through workshops offered by National Oceanic and Atmospheric Administration's National Marine Fisheries Service;

(d) Large mesh gillnets shall be no longer than 2.5 kilometers (1.55 miles).

13. No person shall possess or land a shark listed in 6 NYCRR 40.7 without the tails and fins naturally attached to the carcass. Fins may be cut as long as they remain attached to the carcass by natural means with at least a small portion of uncut skin. Finning is prohibited. Sharks may be eviscerated and have the heads removed. Sharks may not be filleted or cut into pieces at sea.

14. Quotas, trip limits and directed fishery thresholds may be set by the Atlantic States Marine Fisheries Commission Spiny Dogfish & Coast Sharks Management Board (Sharks Board) for the smooth dogfish, small coastal, non-sandbar large coastal and pelagic species groups for each commercial fishing year. DEC will establish trip limits and directed fishery thresholds within the fishing year consistent with those established by the Sharks Board. Such trip limits and thresholds will be enforceable upon 72 hours notice to license holders of the vessel trip limit allowed.

15. If DEC determines that the maximum allowable harvest of sharks has been taken or is projected to be taken before the end of the fishing year, DEC may prohibit the take and possession of a shark species for commercial purposes upon 72 hours notice to license holders.

16. If DEC closes a fishery, but determines that the quota will not be harvested by the projected date, then DEC may reopen the fishery for a specified time at a specified trip limit up to the maximum allowed upon 72 hours notice to license holders.

17. No person shall take, possess or land sharks for commercial purposes when the Federal commercial fishery for that species is closed.

18. No harvester shall sell sharks taken in state waters for commercial purposes except to a holder of a Federal Commercial Shark Dealer Permit. A Federal Commercial Shark Dealer Permit shall be required to buy and sell sharks taken in state waters.

DEC proposes to amend 6 NYCRR section 44.3 to read as follows:

1. Subdivision 44.3(a) is repealed. Subdivisions 44.3(b), 44.3(c) and 44.3(d) are renumbered 44.3(a), 44.3(b) and 44.3(c).

2. Effective June 1, 2010, all lobster pots or traps in use shall contain

escape vents that are either one or more unobstructed rectangular openings not less than five and three quarter inches by not less than two inches or two or more unobstructed circular openings not less than two and five-eighths inches in diameter each.

Text of proposed rule and any required statements and analyses may be obtained from: Stephen W. Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, New York 11733, (631) 444-0435, email: swheins@gw.dec.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.

Additional matter required by statute: Pursuant to the State Environmental Quality Review Act, a negative declaration is on file with the department.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) sections 11-0303 and 13-0347 authorize the Department of Environmental Conservation (DEC) to establish by regulation measures for the management of striped bass including requirements for permits and eligibility for such permits, provided that such regulations are consistent with the compliance requirements of applicable fishery management plans (FMPs) adopted by the Atlantic States Marine Fisheries Commission (ASMFC).

ECL sections 11-0303, 11-1303, 13-0105, 13-0339-a, and 13-0340-a authorize DEC to establish by regulation management measures for Atlantic cod and weakfish including size limits, catch and possession limits, provided that such regulations are consistent with the compliance requirements of the applicable FMP adopted by ASMFC.

ECL section 13-0329(11) authorizes DEC to establish by regulation escape panels and vents consistent with the ASMFC Interstate FMP for American Lobster.

ECL section 13-0338 authorizes DEC to establish by regulation measures for the management of sharks, including size limits, catch and possession limits, open and closed seasons, closed areas, restrictions on the manner of taking and landing, requirements for permits and eligibility for such permits, recordkeeping requirements, requirements on the amount and type of fishing effort and gear, and requirements relating to transportation, possession and sale, provided that such regulations are consistent with the compliance requirements of applicable fishery management plans adopted by the ASMFC and with applicable provisions of FMPs adopted pursuant to the Federal Fishery Conservation and Management Act.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries in such a way as to protect this natural resource for its intrinsic value to the marine ecosystem and to optimize resource use for commercial and recreational harvesters. The ECL stipulates that management and use of State fish and wildlife resources must be consistent with marine fisheries conservation and management policies and interstate fishery management plans.

3. Needs and benefits:

Promulgation of this amendment is necessary to ensure that the regulatory requirements for the commercial striped bass permit income qualifications are more consistent with those requirements for the commercial food fish license as stipulated in the ECL. This amendment has the approval of the Marine Resources Advisory Council.

This proposed rule is also necessary to make New York State regulations for Atlantic cod and haddock consistent with Federal rules. Both species are managed by the Federal government and are not usually caught in New York waters. However, Atlantic cod and haddock are often landed in New York from fishing trips to Exclusive Economic Zone (Federal) waters. This rule is necessary to prevent confusion for recreational anglers as they seek to land in New York cod caught in Federal waters by synchronizing New York's regulations with the Federal rules.

The following paragraphs describe rule makings that are necessary for New York State to remain in compliance with ASMFC FMPs. All member states of ASMFC and the Mid-Atlantic Fishery Management Council (MAFMC) must comply with the provisions of FMPs and management measures adopted by ASMFC and MAFMC. These FMPs and management measures are designed to promote the long-term sustainability of quota managed marine species, preserve the States' marine resources, and protect the interests of both commercial and recreational fishermen. All member states must promulgate any regulations necessary to implement the provisions of the FMPs and remain compliant with the FMPs. New York State must promulgate the proposed rules to comply with management measures and FMPs adopted by ASMFC and MAFMC.

The proposed regulations are necessary to increase the size of lobster trap escape vents on all lobster traps used in New York State waters within Lobster Conservation Management Area 6 (Long Island Sound) to harvest lobsters. This increase in vent size corresponds to the increased minimum

size limit which became effective January 1, 2010. New York's minimum size limit for lobsters increased to three and three-eighths inches carapace length and there must be a correlated increase in escape vent size. Addendum IV of Amendment 3 of the ASMFC American Lobster FMP requires corresponding escape vent size increases for any increase in minimum lobster size limit. The escape vent size increase is necessary to ensure that all sublegal size lobsters are able to get out of the trap and avoid being preyed upon by larger lobsters. Failure to implement this regulation in a timely fashion may result in a determination of non-compliance by ASMFC and by the Secretary of Commerce. New York State may then be subject to the imposition of a moratorium on the harvest of lobster within the State, which may result in significant adverse impacts to the State's economy.

The proposed regulations are also necessary to ensure New York State adopts measures to protect coastal sharks that are consistent with provisions of the ASMFC FMP for coastal sharks and with Federal regulations. Failure to adopt these regulations may result in a finding of non-compliance with the recommendations of the FMP for coastal sharks and subject New York State to the imposition of a moratorium on the harvest of coastal sharks.

Lastly, the proposed rule is necessary to adopt fishery management measures that would reduce fishing pressure on the depleted weakfish stock. Furthermore, New York State must comply with the recent recommendations of the ASMFC Weakfish Management Board and provisions in the ASMFC FMP for weakfish. Failure to comply with the FMP could result in a determination of non-compliance against New York State and possible weakfish fishery sanctions imposed by the Secretary of Commerce.

4. Costs:

(a) Cost to State government:

There are no new costs to State government resulting from this action.

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this proposed amendment. There may be some significant loss of income to any commercial striped bass full share category permit holders who fail to continue to qualify as full share holders and are reduced to part share category.

There may be minor costs associated with complying with gear modifications for lobster license holders. Lobster license holders in lobster conservation management area (LCMA) 6 will need to replace the escape vents on their traps if the vents are too small. The proposed rule may constrain the number of lobsters that commercial fishers may catch and may significantly reduce the number of weakfish that commercial fishers may keep. Consequently, the proposed rule may cause some reduction in the earnings of some commercial fishermen.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

DEC will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying commercial and recreational anglers of the new rules.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

None.

7. Duplication:

The proposed amendment does not duplicate any state or Federal requirement.

8. Alternatives:

Striped bass: No Action Alternative - If this regulation is not amended, all full share category commercial striped bass permit holders will continue to qualify using the 50 percent earned income criteria which is now inconsistent with the commercial food fish license criteria set in law. The proposed rule reflects the recommendations of the Marine Resources Advisory Council, and would make the income eligibility requirements for striped bass permit holders consistent with the income requirements stated in the ECL for new commercial food fish license holders.

Atlantic cod and haddock: No Action Alternative - If the regulations are not changed, then New York rules will remain less restrictive than the Federal rules for recreational cod fishing. This will promote confusion and noncompliance with Federal rules in New York because nearly all cod landed in New York are caught in Federal waters, but this cannot be proven at the dock.

American lobster: No Action Alternative - The ASMFC American Lobster FMP requires an increase in vent sizes for Southern New England. If New York does not implement this increase in vent size, the Secretary of Commerce may find the State non-compliant with the American lobster FMP and subject to fishery sanctions imposed by the Secretary of Commerce. Furthermore, the State may be subject to delayed implementation measures, which impose fishery closures based on the length of time

the regulations are delayed. Any fishery sanctions imposed on New York State would cause significant economic hardship on State lobster harvesters. The estimated dollar value of New York's commercial lobster harvest was approximately \$4.1 million in 2008 which is the last year of estimated value. This alternative was rejected.

Coastal sharks: No Action Alternative - ASMFC has adopted new management measures for coastal sharks. If New York State fails to amend 6 NYCRR Part 40 and to implement the recommendations of ASMFC, New York State will be out of compliance with the Fishery Management Plan for Coastal Sharks. The Secretary of Commerce may then implement a moratorium for fishing for coastal sharks in the State of New York. Consequently, this alternative was rejected.

Weakfish: No Action Alternative – The ASMFC Weakfish Management Board adopted new management measures that significantly reduced the amount of weakfish that could be harvested by commercial and recreational fishermen. If New York State fails to amend 6 NYCRR Part 40 and implement the recommendations of ASMFC, the State will not be in compliance with the management measures put into place by ASMFC and the FMP for Weakfish. ASMFC may then request the Secretary of Commerce to implement a moratorium on fishing for weakfish in New York. Consequently, this alternative was rejected.

9. Federal standards:

The amendments to 6 NYCRR Parts 40 and 44 are necessary to comply with the ASMFC and the Mid-Atlantic Fishery Management Council FMPs.

10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via DEC's website of the changes to the regulations. The proposed regulations will take effect upon filing with the Department of State after the 45-day public comment period.

Regulatory Flexibility Analysis

1. Effect of rule:

The Department of Environmental Conservation (DEC) has proposed a rule that will modify the striped bass commercial permit income qualifications to be more consistent with the income qualifications stated in the Environmental Conservation Law for the commercial food fish license. In 2009, there were 473 commercial striped bass permit holders in New York State. Of these, 372 permit holders were in the full share category and each received 241 tags. The remaining 101 permit holders were in the part share category and each received 39 tags. There is a potential that some of the full share permit holders will no longer qualify as full share once the rule is adopted and will become part share permit holders. This may indicate a possible reduction in their income from striped bass fishing. It is unknown how many permit holders would have a change in their full share or part share status once this amendment is adopted.

The proposed rule will allow recreational anglers to fish for and land Atlantic cod in New York in accordance with Federal rules for the Georges Bank cod fishery. The rule making will also propose to reduce the recreational minimum size limit for haddock from 19 inches to 18 inches. Currently, there is no possession limit for Atlantic cod taken from State waters. However, there is a 10-fish limit for cod taken from Federal waters. This proposed rule will make New York State regulations for Atlantic cod and haddock consistent with Federal rules. The proposed rule will insure that recreational anglers must comply with regulations that are consistent in State and Federal waters. The number of recreational anglers in New York who could be affected by this rule making is unknown by DEC at this time, but the National Marine Fisheries Service has estimated that there were just over 1 million recreational anglers in New York in 2007.

The proposed rule will amend Part 44 and increase the size of lobster trap escape vents to correspond to the increased lobster minimum size limit which became effective January 1, 2010. This rule will allow sublegal lobsters to escape lobster traps and avoid predation by larger lobsters caught in the trap. In 2009 there were 329 New York State licensed commercial lobster harvesters who harvested lobsters in LMA 6.

DEC proposes to adopt regulations that implement management measures for coastal sharks. The proposed rule will identify which shark species are allowed to be taken in the commercial and recreational fisheries and which species are prohibited; specify size limits, possession limits, seasons and authorized fishing gear; detail landing requirements, requirements for harvest, dealer and display licenses and permits; define by-catch reduction measures; and specify an annual process for quota and trip limit determination. The proposed rule will implement current or proposed Federal rules for the management of sharks and will be consistent with the Federal rules.

The proposed rule making will reduce the recreational possession of weakfish to one (1) fish per angler per day, reduce the commercial daily trip limit to 100 pounds, reduce the commercial bycatch limit to 100 pounds during closed seasons, and will specify a 100 undersized fish per trip allowance for the finfish trawl fishery. The income of commercial fishers who target weakfish may be reduced.

No local governments are affected by these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule. There may be minor costs associated with complying with gear modifications for lobster license holders.

5. Economic and technological feasibility:

For the most part, the proposed regulations do not require any expenditure on the part of regulated parties in order to comply with the changes. There may be some loss of income for any commercial striped bass full share category permit holders who fail to continue to qualify as full share holders and are reduced to the part share category. There may be minor costs associated with complying with gear modifications for lobster license holders. The changes required by the proposed regulations may reduce the income of commercial food fish harvesters by reducing the amount of weakfish they may harvest.

There is no additional technology required for small businesses, and this action does not apply to local governments.

6. Minimizing adverse impact:

Prior to the commercial striped bass permit re-qualifying date, all striped bass commercial permit holders will be sent a letter from DEC explaining the requalification process and the forms and records necessary for them to be placed in the full share category. Those who fail to submit records or who cannot meet the income qualifications will be placed in the part share category. Thereafter, permit holders in the part share category may apply for full share status if they meet the full share income requirements in future years.

Licensed lobster harvesters may reduce the costs of the required gear modification by modifying the vent size themselves rather than having it done by the trap manufacturer.

The failure to promulgate the proposed rules will result in New York not complying with the management measures adopted by MAFMC and ASMFC. New York may be found non-compliant with the FMPs for American lobster, coastal sharks or weakfish and subject to sanctions; ASMFC may request the Secretary of Commerce to implement a moratorium for fishing for any of the affected species in the State of New York. Protection of the State's shark and weakfish resources is essential to the long-term benefit of commercial fishers and recreational anglers. Any short-term losses in harvest and angler participation as a result of the promulgation of the proposed rules will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to protect the coastal shark and weakfish stocks from overfishing, allow the stock to rebuild and achieve long-term sustainability of the fisheries for future use. Failure to comply with FMPs and take required actions to protect the State's marine resources could cause the catastrophic collapse of a stock and have a severe adverse impact on the commercial and recreational fishing industries dependent on that species, as well as on the supporting industries for those fisheries. Any positive effect of adopting proper management measures may not be apparent for several years, not until the stocks recover from depletion and become sustainable.

7. Small business and local government participation:

Striped bass commercial fishers have participated in Marine Resources Advisory Council (MRAC) meetings. This regulatory amendment has received the approval of MRAC and they are awaiting enactment of these provisions. Further, other provisions of the rule making will be presented to MRAC by DEC at the next meeting. Members of the local fishing communities will have the opportunity to discuss the ramifications of the rule making at that meeting.

There was no special effort to contact local governments because the proposed rule does not affect them.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The commercial striped bass, American lobster, Atlantic cod, haddock, coastal shark and weakfish fisheries that are directly affected by the proposed rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the State. Further, the proposed rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments of 6 NYCRR Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

1. Nature of impact:

The Department of Environmental Conservation (DEC) has proposed a

rule that will modify the striped bass commercial permit income qualifications to be more consistent with the income qualifications stated in the Environmental Conservation Law (ECL) for the commercial food fish license. Some commercial striped bass full share permit holders may no longer qualify as full share permit holders under the proposed rule and may be reclassified as partial share permit holders. The income derived from fishing for striped bass of those reclassified as partial share permit holders will likely be reduced. It is also likely that some partial share permit holders may qualify as full share permit holders once the proposed rule is adopted. Their income derived from striped bass fishing may increase.

DEC is also proposing to implement a rule that will allow recreational anglers to fish for and land Atlantic cod in New York in accordance with Federal rules for the Georges Bank cod fishery. The rule making will also propose to reduce the recreational minimum size limit for haddock from 19 inches to 18 inches. This rule applies to only recreational anglers.

DEC is proposing to amend Part 44 and increase the size of lobster trap escape vents on all lobster traps used in New York State waters within Lobster Conservation Management Area 6 (Long Island Sound) to harvest lobsters. This increase in vent size will allow sublegal lobsters to exit lobster traps and avoid predation by larger lobsters in the trap. This proposal is unlikely to impact jobs because New York State lobster harvesters are already subject to the increased minimum size for LCMA 6 (since January 1, 2010). This rule will merely require modification of gear already in use by the lobster harvesters.

DEC is also proposing to adopt regulations to protect coastal sharks that are consistent with provisions of the Atlantic States Marine Fisheries Commission (ASMFC) Fishery Management Plan (FMP) for coastal sharks and with Federal regulations. The proposed rule will be consistent with existing or proposed Federal rules. Jobs and incomes are not as likely to be impacted by this rule because most of the regulation is already in effect as a Federal rule and is referenced to in New York State regulations.

Lastly, DEC is proposing to adopt fishery management measures that would reduce fishing pressure on the depleted weakfish stock. The rule will significantly reduce the amount of weakfish commercial fishers will be able to take and land and may reduce income derived from fishing for weakfish.

2. Categories and numbers affected:

DEC has proposed a rule that will modify the striped bass commercial permit income qualifications to be consistent with the income qualifications stated in the ECL for the commercial food fish license. In 2009, there were 473 commercial striped bass permit holders in New York State. Of these, 372 permit holders were in the full share category and each had received 241 tags. The remaining 101 permit holders were in the part share category and each received 39 tags. It is unknown at this time how many permit holders would be reclassified as full share or part share permit holders once this amendment is adopted.

The proposed rule will allow recreational anglers to fish for and land Atlantic cod in New York in accordance with Federal rules for the Georges Bank cod fishery. This will result in placing a 10-fish limit on the possession of cod, whereas there currently is no limit. The number of recreational anglers in New York who could be affected by this rule making is unknown by DEC at this time, but the National Marine Fisheries Service has estimated that there were just over 1 million recreational anglers in New York in 2007.

The proposed rule will increase the size of lobster trap escape vents to correspond to the increased lobster minimum size limit which became effective January 1, 2010. In 2009, there were 329 New York State licensed commercial lobster harvesters who harvested lobsters in Lobster Conservation Management Area 6 (Long Island Sound).

DEC proposes to adopt regulations that implement management measures for coastal sharks and weakfish that will impact both commercial fishers and recreational anglers. In 2009, there were 1,049 State-licensed food fish harvesters in New York. The number of recreational anglers in New York who could be affected by this rule making is unknown by DEC at this time.

This Job Impact Statement does not include recreational anglers in this analysis, since fishing is recreational for them and not related to employment.

3. Regions of adverse impact:

The regions most likely to receive any adverse impact are within the marine and coastal district of the State of New York. This area included all the waters of the Atlantic Ocean within three nautical miles from the coast line and all other tidal waters within the State, including Long Island Sound and the Hudson River up to the Tappan Zee Bridge. The Hudson River is not a usual habitat of Atlantic cod, American lobster, coastal sharks or adult weakfish. The commercial striped bass fishery is limited to portions of the marine and coastal district.

4. Minimizing adverse impact:

Prior to the commercial striped bass permit re-qualifying date, all

striped bass commercial permit holders will be sent a letter from DEC explaining the requalification process and the forms and records necessary for them to be placed in the full share category. Those who fail to submit records or who cannot meet the income qualifications will be placed in the part share category. Thereafter, permit holders in the part share category may apply for full share status if they meet the full share income requirements in future years. Licensed lobster harvesters may reduce the costs of the required gear modification impacts by modifying the vent size themselves rather than having it done by the trap manufacturer.

The failure to promulgate the proposed rules will result in New York not complying with the management measures adopted by MAFMP and ASMFC. New York may be found non-compliant with the FMPs for American lobster, coastal sharks or weakfish and subject to sanctions; ASMFC may request the Secretary of Commerce to implement a moratorium for fishing for any of the affected species in the State of New York. Protection of the State's marine resource is essential to the long-term benefit of commercial fishers and recreational anglers. Any short-term losses in harvest and angler participation will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to protect the coastal shark and weakfish stocks from overfishing, allow the stock to rebuild and achieve long-term sustainability of the fisheries for future use. Failure to comply with FMPs and take required actions to protect the State's marine resources could cause the catastrophic collapse of a stock and have a severe adverse impact on the commercial and recreational fishing industries dependent on that species, as well as on the supporting industries for those fisheries. Any positive effect of adopting proper management measures may not be apparent for several years, not until the stocks recover from depletion and becomes sustainable.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Palliative Care Certified Medical Schools and Residency Programs

I.D. No. HLT-15-10-00012-P

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

Proposed Action: Addition of Part 48 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-n

Subject: Palliative Care Certified Medical Schools and Residency Programs.

Purpose: Defines palliative care certified medical schools & residency programs to award grants according to PHL, section 2807-n.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by Section 2807-n of the Public Health Law, a new Part 48 is hereby added to Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

PART 48

Palliative Care Certified Medical Schools and Residency Programs

48.10 Definitions

(a) *Palliative care shall mean the active, interdisciplinary care of patients with serious, life-threatening, advanced, or life limiting illness, focusing on relief of distressing physical and psychosocial symptoms and meeting spiritual needs. Its goal is achievement of the best quality of life for patients and families.*

(b) *Palliative care certified medical school shall be a Liaison Committee on Medical Education (LCME) or American Osteopathic Association (AOA) accredited medical school in New York State which is an institution granting a degree of doctor of medicine or of osteopathic medicine in accordance with regulations by the Commissioner of Education under subdivision two of section sixty-five hundred twenty-four of the education law, and which meets the following criteria:*

(1) *one or more faculty does clinical work or teaching relevant to palliative care; and/or*

(2) *contains an element of the preclinical or clinical curriculum relevant to palliative care; and*

(3) *is certified by the Commissioner or his or her designee in conformance with Subdivision (a) of Section 48.20 of this Part.*

Relevant work, teaching, or curriculum may include, but is not limited to, didactic coursework or training related to one of the following eight domains of quality palliative care relating to populations with serious or life-threatening illnesses: (1) structure and process of care, (2) physical aspects of care, (3) psychological and psychiatric aspects of care, (4) social aspects of care, (5) spiritual, religious, and existential aspects of care, (6) cultural aspects of care, (7) care of the imminently dying patient, and (8) ethical and legal aspects of care.

(c) Palliative care certified residency program shall be a graduate medical education program in New York State accredited and in good standing by the Accreditation Council for Graduate Medical Education (ACGME) or the American Osteopathic Association (AOA), and which meets the following criteria:

(1) is sponsored by one of the following specialties that have incorporated Hospice and Palliative Medicine (HPM) as a subspecialty:

- (i) anesthesiology;
- (ii) emergency medicine;
- (iii) family medicine;
- (iv) internal medicine;
- (v) pediatrics;
- (vi) physical medicine and rehabilitation;
- (vii) psychiatry and neurology;
- (viii) radiology;
- (ix) surgery; or
- (x) obstetrics and gynecology; and

(2) contains an element of the teaching curriculum is identified as relevant to palliative care; and

(3) is certified by the Commissioner or his or her designee in conformance with Subdivision (b) of Section 48.20 of this Part.

Relevant work, teaching, or curriculum may include, but is not limited to, didactic coursework or training related to one of the following eight domains of quality palliative care, relating to populations with serious or life-threatening illnesses: (1) structure and process of care, (2) physical aspects of care, (3) psychological and psychiatric aspects of care, (4) social aspects of care, (5) spiritual, religious, and existential aspects of care, (6) cultural aspects of care, (7) care of the imminently dying patient, and (8) ethical and legal aspects of care.

48.20 Certification

(a) Any medical school which has submitted an application with documentation acceptable to the department and which has been determined by the Commissioner or his or her designee to have met the definition of a palliative care certified medical school as set forth in subdivision (b) of Section 48.10 of this Part shall be certified until such time as the medical school receives written notice of termination from the Commissioner of Health, who, in his/she sole discretion, may terminate when continuation of such certification no longer benefits public health or satisfies the definitional requirements. Medical schools are eligible during the period of certification to apply for grants for undergraduate medical education in palliative care within amounts appropriated for such purpose to enhance the study of palliative care, increase the opportunities for undergraduate medical education in palliative care and encourage the education of physicians in palliative care.

(b) Any residency program which has submitted an application with documentation acceptable to the department and which has been determined by the Commissioner or his or her designee to have met the definition of a palliative care certified residency program as set forth in subdivision (c) of Section 48.10 shall be certified until such time as the residency program receives written notice of termination from the Commissioner of Health, who, in his/she sole discretion, may terminate when continuation of such certification no longer benefits public health or satisfies the definitional requirements. Residency programs are eligible during the period of certification to apply for grants for graduate medical education in palliative care, within amounts appropriated for such purpose.

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 the promulgation of these regulations is contained in section 2807-n of the Public Health Law (PHL). Hospice and Palliative Medicine (HPM) has recently become a recognized subspecialty reflecting the increased importance of palliative care and the desire to incorporate it into existing medical training. The purpose for certifying palliative care medical schools and residency programs is to award grants as set forth in PHL section 2807-n to appropriate schools and programs that will best uti-

lize such funds to increase and enhance palliative care professional education, and training.

Legislative Objectives:

Despite the formal recognition of HPM within mainstream medicine, the challenge continues to be the lack of professional education and knowledge on end of life care. There is a continued need for faculty leaders in the field of palliative medicine to direct education and research programs in medical schools and residency training programs. The legislative objective is to ensure that physicians are educated about palliative care so that the residents of the State will receive such services of the highest quality when the need arises.

Needs and Benefits:

There has been a growing call to advance the integration of palliative care into the American healthcare system in order to meet the healthcare needs of the chronically ill and aging population and their families. The World Health Organization (WHO) defines palliative care as an approach which improves quality of life of patients and their families facing life-threatening illness, through the prevention and relief of suffering by means of early identification and impeccable assessment and treatment of pain and other problems, physical, psychosocial, and spiritual.

Hospice and Palliative Medicine (HPM) has recently become a subspecialty recognized by both the American Board of Medical Specialties (ABMS) and the Accreditation Council for Graduate Medical Education (ACGME), reflecting the increased importance of palliative care and the desire to incorporate it into existing medical training infrastructure. Despite the formal recognition within mainstream medicine, two of the field's most challenging issues continue to be the lack of professional education and knowledge on end-of-life care and the need to develop and expand hospice and palliative care services into hospitals and nursing homes, where the majority of Americans die. Faculty leaders in the field of palliative medicine are needed to direct education and research programs in medical schools and residency training programs. State support for training and education programs is critical to addressing this need. The National Consensus Projects have established domain of quality palliative care relating to populations with serious or life-threatening illness which will be helpful in targeting training and education.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

None. This regulation merely defines a "palliative care certified medical school" and a "palliative care residency program," as the initial step for a medical school or residency program, to be eligible for grants set forth in PHL section 2807-n. It will require submission of paperwork periodically to the Department, which can be easily done by current medical school or residency program administrative staff.

Cost to State and Local Government:

None.

Cost to the Department of Health:

None. Determinations under the regulation will be made by existing Department staff.

Local Government Mandates:

None.

Paperwork:

Any medical school or residency program that would like to be palliative care certified will have to apply via the grant application process to the Department. The Department will receive grant applications and requests for certification from such schools and residency programs and will make the ultimate determination of what schools and residency programs are certified.

Duplication:

This regulation does not duplicate any other state or federal law or regulation.

Alternative Approaches:

This regulation will determine which medical schools and residency programs are certified for palliative care. Only such medical schools and residency programs may apply for funding through the Palliative Care Education and Training program. There are no other alternatives given statutory language.

Federal Requirements:

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

Compliance Schedule:

This proposal will go into effect upon a Notice of Adoption in the New York State Register.

Regulatory Flexibility Analysis

No Regulatory Flexibility Analysis for Small Businesses and Local Governments is required, pursuant to section 202-b of the State Administrative Procedure Act (SAPA). The proposed regulation only applies to medical schools and residency programs, none of which meet the definition of a small business or are operated by local governments.

Rural Area Flexibility Analysis

No rural area flexibility analysis is required pursuant to section 202-bb(4)(a) of the State Administrative Procedure Act (SAPA). The proposed regulation does not impose an adverse impact on facilities in rural areas, and they do not impose reporting, record keeping or other compliance requirements on facilities in rural areas.

Job Impact Statement

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

Insurance Department

EMERGENCY RULE MAKING

Financial Statement Filings and Accounting Practices and Procedures

I.D. No. INS-15-10-00001-E

Filing No. 318

Filing Date: 2010-03-25

Effective Date: 2010-03-25

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

Action taken: Addition of Part 83 (Regulation No. 172) to Title 11 NYCRR.

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

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

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

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

Chapter 311 of the Laws of 2008, effective July 21, 2008, amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers. Insurance Law Section 1302 provides a listing of non-admitted assets. Chapter 311 removed "goodwill" from non-admitted assets listed in the statute. Insurance Law Section 1301 provides a listing of admitted assets. Chapter 311 established a new Insurance Law

Section 1301(a)(14) that allows an insurer to take positive goodwill up to 10% of the insurer's capital and surplus (adjusted for certain items) as an admitted asset. Chapter 311 also modified certain limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. Chapter 311 made the changes regarding the treatment of goodwill and EDP equipment subject to such limitations and conditions as may be established in regulations promulgated by the superintendent.

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

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

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

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

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

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

New York authorized insurers would have been at a competitive disadvantage if SSAP #10R was not adopted by year-end 2009. Failure to implement the changes in New York at the same time they were implemented in other states would have made New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to report a higher admitted asset value, the lower RBC ratios generated by the lower admitted asset value will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon accounting principles in effect on the date of filing. The filing date for the December 31, 2009 annual statement is March 1, 2010. The insurers must be given advance notice of the applicable principles in order to file their reports in an accurate and timely

manner. This regulation was previously promulgated on an emergency basis on December 28, 2009.

The current proposal was sent to the Governor's Office of Regulatory Reform on January 7, 2010 and the Department is awaiting approval to publish the regulation, however because SSAP #10R will be effective for the annual statement for the year ending December 31, 2009, it is essential that this regulation be continued on an emergency basis.

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

Subject: Financial statement filings and accounting practices and procedures.

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

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

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

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

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

Subdivision (c) is repealed and a new subdivision (c) is added to require insurers other than accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans to depreciate electronic data processing equipment and operating system software over three years.

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

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

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

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

Subdivision (k) is relettered (i).

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

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

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

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

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

Subdivision (o) is relettered (l).

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

Subdivision (q) is relettered (m).

Subdivision (r) is relettered (n).

Subdivision (s) is relettered (o).

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

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

Subdivision (v) is relettered (q).

Subdivision (w) is relettered (r).

Subdivision (x) is relettered (s).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire June 22, 2010.

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

Regulatory Impact Statement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Insurance Law Sections 4321-a, 4322-a, and 4327 establish state-funded stop loss pools to subsidize claim payments made by HMOs pursuant to policies issued in the individual market and the Healthy NY market.

Insurance Law Section 6404 sets forth provisions concerning the

investments that may be used by title insurance corporations. It also sets forth provisions concerning the valuation of various assets of title insurers.

Insurance Law Sections 1109(e) and 4301(e)(5), respectively, provide that the superintendent may promulgate regulations to effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law pertaining to health maintenance organizations. Public Health Law Article 44 authorizes the superintendent to establish standards governing the fiscal solvency of integrated delivery systems, and requires the filing of financial reports by prepaid health service plans and comprehensive HIV special needs plans.

Pursuant to the above provisions, the superintendent is authorized to implement the Accounting Manual, subject to any provisions in New York law that conflict with particular points in the Accounting Manual. The Accounting Manual includes a body of accounting guidelines referred to as Statements of Statutory Accounting Principles ("SSAPs"). The Accounting Manual represents a codification of Statutory Accounting Principles.

Chapter 599 of the Laws of 2002 amended the Insurance Law relating to the treatment of deferred tax assets in the filing of quarterly and annual financial statements by certain insurers.

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

Chapter 311 also modified the limitations on the ability of insurers to take credit for electronic data processing (EDP) equipment as an admitted asset.

2. Legislative objectives: Certain provisions of the Insurance Law provide that authorized insurers, accredited reinsurers, authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations and integrated delivery systems shall file financial statements annually and quarterly with the superintendent. These entities are subject to the provisions of Sections 307 and 308 of the Insurance Law, which require the filing of what are known as Annual and Quarterly Statement Blanks on forms prescribed by the superintendent. Except with regard to filings made by Underwriters at Lloyd's, London, the superintendent has prescribed forms and Annual and Quarterly Statement Instructions that have been adopted from time to time by the NAIC, as supplemented by additional New York forms and instructions. To assist in the completion of the financial statements, the NAIC also adopts and publishes from time to time certain policy, procedure and instruction manuals. One of these manuals, the Accounting Manual, sets forth Statements of Statutory Accounting Principles. The Accounting Manual is incorporated by reference into this regulation.

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

3. Needs and benefits: Section 83.3 of the regulation provides that the financial statements of all authorized insurers, accredited reinsurers (except Underwriters at Lloyd's, London), authorized fraternal benefit societies, and Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV special needs plans (collectively, to as "regulated insurers") shall be completed in accordance with statutory accounting practices and procedures as prescribed by applicable provisions of the Insurance Law and regulations.

The purpose of this Part is to enhance the consistency of the accounting treatment of assets, liabilities, reserves, income and expenses by regulated insurers, by clearly setting forth the accounting practices and procedures to be followed in completing annual and quarterly financial statements that must be filed with the Department.

The NAIC has most recently adopted a new Accounting Manual as of March 2009. The Accounting Manual represents a codification of statutory accounting principles, presented in the form of the SSAPs. The purpose of the codification of statutory accounting principles is to produce a comprehensive guide for regulators, insurers and auditors. Codification provides examiners and analysts with uniform accounting rules against which insurers' financial statements can be evaluated.

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

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

Chapter 311 also modified the limitations on the ability of regulated insurers to take credit for electronic data processing (EDP) equipment as an admitted asset. The proposed rule allows health insurers to amortize EDP equipment over a ten-year period, rather than the three-year period required of other regulated insurers, because many health companies are relatively small, certified to operate only in New York State, or in a limited number of counties in New York. The Department is concerned that such companies might find a three-year requirement to be financially burdensome.

On December 8, 2009, the NAIC adopted a new accounting guidance relating to Deferred Tax Assets (SSAP #10R) which will be effective for the annual statement for the year ending December 31, 2009. The accounting guidance will be included in the Accounting Manual.

The proposed rule adopts SSAP #10R. SSAP #10R extends the period over which deferred tax assets ("DTAs") are projected to be realized from one year to three years and increases the limit of DTAs as a percentage of statutory capital and surplus from 10%, as provided in Insurance Law Section 1301(a)(16), to 15%.⁴ Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs \$465 for a hard copy, or \$395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states' requirements as much as New York's.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies' net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers' overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC's Accounting Practices and Procedures Manual and adopted in other states.

There is no cost to the Insurance Department for the Accounting Manual, since the Department may obtain it free of charge from the NAIC.

5. Paperwork: To the extent that this rule makes changes in accounting principles, regulated insurers will need to familiarize themselves with this regulation. To the extent that the rule conforms New York's requirements to those of other states, the need for separate New York filings will be reduced. Once insurers are familiar with the changes, there should be no increase in required paperwork or a net decrease because of the reduced necessity for separate New York filings in other states.

6. Local government mandate: This rule does not impose any obligations on local governments.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Viable alternatives: Chapter 311 amended the Insurance Law relating to the treatment of certain assets in the filing of quarterly and annual financial statements by certain regulated insurers, subject to such limitations and conditions as may be established in regulations promulgated by the superintendent. Under the proposed rule, accident and health insurance companies, Article 43 corporations, Public Health Law Article 44 health maintenance organizations, integrated delivery systems, prepaid health services plans and comprehensive HIV Special Needs Plans (collectively, "health insurers") will not be permitted to take credit for goodwill as an admitted asset in financial statements, because goodwill is not a tangible asset available for paying claims on an ongoing basis.

The superintendent determined that, as compared to other regulated insurers, health insurers must pay claims on a constant and ongoing basis, which requires a higher degree of asset liquidity for the payment of claims. In addition, because there is no guarantee fund for health insurers, liquidity of assets for health insurers is more important than for other regulated insurers.

The Department also contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department's request and none of the four raised any objections.

9. Federal standards: There are no minimum standards of the federal government in the same or similar areas.

10. Compliance schedule: Regulated insurers already should be aware of the need to comply with the provisions of the Accounting Manual, since the NAIC issued the most recent version of the accounting Manual in March, 2009. In addition, the NAIC publishes changes to accounting guidance during the interim period before issuance of the new Accounting Manual. Regulated insurers use the Accounting Manuals in preparing their Quarterly Statements and the Annual Statements.

Regulatory Flexibility Analysis

The Insurance Department finds that this rule will have no adverse economic impact on local governments, and will not impose reporting, recordkeeping or other compliance requirements on local governments. The basis of this finding is that this rule is directed at regulated insurers, as defined under section 83.3 of this regulation, none of which are local governments.

The Insurance Department is not aware of any adverse impact that this rule will have on small businesses or of any reporting, recordkeeping or other compliance requirements that it will impose on small businesses. This rule is directed at regulated insurers, most of which do not come within the definition of "small business" found in Section 102(8) of the State Administrative Procedure Act, because none is independently owned and operated, and employs less than one hundred individuals.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: This rule applies to regulated insurers doing business or resident in every county in the state, including those that are, or contain, rural areas, as defined under Section 102(13) of the State Administrative Procedure Act. Some of the home offices of these insurers are located within rural areas.

2. Reporting, recordkeeping and other compliance requirements, and professional services: This amendment does not impose new

reporting or recordkeeping requirements. To the extent that the rule conforms New York filings to other states' requirements, the need for separate New York filings will be reduced. To the extent that the rule renders changes in accounting principles, insurers will need to familiarize themselves with the principles themselves.

3. Costs: Direct cost to regulated entities as a result of implementing Part 83 is the acquisition of the Accounting Manual from the NAIC. The Accounting Manual costs \$465 for a hard copy, or \$395 for a CD-ROM, plus shipping charges. Each insurer will need to determine how many copies (either print or CD-ROM) it needs to obtain to fulfill its statutory accounting functions. In any event, the Department believes that most regulated insurers will purchase the Accounting Manual to comply with other states' requirements as much as New York's.

The changes to Regulation 172, most of which amend the regulation to conform with changes that have already been made to the Insurance Law, will result in changes to insurance companies' net worth. The changes will have different effects on various insurance companies. The changes are not intended to increase or decrease insurers' overall net worth; rather, the changes are intended to bring New York statutory accounting rules into closer conformance with the rules set forth in the NAIC's Accounting Practices and Procedures Manual and adopted in other states.

The Accounting Manual specifies substantive changes to eight of the ninety-six "Statements of Statutory Accounting Principles" contained therein. Affected parties will have the opportunity to assess the changes and provide comments to the Department.

4. Minimizing adverse impact: This rule applies to regulated insurers that do business in New York State. It does not impose any unique adverse impact on rural areas. The impact(s) are discussed in items 2 and 3 above.

5. Rural area participation: The Department contacted four law firms who have health insurer clients. All four acknowledged receipt of the Department's request and none of the four raised any objections. All affected parties, including those doing business in rural areas of the State, will have the opportunity to comment upon and discuss the rule after the proposal is published in the State Register.

Job Impact Statement

The Insurance Department has no reason to believe that this rule will have any impact on jobs and employment opportunities. The rule codifies numerous accounting practices and procedures that had not previously been organized in such a unified and coherent manner.

The Department has no reason to believe that this rule will have any adverse impact on jobs or employment opportunities, including self-employment opportunities.

EMERGENCY RULE MAKING

Workers' Compensation Insurance Assessments

I.D. No. INS-15-10-00002-E

Filing No. 319

Filing Date: 2010-03-25

Effective Date: 2010-03-25

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

Action taken: Addition of Subpart 151-6 (Regulation No. 119) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301 and 3451

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

Specific reasons underlying the finding of necessity: Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the Workers' Compensation Board ("WCB") to assess insurers and the State Insurance Fund, for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the Workers' WCB, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the State Insurance Fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount

is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

Prior to January 1, 2010, the Workers' Compensation Law required the Workers' Compensation Board to assess insurers on the total "direct premiums" they wrote in the preceding calendar year, whereas the insurers were collecting the assessments from their insureds on the basis of "standard premium," which took into account high deductible policies. As high deductible policies increased in the marketplace, a discrepancy developed between the assessment an insurer collected, and the assessment the insured was required to remit to the Workers' Compensation Board.

Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4) and 151(2)(b) to change the basis upon which the WCB collects the portion of the allocation from each insurer from "direct premiums" to "standard premium" in order to ensure that insurers are not overcharged or under-charged for the assessment, and to ensure that insureds with high deductible policies are charged the appropriate assessment. Effective January 1, 2010, therefore, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the Superintendent of Insurance to define "standard premium," for the purposes of setting the assessments, and to set rules, in consultation with the WCB, and New York Compensation Rating Board, for collecting the assessment from insureds.

This regulation was previously promulgated on an emergency basis on December 29, 2009. The proposal was sent to the Governor's Office of Regulatory Reform on January 14, 2010 and the Department is awaiting approval to publish the regulation, however because the effective date of the relevant provision of the law is January 1, 2010, and the need that the assessments be calculated and collected in a timely manner, it is essential that this regulation, which establishes procedures that implement provisions of the law, be continued on an emergency basis.

For the reasons cited above, this regulation is being promulgated on an emergency basis for the benefit of the general welfare.

Subject: Workers' Compensation Insurance Assessments.

Purpose: This regulation is necessary to standardize the basis upon which the the workers' compensation assessments are calculated.

Text of emergency rule: A new sub-part 151-6 entitled Workers' Compensation Insurance Assessments is added to read as follows:

Section 151-6.0 Preamble.

(a) Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) require the workers' compensation board to assess insurers, and the state insurance fund for the special disability fund, the fund for reopened cases, and the operations of the workers' compensation board, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the state insurance fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

(b) Prior to January 1, 2010, each insurer paid a percentage of the allocation based on the total direct written premiums it wrote in the preceding calendar year. However, Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4), and 151(2)(b) to change the basis upon which the board collects the portion of the allocation from each insurer. Thus, effective January 1, 2010, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the superintendent of insurance to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the workers' compensation board, and New York workers compensation rating board for collecting the assessment from insureds.

Section 151-6.1 Definitions

As used in this Part:

(a) Board means the New York workers' compensation board.

(b) Insurer means an insurer authorized to write workers' compensation insurance in this state, except for SIF.

(c) NYCIRB means the New York workers compensation rating board, which is also known as the New York workers compensation insurance rating board.

(d) SIF means the state insurance fund.

(e) Standard Premium means:

(1) For a non-retrospectively rated policy:

(i) the premium determined on the basis of the insurer's approved rates; as modified by:

(a) any experience modification or merit rating factor;

(b) any applicable territory differential premium;

(c) the minimum premium;

(d) any construction classification premium adjustment program credits;

(e) any credit from return to work or drug and alcohol prevention programs;

(f) any surcharge or credit from a workplace safety program;

(g) any credit from an independently-filed insurer specialty program (for example, alternative dispute resolution, drug-free workplace, managed care or preferred provider organization programs);

(h) any charge for the waiver of subrogation;

(i) any charge for foreign voluntary coverage; and

(j) the additional charge for terrorism, and the charge for natural disasters and catastrophic industrial accidents; and

(ii) For purposes of determining standard premium, the insurer's expense constant, including the expense constant in the minimum premium, the insurer's premium discount, and premium credits for participation in any deductible program shall be excluded from the premium base; or

(2) For a retrospectively rated policy, the retrospective premium plus the implied premium discount.

Section 151-6.2 Collection of assessments

Every insurer and SIF shall collect the assessments required by Workers' Compensation Law sections 15(8)(h)(4), 25-A(3), and 151(2)(b) from its policyholders through a surcharge based on standard premium in an amount determined by the superintendent, in consultation with NYCIRB and the Board.

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 June 22, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent of Insurance's authority for the promulgation of Part 151-6 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Fifth Amendment to Regulation No. 119) derives from Sections 201 and 301 of the Insurance Law, and Sections 15, 25-A, and 151 of the Workers' Compensation Law.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Sections 15, 25-A, and 151 of the Workers' Compensation Law, as amended by Part QQ of Chapter 56 of the Laws of 2009 require the Superintendent to define the "standard premium" upon which assessments are made for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the Workers' Compensation Board ("WCB"). Section 15 of the Workers' Compensation Law further requires workers' compensation insurers to collect the assessments from their policyholders through a surcharge based on premiums in accordance with the rules set forth by the Superintendent, in consultation with the New York Workers' Compensation Insurance Rating Board ("NYCIRB"), and the chair of the WCB.

2. Legislative objectives: (a) Workers' Compensation Law sections

15(8)(h)(4), 25-A(3), and 151(2)(b) require the WCB to assess insurers writing workers' compensation insurance and the State Insurance Fund, for the Special Disability Fund, the Fund for Reopened Cases, and the operations of the WCB, respectively. The assessments are allocated to insurers, self-insurers, group self-insurers, and the State Insurance Fund based upon the total compensation payments made by all such entities. In the case of an insurer, once the assessment amount is determined, the insurer pays the percentage of the allocation based on the total premiums it wrote during the preceding calendar year.

Prior to January 1, 2010, the Workers' Compensation Law required the WCB to assess insurers on the total "direct premiums" they wrote in the preceding calendar year, whereas the insurers were collecting the assessments from their insureds on the basis of "standard premium," which took into account high deductible policies. As high deductible policies increased in the marketplace, a discrepancy developed between the assessment an insurer collected, and the assessment the insured was required to remit to the WCB.

Therefore, Part QQ of Chapter 56 of the Laws of 2009 ("Part QQ") amended Workers' Compensation Law sections 15(8)(h)(4) and 151(2)(b) to change the basis upon which the board collects the portion of the allocation from each insurer from "direct premiums" to "standard premium" in order to ensure that insurers are not over-charged or under-charged for the assessment, and to ensure that insureds with high deductible policies are charged the appropriate assessment. Thus, effective January 1, 2010, each insurer pays a percentage of the allocation based on the total standard premium it wrote during the preceding calendar year. Part QQ requires the Superintendent to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the WCB, and NYCIRB for collecting the assessment from insureds.

3. Needs and benefits: This amendment is necessary, and mandated by the Workers' Compensation Law, in order to standardize the basis upon which the workers' compensation assessments are calculated to eliminate discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the WCB.

The discrepancy in the assessment calculation and remittance became evident as a result of the proliferation of large deductible policies. In many instances, the "direct premium" paid on a large deductible policy is less what the "standard premium" would be for that policy. Insurers that offered high-deductible policies were collecting for assessments using the "standard premium," but the Workers' Compensation Law was requiring the WCB to use "direct premiums" to bill insurers. Thus, in some instances, workers' compensation insurers were collecting from employers more money than they were remitting to the WCB.

4. Costs: This amendment standardizes the basis upon which the workers' compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the WCB. Although the amendment itself does not impose new costs, the impact of changing the basis for workers' compensation assessments may increase costs for some insurers, but reduce costs for others. Taken together, the amendment aims to level the playing field for insurers that offer large deductible policies and those that do not.

5. Local government mandates: The amendment does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. Paperwork: This amendment requires no new paperwork. Insurers and the State Insurance Fund already collect and remit assessments to the WCB. This regulation only standardizes the basis upon which the assessments are calculated, as required by the Workers' Compensation Law.

7. Duplication: The amendment will not duplicate any existing state or federal rule.

8. Alternatives: No alternatives were considered, because Part QQ requires the Superintendent to define "standard premium," for the purposes of the assessments, and to set rules, in consultation with the WCB and NYCIRB, for collecting the assessment from insureds. Based on discussions with NYCIRB and the WCB, the Superintendent determined that the term "standard premium" should conform to

the definition currently used by insurers, and should ensure that the definition accounts for high deductible policies.

NYCIRB has been collecting premium data on a “standard” basis since its inception nearly 100 years ago. The “standard premium” is the premium without regard to credits, deviations, or deductibles. As new credits and types of policies (such as large deductible policies) develop, NYCIRB adjusts the definition to account for the changes. The Insurance Department is merely adopting NYCIRB’s current definition.

9. Federal standards: There are no applicable federal standards.

10. Compliance schedule: The effective date of the relevant provision of the law is January 1, 2010. The assessments must be calculated and collected as of January 1, 2010.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department 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.

This amendment applies to all workers’ compensation insurers authorized to do business in New York State, as well as to the State Insurance Fund (SIF). It standardizes the basis upon which the workers’ compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers’ Compensation Board.

The basis for this finding is that this rule is directed at workers’ compensation insurers 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 Insurance Department has monitored Annual Statements and Reports on Examination of authorized workers’ compensation insurers subject to this rule, and believes that none of the insurers falls within the definition of “small business”, because there are none that are both independently owned and have fewer than one hundred employees. Nor does SIF come within the definition of “small business” found in section 102(8) of the State Administrative Procedure Act, because SIF is neither independently owned nor operated, nor does it employ one hundred or less individuals.

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. This amendment does not affect self-insured local governments, because it applies only to insurers.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This amendment applies to all workers’ compensation insurers authorized to do business in New York State, as well as to the State Insurance Fund (the “SIF”). These entities do business throughout New York State, including rural areas as defined under section 102(10) of the State Administrative Procedure Act (“SAPA”).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Insurers and SIF already collect and remit assessments to the Workers’ Compensation Board (“WCB”). This amendment simply standardizes the basis upon which the assessments are calculated.

3. Costs: This amendment standardizes the basis upon which the workers’ compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the WCB. Although the amendment itself does not impose new costs, the impact of changing the basis for workers’ compensation assessments may increase costs for some insurers, but reduce costs for others. Taken together, the amendment aims to level the playing field for insurers that offer large deductible policies and those that do not.

4. Minimizing adverse impact: The amendment does not impose any impact unique to rural areas.

5. Rural area participation: This amendment is required by statute. The entities covered by this amendment - workers’ compensation insurers authorized to do business in New York State and the State Insurance Fund - do business in every county in this state, including rural areas as defined under section 102(10) of SAPA. This amendment standardizes the basis upon which the workers’ compensation assessments are calculated.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. The rule merely standardizes the basis upon which workers’ compensation assessments are calculated in order to ensure that there is no discrepancy between the amount that an insurer collects from employers, and the amount that an insurer remits to the Workers’ Compensation Board. The insurer’s existing personnel should be able to perform this task. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This rule should not have a measurable impact on self-employment opportunities.

EMERGENCY RULE MAKING

Valuation of Life Insurance Reserves

I.D. No. INS-15-10-00003-E

Filing No. 322

Filing Date: 2010-03-26

Effective Date: 2010-03-26

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

Action taken: Amendment of Part 98 (Regulation No. 147) of Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: This amendment to Regulation No. 147 removes restrictions on the mortality adjustment factors (known as X factors) in the deficiency reserve calculation. The current restrictions on the X factors prevent some insurers from using mortality rates with a slope similar to their expected mortality. The purpose of the X factor in the deficiency reserve calculation is to allow insurers to adjust the valuation mortality assumptions so that the mortality rates better reflect experience mortality rates; removal of current restrictions will allow this to occur. In many cases, this will reduce the amount of deficiency reserves held by an insurer. However, in order to safeguard against inappropriate reserve levels, every insurer using an X factor that is less than 100 percent at any duration for any policy is required by Section 98.4(b)(5) of the Regulation to submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report that complies with the requirements of the Actuarial Standards of Practice.

This amendment also provides clarification in the calculation of the segment length, and addresses whether recalculation is required when valuation mortality changes. Specifically, for companies that are using the 2001 CSO Preferred Structure Mortality Table, there may be instances where the valuation mortality must be changed to meet the requirements of 11 NYCRR 100 (Regulation 179) with respect to the present value of death benefits over certain future periods. In such instances, the segment length would not need to be recalculated for policies issued prior to January 1, 2009.

These standards have already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted these changes for year-end 2009. Since New York has a separate regulation addressing this subject matter, the revised standards are not automatically adopted and need to be adopted via an amendment to Regulation No. 147. Insurers domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes. Adopting these standards will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

Adoption of the proposed amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if these amendments are not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the December 31, 2009 annual statement is March 1, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009. The proposal was sent to the Governor's Office of Regulatory Reform on January 12, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For all of the reasons stated above, an emergency adoption of this third amendment to Regulation No. 147 is necessary for the general welfare.

Subject: Valuation of Life Insurance Reserves.

Purpose: Incorporates revisions to National Association of Insurance Commissioners model regulation and actuarial guideline.

Text of emergency rule: Subparagraphs (ii) and (iii) of Section 98.4(b)(5) of this Part are repealed and subparagraphs (iv) through (ix) are renumbered (ii) through (vii).

Section 98.4(b)(5)(v) of this Part, as re-lettered by this amendment above, is amended to read as follows:

(v) The appointed actuary may decrease X at any valuation date as long as X [does not decrease in any successive policy years and as long as it] continues to meet all the requirements of this paragraph;

New subdivisions (c) and (d) are added to section 98.5 to read as follows:

(c) *For policies subject to a non-elective change in valuation mortality rates because the requirements for continued use of the prior rates were no longer satisfied, the insurer may, but shall not be required to, recalculate the segments.*

(d) *For policies subject to an insurer-election to substitute the 2001 Preferred Class Structure Mortality Table for the 2001 CSO Mortality Table:*

(1) *If the policy was issued on a policy form filed for approval prior to January 1, 2009, the insurer may, but shall not be required to, recalculate the segments; and*

(2) *If the policy was issued on a policy form filed for approval after January 1, 2009, the insurer shall recalculate the segments using the new valuation mortality rates.*

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 June 23, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the Third Amendment to Regulation No. 147 (11 NYCRR 98) derives from Sec-

tions 201, 301, 1304, 1308, 4217, 4218, 4240 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.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded the Superintendent by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law requires every insurer authorized under this chapter to transact the kinds of insurance specified in paragraph one, two or three of subsection (a) of section one thousand one hundred thirteen of this chapter to maintain reserves necessary on account of such insurer's policies, certificates and contracts.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities ("reserves") for all outstanding policies and contracts of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves. Reserving has not historically included lapse as a factor in calculations, because it was not relevant to traditional forms of life insurance contracts, and therefore Section 4217 does not expressly include references to lapses. However, new products have been developed that were not contemplated at the time Section 4217 was written, such that lapses may be relevant in reserve calculations in some cases.

Section 4217(c)(6)(C) provides that reserves according to the commissioner's reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of Section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for Section 4217 to such policies and contracts as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on estimates of future experience, or in the case of any plan of life insurance or annuity that is of such a nature that the minimum reserves cannot be determined by the methods described in Section 4217(c)(6) and Section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and must be computed by a method that is consistent with the principles of Sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioner's reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated by the commissioner's reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4240(d)(6) states that the reserve liability for variable contracts shall be established in accordance with actuarial procedures that recognize the variable nature of the benefits provided and any mortality guarantees provided in the contract. Section 4240(d)(7) states that the Superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioner's reserve valuation method for life insurance certificates providing for a varying amount of benefits,

or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives: Maintaining solvency of insurers doing business in New York is a principle 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 policyholders. At the same time, an insurer benefits when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment to section 98.4(b)(5) of Regulation No. 147 (11 NYCRR 98) is necessary to help ensure the solvency of life insurers doing business in New York. The original version of Regulation No. 147, which incorporated the National Association of Insurance Commissioners (NAIC) Valuation of Life Insurance Policies model regulation (adopted in 1999), was permanently adopted in 2003. In 2004, the Department and other states became aware that some insurers were creating new products in order to avoid the reserve methodologies described in Regulation No. 147. As a result, the NAIC began developing an Actuarial Guideline in 2004 that addressed the concerns of the Department and other regulators by eliminating any perceived ambiguity in the standards for policies issued July 1, 2005 and later. This revision was adopted by the NAIC in October 2005, and Regulation No. 147 thereafter was amended on an emergency basis to reflect the principles of Section 4217 of the Insurance Law and the NAIC standards for policies issued July 1, 2005 and later. The amendment was permanently adopted effective January 10, 2007.

In September 2006, the NAIC adopted a new version of Actuarial Guideline 38, which included provisions on lapse decrements and a separate asset adequacy analysis requirement for certain universal life with secondary guarantee policies. Regulation 147 was thereafter amended again, and the amendments were adopted on December 26, 2007.

In September 2009, the NAIC adopted revisions to its model regulation related to X factors used for calculating deficiency reserves. The purpose of the X factor in the deficiency reserve calculation is to allow companies to adjust the valuation mortality to mortality that approximates the expected mortality experience of the company. Specifically, the NAIC's revisions remove the following provisions: (1) X could not be less than 20%; and (2) X could not decrease in successive policy years. Additionally, the NAIC adopted a new Actuarial Guideline 46, which provides guidance on the interpretation of the calculation of segment length when there is a change in the valuation mortality rates subsequent to issuance of the policy. For policies issued prior to January 1, 2009, the segment length would not need to be recalculated.

The current restrictions on the X factors in Regulation No. 147 prevent some companies from obtaining mortality with a slope similar to their expected mortality. The removal of these restrictions will enable companies to adjust the valuation mortality to mortality that approximates the expected mortality experience of the company. However, in order to safeguard insureds against inappropriate reserve levels by insurers, the Department requires every insurer using X factors to submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves.

This amendment to Regulation No. 147 incorporates both the NAIC revisions to the model regulation and the interpretation of the Actuarial Guideline, thus resulting in consistency between the NAIC and New York and promoting regulatory uniformity across the U.S. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the proposed amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure to maintain higher risk based capital ("RBC") ratios needed

to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if these amendments are not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York authorized companies look weaker financially than their peer companies. If New York authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

5. Local government mandates: 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 amendment to the regulation imposes no new reporting requirements.

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

8. Alternatives: The only alternative considered by the Department was to not remove the provisions for the X factors and to not include the guidance included in Actuarial Guideline 46 that were adopted by the NAIC in September 2009. The X factor provisions consisted of removing the requirement that X could not be less than 20% and that X could not decrease in successive policy years. The Actuarial Guideline 46 guidance relates to policies issued prior to January 1, 2009, and does not require the contract segments to be recalculated when the valuation mortality rates change after issuance of the policy.

The Department has had numerous discussions with affected insurer-

ers and their trade associations, including the Life Insurance Council of New York and American Council of Life Insurers, during the course of the development of a national standard through the National Association of Insurance Commissioners. These items are part of a larger capital and surplus relief plan for insurers. Adopting these standards will allow New York insurers to be subject to the same standards that have already been adopted by the NAIC and which are being implemented in other states. Insurers authorized in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies authorized in states that have adopted these changes and in those circumstances, New York authorized companies would be at a deficit, from the impression that there is a significant difference in financial stability of New York authorized insurers and those authorized outside the state.

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

10. Compliance schedule: This amendment to the regulation applies to financial statements filed on or after December 31, 2009. This amendment removes two provisions from the X factors used in calculating deficiency reserves. However, these changes are voluntary, and insurers are not required to make either of these changes. Additionally, these changes would only affect those insurers that use X factors in calculating deficiency reserves. Since the removal of these provisions were already adopted by the NAIC, insurers that wish to incorporate these changes into their reserve methodology should have adequate time to make these changes.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department 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 Insurance 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

1. Types and estimated number of rural areas: Insurers and fraternal benefit societies covered by the amendment do business in every county in this state, including rural areas as defined under SAPA 102(10).

2. Reporting, recordkeeping and other compliance requirements; and professional services: There are no reporting, recordkeeping or other compliance requirements associated with this amendment to the regulation. Entities subject to the regulation will not need to engage professional services to comply with the amendment.

3. Costs: This amendment provides for lower minimum standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefit societies authorized to do business in New York State will be minimal. Since the majority of the reserve requirements and methodologies included in Regulation No. 147 have been in effect since the adoption of the prior two amendments in 2007, most insurers would only need to update their current computer programs to implement the changes in the X factor requirements for those policies that use an X factor in calculating the deficiency reserves. The Department does not expect any material additional costs to be incurred related to modifications for the calculation of the segment length. An insurer that needs to modify its current system could produce the modifications internally, or if the system was purchased from a consultant, have its consultant

produce the modifications. The cost would include the actual modifications, as well as the testing and implementation of the new software. Once the modifications to the system have been developed, no additional costs should be incurred.

Based on an American Council of Life Insurers study, the industry-wide impact of the change in the X factor provisions would be an estimated decrease in reserves of approximately \$2 to \$3 billion. That, in turn, will result in insurers realizing greater capital. It is not expected that there would be any reserve relief related to the calculation of the segment length. However, in order to safeguard against inappropriate reserve levels, every company using X factors must submit an actuarial opinion that states whether the mortality rates resulting from the application of the X factors meet the requirements for deficiency reserves. The opinion must be supported by an actuarial report which complies with the requirements of the Actuarial Standards of Practice.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by the amendment to Regulation No. 147. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: The Department has had numerous discussions with affected insurers and their trade associations, including the Life Insurance Council of New York and American Council of Life Insurers, during the course of the development of a national standard through the National Association of Insurance Commissioners.

Job Impact Statement

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment sets standards for setting life insurance reserves for insurers and fraternal benefit societies. Compliance should not require the employment of additional personnel or outside contractors.

EMERGENCY RULE MAKING

Recognition of the 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities

I.D. No. INS-15-10-00004-E

Filing No. 323

Filing Date: 2010-03-26

Effective Date: 2010-03-26

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

Action taken: Amendment of Part 100 (Regulation No. 179) of Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: This amendment to Regulation No. 179 extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004 with the superintendent's approval and if certain conditions are met by the insurer related to policies or portions of policies which are coinsured. Previously, this table could only be used for policies issued on or after January 1, 2007. The use of this table allows for the reserves to better match the risks associated with different underwriting classifications.

This standard has already been adopted by the National Association of Insurance Commissioners through its Accounting Practices and Procedures Manual, and many states have already adopted this change for year-end 2009. Since New York has a separate regulation addressing this subject matter, the revised standard is not automatically adopted and needs to be adopted via an amendment to Regulation No. 179. Insurers domiciled in states that do not adopt this change by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted this change. Adopting this standard will encourage regulatory uniformity and enable insurers authorized in New York to be subject to the same reserve levels as in states that have adopted the standards.

While the anticipated impact of the adoption of this proposed amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis on inforce business for New York authorized life insurers. Additionally, the impact of this change will likely increase over time. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure on maintaining the high level of risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted by year-end 2009. Failure to implement the changes in New York at the same time they are implemented in other states will make New York-authorized companies look weaker financially than their peer companies. If New York-authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York-authorized insurers throughout the year.

Insurers subject to this regulation must file quarterly financial statements based upon minimum reserve standards in effect on the date of filing. The filing date for the December 31, 2009 annual statement is March 1, 2010. The insurers must be given advance notice of the applicable standards in order to file their reports in an accurate and timely manner. This regulation was previously promulgated on an emergency basis on December 28, 2009. The proposal was sent to the Governor's Office of Regulatory Reform on January 12, 2010 and the Department is awaiting approval to publish the regulation. It is essential that this regulation be continued on an emergency basis.

For all of the reasons stated above, an emergency adoption of this second amendment to Regulation No. 179 is necessary for the general welfare.

Subject: Recognition of the 2001 CSO Mortality Table and Preferred Mortality Tables in Determining Minimum Reserve Liabilities.

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

Text of emergency rule: Paragraph (3) of subdivision (a) of section 100.6 is amended to read as follows:

(3) Part 98.4(b)(5) of this Title: The 2001 CSO Mortality Table is the minimum mortality standard for deficiency reserves. If select mortality rates are used, they may be multiplied by X percent for durations in the first segment, subject to the conditions specified in Parts 98.4(b)(5)(i) - 98.4(b)(5)(ix)(j)(vii) of this Title. In demonstrating compliance with those conditions, the demonstrations may not combine the results of tests that utilize the 1980 CSO Mortality Table with those tests that utilize the 2001 CSO Mortality Table, unless the combination is explicitly required by regulation or necessary to be in compliance with relevant Actuarial Standards of Practice.

Subdivision (a) of section 100.8 is amended to read as follows:

(a) At the election of the insurer, for each calendar year of issue, for any one or more specified plans of insurance and subject to satisfying the conditions stated in section 100.9 of this Part, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum mortality standard for policies issued on or after January 1, 2007. *For policies issued on or after January 1, 2004, and prior to January 1, 2007, the 2001 CSO Preferred Class Structure Mortality Table may be substituted with the prior approval of the superintendent and subject to the conditions of section 100.9 of this Part.* A table from the 2001 CSO Preferred Class Structure Mortality Table used in place of a 2001 CSO Mortality Table, pursuant to the requirements of this Part, will only be treated as part of the 2001 CSO Mortality Table for purposes of reserve valuation.

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 June 23, 2010.

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

Regulatory Impact Statement

1. Statutory authority: The superintendent's authority for the adoption of 11 NYCRR 100 (Regulation No. 179) derives from sections 201, 301, 1304, 4217, 4218, 4221, 4224, 4240, 4517, Article 24, and Article 26 of the Insurance Law.

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

Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

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

Section 4217(c)(2)(A)(iii) permits, as a minimum standard of valuation for life insurance policies, any ordinary mortality table adopted by the National Association of Insurance Commissioners (NAIC) after 1980, and approved by the superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for such policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for such policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which such modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the NAIC after 1980, and approved by the superintendent, for use in determining the minimum nonforfeiture standard.

Section 4224(a)(1) prohibits unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for life insurance policies.

Section 4240(d)(7) states the superintendent shall have the power to promulgate regulations, as may be appropriate, to carry out the provisions of this section, which covers various issues related to separate accounts of insurance companies, including reserve issues.

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

Article 24 describes unfair methods of competition and unfair and deceptive acts and practices.

Article 26 describes unfair claim settlement practices, other misconduct and discrimination.

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 policyholders. The Insurance Law prescribes the mortality tables and interest rates to be used for calculating such reserves. At the same time, an insurer benefits when the insurer has adequate capital for company uses such as expansion, product innovation, and other forms of business development.

3. Needs and benefits: This amendment extends the use of the 2001 CSO Preferred Structure Mortality Table to policies issued on or after January 1, 2004. Use of this table allows for the reserves to better match the risks associated with different underwriting classifications. However, use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. While the anticipated impact of this amendment will vary by insurer and product, some insurers may experience a material reduction in reserves for policies issued on a preferred basis. Based on a survey conducted by the American Council of Life Insurers, the industry wide impact of allowing the use of this table for policies issued on or after January 1, 2004 is estimated to be a decrease in reserves of approximately \$600 million - \$1.2 billion. The retroactive use of such table will not jeopardize New York's long-standing tradition of protecting insureds from insurers that under-reserve since the use of such table is conditional, dependent upon the requirements set forth in the current rule being met by the insurer. Companies domiciled in states that do not adopt these changes by December 31, 2009 year-end will be forced to hold higher reserves relative to companies domiciled in states that have adopted these changes.

Adoption of the proposed amendment will decrease reserves on inforce business for New York authorized life insurers - in some cases, by a material amount. Given the difficult economic environment in which the insurance industry continues to operate, there is significant pressure to maintain higher risk based capital ("RBC") ratios needed to compete successfully in the marketplace, as well as significant capital costs associated with reserves that are greater than necessary. Redundant reserves cost companies additional money to manage, and thereby increase costs to consumers. Thus, the proposed amendment also will benefit consumers by enabling insurers to keep costs at a reasonable level.

New York authorized insurers will be at a competitive disadvantage if this amendment is not adopted by year-end 2009. Failure to implement the

changes in New York at the same time they are implemented in other states will make New York authorized companies look weaker financially than their peer companies. If New York authorized insurers are not given the same opportunity as non-New York insurers to reduce their reserves, the lower RBC ratios generated by the higher reserves will create the impression among producers and consumers that there is a real difference in financial stability among the companies - an impression that may negatively impact market share of New York authorized insurers throughout the year.

4. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current computer systems if it continues to maintain higher reserves. Administrative costs to most insurers and fraternal benefits societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been available for use by insurers since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004, and the use of this table is optional.

Costs to the Insurance Department of this amendment will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this amendment to Regulation No. 179. There are no costs to other government agencies or local governments.

5. Local government mandates: 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 current rule imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years.

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

8. Alternatives: The only alternative considered was to not extend the date of using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004. However, this would result in higher reserve requirements for New York authorized life insurers and fraternal benefit societies on some policies, since this change was adopted by the NAIC in September 2009. This change was discussed during various NAIC conference calls and the Department conducted outreach with affected stakeholders, including the Life Insurance Council of New York. Additionally, the American Council of Life Insurers was instrumental in drafting the language for the revised regulation.

This item is part of a larger capital and surplus relief plan for insurers. Adopting this amendment will allow New York insurers to be subject to the same standard that has already been adopted by the NAIC and which is being implemented in other states. Insurers authorized in states that do not adopt this change by December 31, 2009 year-end will be forced to hold higher reserves relative to companies authorized in states that have adopted this change and in those circumstances, New York authorized companies would be at a disadvantage, from the impression that there is a significant difference in financial stability of New York authorized insurers and those authorized outside the state.

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, 2009. This amendment allows the use of 2001 CSO Preferred Class Structure Mortality Table for policies issued on or after January 1, 2004. Use of the 2001 CSO Preferred Class Structure Mortality Table, however, is not mandatory. Voluntary election of such table is conditional, dependent upon the requirements set forth in the current rule being met by the insurer. The actuarial certification and supporting actuarial report is due annually on March 1. The statistical report required for insurers that use the 2001 CSO Preferred Class Structure Mortality Table is due annually on July 1. Since use of the 2001 CSO Preferred Class Structure Mortality Table was previously in effect and this amendment only extends the date for using the table, insurers should have ample time to meet the reporting requirements.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department 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 life insurers and fraternal benefit societies authorized to do business in New York State, none of which fall within the definition of "small business" contained in section 102(8) of the State Administrative Procedure Act. The Insurance 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 which are both independently owned and have under one hundred employees.

2. Local governments:

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

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Insurers covered by the regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act.

2. Reporting, recordkeeping and other compliance requirements; and professional services: The amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table to policies issued on or after January 1, 2004. The current regulation imposes reporting requirements related to the actuarial certification and supporting actuarial report required for insurers using the 2001 CSO Preferred Class Structure Mortality Table for valuation. Additionally, the current rule requires that insurers opting to use the table provide data for mortality and other company specific experience in a statistical report for life insurance policies and group life insurance products sold to individuals by certificate with premium rates guaranteed from issue for at least two years. Use of the 2001 CSO Preferred Class Structure Mortality Table is not mandatory. Voluntary election of such table is conditional on the requirements set forth in the prior version of the regulation, which became effective on December 26, 2007, being met by the insurer.

3. Costs: This amendment provides for lower minimum reserve standards, and an insurer need not modify its current systems if it continues to maintain higher reserves.

Administrative costs to most insurers and fraternal benefits societies authorized to do business in New York State will be minimal, since the 2001 CSO Preferred Class Structure Mortality Table has been able to be used since January 1, 2007. This amendment will extend the date for using the 2001 CSO Preferred Class Structure Mortality Table back to January 1, 2004 and the use of this table is optional.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers for policies affected by this rule. There are no costs to other government agencies or local governments.

4. Minimizing adverse impact: The regulation does not impose any adverse impact on rural areas.

5. Rural area participation: This amendment was discussed during various public NAIC conference calls, and the Department conducted outreach with affected stakeholders, including the Life Insurance Council of New York. Additionally, the American Council of Life Insurers was instrumental in drafting the language for the revised regulation.

Job Impact Statement

The Insurance Department finds that this amendment should have no impact on jobs and employment opportunities. This amendment extends the use of the 2001 CSO Preferred Class Structure Mortality Table for use in determining minimum reserve liabilities and nonforfeiture benefits back to policies issued on or after January 1, 2004. Previously, this table could be used for policies issued on or after January 1, 2007. This rule will lower reserve requirements for those insurers that elect to use this table for policies issued on or after January 1, 2004 and therefore decrease the cost of doing business in New York. Compliance should not require the employment of additional personnel or outside contractors.

EMERGENCY RULE MAKING

Audited Financial Statements

I.D. No. INS-15-10-00005-E

Filing No. 324

Filing Date: 2010-03-26

Effective Date: 2010-03-26

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

Action taken: Repeal of Part 89 and addition of new Part 89 (Regulation No. 118) to Title 11 NYCRR.

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

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

Specific reasons underlying the finding of necessity: In September 2009, the New York State Insurance Department, after several years of working closely with the National Association of Insurance Commissioners ("NAIC"), received its accreditation under the NAIC's Financial Regulations Standards and Accreditation Program ("accreditation program"). This accreditation program is the cornerstone of uniform solvency regulation across the country. By obtaining accreditation, New York was recognized as having demonstrated its continued commitment to the NAIC and state-based regulation of insurers and other regulated entities. The regulatory regime acknowledged through the accreditation program provides substantial protection for the policyholders and for state and local governments that rely on the stability and solvency of insurers that do an insurance business within their borders.

The accreditation program is designed principally to ensure that all regulated insurers are required to maintain financial solvency. Other goals achieved by states that have been approved by the accreditation program are verification that the state conducts effective and efficient financial analysis and examination process, and has in place the appropriate organizational and personnel practices.

The benefits of accreditation for the Insurance Department are many. The chief benefit is that New York's examinations, audits and other reviews of its regulated insurers will be recognized by her sister states so that other states will not subject New York domestic insurers to greater barriers of entry and operation than non-New York insurers. Further, accreditation indicates that the Insurance Department examination and audit operations and controls meet a nationally recognized standard assuring potential policyholders that the prospective insurers meet desirable levels of financial solvency.

Accreditation is not a one-time event. Accredited insurance departments are required to undergo a comprehensive review by an independent review team every five years to ensure departments continue to meet baseline financial solvency oversight standards. Newly accredited insurance departments undergo this review both to obtain the initial approval and, in the case of the New York State Insurance Department, an additional review within two years of accreditation. The accreditation standards require state insurance departments to have adequate statutory and administrative authority to regulate an insurer's corporate and financial affairs, and that they have the necessary resources to carry out that authority.

Among the commitments made by the Insurance Department to the NAIC as a condition of New York's approval under the accreditation program is an assurance that an NAIC model audit rule (NAIC model) would be timely adopted to be effective for regulated insurers as of January 1, 2010. The purpose of the NAIC model is to implement a state statute or regulation that contains a requirement for an annual audit of each domestic insurer by an independent certified public accountant (CPA), based on the June 1998 version of the NAIC's Model Rule Requiring Annual Audited Financial Reports. Further, the NAIC model, once adopted by a state, requires that an insurer comply with certain best practices related to auditor independence, corporate governance and internal controls over financial reporting. The NAIC model reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model closely hews to the audit and controls standards established by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq., and extends that statute's application to regulated companies.

Continuation of accreditation by the NAIC requires New York to adopt specific rules in addition to those already imposed by current 11 NYCRR 89 (Regulation 118). For example, New York must prohibit each CPA from entering into an agreement of indemnity or release from liability, and must require CPA partner rotation in a manner similar to the NAIC's model.

Each of the required elements is contained in the proposed rule, either as a result of the adoption of the standards of the NAIC model or the continuation of the standards contained in present Regulation 118. New York has made every effort to conform the proposed rule to the NAIC model, except where inconsistent with a statutory requirement expressly established by New York law. Furthermore, and critically, the effective date stated in the proposed rule is required to maintain accreditation - January 1, 2010.

This regulation was previously promulgated on an emergency basis on December 28, 2009. The proposal was sent to the Governor's Of-

fice of Regulatory Reform (GORR) on March 12, 2010 and the Department is awaiting approval to publish the regulation. Pending GORR's approval, this regulation must be continued on an emergency basis because of the accreditation deadline.

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

Subject: Audited Financial Statements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 89.16 contains the effective dates and special rules.

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

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 June 23, 2010.

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

Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, 307(b), 1109, 4710(a)(2) and 5904(b) of the Insurance Law. These sections establish the superintendent's authority to promulgate regulations governing audited financial statements for authorized insurers as defined by section 107 of the Insurance Law and for fraternal benefit societies and managed care organizations.

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

Insurance Law Section 307(b) requires insurers to file annual financial statements on forms prescribed by the superintendent.

Insurance Law Section 1109 provides that the superintendent may promulgate regulations in effectuating the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Insurance Law Section 4710(a)(2) requires municipal cooperative health benefit plans to file annual financial statements on forms prescribed by the superintendent.

Insurance Law Section 5904(b) requires risk retention groups not chartered and licensed as property/casualty insurers to file a copy of the annual financial statement submitted to the state in which the risk retention group is chartered and licensed.

2. Legislative objectives: 11 NYCRR 89 (Regulation 118) was originally promulgated in 1984 to implement the provisions of Section 307(b) of the Insurance Law. The proposed repeal of the current regulation and promulgation of the new regulation continues to implement the provisions of section 307(b), and add provisions required pursuant to the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. (“SOX”).

3. Needs and benefits: SOX imposes a comprehensive regime of audits and internal management controls and reports designed to ensure greater transparency and accountability.

The proposed regulation is closely patterned upon a National Association of Insurance Commissioners model regulation (“NAIC model”) that reflects a consensus of the insurance regulators of all states and territories of the United States as to scope, detail, needs and benefits. The NAIC model is similar to current Regulation 118 but imposes additional rules patterned on SOX. For example, the NAIC model and proposed regulation both require the regulated insurer to forbid its CPA from entering into an agreement of indemnity or release from liability. The proposed regulation will apply not only to companies already subject to SOX, but also to other companies, such as mutual companies, fraternal benefits societies and managed care organizations, that are presently governed by Regulation 118.

The proposed regulation, once adopted, will ensure that regulated companies engage in best practices related to auditor independence, corporate governance and internal controls over financial reporting.

4. Costs: This regulation imposes no compliance costs on state or local governments. There will be no additional costs incurred by the Insurance Department. Costs to be incurred by the parties affected differ depending upon the size of the company and whether that company is publicly held and thus already required to comply with SOX. Companies regulated by SOX will incur few additional costs. Compliance cost estimates received from a cross-section of affected companies that are not subject to SOX are most often estimated to be minimal or negligible. Of those companies that stated compliance would require additional expenditures, the amounts range from \$25,000 a year to in excess of \$2 million (for one large mutual insurance company).

5. Local government mandates: 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: Paperwork associated with filings to the superintendent should be minimal. The paperwork associated with the audit and controls regime required by the proposed regulation should also be minimal.

7. Duplication: None.

8. Alternatives: In developing this regulation, the Department obtained industry input and hued to the model regulation developed by the National Association of Insurance Commissioners (the “NAIC model”) to implement SOX to the extent possible. However, the model has been modified as necessary to comply with New York statutes and regulations. The proposed regulation also restricts its application only to those entities over which the Department has jurisdiction unlike the NAIC model, which also contains rules that apply to CPAs.

Several comments received by the Department noted the compliance difficulties faced by foreign companies and United States branches of alien insurers, specifically with respect to the roles to be performed by persons not residing in the United States and for the reporting requirements to be imposed upon an integrated enterprise containing insurers in New York as well as entities with no nexus to New York. In response, the Department modified the regulation to provide detailed rules as to whether members of management may attest to filings, and to establish limited exceptions available only to these entities, in addition to the provision that permits a waiver of any provision of the regulation upon evidence of financial or organizational hardship.

One commenter requested that the definition of a managed care organization (“MCO”), entities that are included within the companies subject to this regulation, be restricted to exclude those entities that operate only in New York and that only serve public programs, i.e., Medicaid, Family Health Plus and Child Health Plus. After consideration and consultation with the Department of Health, the Department narrowed the definition of an MCO to exclude all MCOs that are primarily subject to the oversight of the Department of Health, and that also do not file financial documents with the Department other than for escrow accounts. Other MCOs that do file financial documents with the Insurance Department will still be governed by this regulation.

Another commenter objected to restrictions on using the same CPA for SOX audit work and tax return preparation for more than a five-year period for small companies. The exemption from any provision of the proposed regulation available upon proof of financial or organization hardship now addresses this comment.

Several comments noted that a company may be required to file both SOX reports and the reports required by the NAIC model as adopted by the various states. Companies want to avoid making duplicative filings to those required by the state of domicile. The proposed regulation contemplates accepting the domiciliary state filings as New York filings to the extent that they are substantially similar to those required by the proposed regulation.

Several comments noted differences between the NAIC model and the proposed regulation on filing deadlines, exceptions and the rules governing confidentiality of work papers. Different dates or deadlines are due to restrictions in New York law that require modification to the NAIC model. Certain automatic exclusions from the NAIC model could not be included in the proposed regulation to the extent that they conflict with New York law. Finally, the confidentiality of commercial information, including work papers, obtained by state and local government is already subject in New York to a comprehensive regime of rules, exceptions and requirements, and thus did not need to be addressed in the proposed regulation.

9. Federal standards: The federal rules under SOX are extensive. The provisions in the proposed regulation are similar to the comparable federal provisions. The regulation does not conflict with any federal rules.

10. Compliance schedule: The regulation applies to companies for reporting periods beginning on or after January 1, 2010. Provisions of the regulation allow the company time to bring audit systems and controls into compliance without the need to ask for an extension or waiver. This timetable is contemplated by the NAIC model and has been adopted by many, but not all, states. The Department believes it is highly desirable to conform the application date of this proposed regulation to the effective date in other states.

Regulatory Flexibility Analysis

The Insurance Department finds that this regulation would not impose reporting, recordkeeping or other requirements on small businesses since the provisions contained therein apply only to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business in New York State. Inasmuch as most of these companies are not independently owned and operated and employ more than 100 individuals, they do not fall within the definition of “small business” as found in section 102(8) of the State Administrative Procedure Act.

This regulation specifically considers the impact of the require-

ments contained therein on small businesses by exempting assessment co-operative property/casualty insurance companies having direct premiums written in New York State of less than \$250,000 in any calendar year and having fewer than 500 policyholders at the end of such calendar year from the requirement to file an annual statement. Further, the proposed regulation allows any company, including a small business, to request an exemption from any and all of its requirements upon written application to the superintendent based upon a financial or organizational hardship upon the company.

This regulation contains, as does current Regulation No. 118, minimum requirements that must be included in the contract between a regulated company and the independent certified public accountant (“CPA”) retained by the company. Accordingly, CPAs, regardless of whether they are small businesses or not, could be considered affected parties under this regulation. However, the Insurance Department estimates the impact of the continuation of these rules to be minimal, especially since if a CPA agrees to audit a regulated company, the price of the engagement will compensate the CPA for costs incurred. Additionally, CPAs retained by insurers tend to be large limited liability corporations or partnerships that are not small businesses. In any event, a CPA may choose not to audit a company that will require execution of a contract subject to this regulation.

The regulation does not impose any impact, including any adverse impact, or reporting, recordkeeping, or other compliance requirement on any local government.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Companies affected by the proposed regulation include regulated insurers, fraternal benefit societies, and managed care organizations authorized to do business in New York State. The companies affected by this regulation do business in every county in this state, including “rural areas” as defined under section 102(1) of the State Administrative Procedure Act. Some of the home offices of these companies lie within rural areas. Further, companies may establish new office facilities and/or relocate in the future depending on their requirements and needs.

2. Reporting, recordkeeping and other compliance requirements: Many of the compliance requirements (such as filing due date and record retention period) are consistent with the requirements presently contained in Regulation 118 and should not impose upon any regulated party, regardless of whether they are located in a rural area or not, any additional paperwork, recordkeeping or compliance requirements. The obligations imposed by the proposed regulation with regard to establishment and maintenance of audit controls and standards are either consistent with or less than those required by current Regulation 118 and a federal statute, the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. (“SOX”), that imposes similar rules. If there are failures in the audit and controls process, a company is required to notify the superintendent. The regulation contains automatic exclusions from compliance for certain small companies. Further, any company that faces organizational or financial hardship can seek an exemption from any requirement imposed by the regulation.

The proposed regulation requires a regulated company to perform the audit of its operation and controls with the assistance of a certified independent public accountant (“CPA”). The terms of the employment of the CPA and the period for which work papers and communications are to be retained (contained in 11 NYCRR 243 (“Standards of Record Retention by Insurance Companies”)) are both specified in the proposed regulation. Accordingly, CPAs, regardless of whether they are located in rural areas or not, could be considered affected parties under this regulation. However, the Insurance Department estimates the impact of these rules on CPAs, regardless of whether they are located in rural areas or not, should be negligible, if any at all. Indeed, if a CPA agrees to audit a regulated company, the price of the engagement will compensate the CPA for costs incurred. Additionally, CPAs retained by insurers tend to be large limited liability corporations or partnerships that are not small businesses. In any event, a CPA may choose not to audit a company that will require execution of a contract subject to this regulation.

3. Costs: The proposed regulation implements requirements largely based on the rules imposed by current Regulation 118 and SOX. The

cost of complying with the new requirements will depend on the size of the company and whether the company is already subject to SOX because it is publicly held. Companies regulated by SOX will incur few additional costs beyond those imposed by current Regulation 118 and the federal statute. Compliance cost estimates with respect to the proposed regulation were received from a cross-section of companies that are not subject to SOX. If the company is already required to comply with similar regulations in other states, the additional expense of the New York proposed regulation is estimated to be minimal or negligible. Of those companies that stated compliance would require additional expenditures, the amounts range from \$25,000 a year to in excess of \$2 million (for one very large domestic mutual insurance company).

However, the proposed regulation requires a regulated company to perform the audit of its operation and controls with the assistance of a certified independent public accountant (“CPA”). The terms of the employment of a CPA is specified in the proposed regulation in a manner that is consistent with the current Regulation 118. Further, a CPA can obtain compensation for additional costs as part of the contract entered into with the regulated company. Accordingly, CPAs, regardless of whether they are located in rural areas or not, should not have to incur uncompensated additional costs to comply with the proposed regulation.

4. Minimizing adverse impact: The proposed regulation applies to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business throughout New York State, including rural areas. It does not impose any adverse impacts unique to rural areas.

5. Rural area participation: In developing this regulation, the Department conducted extensive outreach to regulated insurers, fraternal benefit societies and managed care organizations authorized to do business throughout New York State, including those located or domiciled in rural areas.

Job Impact Statement

The Insurance Department finds that this regulation will have no adverse impact on jobs and employment opportunities since, for publicly held companies, its requirements largely reflect obligations already contained in the present Regulation 118 and those imposed by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 et seq. (“SOX”). For insurers, fraternal benefit societies or managed care organizations not already subject to SOX, the regulation contain minor refinements of those companies’ current obligations under Regulation 118 to establish, maintain and report internal audit and oversight. Compliance may require the employment of additional personnel or outside contractors.

No region in New York should experience an adverse impact on jobs and employment opportunities. This regulation should not have a negative impact on self-employment opportunities.

Office of Mental Health

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health

I.D. No. OMH-15-10-00011-EP

Filing No. 377

Filing Date: 2010-03-30

Effective Date: 2010-03-30

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

Proposed Action: Amendment of Part 577 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 43.02

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

Specific reasons underlying the finding of necessity: The amendments are made in accordance with the 2009-2010 enacted Deficit Reduction Legislation, by reducing the growth rate of Medicaid reimbursement associated with private psychiatric hospitals licensed pursuant to Article 31 of the Mental Hygiene Law and issued an operating certificate in accordance with Part 582 of Title 14 NYCRR, effective 1/1/10.

Subject: Rates of Reimbursement - Hospitals Licensed by the Office of Mental Health.

Purpose: To reduce the growth of Medicaid reimbursement for licensed Article 31 private psychiatric hospitals.

Text of emergency/proposed rule: 1. Paragraph (1) of subdivision (e) of Section 577.7 is amended to read as follows:

(1) Allowable operating costs in the rate year are calculated by choosing the lower of the base year cost computed on a per diem basis or the limitation cost computed on a per diem basis, and trending this amount forward two years by the inflation factor, *except for the rate period effective January 1, 2010, to December 31, 2010, when the inflation factor used to trend costs will be limited to the inflation factor for the first year of the two-year period.* Administration costs, as contained in and part of operating costs, shall be subject to an administrative cost screen. Two separate administrative cost screens shall be calculated, one for hospitals with greater than 100 beds (group one), and one for hospitals with 100 or less beds (group two). The administrative cost screen is derived from the costs in the fiscal year one year prior to the base year (i.e., the same cost year from which the limitation is derived), and shall be the group average per diem cost plus 10 percent.

2. Paragraph (4) of subdivision (h) of Section 577.7 is amended to read as follows:

(4) The operating cost component of the rate will be updated annually, *except for the period January 1, 2010, to December 31, 2010,* with the Medicare inflation factor for hospitals and units excluded from the prospective payment system, until the hospital has operated for six months at a minimum occupancy level of at least 75 percent and files its first cost report for that same period in accordance with section 577.5 of this Part.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire June 27, 2010.

Text of rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.state.ny.us

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

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

Regulatory Impact Statement

1. Statutory Authority: Section 7.09 of the Mental Hygiene Law grants the Commissioner of the Office of Mental Health the authority and responsibility to adopt regulations that are necessary and proper to implement matters under his/her jurisdiction.

Section 43.02 of the Mental Hygiene Law provides that the Commissioner has the power to establish standards and methods for determining rates of payment made by government agencies pursuant to Title 11 of Article 5 of the Social Services Law for services provided by facilities, including hospitals, licensed by the Office of Mental Health.

2. Legislative Objectives: Article 7 of the Mental Hygiene Law reflects the Commissioner's authority to establish regulations regarding mental health programs. The amendments to Part 577 are needed to reduce the growth rate of Medicaid reimbursement associated with private psychiatric hospitals licensed pursuant to Article 31 of the Mental Hygiene Law and issued an operating certificate in accordance with Part 582 of Title 14 NYCRR. (Note: These amendments are not applicable to psychiatric hospitals which are jointly licensed pursuant to Article 31 of the Mental Hygiene Law, as well as Article 28 of the Public Health Law.) These amendments are made in accordance with the 2009-2010 enacted Deficit Reduction Legislation.

3. Needs and Benefits: Effective January 1, 2010, the amendments remove the 2010 trend factor of 2.5 percent in developing the 2010 per diem Medicaid rates for Article 31 private psychiatric hospitals. Normally, under the Commissioner's authority, OMH trends base year costs forward two years to the rate year by using two annual trend factors (representing a trend factor for the year preceding the rate year and another trend factor for the rate year). But for the 2010 rate year, OMH will not use the 2010 trend factor and only use the 2009 trend factor of 3.8 percent. This action is consistent with the elimination of the inflationary adjustments and trends applied to rates for community mental health programs in 2009-2010. This amendment is a reflection of the serious fiscal condition of the State. As a result of the enacted Deficit Reduction Legislation, the rate of growth in Medicaid expenditures for the private psychiatric hospitals will be

slowed, but the expectation is that the level of services provided by such hospitals will be maintained.

4. Costs:

(a) cost to State government: These regulatory amendments will not result in any additional costs to State government.

(b) cost to local government: These regulatory amendments will not result in any additional costs to local government.

(c) cost to regulated parties: This regulatory amendment will not result in any additional cost to regulated parties, but will reduce the rate of growth in Medicaid payments that the Article 31 private psychiatric hospitals would have received, projected to be 2.5 percent. Currently there are nine such providers. It is estimated that this action will result in an annual reduction in Medicaid growth of approximately \$1.0 million State share of Medicaid (\$2.0 million gross Medicaid).

5. Local Government Mandates: These regulatory amendments will not result in any additional imposition of duties or responsibilities upon county, city, town, village, school or fire districts.

6. Paperwork: This rule should not substantially increase the paperwork requirements of affected providers.

7. Duplication: These regulatory amendments do not duplicate existing State or federal requirements.

8. Alternatives: As noted above, this amendment is consistent with the 2009-2010 enacted Deficit Reduction Legislation and the budgetary constraints included therein. The elimination of the 2010 trend factor of 2.5 percent is consistent with the elimination of the inflationary adjustments and trends applied to rates for community mental health programs in 2009-2010 and reflects the serious fiscal condition of the State. The only alternative to this rulemaking would have been to make budgetary cuts to another program which may have already sustained previous cuts and could have the potential for putting those providers at financial risk. Therefore, that alternative was not considered. It should be noted that residential treatment facilities and Department of Health-licensed hospitals have had the same budgetary constraints enacted.

9. Federal Standards: The regulatory amendments do not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance Schedule: The regulatory amendments would become effective immediately upon adoption.

Regulatory Flexibility Analysis

The rulemaking will reduce the rate of growth in Medicaid reimbursement associated with private psychiatric hospitals licensed pursuant to Article 31 of the Mental Hygiene Law and issued an operating certificate in accordance with Part 582 of Title 14 NYCRR. The proposed change is consistent with the 2009-10 enacted Deficit Reduction Legislation and recognizes the serious fiscal condition of the State. This change removes the 2010 trend factor in the development of the 2010 per diem Medicaid rates for Article 31 private psychiatric hospitals, and, as a result, slows the rate of growth in Medicaid expenditures. There will be no adverse economic impact on small businesses or local governments; therefore, a regulatory flexibility analysis is not submitted with this notice.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this notice because the rulemaking, which serves to reduce the growth rate of Medicaid reimbursement associated with private psychiatric hospitals licensed pursuant to Article 31 of the Mental Hygiene Law and issued an operating certificate in accordance with Part 582 of Title 14 NYCRR, will not impose any adverse economic impact on rural areas. The proposed change is consistent with the 2009-10 enacted Deficit Reduction Legislation and recognizes the serious fiscal condition of the State. This change removes the 2010 trend factor in the development of the 2010 per diem Medicaid rates for Article 31 private psychiatric hospitals, and, as a result, slows the rate of growth in Medicaid expenditures.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because the regulation eliminates the 2010 trend factor in the development of the 2010 per diem Medicaid rates for Article 31 private psychiatric hospitals, and, as a result, slows the rate of growth in Medicaid expenditures. The proposed change is consistent with the 2009-10 enacted Deficit Reduction Legislation and recognizes the serious fiscal condition of the State. There will be no adverse impact on jobs and employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Mental Health Services - General Provisions

I.D. No. OMH-15-10-00009-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 Part 501 of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 7.09 and 31.04

Subject: Mental Health Services - General Provisions.

Purpose: To add a definition to existing regulation that states OMH's acceptance of the use of electronic medical records.

Text of proposed rule: Section 501.2 of Title 14 NYCRR is amended by adding a new subdivision (a) and renumbering subdivisions (b), (c), (d), and (e), respectively, as follows:

(a) *Case record, clinical record, medical record, or patient record means clinical record as such term is defined in Section 33.16 of the Mental Hygiene Law, whether created or maintained in writing or electronically. All such records shall use accepted mechanisms for clinician signatures, be maintained in a secure manner, and be readily accessible to the Office upon request.*

(b) Commissioner means the commissioner of the New York State Office of Mental Health.

[(d)](c) Mental illness means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.

[(e)](d) Minor means a person who has not attained the age of 18 years.

[(b)](e) Office means the New York State Office of Mental Health.

[(c)](f) Provider of services means a provider of services, as defined in section 1.03 of the Mental Hygiene Law, which is responsible for the operation of a program or network of programs. Such entity may be an individual, partnership, association, corporation, limited liability company, or public or private agency, other than an agency of the State, which provides services for persons with mental illness.

Text of proposed rule and any required statements and analyses may be obtained from: Joyce Donohue, NYS Office of Mental Health, 44 Holland Avenue, Albany, NY 12229, (518) 474-1331, email: cocbjdd@omh.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.

Consensus Rule Making Determination

This rulemaking is filed as a Consensus rule on the grounds that it is non-controversial and conforms to non-discretionary statutory provisions. No person is likely to object to this rulemaking since it merely clarifies the Office's position regarding the use of electronic medical records which is in conformance with State and Federal law.

In 2000, the Federal "Electronic Records and Signatures in Commerce Act" was enacted into law to facilitate the use of electronic records and signatures in interstate or foreign commerce. One year earlier, in 1999, New York State had enacted the Electronic Signatures and Records Act (ESRA) through Chapter 57-A of the Consolidated Laws. In New York State, ESRA provides that an electronic signature shall have the same force and effect as a handwritten signature, unless there is a statutory provision to the contrary. Further, Executive Department regulations (Title 9 NYCRR) encourage the use of electronic signatures and records to facilitate both business in, as well as the business of, New York State. These regulations state, "ESRA recognizes the importance of technology to the State and a need to build the foundation for its acceptance, implementation and use by State agencies, local government, the private sector and citizens."

The rulemaking increases flexibility for providers of mental health services by supporting the use of electronic medical records and by clarifying that the definition of "case record, clinical record, medical record, or patient record" includes records created or maintained in writing or electronically. All such records must use accepted mechanisms for clinician signatures and shall be maintained in a secure manner. It is important to note that while the Office does support the use of electronic records and electronic signatures, it does not mandate their use.

Statutory Authority: Sections 7.09 and 31.04 of the Mental Hygiene Law grant the Commissioner of the Office of Mental Health the power and responsibility to adopt regulations that are necessary and proper to implement matters under his jurisdiction. Section 31.01 of the

Mental Hygiene Law charges the Commissioner of the Office of Mental Health with the responsibility to promulgate rules and regulations requiring the development of evaluation criteria and methods, including, but not limited to: uniform definitions of services for persons with mental disabilities; uniform financial and clinical reporting procedures; requirements for the generation and maintenance of uniform data for all individuals receiving services from any provider of services; uniform criteria for evaluating categories of need; and uniform standards for all comparable services and programs.

Job Impact Statement

A Job Impact Statement is not submitted with this notice because this consensus rule merely adds a definition to existing regulation that complies with the State Electronic Signatures and Records Act. There will be no impact on jobs and employment opportunities as a result of this rulemaking.

Office of Mental Retardation and Developmental Disabilities

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Reimbursement of Free-Standing Respite (FSR) Centers and Eligibility for Respite

I.D. No. MRD-15-10-00013-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 635-10.1(e), 635-10.4(g), 635-10.5(b), (h) and 686.13(k) of Title 14 NYCRR.

Statutory authority: Mental Hygiene Law, sections 13.07, 13.09(b), 16.00 and 43.02

Subject: Reimbursement of free-standing respite (FSR) centers and eligibility for respite.

Purpose: To clarify reimbursement for FSR centers and to change respite eligibility related to live in staff in CRs and IRAs.

Text of proposed rule: • Subdivision 635-10.1(e) is amended as follows:

(e) Only section 635-10.4(b)(2) and (c) - [(g)] (f) of this Subpart are applicable to eligible persons receiving waiver community residential habilitation services in facilities operated by providers of services pursuant to Part 671 of this Title.

- Subdivision 635-10.4(g) is amended as follows:

(g) Respite services are broadly defined as the provision of intermittent, temporary substitute care of a person on behalf of a primary caregiver who is either a family member, a legal guardian, an advocate, or a family care provider [or community residence live-in staff]. It is a means of providing relief from the responsibilities of daily caregiving.

(1) Respite may be provided only to persons living at home [,] or in family care [,] or in community residences (including IRAs) with live-in staff].

(2) Respite may be provided in any setting that is operated [,] or certified [,] or approved [] by OMRDD [,] including a private residence]. Respite may also be provided in a setting that is not operated or certified by OMRDD, including a private residence.

Note: Paragraphs (3) - (5) remain unchanged.

[(6)] [Free-standing respite shall comply with all existing contract stipulations for this service.]

Note: Paragraph (7) is renumbered to be paragraph (6).

- Paragraph 635-10.5(b)(1) is amended as follows:

(1) The following shall apply to residential habilitation services provided by an individualized residential alternative (IRA), provided as at home residential habilitation and family care residential habilitation [on or after July 1, 2002]. (Note: for reimbursement of respite services provided in an IRA see subdivision (h) of this section.)

- Paragraph 635-10.5(h)(3) is amended as follows:

(3) Prices for [the reimbursement of waiver] respite services shall be determined through a budget review.

- Subparagraphs 635-10.5(h)(3)(ii), (iii) & (iv) are amended as follows:

[(ii)] [The unit of service for respite other than that for determining the unit capital price for a non-state-operated free-standing respite center shall be one hour equaling 60 minutes and may be claimed in 15-minute increments, as documented.]

[(iii)] [The unit price for respite other than that delivered at a non-state-operated free-standing respite center shall be determined by dividing the OMRDD approved total annual budgeted costs by the corresponding projected hours of utilization.]

[(iv)] [The unit price for respite delivered at a non-state-operated free-standing respite center shall consist of an operating price and a capital price.]

[(a)] [The unit operating price for a non-state-operated free-standing respite center shall be determined by dividing the approved annual budgeted operating costs by the corresponding projected hours of utilization.]

(ii) *There shall be only an operating price for respite services other than those delivered by a non-State operated free-standing respite center. There shall be an operating price and a capital price for respite services delivered by a non-State operated free-standing respite center certified as an IRA.*

(iii) *For operating prices:*

(a) *The unit of service shall be one hour equaling 60 minutes.*

(b) *The provider may claim reimbursement in 15 minute increments, as the service is documented.*

(c) *OMRDD shall determine the price by dividing the OMRDD approved total annual budgeted costs by the corresponding projected hours of utilization. OMRDD shall approve budgeted costs if they are reasonable, related to respite services and consistent with efficiency, economy and quality of care.*

(iv) *For capital prices:*

[(b)](a) The [unit capital] price [for a non-state-operated free-standing respite center] shall be determined by dividing the approved annual budgeted capital costs by 12 [and shall be paid monthly]. Capital costs [for a non-state-operated free-standing respite center] shall be determined in accordance with Subpart 635-6 of this Title, except that the provider may be reimbursed for debt service in lieu of depreciation and interest, in which case only OMRDD approval is required.

(b) *Capital prices shall be paid monthly.*

- Paragraph 635-10.5(h)(5) is amended as follows:

(5) Reimbursement for respite services delivered at a free-standing respite center to [a consumer] *an individual* living in a family care home shall not be billed to Medicaid by the free-standing respite center.

- Renumbered paragraph 635.10.5(h)(8) is amended as follows:

(8) The [reimbursement] price determined in accordance with this subdivision shall not be considered final unless approved by the Director of the State Division of the Budget.

- A subdivision 686.13(k) is amended as follows:

(k) Computation of the reimbursable costs for the facility class known as the individualized residential alternative (IRA).

(1) *For reimbursement of residential habilitation provided for residents by an IRA with a certified capacity which does not consist of only temporary use beds see subdivision 635-10.5(b).*

(2) *In addition to the IRA price for residential habilitation, another [A] portion of the [applicable IRA] price for an IRA with a certified capacity which does not consist of only temporary use beds includes allowable room, board and protective oversight costs. This portion of the price shall be determined by taking into account total allowable room, board and protective oversight costs. The price shall be net of income and lower income housing assistance.*

(Note: Subparagraphs (1)(i) - (x) are renumbered as subparagraphs (2)(i) - (x) and are unchanged.)

(3) *For an IRA that provides respite services to individuals who do not reside in it, reimbursement of those services is in accordance with subdivision 635-10.5(h).*

(i) *An IRA, other than a free-standing respite center, may provide respite services to individuals who do not reside in it by utilizing temporary use beds and/or vacant certified beds.*

(ii) *Respite services may also be provided in IRAs which are free-standing respite centers. These facilities have a certified capacity which consists only of temporary use beds.*

Text of proposed rule and any required statements and analyses may be obtained from: Barbara Brundage, Director, Regulatory Affairs Unit, OMRDD, 44 Holland Avenue, Albany, New York 12229, (518) 474-1830, email: barbara.brundage@omr.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.

Additional matter required by statute: Pursuant to the requirements of SEQRA and 14 NYCRR Part 602, OMRDD has determined that the action described herein will have no effect on the environment, and an E.I.S. is not needed.

Regulatory Impact Statement

1. Statutory Authority:

a. Section 13.07 of the New York State Mental Hygiene Law establishes that OMRDD shall have responsibility for seeing that persons with developmental disabilities receiving care and treatment have their personal and civil rights protected.

b. The OMRDD's authority to adopt rules and regulations necessary and proper to implement any matter under its jurisdiction as stated in the New York State Mental Hygiene Law Section 13.09(b).

c. Section 16.00 of the New York State Mental Hygiene Law enables the commissioner of OMRDD to regulate and assure the quality of services provided to persons with developmental disabilities.

d. OMRDD's responsibility, as stated in section 43.02 of the Mental Hygiene Law, for setting Medicaid rates for services in facilities certified by OMRDD.

2. Legislative Objectives: The proposed amendments further the legislative objectives embodied in sections 13.07, 13.09(b), 16.00 and 43.02 of the New York State Mental Hygiene Law by revising the regulations governing Home and Community Based Services (HCBS) respite services. The proposed amendments are primarily concerned with clarifying the reimbursement methodology applicable to free-standing respite centers which are certified as Individualized Residential Alternatives (IRAs). In addition, the proposed regulation makes a change regarding those who are eligible to receive the service.

3. Needs and Benefits: Recently, OMRDD began certifying free-standing respite centers as a type of individualized residential alternative (IRA). Historically, IRAs have been residential facilities with permanent residents, with some IRAs reserving limited opportunities for respite purposes. The certification of free-standing respite centers as IRAs has led to some confusion in the field regarding whether the rate setting regulations for HCBS residential habilitation in IRAs apply, or whether the rate setting regulations for HCBS respite apply.

The proposed regulations would clarify existing OMRDD regulations to eliminate this confusion. The new language would make it explicit that OMRDD rate setting regulations for HCBS respite apply in free-standing respite centers, and the rate setting regulations governing IRA residential habilitation do not apply.

In addition, the regulations include a change to the criteria regarding who may receive respite. Current regulations specify that to be eligible for respite services, a person's primary caregiver must be a family member, a legal guardian, an advocate, a family care provider, community residence live-in staff, or IRA live-in staff. The proposed regulations would delete community residence live-in staff and IRA live-in staff from the list of primary caregivers. This change will correct an inequity in that respite services are not currently available for staff of community residences or IRAs without live-in staff.

The regulation language which recognizes community residence (or IRA) live-in staff as primary caregivers is from a period when the live-in staff were essentially round-the-clock caregivers whenever the

individual(s) with developmental disabilities was in the home. Under current service models, live-in staff do not function as round-the-clock caregivers. Typically, the staffing pattern for residences with live-in staff is very similar to the pattern for residences without live-in staff. The proposed regulations recognize the similarity in staffing patterns by treating staff of all IRAs and community residences in the same manner with regard to eligibility for respite services.

OMRDD is aware of one operator of a summer camp which bills for respite services for individuals who live in IRAs with live-in staff. The IRAs are also operated by the same provider. The proposed change to the regulation removes the ability of this provider to bill summer camp as respite services for the individuals who reside in its IRAs with live-in staff. This regulation would treat all residents of IRAs and community residences equitably regarding access to summer camp opportunities.

This change does not mean that individuals who live in IRAs or community residences with live-in staff will not be able to attend summer camp. Many individuals who live in IRAs and community residences attend summer camp without the camp billing services as respite services. If an individual chooses to attend summer camp, the residential provider, the individual and family member(s) or advocate(s) who represents the individual, should discuss the sources of funds available to pay for the summer camp. Individuals who live in residences with live-in staff have access to the same funding sources for camp or other vacation opportunities that are available to individuals who reside in IRAs or community residences without live-in staff.

The proposed regulations also include clarification that respite services can be provided in any setting, including sites certified or operated by OMRDD and private residences. This will clarify that respite providers can take the individuals to various community settings while respite services are being delivered. While current regulations do permit this practice, the proposed regulations add additional clarity.

4. Costs:

a. Costs to the Agency and the State and its Local Governments: The proposed regulatory change will save approximately \$800,000 in Medicaid costs annually, with approximately \$400,000 of this as savings to New York State and approximately \$400,000 as savings to the federal government. This is a result of the summer camp not being able to bill respite services.

There will be no new costs or savings to local governments as a result of the proposed amendments.

b. Costs to Private Regulated Parties: The operator of the one summer camp that currently bills respite services for individuals who live in IRAs with live-in staff will no longer be able to bill for those respite services. If the provider chooses to continue to provide summer camp opportunities for these individuals without seeking alternative funding, the provider will incur a loss of \$800,000. However, as noted above, other funding sources may be available to pay for camp, or the individuals may forgo attendance at camp. The camp may also be able to serve other individuals instead of the IRA residents. These scenarios would mitigate the impact on the provider.

5. Local Government Mandates: There are no new mandates on local governmental units or any other special districts.

6. Paperwork: The operator of the summer camp will not be able to bill for respite services, thereby reducing the reporting and service documentation that is required to bill for HCBS waiver services. Professional services will not be needed to implement the rule.

7. Duplication: None.

8. Alternatives: OMRDD considered leaving the regulations unchanged. However, OMRDD considers it important to clarify the applicability of the rate setting regulations in free-standing respite given the confusion that exists in the field. OMRDD considered making the changes to eliminate IRA live-in staff as ineligible for respite reimbursement in the spring of 2009. However, it was decided to allow the one provider a year to accommodate to this change. OMRDD did not consider continuing the inequitable practice of allowing the provider to receive reimbursement for respite provided for residents of IRAs with live-in staff.

9. Federal Standards: The proposed amendments do not exceed any minimum standards of the Federal government.

10. Compliance Schedule: It is OMRDD's intent to finalize the proposed amendments as quickly as allowed by the requirements of SAPA.

Regulatory Flexibility Analysis

1. Effect on small businesses: These proposed amendments apply to organizations that operate facilities under the auspices of OMRDD.

While most of the organizations employ more than 100 people overall, many of the facilities operated by the organizations at discrete sites (e.g. small free-standing respite centers) employ fewer than 100 employees at each site, and each site (if viewed independently) would therefore be classified as a small business. Some smaller organizations which employ fewer than 100 employees would themselves be classified as small businesses.

The operator of the one summer camp which is currently billing respite services to serve individuals who live in IRAs with live-in staff employs more than 100 persons and therefore is not classified as a small business.

The proposed amendments have been reviewed by OMRDD in light of their impact on these small businesses and on local governments. OMRDD has determined that the proposed amendments will not cause undue hardship to small business providers because there are no increased costs and no increased compliance requirements for small businesses or local governments.

The proposed amendments result in no new costs for local government.

2. Compliance requirements: Existing free-standing respite centers will be compliant with the proposed amendments. The proposed amendments contain no compliance requirements for local governments.

3. Professional services: No additional professional services are required as a result of these proposed amendments. The proposed amendments will have no impact on the professional service needs of the local government.

4. Compliance costs: There are no costs to local governments.

5. Economic and technological feasibility: The proposed amendments do not impose on regulated parties the use of any technological processes.

6. Minimizing adverse economic impact: These proposed amendments impose no adverse economic impact on local governments or small businesses.

7. Small business and local government participation: This regulation has been anticipated since January, 2007, and was discussed with the Provider Council at that time as well as on several subsequent occasions. For all intents and purposes, this regulation does not change any aspect of a provider's delivery and reimbursement of free-standing respite services.

By letter dated January 25, 2009 the one operator of the summer camp billing respite services for individuals living in IRAs with live-in staff was notified of OMRDD's intent to revise the respite regulations to delete IRA live-in staff from the list of primary caregivers.

Rural Area Flexibility Analysis

The amendments propose to clarify the reimbursement regulations for free-standing respite centers and to change respite eligibility for individuals who reside in community residences or IRAs with live-in staff to make it consistent with the eligibility for individuals who live in residences without live-in staff. Respite services would no longer be available for individuals in IRAs or community residences with live-in staff.

1. The proposed regulation may impact one rural area. The operator of a summer camp located in a rural area is currently billing for the provision of respite services for individuals who live in IRAs with live-in staff operated by the same provider.

2. There are no reporting, recordkeeping or other compliance requirements. The operator of the summer camp will not be able to bill for respite services, thereby reducing the reporting and service documentation that is required to bill for respite services. Professional services will not be needed to implement the rule.

3. There are no initial capital costs or costs of complying with the

rule. However, the operator of the summer camp will be unable to bill approximately \$800,000 in respite services for individuals it serves who live in IRAs with live-in staff. It is unclear whether the provider and/or affected individuals will obtain alternative funding to continue to send the individuals to summer camp, or whether the camp will be able to serve other individuals instead. If the camp attendance goes down, the operations of the summer camp may be curtailed. Alternatively, the camp may choose to reduce or waive normal camp charges for these individuals, which may affect camp revenues.

4. Minimizing economic impact: Individuals who live in IRAs with live-in staff and the provider of the IRA have access to the same funding sources to pay for summer camp that are available to individuals in IRAs without live-in staff.

5. Participation of public and private interests: By letter dated January 25, 2009 the one operator of the summer camp billing respite services for individuals living in IRAs with live-in staff was notified of OMRDD's intent to revise the regulation pertaining to respite services.

Job Impact Statement

1. Nature of the impact on jobs and employment opportunities: The amendments may adversely impact existing jobs or employment opportunities. The amendments propose to clarify the reimbursement regulations for free-standing respite centers and to change respite eligibility for individuals who reside in community residences or IRAs with live-in staff to make it consistent with the eligibility for individuals who live in residences without live-in staff. One operator of a summer camp is currently billing approximately \$800,000 per year to provide respite services for individuals who live in IRAs with live-in staff operated by the same provider. The provider would no longer be able to bill for these services. It is unclear whether the provider and/or affected individuals will obtain alternative funding to continue to send the individuals to summer camp, or whether the camp may be able to serve other individuals instead. If the camp attendance goes down, the operations of the summer camp may be curtailed and fewer individuals may be hired by the summer camp.

2. Categories of jobs or employment opportunities affected by the rule: The employment opportunities offered by a summer camp for individuals with developmental disabilities might be affected. These include direct care professionals, food service staff, nurses and administrators.

3. Number of positions in each category: It is difficult to estimate the number of positions that might be lost in each category. The most prevalent jobs at this summer camp are for direct care professionals. As noted above, it is difficult to predict the actual impact on the summer camp operator.

4. Regions affected: The camp is located in the Catskills.

5. Minimizing adverse impacts: Individuals who live in IRAs with live-in staff and the provider of the IRA have access to the same funding sources to pay for summer camp that are available to individuals in IRAs without live-in staff.

Power Authority of the State of New York

NOTICE OF ADOPTION

Rates for the Sale of Power and Energy

I.D. No. PAS-02-10-00005-A

Filing Date: 2010-03-29

Effective Date: 2010-04-01

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

Action taken: Revision in rates for Village of Tupper Lake.

Statutory authority: Public Authorities Law, section 1005(3)

Subject: Rates for the sale of power and energy.

Purpose: Maintain system's fiscal integrity; this increase in rates does not result from a Power Authority rate increase to the Village.

Text or summary was published in: the January 13, 2010 issue of the Register, I.D. No. PAS-02-10-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Karen Delince, Corporate Secretary, Power Authority of the State of New York, 123 Main Street, 11-P, White Plains, NY 10601, (914) 390-8085, email: secretarys.office@nypa.gov

Assessment of Public Comment

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

Public Service Commission

NOTICE OF ADOPTION

Electric Rates and Charges

I.D. No. PSC-46-08-00005-A

Filing Date: 2010-03-30

Effective Date: 2010-03-30

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

Action taken: On 3/25/10, the PSC adopted an order, making permanent Central Hudson Gas and Electric Corporation's amendments to PSC 15—Electricity.

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

Subject: Electric rates and charges.

Purpose: To make permanent amendments to PSC 15—Electricity.

Substance of final rule: The Commission, on March 25, 2010, adopted an order, making permanent Central Hudson Gas and Electric Corporation's amendments to PSC 15—Electricity, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

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

(08-E-0887SA1)

NOTICE OF ADOPTION

Gas Rates and Charges

I.D. No. PSC-46-08-00011-A

Filing Date: 2010-03-30

Effective Date: 2010-03-30

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

Action taken: On 3/25/10, the PSC adopted an order, making permanent Central Hudson Gas and Electric Corporation's amendments to PSC 12—Gas.

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

Subject: Gas rates and charges.

Purpose: To make permanent amendments to PSC 12—Gas.

Substance of final rule: The Commission, on March 25, 2010, adopted an order, making permanent Central Hudson Gas and Electric Corporation's (company) amendments to PSC 12—Gas, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-G-0888SA1)

NOTICE OF ADOPTION

Petition for Rehearing by Consolidated Edison Company of New York, Inc.

I.D. No. PSC-30-09-00012-A

Filing Date: 2010-03-29

Effective Date: 2010-03-29

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

Action taken: On 3/25/10, the PSC adopted an order approving in part Consolidated Edison Company of New York, Inc.'s request to rescind the requirement to provide for the "warm transfer" of customer calls from the company to the ESCOs.

Statutory authority: Public Service Law, sections 5(1)(b), 22 and 66(1)

Subject: Petition for rehearing by Consolidated Edison Company of New York, Inc.

Purpose: To approve in part a request to rescind the requirement to provide for the "warm transfer" of customer calls.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving in part Consolidated Edison Company of New York, Inc.'s (company) request to rescind the requirement to provide for the "warm transfer" of customer calls from the company to the ESCOs as a component of its ESCO Referral Program, PowerMove, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-E-0523SA7)

NOTICE OF ADOPTION

Petition for Rehearing

I.D. No. PSC-32-09-00010-A

Filing Date: 2010-03-29

Effective Date: 2010-03-29

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

Action taken: On 3/25/10, the PSC adopted an order, regarding Central Hudson Gas and Electric Corporation's Petition for Rehearing of the Commission's June 22, 2009 order.

Statutory authority: Public Service Law, sections 4(1), 22, 65(1), 66(1) and (12)

Subject: Petition for rehearing.

Purpose: To approve in part and deny in part the petition for rehearing.

Substance of final rule: The Commission, on March 25, 2010, adopted an order, denying in part and granting in part Central Hudson Gas and Electric Corporation's Petition for Rehearing of the Commission's June 22, 2009 Order Adopting Recommended Decision with Modifications, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-G-0888SA2)

NOTICE OF ADOPTION

Petition for Rehearing

I.D. No. PSC-32-09-00011-A

Filing Date: 2010-03-29

Effective Date: 2010-03-29

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

Action taken: On 3/25/10, the PSC adopted an order, regarding Central Hudson Gas and Electric Corporation's Petition for Rehearing of the Commission's June 22, 2009 order.

Statutory authority: Public Service Law, sections 4(1), 22, 65(1), 66(1) and (12)

Subject: Petition for rehearing.

Purpose: To approve in part and deny in part the petition for rehearing.

Substance of final rule: The Commission, on March 25, 2010, adopted an order, denying in part and granting in part Central Hudson Gas and Electric Corporation's Petition for Rehearing of the Commission's June 22, 2009 Order Adopting Recommended Decision with Modifications, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(08-E-0887SA2)

NOTICE OF ADOPTION

Capacity Release Service

I.D. No. PSC-32-09-00018-A

Filing Date: 2010-03-25

Effective Date: 2010-03-25

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

Action taken: On 3/25/10, the PSC adopted an order directing Orange and Rockland Utilities, Inc. to cancel amendments to PSC 4 – Gas, modifying the companies' Capacity Release Service available to qualified sellers.

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

Subject: Capacity Release Service.

Purpose: To cancel amendments to PSC 4 – Gas.

Substance of final rule: The Commission, on March 25, 2010, adopted an order, directing Orange and Rockland Utilities, Inc.'s to cancel amendments to PSC 4 – Gas, effective November 9, 2009 and postponed to April 1, 2010, to change the terms under which the company releases upstream pipeline capacity to marketers and to allow the company to release capacity at their weighted average cost of capacity, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or

social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-G-0567SA1)

NOTICE OF ADOPTION

Capacity Release Service

I.D. No. PSC-32-09-00019-A
Filing Date: 2010-03-25
Effective Date: 2010-03-25

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

Action taken: On 3/25/10, the PSC adopted an order directing Consolidated Edison Company of New York, Inc. to cancel amendments to PSC 9 – Gas, modifying the companies' Capacity Release Service available to qualified sellers.

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

Subject: Capacity Release Service.

Purpose: To cancel amendments to PSC 9 – Gas.

Substance of final rule: The Commission, on March 25, 2010, adopted an order directing Consolidated Edison Company of New York, Inc.'s to cancel amendments to PSC 9 – Gas, effective November 9, 2009 and postponed to April 1, 2010, to change the terms under which the company releases upstream pipeline capacity to marketers and to allow the company to release capacity at their weighted average cost of capacity, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-G-0568SA1)

NOTICE OF ADOPTION

Transfer of a Lightly-Regulated 138 KV Substation Located in Tonawanda, New York

I.D. No. PSC-39-09-00017-A
Filing Date: 2010-03-30
Effective Date: 2010-03-30

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

Action taken: On 3/25/10, the PSC adopted an order approving the transfer of a lightly-regulated 138 kV substation located in Tonawanda, New York from General Motors Corporation to General Motors Company.

Statutory authority: Public Service Law, section 70

Subject: Transfer of a lightly-regulated 138 kV substation located in Tonawanda, New York.

Purpose: To approve the transfer of a lightly-regulated 138 kV substation located in Tonawanda, New York.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving the transfer of a lightly-regulated 138 kV substation located in Tonawanda, New York from General Motors Corporation to General Motors Company, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or

social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-E-0656SA1)

NOTICE OF ADOPTION

Alternative Treatment of Revenues and Costs Associated with Transportation of Natural Gas

I.D. No. PSC-41-09-00012-A
Filing Date: 2010-03-29
Effective Date: 2010-03-29

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

Action taken: On 3/25/10, the PSC adopted an order denying Corning Natural Gas Corporation's request for an alternative treatment of local production revenues associated with transportation of locally produced natural gas.

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

Subject: Alternative treatment of revenues and costs associated with transportation of natural gas.

Purpose: To deny Corning's petition for alternative treatment of revenues and costs associated with transportation of natural gas.

Substance of final rule: The Commission, on March 25, 2010, adopted an order denying Corning Natural Gas Corporation's request for an alternative treatment of local production revenues associated with transportation of locally produced natural gas, and directed the company to refund 90% of all revenues generated from receipt of local production gas in excess of the \$250,000 imputation, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(07-G-0772SA3)

NOTICE OF ADOPTION

Disposition of Property Tax Refunds Received by Long Island Water Corporation

I.D. No. PSC-44-09-00018-A
Filing Date: 2010-03-26
Effective Date: 2010-03-26

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

Action taken: On 3/25/10, the PSC adopted an order regarding disposition of a property tax refund received by Long Island Water Corporation and adopted the terms of a Joint Proposal.

Statutory authority: Public Service Law, section 113(2)

Subject: Disposition of property tax refunds received by Long Island Water Corporation.

Purpose: To approve the disposition of property tax refunds received by Long Island Water Corporation.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving the disposition of property tax refunds received by Long Island Water Corporation and adopting the terms of a joint proposal, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commis-

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-W-0581SA1)

NOTICE OF ADOPTION

Major Electric Rate Filing

I.D. No. PSC-46-09-00005-A

Filing Date: 2010-03-26

Effective Date: 2010-03-26

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

Action taken: On 3/25/10, the PSC adopted an order approving the joint proposal for Consolidated Edison Company of New York, Inc.'s three-year Electric Rate Plan.

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

Subject: Major electric rate filing.

Purpose: To approve a three-year Electric Rate Plan and for leveled electric rate increases in 2010, 2011 and 2012.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving the joint proposal for Consolidated Edison Company of New York, Inc.'s three-year Electric Rate Plan and for leveled electric rate increases in 2010, 2011 and 2012, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-E-0428SA1)

NOTICE OF ADOPTION

Uniform System of Accounts for Accounting Authorization

I.D. No. PSC-48-09-00013-A

Filing Date: 2010-03-26

Effective Date: 2010-03-26

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

Action taken: On 3/25/10, the PSC adopted an order approving the petition of United Water Westchester Inc. to defer the costs of undisputed purchased water costs.

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

Subject: Uniform System of Accounts for Accounting Authorization.

Purpose: To approve United Water Westchester Inc. to defer the costs of undisputed purchased water costs.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving the petition of United Water Westchester Inc. to defer the costs of undisputed purchased water costs incurred during the period June 2008 through August 2009 plus accrued interest of the disputed purchased water costs incurred during the period July 2009 through August 2009; and the cost of retroactive power and chemical expenses associated with purchased water during 2007 and 2008, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-

2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-W-0778SA1)

NOTICE OF ADOPTION

To Modify Demand Response Programs and Approve a Cost Recovery Mechanism

I.D. No. PSC-01-10-00014-A

Filing Date: 2010-03-25

Effective Date: 2010-03-25

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

Action taken: On 3/25/10, the PSC adopted an order approving Consolidated Edison Company of New York, Inc.'s amendments to PSC 9 – Electricity, effective December 15, 2009 on a temporary basis, to modify demand response programs and approve a cost recovery mechanism.

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

Subject: To modify demand response programs and approve a cost recovery mechanism.

Purpose: To approve a cost recovery mechanism for New York Power Authority customers.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving Consolidated Edison Company of New York, Inc.'s amendments to PSC 9 – Electricity, effective December 15, 2009 on a temporary basis, to modify demand response programs and approve a cost recovery mechanism for New York Power Authority customers, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-E-0115SA5)

NOTICE OF ADOPTION

Joint Proposal for Electric Capital Expenditures

I.D. No. PSC-01-10-00019-A

Filing Date: 2010-03-26

Effective Date: 2010-03-26

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

Action taken: On 3/25/10, the PSC adopted an order approving, with modifications, the joint proposal regarding the examination of Consolidated Edison Company of New York, Inc.'s electric capital expenditures.

Statutory authority: Public Service Law, sections 65(1), 66(1), (4), (5), (9), (10), (11), (19) and 113

Subject: Joint proposal for electric capital expenditures.

Purpose: To approve the joint proposal for electric capital expenditures.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving, with modifications, the joint proposal regarding Consolidated Edison Company of New York, Inc.'s electric capital expenditures and directed the company to file tariff revisions necessary to effectuate the provisions, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-

2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (07-E-0523SA8)

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-03-10-00005-A

Filing Date: 2010-03-25

Effective Date: 2010-03-25

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

Action taken: On 3/25/10, the PSC adopted an order approving Martin Rosenwasser and Edward Kravitz's tariff revisions to P.S.C. No. 2 – Water, effective May 1, 2010, to provide additional annual revenues of \$172 or 107%.

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

Subject: Water rates and charges.

Purpose: To approve additional annual revenues of \$172 or 107%, effective 5/1/10.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving Martin Rosenwasser and Edward Kravitz's tariff revisions to P.S.C. No. 2 – Water, effective May 1, 2010, to provide additional annual revenues of \$172 or 107%, subject to the terms and conditions set forth in the order.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-W-0866SA1)

NOTICE OF ADOPTION

Amendments to PSC 8 – Gas, to Add a Provision That Notifies Suppliers Via Website

I.D. No. PSC-04-10-00009-A

Filing Date: 2010-03-25

Effective Date: 2010-03-25

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

Action taken: On 3/25/10, the PSC adopted an order approving National Fuel Gas Distribution Corporation's amendments to PSC 8 – Gas, postponed to March 28, 2010, to add a provision that notifies suppliers of post instructions on its website.

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

Subject: Amendments to PSC 8 – Gas, to add a provision that notifies suppliers via website.

Purpose: To approve amendments to PSC 8 – Gas, to add a provision that notifies suppliers via website.

Substance of final rule: The Commission, on March 25, 2010, adopted an order approving National Fuel Gas Distribution Corporation's (company) amendments to PSC 8 – Gas, effective March 25, 2010, and postponed to March 28, 2010, to add a provision that notifies suppliers that the company may post instructions on its website regarding the minimum flow requirements which are applicable to Mandatory Upstream Transmission Capacity delivery points and to update the company's Grandfathered Upstream Transmission Capacity threshold level.

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

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

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (10-G-0002SA1)

Department of State

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Security Guard Registration for Bouncers

I.D. No. DOS-15-10-00010-P

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

Proposed Action: Amendment of section 170.1 of Title 19 NYCRR.

Statutory authority: General Business Law, section 89-o

Subject: Security guard registration for bouncers.

Purpose: To clarify security guard registration requirements for bouncers.

Text of proposed rule: Section 170.1 is amended to read as follows:

170.1 Security guards

(a) A person described in General Business Law, section 89-f(6) is a security guard if he or she principally performs the activities of prevention, deterrence, control or enforcement.

(b) For purposes of this Part:

(1) prevention includes protecting persons and/or property from harm, theft, and other unlawful activity, including response to a security systems alarm;

(2) deterrence includes deterring, observing, detecting, and reporting unlawful or unauthorized activity;

(3) control includes controlling, by street or other patrol service, access to property, including employee personnel, visitors, vehicles and traffic;

(4) enforcement includes enforcing security policies, rules, regulations, and procedures.

(c) Principally performing shall mean:

(1) engaged in the functions set forth in subdivision (b) of this section for more than 50 percent of the person's regularly scheduled work hours. *However, those individuals who perform duties within, about, in front of or adjacent to, or in any parking lot provided for patrons of an establishment licensed pursuant to the alcoholic beverage control law for the sale and/or consumption of alcoholic beverages on the premises, for any period of time whatsoever, and who are employed, permitted with or without compensation, or retained as an independent contractor by an on-premises alcoholic beverage licensee to grant or refuse admission, to escort a patron or prospective patron from the establishment licensed pursuant to the alcoholic beverage control law and/or areas under the control of the establishment licensed pursuant to the alcoholic beverage control law, to keep order, to protect persons and/or property from harm and to deter, prevent, terminate and report any unlawful or authorized activity shall be deemed to principally perform security guard functions and shall be required to register as a security guard pursuant to Article 7-A of the General Business Law;* or

(2) employed to perform any or all of the above functions for any duration, with the condition of such employment being that he or she is armed with a weapon; or

(3) employed to perform any or all of the above functions for any

duration, with the condition of such employment being that he or she wear a military style uniform or insignia, either being indicative of security guard status.

(d) Police officers.

(1) When employed by a security guard company, an off-duty police officer is exempt from the registration, fingerprinting and training provisions of General Business Law, article 7-A. When employed by a security guard company, a retired or former police officer must comply with the registration, fingerprinting and training provisions of General Business Law, article 7-A.

(2) Before employing an off-duty police officer as a security guard, a security guard company licensed pursuant to General Business Law, article 7 shall obtain an employee statement from the off-duty police officer as required by *General Business Law, section 81(2)*; provided, however, the off-duty police officer shall be exempt from the fingerprinting provisions of *General Business Law, section 81*, subdivisions (3), (4), (5), (6) and (7).

(e) Peace officers. When employed by a security guard company, an off-duty peace officer must comply with the registration and fingerprinting provisions of General Business Law, article 7-A. The peace officer must also comply with the training provisions of *General Business Law, section 89-n* subject to that section's special exceptions for peace officers.

(f) For the purposes of General Business Law, articles 7 and 7-A, a security guard is considered to be employed by a security guard company if the security guard is not independently licensed as a private investigator or as a watch, guard or patrol agency pursuant to General Business Law, article 7, even if the security guard is treated as an independent contractor by the security guard company for Federal or State tax purposes.

Text of proposed rule and any required statements and analyses may be obtained from: Whitney Clark, Department of State, Division of Licensing Services, 80 South Swan Street, PO Box 22001, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Article 7-A (Security Guard Act) of the General Business Law was enacted as Chapter 336 of the Laws of 1992. Section 89-o, authorizes the Secretary of State to adopt rules and regulations implementing the provisions of Article 7-A in consultation with the Security Guard Advisory Council. Section 89-o, further states: "[s]uch rules and regulations shall include criteria for determining whether a person is a security guard or whether a particular function is a security guard function as defined by subdivision six of section 89-f of this article." This rule clarifies the requirement that bouncers be registered as security guards pursuant to Article 7-A. Accordingly, the Secretary of State has express authority to adopt this rule.

2. Legislative objectives:

By enacting the Security Guard Act the Legislature sought, in part, to "establish uniform standards for the employment, registration, training [and] enforcement... of security guards and the security guard industry within the state." 1992 N.Y. Laws 336. The Legislature found that the ever increasing number of unregulated and unlicensed security guards who "may lack sufficient training and their nexus to the general public" is a matter of such compelling state concern as to require the creation of certain minimum recruitment and training standards. *Id.* As provided for in section 89-o of the General Business Law, this rule establishes registration requirements of bouncers who perform security guard functions. The Secretary has found that current regulations have been misinterpreted by the industry and that, as a result, many bouncers fail to comply with the registration requirements of the Security Guard Act. The Secretary has further found that unregistered bouncers continue to be a danger to the safety and general welfare of the public and the proposed rule is necessary to protect the citizens of the State. Accordingly, this rule advances the stated

objectives of the Legislature when it enacted Article 7-A. After consulting with the Security Guard Advisory Council, the Department has determined that the proposed rule is necessary.

3. Needs and benefits:

This rule is needed in order to more adequately protect the public against unregulated and unlicensed bouncers. As part of their employment, bouncers perform security related duties such as protecting persons and property from harm and controlling access to the establishments where they are employed. Insofar as bouncers interact with patrons who may be intoxicated or otherwise impaired, proper training as a security guard is crucial as is the need for a criminal history background check which all security guards must undergo as part of the registration process.

Recent events highlight the need for this training and registration. In June 2009, Darryl Littlejohn was convicted of rape and first degree murder for the death of a patron from a bar where he was employed as a bouncer. (Shifrel, Scott and Goldiner, Dave, Darryl Littlejohn Gets Life Without Parol in Death of Imette St. Guillen, NY Daily News, July 8, 2009). In July 2009, a patron of a Rochester area night-club fell to his death after being chased by up to nine bouncers. (McLendon, Gary, Questions Linger in Water Street Chase That Ended with Death, Democrat and Chronicle, February 1, 2009). In August 2008, Ingrid Rivera, a 24 year old patron of a Times Square night-club was found beaten to death on the roof of the establishment. Club employees, including bouncers, were the initial suspects in Ms. Rivera's death. (Kerry Burke, Employee Questioned in Beating Death of Woman at Times Square Night club, NY Daily News, August 7, 2008). In 2006, Stephen Sakai, a New York City bouncer, was charged with shooting patrons outside a Manhattan nightclub and with three killings in Brooklyn, NY. Michael Brick, Law Officials Say Bouncer Is Indicted in 3 More Deaths, N.Y. Times, July 13 2006, at B1.

Unless the registration requirements of Article 7-A are clarified, the public's safety and general welfare will continue to be jeopardized by this largely, unlicensed profession. Accordingly, the Secretary of State has determined that the instant rule making is necessary to protect the general welfare and safety of the public.

4. Costs:

a. Costs to regulated parties:

Bouncers who complete the registration process in compliance with the proposed regulation will incur costs associated with applying for a security guard registration and completing the required training. The Department of State charges an application fee of \$36.00 for registering as a security guard. Applicants must also pay the following fingerprint fees: \$75.00 for a State criminal history search, \$19.25 in FBI fingerprint fees and \$11.50 in DCJS vendor fees for electronic submission of the applicant's fingerprints. Registered security guards are required to complete an eight hour pre-assignment training course, 16 hours of on-the job training and 8 hours of annual training. The cost of this training varies. Some employers provide the training at no cost. Others send security guard employees to educational institutions to complete the training. The cost of completing the training at these education institutions varies from \$20.00 to \$100 for each of the required three courses.

Bars and other establishments employing bouncers will also have to become registered with the Department of State as proprietary security guard employers. There is no cost for obtaining this registration.

b. Cost to the Department of State:

The Department of State anticipates that the cost of implementation and continued administration of this rule will be minimal and that the Department's mandate to adopt future rules and regulations implementing the provisions of Article 7-A can be accomplished by using existing staff and resources.

c. Cost to State and local governments:

The rule does not otherwise impose any implementation or compliance costs on State or local governments.

5. Local mandates:

The rule does not impose any program, service, duty or other responsibility on local governments.

6. Paperwork:

The rule does not impose paperwork requirements on the regulated parties other than registration and those already imposed pursuant to Article 7-A of the General Business law and the regulations promulgated thereunder.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State has been contacted by the State Liquor Authority which is charged with the enforcement and administration of the Alcoholic Beverage Control Law. Both administrative bodies are in agreement that regulations requiring registration and training of bouncers are needed to better protect the public against the dangers of this unlicensed profession. The State Liquor Authority expressed interest in amending its own regulations to require compliance with the current security guard regulations. However, as the Department of State is charged with the enforcement and administration of said regulations, it was decided that the State Department should adopt this rule.

The Department of State also considered not amending existing regulations but, rather, to educate the public about the need for bouncers to register as security guards. A series of seminars were held around New York State with local law enforcement. Since these educational seminars were held, however, raids by the State Liquor Authority have continued to find unregistered bouncers being employed at bars, taverns and night-clubs. Events surrounding death and injury to patrons of these establishments by bouncers have continued, thereby convincing the Department that the proposed regulation is necessary.

9. Federal standards:

There are no federal standards for the registration and training of bouncers. Accordingly, this rule is not pre-empted by any existing federal standard.

10. Compliance schedule:

The Department anticipates that bouncers would be able to begin earning accreditation and become registered immediately. The rule will be effective 90 days after adoption to afford bouncers and bouncer employers time to comply with this rule.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will require bouncers to become registered as security guards. As a result, the proposed rule will effect those business which employ bouncers; particularly bars, taverns and night-clubs. Many of these establishments are small businesses. The State Liquor Authority licenses 25,567 establishments where the consumption of alcohol is permitted. Any one of these establishments may employ one or more bouncers.

The rule does not apply to local governments.

2. Compliance requirements:

To comply with the proposed rule, bouncers will be required to successfully complete the security guard training required by Article 7-A of the Security Guard Act. This training consists of the following courses: an 8 hour pre-assignment training course, a 16 hour on-the-job training course and an annual training course of 8 hours. Bouncers will also be required to submit a security guard application to the Department of State with two sets of fingerprint cards and pay the following fees: \$36 registration fee, \$75 NYS fingerprint fee, \$19.25 FBI fingerprint fee and \$11.50 DCJS vendor fee.

Employers of security guards are required to become registered as authorized security guard employers. The registration process consists of filing an application with the Department of State. There is no registration or other fee. Employers must also ensure that prospective bouncer employees are properly registered as security guards. This process entails obtaining an Employee Statement from the prospective employee and contacting the Department of State to ensure that the prospective employee is eligible for employment. Employers are required to maintain employee records throughout the period of employment and for one year after the employee ceases working for the employer.

3. Professional services:

Bouncers may require professional services to complete the required security guard training. While some employers offer this training to security guard employees at no charge, others require the employees to obtain the required training at security guard schools. Numerous schools exist throughout the state and offer the training at a cost of \$20-\$100 per class.

The Department of State does not anticipate that employers of security guards will need to obtain professional services to comply with the proposed rule. As set forth above, compliance requirements for employers of security guards consist primarily of filing an application with the Department of State, obtaining employee statements from prospective employees and contacting the Department of State to ensure that the prospective employee is eligible for employment. It is believed that these tasks can be completed easily by employers without assistance of any professionals.

4. Compliance costs:

Bouncers who complete the registration process in compliance with the proposed regulation will incur costs associated with applying for a security guard registration and completing the required training. The Department of State charges an application fee of \$36.00 for registering as a security guard. Applicants must also pay the following fingerprint fees: \$75.00 for a State criminal history search, \$19.25 in FBI fingerprint fees and \$11.50 in DCJS vendor fees for electronic submission of the applicant's fingerprints. Registered security guards are required to complete an eight hour pre-assignment training course, 16 hours of on-the job training and 8 hours of annual training. The cost of this training varies. Some employers provide the training at no cost. Others send security guard employees to educational institutions to complete the training. The cost of training at these education institutions varies from \$20.00 to \$100 per course.

Bars and other establishments employing bouncers will also have to become registered with the Department of State as proprietary security guard employers. There is no cost for obtaining this registration.

5. Economic and technological feasibility:

The Department has determined that it will be economically and technologically feasible for small businesses to comply with the proposed rule. The compliance requirements for businesses which employ security guards are minimal and consist largely of ministerial tasks of filing a registration application with the Department, having prospective employees complete an employee statement, and contacting the Department of State to ensure that the prospective employee is eligible for employment.

There is no cost for obtaining an employer registration with the Department of State. The Department does not anticipate that employers will incur any other costs in complying with the proposed rule.

6. Minimizing adverse economic impact:

In considering whether to advance the proposed rule, the Department of State considered its impact; particularly on employment opportunities in New York State. It was determined that clarifying existing regulations to ensure the security guard registration of bouncers, would have a positive economic impact insofar as it will increase employment opportunities for bouncers. Employers throughout New York State employ security guards to protect persons and property and to prevent unauthorized access. The proposed rule would require bouncers to complete security guard training and obtain a New York State security guard registration. This will enable bouncers to obtain employment in the security field. Numerous employment opportunities exist for security guards throughout New York. As such, the proposed rule will expand employment opportunities for bouncers and have a positive economic impact.

7. Small business participation:

Prior to proposing the rule, the Department of State held a series of seminars throughout the State with the State Liquor Authority and local law enforcement. These educational seminars on the requirements of the Security Guard Act were attended by many business representatives, including those of small businesses. The State Liquor Authority has also widely shared its interpretation of the Security Guard Act and that said statute requires the registration of bouncers. In raids and

inspections of establishments licensed by said agency, the SLA has issued citations for the employment of unregistered security guards. The Department of State will continue its outreach after the rule is formally proposed as a Notice of Proposed Rule Making in the State Register. The publication of the rule in the State Register will provide additional notice to small businesses. Additional comments will be received and entertained by the Department.

Rural Area Flexibility Analysis

1. Effect of the rule:

The rule will apply to bouncers employed by establishments licensed by the State Liquor Authority. The State Liquor Authority licenses 25,567 establishments where the consumption of alcohol is permitted. Any one of these establishments may employ one or more bouncers.

2. Compliance requirements:

To comply with the proposed rule, bouncers will be required to successfully complete the security guard training required by Article 7-A of the Security Guard Act. This training consists of the following courses: an 8 hour pre-assignment training course, a 16 hour on-the-job training course and an annual training course of 8 hours. Bouncers will also be required to submit a security guard application to the Department of State with two sets of fingerprint cards and pay the following fees: \$36 registration fee, \$75 NYS fingerprint fee, \$19.25 FBI fingerprint fee and \$11.50 DCJS vendor fee.

Employers of security guards are required to become registered as authorized security guard employers. The registration process consists of filing an application with the Department of State. There is no registration or other fee. Employers must also ensure that prospective bouncer employees are properly registered as security guards. This process entails obtaining an Employee Statement from the prospective employee and contacting the Department of State to ensure that the prospective employee is eligible for employment. Employers are required to maintain employee records throughout the period of employment and for one year after the employee ceases working for the employer.

3. Professional services:

Bouncers may require professional services to complete the required security guard training. While some employers offer this training to security guard employees at no charge, others require the employees to obtain the required training at security guard schools. Numerous schools exist throughout the state and offer the training at a cost of \$20-\$100 per class.

The Department of State does not anticipate that employers of security guards will need to obtain professional services to comply with the proposed rule. As set forth above, compliance requirements for employers of security guards consist primarily of filing an application with the Department of State, obtaining employee statements from prospective employees and contacting the Department of State to ensure that the prospective employee is eligible for employment. It is believed that these tasks can be completed easily by employers without assistance of any professionals.

4. Compliance costs:

Bouncers who complete the registration process in compliance with the proposed regulation will incur costs associated with applying for a security guard registration and completing the required training. The Department of State charges an application fee of \$36.00 for registering as a security guard. Applicants must also pay the following fingerprint fees: \$75.00 for a State criminal history search, \$19.25 in FBI fingerprint fees and \$11.50 in DCJS vendor fees for electronic submission of the applicant's fingerprints. Registered security guards are required to complete an eight hour pre-assignment training course, 16 hours of on-the job training and 8 hours of annual training. The cost of this training varies. Some employers provide the training at no cost. Others send security guard employees to educational institutions to complete the training. The cost of training at these education institutions varies from \$20.00 to \$100 per course.

Bars and other establishments employing bouncers will also have to become registered with the Department of State as proprietary security guard employers. There is no cost for obtaining this registration.

5. Minimizing adverse economic impacts:

In considering whether to advance the proposed rule, the Department of State considered its impact; particularly on employment opportunities in New York State. It was determined that clarifying existing regulations to ensure the security guard registration of bouncers, would have a positive economic impact insofar as it will increase employment opportunities for bouncers. Employers throughout New York State employ security guards to protect persons and property and to prevent unauthorized access. The proposed rule would require bouncers to complete security guard training and obtain a New York State security guard registration. This will enable bouncers to obtain employment in the security field. Numerous employment opportunities exist for security guards throughout New York. As such, the proposed rule will expand employment opportunities for bouncers and have a positive economic impact.

6. Rural area participation:

Prior to proposing the rule, the Department of State held a series of seminars throughout the State with the State Liquor Authority and local law enforcement. These educational seminars on the requirements of the Security Guard Act were attended by many business representatives, including those from rural areas. The State Liquor Authority has also widely shared its interpretation of the Security Guard Act and that said statute requires the registration of bouncers. In raids and inspections of establishments licensed by said agency, the SLA has issued citations for the employment of unregistered security guards. The Department of State will continue its outreach after the rule is formally proposed as a Notice of Proposed Rule Making in the State Register. The publication of the rule in the State Register will provide additional notice to residents and business owners from rural areas. Additional comments will be received and entertained by the Department.

Job Impact Statement

1. Nature of the impact on jobs and employment opportunities.

The Department of State has determined that the proposed rule will promote the development of new employment opportunities for bouncers. Employment opportunities exist for security guards in a variety of venues including, but not limited to, shopping malls, grocery and department stores, sporting arenas and events and through other private and public employers. By requiring bouncers to obtain the training required by Article 7-A of the General Business Law (the "Security Guard Act") and become registered as security guards pursuant to said statute, the proposed rule will expand employment opportunities for bouncers.

The Department of State has also determined that the proposed rule will not have an adverse impact on existing jobs. For liability and security reasons, bars, taverns and night-clubs employ bouncers. These establishments will continue to need bouncer employees if the proposed rule is ultimately adopted. By requiring these employees to complete mandatory training and become registered as security guards will assure employers that they are employing trained, competent professionals. The training and registration requirements of the Security Guard Act are not onerous and can be easily completed by existing and prospective bouncers and the employers of these security guards.

2. Categories of jobs or employment opportunities affected by the proposed rule.

The proposed rule will affect those persons employed as bouncers. If the proposed rule is adopted, bouncers will expand their employment opportunities to include those in the security field.

3. The approximate number of jobs or employment opportunities affected in each category.

The Department of State has been unable to determine the number of bouncers who will be affected by this rule insofar as the State Liquor Authority does not maintain these numbers and it is believed that many bouncers work for cash and do not pay taxes. The State Liquor Authority licenses 25,567 establishments where the consumption of alcohol is permitted. Any one of these establishments may employ one or more bouncers.

4. Regional impact on jobs or employment opportunities.

The Department of State has determined that the proposed rule will

have a uniform impact throughout the State. Bouncers in the New York City area are already required to be registered security guards pursuant to local law. Many establishments in upstate New York employ bouncers as well, particularly in municipalities with one or more college or university.

5. Measures taken to minimize any unnecessary adverse impacts on exiting jobs and to promote the development of new employment opportunities.

In considering whether to advance the proposed rule, the Department of State considered its impact; particularly on employment opportunities in New York State. It was determined that clarifying existing regulations to ensure the security guard registration of bouncers, would have a positive impact on employment opportunities. Employers throughout New York State employ security guards to protect persons and property and to prevent unauthorized access. The proposed rule would require bouncers to complete security guard training and obtain a New York State security guard registration. This will enable bouncers to obtain employment in the security field. Numerous employment opportunities exist for security guards throughout New York. As such, the proposed rule will expand employment opportunities for bouncers.

State University of New York

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Alterations in Traffic Patterns, Speed Restrictions and Street Names

I.D. No. SUN-15-10-00006-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 584 of Title 8 NYCRR.

Statutory authority: Education Law, section 360(1)

Subject: Alterations in traffic patterns, speed restrictions and street names.

Purpose: To more clearly designate traffic flow and control as well as new street designations.

Substance of proposed rule (Full text is posted at the following State website: www.stonybrook.edu): The proposed changes to 8 NYCRR 584 reflect alterations in existing traffic patterns speed restrictions and changes in street names on the campuses of the State University of New York at Stony Brook, designed to further improve pedestrian and vehicular safety.

Additional amendments include vehicle registration instructions, parking permit requirements for faculty, staff, students and visitors, identification of restricted parking areas for notification of towing potential and clarification of enforcement responsibility.

Text of proposed rule and any required statements and analyses may be obtained from: Lynette M. Phillips, Esq., SUNY Stony Brook, Office of the University Counsel, 328 Administration Building, Stony Brook, New York 11794-1212, (631) 632-6110, email: Lynette.Phillips@stonybrook.edu

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

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

Regulatory Impact Statement

1. Statutory Authority: Education Law § 360(1).
2. Legislative Objectives: To provide for safety and convenience of students, faculty, employees and visitors to and on the property, roads, streets and highways under the supervision and control of the State University of New York through the regulation of vehicular and pedestrian traffic, parking and signage.
3. Needs and Benefits: Changes in traffic patterns and control designations on the State University campuses are designed to enable the campus community, visitors and emergency vehicles to traverse the campuses more safely and more efficiently.
4. Costs: None.

5. Local Government Mandates: None.
6. Paperwork: None.
7. Duplication: None.
8. Alternatives: None.
9. Federal Standards: There are no related Federal standards.
10. Compliance Schedule: The campus will notify those affected as soon as the rule is effective. Compliance should be immediate.

Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because this proposal does not impose any requirements on small businesses and local governments. This proposed rule making will not impose any adverse economic impact on small businesses and local governments or impose any reporting, record keeping or other compliance requirements on small businesses and local governments. The proposal addresses traffic pattern changes on the campuses of the State University of New York at Stony Brook.

Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because this proposal will not impose any adverse economic impact on rural areas or impose any reporting, record keeping or other compliance requirements on public or private entities in any rural area. The proposal addresses traffic pattern, control changes and street name designations on the campuses of the State University of New York at Stony Brook.

Job Impact Statement

No job impact statement is submitted with this notice because this proposal does not impose any adverse economic impact on existing jobs or employment opportunities. The proposal addresses traffic pattern changes on the campuses of the State University of New York at Stony Brook.