

# RULE MAKING ACTIVITIES

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

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

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

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## Education Department

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

#### Advisory Committee on Long-Term Clinical Clerkships

**I.D. No.** EDU-17-11-00013-EP

**Filing No.** 337

**Filing Date:** 2011-04-08

**Effective Date:** 2011-04-08

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

**Proposed Action:** Amendment of sections 3.2 and 60.2 of Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 6506(4), 6507(2), (4) and 6508(1)

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

**Specific reasons underlying the finding of necessity:** The proposed amendment to the Regulations of the Commissioner of Education and the Rules of the Board of Regents govern the process for approving international medical schools that seek authorization to place students in long-term clinical clerkships. Section 60.2 of the Regulations of the Commissioner provides that an unaccredited/unregistered medical school may place students in long-term clinical clerkships, provided that that the program in the medical school has been determined by the Department to meet substantially the requirements of section 60.1(a)(1) and Parts 50 and 52 of the Regulations of the Commissioner.

The proposed amendment establishes an Advisory Committee on Long-Term Clinical Clerkships to oversee the process for evaluating medical schools that seek authorization to place students in long-term clinical

clerkships in New York State, including the criteria and standards to be applied in reviewing such medical programs. Currently there are several programs that seek continuation of authorization that was previously granted. Other medical programs have requested first-time authorization and are awaiting an evaluation and site visit.

Emergency action is necessary to ensure that all programs that seek either a continuing approval or a first-time approval to place students in long-term clinical clerkships will be evaluated in a timely manner using uniform criteria and standards of review. Without emergency action, the reevaluation of programs that have already been approved and the approval of programs seeking first-time approval will be delayed.

**Subject:** Advisory Committee on Long-Term Clinical Clerkships.

**Purpose:** Establishes Advisory Committee to recommend standards for placement of students into long-term clinical clerkships in New York.

**Text of emergency/proposed rule:** 1. Paragraph (5) of subdivision (d) of section 3.2 of the Rules of the Board of Regents is amended, effective April 8, 2011, to read as follows:

(5) Committee on Professional Practice:

- (i) ...
- (ii) ...
- (iii) ...
- (iv) ...
- (v) ...
- (vi) ...
- (vii) ...
- (viii) ...
- (ix) ...

(x) reviews and approves appointments to the State [Board] *Boards* for the Professions; [and]

(xi) reviews and makes recommendations to the full board on incorporation and chartering of professional organizations and non-degree granting institutions or organizations related to the professions; *and*

(xii) *reviews recommendations of the Department relating to applications from international medical schools to place their students in long-term clinical clerkships in New York State.*

2. Section 60.2 of the Regulations of the Commissioner of Education is amended, effective April 8, 2011, to read as follows:

§ 60.2 Clinical clerkships.

(a) *Definitions: As used in this Part:*

(1) Clinical clerkship [as used in this Part] shall mean a supervised educational experience which is part of the clinical component of a program of undergraduate medical education, which takes place in a general hospital or in an equivalent health organization acceptable to the department and which is performed in accordance with all requirements of the jurisdiction in which such facility is located;

(2) *Long-term clinical clerkship shall mean a clinical clerkship which, in the aggregate of all clerkship experience received during two academic years, exceeds 12 weeks.*

- (b) ...
- (c) ...
- (d) ...
- (e) ...

(f) *Establishment of Advisory Committee on Long-Term Clinical Clerkships.*

(1) *Upon consultation with the Board of Regents, the Chancellor shall appoint an Advisory Committee on Long-Term Clinical Clerkships. The Committee shall serve in a consultative and advisory capacity on matters pertaining to the standards and process for approving international medical schools to place their students in long-term clinical clerkships in New York State and shall perform such specific tasks as are assigned by the Department or the Board of Regents.*

(2) *Composition of the committee. The committee shall consist of:*

(i) *one member of the Board of Regents, who will serve as co-chair of the committee along with the chairperson of the State Board for Medicine;*

(ii) the chairperson of the State Board for Medicine or another member of the such board designated by the chairperson, who will serve as co-chair of the committee along with the member of the Board of Regents;

(iii) the Executive Secretary of the State Board for Medicine, who shall be a non-voting member of the committee;

(iv) one representative of the Department of Health;

(v) two physicians who are experienced in the evaluation of medical education programs;

(vi) two representatives of international medical schools approved by the Department or Board of Regents to place their students in long-term clinical clerkships in New York State;

(vii) two representatives of medical schools registered in New York State; and

(viii) two representatives from hospitals that serve as sites for clinical clerkships in New York State.

(3) *Terms of members.* The terms of the members of the first committee appointed pursuant to subparagraphs (v) through (viii) of paragraph (2) of this subdivision shall be so arranged that the terms of two members shall expire on June 30, 2013, the terms of two on June 30, 2014, and the terms of two on June 30, 2015, and the terms of two on June 30, 2016. Thereafter, all members appointed pursuant to subparagraphs (v) through (viii) of paragraph (2) of this subdivision shall be appointed to serve a term of four years each, beginning with the first day of July next following the ending of the term to which each, respectively, is to succeed, except that an appointment to fill a vacancy created other than by the expiration of a term shall be for the unexpired term. Members shall serve no more than two terms in succession, except that a member may serve a succeeding third term if at least one of the preceding two terms was less than two years in duration. Members may again serve two terms in succession after a gap in service of at least four years.

(4) *Duties of the Advisory Committee on Long-Term Clinical Clerkships.* The committee shall gather and study existing research on relevant issues, such as health workforce demands and trends, health workforce diversity and Board of Regents policy determinations. Based on such research and policy determinations, the committee shall:

(i) make recommendations regarding the standards to be applied in assessing applications by international medical schools for approval to place their students in long-term clinical clerkships in New York State;

(ii) make recommendations regarding the process to be followed in assessing such applications for approval to place their students in long-term clinical clerkships;

(iii) appoint an appropriate site review team from a roster of individuals approved by the committee; and

(iv) after consideration of the site review report, issue a report and recommendation, with minority opinions reflected, as to whether an application for placement of students in a long-term clinical clerkship should be approved.

(5) After consideration of the committee's recommendations, the Department shall make a recommendation to the Board of Regents as to whether an application for authorization to place students in a long-term clinical clerkship should be approved. Upon approval by the Board of Regents, the medical school shall be authorized to place students in long-term clinical clerkships in New York State pursuant to standards and/or limitations prescribed by the Board of Regents.

(6) Until the Board of Regents approves the new standards and processes for approval for the placement of students in international medical schools in long-term clinical clerkships, schools currently approved for such purpose will continue to be subject to the current standards and processes prescribed in subdivision (c) of this section.

**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 July 6, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Christine Moore, NYS Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

**Data, views or arguments may be submitted to:** Seth Rockmuller, NYS Education Department, 89 Washington Avenue, 2nd Floor, West Wing, Albany, NY 12234, (518) 486-1765, email: opopr@mail.nysed.gov

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY:

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

Section 6501 of the Education Law provides that, to qualify for admission to a profession, an applicant must meet requirements prescribed in the article of the Education Law that pertains to the particular profession.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules relating to the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations relating to the professions.

Subdivision (1) of section 6508 of the Education Law authorizes the state boards for the professions to assist the Regents and the Department in matters of professional licensure and practice.

#### 2. LEGISLATIVE OBJECTIVES:

The proposed amendment to section 3.2 of the Rules of the Board of Regents expands the duties of the Board's Professional Practice Committee (PPC) to authorize the PPC to review the recommendations of the Department relating to applications from international medical schools to place students in long-term clinical clerkships in New York.

The proposed amendment of section 60.2 of the Regulations of the Commissioner of Education describes the composition of the Advisory Committee on Long-Term Clinical Clerkships, and specifies the terms of the committee members. The Committee would include one member of the Board of Regents, the chairperson of the State Board for Medicine, the Executive Secretary of the State Board of Medicine, one representative from the Department of Health, two representatives of medical schools registered in New York State, two representatives from international medical schools approved to place students in long-term clinical clerkships in New York State, two representatives from hospitals that serve as clinical clerkship sites, and two physicians experienced in evaluating medical education. The proposed regulations also define the duties of the committee, including the recommendation of standards and processes by which dual-campus international medical schools seeking authorization to operate in New York State would be evaluated. The Advisory Committee would also be responsible for appointing a site review team for each school seeking such authorization and, after consideration of the site review report, would issue a report with recommendations to the Department, with minority opinions reflected, as to whether an application should be approved. The Department would then make recommendations to the Board as to whether an application should be approved. Until the Board of Regents approves the new standards and processes, schools currently approved for such purpose would continue to be subject to the current standards and processes.

#### 3. NEEDS AND BENEFITS:

Between November 2010 and January 2011, the PPC engaged in discussions with Department staff and the Chair of the New York State Board for Medicine regarding the oversight of dual-campus international medical schools that seek authorization to place students in long-term clinical clerkships in NYS hospitals. The discussions with the PPC incorporated input from the Study Group on International Medical Schools which included representation from a broad spectrum of the medical education and hospital services communities, including representatives from the affected schools. The Study Group considered the following assertions/information in making its recommendations:

- The number of dual-campus international medical schools operating in NYS has increased dramatically since rules governing their activities in NYS were first promulgated in 1981.
- The schools established extensive affiliation agreements with NYS hospitals to place their students in clinical clerkships.
- Hospitals derive substantial income from fees paid by dual campus medical schools to hospitals that provide opportunities for their students to engage in clinical training.
- Accredited and registered medical schools in New York State (NYS) expressed concern that the continued accommodation of students from the international medical schools impacts their ability to find suitable clinical clerkship placements for their students.
- Admission standards for students attending the dual-campus international medical schools and the implementation of the didactic and clinical parts of the medical programs have not been reviewed in decades, even as medical practice has become more demanding and complex.
- There is a physician shortage in NYS that is expected to grow.
- Approximately 35% of active patient care physicians in New York State are international medical graduates (not necessarily from schools placing students in clinical clerkships in NYS).
- Many of the students attending the dual-campus international medical schools are United States citizens.
- Graduates of the dual-campus international medical schools will eventually return to the United States to compete for placement in postgraduate training programs (residencies).
- Postgraduate training opportunities have not grown to match the increased demand by domestic and international medical graduates.

After consideration of the various preliminary findings and the changes

that had taken place in the provision of medical education, the Board of Regents concluded that it was time to review the applicable regulations and policies. Accordingly, the Board of Regents agreed to establish an Advisory Committee that would provide advice on matters related to the evaluation and approval of dual-campus international medical schools seeking authorization to place students in long-term clinical clerkships in New York State. The plan approved by the PPC at its meeting in February 2011 specifically provided for the Advisory Committee to examine the standards and processes for such evaluations and approvals.

#### 4. COSTS:

(a) Costs to State government: The estimated cost to State government is as follows. These costs will be recovered through fees charged to the schools applying for approval to place students in long-term clinical clerkships in New York State.

#### First Year Costs

1. Interview of candidates (travel, lodging):	
24 Candidates - avg travel per candidate \$200	\$4,800
2. Organizational Meetings (3 meetings)	
Travel - avg per member \$200	\$7,200
Per diem - \$100/member (if not waived)	\$3,600
Organizational meetings total cost	\$10,800
3. Meetings (2 meetings)	
12 members - avg travel per member \$200	\$4,800
Avg lodging cost \$200 (4 members)	\$1,600
Per diem - \$100/member (if not waived)	\$2,400
Post organizational meetings total cost	\$8,800
Total First Year Cost	\$24,400

#### Annual Costs After First Year

Meetings (2 annually after first year)	
12 members - avg travel per member \$200	\$4,800
Avg lodging cost \$200 (4 members)	\$1,600
Meetings after first year total cost	\$6,400

(b) Cost to local government: The proposed amendment establishes the committee that will recommend standards and processes for the evaluation of international medical schools that seek authorization to place students in long-term clinical clerkships. Local governments play no role in the process of evaluating international medical schools. As such, there will be no cost to local government.

(c) Cost to private regulated parties: The proposed regulation will not impose any new costs on applicants for approval to place students in long-term clinical clerkships.

(d) Cost to the regulatory agency: See Cost to State Government above.

#### 5. LOCAL GOVERNMENT MANDATES:

The proposed amendments to the Rules and the Regulations are applicable to international medical schools only and do not impose any program, service, duty or responsibility upon local governments.

#### 6. PAPERWORK:

The proposed amendments to the Rules and the Regulations do not impose any additional reporting or recordkeeping requirements beyond those already required to be submitted by international medical schools seeking approval to place students in long-term clinical clerkships in New York State.

#### 7. DUPLICATION:

The proposed amendments to the Rules and the Regulations do not duplicate other existing State or Federal requirements.

#### 8. ALTERNATIVES:

The proposed amendments to the Rules and the Regulations are necessary to update the standards and process for the approval of international medical schools to place students in long-term clinical clerkships in New York State. Because changes in foreign medical education and the availability of limited resources make continuation of the existing process problematic, there are no viable alternatives to the proposed amendments.

#### 9. FEDERAL STANDARDS:

There are no Federal standards applicable to approval of international medical schools to place students in long-term clinical clerkships.

#### 10. COMPLIANCE SCHEDULE:

Compliance with the standards and process recommended by the Advisory Committee will be required upon approval of said standards and process by the Board of Regents. A date certain for the development of the standards and process or approval by the Board of Regents has not been established.

#### Regulatory Flexibility Analysis

The purpose of the proposed amendments is to establish an Advisory Committee on Long-Term Clinical Clerkships to establish academic standards applicable to international medical schools seeking to place students in long-term clinical clerkships in New York State and the process by which such standards are evaluated. The amendments also authorize the Board of Regents to review recommendations of the Department, after a recommendation from the Advisory Committee, relating to applications from international medical schools to place their students in long-term clinical clerkships in New York State.

The amendments are applicable to international medical schools only. Small businesses and local governments will not be impacted by the proposed amendment. Accordingly, no further steps were needed to ascertain the impact on small businesses and local governments.

#### Rural Area Flexibility Analysis

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

The purpose of the proposed amendments is to establish an Advisory Committee on Long-Term Clinical Clerkships to establish academic standards applicable to international medical schools seeking to place students in long-term clinical clerkships in New York State and the process by which such standards are evaluated. The amendments also authorize the Board of Regents to review recommendations of the Department, after a recommendation from the Advisory Committee, relating to applications from international medical schools to place their students in long-term clinical clerkships in New York State.

These amendments will not be applicable to New York State registered medical schools, including any that provide services in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment does not impose any additional costs or record keeping requirements to international medical schools who apply for approval.

##### 3. COSTS:

The proposed amendment does not impose any costs on individuals or entities located in rural areas.

##### 4. MINIMIZING ADVERSE IMPACT:

The proposed amendments are intended to ensure competent medical education for international medical students undertaking clinical training in New York State and thereby protect the health of the public. Due to the nature of the proposed amendment, there is no reason to establish different requirements for institutions located in rural areas.

##### 5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the State Board for Medicine and from statewide professional associations, hospital organizations and medical schools, who collectively represent or include individuals and entities located in rural areas.

#### Job Impact Statement

The purpose of the proposed amendments is to establish an Advisory Committee on Long-Term Clinical Clerkships to establish academic standards applicable to international medical schools seeking to place students in long-term clinical clerkships in New York State and the process by which such standards are evaluated. The amendments also authorize the Board of Regents to review recommendations of the Department, after a recommendation from the Advisory Committee, relating to applications from international medical schools to place their students in long-term clinical clerkships in New York State.

Because it is evident from the nature of the proposed amendments that there will be no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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## State Board of Elections

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

#### Campaign Contribution Limits

I.D. No. SBE-17-11-00015-P

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

**Proposed Action:** This is a consensus rule making to amend section 6214.0 of Title 9 NYCRR.



**Statutory authority:** Election Law, section 14-114(1)(c)

**Subject:** Campaign Contribution Limits.

**Purpose:** To set contribution limits as adjusted to reflect the consumer price index.

**Text of proposed rule:** Section 6214.0 Campaign Contribution Limits.

The following limits will apply to campaign contributions until such time as the State Board of Elections adjusts the limits to reflect changes in the consumer price index:

Previous Limit	Current Limit	Office/Election
\$ 5,400.00	\$ 6,000.00	State senate primary
		Statewide primary minimum
		NYC citywide primary minimum
\$16,200.00	\$18,100.00	Statewide primary maximum
		NYC citywide primary minimum
\$33,900.00	\$37,800.00	Statewide general
		NYC citywide general
\$ 8,500.00	\$ 9,500.00	State senate general
\$ 3,400.00	\$ 3,800.00	State assembly primary
		State assembly general
\$84,400.00	\$94,200.00	Party committees]
\$ 6,000.00	\$ 6,500.00	State senate primary
		Statewide primary minimum
		NYC citywide primary minimum
\$18,100.00	\$19,700.00	Statewide primary maximum
		NYC citywide primary minimum
\$37,800.00	\$41,100.00	Statewide general
		NYC citywide general
\$ 9,500.00	\$10,300.00	State senate general
\$ 3,800.00	\$ 4,100.00	State assembly primary
		State assembly general
\$94,200.00	\$102,300.00	Party committees

**Text of proposed rule and any required statements and analyses may be obtained from:** Kimberly A. Galvin, New York State Board of Elections, 40 Steuben Street, Albany, NY 12207, (518) 474-6367, email: kgalvin@elections.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 rule implements a non-discretionary statutory requirement, that is purely mathematical in nature. For that reason, we do not believe that anyone will object to this rulemaking.

#### Job Impact Statement

This rule will impact neither the creation nor the diminution of employment opportunities in New York State.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Summary Abatement Orders

**I.D. No.** ENV-04-11-00002-A

**Filing No.** 335

**Filing Date:** 2011-04-07

**Effective Date:** 2011-04-27

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

**Action taken:** Amendment of Part 620 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 71-0301

**Subject:** Summary Abatement Orders.

**Purpose:** To make regulation consistent with statutory language; to clarify documentation required to obtain order; to update language.

**Text or summary was published** in the January 26, 2011 issue of the Register, I.D. No. ENV-04-11-00002-A.

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

**Text of rule and any required statements and analyses may be obtained from:** Helene Goldberger, Administrative Law Judge, NYSDEC, Office of Hearings and Mediation Services, 625 Broadway, Albany, NY 12233-1550, (518) 402-9003, email: hggoldbe@gw.dec.state.ny.us

#### Assessment of Public Comment

The agency received no public comment.

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

#### Reporting Requirements for Food Fish, Lobster, Crab, Food Fish and Crustacea Dealers and Shipper, and Party/Charter Licenses

**I.D. No.** ENV-17-11-00010-P

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

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

**Statutory authority:** Environmental Conservation Law, section 13-0342

**Subject:** Reporting requirements for food fish, lobster, crab, food fish and crustacea dealers and shipper, and party/charter licenses.

**Purpose:** Update the reporting requirements for commercial fishermen, party/charter vessel businesses and food fish and crustacea dealers.

**Text of proposed rule:** Existing subdivision 6 NYCRR 40.1(c) is repealed. New subdivision 6 NYCRR 40.1(c) is adopted to read as follows:

(c) Reporting requirements.

(1) Marine commercial food fishing license, food fish landing license and marine bait permit holders.

(i) Any person who is the holder of a marine commercial food fishing license, food fish landing license, or marine bait permit issued pursuant to section 13-0335 of the Environmental Conservation Law shall complete and submit an accurate fishing Vessel Trip Report for each commercial fishing trip, detailing all fishing activities and all species landed, on a form prescribed by the department. The license holder shall submit such fishing reports monthly to the department within 15 days after the end of each month or at a frequency specified by the department in writing. Fishing Vessel Trip Reports shall be completed, signed, and submitted to the department for each month; if no fishing trips were made during a month, a report must be submitted stating no trips were made for that month. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements. Any New York license holder who is also the holder of a federal fishing permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service. If requested in writing by the department, New York license holders who also hold federal fishing permits shall submit to the department the state (blue) copy of the Fishing Vessel Trip Report (NOAA Form No. 88-30) for the month or months identified in the written notification.

(ii) The fishing Vessel Trip Report must be completed with all

required information, except for information not yet ascertainable, and signed before the vessel arrives at the dock or lands the catch. Information that may be considered unascertainable before arriving at the dock or landing includes dealer name, dealer number, and date sold.

(2) Food fish and crustacea dealers and shippers license holders.

Any person who is the holder of a marine and coastal district food fish and crustacea dealers and shippers license issued pursuant to section 13-0334 of the Environmental Conservation Law shall:

(i) Complete and sign an accurate Purchases From Fishing Vessels and/or Fishermen report detailing each purchase of marine food fish, crustacea, horseshoe crabs, and whelks from harvesters, on a form prescribed by the department. The license holder must submit these reports to the department within 3 days after the end of each week, or at a frequency specified by the department in writing. A Purchases From Fishing Vessels and/or Fishermen report shall be completed, signed and submitted to the department each week; if no purchases of fish or crustacea were made during that week, a report must be submitted stating no purchases were made for the week. Incomplete Purchases From Fishing Vessels and/or Fishermen reports or unsigned reports will not satisfy these reporting requirements. Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service.

(ii) Effective January 1, 2012, submit complete and accurate purchases from fishing vessels and/or fishermen reports to the Atlantic Coastal Cooperative Statistics Program (ACCS) through its website at [www.accs.org](http://www.accs.org). Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead meet the reporting requirements specified by NOAA Fisheries Service.

(3) Marine and coastal district party and charter boat license holders.

(i) Any person who is the holder of a marine and coastal district party and charter license issued pursuant to section 13-0336 of the Environmental Conservation Law shall complete and submit an accurate fishing Vessel Trip Report for each party or charter fishing trip, on a form prescribed by the department. The license holder shall submit such fishing reports monthly to the department within 15 days after the end of each month or at a frequency specified by the department in writing. Fishing Vessel Trip Reports must be completed, signed, and submitted to the department for each month; if no fishing trips were made during a month, a report must be submitted for that month stating no trips were made. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements. For each fishing trip, the license holder shall complete and sign the fishing Vessel Trip Report prior to the vessel's return to port. Any New York license holder who is also the holder of a federal fishing permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service.

(ii) Upon the request of an on-board observer, who is an authorized representative of the department or of the NOAA Fisheries Service, the holder of a marine and coastal district party and charter boat license shall carry such on-board observer at all times when engaged in activities authorized by such license, and shall report catch and effort information to the department or the NOAA Fisheries Service when requested to do so by such agencies or an authorized representative.

(4) License holders subject to the provisions of this subdivision shall present their logbooks, fishing Vessel Trip Reports or Purchases from Fishing Vessel Reports and/or Fishermen reports and make them available for inspection upon the request of an authorized agent of the department or NOAA Fisheries Service. License holders shall submit their fishing Vessel Trip Reports or Purchases from Fishing Vessels and/or Fishermen reports to the department at the following address: NYSDEC, Bureau of Marine Resources, 205 N. Belle Mead Road, Suite # 1, East Setauket, New York 11733. Reports may be mailed, faxed, emailed or submitted by any other method approved by the department.

(5) In fulfillment of these reporting requirements, license holders subject to the provisions of this subdivision may choose to submit purchases from fishing vessels data or fishing trip data online at the Atlantic Coastal Cooperative Statistics Program website, [www.accs.org](http://www.accs.org). Complete and accurate fishing trip and purchase data submissions to this website will satisfy the reporting requirements specified in this subdivision. License holders who submit fishing data electronically must maintain a dated logbook, on board the specific fishing vessel, that details all fishing activities for each fishing trip. Data to be recorded in this logbook must include the vessel name, date sailed and date landed, all species landed and the weight or number of each species taken during the dated trip, and other information required by the department. Entries must be entered into the logbook before the vessel arrives at the dock or lands the catch.

(6) Failure to file fishing Vessel Trip Reports or Purchases from Fishing Vessels and/or Fishermen reports as required may disqualify the owner or operator from receiving future licenses or permits pursuant to Part 175 of this title. Any person who falsifies any fishing Vessel Trip

Report or Purchases from Fishing Vessels and/or Fishermen report shall be subject to the penalties established pursuant to the provisions of Article 71 of Environmental Conservation Law and may be subject to permit revocation pursuant to Part 175 of this Chapter.

Existing subdivision 40.1(d) through paragraph 40.1(j)(19) remain the same.

Existing paragraph 6 NYCRR 40.1(j)(20) is repealed.

New paragraph 6 NYCRR 40.1(j)(20) is adopted to read as follows:

(20) Reporting Requirements.

(a) Fishing Vessel Trip Reports - Any person who is a holder of a striped bass commercial permit shall complete and submit an accurate fishing Vessel Trip Report for each commercial fishing trip, detailing all fishing activities and all species landed, pursuant to paragraph (1) of subdivision 40.1 (c) of this part. Fishing Vessel Trip Reports shall be completed, signed, and submitted to the department for each month; if no fishing trips were made for striped bass during a month, a report must be submitted for that month stating no striped bass trips were made. Permit holders who operate federally permitted vessels and take striped bass must complete and submit the state (blue) copy of their Fishing Vessel Trip Report (NOAA Form No. 88-30) to the department for each commercial striped bass trip. Permit holders must submit the last report 5 days after the close of the commercial striped bass season or within 5 days after all striped bass tags are used. Permit holders must submit all required information, including, but not limited to, the name of the vessel, the permit number(s), trip type, all species taken, the striped bass tag serial numbers used for the trip, the weight (in pounds), and number of striped bass taken, the name and signature of the permit holder, and the date signed. All reports must be complete. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements and may be returned to the permit holder who submitted them for completion. Once commercial striped bass permit holders have reported 100 percent use of the individual allocation of tags, they are no longer required to submit reports for striped bass. Permit holders who fail to submit acceptable fishing Vessel Trip Reports to the department may be denied future commercial striped bass fishing permits pursuant to Part 175 of this title.

(b) Striped Bass Tags - All striped bass commercial permit holders must return any unused tags to the department by December 20 of the year the tags were issued. Permit holders who fail to return unused tags may be denied future commercial striped bass fishing permits pursuant to Part 175 of this title. Permit holders who fail to accurately account for all tags may receive a reduction in the number of tags allocated in the next fishing season in which the permit holder applies for a striped bass commercial permit. This reduction in tags will be equal to the number of tags not accounted for in the previous fishing season.

Existing paragraph 40.1(j)(21) through section 40.7(d)(16) remain unchanged.

Section 44.10 is repealed.

New section 44.10 is adopted to read as follows:

44.10 Reporting requirements.

(a) Marine commercial lobster, lobster landing, lobster bait gill net, horseshoe crab and crab permit holders.

(1) Any person who is the holder of a marine commercial lobster, lobster landing or lobster bait gill net permit issued pursuant to section 13-0329 of the ECL, a marine commercial crab permit issued pursuant to section 13-0331 of the ECL, or a horseshoe crab permit issued pursuant to 6 NYCRR 44.8 (c), shall complete and submit an accurate fishing Vessel Trip Report for each commercial fishing trip, detailing all fishing activities and all species landed, on a form prescribed by the department. The permit holder shall submit such fishing reports monthly to the department within 15 days after the end of each month or at a frequency specified by the department in writing. Fishing Vessel Trip Reports shall be completed, signed, and submitted to the department for each month; if no fishing trips were made during a month, a report must be submitted for that month stating no trips were made. Incomplete fishing Vessel Trip Reports or unsigned reports will not satisfy these reporting requirements. Any New York permit holder who is also the holder of a federal fishing permit issued by NOAA Fisheries Service must instead meet the reporting requirements specified by NOAA Fisheries Service. If requested in writing by the department, New York permit holders who also hold federal fishing permits shall submit to the department the state (blue) copy of the Fishing Vessel Trip Report (NOAA Form No. 88-30) for the month or months identified in the written notification.

(2) The fishing Vessel Trip Report must be completed with all required information, except for information not yet ascertainable, and signed before the vessel arrives at the dock or lands the catch. Information that may be considered unascertainable before arriving at the dock or landing includes dealer name, dealer number, and date sold.

(b) Food fish and crustacea dealers and shippers licenses. Any person who is the holder of a marine and coastal district food fish and crustacea



dealers and shippers license issued pursuant to section 13-0334 of the Environmental Conservation Law shall:

(1) Complete and sign an accurate Purchases From Fishing Vessels and/or Fishermen report detailing each purchase of marine food fish, crustacea, horseshoe crabs, and whelks from harvesters on a form prescribed by the department. The license holder must submit these reports to the department within 3 days after the end of each week, or at a frequency specified by the department in writing. A Purchases From Fishing Vessels and/or Fishermen report shall be completed, signed and submitted to the department each week; if no purchases of fish, crustacea, horseshoe crabs or whelks were made during that week, a report must be submitted stating no purchases were made for the week. Incomplete Purchases From Fishing Vessels and/or Fishermen reports or unsigned reports will not satisfy these reporting requirements. Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service.

(2) Effective January 1, 2012, submit complete and accurate purchases from fishing vessels and/or fishermen reports to the Atlantic Coastal Cooperative Statistics Program (ACCSPP) through its website at [www.accsp.org](http://www.accsp.org). Any New York license holder who is also the holder of a federal dealers permit issued by NOAA Fisheries Service must instead meet the reporting requirements specified by NOAA Fisheries Service.

(c) License holders subject to the provisions of this subdivision shall present their fishing Vessel Trip Reports or Purchases From Fishing Vessel Reports and/or Fishermen and make them available for inspection upon the request of an authorized agent of the department or NOAA Fisheries Service. Reports shall be submitted to the department at the following address: NYSDEC, Bureau of Marine Resources, 205 N. Belle Mead Road, Suite # 1, East Setauket, New York 11733. Reports may be mailed, faxed, emailed or submitted by any other method approved by the department.

(d) In fulfillment of these reporting requirements, license holders subject to the provisions of this subdivision may choose to submit purchases from fishing vessels data or fishing trip data online at the Atlantic Coastal Cooperative Statistics Program website, [www.accsp.org](http://www.accsp.org). Complete and accurate fishing trip and purchase data submissions to this website will satisfy the reporting requirements specified in this subdivision. License holders who submit fishing data electronically must maintain a dated logbook, on board the specific fishing vessel, that details all fishing activities for each fishing trip. Data to be recorded in this logbook must include the vessel name, date sailed and date landed, species and weight of the species taken during the dated trip, and other information required by the department. Entries must be entered into the logbook before the vessel arrives at the dock or lands the catch.

(e) Failure to file fishing Vessel Trip Reports or Purchases From Fishing Vessel and/or Fishermen Reports as required may disqualify the owner or operator from receiving future licenses or permits pursuant to Part 175 of this title. Any person who falsifies any fishing Vessel Trip Report or Purchases from Fishing Vessel and/or Fishermen Report shall be subject to the penalties established pursuant to the provisions of Article 71 of Environmental Conservation Law and may be subject to permit revocation pursuant to Part 175 of this Chapter.

Section 44.11 is renumbered as section 44.12.

A new section 44.11 is adopted to read as follows:

44.11 Confidentiality of fisheries data.

Fisheries data, statistics or other information collected from individual permit or license holders by the department or available to the department from other states or the federal government shall be confidential and shall not be disclosed except to an authorized user or when required under court order; provided, however, that the department may release or make public any statistics in an aggregate or summary form (with no less than three submitters contributing to that statistic) which does not directly or indirectly disclose the identity of any person who submits such statistics. For the purposes of these regulations an authorized user is any person that is employed by or under contract to the department or who is employed by or is under contract to the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the Mid-Atlantic Fishery Management Council, the New England Fishery Management Council, the South Atlantic Fishery Management Council, or the states of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, North Carolina, South Carolina, Georgia or Florida, and who has been designated by such agency or state, under the auspices of the Atlantic Coastal Cooperative Statistics Program to require confidential data as a means to fulfill their job and their job is related to fisheries management and conservation.

**Text of proposed rule and any required statements and analyses may be obtained from:** Maureen Davidson, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, New York 11733, (631) 444-0857, email: [mcdavids@gw.dec.state.ny.us](mailto:mcdavids@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 section 13-0342 authorizes the Department of Environmental Conservation (DEC) to adopt regulations requiring the reporting of catch, effort, area fished, gear used, bycatch and volume and value of product purchased from fishermen by all holders of commercial food fish, lobster, crab and menhaden fishing licenses; food fish and crustacea dealers and shippers licenses; and party and charter vessel licenses.

##### 2. Legislative objectives:

It is the objective of the above-cited legislation that DEC regulates the reporting of catch, effort, area fished, gear used, bycatch, and volume and value of product purchased from fishermen by the holders of food fish, lobster, and crab fishing and landing licenses, party and charter boat licenses, and food fish and crustacea dealers and shipper licenses. The information submitted by licensed harvesters and food fish and crustacea dealers and shippers is used by DEC, the New-England and Mid-Atlantic Fisheries Management Councils, Atlantic States Marine Fisheries Commission and National Oceanic and Atmospheric Administration (NOAA) Fisheries Service to develop, implement and monitor fishery management strategies. It is the legislative intent that DEC be provided with the appropriate fishery information needed to develop and implement suitable fishery management measures that promote prudent and sustainable utilization of the marine resources within the state marine waters.

##### 3. Needs and benefits:

Promulgation of this amendment is necessary to ensure that the regulatory requirements for the reporting of fishery dependent information are consistent for all affected license holders. This proposed rule will update the reporting regulations to reflect the current circumstances of fishery data collection in New York.

Through the adoption of the proposed rule, DEC seeks to ease the reporting burden placed on licensed fishermen and dealers by introducing options other than mailing for the submission of Fishing Vessel Trip Reports (VTRs) and dealer/shipper purchase forms. The proposed rule will allow VTRs to be submitted by fax, email, or electronically online to the Atlantic Coastal Cooperative Statistics Program (ACCSPP). ACCSP maintains a data warehouse for fishery data collected from states along the Atlantic Seaboard. Fishery data may be entered by the individual fisherman or dealer and is immediately available to state fishery managers. Electronic submissions also reduce the costs of processing reports; DEC will no longer need to print and distribute report forms or review, sort and process paper forms that are submitted to the department.

All member states of the Atlantic States Marine Fisheries Commission (ASMFC) and the Mid-Atlantic Fishery Management Council (MAFMC) must comply with the provisions of fishery management plans (FMPs) adopted by ASMFC and MAFMC. These FMPs 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 rule to comply with the data collection standards for commercial and for-hire (party/charter boat) fisheries as set by the FMPs adopted by ASMFC and MAFMC and by ACCSP.

##### 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 holders of food fish, lobster, crab or party/charter boat licenses from this proposed amendment. These regulated parties are already subject to reporting requirements in existing regulations. There may be some costs to the 432 food fish and crustacea dealer and shipper license holders to comply with the requirement to submit purchase reports online to the Atlantic Coastal Cooperative Statistics Program if the dealer/shipper does not have a computer or access to the Internet. Such costs may run upward to \$1,000.00 for the initial investment in a computer and Internet service.

(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 license holders of the new rules.

## 5. Local government mandates:

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

## 6. Paperwork:

There is no new paperwork. The regulated parties are already subject to reporting requirements in existing regulations.

## 7. Duplication:

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

## 8. Alternatives:

No Action Alternative - If DEC does not promulgate the proposed rule, the reporting requirements for State commercial fishermen, food fish dealers/shippers and party and charter operators will continue to be inconsistent with the current practices in New York State. DEC will have to request actions from permitted parties that would be contrary to existing regulation. For instance, current regulations require VTRs to be submitted to an address that no longer exists. Furthermore, existing regulations do not allow DEC and the local fishing community to take advantage of current technology for reporting purposes.

## 9. Federal standards:

The amendments to 6 NYCRR Parts 40 and 44 are in compliance with the ASMC and the MAFMC FMPs and the data collection standards set by ACCSP.

## 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:

DEC is proposing a rule that will amend the reporting requirements for holders of the following licenses and permits: food fishing, food fish landing, marine bait, food fish and crustacea dealer and shipper, marine and coastal district party and charter boat, striped bass commercial harvesting, lobster, crab, and horseshoe crab harvesting. This proposed rule will update the regulations to reflect the current circumstances of fishing data collection in New York and make the reporting requirements consistent for all State licensed fishermen and dealers. DEC also proposes to make online reporting for food fish and crustacea (FF&C) dealers and shippers mandatory in 2012.

## 2. Compliance requirements:

New York State commercial fishermen have been submitting vessel trips reports (VTRs), detailing fishing activities for each trip, since 2004. The proposed rule making will not significantly increase the burden of reporting already placed on State fishermen, but will require more diligence on the part of the fishermen on how and when the VTR forms are completed.

Once online reporting becomes mandatory, FF&C dealers and shippers will no longer submit paper purchase report forms, but will instead submit reports online to the Atlantic Coastal Cooperative Statistics Program and will need to be able to access the Internet.

## 3. Professional services:

None.

## 4. Compliance costs:

There are no initial capital costs that will be incurred by licensed fishermen to comply with the proposed rule. There may be some costs to the 432 food fish and crustacea dealer and shipper license holders to comply with the requirement to submit purchase reports online to the Atlantic Coastal Cooperative Statistics Program if the dealer/shipper does not have a computer or access to the Internet. Such costs may run upward to \$1,000.00 for the initial investment in a computer and Internet service.

## 5. Economic and technological feasibility:

For the most part, the proposed regulations do not require any expenditure on the part of licensed fishermen in order to comply with the changes. There may be some costs for FF&C dealers and shippers who do not presently own computers or do not have access to the Internet. DEC is aware that some FF&C dealers and shippers already have computers and Internet access; the actual proportion of the total number of dealers and shippers is unknown. Currently Federally permitted dealers are required to submit their reports via the Internet. The states of Maine, Massachusetts, Rhode Island and New Jersey all have some level of electronic reporting by seafood dealers. New York State FF&C dealers and shippers will be required to submit reports online to the Atlantic Coastal Cooperative Statistics Program website, the same website reported to by federal dealers and other out-of-state dealers.

## 6. Minimizing adverse impact:

Through the adoption of the proposed rule, DEC seeks to ease the reporting burden placed upon licensed fishermen and FF&C dealers and shippers by introducing options for the submission of VTRs and seafood purchase forms. The proposed rule will allow VTRs and seafood purchase forms to be submitted by fax, email or electronically online to the Atlantic

Coastal Cooperative Statistics Program (ACCSP). ACCSP maintains a data warehouse for fishery data collected from states along the Atlantic Seaboard. Fishery data may be entered by the individual fisherman or dealer and is immediately available to State fishery managers. Electronic submissions also reduce the costs of processing reports; DEC will no longer need to print and distribute report forms or handle paper forms that are submitted to the department. State fishermen and FF&C dealers will no longer need to maintain a supply of forms and will no longer incur postal costs for mailing the forms to DEC.

## 7. Small business and local government participation:

DEC has been informing State dealers of the progress towards electronic or online reporting. In 2009, the Bureau of Marine Resources (BMR) surveyed state FF&C dealers and shippers for their opinions on electronic reporting. In June 2010, the BMR sent letters to State FF&C dealers and shippers explaining that DEC was moving forward with electronic reporting for State dealers and shippers. State FF&C dealers and shippers will be kept informed of the rule making process and will have approximately six months notice before the rule becomes effective.

The proposed rule does not apply to local governments.

**Rural Area Flexibility Analysis**

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

DEC is seeking to propose amendments to 6 NYCRR Parts 40 and 44 to modify the reporting requirements for State licensed food fish harvesters, commercial striped bass harvesters, food fish and crustacea dealers and shippers, marine and coastal party and charter boat owners or operators and commercial lobster, crab and horseshoe crab harvesters. All commercial and recreational harvesting of food fish, crustacea, horseshoe crabs and whelk takes place in the marine and coastal district and there are no rural areas within the marine and coastal district.

Any person who holds a Food Fish and Crustacea Dealer and Shipper (FF&C) license will be affected by the proposed rule. In 2010, 427 individuals were issued a Food Fish and Crustacea Dealer and Shipper license. Most FF&C license holders are located in the New York City Metropolitan Area and on Long Island, areas within the marine and coastal district, and not located within a rural area. About 100 FF&C license holders are located in areas of New York State with less than 1,000 people per square mile, which may be identified as rural areas. There are no specific rural areas within New York where FF&C license holders are located; they are scattered throughout the state.

All licensed FF&C dealers and shippers are required to submit reports to DEC detailing all purchases of food fish, crustacea and horseshoe crabs from fishermen. The proposed rule will require they also report purchases of whelks from fishermen and that they submit purchase reports online to the Atlantic Coastal Cooperative Statistics Program (ACCSP). Not all FF&C dealers purchase seafood from fishermen. Many only purchase from other seafood dealers and, consequently, are not required to submit any purchase reports. They must submit an annual statement or form to DEC indicating that they do not purchase from fishermen. Although the proposed rule may apply to FF&C dealers located in rural areas of New York, it will probably affect only a portion of them, those who purchase directly from fishermen. At this time, DEC does not have the detailed data analysis needed to numerate how many dealers in rural areas purchase seafood directly from fishermen.

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

FF&C dealers and shippers have been submitting reports to DEC since 2003. The proposed rule does not change the requirement for reporting or the frequency of reporting, but will change the manner of reporting. DEC proposes to make online or electronic reporting mandatory in 2012 for FF&C dealers and shippers. Those dealers and shippers who do not yet have access to the Internet would have to acquire access for themselves or use library facilities. DEC is also exploring the feasibility of making a computer available for the use of walk-in license holders who wish to enter fishery data at the Bureau of Marine Resources (BMR). The amendments to the reporting requirements will apply to all FF&C dealers, not just those in rural areas.

## 3. Costs:

There are no initial capital costs that will be incurred by licensed fishermen to comply with the proposed rule. There may be some costs to the 432 food fish and crustacea dealer and shipper license holders to comply with the requirement to submit purchase reports online to the Atlantic Coastal Cooperative Statistics Program if the dealer/shipper does not have a computer or access to the Internet. Such costs may run upward to \$1,000.00 for the initial investment in a computer and Internet service.

## 4. Minimizing adverse impact:

By adopting the proposed rule, DEC seeks to ease the reporting burden placed upon licensed fishermen and FF&C dealers and shippers by introducing options for the submission of Fishing Vessel Trip Reports (VTRs) and seafood purchase forms. The proposed rule will allow VTRs and seafood purchase forms to be submitted by fax, email or electronically



online to the ACCSP. ACCSP maintains a data warehouse for fishery data collected from states along the Atlantic Seaboard. Fishery data may be entered by the individual fisherman or dealer and is immediately available to State fishery managers. Electronic submissions also reduce the costs of processing reports; DEC will no longer need to print and distribute report forms or handle paper forms that are submitted to the department. State fishermen and FF&C dealers will no longer need to maintain a supply of forms and will no longer incur postal costs for mailing the forms to DEC.

#### 5. Rural area participation:

DEC has been informing State FF&C dealers and shippers of the progress towards electronic or online reporting. In 2009, the BMR surveyed State dealers and shippers for their opinions on electronic reporting. In June 2010, the BMR sent letters to State FF&C dealers and shippers explaining that DEC was moving forward with electronic reporting for state dealers and shippers. State FF&C dealers and shippers will be kept informed of the rule making process and will have approximately six months notice before the rule becomes effective.

#### Job Impact Statement

##### 1. Nature of impact:

The Department of Environmental Conservation (DEC) is proposing a rule that will amend the reporting requirements for holders of the following licenses and permits: food fishing, food fish landing, marine bait, food fish and crustacea dealer and shipper, marine and coastal district party and charter boat, striped bass commercial harvesting, lobster, crab, and horseshoe crab harvesting. This proposed rule will update the regulations to reflect the current circumstances of fishing data collection in New York and make the reporting requirements consistent for all State licensed fishermen and dealers. DEC also proposes to make online reporting for food fish and crustacea (FF&C) dealers and shippers mandatory in 2012.

The proposed rule making will not significantly increase the burden of reporting already placed on State fishermen, but will require more diligence on the part of the fishermen on how and when Fishing Vessel Trip Report (VTR) forms are completed. The proposed rule will require FF&C dealers and shippers to be able to access to the Internet.

##### 2. Categories and numbers affected:

The following is a list of the license and permit categories that will be affected by the proposed rule and the number of each license or permit that was issued in 2010: Crab - 578, Crab (nonresident) - 28, Food Fishing - 990, Food Fishing (nonresident) - 40, Food Fish Landing - 48, Food Fish and Crustacea Dealer and Shipper - 423, Horseshoe Crab - 368, Horseshoe crab (nonresident) - 12, Lobster - 360, Lobster (nonresident) - 30, Lobster Landing - 12, Marine Bait - 74, Menhaden (all classes) - 23, Party and Charter Boat - 502, Striped Bass Commercial harvester - 480, Whelk - 256, Whelk (nonresident) - 12.

##### 3. Regions of adverse impact:

All commercial and recreational harvesting of food fish, crustacea, horseshoe crabs and whelk takes place in the marine and coastal district. In contrast, State licensed FF&C dealers and shippers are located throughout New York State. However, seventy-five percent of the FF&C license holders are located within the New York City Metropolitan Area and on Long Island. The remaining twenty-five percent are located in scattered areas of New York State outside the metropolitan area. There are no specific regions of adverse impact on jobs.

##### 4. Minimizing adverse impact:

Through the adoption of the proposed rule, DEC seeks to ease the reporting burden placed upon licensed fishermen and FF&C dealers and shippers by introducing options for the submission of VTRs and seafood purchase forms. The proposed rule will allow VTRs and seafood purchase forms to be submitted by fax, email or electronically online to the Atlantic Coastal Cooperative Statistics Program (ACCSP). Electronic submissions reduce the costs of processing reports; DEC will no longer need to print and distribute report forms or handle paper forms that are submitted to the department. State fishermen and FF&C dealers will no longer need to maintain a supply of forms and will no longer incur postal costs for mailing the forms to DEC.

##### 5. Self-employment opportunities:

Most State fishermen and many FF&C dealers and shippers are self-employed. However, this rule will not have a measurable impact on opportunities for self-employment.

## Department of Health

### EMERGENCY RULE MAKING

#### Inappropriate Use of Cesarean Deliveries and Audits of Institutional Cost Reports (ICR)

**I.D. No.** HLT-17-11-00011-E

**Filing No.** 333

**Filing Date:** 2011-04-06

**Effective Date:** 2011-04-06

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

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

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

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

**Specific reasons underlying the finding of necessity:** It is necessary to issue the proposed regulations on an emergency basis in order to implement Public Health Law section 2807-c(35)(b)(xii), as amended by Chapter 59 of the Laws of 2011, in a timely manner related to the incorporation of quality-related measures pertaining to the inappropriate use of cesarean deliveries. The new methodology for payments for cesarean deliveries is intended to pay more appropriately for such deliveries.

Similarly, it is necessary to issue the proposed regulations on an emergency basis in order to implement Public Health Law section 2807-c(35)(b)(xiii), as amended by Chapter 59 of the Laws of 2011, in a timely manner related to imposing a fee schedule associated with filing institutional cost reports, which is intended to fund the costs of auditing institutional cost reports. In addition, this regulation eliminates the need for hospitals to submit a CPA certification of their cost reports for years ended on and after December 31, 2010. To avoid these costs, hospitals need to be advised of the elimination of this requirement.

Public Health Law section 2807-c(35), as amended by Chapter 59 of the Laws of 2011, Part H, § 36, specifically provides the Commissioner of Health with authority to issue these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of associated Medicaid State Plan amendments and assure there are no delays in implementation of these new policies related to payments for cesarean deliveries and fee obligations for filing institutional cost reports.

**Subject:** Inappropriate Use of Cesarean Deliveries and Audits of Institutional Cost Reports (ICR).

**Purpose:** Limits payments for cesarean deliveries to the hospital's average Medicaid payment for vaginal deliveries. Impose a fee schedule re: ICRs.

**Text of emergency rule:** Subdivision (k) of section 86-1.2 of title 10 of NYCRR is amended to read as follows:

(k) Accountant's certification. *With regard to institutional cost reports filed for report years prior to 2010, [T]he institutional cost report shall be certified by an independent licensed public accountant or an independent certified public accountant. The minimum standard for the term independent shall be the standard used by the State Board of Public Accountancy.*

Subdivision (b) of section 86-1.4 of title 10 of NYCRR is amended and a new subdivision (i) is added to read as follows:

(b) Subsequent to the filing of fiscal and statistical reports, field audits [shall] *may* be conducted of the records of medical facilities in a time, manner and place to be determined by the State Department of Health. [Where feasible, the department shall enter into an agreement to use a combined audit (Medicare-Medicaid and other organizations and agencies having audit responsibilities) to satisfy the department's auditing needs. In this respect, the State Department of Health reserves the right, after entering into an agreement to use a combined audit, to reject the audit findings of other organizations and agencies having audit responsibilities and to perform a limited scope or comprehensive audit of their own for the same fiscal period audited by the organization and/or agency.] *Alternatively or in addition the Department may, in its sole discretion, conduct desk audits of such fiscal and statistical reports.*

(i)(1) *Effective for institutional cost reports filed for report periods ending on and after December 31, 2010, the Department shall establish a fee schedule for the purpose of funding audit activities authorized pursuant to this section. Such fee schedule shall be published on the Depart-*



ment's Health website at <http://www.health.state.ny.us>. The amount of such fees shall be based upon the relative amount of the total costs reported by each facility, provided, however, that minimum and maximum fee levels may be established.

(2) Additional fees shall be established for facilities filing more than two institutional cost reports for a cost period. The Department may, upon written application submitted prior to the submission of such additional institutional cost reports, waive all or part of such additional fees based on a showing of financial hardship or for other good cause shown. Such a waiver must be in writing.

(3) Fees shall be submitted at the time of the submission of the institutional cost reports. A failure to pay such fees may be deemed by the Department as constituting the non-filing of the institutional cost report and subject the facility to the rate reduction authorized pursuant to section 86-1.2(c) of this Subpart. Failure to pay the additional fee associated with the filing of additional institutional cost reports as described in paragraph (2) of this subdivision shall result in the non-utilization of such revised cost reports by the Department. Delinquent fees may be collected by the Department in accordance with the provisions of Public Health Law section 2807-c(18)(h).

Subpart 86-1 of title 10 of NYCRR is amended by adding a new section 86-1.40, to read as follows:

86-1.40 *Inappropriate utilization of services.* (a) Effective for discharges occurring on and after April 1, 2011, and subject to the provisions of subdivision (b) of this section, payments for cesarean deliveries will be limited to the hospital's average Medicaid payment for a vaginal delivery.

(b) A hospital may submit a written appeal to the Department within 30 days of such cesarean delivery, setting forth a detailed justification regarding why a cesarean delivery was medically necessary. The Department may require the hospital submitting such an appeal to provide such additional information as the Department deems warranted to perform its review. If the Department determines, on the basis of such written appeal and any additional information requested by the Department, that the cesarean delivery was medically necessary, the Department shall make an appropriate adjustment in the payment amount.

**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 July 4, 2011.

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

#### **Regulatory Impact Statement**

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

Public Health Law section 2807-c(35)(b)(xii) authorizes the Commissioner of Health to incorporate quality related measures pertaining to the inappropriate use of certain medical procedures, including, but not limited to, cesarean deliveries, into the payment methodology for hospitals by regulation.

Public Health Law section 2807-c(35)(b)(xiii) authorizes the Commissioner to impose a fee, by regulation, on general hospitals that is sufficient to cover the costs of auditing the institutional cost reports submitted by such hospitals.

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

The Legislature authorized the Commissioner to address the inappropriate use of medical procedures including cesarean deliveries to promote quality care and reduce unnecessary expenditures.

The Legislature authorized the Commissioner to impose fees sufficient to cover the costs of auditing institutional cost reports for fiscal purposes and to improve the data integrity of information reported by hospitals. Such information is used to make both policy and financial decisions related to the Medicaid program.

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

The proposed amendment appropriately implements the provisions of Public Health Law section 2807-c(35)(b)(xii), which authorizes the Commissioner to address the inappropriate use of cesarean deliveries. Cesarean deliveries are surgical procedures and therefore involve risks, and elective cesarean deliveries involve unnecessary risks. Therefore, high rates of cesarean deliveries are increasingly viewed as indicative of quality of care issues.

This amendment, in concert with enacted statute, appropriately implements a limit on payments for unnecessary cesarean deliveries. Providing deliveries appropriate to the situation will likely reduce costs while at the same time providing higher quality of care. A provision for appeal based on medical necessity provides the means for appropriate payment in those circumstances where a cesarean delivery is, in fact, appropriate.

The proposed rule implementing the provisions of Public Health Law

section 2807-c(35)(b)(xiii) provides for the establishment and implementation of a new fee schedule to support the costs of auditing institutional cost reports. The rule also details how the audit process will be implemented.

##### **COSTS:**

##### **Costs to State Government:**

There are no additional costs to State government as a result of this amendment.

##### **Costs of Local Government:**

There will be no additional cost to local governments as a result of these amendments.

##### **Costs to the Department of Health:**

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

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

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

##### **Paperwork:**

There is no additional paperwork required of providers as a result of these amendments, except that a hospital must submit justification of medical necessity and other information as requested by the Department to obtain the higher level of payment for a cesarean delivery.

##### **Duplication:**

These regulations do not duplicate existing State and federal regulations.

##### **Alternatives:**

No significant alternatives are available. The Department is authorized by the Public Health Law sections 2807-c(35)(b)(xii) and 2807-c(35)(b)(xiii) to address certain aspects of the hospital reimbursement methodology through regulations.

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

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

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

Section 86-1.2 requires that institutional cost reports for cost periods prior to 2010 be certified by an independent licensed or certified public accountant. Regulated parties must continue to comply with this provision when filing institutional cost reports for cost periods prior to 2010.

Section 86-1.4 also allows the Department to impose fees on general hospitals sufficient to cover the costs of auditing the institutional cost reports submitted by general hospitals for cost periods on and after December 31, 2010. Regulated parties must comply with this provision at the time of submission of the institutional cost report. Failure to comply may subject the facility to a rate reduction. In addition, general hospitals that fail to pay the additional fee associated with filing more than two institutional cost reports for a reporting period will be subject to an additional fee.

Section 86-1.40 requires that for discharges occurring on and after April 1, 2011, payments for cesarean deliveries will be limited to the hospital's average Medicaid payment for a vaginal delivery; there is no period of time necessary for regulated parties to achieve compliance.

#### **Regulatory Flexibility Analysis**

##### **Effect on Small Business and Local Governments:**

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

Health care providers subject to the provisions of this regulation under section 2807-c(35)(b)(xii) of the Public Health Law will see a shift in funding that will correspond to each hospital's shift in the number of cesarean deliveries performed versus the number of vaginal deliveries performed.

All health care providers who file Institutional Cost Reports with the Department, including the seven hospitals identified as small businesses, are subject to the provisions of this regulation under section 2807-c(35)(b)(xiii) of the Public Health Law. However, this rule also eliminates the requirement for all hospitals that annual cost reports be certified by an independent CPA, thus reducing the costs and administrative burdens resulting from that current requirement. In addition, provisions are made to waive or reduce some of the new fees for institutions who demonstrate financial hardship and good cause and who apply for such in writing.

This rule will have no direct effect on Local Governments.

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

No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules, except that a hospital must submit justification of medical necessity and other information as requested by the Department to obtain the higher level of payment for a cesarean delivery. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Associa-

tion, as is currently required. The rule should have no direct effect on Local Governments.

#### Professional Services:

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

#### Compliance Costs:

As a result of the new provision of 86-1.40, overall statewide aggregate hospital Medicaid revenues for hospital inpatient services will shift in an amount corresponding to the shift from the number of cesarean deliveries performed to the number of vaginal deliveries performed.

While fee obligations related to the filing of institutional cost reports represent a cost for general hospitals, this is offset by the reduction in costs resulting from the elimination of the requirement that reports be certified by an independent certified public accountant. No capital costs will be imposed as a result of this rule, nor will there be an annual cost of compliance.

#### Economic and Technological Feasibility:

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

#### Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

#### Small Business and Local Government Participation:

Hospital associations participated in discussions and contributed comments through the State's Medicaid Redesign Team process regarding these changes.

#### Rural Area Flexibility Analysis

##### Effect on Rural Areas:

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

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

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

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

#### Compliance Requirements:

No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.

#### Professional Services:

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

#### Compliance Costs:

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

#### Minimizing Adverse Impact:

The proposed amendments reflect statutory intent and requirements.

#### Rural Area Participation:

This amendment is the result of ongoing discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign

Team held multiple regional hearings and solicited ideas through a public process.

#### Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature and purpose of the proposed rules, that they will not have a substantial adverse impact on jobs or employment opportunities. The proposed regulations revise the payment methodology for cesarean deliveries, allow for the Department to perform field or desk audits of the fiscal and statistical records of medical facilities, establish a fee schedule for filing institutional cost reports for report periods on and after December 31, 2010, and require accountant's certification only for institutional cost reports filed for cost years prior to 2010. The proposed regulations have no implications for job opportunities.

## EMERGENCY RULE MAKING

### Medicaid Benefit Limits for Enteral Formula, Prescription Footwear, and Compression Stockings

**I.D. No.** HLT-17-11-00012-E

**Filing No.** 334

**Filing Date:** 2011-04-06

**Effective Date:** 2011-04-06

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

**Action taken:** Amendment of Parts 505 and 513 of Title 18 NYCRR.

**Statutory authority:** Public Health Law, sections 201 and 206; and Social Services Law, sections 363-a and 365-a(2)

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

**Specific reasons underlying the finding of necessity:** Chapter 59 of the laws of 2011 enacted a number of proposals recommended by the Medicaid Redesign Team established by the Governor to reduce costs and increase quality and efficiency in the Medicaid program. The changes to SSL section 365-a(2)(g) that establish benefit limits for enteral formula, prescription footwear, and compression stockings take effect April 1, 2011. Paragraph (t) of section 111 of Part H of Chapter 59 authorizes the Commissioner to promulgate, on an emergency basis, any regulations needed to implement such law. The Commissioner has determined it necessary to file these regulations on an emergency basis to achieve the savings intended to be realized by the Chapter 59 provisions regarding benefits limits.

**Subject:** Medicaid Benefit Limits for Enteral Formula, Prescription Footwear, and Compression Stockings.

**Purpose:** To implement mandatory provisions of SSL, section 365-a(2)(g), as amended by Chapter 59 of the Laws of 2011.

**Text of emergency rule:** Paragraph (2) of subdivision (b) of section 505.1 is amended, and a new paragraph (3) is added to read as follows:

(2) the identification card on its face:

(i) restricts an individual recipient to a single provider; or

(ii) requires prior authorization for all ambulatory medical services and supplies except emergency care [.] ; or

(3) *the service exceeds benefit limitations as established by the department.*

Paragraph (4) of subdivision (a) of section 505.5 is amended to read as follows:

(4) Orthopedic footwear means shoes, shoe modifications, or shoe additions which are used *as follows: in the treatment of children*, to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; *in the treatment of children*, to support a weak or deformed structure of the ankle or foot; *as a component of a comprehensive diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy with evidence of callus formation, a foot deformity or poor circulation; or to form an integral part of an orthotic brace.* Orthopedic shoes must have, at a minimum, the following features:

Subparagraph (ii) of paragraph (4) of subdivision (b) of section 505.5 is amended to read as follows:

(ii) The maximum number of refills permitted for medical/surgical supplies is found in the fee schedule for durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear. The fee schedule for such equipment and supplies is available *free of charge* from the [department] *Medicaid fiscal agent's website.*

[and is also contained in the department's Medicaid Management Information System (MMIS) provider Manual (Durable Medical Equipment, Medical and Surgical Supplies, Prosthetic and Orthotic Appliances). Copies of the manual may be obtained by writing Computer Sciences Corporation, Health and Administrative Services Division, 800 North Pearl St., Albany, NY 12204. Copies may also be obtained from the Department of Social Services, 40 North Pearl St., Albany, NY 12243. The manuals are provided free of charge to every provider of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear at the time of enrollment in the MA program.]

Subparagraph (vi) of paragraph (1) of subdivision (d) of section 505.5 is amended to read as follows:

(vi) [All items not listed in the department's fee schedule for durable medical equipment, medical/surgical supplies, prosthetic and orthotic appliances and orthopedic footwear require prior approval from the New York State Department of Health. The fee schedule for such equipment and supplies is available from the department and is also contained in the department's MMIS Provider Manual (Durable Medical Equipment, Medical/Surgical Supplies, Prosthetic and Orthotic Appliances). Copies of the manual may be obtained by writing Computer Sciences Corporation, Health and Administrative Services Division, 800 North Pearl St., Albany, NY 12204. Copies may also be obtained from the Department of Social Services, 40 North Pearl St., Albany, NY 12243. The manuals are provided free of charge to every provider of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear at the time of enrollment in the MA program.] Reimbursement amounts for unlisted items are determined by the New York State Department of Health and must not exceed the lower of: (a) the acquisition cost to the provider plus 50 percent; or (b) the usual and customary price charged to the general public.

Subparagraph (iii) of paragraph (4) of subdivision (d) of Section 505.5 is amended to read as follows:

(iii) The fee schedule for orthotic and prosthetic appliances and devices is available *free of charge* from the Medicaid [department and is also contained in the department's MMIS Provider Manual (Durable Medical Equipment, Medical and Surgical Supplies, Prosthetic and Orthotic Appliances). Copies of the manual may be obtained by writing Computer Sciences Corporation, Health and Administrative Services Division, 800 North Pearl St., Albany, NY 12204. Copies may also be obtained from the Department of Social Services, 40 North Pearl St., Albany, NY 12243. The manuals are provided free of charge to every provider of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and orthopedic footwear at the time of enrollment in the MA program] *fiscal agent's website*.

Subparagraph (i) of paragraph (5) of subdivision (d) of section 505.5 is amended to read as follows:

(i) Payment for orthopedic footwear must not exceed the lower of:

(a) [the acquisition cost to the provider plus 50%] *the maximum reimbursable amount as shown in the fee schedule for durable medical equipment, medical/surgical supplies, orthotics and prosthetic appliances and orthopedic footwear; the maximum reimbursable amount will be determined for each item of footwear based on an average cost of products representative of that item; or*

(b) the usual and customary price charged to the general public *for the same or similar products*.

Paragraph (1) of subdivision (e) of section 505.5 is amended to read as follows:

(1) [The following items] *Items of durable medical equipment, medical/surgical supplies, orthotic and prosthetic appliances and devices, and orthopedic footwear are limited in their amount and frequency and may require prior authorization. Service limits and prior authorization requirements are listed in the provider manual at the Medicaid fiscal agent's website.*

ITEM	LIMIT
Cane	1 every 3 yrs.
Cane, Quad or three prong	1 every 3 yrs.
Flare heels (each)	2 pair per yr.
Cork lifts	2 pair per yr.
Steindler heel corrections	2 pair per yr.
Spenco Insert	2 pair per yr. per child
Heel wedge	2 pair per yr.
Foot, insert, removable, molded to patient model, longitudinal arch support, each	2 per yr. per adult

Foot, insert, removable, molded to patient model, longitudinal/metatarsal support, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal, each	2 per yr. per adult
Foot, arch support, removable, premolded, longitudinal/metatarsal, each	2 per yr. per adult Longitudinal arch
support	1 pair per yr. per adult
Foot, arch support, mold/Levi mold	2 pair per yr. per adult Removable
stocking/below knee medium wt.	1 pair per yr. per adult Elastic
Elastic stocking/below knee heavy wt.	4 pair per yr.
Elastic stocking/above knee medium wt.	4 pair per yr.
Elastic stocking/above knee heavy wt.	4 pair per yr.
Elastic stocking/full length medium wt.	4 pair per yr.
Elastic stocking/full length heavy wt.	4 pair per yr.
Elastic stocking/leotards	4 pair per yr.
Elastic stocking/garter belt	4 pair per yr.
Surgical stocking/below knee	4 pair per yr.
Surgical stocking/thigh length	4 pair per yr.
Surgical stocking/full length	4 pair per yr.
Corset, Sacroiliac 2 per yr. Corset, Lumbar	2 per yr.
Handheld shower head	1 every 3 yrs.
Bed pan, fracture	1 every 3 yrs.
Urinary suspensory	1 every 5 yrs.
Emesis basin	1 every 5 yrs.
Sitz bath	1 every 5 yrs.
Urinal, female, any material	1 every 5 yrs.
Urinal, male, any material	1 every 5 yrs.
Commode pad	1 every 5 yrs.
Flotation pad	1 per yr.
Humidifier, cold air	1 every 3 yrs.
Vaporizer, room type	1 every 3 yrs.
Standard adult wheelchair	1 every 3 yrs.
Electric heating pad standard	1 every 3 yrs.
Hot fomentation heating pads	1 every 3 yrs.
Orthopedic shoes	2 pair per yr.]

A new subdivision (g) of section 505.5 is added to read as follows:

(g) *Benefit limitations. The department shall establish defined benefit limits for certain Medicaid services as part of its Medicaid State Plan. The department shall not allow exceptions to defined benefit limitations. The department has established defined benefit limits on the following services:*

(1) *Compression and surgical stockings are limited to coverage during pregnancy and for venous stasis ulcers.*

(2) *Orthopedic footwear is limited to coverage in the treatment of children to correct, accommodate or prevent a physical deformity or range of motion malfunction in a diseased or injured part of the ankle or foot; in the treatment of children to support a weak or deformed structure of the ankle or foot; as a component of a comprehensive diabetic treatment plan to treat amputation, ulceration, pre-ulcerative calluses, peripheral neuropathy with evidence of callus formation, a foot deformity or poor circulation; or to form an integral part of an orthotic brace.*

(3) *Enteral nutritional formulas are limited to coverage for tube-fed individuals who cannot chew or swallow food and must obtain nutrition through formula via tube; individuals with rare inborn metabolic disorders requiring specific medical formulas to provide essential nutrients not available through any other means; and for children under age 21 when caloric and dietary nutrients from food cannot be absorbed or metabolized.*



Paragraph (1) of subdivision (b) of section 513.0 is amended to read as follows:

(1) The department, as the single State agency supervising the administration of the MA program, has entered into an interagency agreement with the Department of Health whereby that department will review and approve selected medical, dental and remedial care, services and supplies prior to their being furnished. The purpose of this process is to assure that: the requested medical, dental and remedial care, services or supplies are medically necessary and appropriate for the individual recipient's medical needs; other adequate and less expensive alternatives have been explored and, where appropriate and cost effective, are approved; *the request does not exceed benefit limitations as promulgated by the department*; and the medical, dental and remedial care, services or supplies to be provided conform to accepted professional standards. The department shall not allow exceptions to defined benefit limitations.

A new subdivision (h) of section 513.1 is added to read as follows:

(h) *Benefit limits means specified Medicaid coverage limits which cannot be exceeded by obtaining prior approval or authorizations and for which no exceptions are allowed.*

Paragraph (1) of subdivision (h) of section 513.6 (a) is amended to read as follows:

(1) the specific statutory and regulatory standards *and benefit limits* governing the furnishing of the requested care, services, or supplies;

***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 July 4, 2011.

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

#### ***Regulatory Impact Statement***

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

Social Services Law (SSL) section 363-a and Public Health Law section 201(1)(v) provide that the Department is the single state agency responsible for supervising the administration of the State's medical assistance ("Medicaid") program and for adopting such regulations, not inconsistent with law, as may be necessary to implement the State's Medicaid program.

##### **Legislative Objective:**

The legislative objective, expressed through SSL section 365-a(2)(g), is to impose benefit limitations on Medicaid coverage of enteral formula, prescription footwear, and compression stockings.

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

Enteral formula. Enterals are ordered by practitioners and dispensed by pharmacy or durable medical equipment providers. Medicaid reimburses the cost of enteral formulas for administration via tube or as a liquid oral nutritional therapy when there is a documented diagnostic condition where caloric and dietary nutrients from food cannot be absorbed or metabolized. When prescribed for oral supplementation in adults who can chew and swallow their food, it is objectively difficult to assess medical necessity for the enteral formula and to prevent such reimbursement when used strictly as a convenient food supplement and not due to medical necessity to treat a clinical condition. In the Medicare program enterals are covered for tube-fed individuals only.

Medicaid has attempted to put controls into place such as Card Swipe Prior Authorization and Automated Telephone Prior Authorization. Medicaid has also continued to monitor (through reporting systems) and correct provider prescribing and dispensing activity. In 2004, the enteral pricing methodology was changed, resulting in a 10-20 percent reduction in fees. Despite these measures, total yearly Medicaid utilization and expenditures for enteral nutrition have risen from less than \$11 million per year in 1997 to over \$70 million using the current coverage guidelines and procedures.

By limiting the benefit to specific medical necessity criteria for tube-fed individuals who cannot chew or swallow food, and must obtain nutrition through formula via tube, for individuals with rare inborn metabolic disorders requiring specific medical formulas to provide essential nutrients not available through any other means, and for children when there is a documented diagnostic condition where caloric and dietary nutrients from food cannot be absorbed or metabolized, the regulation will help reduce Medicaid costs by \$15.4 million state and local share annually while continuing to meet intensive medical needs of individual beneficiaries with serious medical conditions.

Orthopedic footwear. Orthopedic footwear is ordered by practitioners and dispensed by durable medical equipment providers. Medicaid currently reimburses the cost of footwear for treatment of any physical deformity, range of motion malfunction, or foot or ankle weakness. A significant portion of utilization under the current benefit is for individuals whose

needs can be met with off the shelf footwear. When prescribed for these less serious purposes, it is objectively difficult to assess medical necessity for the footwear and to prevent such reimbursement. Medicare reimburses footwear only for treatment of diabetes complications. Additionally, footwear is currently manually priced at invoice cost plus 50 percent, resulting in paper claims.

By limiting the benefit based on medical necessity criteria and adopting the new reimbursement methodology, the regulation will reduce Medicaid costs by \$7.35 million state and local share in State Fiscal Year 2011-12 while continuing to meet intensive medical needs of individual beneficiaries with serious medical conditions.

Compression stockings. Compression stockings are ordered by practitioners and dispensed by pharmacy or durable medical equipment providers. Medicaid currently reimburses the costs of stockings for treatment of clinically significant medical conditions such as open wounds, and complications in pregnancy. Medicaid also currently reimburses the cost of stockings that have been prescribed for relatively less serious purposes such as circulatory improvement and wound prevention. When prescribed for these less serious purposes, it is objectively difficult to assess medical necessity for the stockings and to prevent their reimbursement when used strictly for comfort or convenience instead of medically necessary treatment for a clinical condition. Medicare reimburses for stockings only for treatment of open wounds.

By limiting the benefit based on diagnoses of pregnancy or open wounds, the regulation will help reduce Medicaid costs while continuing to meet intensive medical needs of individual beneficiaries with serious medical conditions.

In addition to the changes described above, the regulation amends sections 513.0, 513.1 and 513.6 to clarify that the new benefit limitations are not subject to exception through prior approval. Also, the regulation updates outdated language in section 505.5 regarding how durable medical equipment providers could obtain a hard copy of the Medicaid Provider Manual; such Manual is currently made available to providers online.

##### **COSTS:**

Costs for the Implementation of, and Continuing Compliance with the Regulation to the Regulated Entity:

This amendment will not increase costs to the regulated parties. It will reduce revenues to the extent providers are furnishing enteral formula, prescription footwear, or compression stockings beyond the scope of the benefit limit.

##### **Costs to State and Local Government:**

This amendment will not increase costs to the State or local governments. Savings to the Medicaid Program will be achieved by establishing these benefit limits.

##### **Costs to the Department of Health:**

There will be no additional costs to the Department.

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

This amendment will not impose any program, service, duty, additional cost, or responsibility on any county, city, town, village, school district, fire district, or other special district.

##### **Paperwork:**

This amendment will not impose any additional paperwork for providers of enteral formula, prescription footwear, or compression stockings.

##### **Duplication:**

There are no duplicative or conflicting rules identified.

##### **Alternatives:**

The benefit limits on enteral formula, prescription footwear, and compression stockings are mandated by section 365-a(2)(g) of the SSL. No alternatives were considered.

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

The proposed regulations do not exceed any minimum federal standards.

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

Social services districts and fiscal intermediaries should be able to comply with the proposed regulations when they become effective.

#### ***Regulatory Flexibility Analysis***

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

This amendment affects the 3,123 pharmacies and 369 durable medical equipment providers enrolled in the Medicaid program who actively bill Medicaid for enteral formula. The amendment will limit the enteral benefit, which will reduce Medicaid utilization and billable claims to these businesses, some of which are small. The Department is anticipating a \$15.40 million reduction in enteral expenditures in State Fiscal Year (SFY) 2011-12 and thereafter.

This amendment affects the 955 durable medical equipment providers enrolled in the Medicaid program who actively bill Medicaid for footwear. The amendment will limit the footwear benefit, which will reduce Medicaid utilization and billable claims to these businesses, some of which are small. The Department is anticipating a \$7.35 million reduction in footwear expenditures in SFY 2011-12 and \$16 million annually thereafter.

This amendment affects the 1196 pharmacies and 441 durable medical equipment providers enrolled in the Medicaid program who actively bill Medicaid for stockings. The amendment will limit the stocking benefit, which will reduce Medicaid utilization and billable claims to these businesses, some of which are small. The Department is anticipating a \$1.07 million reduction in stocking expenditures in SFY 2011-12 and thereafter.

The fifty-eight local social services districts share in the costs of services provided to eligible beneficiaries who receive Medicaid through their districts.

#### Compliance Requirements:

This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

#### Professional Services:

No new professional services are required as a result of this amendment.

#### Compliance Costs:

There are no direct costs of compliance with this amendment. However, affected providers will realize reduced Medicaid billings for enteral formula, prescription footwear, and compression stockings. Local social service districts will experience decreased costs in their share of medical expenses for these items as a result of overall decreases in utilization.

#### Economic and Technological Feasibility:

The amendment will not change the way providers bill for services or affect the way the local districts contribute their local share of Medicaid expenses for enteral formula, prescription footwear, or compression stockings. Therefore, there should be no technological difficulties associated with compliance with the proposed regulation.

#### Minimizing Adverse Impact:

SSL section 365-a(2)(g) requires a benefit limit on the coverage of enteral formula, prescription footwear, and compression stockings. These limits will affect providers by reducing payable Medicaid claims for such items. This impact cannot be avoided given the statutory mandate.

#### Small Business and Local Government Participation:

Local government officials have consistently urged the Department to implement Medicaid cost savings programs. The Department also meets on a regular basis with provider groups such as the New York Medical Equipment Providers (NYMEP). NYMEP has been informed of the proposed changes and has indicated its concerns regarding adequate notice to beneficiaries and practitioners on the revised benefits. Upon promulgating the regulation, the Department will inform the industry of the changes and assist as necessary with the transition to the new benefit limits.

#### Rural Area Flexibility Analysis

##### Types and Estimated Number of Rural Areas:

The benefit limit on enteral formula will apply to 3123 pharmacies and 369 durable medical equipment providers in New York State. The benefit limit on prescription footwear will apply to 955 durable medical equipment providers in New York State. The benefit limit on compression stockings will apply to 1196 pharmacies and 441 durable medical equipment providers in New York State. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

#### Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:

No new reporting, recordkeeping or other compliance requirements and professional services are needed in a rural area to comply with the proposed rule.

#### Costs:

There are no direct costs associated with compliance. However, affected providers will realize reduced Medicaid billable claims for enteral formula, prescription footwear, and compression stockings.

#### Minimizing Adverse Impact:

The Department considered the approaches in Section 202-bb(2)(b) of the State Administrative Procedure Act and found them to be inappropriate given the legislative objective.

#### Rural Area Participation:

The Department meets on a regular basis with provider groups such as the New York Medical Equipment Providers (NYMEP), who represents some rural providers, to discuss reimbursement issues. NYMEP has indicated its concerns regarding adequate notice to beneficiaries and practitioners on the revised benefits. Upon promulgating the regulation, the Department will inform the industry of the changes and assist as necessary with the transition to the new benefit limits.

#### Job Impact Statement

##### Nature of Impact:

This rule will result in decreased Medicaid billable claims for providers of enteral formula, prescription footwear, and compression stockings. This decreased revenue will not likely have an adverse impact on jobs and employment opportunities within these businesses as they offer a wide variety of services which are reimbursed by Medicaid.

##### Categories and Numbers Affected:

This rule, which decreases Medicaid revenue, will not likely affect employment opportunities within providers who provide enteral formula, prescription footwear, and compression stockings.

The dispensing of enteral formula and compression stockings requires store clerk level staff, not licensed professionals.

The dispensing of prescription footwear requires staff certification from a national orthotic and prosthetic accreditation and training body. Support staff require no special training.

#### Regions of Adverse Impact:

This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program to provide enteral formula, prescription footwear, and compression stockings.

#### Minimizing Adverse Impact:

SSL section 365-a(2)(g) requires a benefit limit on the coverage of enteral formula, prescription footwear, and compression stockings. These limits will affect providers by reducing payable Medicaid claims for such items. This impact cannot be avoided given the statutory mandate.

#### Self-Employment Opportunities:

The rule is expected to have minimal impact on self-employment opportunities since the majority of providers that will be affected by the rule are not small businesses or sole proprietorships whose sole business is dispensing enteral formula, prescription footwear, or compression stockings.

## Insurance Department

### EMERGENCY RULE MAKING

#### Life Settlements

**I.D. No.** INS-17-11-00014-E

**Filing No.** 351

**Filing Date:** 2011-04-11

**Effective Date:** 2011-04-11

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

**Action taken:** Addition of Part 381 (Regulation 198) to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 2137, 7803 and 7804; as added by L. 2009, ch. 499 and L. 2009, ch. 499, section 21

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

**Specific reasons underlying the finding of necessity:** This part sets forth the license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries and financial accountability requirements for life settlement providers as required under sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009. These sections, along with other sections of the new life settlement legislation, became effective May 18, 2010.

These sections of the Insurance Law require licensing and registration of life settlement providers, life settlement intermediaries and life settlement brokers. In order to license and register these persons, the fees associated with the licensing and registration, as well as financial accountability requirements which life settlement providers must demonstrate at licensing, must first be established by regulation as required by the legislation. The licensing of these entities is a critical aspect of the new life settlement law in order to properly safeguard the public in life settlement transactions.

Section 21 of Chapter 499 of the Laws of 2009 permits a person lawfully operating as a life settlement provider, life settlement intermediary, or life settlement broker in this state with respect to life settlement transactions not heretofore regulated under the Insurance Law to continue to do so pending approval or disapproval of the person's application for license or registration, if such person files the appropriate application with the Superintendent not later than 30 days after the Superintendent publishes the application on the Department's website and certifies that the applicant shall comply with all applicable provisions of the Insurance Law and regulations promulgated thereunder. Because the law provides that the Superintendent must establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers, and such constitutes rulemaking under the State Administrative Procedure Act, it is critical that these fees be established and maintained in effect on an emergency basis to facilitate the processing of



these applications. Otherwise, life settlement providers, life settlement intermediaries and life settlement brokers will be able to continue to operate in New York without applying for licensing or registration and thereby engaging in life settlement transactions without being licensed by or registered with the Superintendent, which will not adequately protect the public. It is also critical that the fees established by this emergency regulation remain in effect in order for the Department to continue to accept new applications for licensure by life settlement providers, life settlement intermediaries and life settlement brokers. If the Department was unable to accept new applications for licensure, a competitive disadvantage for new applicants seeking such licensure could result.

This regulation was previously promulgated on an emergency basis on April 23, 2010, July 19, 2010, October 14, 2010 and January 11, 2011. In addition, a proposal for the permanent adoption of the regulation was sent to the Governor's Office of Regulatory Reform on February 8, 2011, and the Department is awaiting approval to publish the proposed regulation in the *State Register*.

The Department is still focused on, and continues to be engaged in outreach to interested parties regarding, additional issues regarding licensing that need to be addressed in future amendments to the regulation (e.g., processing of submitted licensing applications; establishing internal procedures, processes and systems; responding to life settlement issues and inquiries).

**Subject:** Life Settlements.

**Purpose:** To implement Chapter 499 of the Laws of 2009's provisions of license fees and financial accountability requirements.

**Text of emergency rule:** Chapter XV of Title 11 is renamed "Life Settlements."

*Section 381.1 License fees and financial accountability requirements for life settlement providers.*

(a) *The application for a license as a life settlement provider shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$10,000.*

(b) *The financial accountability of a life settlement provider required in accordance with section 7803(c)(2)(E) of the Insurance Law, to assure the faithful performance of its obligations to owners and insureds on life settlement contracts subject to Article 78 of the Insurance Law, shall be in an amount at least equivalent to \$250,000, shall be maintained at all times and may be evidenced in one of the following manners:*

(1) *Assets in excess of liabilities in an amount at least equal to \$250,000 as reflected in the applicant's financial statements;*

(2) *A surety bond in an amount at least equal to \$250,000 placed in trust with the superintendent issued by an insurer licensed in this State to write fidelity and surety insurance under section 1113(a)(16) of the Insurance Law; or*

(3) *Securities placed in trust with the superintendent consisting of securities of the types specified in section 1402(b)(1) and (2) of the Insurance Law, estimated at an amount not exceeding their current market value, but with a total par value not less than \$250,000; provided that:*

(i) *If the life settlement provider is incorporated in another state, the securities allowed for placement in the trust may consist of direct obligations of that state; and*

(ii) *If the aggregate market value of the securities in trust falls below the required amount, the superintendent may require the life settlement provider to deposit additional securities of like character.*

(c) *The application for the biennial renewal of a life settlement provider license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$5,000.*

*Section 381.2 License fees for life settlement brokers.*

(a) *The application for a license as a life settlement broker shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.*

(b) *The application for the biennial renewal of a life settlement broker license shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee for each individual applicant and for each proposed sub-licensee of forty dollars for each year or fraction of a year in which a license shall be valid.*

*Section 381.3 Registration fees for life settlement intermediaries.*

(a) *The application for registration as a life settlement intermediary shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$7,500.*

(b) *The application for the biennial renewal of a life settlement intermediary registration shall be made on such forms and supplements as prescribed by the superintendent and shall be accompanied by a non-refundable fee of \$2,500.*

**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 July 9, 2011.

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

#### **Regulatory Impact Statement**

1. Statutory authority: The Superintendent's authority for promulgation of this rule derives from sections 201 and 301 of the Insurance Law, sections 2137, 7803 and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, and section 21 of Chapter 499 of the Laws of 2009.

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

Section 2137, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement brokers. Section 2137(h)(8) requires licensing and renewal fee be determined by the Superintendent, provided that such fees do not exceed that which is required for the licensing and renewal of an insurance producer with a life line of authority.

Section 7803, as added by Chapter 499 of the Laws of 2009, sets forth the licensing requirements for life settlement providers. Section 7803(c)(1) requires the application for a life settlement provider's license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(h)(1) provides that an application for renewal of the license be accompanied by a fee in an amount to be established by the Superintendent. Section 7803(c)(2)(E) requires a life settlement provider to demonstrate financial accountability as evidenced by a bond or other method for financial accountability as determined by the Superintendent pursuant to regulation.

Section 7804, as added by Chapter 499 of the Laws of 2009, sets forth the registration requirements for life settlement intermediaries. Section 7804(c)(1) requires the application for a life settlement intermediary registration be accompanied by a fee in an amount to be established by the Superintendent. Section 7804(i)(1) provides that an application for renewal of the registration be accompanied by a fee in an amount to be established by the Superintendent.

Pursuant to State Administrative Procedure Act Section 202, the implementation of the fee requirements under Sections 2137, 7803 and 7804 requires the promulgation of regulations.

Section 21(6) of Chapter 499 of the Laws of 2009 authorizes the Superintendent to promulgate rules and regulations necessary for the implementation of its provisions.

2. Legislative objectives: Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, which will become effective May 18, 2010, require the licensing of life settlement providers and life settlement brokers and the registration of life settlement intermediaries. Such sections also provide that the license and registration fees charged these persons and the financial accountability requirements that life settlement providers must demonstrate at licensing shall be established by the Superintendent.

Section 21(6) of Chapter 499 of the Laws of 2009 authorizes the Superintendent to promulgate rules and regulations necessary for the implementation of its provisions. This rule is necessary to implement Sections 2137, 7803 and 7804 of the Insurance Law.

3. Needs and benefits: Section 21 of Chapter 499 of the Laws of 2009 permits a person lawfully operating as a life settlement provider, life settlement intermediary or life settlement broker in this state with respect to life settlement transactions not heretofore regulated under the Insurance Law to continue to do so pending approval or disapproval of the person's application for license or registration, if such person files the appropriate application with the Superintendent not later than 30 days after the Superintendent publishes the application on the Department's website and certifies that the applicant shall comply with all applicable provisions of the Insurance Law and regulations promulgated thereunder. Because the law provides that the Superintendent must establish the application filing fees for licensing of life settlement providers and brokers, and the registration of life settlement intermediaries, and financial accountability requirements for life settlement providers, and such constitutes rulemaking under the State Administrative Procedure Act, it is critical that these fees be established on an emergency basis to facilitate the processing of these applications. Otherwise, life settlement providers, life settlement intermediaries and life settlement brokers will be able to continue to operate in New York without applying for licensing or registration and thereby continue to engage in life settlement transactions without being licensed by or registered with the Superintendent, which will not adequately protect the public. It is also critical that the fees established by this emergency regulation remain in effect in order for the Department to accept new applications for licensure by life settlement providers, life settlement intermediaries and life settlement brokers. If the Department was unable



to continue to accept new applications for licensure, a competitive disadvantage for new applicants seeking such licensure could result.

Adoption of this rule establishing license and registration fees and financial accountability requirements is necessary for the timely implementation of the life settlement legislation.

4. Costs: The rule requires an initial license application fee of \$10,000 for life settlement providers and an initial registration application fee of \$7,500 for intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

In developing the license and renewal fees for life settlement providers, life settlement intermediaries and life settlement brokers, the following were considered:

- New York Insurance Law Section 332 provides that the expenses of the Department for any fiscal year, including all direct and indirect costs, shall be assessed by the Superintendent pro rata upon all domestic insurers and licensed United States branches of alien insurers domiciled in New York. Life settlement providers and life settlement intermediaries are not subject to this assessment. As a result, these expenses will be borne by insurers through the Section 332 assessments, since fees collected by the Superintendent are turned over to the State's general fund, and do not directly reimburse the expenses of the Department. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration. Several factors were considered in arriving at appropriate fees:
- Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.
- Initial and renewal licensing fees charged to life settlement providers are set at rates greater than initial and renewal registration fees charged to life settlement intermediaries. The differences in such fees reflect the lesser time-based expenses associated with the registration of intermediaries than associated with provider licensing.
- New Insurance Law Sections 2137 provides that the licensing or renewal fees prescribed by the Superintendent for a life settlement broker shall not exceed the licensing or renewal fee for an insurance producer with a life line of authority. In accordance with the statute, this rule sets the licensing and renewal fee for a life settlement broker at \$40, which is equal to the current licensing or renewal fee of an insurance producer with a life line of authority.

In developing the financial accountability requirements that a life settlement provider must comply with, the Superintendent considered the cash outlay of each offered compliance option. The establishment of a surety bond requires the purchase of the surety bond. The deposit of securities with the Superintendent requires the establishment of a custodian account and incurrence of the associated expenses. The maintenance of a required level of assets in excess of liabilities may require the addition of capital where such level is not currently maintained.

The rule does not impose additional costs to the Insurance Department or other state government agencies or local governments.

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

6. Paperwork: No additional paperwork should result from the provisions set by this rule.

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

8. Alternatives: In the development of the licensing and registration fees imposed on life settlement providers and life settlement intermediaries, the Department's draft proposal was premised on the Superintendent retaining the fees to cover Department costs, and the fees were significantly

higher than as included in the emergency regulation. However, as noted, such fees are turned over to the State's general fund and thus do not directly reimburse the Department for its expenses.

The Department solicited comments from interested parties on the draft rule, which contained the higher fees. An outreach draft of the rule was posted on the Department's website for a two-week public comment period and a meeting was held at the Department on April 6, 2010 to discuss the rule with interested parties. The Life Insurance Settlement Association (LISA), a life settlement industry trade association, and other life settlement interested parties commented that the intended fees would present a financial barrier for some life settlement providers wishing to compete in the New York marketplace. LISA, as well as other interested parties, took the position that a decreased number of licensed providers in New York inhibits fair competition and industry growth, which would ultimately harm New York policyholders seeking the assistance of the secondary market for life insurance because of the lack of competition. In response to these comments, the initial license fee for life settlement providers was reduced from \$20,000 to \$10,000 and the initial registration fee for life settlement intermediaries was reduced from \$10,000 to \$7,500.

The Life Insurance Council of New York (LICONY), a life insurance trade association, has expressed support of a licensing and registration fee structure set at a level that is sufficient so that participating entities are paying for the regulation of their industry. The Superintendent attempted to balance the competing interests discussed above to arrive at a fee schedule that would be fair and equitable.

With regard to financial accountability requirements, the outreach draft posted to the Department's website for public comment had provided two options - surety bond and security deposit - to comply with such demonstration. After consideration of the comments received from LISA and other life settlement industry interested parties indicating that these options would create a financial barrier for some providers wishing to enter and operate in the New York market, the Superintendent added a third option that provides a less costly and less capital restrictive compliance alternative. The third option allows a life settlement provider to satisfy the financial accountability requirements by demonstrating that its assets exceed its liabilities by an amount no less than \$250,000. These financial accountability requirements are on a par with the requirements in many other states.

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

10. Compliance schedule: The emergency adoption of this regulation ensures that the fees and financial accountability requirements can be included immediately in the license application for life settlement providers and life settlement brokers and registration application for life settlement intermediaries. To ensure the timely implementation of Sections 2137, 7803, and 7804 of the Insurance Law as added by Chapter 499 of the Laws of 2009, the license application forms for life settlement providers and life settlement brokers and the registration form for life settlement intermediaries need to be published on the Department's website as soon as possible.

The emergency regulation was necessary in order to establish fees and financial accountability standards in order to commence licensing life settlement providers, intermediaries and brokers. Since the emergency regulation went into effect in April, 2010, the Department has focused on the issues that needed to be addressed regarding licensing (e.g., development of licensing applications and processing of submitted applications; establishing internal procedures, processes and systems; responding to life settlement issues and inquiries). The Department continues to be engaged in outreach to interested parties to get their input regarding the additional provisions to be added to the regulation.

#### **Regulatory Flexibility Analysis**

1. Effect of the rule: This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements for life settlement providers.

This rule is directed to life settlement providers, life settlement brokers and life settlement intermediaries. Some of these entities may come within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act, because they are independently owned and operated, and employ 100 or fewer individuals.

This rule should not impose any adverse compliance requirements or adverse impacts on local governments. The basis for this finding is that this rule is directed at the entities allowed to conduct life settlement business, none of which are local governments.

2. Compliance requirements: The affected parties will need to accompany their applications along with fees as prescribed by this rule. Also, each life settlement provider applying for license has to comply with financial accountability requirements by demonstrating that its assets exceeds its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

3. Professional services: None is required to meet the requirements of this rule.

4. Compliance costs: The regulation requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must comply with financial accountability requirements by demonstrating that its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

5. Economic and technological feasibility: The affected parties will need to pay licensing and registration fees as prescribed by the rule.

6. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by the rule may present a financial barrier for some small-business life settlement providers and life settlement intermediaries wishing to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the licensing and registration fees, alternatives (such as the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to small-business life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on small-business life settlement providers and intermediaries were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comment received by the Department from interested parties in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less costly and less capital restrictive alternative to the other two methods of compliance in the rule.

7. Small business and local government participation: Affected small businesses had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period starting March 19, 2010 and to participate (in person or by conference call) in a meeting held at the Department on April 6, 2010 to discuss the rule.

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

1. Types and estimated numbers of rural areas: There may be some life settlement providers, life settlement brokers, and life settlement intermediaries that do business in rural areas as defined under State Administrative Procedure Act Section 102(13).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This rule will not impose any reporting or record-keeping requirements on public or private entities in rural areas. The affected parties that do business in rural areas will need to comply with the license and registration fees and financial accountability requirements imposed by the rule.

3. Costs: The rule requires a license fee of \$10,000 for life settlement providers and a registration fee of \$7,500 for life settlement intermediaries. Licensed providers and intermediaries are required to pay a renewal fee every two years, in the amount of \$5,000 and \$2,500, respectively. The rule also sets an annual license fee of \$40 for life settlement brokers. In addition to paying the licensing fee and renewal fees, a life settlement provider must meet financial accountability requirements by demonstrating its assets exceed its liabilities by \$250,000 at the time of initial licensing and at all times thereafter, or by placing either a surety bond or securities in an amount of not less than \$250,000 in trust with the Superintendent.

4. Minimizing adverse impact: The initial and renewal licensing and registration fees and financial accountability requirements for life settlement providers and life settlement intermediaries prescribed by the rule may present a financial barrier for some life settlement providers and life settlement intermediaries doing business in rural areas that wish to compete in the New York market. Nonetheless, the Superintendent believes that it is appropriate for the initial and renewal licensing and registration fees charged to life settlement providers and life settlement intermediaries to reflect, if not approximate, the costs and expenses incurred by the Department in implementing this legislation. At the same time, the Superintendent must balance other competing interests: while being reasonable and sufficient to reflect a life settlement provider's or life settlement intermediary's commitment to the New York market and a level of financial resources of such persons that will enable them to create and maintain a compliance structure necessary to ensure the faithful performance of their obligations to owners and insureds on life settlement contracts subject to Insurance Law Article 78, and yet not be too excessive so as to discourage providers and intermediaries with lesser financial resources from seeking licensing or registration.

Renewal fees for both life settlement providers and life settlement intermediaries are considerably less than the initial fees. This reflects that expenses incurred on renewal applications are generally lower than on initial application.

With regard to the fees, alternatives (such as the direct billing of expenses, an assessment based allocation of expenses, or a reduction of licensing and registration fees charged to rural area life settlement providers and life settlement intermediaries) that may have reduced the impact of such fees on life settlement providers and intermediaries doing business in rural areas were considered. However, such alternatives would require legislative authority, which could not be secured in a timeframe necessary for the timely implementation of the life settlement legislation.

With regard to the financial accountability requirements imposed on life settlement providers, after consideration of the public comments received from interested parties by the Department in response to the posting of a draft of the rule on the Department website and a meeting held with such parties to discuss the rule, the Superintendent did include in the rule an additional compliance method - demonstration of assets in excess of liabilities by an amount no less than \$250,000 - which provides a less costly and less capital restrictive alternative to the other two methods of compliance included in the rule.

5. Rural area participation: Affected parties doing business in rural areas of the State had the opportunity to comment on the draft of the rule posted on the Department website during the two-week comment period starting March 19th and participate (in person or by teleconference) in the Department meeting on April 6th with interested parties to discuss the rule.

#### **Job Impact Statement**

The Insurance Department finds that this rule should have no impact on jobs and employment opportunities. This rule sets license fees for life settlement providers and life settlement brokers, registration fees for life settlement intermediaries, and financial accountability requirements that life settlement providers must demonstrate at licensing. Additional licensing and registration requirements will be established by related rulemaking in the near future.

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## **Department of Labor**

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### **NOTICE OF EXPIRATION**

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

#### **Public Employees Occupational Safety and Health Standards**

<b>I.D. No.</b>	<b>Proposed</b>	<b>Expiration Date</b>
LAB-14-10-00007-P	April 7, 2010	April 7, 2011

## Department of Motor Vehicles

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

#### Motorcycle Drivers Licenses

**I.D. No.** MTV-17-11-00009-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 3 of Title 15 NYCRR.

**Statutory authority:** Vehicle and Traffic Law, sections 215(a), 501(2)(c) and 1198

**Subject:** Motorcycle Drivers Licenses.

**Purpose:** Eliminates the reference of a specific named motorcycle safety program.

**Text of proposed rule:** Subparagraph (iii) of paragraph (5) of subdivision (a) of section 3.7 is amended to read as follows:

(iii) that he or she is the holder of a valid New York driver's license, and has successfully completed [the 15-hour "Motorcycle Rider Course: Riding and Street Skills" developed by the Motorcycle Safety Foundation (MSF)] *a motorcycle rider training course approved by the Commissioner.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

**Data, views or arguments may be submitted to:** Everett Mayhew, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 526, Albany, NY 12228, (518) 474-0871

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

#### Consensus Rule Making Determination

The New York State Motorcycle Safety Program, created by Chapter 435 of the Laws of 1997, added a new Section 410-a to the Vehicle and Traffic Law. It required the Commissioner to establish and implement a motorcycle safety program. With this law, New York became the 46th state to establish a legislated motorcycle safety program. The goal of the program is to reduce the number of motorcyclist injuries and fatalities with an emphasis on rider education and motorist awareness of motorcycles. To promote rider education and proper licensing, DMV waives the motorcycle road test for licensed drivers who successfully complete an approved rider training program. The program uses a nationally recognized curriculum and is funded through a special revenue account that is supported by a portion of all motorcycle license and registration fees. In 2010, the program generated \$2,804,788.00 in revenue and trained over 16,000 motorcyclists.

This amendment makes a technical amendment to 15 NYCRR 3.7(5)(iii), to eliminate the reference to the "Motorcycle Rider Course: Riding and Street Skills" developed by the Motorcycle Safety Foundation (MSF)", since that particular program no longer exists. The proposed amendment simply refers to a "course approved by the Commissioner," a general reference that will eliminate the need to amend this regulation every time the course title and/or course sponsor changes. Since this is a technical, non-controversial proposal, a consensus rulemaking is appropriate.

#### Job Impact Statement

A Job Impact Statement is not submitted because the proposed amendment will not have an adverse impact on job creation or development in New York State.

## Public Service Commission

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

#### Eligibility to Participate in the Customer-Sited Tier and to Receive Financial Incentives Funded by the RPS Charge

**I.D. No.** PSC-17-11-00017-P

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

**Proposed Action:** The Commission is considering a petition by Energy Investment Systems, Inc., et al., requesting that regenerative drive technology be made an eligible resource in the Customer-Sited Tier of the Renewable Portfolio Standard (RPS) program.

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

**Subject:** Eligibility to participate in the Customer-Sited Tier and to receive financial incentives funded by the RPS charge.

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

**Substance of proposed rule:** The Commission is considering whether to adopt, modify, or reject, in whole or in part, potential modifications to the Renewable Portfolio Standard (RPS) program proposed by Energy Investment Systems, Inc. and The C.V. Starr Research Foundation (Petitioners) in a petition entitled "Joint Petition of Energy Investment Systems, Inc. and The C.V. Starr Research Foundation at the Cooper Union for the Advancement of Science and Art" dated March 23, 2011. Petitioners request that "regenerative drive technology" be made eligible to participate in the RPS Customer-Sited Tier as an eligible technology. Petitioners describe "regenerative drive technology" as a way of generating electricity from elevators when the gravitational pull (the force going down) is greater than the weight going up, and gravity must be held in check such that the mechanical energy of the moving car or counterweight causes the elevator motor to rotate in the opposite direction, functioning as a generator (or re-generator) of electricity. The elevator can also produce electricity as it slows down, or decelerates, before it stops when the motor/generator works as a braking system. Conventional elevator systems dissipate this untapped electricity as waste heat, routing it through electrical resistors in the elevator shaft or machine room. As part of their petition, Petitioners propose a study to assess the prospective impact of regenerative drive technology in New York City and to determine the feasibility and financial framework of potential RPS customer-sited tier incentives.

The Renewable Portfolio Standard (RPS) employs two programs as the principal means of obtaining additional renewable resources. Both programs are administered by the New York State Energy Research and Development Authority (NYSERDA). The bulk of the electricity needed is obtained from competitive procurements of renewable resources (the Main Tier). A complementary program was established for behind-the-meter applications of renewable generation (the Customer-Sited Tier). The Customer-Sited Tier is designed to encourage customers to install their own "behind-the-meter" renewable energy production systems. This gives customers an opportunity to directly affect the generation source of the electricity they consume. It also provides an avenue of funding for promising higher-cost low or non-polluting electricity technologies that might otherwise find it difficult economically to compete for funding in the Main Tier. Such support helps sustain the infrastructure of distributors, installers and other businesses bringing these technologies to customers. It also promotes behind the meter resources which are likely to enhance distributed generation as an alternative to central station power plants. Customer-Sited resources include only certain self-generation, "behind-the-meter" facilities located in New York that are placed into service on or after January 1, 2003. The technologies currently eligible for participation in the Customer-Sited Tier include solar photovoltaic, anaerobic digestion biogas systems (anaerobic digesters), fuel cells, small wind, and solar thermal. Participation in the program is generally limited to electric customers that pay the RPS surcharge. A determination granting "eligibility" would make new or newly-expanded regenerative drive technology facilities potentially



eligible to receive financial incentives funded by the RPS charge paid by electric utility company ratepayers throughout New York State. Public authority customers do not pay the RPS charge.

According to the petition, Petitioner Energy Investment Systems, Inc. is a consulting firm that advises building owners, property managers and developers on how to increase energy efficiency and reduce their energy costs. The firm also contributes its expertise to advance public policy discussions among public and private sectors. According to the petition, The C.V. Starr Research Foundation serves as the primary research unit of the Albert Nerkin School of Engineering of The Cooper Union for the Advancement of Science and Art.

In addition to other comments, parties are invited to comment on whether the Generic Final Environmental Impact Statement dated August 26, 2004 (available at <http://www.dps.state.ny.us/03e0188.htm>) previously prepared in Case 03-E-0188 adequately addresses the potential adverse environmental impacts that may occur due to the changes in the RPS Program proposed by Petitioners [Note: See 6 NYCRR Section 617.9(a)(7) for the State Environmental Quality Review Act regulations regarding supplemental environmental impact statements].

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (03-E-0188SP28)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Con Edison's Report on 2010 Performance Under Electric Service Reliability Performance Mechanism

**I.D. No.** PSC-17-11-00018-P

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

**Proposed Action:** The Public Service Commission (Commission) is considering whether Consolidated Edison Company of New York, Inc.'s (Con Edison) met its 2010 performance standards under the Electric Service Reliability Performance Mechanism.

**Statutory authority:** Public Service Law, sections 65 and 66

**Subject:** Con Edison's Report on 2010 Performance under Electric Service Reliability Performance Mechanism.

**Purpose:** To consider whether Con Edison has met its performance standards as prescribed by the Commission in Con Edison's rate plan.

**Substance of proposed rule:** The Public Service Commission (Commission) is considering Consolidated Edison Company of New York, Inc. (Con Edison) Report on 2010 Performance under Electric Service Reliability Performance Mechanism (2010 RPM Report). Specifically, the Commission will consider whether Con Edison has met all of the required performance standards set forth in the utility's rate plan. Con Edison states that a revenue adjustment of \$5 million is not applicable for its failure to meet its network duration threshold standard given that outages were caused by excludable overhead major storms that have impacted its network system. In addition, Con Edison states that a revenue adjustment of \$10 million is not applicable for its failure to meet its Remote Monitoring System metric due to extraordinary circumstances in the Long Island City network. The utility states that it has met all the remaining performance metrics, which include radial system-wide threshold standards, summer network feeder open automatics, major outages, radial restoration, pole repairs, shunt removals, no current streetlight and traffic signal repairs, and over duty circuit breaker replacements.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0428SP3)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Economic Development Rates

**I.D. No.** PSC-17-11-00019-P

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

**Proposed Action:** The Commission is considering a proposed tariff filing by Village of Ilion to make various changes in rates, charges, rules and regulations contained in its Schedule for Electric Service, PSC No. 3.

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

**Subject:** Economic Development Rates.

**Purpose:** To establish a New Service Classification No. 8 – Individual Service Agreements – Economic Development.

**Substance of proposed rule:** The Commission is considering a proposal filed by Village of Ilion (the Village) to establish a new Service Classification No. 8 – Individual Service Agreements – Economic Development. The Village is also filing a new schedule to update the name on the schedule to Village of Ilion, Light Department. The current name on the schedule is Ilion Board of Light Commissioners. The Commission may adopt in whole or in part, modify or reject Village of Ilion's proposal.

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

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (11-E-0141SP1)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Modifications to Required Filing Dates for Program and Evaluation Reports, Monthly Scorecard Reports, and O&E/Marketing Reports

**I.D. No.** PSC-17-11-00020-P

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

**Proposed Action:** The Commission is considering whether to adopt, in whole or in part, Department of Public Service Staff proposals regarding the deadlines for the filing of certain reports for the Energy Efficiency Portfolio Standard (EEPS) programs.

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

**Subject:** Modifications to required filing dates for program and evaluation reports, monthly scorecard reports, and O&E/marketing reports.

**Purpose:** To encourage energy conservation and facilitate cost-effective programs under the Energy Efficiency Portfolio Standard.

**Substance of proposed rule:** The Commission is considering whether to adopt, in whole or in part, to reject, or to take any other action with respect to the following proposals of the Staff of the Department of Public Service regarding the deadlines for the filing of certain reports for the Energy Efficiency Portfolio Standard (EEPS) programs:

1. Each EEPS Program Administrator is currently required to file annual program and evaluation reports no later than 60 days after the conclusion of the calendar year being reported. Staff is proposing that the deadline be changed such that each EEPS Program Administrator will be required to file annual program and evaluation reports no later than 90 days after the conclusion of the calendar year being reported.

2. Each EEPS Program Administrator is currently required to file quarterly program and evaluation reports no later than 45 days after the conclusion of the calendar quarter being reported. Staff is not proposing any change in that deadline.

3. Each EEPS Program Administrator is currently required to file monthly scorecard reports no later than 14 days after the conclusion of the calendar month being reported. Staff is proposing that the deadline be changed such that each EEPS Program Administrator will be required to file monthly scorecard reports no later than 30 days after the conclusion of the calendar month being reported.

4. Each EEPS Program Administrator is currently required to file annual reports of each calendar year's Outreach&Education/Marketing program achievements, as available to date, and updated plans for the coming calendar year, with the third quarter status reports (due November 14th of each year) so that they can be reviewed prior to the end of each program year. Staff is proposing that the deadline be changed such that each EEPS Program Administrator will be required to file annual reports of each calendar year's Outreach&Education/Marketing program achievements, and updated plans for the remainder of the calendar year, with the annual program and evaluation reports filed no later than 90 days after the conclusion of the calendar year being reported.

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

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

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

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

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

(07-M-0548SP37)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Petition for the Submetering of Electricity

**I.D. No.** PSC-17-11-00021-P

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

**Proposed Action:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by CityStation West, LLC to submeter electricity at 1521 6th Avenue, Troy, New York.

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

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

**Purpose:** To consider the request of CityStation West, LLC to submeter electricity at 1521 6th Avenue, Troy, New York.

**Substance of proposed rule:** The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by CityStation West, LLC to submeter electricity at 1521 6th Avenue, Troy, New York, located in the territory of Niagara Mohawk Power Corporation d/b/a National Grid.

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

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

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

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

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

(11-E-0124SP1)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Whether to Approve, Modify or Deny the Plan to Provide Commercial Demand Response Data Access

**I.D. No.** PSC-17-11-00022-P

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

**Proposed Action:** The Commission is considering whether to approve, modify or deny a proposal by Consolidated Edison Company of New York, Inc. to provide Commercial Demand Response data access in a manner that supports market requirements and customer needs.

**Statutory authority:** Public Service Law, sections 65(1), 66(1) and (12)

**Subject:** Whether to approve, modify or deny the plan to provide Commercial Demand Response data access.

**Purpose:** Whether to approve, modify or deny the plan to provide Commercial Demand Response data access.

**Substance of proposed rule:** The Commission is considering whether to approve, modify or deny, in whole or in part, a proposed filing by Consolidated Edison Company of New York, Inc. related to its commercial demand response programs. The proposed filing is intended to provide program participants access to meter data in a manner that supports market requirements and customer needs.

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

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

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

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

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

(08-E-1463SP3)

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Private Outdoor Lighting

**I.D. No.** PSC-17-11-00023-P

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



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

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

**Subject:** Private Outdoor Lighting.

**Purpose:** To add new fixtures to Service Classification No. 6 Private Outdoor Lighting.

**Substance of proposed rule:** The Commission is considering a proposal filed by the Village of Springville to add new fixtures to Service Classification No. 6 Private Outdoor Lighting. The current 175 Watt Mercury lights are being phased out and will eventually be replaced by either the 70 Watt Metal Halide or the 150 Watt Metal Halide. The proposed filing has an effective date of July 1, 2011. The Commission may adopt in whole or in part, modify or reject the Village of Springville's proposal, and may apply its decision to other utilities.

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

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

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

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

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

(11-E-0126SP1)

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## State University of New York

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### EMERGENCY RULE MAKING

#### State University of New York Student Assembly

**I.D. No.** SUN-17-11-00024-E

**Filing No.** 352

**Filing Date:** 2011-04-12

**Effective Date:** 2011-04-12

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

**Action taken:** Amendment of sections 341.4 and 341.18 of Title 8 NYCRR.

**Statutory authority:** Education Law, section 355(2)(b) and (h)

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

**Specific reasons underlying the finding of necessity:** Amendment of these regulations needs to proceed on an emergency basis in order to allow the new rules to be in place in time for the annual conference of the Student Assembly at which elections are held.

**Subject:** State University of New York Student Assembly.

**Purpose:** To grant representation and the ability to vote to additional graduate student governments and to update terminology used.

**Text of emergency rule:** 341.4 Member institutions.

Each campus of the State University shall be a member institution according to the following: the graduate division [of each university center] at each of the doctoral degree granting institutions; the undergraduate division [of each university center] at each of the doctoral degree granting institutions; each of the other State-operated campuses; each community college; New York State College of Ceramics at Alfred University; and one from the four statutory colleges at Cornell University.

341.18 Executive committee.

(a) There shall be an executive committee of the student assembly to conduct necessary business between meetings of the student assembly and other matters as prescribed by this Part or the bylaws. The executive com-

mittee shall include the officers of the student assembly and the designated number of representatives from the following: [two]three representatives from the [university centers]doctoral degree granting institutions (undergraduate division); three representatives from the university colleges; [one representative from the health science centers;] two representatives from the Colleges of Technology, Agriculture and Technology, and [Specialized/]Statutory Colleges; [one]two representatives from the [university centers (]graduate division of the doctoral degree granting institutions[]]; six representatives from the community colleges and one nonvoting student representative from each standing committee. In order to serve as a member of the executive committee, an individual must be a student at a State University of New York campus and must maintain a cumulative GPA of 2.0 or higher.

**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 July 10, 2011.

**Text of rule and any required statements and analyses may be obtained from:** Lisa S. Campo, State University of New York, State University Plaza, S-325, Albany, New York 12246, (518) 320-1400, email: [Lisa.Campo@SUNY.edu](mailto:Lisa.Campo@SUNY.edu)

#### Regulatory Impact Statement

1. Statutory Authority: Education Law, Sections 355(2)(b) and 355(2)(h). Section 355(2)(b) authorizes the State University Trustees to make and amend rules and regulations for the governance of the State University and institutions therein. Section 355(2)(h) authorizes the State University Trustees to regulate the admission of students, tuition charges and other fees and charges, curricula and all other matters pertaining to the operation and administration of each State-operated institution of the University.

2. Legislative Objectives: The present measure will amend the Student Assembly Articles of Organization to grant representation and the ability to vote on issues affecting SUNY to additional graduate student governments. The present measure will also update the terminology used to identify campus sectors by referring to doctoral degree granting institutions rather than University Centers.

3. Needs and Benefits: The present measure is necessary to provide for separate graduate student representation for an additional set of campuses. The change was discussed and requested by students in the Student Assembly.

4. Costs: None.

5. Local Government Mandates: There are no local government mandates. The amendment does not affect students enrolled in the community colleges operating under the program of the State University of New York.

6. Paperwork: No parties will experience any new reporting responsibilities.

7. Duplication: None.

8. Alternatives: The alternative of leaving representation in the Student Assembly unchanged was considered and requested by students within the Student Assembly itself. The alternative of recognizing graduate student governments as members at all state-operated campuses was also requested since it would give greater weight to graduate student governments at campuses with small graduate enrollments than to undergraduate student governments.

9. Federal Standards: None.

10. Compliance Schedule: The amendment needs to be effective in time for the next Student Assembly conference and elections in April 2011 so that newly admitted graduate student governments can participate in elections for Student Assembly officers.

#### Regulatory Flexibility Analysis

No regulatory flexibility analysis is submitted with this notice because the proposed rule 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, recordkeeping or other compliance requirements on small businesses and local governments.

#### Rural Area Flexibility Analysis

No rural area flexibility analysis is submitted with this notice because the proposed rule does not impose any requirements on rural areas. The rule will not impose any adverse economic impact on rural areas or impose any reporting, recordkeeping, professional services or other compliance requirements on rural areas.

#### Job Impact Statement

No job impact statement is submitted with this notice because the proposed rule does not impose any adverse economic impact on existing jobs, employment opportunities, or self-employment. This regulation governs



tuition charges for State University of New York and will not have any adverse impact on the number of jobs or employment.

## Office of Temporary and Disability Assistance

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

#### Fair Hearings Process

**I.D. No.** TDA-17-11-00016-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 358-5.5 of Title 18 NYCRR.

**Statutory authority:** Social Services Law, sections 20(3)(d), 22(8) and 34(3)(f)

**Subject:** Fair Hearings Process.

**Purpose:** Amend fair hearings regulations to remove the time frames within which an Appellant or an Appellant's authorized representative must request that a defaulted fair hearing be rescheduled.

**Text of proposed rule:** Section 358-5.5 of Title 18 NYCRR is amended to read as follows:

§ 358-5.5 Abandonment of a request for a fair hearing.

(a) OAH will consider a fair hearing request abandoned if neither the appellant nor appellant's authorized representative appears at the fair hearing unless either the appellant or appellant's authorized representative has:

(1) contacted OAH [within 15 days of the scheduled date of the fair hearing] to request that the fair hearing be rescheduled; and

(2) provided OAH with a good cause reason for failing to appear at the fair hearing on the scheduled date; or

(3) contacted OAH within 45 days of the scheduled date of the hearing and establishes that the appellant did not receive the notice of fair hearing prior to the scheduled hearing date].

(b) OAH will restore a case to the calendar if the appellant or appellant's authorized representative has met the requirements of subdivision (a) of this section.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jeanine Stander Behuniak, New York State Office of Temporary and Disability Assistance, 40 North Pearl Street, 16C, Albany, New York 12243-0001, (518) 474-9779, email: Jeanine.Behuniak@OTDA.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:

Social Services Law (SSL) § 20(3)(d) authorizes the Office of Temporary and Disability Assistance (OTDA) to promulgate regulations to carry out its powers and duties.

SSL § 22(8) requires OTDA to promulgate regulations as may be necessary to administer its fair hearings process.

SSL § 34(3)(f) requires the Commissioner of OTDA to establish regulations for the administration of public assistance and care within the State.

##### 2. Legislative objectives:

It was the intent of the Legislature in enacting the above statutes that OTDA establish rules in order to assure that the due process rights of applicants for and recipients of public assistance, medical assistance, food stamps and services are adequately protected. Furthermore, these statutes give OTDA the authority to promulgate regulations concerning the administration of the fair hearings process.

##### 3. Needs and benefits:

The regulations governing the fair hearings process for public assistance, medical assistance, food stamps and services are generally contained in 18 NYCRR Part 358. This instant regulatory change is in response to a case titled, *Donald Johnson v. Elizabeth R. Berlin, et al.*, Sup. Ct. New York County (400081/10). While the current regulations protect the rights of individuals who ask for hearings (the "Appellants"), the goal of this change is to ensure that the due process rights of Appellants are protected in instances where they have good cause reasons for not attending their scheduled fair hearings. The substantive change, specifically to 18

NYCRR § 358-5.5, would remove the time frames within which an Appellant or an Appellant's authorized representative is to request that a fair hearing be rescheduled. The criteria for reviewing an Appellant's reason for missing the scheduled hearing would be whether the Appellant has established good cause for missing the hearing. What constitutes good cause would be determined on a case by case basis and would be relative to the individual circumstances of the particular Appellant. This means that the Appellant's time frame to contact OTDA's Office of Administrative Hearings would be determined by the Appellant's good cause reason, and timeliness would be a factor to be considered in such determination.

##### 4. Costs:

These regulatory amendments would have no significant cost impact.

##### 5. Local government mandates:

The proposed amendments may have a nominal impact on local social service districts (local districts). Both before and after the regulatory change, the local districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the local districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory change might have resulted in procedural dismissals of the hearing requests.

These regulatory amendments would not impose any additional programs, services, duties or responsibilities upon the local districts, other than the above. The Office of Administrative Hearings is responsible for reviewing requests to have fair hearings rescheduled and for making good cause determinations.

##### 6. Paperwork:

There would be no additional forms required to support this process.

##### 7. Duplication:

The proposed amendments to 18 NYCRR § 358-5.5 would not duplicate, overlap or conflict with any existing State or federal requirements.

##### 8. Alternatives:

The alternative is to leave the regulation as it is currently written. However, OTDA is pursuing amendments because the goal of this rule is to ensure fairness in the hearings process.

##### 9. Federal standards:

The proposed amendments would not conflict with federal standards for public assistance, medical assistance, food stamps and services.

##### 10. Compliance schedule:

The local districts would be in compliance with the proposed amendments upon their adoption, and the Office of Administrative Hearings would utilize its existing administrative framework to be in compliance with the proposal on its effective date.

#### Regulatory Flexibility Analysis

##### 1. Effect of rule:

The proposed amendments would have no effect on small businesses. The proposed amendments may have a nominal impact on local districts. Both before and after the regulatory change, the local districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the local districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory change might have resulted in procedural dismissals of the hearing requests.

##### 2. Compliance requirements:

As this proposed regulation is primarily directed at OTDA's administration of the hearings process, these regulatory amendments would only have a nominal impact on the local districts.

##### 3. Professional services:

The proposed amendments would not require small businesses or local governments to hire additional professional services.

##### 4. Compliance costs:

These regulatory amendments would have no significant cost impact.

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

All small businesses and local governments have the economic and technological ability to comply with the proposed regulation.

##### 6. Minimizing adverse impact:

It is anticipated that there would not be an adverse economic impact.

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

All 58 local districts in the State have had an opportunity to review and comment upon these proposed regulatory amendments. Five districts, including two rural social services districts (rural districts), provided comments. The comments can be addressed in four groups: 1) Clarification regarding aid-to-continue, timeliness of a requested restoration to the fair hearing calendar and the recoupment of overpayments (three districts); 2) The impact of the amended regulation on a Notice of Intent's statute of

limitations in the context of a fair hearing, and what to bring to a hearing (one district); 3) Maintenance of an Appellant's case file (one district); and 4) The burdensome nature and costs (three districts).

In regard to the first of the four groups, aid-to-continue would be ordered in the situation where good cause is found for defaulting a prior fair hearing. This good cause determination will be decided by the Administrative Law Judge. Timeliness would be a factor in the good cause determination along with the Appellant's reason for missing the originally scheduled hearing. One district misinterpreted the language of the amendment as abrogating time as a consideration in the instant process; however, time will be a component of the good cause determination. Where aid-to-continue has been ordered, but the Appellant ultimately loses his/her challenge to the local district's action on the merits, the local district, consistent with existing policy, should make efforts to recoup any overpayments.

In regard to the applicability of the statute of limitations, procedures regarding the statute of limitations will remain the same. As to how to prepare for a reopened hearing, the local district should follow current procedures. At the reopened fair hearing, the local district should be prepared to argue the merits, if it so desires, or the local district could rest on the statute of limitations argument, at its option.

In regard to maintaining an Appellant's case file, the local districts should continue their current case retention policy. The concern that case files would have to be kept for an unlimited time period is ameliorated by time being a factor in the good cause determination.

As to the burdensome nature of the change and costs, one of the counties feels that certain recipients are requesting fair hearings and receiving aid-to-continue benefits pending the issuance of a final determination on benefits to which they may not be entitled. Also the local districts feel that they are understaffed, and that the removal of the time frames will essentially lead to unfair awards of aid-to-continue. This concern has to be weighed against the due process rights of those fair hearing Appellants who would be entitled to their benefits after establishing a legitimate reason for defaulting the prior fair hearing. It should be noted that the Appellant will have the initial burden of demonstrating that he/she has a good cause reason for missing the originally scheduled hearing. It should be further noted that the Administrative Law Judges are charged with the responsibility to review the Appellant's reasons for a default.

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

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

The proposed amendments may have a nominal impact on the forty-four rural social services districts (rural districts) in the State. Both before and after the regulatory change, the rural districts would be required to send a representative to attend the underlying hearing and be prepared to defend the case on the merits. After the regulatory change, there is a greater likelihood that the matter would proceed to the merits rather than be dismissed on procedural grounds. As such, there is an increased likelihood of action necessary by the rural districts to comply with resulting client-favorable fair hearing decisions that prior to the regulatory change might have resulted in procedural dismissals of the hearing requests.

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

No additional record keeping, reporting or compliance would be required by the rural districts, other than that noted above. The proposed amendments would primarily affect the operations of OTDA's Office of Administrative Hearings.

##### **3. Costs:**

These regulatory amendments would have no significant cost impact.

##### **4. Minimizing adverse impact:**

It is anticipated that there would not be an adverse economic impact.

##### **5. Rural area participation:**

All rural districts in the State have had an opportunity to review and comment upon these proposed regulatory amendments. Two rural districts provided comments, which can be addressed in two groups: 1) Clarification regarding aid-to-continue, timeliness of a requested restoration to the fair hearing calendar and the recoupment of overpayments; and 2) The burdensome nature and costs.

In regard to the first of the two groups, aid-to-continue would be ordered in the situation where good cause is found for defaulting a prior fair hearing. This good cause determination will be decided by the Administrative Law Judge. Timeliness would be a factor in the good cause determination along with the Appellant's reason for missing the originally scheduled hearing. Where aid-to-continue has been ordered, but the Appellant ultimately loses his/her challenge to the local district's action on the merits, the local district, consistent with existing practices, should make efforts to recoup any overpayments.

As to the burdensome nature of the change and costs, one of the counties feels that certain recipients are requesting fair hearings and receiving aid-to-continue benefits pending the issuance of a final determination on benefits to which they may not be entitled. Also the local district feels that

it is understaffed, and that the removal of the time frames will essentially lead to unfair awards of aid-to-continue. This concern has to be weighed against the due process rights of those fair hearing Appellants who would be entitled to their benefits after establishing a legitimate reason for defaulting their prior fair hearing. It should be noted that the Appellant will have the initial burden of demonstrating that he/she has a good cause reason for missing the originally scheduled hearing. It should be further noted that the Administrative Law Judges are charged with the responsibility to review the Appellant's reasons for a default.

#### **Job Impact Statement**

A Job Impact Statement is not required for the proposed amendments. It is apparent from the nature and the purpose of the proposed amendments that they would not have a substantial adverse impact on jobs and employment opportunities. The proposed amendments would not affect in any real way the jobs of the workers in the local districts or OTDA. Thus the changes would not have any adverse impact on jobs and employment opportunities in New York State.